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Business Crime 2021

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11th Edition

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Ryan Junck and Andrew Good
Skadden, Arps, Slate, Meagher & Flom LLP

Expert Chapters

1 **Recent Trends in U.S. Enforcement and Outlook for 2021**
Ryan Junck, Andrew Good & Alissa Curran, Skadden, Arps, Slate, Meagher & Flom LLP

5 **The Business Crime Landscape**
Aziz Rahman, Nicola Sharp & Syedur Rahman, Rahman Ravelli

14 **2020: A Fraudster's Perfect Vision for Fraud Opportunity? Why Crisis Management is Now More Important Than Ever**
Kaley Crossthwaite & Richard Shave, BDO LLP

18 **Connected and Collateral Consequences of Corporate Crime: Can a Corporate Survive a Criminal Conviction?**
Tracey Dovaston, Matt Getz & Peter Skinner, Boies Schiller Flexner LLP

24 **Who Owns a Bribe? And Why Should You Care?**
Andrew Stafford QC & Evelyn Sheehan, Kobre & Kim

Q&A Chapters

29 **Australia**
Clayton Utz: Tobin Meagher & Andrew Moore

39 **Brazil**
Joyce Roysen Advogados: Joyce Roysen & Veridiana Vianna

52 **England & Wales**
Peters & Peters Solicitors LLP: Hannah Laming & Karl Masi

61 **France**
Debevoise & Plimpton LLP: Antoine Kirry & Alexandre Bisch

72 **Germany**
AGS Legal: Dr. Jan Kappel & Dr. Jan Ehling

81 **Greece**
Anagnostopoulos: Ilias G. Anagnostopoulos & Jerina (Gerasimoula) Zapanti

90 **Hong Kong**
Haldanes: Felix Ng, Emily Cheung & Vanessa Wong

101 **India**
Kachwaha and Partners: Sumeet Kachwaha & Tara Shahani

112 **Israel**
S. Horowitz & Co.: Pnina Sheffer Emmanuel, Amit Becher & Yaron Dagan

120 **Italy**
Studio Legale Pisano: Roberto Pisano

132 **Japan**
Nagashima Ohno & Tsunematsu: Yoshihiko Matake & Shin Mitarai

141 **Korea**
Bae, Kim & Lee LLC: Seong Soo Kim & Yoo Joung Kang

150 **Liechtenstein**
Lawfirm Holzhacker: *Dr.iur.* Gerhard R. Holzhacker

163 **Netherlands**
Sjöcrona Van Stigt: Sabine ten Doesschate & Pasqualle Uijtdewillegen

173 **Nigeria**
AO2LAW: Bidemi Daniel Olumide & Kitan Kola-Adefemi

180 **Poland**
Sołtysiński Kawecki & Szlęzak: Tomasz Konopka

191 **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão): Tiago Geraldo, Frederico Machado Simões & Eduardo Nunes Pereira

202 **Romania**
ENACHE PIRTEA & Associates S.p.a.r.l.: Simona Pirtea & Mădălin Enache

210 **Singapore**
Drew & Napier LLC: Gary Low & Vikram Ranjan Ramasamy

218 **Slovenia**
Zdolšek – Attorneys at Law: Stojan Zdolšek & Tomaž Bajec

226 **Spain**
Geijo & Associates SLP: Arantxa Geijo Jiménez & Louise Lecaros de Cossio

235 **Switzerland**
Kellerhals Carrard: Dr. Florian Baumann, Dr. Claudia Götz Staehelin & Dr. Omar Abo Youssef

249 **Taiwan**
Lee and Li, Attorneys-at-Law: Jack Chih-Ke Wu & Michael T. H. Yang

261 **Turkey**
Moroğlu Arseven: Burcu Tuzcu Ersin & Burak Baydar

272 **USA**
Skadden, Arps, Slate, Meagher & Flom LLP: Ryan Junck, Andrew Good & Pippa Hyde

From the Publisher

Dear Reader,

Welcome to the 11th edition of *ICLG – Business Crime*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to business crime laws and regulations around the world, and is also available at www.iclg.com.

This year, five general chapters cover recent trends in the U.S., the business crime landscape, fraud in 2020, corporate criminal convictions and ownership of bribes.

The question and answer chapters, which in this edition cover 25 jurisdictions, provide detailed answers to common questions raised by professionals dealing with business crime laws and regulations.

As always, this publication has been written by leading business crime lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Ryan Junck and Andrew Good of Skadden, Arps, Slate, Meagher & Flom LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Consulting Group Publisher
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Recent Trends in U.S. Enforcement and Outlook for 2021


Ryan Junck


Andrew Good


Alissa Curran

Skadden, Arps, Slate, Meagher & Flom LLP

Introduction

Business crime enforcement in the United States remained steady throughout 2019 and 2020. Federal business crime prosecutions decreased slightly year over year, a continuation of a longer-term trend that has seen them nearly halved from levels in 2010.[1] However, certain areas have remained quite active, such as Foreign Corrupt Practices Act (FCPA) enforcement and market abuse, the latter particularly in reference to commodity trading. Meanwhile, state agencies have increased activity, filling in some perceived gaps in enforcement, and larger states such as New York and California have announced initiatives or sought budget increases to target business crime enforcement.

Looking ahead to 2021, the COVID-19 pandemic is expected to impact enforcement priorities. The pandemic has increased interaction between the public and private sectors, which then is likely to increase the need and opportunity for business crime enforcement. U.S. government officials have already made clear that oversight and enforcement efforts with respect to fraud and misconduct affecting COVID-19-related government programmes will be a priority moving forward.

This chapter provides an overview of U.S. business crime enforcement trends in 2019 and 2020 and anticipates the landscape for 2021.

Anti-Corruption Enforcement

FCPA enforcement has been a clear and consistent priority of the U.S. Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). In 2019, these authorities imposed more than $2.6 billion in corporate fines.[2] This trend will likely continue, regardless of the outcome of the 2020 presidential election, as anti-corruption compliance generally enjoys broad support in the U.S.

The Commodity Futures Trading Commission (CFTC), which does not have a direct mechanism to bring cases under the FCPA, recently signalled its intention to become more involved in prosecuting foreign corruption. In March 2019, James McDonald, the director of enforcement at the CFTC, noted the commission's commitment to enforcing the Commodities Exchange Act and its provisions that encompass foreign corrupt practices.[3] In so doing, Mr. McDonald indicated that the CFTC would not "pile onto" investigations by other enforcement authorities and would ensure that any action that includes a monetary penalty for the CFTC "appropriately accounts for any imposed by any other enforcement body". The CFTC also indicated its intention to give "dollar-for-dollar" credit for disgorgement or restitution payments made in connection with a related action.[4]

Amid these FCPA-focused priorities for regulators, U.S. agencies face a new challenge to FCPA enforcement against non-U.S. nationals. An early 2020 decision in *United States v. Hoskins* appears to limit the DOJ's ability to rely on theories of agency to bring actions against foreign participants in bribery schemes.[5] In *Hoskins*, the District Court for the District of Connecticut overturned a jury verdict against Lawrence Hoskins, a U.K. resident and former executive of Alstom, a French transportation and power company, on FCPA charges. The court did so on the basis that the government had produced insufficient evidence at trial to show that Hoskins was an agent of Alstom Power Inc. (API), the American subsidiary of Alstom involved in the alleged bribery scheme at issue. The government relied on an agency theory because Hoskins was not a U.S. person, was not employed by a U.S. entity, and did not engage in activity in the United States. In overturning the jury's verdict, the court concluded that API had no right of control over Hoskins' actions during the relevant time period, such that Hoskins was not an "agent" of a domestic concern. While this case represents a potential setback for prosecutors in FCPA cases against non-U.S. nationals who are employees of foreign issuers, the court left Hoskins' money laundering conviction undisturbed. As such, the *Hoskins* decision may cause prosecutors to look to money laundering statutes as a mechanism to pursue corruption-related misconduct by foreign nationals. The DOJ has appealed the decision, so the standard for agency determinations may develop further.

Setting aside the potential prosecutorial limitations that *Hoskins* may ultimately impose, the case is part of a broader trend of increased focus on FCPA prosecutions of individuals. In December 2019, then Assistant Attorney General Brian A. Benczkowski remarked that the DOJ Criminal Division's FCPA Unit had publicly announced 34 charges against individuals that year, more than any other year in the division's history.[6] In highlighting this figure, Benczkowski noted that this trend was not an "outlier or a statistical anomaly", but instead a continuation of the increased focus placed on individual FCPA cases in 2017 and 2018 that demonstrated the division's continued

commitment to holding individuals accountable in the FCPA context. We would expect this attention to individual accountability in FCPA cases to continue, with individuals exercising their right to a jury trial as a result.

Market Abuse Investigations

Investigation into market misconduct is another area of enforcement that was active in 2019 and 2020. Interestingly, business crime prosecutors have employed tools originally developed to combat organised crime in their enforcement efforts. Early in the last decade, the DOJ made widespread use of wiretaps in its investigations into insider trading at hedge funds, and in 2019, the DOJ charged a market abuse case using the Racketeer Influenced and Corrupt Organizations Act (RICO). RICO was originally developed to combat organised crime and had seldomly been employed in business crime prosecutions prior to this point.

The DOJ opted to use RICO in one of the many investigations that it has launched into alleged spoofing, a practice that often involves using high-frequency or algorithmic trading to engage in market manipulation. The DOJ collaborated with the CFTC in this effort, and in 2019 the DOJ filed 16 cases in parallel with the CFTC, the most ever in a single year.[7] This collaboration has led to specialisation within the DOJ on this type of investigation, and the effort is likely to continue into 2021. The CFTC is also active in this space separate from its DOJ collaboration. Its fiscal year 2019 Division of Enforcement annual report noted that approximately 65% of the cases that the agency filed in 2019 involved commodities fraud, manipulative conduct, false reporting or spoofing.[8] The division has indicated that it has "enhanced" its focus on these areas recently and will continue to actively pursue commodities fraud and manipulative conduct.

Looking at more traditional forms of market abuse, a recent case from the U.S. Court of Appeals for the Second Circuit may shift how prosecutors charge insider trading cases. In *United States v. Blaszczak*, the court held that the government need not show that a defendant charged for providing inside information to another, a so-called "tipper", does so in exchange for a personal benefit where the charges are based on Title 18 fraud counts, as opposed to on the antifraud provisions of Title 15.[9] This stipulation broke from decades of insider trading jurisprudence developed in the context of Title 15. In reaching its decision, the court noted that Title 18 "was intended to provide prosecutors with a different – and broader – enforcement mechanism to address securities fraud than what had been previously provided in the Title 15 fraud provisions". The fact that Title 18's securities fraud statutes present a lower evidentiary burden for prosecutors will likely cause law enforcers to employ fraud statutes under Title 18 with increased frequency, although we expect that such charges will often accompany charges for Title 15 violations.

Increased Enforcement Activity From State Regulators

State prosecutors have increased activity in part in response to a perceived slowdown in federal business crime enforcement over the past several years. This perceived decline appears to be supported by the data. A recent study by Syracuse University's Transactional Records Clearinghouse (TRAC) showed that, as of January 2020, federal white collar prosecutions had reached their lowest point since 1986, the year that TRAC began recording this data. According to the TRAC study, the DOJ brought 359 cases in January 2020 that it classifies as white collar prosecutions, an 8% decrease compared to the same time in 2019 and representing a 25% decrease over the past five years. Although these numbers do not capture deferred or non-prosecution agreements, guilty pleas or settlements, they support the overall view that the government has placed less emphasis on business crime prosecutions than recent prior administrations.

Among states asserting themselves in the business crime arena, New York has been particularly active. Governor Andrew Cuomo has proposed expanding the powers of the New York State Department of Financial Services in response to a perceived rollback of the federal Consumer Financial Protection Bureau's (CFPB) enforcement efforts.[10] Similarly in California, Governor Gavin Newsom is seeking to increase the budget of the state's department of business oversight that regulates banks, investment advisers, brokers and other financial services entities in response to a perceived drop-off in enforcement activity from the CFPB.[11] In addition to increasing resources targeted at consumer protection, state attorneys general are pursuing actions against pharmaceutical companies (relating to the opioid epidemic) and attacking public corruption.

In general, we expect state attorneys general to continue to focus on business crime enforcement. If business crime "hotspots" emerge in 2021, increased coordination across state and federal authorities in prosecuting business crime may occur. The Residential Mortgage-Backed Securities Working Group that was created in 2012 following the great recession may provide a model structure for such an undertaking. Under such a model, federal and state attorneys' law enforcement agencies pool resources and coordinate their investigations into potential misconduct that is viewed as being of particular public interest.

COVID-19-Related Issues

Misconduct related to COVID-19 conditions is likely to be just such an issue of public interest in 2021. It is expected to draw the attention of multiple law enforcement agencies given the intersections between COVID-19 and business crime, including social distancing's impact on compliance programmes and investigations, private sector access to government relief efforts, and market abuse schemes related to the virus itself.

Officials from the SEC and the DOJ have highlighted the continued importance for companies to self-report compliance issues or other difficulties with conducting internal investigations amid the pandemic.[12] In April 2020, Robert Dodge, an assistant director in the SEC's FCPA unit, and David Fuhr, an assistant chief in the DOJ's FCPA unit, both emphasised that companies must continue to prioritise maintaining their compliance programmes during the COVID-19 outbreak and underscored the agencies' expectation that companies will continue to abide their anti-corruption responsibilities, noting that the rules still "very much apply" during these unprecedented times.[13]

The Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, which was signed into law on March 27, 2020, provided for the establishment and expansion of a range of economic assistance programmes designed to help U.S. businesses manage the financial consequences of the ongoing COVID-19 crisis. The CARES Act also created oversight and enforcement functions that will supplement existing law prohibiting fraud and other misconduct in connection with government programmes. The CARES Act has already been the subject of intense scrutiny, particularly with respect to the Paycheck Protection Program (PPP) administered by the Small Business Administration (SBA) and the Department of the Treasury (Treasury). We expect law enforcement to dedicate resources to investigating and prosecuting misconduct in connection with the CARES Act in 2020 and 2021.

More specifically, on April 28, 2020, U.S. Treasury Secretary Steven Mnuchin stated that businesses who wrongfully sought funds from the PPP could face potential criminal liability. Following the launch of the initial programme, the SBA issued a supplemental final rule informing PPP applicants that they must certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant". Secretary Mnuchin stated that any entity that received more than $2 million under the PPP would be audited. However, to what extent federal authorities will bring criminal charges to address perceived abuse of the PPP remains to be seen.

The DOJ has also indicated that it will focus on the lending programmes administered by the Treasury and the board of governors of the Federal Reserve System (Federal Reserve), including the activities of any banks involved with disbursing funds for certain programmes. The DOJ will likely maintain a robust criminal enforcement posture throughout the life cycle of the various CARES Act programmes. False applications could be prosecuted under federal statutes related to false statements and also under wire and bank fraud statutes.

The DOJ has additionally made clear its intent to redirect resources and efforts to combat COVID-19-related fraud and misconduct. On March 16, 2020, William Barr, the U.S. attorney general, issued a memorandum instructing each U.S. attorney's office "to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic". As part of this directive, he encouraged U.S. attorney's offices to consult with the DOJ Civil Division's Consumer Protection Branch, the DOJ Criminal Division's Fraud Section, and the DOJ Antitrust Division's Criminal Enforcement Program "for additional guidance on how to detect, investigate, and prosecute" COVID-19-related schemes. Attorney General Barr also emphasised that U.S. attorney's offices should work closely with state and local regulators to ensure that these offices are aware of potential wrongdoing as quickly as possible and that "all appropriate enforcement tools are available to punish it".[14] In March 2020, Jeffrey Rosen, the deputy U.S. attorney general, also instructed each U.S. attorney's office to appoint a coronavirus fraud coordinator to, among other things, oversee the prosecution of coronavirus-related crimes.[15]

The SEC will also focus on identifying and eliminating COVID-19-related fraud and misconduct. In May 2020, Steven Peikin, the co-director of the SEC's Division of Enforcement, indicated that the commission has devoted increased resources to COVID-19-related cases, including the establishment of a coronavirus steering committee that consists of approximately two dozen leaders from across the division.[16] The committee is focused on, among other things, proactively identifying and monitoring areas of potential misconduct. As part of this effort, it will work with the division's market abuse unit to monitor trading activity around public announcements by issuers that are impacted by COVID-19 and to provide greater surveillance of market movements to identify possible abuse.

Conclusion

We expect an uptick in business crime enforcement activity in 2021 arising out of the U.S. government's COVID-19 response. Regardless of the outcome of the 2020 presidential election, we anticipate FCPA and market abuse cases to continue apace and for state regulators to continue exercising their enforcement powers in the business crimes and public corruption spaces.

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The Business Crime Landscape


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As business crime is now higher than ever on the authorities' list of priorities, we examine here the current issues that are of most importance to those in business, including the many changes and the new responsibilities that have been introduced.

Perhaps the issue in greatest need of resolving is the uncertainty relating to business regulation and enforcement posed by Brexit.

1 Brexit

Many investigations cross borders and involve law enforcement agencies from a number of countries. UK enforcement agencies, such as the Serious Fraud Office (SFO), National Crime Agency (NCA) and HM Revenue and Customs (HMRC), liaise closely with their foreign counterparts; working with them and sharing information and expertise when necessary.

With Brexit, however, much of this appears in doubt, as far as Europe is concerned. At the time of writing, the UK and the European Union (EU) have yet to define how much co-operation there will be after the UK's departure date has passed. There are signs for optimism in the conclusion of the huge Airbus bribery investigation, which saw the UK and France (along with the US) work closely together to conclude a record-breaking €3.9 billion settlement in early 2020.[1] Yet it remains to be seen if the UK's law enforcement agencies can maintain existing working arrangements with their European counterparts.

Extradition

At the end of the transition period – which is currently scheduled to end on 31 December 2020 – the UK will no longer be part of the European Arrest Warrant (EAW) system unless an agreement is reached between the UK and EU. The EAW exists to ensure that EU Member States can return a criminal suspect to the state that wants him for trial or to enforce a custodial sentence. If no new bilateral arrangements are reached with individual EU states, the UK will probably return to the framework of the European Convention on Extradition 1957 (the ECE). This is likely to mean that extradition of a suspect from an EU state will cost more, take longer and be more complex than it is under EAW. A return to the ECE is unlikely to enhance co-operation between the UK and EU states regarding the apprehension and trial of alleged criminals.

It should be noted that French and German courts refused to extradite four individuals caught up in the SFO's five-year-long Euribor investigation – an investigation the SFO finally dropped in 2020.[2] Extradition can only occur within the EU if the alleged wrongdoing constitutes a crime in the country requesting extradition and in the country that receives the extradition request. It has been four years since Frankfurt prosecutors dropped their parallel case, as it was found that rigging Euribor did not constitute a criminal offence in Germany. The Euribor case indicates how issues can arise if countries are not "as one" regarding law enforcement. It is hard not to envisage further divisions post-Brexit. As an example, Germany's constitution has strict limits on the extradition of its nationals, with an exception existing for requests via EAW. If the UK is no longer part of that system, it is hard to see Germany complying with British extradition requests. NCA statistics show that the UK received 14,553 EAWs in 2019–20. The total for 2009 to 2020 was 119,785.[3] The scale of extradition is clear but the future of it is currently unclear.

2 Money Laundering Directives

The Fourth Anti-Money Laundering Directive (4MLD) built on the existing Anti-Money Laundering (AML) and Counter Financing of Terrorism (CTF) framework and introduced changes, notably around beneficial ownership identification and increasing firms' due diligence obligations.[4] The definition of a politically exposed person (PEP) was widened by the Criminal Finances Act 2017,[5] in relation to unexplained wealth orders (see below). The Act classes a PEP as any individual entrusted with prominent public functions by an international organisation or by a state other than the UK or another European Economic Area (EEA) state. Under the Act, a PEP can also be a relative or associate of such a person.

The Fifth Anti-Money Laundering Directive (5MLD)[6] built on this, bringing greater transparency by establishing beneficial ownership registers, tackling risks associated with the use of virtual currencies for terrorist financing, improving safeguards for financial transactions involving high-risk countries and enhancing access for financial intelligence units to centralised bank account registers and central data retrieval systems in Member States.

Despite Brexit, the UK appears unwilling to veer away from the EU's stance on money laundering. The UK implemented

5MLD in January 2020 and as a continuing member of the Financial Action Task Force (FATF), it is unlikely that the UK will relax its AML controls post-Brexit. But some questions need answers. How the UK's system of beneficial ownership registers will work alongside those of EU states remains to be seen. While June 2020 saw Europol announce the creation of the European Financial and Economic Crime Centre (EFECC)[7] to boost support for EU states to tackle financial and economic crime, any UK involvement with it is yet to be determined. May 2020 saw the European Commission adopt an action plan for an EU policy on preventing money laundering and terrorism financing based on ideas including a single EU rulebook, EU-level supervision and enhanced co-operation between financial intelligence units.[8] The Commission intends to finalise the plan by early 2021 but, as yet, UK involvement is uncertain.

But regardless of the uncertainty, being aware and proactive regarding prevention is the only way to avoid falling foul of these regulations. Implementing adequate procedures that deny the opportunity to launder money will prevent problems and – even if it does not – will provide a valid defence if it can be shown that all possible precautions were taken. Such procedures need to be monitored, tested regularly and, when necessary, revised to ensure they are doing what they are supposed to.

There have been many recent examples of the high price that can be paid for money laundering failings. In 2019, a total of $8.14 billion was paid in penalties for 58 AML breaches.[9] These included Standard Chartered being ordered to pay $1.1 billion (£842 million) to settle allegations of poor money-laundering controls and sanctions breaching.[10] Swedbank was fined €360 million for money laundering – the biggest penalty ever imposed by a Scandinavian financial supervisor[11] – while 2020 saw Deutsche Bank paying $150 million for compliance failures, including dealings with Danske Bank's Estonian branch, which is at the centre of a €200 billion money laundering investigation.[12]

At the time of writing, the UK's Financial Conduct Authority (FCA) is yet to bring a criminal prosecution for money laundering. But in 2019, when the FCA had over 60 AML investigations, it said it was giving more consideration to pursuing criminal prosecutions for such offences.[13]

The role of the EU in penalising nations should also be recognised. In July 2020, the Court of Justice of the European Union ordered Ireland to pay €2 million and Romania €3 million to the European Commission for failure to fulfil their obligations under 4MLD.[14]

3 Unexplained Wealth Orders

Unexplained wealth orders (UWOs) came into effect in January 2018, following the passing of the Criminal Finances Act 2017.[15] Section 1 of this Act heavily amended the Proceeds of Crime Act 2002 (POCA) to introduce them. UWOs can apply to either a PEP who is not a citizen of the EEA or a person suspected of serious crime here or abroad. They are available to the SFO, NCA, HMRC, Crown Prosecution Service (CPS) and FCA, who can apply to the High Court for one in respect of any assets valued at more than £50,000 – if there are reasonable grounds to suspect that the individual who owns them does not have a legitimate income large enough to have obtained them. A UWO requires an individual or organisation to explain how an asset was acquired. An inadequate explanation or providing unsatisfactory evidence will see the asset considered "recoverable property" for the purposes of a civil recovery order under POCA.

Challenges

The authorities do not have a flawless track record when applying for orders. An agency applies to court for a UWO on a without notice basis, which means that the intended target of the UWO is not present and cannot put forward reasons why they should not be made the subject of an order. But has the agency demonstrated that the target meets the criteria for a UWO? Has the agency been open and upfront with the judge? Any agency applying for a UWO is under an obligation to give full and frank disclosure at without notice hearings, including having to put forward any point that the defence might have made if it was present. There is scope, therefore, to challenge the UWO.

It must also be remembered that UWOs are new but not a revolutionary cure-all. As an example, March 2018 saw the SFO recover £4.4 million from corrupt Chad diplomats using a civil recovery order.[16] The case pre-dated the introduction of UWOs so they were not an option. But in this case, and many others, UWOs are not needed. UWOs are simply an extension of existing civil recovery proceedings.

Civil recovery is a highly specialised area of law involving complex High Court litigation. As a firm that has been handling such cases on a major scale since POCA introduced the civil recovery regime, we were the first to challenge a civil recovery order all the way to the Supreme Court. We believe that UWOs will become a common feature on the legal landscape. Any subject of one must be quick to act. They must provide a statement explaining how they legitimately acquired the assets. No response or an unsatisfactory explanation will give rise to a presumption that the property is recoverable via civil recovery proceedings that can be commenced under Part 5 of POCA. An individual can also be prosecuted for providing misleading or untrue information, which can mean a fine and a maximum two-year prison sentence.

In 2018, the NCA obtained the UK's first UWO, against Mrs Zamira Hajiyeva, wife of Jahangir Hajiyev, a former banker imprisoned for fraud and embezzlement in Azerbaijan. Under the terms of the UWO, Hajiyeva had to disclose to the NCA how she afforded UK property worth £22 million. Hajiyeva brought a legal challenge to the UWO but this was unsuccessful. The High Court upheld the order, finding that her husband was a PEP from a non-EEA country against whom a UWO could be granted and that Hajiyeva herself was also a PEP. In February 2020, the Court of Appeal rejected her appeal, refused to allow her to take the case to the Supreme Court and ordered her to pay the NCA's costs. The court found that there were reasonable grounds for suspecting that the known sources of lawfully obtained income available were insufficient to obtain the property.[17]

But the NCA has not had total success with UWOs. In April 2020, the High Court was persuaded to discharge three UWOs relating to three London properties owned for the benefit of Nurali Aliyev and his mother, Dariga Nazarbayeva. The NCA's assumption that the three houses were bought with funds embezzled by Nurali Aliyev's now dead father, a former Kazakhstan government official, was ruled to be unreliable by the court. The NCA said it would appeal. But in June 2020, the Court of Appeal ruled that the NCA had no real prospect of overturning the High Court decision, stating there was "no compelling reason" why the appeal should be heard. This was followed by Nurali Aliyev bringing an action for £1.5 million costs against the NCA.[18]

Civil law

A UWO is an investigatory tool. That said, it is a powerful one – and it is a precursor to High Court Civil recovery proceedings under Part 5 of POCA. The UWO will be issued as part of a POCA civil recovery investigation – in other words, where the NCA suspects that property has been purchased with the proceeds of crime.

The material provided under a UWO can be used in civil recovery applications by the NCA. Our experience of representing clients caught up in civil recovery investigations from the earliest days of POCA onwards led to us bringing the very first challenge to the civil recovery scheme to reach the Supreme Court [*Gale v SOCA* [2011] UKSC 49].[19] The case deals with the right to a fair trial (Article 6 of the European Convention) and the limitations there are on pursuing a claim where the defendant has already been tried and acquitted in the criminal courts for the same allegations made in the civil claim.

Enforcement of a UWO appears weighted against the individual. As UWOs are a civil law device rather than a criminal law one, the authorities only require their evidence to be good enough to argue on the balance of probabilities. Our background in challenging restraint orders and freezing orders issued under POCA leads us to believe that UWOs could well see many innocent people fighting to retain their assets. Contesting any aspect of a UWO will make a difference to an individual's ability to retain what is rightfully theirs.

But while UWOs are now available, it would be wrong to assume that they will be the only option used by the authorities.

4 Deferred Prosecution Agreements

Deferred prosecution agreements (DPAs) were introduced under the provisions of Schedule 17 of the Crime and Courts Act 2013),[20] which made them available to the CPS and the SFO. By the end of July 2020, there had been eight concluded in the UK.

A DPA is an agreement reached between a prosecutor and an organisation that could be prosecuted. It is finalised under the supervision of a judge and allows a prosecution to be suspended as long as the organisation meets certain specified conditions, such as paying fines or compensation or changing working practices. If the conditions are met, there is no prosecution. Failure to meet the conditions will lead to prosecution.

The US has had DPAs since the 1990s. Other countries are now following suit. In January 2018, France's first DPA (known as a CJIP) was reached and the following year the French Financial National Prosecutor (PNF) and its Anticorruption Agency (AFA) published their first guidelines on DPAs, in order to encourage self-reporting and co-operation from corporate wrongdoers.[21] In March 2018, Singapore passed the Criminal Justice Act, which created the framework for DPAs. The same year saw Canada, Argentina and Japan also introduce DPA-style arrangements, while 2019 saw the Australian government tabling a bill to do the same.

The increased international presence of DPAs means that many in business around the world may need to know how to obtain one. In the UK, the SFO has made it clear that DPAs will not be given to each and every company seeking one. There will be little or no chance of a DPA for those who do not self-report, offer little or no genuine co-operation with an SFO investigation or show no desire to change working practices.

The SFO's conclusion of its DPA with Airbus in 2020 (as part of the company's huge settlement with UK, US and French authorities) showed the agency's willingness to use the wide territorial reach of the UK's Bribery Act.[22] But it also showed the importance of co-operation in investigations. The DPA details the lengths Airbus went to, including confirming the existence of corruption concerns, identifying issues investigators were unaware of, reporting overseas activities and compiling more than 30 million documents.[23] The Airbus case is a high-profile indicator of the demands that a corporation must meet to secure a DPA.

One problem that has arisen regarding DPAs is the issue of corporate versus individual liability. In receiving a DPA in 2017 over its accounting scandal, Tesco accepted there had been wrongdoing, but the three executives that were charged in relation to it were all cleared, meaning that nobody was convicted for the offences that Tesco admitted had been committed.[24] This problem was repeated in 2019, when three Sarclad employees were acquitted of bribery after the company had agreed a DPA with the SFO.[25] And while the SFO reached a DPA with Rolls-Royce in 2017 over the large-scale bribery it committed over decades, the agency has closed the investigation with no charges being brought against individuals.[26] Like Tesco and Sarclad, the outcome was a contradictory situation: Rolls-Royce openly accepted it had used bribery but nobody was held to account for it in a court of law. This situation was echoed in December 2019, when three former employees of Guralp Systems were acquitted of conspiracy to make corrupt payments – we acted for a senior executive in the case – leading to the removal of reporting restrictions on the DPA the SFO had agreed with the company two months earlier.[27] Such outcomes may affect the SFO's willingness to offer DPAs in some circumstances. A company that does not know how to maximise its chances of obtaining one could be making a costly mistake.

Self-reporting

The issue, therefore, is how a company should seek a DPA. A DPA can be a reward for openness. The sooner a company self-reports and the more open it is with SFO investigators, the greater the possibility of a DPA. In the UK's second DPA, involving Sarclad, the judge remarked on the swiftness of the self-reporting and stated it should benefit the company. But self-reporting is not a simple, one-off escape route from prosecution. How it is done and subsequent negotiations with the SFO must be overseen by those with legal expertise and experience of such situations. The SFO will not give a DPA to those it believes are giving the impression of co-operation rather than genuinely assisting its investigators.

Much will depend, therefore, on how much real help a company gives to an external investigation. The amount of work a company puts into its internal investigation, the access to its findings it gives investigators and the quality of the records of such efforts can all help determine whether a DPA is granted. No DPA will be offered if the SFO feels that it has not been given all the information or it believes an internal investigation tipped off potential suspects, prompted the deletion of potential evidence or did not go far enough up the management structure.

Internal investigations

An internal investigation has to be started as soon as a company realises there is a problem. Only a carefully devised and properly executed investigation will ensure the facts are established and enable the company to decide the appropriate course of action, regarding either self-reporting the wrongdoing (if the authorities are unaware of it) or responding to allegations that have

been made. Legal expertise is needed but an internal investigation can mean involving experts from fields such as data preservation and analysis, forensic accounting, economics or particular cultural or business areas. It is essential to know exactly how to engage with the SFO and the best way to disclose wrongdoing, manage staff interviews, preserve documentation, introduce preventative measures and maximise the chances of securing a DPA. Changes to the law – on issues such as, for example, legal privilege – can make all the difference to an investigation. Anyone conducting it, therefore, must be aware of all aspects of the relevant law. This can be especially important if the wrongdoing crosses borders, prompting a multijurisdictional case that can be more complex and involve unique aspects from country to country. As an example, French guidance on DPAs says that if a company wishes to assert the French attorney-client privilege as a reason not to share information with the PNF, the PNF will assess whether the refusal is justified.[28] If the PNF considers the refusal unjustified, the PNF will consider whether this affects any credit given to the company for co-operation. But prosecutors will take into consideration any waiving of foreign privilege as a result of sharing the material with the PNF. In the UK, the SFO's Lisa Osofsky warned in 2019 that any business that "throws the blanket of legal professional privilege" cannot be considered to be co-operating.[29] She voiced her views on privilege after the Court of Appeal decision in *ENRC v SFO*,[30] which ruled that documents generated by ENRC during an internal corruption investigation were protected by privilege and therefore did not have to be disclosed to the SFO. This unanimous decision overturned the controversial 2017 High Court ruling that such documents were not privileged. As a result, it boosts the likelihood of a successful claim to litigation privilege in England when companies are facing possible criminal prosecution.

Co-operation and negotiation

When it gained a DPA to settle allegations of bribery being committed over many years, Rolls-Royce did not self-report its wrongdoing. But it did then offer all possible co-operation and reported wrongdoing that the SFO had not known about. The DPA settlement referred to the "extraordinary co-operation" Rolls-Royce offered, emphasising the value of such action in securing a DPA.

The SFO's 2019 document "*Corporate Co-operation Guidance*"[31] defines co-operation as "providing assistance to the SFO that goes above and beyond what the law requires" and details 11 general practices that companies should consider when preserving material and giving it to the SFO. There is specific guidance given relating to digital evidence and devices, hard copies and physical evidence, financial records and analysis of them, industry information and individuals. The guidance refers to its 2014 "*Deferred Prosecution Agreements – Code of Practice*",[32] which says making witnesses available for interview and providing a report of an internal investigation are evidence of co-operation. But the SFO states that if a company claims privilege then that privilege is expected to be certified by independent counsel. The guidance, it should be emphasised, says that even "full, robust co-operation" will not guarantee any particular outcome.

Any company hoping to negotiate with the SFO must, therefore, have an appetite for co-operation, a desire to reform itself and an ability to convey this to the SFO in a way that emphasises it is genuine in wanting to put right the wrongs. This is a sensitive area – and one where the right expertise can be all-important. In the DPA concluded between the SFO and G4S in July 2020, the company paid a £38.5 million fine having been given a 40% discount on it. This was only the second time in an SFO DPA that a discount lower than 50% had been applied – and it was due to what the judge noted was G4S' delayed co-operation.[33]

Negotiation is also an important factor in obtaining a DPA. If, for example, a company does not self-report at the right time or in the right way, or fails to properly communicate its willingness to be open with the authorities, it will put itself at a disadvantage. We can say, having been involved in DPA negotiations, that if a company does not emphasise how thorough its internal investigation was, misses opportunities to emphasise any changes it has made or fails to explain any mitigating circumstances, it is reducing its chances of a DPA. These points must be articulated in a way that will not alienate the investigators, which is why it is a task best left to those who deal regularly with the authorities.

It is also worth noting that in the DPA reached between the SFO and Serco Geografix Ltd (SGL) in July 2019 in relation to fraud and false accounting, SGL's parent company Serco Group PLC agreed to several undertakings.[34] With SGL a dormant company at the time of the DPA, the undertakings that apply to it are of limited value, whereas Serco Group's undertakings are of greater significance – applying to Serco Group and all its subsidiaries. This may indicate that the SFO is looking to DPAs to have a widespread effect throughout a group of companies rather than on just the one whose actions prompted the investigation. If one company in a group is investigated, therefore, the whole group may need to convince investigators of a determination to put right the wrongs in order to secure a DPA.

5 Tax Evasion

Tax evasion is an ever-present issue when it comes to the law and business crime. The Paradise Papers put the issue of tax avoidance firmly back in the headlines in late 2017, less than two years after the similar Panama Papers scandal led to many questionable tax activities being exposed and investigated.

A swift response to any hint of a tax investigation is vital in order to formulate an appropriate response to investigating authorities' questions and allegations. The importance of this is clear after even the briefest examination of HMRC's caseload, which indicates the scale and international nature of many of its investigations.

HMRC's tax fraud investigations led to more than 600 individuals being convicted in 2019, while its Fraud Investigation Service continues to bring in around £5 billion a year through civil and criminal investigations. Recent, high-profile cases include two professionals who attempted to steal £60 million via a fraudulent tax avoidance scheme claiming to involve conservation and HIV research, a gang convicted of a £121 million VAT fraud and money laundering operation involving the UK, Cyprus, Hong Kong, Dubai and other countries, and working with Interpol to prosecute a pan-European crime network of cigarette trafficking, drug smuggling and money laundering.[35]

HMRC has argued that increasingly complex, international frauds and better-resourced, more highly organised gangs will not be an obstacle to its ability to tackle tax crime. The Criminal Finances Act[36] makes companies and partnerships criminally liable if they fail to prevent tax evasion by any of their staff or external agents and allows authorities to hold firms criminally liable for matters relating to UK taxes or overseas taxes where there is a UK connection. A business can only avoid criminal liability if it can show it had implemented reasonable prevention procedures or that it would have been unreasonable to expect it to have such procedures in place.

The Act is a reminder that those in business must be their own watchdogs: responsible for training, monitoring, risk assessment, preventative measures and whistleblowing procedures. Any defence to tax-related allegations has to use evidence and legal argument to challenge prosecutors' claims and explain why certain activities and transactions were conducted.

6 Bribery

Like tax evasion, bribery is another constant on the legal landscape where recent developments have emphasised the need to ensure preventative measures are appropriate.

Early in 2018, Airbus agreed to pay an €81 million fine to end a five-year bribery investigation by German prosecutors into the 2003 sale of Eurofighter jets to Austria.[37] In June 2019, Airbus announced it was shutting down its subsidiary GPT Special Project Management, which had been under investigation for seven years over allegations it paid multimillion-pound bribes to secure a military contract with the Saudi Arabian government.[38]

Early in 2020, Airbus concluded its record-breaking DPA with the SFO, agreeing to pay a fine and costs totalling €991 million here in the UK as part of a €3.6 billion settlement involving French and US authorities.[39] It is the largest ever global resolution for bribery and came just under four years after the SFO began investigating bribery allegations relating to Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana between 2011 and 2015. The case is a reminder of the multinational nature of much modern business – and the scope it offers for corruption. But Airbus' problems were not unique and it is not the only company to have faced a major bribery investigation.

It should not be forgotten that, regardless of the company, the location or the industry, trading in more than one country can bring with it the risk of bribery. It must also be remembered that, in whichever continent a company trades, countries are now more aware of the dangers that bribery poses to their economies and their infrastructure. Investigating authorities are now more determined to identify and punish bribery and more likely to work with their counterparts in other countries if the allegations cross borders.

We may, therefore, see an increase in the number of companies accused of bribery in countries where they trade but are not based. They will need legal representation from solicitors with in-depth knowledge of business crime law in those countries. Such cases require the putting together and co-ordinating of a cross-border defence case, identification of the best case scenario for the accused and an awareness of how best to either challenge or negotiate with the relevant authorities. The right solicitor can examine the circumstances surrounding the allegations, the strength of the prosecution case and any mitigating factors to then decide when to fight, how best to fight or when and how to negotiate. And wherever a company trades and whatever its line of work, it has to take advice on the risks of bribery that apply to it – and introduce measures to reduce that risk.

Failing to prevent bribery

In 2016, the SFO secured its first conviction under section 7 of the UK Bribery Act 2010, the failure to prevent bribery. UK-based construction company Sweett Group PLC admitted failing to prevent its subsidiary Cyril Sweett International (CSI) paying bribes on its behalf from 2012 to 2015 in the United Arab Emirates. 2018 saw the first contested conviction under Section 7 when office refurbishment company Skansen was found guilty after its then managing director had paid bribes in 2013 to win two contracts worth £6 million. Skansen highlighted its policies emphasising honesty, its system of financial controls, clauses in its contracts preventing bribery and that its controls had stopped the largest of the bribes being paid. It had also co-operated fully with the police investigation. Yet Skansen – which was by then a small, dormant company with no assets – was still convicted.[40]

One reading of the way this case has been handled is to see it as proof that prosecutors are aiming for the easier targets for a bribery prosecution and conviction. Another way is to believe that prosecutors think it is too difficult to secure the conviction of a company for the Section 1 Bribery Act offence of giving bribes, as it is too onerous to prove that the directing mind and will of the company was involved in the offence. They may, therefore, look to Section 7 to secure convictions, as many companies will not be able to rely on the defence of having adequate procedures in place.

If either interpretation is correct, it means that many companies need to examine their anti-bribery procedures closely to see if they can be considered adequate. The irony is that the Bribery Act does not go into any detail about what would constitute adequate procedures. Guidance from the Ministry of Justice refers to the need for such procedures to be proportionate to the risk, have commitment from the top levels of a company and involve risk assessment, due diligence, training and monitoring. But the same guidance then adds that the adequacy of procedures will actually depend on the facts in each case.

Speaking after Skansen, the SFO's Joint Head of Bribery and Corruption said: "If you are relying on the Section 7 defence, corruption has been proved to have taken place which your procedures failed to prevent. The case is perhaps a salient reminder to corporates to ensure their compliance procedures are sufficiently robust and of the high bar that will need to be reached for a section 7 defence to succeed."[41]

In March 2019, the House of Lords Select Committee on the Bribery Act 2010 found that while the Act is considered an international gold standard for anti-bribery legislation, the UK government must improve the advice given to small and medium-sized companies on how to comply with the Act when exporting goods and services.[42]

From the moment it came into effect on 1 July 2011, the Bribery Act has covered all companies of all sizes, either based in, or with a close connection to, the UK. Any such company can be prosecuted in the UK, under the Act, for bribery that was perpetrated on its behalf anywhere in the world. Prosecutions can be brought against a company if the bribery was committed by its staff, an intermediary, third party or trading partner acting on its behalf. With maximum punishments including unlimited fines and up to 10 years' imprisonment, it is a fierce and far-reaching piece of legislation. The Section 7 conviction is just another reminder of the importance of compliance with the Act. It should also be noted that Lisa Osofsky is one of a number of figures to speak in support of introducing a wider corporate offence of failing to prevent economic crime, which would mean companies needing to place even greater emphasis on compliance.[43]

The Act has not been used often in its first 10 years. Almost all of the convictions under the Act have been for individuals offering bribes or for individuals taking bribes, with just the two Section 7 convictions. But it is possible the Act has compelled companies to take the necessary action to prevent them becoming involved in bribery. The Act's value as a tool for emphasising the need for compliance cannot be discounted. The SFO has been criticised for dropping some major bribery investigations but this may be due to lack of resources rather the Act's shortcomings.

Anti-corruption enforcement by US regulators

American regulators have an exceedingly long reach when enforcing US anti-corruption laws – and any company subject to the UK Bribery Act must keep an eye on possible liability in the US as well. The Foreign Corrupt Practices Act (FCPA)[44] broadly applies to companies that list shares on a US exchange or that are incorporated or have their headquarters in the US. It also applies to US citizens wherever they are located and anyone acting as an agent of a US company. The FCPA's broad jurisdiction has been used to target a number of international companies this year, including Novartis AG (which agreed to pay a $346.7 million penalty) and Airbus SE ($2.09 billion).[45,46]

Enforcement of the FCPA has historically been divided between the US Department of Justice (which brings criminal charges) and the US Securities and Exchange Commission (which brings civil charges). But the US civil regulator, the Commodity Futures Trading Commission (CFTC), signalled in 2019 that it planned to pursue investigations against foreign corruption that affects commodities trading, such as payments to foreign officials to manipulate commodities markets or using CFTC-regulated virtual currencies to pay bribes.[47]

US regulators also have various non-FCPA routes to punish corruption. As an example, the prosecution of various FIFA executives relied on the "honest services" wire fraud statute (18 U.S.C. § 1346) to obtain jurisdiction over foreign citizens who were not subject to the FCPA. The Second Circuit Court of Appeal upheld the convictions on the basis that the men had breached their fiduciary duties to their employer (FIFA) by engaging in commercial bribery and used US wire transfers in the process – giving US regulators a powerful new avenue to target bribery that does not fall within the FCPA's jurisdiction.[48]

7 Cryptocurrency

The rise of cryptocurrency is worth a chapter on its own, given the challenges it poses as an unregulated industry and the fact that annual cryptoasset-related crime totals an estimated $4 billion.[49] Concerns have been voiced over its security and the way it functions, prompted by reports of the increased risk of organised hacks and of thefts from wallets and platforms: issues central to the functioning of cryptocurrency trading.

In July 2019, the FCA proposed a ban on financial instruments linked to digital cryptocurrencies such as Bitcoin, warning that such products could cause huge losses for those who do not understand the risks. It said that products such as derivatives and exchange-traded notes (ETNs) that reference crypto-assets were not suited to small investors, were extremely volatile, difficult to value and carried an increased risk of financial crime.[50]

Concerns often centre on the anonymity parties have when cryptocurrency transactions are made and recorded on the open ledger. But with blockchain technology used in this, there is effectively a situation where everyone in a chain of computers has to approve an exchange before it is verified and recorded. This means that there is a clear digital record of transactions, with the open ledger storing and keeping track of any transactions and payments that represent the value of the cryptocurrency. It is public and transparent, so can act as a digital time stamp.

Crucially, blockchain technology can be used as a tool to uncover theft or sophisticated hacks. Asset recovery exercises can, therefore, be performed. The blockchain cryptography means that records of transactions cannot be tampered with. Once a transaction is recorded, it cannot be deleted or removed. This is the tool by which an individual or company can use the legal process to seek to recover misappropriated cryptocurrency assets.

Such a process involves conducting an internal investigation to assess the potential causes of the incident. This would include – but not be limited to – considering the chronology of payments prior to the theft, forensically analysing all relevant documentation, capturing and examining digital evidence from emails, computers, networks and servers and interviewing any staff or relevant persons. As a result, an asset tracing exercise can be conducted, with those carrying it out co-ordinating with third parties, such as the relevant exchange from which the assets were stolen. Depending on the outcome of the review and analysis, if those perpetrating the fraud are identified, their assets can potentially be frozen so that judgment can be enforced against them.

In many ways, cryptocurrency is a new chapter in trading. But, as with other forms of business, the correct approach can help prevent – or at least identify and punish – fraud. A failure to take the necessary steps can be costly.

In November 2019, the UK Jurisdiction Taskforce (UKJT) published its legal statement, identifying key questions that needed to be answered about English law's approach to cryptoassets and smart contracts. It was not a legal precedent but aimed to create a degree of legal certainty.[51] The following month, the landmark cryptocurrency case of *AA v Persons Unknown and others* – a case in which we acted for one of the defendants – saw the UKJT's analysis of cryptoassets as property endorsed by the High Court, enabling a proprietary injunction to be granted over them.[52] In the only other High Court cryptoasset case, *Robertson v Persons Unknown*,[53] the court was also prepared to proceed on the basis that a cryptoasset could constitute legal property. January 2020 saw new regulatory powers introduced by the FCA that allowed it to supervise how cryptoasset businesses conduct their business with consumers.[54] Yet a number of issues still need to be clarified regarding cryptoassets. These include establishing identities of those holding the cryptoassets in question, cryptocurrency exchanges' obligations to produce such information, tracing cryptoassets where there is no intermediary to apply freezing injunctions and arguments regarding jurisdiction and the governing law in such cases.

8 Other Ongoing, Related Issues

Cum-Ex

The Cum-Ex scandal arose out of the buying and reselling of shares in a way that hid the identity of the actual owner, thus enabling more than one party to claim tax rebates on capital gains tax, even though that tax may have been only been paid once or not at all. Authorities in Germany say Cum-Ex has cost the German government €10 billion in lost revenue. When first uncovered in 2012, it was believed to be a problem only affecting Germany, but reports have indicated that a dozen or so other European countries may also have been affected.[55]

At present, the sheer volume of Cum-Ex trading under investigation, the number of organisations supposedly involved and the amount of profits that were generated make it unlikely that much of Europe's financial services sector will escape scrutiny. In the UK, the FCA disclosed via a Freedom of Information Request in 2020 that it was investigating 14 financial institutions and six individuals in relation to Cum-Ex.[56] Corporate liability versus individual liability may be one of the important areas that determines the success or otherwise of any future prosecutions.

In May 2020, the European Banking Authority (EBA) published a report following its inquiry into dividend arbitrage trading – which includes Cum-Ex trades – and produced a 10-point plan to prevent further problems. It also highlighted

the lack of co-ordinated activity that has existed between Member States and has called on EU Member States to end such a lack of joined-up thinking.[57]

At the time of writing, we are in the early stages of what could prove to be Europe's largest tax fraud. As a firm that has experience of the proceedings, we believe this could have major implications for the whole European financial system.

Market manipulation

UK-based traders who interact with exchanges in the US must remain wary of US efforts to fight market manipulation, particularly "spoofing". Spoofing is the placing of an order on one side of the market with the intention of cancelling it before execution. It is done in order to fool other traders into thinking supply or demand has changed and, as a result, have another order filled at a better price.

The DOJ has aggressively pursued spoofers, with a number of traders scheduled to go on trial in late 2020. Sentences for individuals found guilty of spoofing have as yet been relatively light, with only one prison sentence so far.

Pandemic-related fraud

Many businesses and individuals will be suspected of making or attempting to make fraudulent gains from the healthcare challenges posed by coronavirus. Price fixing of pharmaceuticals or equipment, pandemic-related investment fraud, sales of counterfeit medical products, online selling of goods at hugely inflated prices or non-existent goods and attempts to use real or non-existent charities for fraud could all lead to prosecutions. By July 2020, there had already been arrests for suspected abuse of the government's Coronavirus Job Retention Scheme, with HMRC having received 4,400 reports of possible furlough fraud.[58]

One of the biggest sources of pandemic funding in developing countries is expected to be the World Bank and other multilateral development banks (MDBs), who intend to lend hundreds of billions of dollars to support critical infrastructure projects. Such lending will create opportunities for corruption and fraud, although MDBs have their own investigations departments, wide powers of investigation and sanction and a track record of aggressive anti-corruption enforcement. In addition, MDBs can refer instances of wrongdoing to national law enforcement agencies. In light of the huge amount of MDB money about to be deployed to combat coronavirus, MDB investigations are expected to increase significantly.

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Aziz Rahman's flair for co-ordinating national, international and multi-agency defences has led to success in some of the most significant business crime cases of this century. His achievements have led to him being described as "a Rolls-Royce performer" by *The Legal 500*. The latest *Legal 500* calls him "a powerhouse figure in white-collar crime – exceptionally knowledgeable, a fantastic strategist and a very well-respected leader". *Chambers UK* has called him "a brilliant lawyer…phenomenally committed to his clients". Its most recent edition says he "demonstrates enviable expertise in financial crime issues" and calls him "a great lawyer in all aspects".

His expertise and experience in serious and corporate fraud, complex crime, bribery and corruption and compliance and regulatory matters, along with his skill in leading and managing legal teams, has been shown to produce the strongest bespoke defence for clients, as well as secure the best possible outcomes and a string of awards. His regular dealings with law enforcement agencies around the world have brought consistent success in major business crime cases here and abroad. He has been the first solicitor to take certain types of case to the highest possible UK and European courts.

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Nicola worked on Rahman Ravelli's successful representation of the CEO in the huge Imperial Consolidated investment fraud prosecution brought by the SFO, led the defence team in Britain's biggest mortgage fraud case and regularly defends clients in multi-million-pound Proceeds of Crime Act cases. Her specialist areas of expertise include multinational investment fraud, mortgage fraud, money laundering and bribery and corruption.

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Syedur Rahman's expertise in business crime and multijurisdictional asset recovery cases and his ability to negotiate with investigators have ensured his clients receive the strongest representation. He is in demand to work on cases where there is the possibility of securing a deferred prosecution agreement (DPA) for clients and has risen to prominence as an authority on the issue of cryptocurrency-related fraud.

Syed is proficient in both criminal and civil cases, especially where there is an allegation of serious fraud or corporate wrongdoing. He has in-depth experience of national and international regulatory and compliance cases. The latest edition of *Chambers UK* ranks Syed as a lawyer to watch and praises his "thoroughness and eagerness". *Chambers* has said "he leaves no stone unturned and has a passion for what he does" and has repeatedly highlighted his expertise in Proceeds of Crime Act (POCA) work and asset recovery proceedings. *The Legal 500* has said he "goes the extra mile to get the best results for his clients". Its most recent edition says Syed is "a creative thinker", "a master of detail" and someone who "entirely devotes himself to his cases". His specialist expertise in civil recovery proceedings under Part 5 of POCA has led to him recording particularly notable successes for clients in cases that cross borders.

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Rahman Ravelli's depth of experience and acknowledged expertise in serious and corporate fraud, white-collar crime, bribery and corruption, regulatory matters, complex crime, market abuse, asset recovery and commercial litigation – particularly civil fraud – have ensured the highest legal guide rankings, a string of awards and legal successes and a reputation second to none.

It is among the UK's most prominent legal firms for managing all aspects of criminal and regulatory defence and dealing with UK and worldwide agencies. *The Legal 500* called it "an exceptional firm with exceptional people", while *Chambers UK* said it was: "Absolutely outstanding. An impressive team with real depth."

Rahman Ravelli receives instructions on the largest and most notable and complex multinational and multi-agency white-collar crime investigations.

It is in increasing demand to help corporates and senior executives investigate and self-report wrongdoing to achieve a civil, rather than a criminal, solution to an issue.

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2020: A Fraudster's Perfect Vision for Fraud Opportunity? Why Crisis Management is Now More Important Than Ever


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1 Introduction

Could 2020 have been the perfect year for a fraudster? Quite possibly. Financial irregularities and fraud can happen at any time, but the wide-scale changes made to the way we work, driven by the COVID-19 pandemic, has led to a whole new breed of fraud risks, as well as the re-emergence of some old scams, as the fraudsters adapt to a world of new opportunities.

2020 has been a boom period for fraud as corporates all over the world make rapid and often dramatic changes to their normal working practices. It has become clear that in the rush to adapt their operational procedures, many businesses may have inadvertently cut corners and created new fraud vulnerabilities. The unfortunate reality for some businesses was that despite a long, hard fight to stay operational and solvent during the pandemic, the thing that bought them down was not the lack of trade or liquidity, but fraud.

In these times of economic stress and heightened fraud risk, now more than ever, businesses need extra vigilance to prevent and detect fraud issues. Sadly, history has shown us time and again that no matter what controls and procedures are put in place, fraudsters can often find a way to bypass those systems, so the need for companies to have a clear crisis management strategy remains critically important. Only by doing this will they be prepared and ready to take decisive action when a fraud crisis hits them. Indeed, the way the pandemic crisis has impacted the world, seemingly coming out of nowhere, has been the catalyst for some businesses to take a step back and consider crisis planning in a new light.

A well-thought-out crisis management plan should be a staple part of any organisation's broader contingency planning process. It is important that there is a framework in place to guide an organisation through the process, ensuring that when a problem arises, the response can be swift and sure-footed. A good crisis management plan will empower a business to manage their response effectively and can have a dramatic influence on a company's chances of successfully navigating a crisis.

It is worth reminding the reader that an effective crisis management plan will be one that is regularly reviewed and updated, rather than one that is drafted and left in the cupboard as "job done".

In this chapter, we consider the explosion of fraud cases that arose during 2020, before considering some core elements of a sound crisis management plan.

2 The 2020 Fraud Boom

The speed at which businesses have forced through change during 2020 has been unprecedented.

As the *Financial Times* put it in May 2020: "*New laptops for Indian remote-workers? Done, "overnight", according to Unilever. Company-wide wellbeing software? BP sealed a contract in 10 days that would usually take six weeks. New staff to plug gaps? Serco, the outsourcer, has cut its hiring process from five weeks to less than three.*"[1]

This was a period when businesses were looking to cut through red tape, bypass outdated policies and make proactive changes to their operational, structural and technological frameworks. Big decisions were made over short time scales in a volatile business environment.

Whilst the various Government stimulus schemes provided a vital funding lifeline to many businesses, the speed at which the schemes were devised and the light touch claims-authorisation process led to concerns about the levels of fraudulent claims submitted. This effectively came down to a speed versus accuracy trade-off for the Government who, on one hand wanted to quickly make funding available to businesses, but on the other hand needed to make the process as watertight as possible to detract fraudsters. This speed versus accuracy dynamic was mirrored in everyday business decisions made by businesses all over the world, with some placing more weight on fraud risk than others.

So, whilst some businesses gave careful consideration to associated fraud risks, the level of urgency required to stay afloat and drive through change ultimately meant some decisions were not fully thought through before implementation.

Had the new systems been properly tested? What were the new risks associated with home working and these new systems? Was there still sufficient segregation of duties in place? Had staff been properly trained? How well do we really know these new suppliers and/or recruits? These and other questions were not always fully answered and, as a result, a host of opportunities arose for fraud. Common examples of resultant frauds suffered by businesses during the pandemic include the following:

- Cyber-attacks. The level of cyber-attacks on businesses has reached new highs in 2020 and a host of issues such as new Government funding schemes and tax rules means the fraudsters have plenty of opportunity to develop new hooks to tempt recipients to click on bogus email links. Corporate victims of this type of fraud often find that an employee's user identity has been compromised, leading to the scammers gaining access to the business's systems.
- Spear phishing. With millions of employees now working at home, companies face a higher risk of being defrauded by people from outside their operations as it is harder to verify identities. Entities have found that formerly face-to-face business is now being conducted by telephone or video call and so are vulnerable to impersonation, or "spear phishing" or "whaling" frauds. These frauds typically target or impersonate the C-suite and typically involved emails purporting to be from senior executives authorising fund transfers or requesting financial information.

- Bank mandate fraud. A rash of frauds arose, preying on companies struggling to pay their bills as the COVID-19 lockdown hit income. An old favourite of fraudsters has long been posing as genuine suppliers and providing new, fraudulent bank account details, with common recent examples including bogus landlords purporting to offer rent discounts or deferrals in exchange for down payments. Other common frauds also involve bogus new suppliers of in-demand equipment, from protective masks to testing kits and temperature gauges.
- Supply chain disruption. With large numbers of suppliers going bust, new business relationships often need to be forged at pace in order to maintain supply chains. Frauds have arisen after insufficient due diligence was conducted on these new suppliers, some of which ultimately turned out to be bogus. There have been a range of common frauds from incorrect/low-quality goods being supplied, to the receipt of far fewer goods than were ordered and counterfeit goods.
- Insider fraud. Although many employees were laid off or furloughed during 2020, there are some areas of expertise that are very much in demand, for example IT. With home working becoming commonplace during lockdown, many businesses had an urgent need to strengthen their IT teams in order to support the remote working platforms that staff were now using. This need to capture these specialist resources quickly, often in a competitive environment, led to some businesses not undertaking sufficient due diligence on the candidates. As a result, some businesses became victims of fraud after inadvertently hiring fraudsters into their teams who then acted as insiders to facilitate fraud. We predict that there will be many more insider frauds that have yet to be detected – some may take years to come to light without robust internal controls and reviews.
- IT-related fraud. During the lockdown, many remote working employees are more reliant than ever on IT teams (either internal or external) and many frauds resulted from employees dropping their usual level of scepticism and providing a bogus IT support member with sufficient personal information for them to access their corporate accounts.
- Increased home working also resulted in businesses' data often not being as well-protected as it normally was. During the lockdown period, cybersecurity company ThreatAware estimated that up to 55 per cent of business PCs may have been vulnerable to cyber-attack as they were now connected to home networks that lack sophisticated protection. Zoom quickly became the business communication tool of choice in the early part of the lockdown before reportedly experiencing a decrease in its clientele as a result of concerns over security breaches by fraudsters targeting users' personal data. Many businesses were quick to switch platforms as reputation for safety and good robust working practices remained important to maintain trust from investors, clients and suppliers.

The huge spike in corporate fraud in 2020 has had a big impact not only on the businesses themselves but also those behind the corporate structures, from creditors to those who have lost their livelihoods, such as employees and investors.

3 Crisis Management

Well-organised businesses have spent time and resources reassessing their core fraud risks in the new working environment, implementing training and new fraud awareness programmes, and amending procedures and controls to suit the new ways of working. Many businesses have also been re-assessing their crisis management approach. The unforeseen arrival of the pandemic and the dramatic impact it has had on the corporate world has led to a renewed energy among some businesses to ensure they are properly prepared for the next crisis, whatever that crisis may be. We set out below a guide to some of the core issues being considered.

Crisis management – a user-friendly guide

Plan for the crisis

Although it might not be possible to predict a crisis, it is not true to say that you cannot plan for it. The last thing that an organisation has capacity for during a crisis is finding and engaging external advisors, so at the very least an organisation can meet and agree terms with lawyers, forensic accountants, PR agencies and other specialist external advisors. Additionally, the organisation should establish a crisis committee, agree communication methods with members of that committee and put in place contingency plans in the event that certain members of the committee are not available, or able to assist. A crisis management plan should be clearly documented and communicated to the necessary people, but it should be flexible and able to change depending on the nature of the crisis.

The immediate priorities

The first challenge for the organisation is to identify the issue. This sounds so simple, but it is often the most difficult thing to do. It is so important to do this in order for the organisation to ensure it has the right people with the best skills and experience to help it to navigate its way through the crisis. Also, until the issue is identified, it is impossible for the organisation to appoint the correct chairperson of the crisis committee. Experience has taught us that the stakeholders want and need to hear from the top, but it has also told us that the most senior member of the organisation is not always best placed to lead the investigation and communication.

Once the organisation has identified the issue, it should ensure that it preserves all the relevant information and data and considers whether it needs to maintain privilege. The best rule of thumb is to always assume that privilege should be maintained, so organisations should speak to their lawyers at an early stage.

Depending on the nature of the crisis, there might be a need to suspend employees or relations with external third parties immediately. However, it is important to remember that any action taken by an organisation in this regard might have an impact on contractual relationships and these must be considered as early as possible.

Stakeholder management and communications

It is important to recognise that the organisation needs to communicate well both internally and externally in order to avoid adding to the crisis. There is an understandable temptation to say nothing until the issues are clear and a certain amount of investigative work has been done. However, this can be problematic as stakeholders will often create their own narrative in the absence of a clear narrative from the organisation. Consider issuing immediate holding communications to both internal and external stakeholders in order for the organisation to keep control over the information. It is also vital that the organisation monitors and attempts to control social media when in the middle of a crisis.

PR and communication must be part of any crisis management plan. The last thing the organisation wants is to be distracted by interviewing PR agencies when it is in the middle of a crisis,

so it is a good idea to already have a PR agency vetted and ready to go. The organisation can then activate its crisis management plan and instruct its external advisors immediately.

One thing not to forget is for the organisation to communicate regularly, and accurately. This can be very challenging when the issues are still being investigated and the organisation does not have a set of complete facts. It is also vital to remember that any statements that are issued will be read in the context of what else is going on with the world. It is important to judge the tone of any communications correctly. A general rule of thumb is that silence is not an option.

Remaining flexible and nimble is key for any organisation in crisis. Take time to reflect on the objectives that have been set and change them if necessary.

Importance of resilience and self-care

It is also important to remember that the members of the crisis management team are only human. One of the things about the COVID-19 pandemic is that it has affected everyone – the senior management, workers, advisors and stakeholders.

Taking regular breaks and recognising the impact that the crisis is having on the individuals dealing with the issues day to day is vital. Crises lead to stress and anxiety on levels that not even the most accomplished CEO will have experienced before and it is important to acknowledge this.

One of the lessons that COVID-19 has taught us all is that if well-being is not part of the crisis plan, then poor decisions can be made by over-tired and stressed members of the team. Everyone remembers the Tony Hayward comment: "I'd like my life back," following the BP Deepwater Horizon oil spill that killed 11 people. This was widely acknowledged to be a PR disaster.

Crises for corporates can be on different levels and can go on for several months, or even longer, as the pandemic has shown us. It is essential that the organisation does not remain in "crisis mode" but can resume normal business. Moving from crisis mode to "normal" business requires detailed planning and excellent communication. As the pandemic has shown us, scenario planning for a "new normal", listening to workers and stakeholders, is vital for businesses to look forward to the future.

Learning from the crisis

Of course, the pandemic was the cause of the main crisis for individuals and businesses alike. However, as we have set out, many corporates have already experienced a second crisis by way of a fraud. Many frauds that resulted from the pandemic will not have been identified yet.

Once all internal investigations have finished and the root causes of the fraud have been identified, the most tempting thing to do is to go back to "business as usual". However, lots of invaluable lessons can be learned from surviving a crisis. The organisation must ensure that it can take these positives and implement changes to ensure that events are not repeated. Events that led up to the fraud and the causes of the fraud should remain on the agenda for discussion at the top level of management so that the organisation can learn from the problem and monitor change.

It is also critical that the organisation can demonstrate that it has implemented changes to prevent the crisis and fraud from occurring again. The pandemic has been referred to as a "black swan", or an event that takes us by surprise, has a major effect and is inappropriately rationalised afterwards with the benefit of hindsight. However, good planning helps to respond to all unexpected events and to minimise the risk of knock-on damage such as fraud. Stakeholders will not be forgiving if the same issues arise again.

4 Conclusion

The scale and unexpected nature of COVID-19 has very much put crisis management at the top of the agenda for most businesses. The pandemic has highlighted the striking reality that the way a business prepares for a crisis can have such a huge impact on that business's chances of riding out the next unexpected challenge. Whilst it is not possible to predict everything and some crises may never be foreseen, fraud is an ever-present risk for all businesses and needs to remain at the forefront of businesses' controlling minds.

Endnote

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Connected and Collateral Consequences of Corporate Crime: Can a Corporate Survive a Criminal Conviction?


Tracey Dovaston


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Introduction and Overview

So your corporate has done the crime (or not). It has decided to do the time (or not). But what does "time" entail for a corporate facing a criminal conviction? Where does the liability start and where does it finish? Can it simply pay its way out? Can it ever draw a line under the incident?

Admissions of guilt and imposition of financial penalties are direct consequences of a corporate criminal conviction or negotiated resolution. However, alongside a conviction or a resolution, with or without an admission of guilt, there are less obvious connected and collateral consequences that may apply. These consequences can have a significant and often negative impact well after a penalty has been paid. They require careful analysis when a corporate is assessing whether to enter into any form of settlement with the authorities in relation to criminal allegations. The consequences can range from exclusion from public procurement contracts to an extensive compliance remediation exercise, even a monitorship, and from investigations or prosecutions in other jurisdictions to exposure to follow-on litigation, including class actions. In an environment where global regulators co-operate extensively and share information by the terabyte, a corporate considering self-reporting misconduct should assess from a very early stage its potential legal and financial exposure, across multiple jurisdictions.

In this chapter, we provide an overview of these complex and inter-related collateral consequences, with a focus on those that may arise for corporates in the UK and US when being prosecuted for corporate crimes.

Connected Consequences

Connected consequences are those that form part of the official sanction of the court or settlement and continue for a mandated period.

Deferred prosecution agreements and non-prosecution agreements

A deferred prosecution agreement ("**DPA**") is an agreement between a prosecutor and an offending corporate, reached under judicial supervision, that allows a prosecution to be suspended for a defined period provided the corporate meets certain specified conditions. The conditions, which can be a considerable financial burden on the corporate, can include payment of penalties, compensation and the appointment of a monitor to oversee the implementation of an anti-bribery and corruption programme. UK prosecutors have been able to enter into US-style DPAs following provisions that came into force in 2014. Since then, the UK's Serious Fraud Office ("**SFO**") has entered into seven DPAs for approximately £1.53 billion.

In addition, the US Department of Justice ("**DOJ**") and Securities and Exchange Commission ("**SEC**") use non-prosecution agreements ("**NPAs**"), which offer even more flexibility. These are essentially an agreement between the DOJ and the accused whereby the accused agrees to waive any applicable limitation periods and fulfil certain specified requirements in exchange for the DOJ agreeing not to pursue a criminal case during the period of the agreement. NPAs typically last for three years and require corporates to implement very specific compliance programmes, to report any additional instances of wrongdoing to the DOJ, and to co-operate in investigations of other corporates or corporate employees. They are private agreements that are not subject to judicial oversight.

In the United States, DPAs and NPAs have a long history and are widely used, particularly in corruption, fraud, Bank Secrecy Act and Foreign Corrupt Practices Act ("**FCPA**") prosecutions. In 2019 alone, the DOJ entered into seven DPAs and NPAs addressing alleged violations of the FCPA, and 12 addressing allegations sounding in fraud. This includes the two largest FCPA monetary settlements ever. First, a DPA between the US Attorney's Office for the Southern District of New York and Telefonaktiebolaget LM Ericsson ("**Ericsson**"), a Swedish telecommunications company, to resolve allegations related to violations of the FCPA by Ericsson and its Egyptian subsidiary. The DPA imposed approximately US$520 million in criminal penalties and an independent compliance monitor. Combined with its settlement with the SEC, Ericsson paid penalties of approximately US$1.1 billion. Second, a combined DOJ and SEC DPA with Russian telecommunications company Mobile TeleSystems PJSC ("**MTS**") in the amount of US$850 million.

An NPA from 2019, notable for the size of its monetary penalties, was entered into between RB Group, a global consumer goods conglomerate, and DOJ's Consumer Protection Branch and the US Attorney's Office for the Western District of Virginia. The NPA related to the marketing, sale, and distribution of a

drug used to treat opioid addiction, and imposed a total monetary obligation of US$1.4 billion – the largest NPA or DPA amount reached in 2019 – including, among other things, a civil settlement and a forfeiture of alleged proceeds. However, the NPA did not include a criminal penalty.

Monitorships

A monitorship is a programme supervised by an individual or team of individuals that are independent of the corporate. Its role is not to punish the corporate but rather to help it improve its compliance programmes in order to avoid similar problems in the future. The monitor brings to bear their independence, objectivity, compliance knowledge, training and learning to assess whether the corporate is fulfilling the criteria of the relevant settlement. Monitors generally report to an oversight agency (such as the DOJ, the SEC or the SFO). The specific issues to be monitored, as well as how often and to whom the monitor reports, is highly negotiated and will be specifically addressed in the agreement resolving the matter.

Whilst monitorships are often the result of extensive negotiations with regulators, they can in essence begin before the corporate self-reports an offence, when a corporate seeks to establish and deal with the problem before contacting the government. A corporate can receive credit for having done so. The idea is to show substantial progress in making improvements and a commitment to the required investment, in the hope that proactivity by the corporate will be factored into a more limited monitoring arrangement.

Monitorships are often viewed as costly, invasive and lengthy. They are commonly implemented for an initial period of three years, and can be extended multiple times thereafter. For example, Odebrecht SA, a Brazilian construction company, as part of a plea deal agreed in 2016 with the DOJ following claims of having violated US foreign bribery laws, agreed to retain an independent compliance monitor for three years and implement a compliance and ethics programme. However, after prosecutors said the corporate failed to adopt recommendations made by the monitor, it was required to extend the monitorship and other terms of its plea agreement with the DOJ.

Typically, monitorships cost millions of dollars, to be paid for by the corporate (and ultimately its shareholders). The ultimate cost largely depends on the scope and duration of the monitorship. The monitor's investigation and recommendations need to take into account the context of the corporate's operations, industry, and competitors. Thus, monitors typically bring on board consultants and advisors with business-specific expertise to help advise them, thereby driving up costs. Costs will also be influenced by: the complexity of the settlement agreement; the quality of the corporate's existing compliance programme; and the geographic markets and industries in which the corporate operates.

Regulators in the United States are aware of the cost of corporate monitors. For example, when assessing the need and propriety of a monitor, the DOJ Criminal Division considers (1) the potential benefits that employing a monitor may have for the corporate and the public, and (2) the cost of a monitor and its impact on the operations of a corporate. Additionally, the DOJ has taken the position that a monitorship should never be imposed for punitive purposes.

Compliance remediation

Regulatory enforcement actions or findings often require corporates to implement wide-ranging remedial programmes or changes to business practices, in addition to or instead of a monitorship. The investment required to respond adequately to regulatory orders can be significant, with a single project often running into the tens of millions of dollars. Corporates may have to agree to remedy their compliance procedures as a condition of a DPA or other settlement. This could include making substantive changes to the corporate's governance, anti-bribery and corruption controls and even to senior management.

For example, in the DPA agreed by Airbus SE with the SFO in January 2020, in relation to allegations that Airbus had used external consultants to bribe customers to buy its civilian and military aircraft, in addition to agreeing to pay €991 million, Airbus was also required to improve its compliance and ethics programme in order to enhance its ability to prevent and detect bribery offences throughout its own and its subsidiaries' operations. The remediation programme requires Airbus to undertake a root and branch group-wide compliance review, entailing significant time and cost investment.

The extensive requirements include: strengthening the group's assurance activities and operating practices in recruitment, risk management and controls; replacement of senior management at executive committee level, including appointment of a new CEO, CFO and General Counsel; creating an ethics and compliance sub-committee of the board to provide independent oversight of the corporate's ethics and compliance programme; extensive recruitment of external compliance professionals with direct access to the board and executive committee through the General Counsel; employment of a Chief Ethics & Compliance Officer; revising its code of conduct and other principles, supported by extensive training; strengthening risk management, compliance and internal escalation processes; strengthening contractual-credit governance; prohibiting the use of external consultants in any commercial aircraft sales campaign; verification visits to test the performance and compliance of a particular subsidiary or region; and reviews by the French anti-corruption government body, auditors and an independent panel in respect of its culture, ethics and compliance procedures.

The five-year DPA reached between Insys Therapeutics, Inc. and the US Attorney's Office for the District of Massachusetts provides an example of a criminal settlement with sizeable remedial measures in the United States. The DPA resolved federal criminal charges arising from the payment of kickbacks and other unlawful marketing practices related to the promotion of an opioid-based painkiller called Subsys. The DPA requires Insys to abide by the terms of an extensive Corporate Integrity Agreement that details the structure, content, and oversight of Insys's corporate compliance programme, including the commissioning of an annual independent review process. The agreement provides for new written standards, training and education programmes for employees, a disclosure programme for whistleblowing, certain restrictions on charitable donations and research grants, and a programme providing for the clawback of executives' incentive-based salaries.

Voluntary requirements, own-initiative requirements and skilled person reviews

Voluntary requirements ("**VREQs**") and own-initiative requirements ("**OIREQ**") are part of the UK Financial Conduct Authority ("**FCA**") and Prudential Regulatory Authority's ("**PRA**") early intervention programme, designed to eliminate or reduce ongoing risk to consumers or markets from a firm. These powers may be used in cases involving less serious contraventions or failures to meet regulatory standards and will be used where serious misconduct has occurred and the harm needs to be prevented immediately.

Pursuant to a VREQ, a firm agrees to implement a restriction on its business activities proposed by the FCA without relying on its formal statutory powers. For example, in 2015, the FCA became aware of some financial advisers advising customers to switch their mainstream personal pensions into self-invested personal pensions (a plan that enables the holder to choose and manage the investments made) with underlying high-risk assets. Following short-notice visits to these firms, the FCA asked the firms to agree to VREQs which prevented them from continuing to sell the high-risk products and to implement independent verification of their pension-switching advice processes before they would be permitted to advise on pension switches or transfers again. As a result of the firms agreeing to the VREQs, the firms stopped advising switches into the high-risk assets.

Technically, a VREQ is voluntary, as the firm has the option to reject it. However, in the context of a regulatory investigation, where the firm is at risk of the FCA taking a harder line, firms may feel that their hand is forced – particularly because refusal to agree to a VREQ can lead to the imposition by the FCA of the same (or more stringent) requirements under an OIREQ. In addition, when the FCA decides on what (if any) enforcement action to take, its rules require it to consider "*the degree of co-operation the firm showed during the investigation of the breach*".[1] Agreeing to a VREQ is likely to be regarded as evidence of such co-operation and the taking of proactive action to mitigate actual or potential damage to customers.

Under Section 166 of the UK's Financial Services and Markets Act 2000 ("**FSMA**"), the FCA and PRA have the power to require a firm to appoint a skilled person (such as a law firm or auditing firm) to produce a report on specified matters, or to appoint a skilled person directly. The skilled person may be required to conduct a review of past business in a particular area or sales of a particular product; a review of a firm's compliance with the client money and asset rules; or a review of a firm's systems and controls. The FCA issued 24 Section 166 notices in Q1 2020.

The report will generally establish the extent of any problems, the degree of any customer detriment, and the required remedial action. The report may be used by the FCA to determine the ongoing supervisory relationship that the FCA has with the firm and whether the FCA will undertake any enforcement action against the firm.

As with monitorships, the skilled person's report can be costly and invasive. Costs are generally borne by the regulated firm and may be substantial. The scope of the report will depend on the skilled person's mandate agreed with the regulator.

Compensation of victims

In the UK, compensation orders are a standard part of sentencing for corporate criminal offences and can be included in DPAs. Subject to negotiation with the prosecutors and judicial oversight, other financial terms can include: payment of a financial penalty; payment of the prosecutor's costs; donations to charities which support the victims of the offending; and disgorgement of profits.

The FCA also has power to apply to the court for a restitution order under section 382 FSMA and, in the case of market abuse, under section 383 FSMA. Where the court makes an order, it will determine what sum appears to be "just" having regard to the profits appearing to the court to have accrued, or the extent of the loss or other adverse effect, or (if relevant) both. The FCA then distributes this sum as directed by the court to those who have suffered loss.

In cases where it is appropriate to do so, the FCA will consider using its own administrative powers under section 384 FSMA to obtain restitution from a firm before taking court action. For example, in March 2017, the FCA required Tesco Plc to pay approximately £85 million plus interest to its investors in connection with market abuse in relation to a misleading trading update. This was in addition to the £130 million that Tesco Stores Plc, Tesco plc's subsidiary, agreed to pay the SFO under a DPA for the same set of facts.[2] Many corporates will voluntarily offer to compensate those harmed as part of any remediation strategy. This will often be a significant factor taken into account by the FCA in determining the amount of a penalty, if any.

Regulators in the United States may also apply to courts for funds to compensate victims, and in some instances, federal courts are required to order restitution pursuant to the Mandatory Restitution Act of 1996.

A New York court ruled in September 2019 that hedge fund Och-Ziff Capital Management should compensate certain victims of its foreign bribery scheme, who are claiming US$1.8 billion in damages. Although the US court acknowledged difficulty in quantifying the loss at issue and has requested additional briefing on the matter, the ruling, if it stands, could threaten the finality of Och-Ziff's plea agreement, substantially increase the hedge fund's financial exposure, and add a new and complicated consideration for future negotiated resolutions in FCPA matters. The ruling also raises the prospect of similar restitution claims in other FCPA cases.

Collateral Consequences

Collateral consequences are the official and unofficial sanctions and restrictions that corporates convicted of crimes or resolving criminal allegations face, separate and apart from any sentence or resolution.

Potential for overseas investigations/prosecutions

Understanding and managing the consequences of corporate criminal offences and resolutions is crucial not just for the sake of compliance in one jurisdiction, but also to protect a corporate's worldwide operations from investigations that might be initiated in one country but quickly spread to others.

For example, corruption investigations generally know no borders and often do not remain limited to the jurisdiction where they were initiated. A corporate that becomes the subject of an investigation in Indonesia may quickly find itself under investigation by other enforcement bodies around the world inquiring about similar issues in their jurisdictions, or responding to far-reaching inquiries from UK and US authorities about how it manages similar risks across its worldwide operations. This pattern is common and has several high-profile examples. For example, the 2011 DOJ and SEC investigations into Walmart's activities in Mexico reportedly spread to Brazil, India and China. Similarly, the investigation into GlaxoSmithKline's allegedly corrupt actions in China reportedly prompted additional investigations in countries as far away as Iraq, Jordan, Lebanon and Poland.

Debarment from public procurement

From the mid-1990s, the World Bank began adopting anti-corruption regulations to govern its lending programmes. It has expanded its anti-corruption initiatives periodically since, including the creation of its Integrity Vice Presidency Office, which investigates corruption allegations and institutes debarment proceedings against violators.

World Bank enforcement has global reach and impact, particularly in the developing world where its lending programmes are focused. Many corporates are subject to World Bank regulations

without necessarily being aware of it. For example, products or services delivered to a World Bank-funded project are typically covered by World Bank anti-corruption and fraud rules. The World Bank takes a very wide view of what constitutes corruption and fraud, and debarment is virtually automatic once action is initiated against a violator. For example, in 2011, the World Bank debarred Macmillan Publishers Limited from participating in World Bank-funded tender business for a minimum of three years following allegations that its agent in East and West Africa had attempted to influence a contract tender for the supply of educational material to national governments by offering bribes. As the World Bank is party to a cross-debarment treaty with the other four major multilateral development banks, once any corporate is debarred for more than one year by any of the five treaty members, it is automatically also debarred by the other four.[3]

Debarment is a sanction that is also widely used by individual jurisdictions. For example, in the UK, a corporate convicted of active bribery offences faces mandatory debarment from public contracts across the EU pursuant to the UK Public Contracts Regulations 2006 and Public Contracts Regulations 2015 (derived from regulations in place across the EU). By contrast, if the corporate is convicted for failing to prevent bribery by its associated persons, or agrees to a DPA relating to bribery offences, then debarment is discretionary.

In the United States, the federal government only awards contracts and grants to companies considered "*presently responsible*"; whether a potential contractor has been convicted of a crime factors into that determination. Additionally, federal appropriations statutes routinely contain a presumption prohibiting certain federal agencies from using appropriated funds for contracts with corporates that have been convicted of a felony within the two years preceding the award. Convictions under certain federal statutes, including certain provisions of the Clean Air Act and the Clean Water Act, also lead to mandatory debarment for a period of time. Besides losing access to government contracts, corporates convicted of a felony may also lose federal security clearances and the ability to obtain export licences.

State and local governments in the United States will abide by their own debarment regulations, but many states automatically initiate debarment proceedings against companies that are debarred by the federal government. For example, Massachusetts requires that a contractor that has been debarred or suspended by a United States agency be simultaneously debarred or suspended unless special circumstances exist.

Most nations do not want corporates known for corruption to continue to participate in public projects, often because elected officials do not want to be seen to be associated with such entities. Being frozen out of lucrative markets for a period of years (or permanently in severe cases) can effectively destroy a business until the debarment period ends.

National and state regulators in the US also use their chartering and licensing authority to police wrongdoing, particularly in the financial services industry. For instance, the New York Department of Financial Services ("**DFS**") oversees all banks and insurance companies chartered or licensed to do business in the state of New York, which includes one of the largest financial markets in the world. The regulator has used the threat of revoking a bank's licence to do business in New York – the proverbial "*death penalty*" – to force large settlements, such as a US$340 million settlement with Standard Chartered Bank ("**SCB**") in 2012, which also included a monitor. In 2017, Habib Bank Limited, the largest bank in Pakistan, agreed to resolve a DFS enforcement action for persistent Bank Secrecy Act/anti-money laundering and sanctions compliance failures that included a US$225 million penalty and the bank's agreement to surrender its licence to operate its New York branch, its only branch in the US.

Potential contractual breaches

The continuity and renewal of a corporate's contracts with its clients or counterparties such as joint venture partners may be contingent on the corporate acting lawfully.

A criminal conviction or resolution, or even prosecution, depending on the terms of the contract, may give rise to an event of default or right to terminate the contract (with a potential liability for damages).

Implications for senior management and operations

In the UK, a director convicted of a bribery offence can be disqualified from holding a director position for up to 15 years. In the United States, a person convicted of a criminal offence involving dishonesty, a breach of trust, or money laundering may not participate in the affairs of a federally insured depository institution. Criminal conviction may also act as a bar to certain licences or factor into an agency's consideration of whether a licence should be granted or renewed. For example, the SEC may revoke the registration of any advisor, broker, or dealer who has been convicted of certain enumerated offences, and the Commodity Futures Trading Commission may suspend or refuse to register a merchant, broker, advisor, or trader if the person has been convicted of certain offences within 10 years.

Additionally, the prosecution of a corporate's executives can continue long after the investigation into the corporate has closed. For example, the French and UK prosecutors' investigations into bribery allegations against former Airbus-linked individuals continues notwithstanding that Airbus agreed to pay approximately US$4 billion to settle investigations brought by the DOJ, SFO and French authorities. In the United States, the DOJ's investigation into executives of Volkswagen AG arising from the diesel emissions scandal continued long after Volkswagen pled guilty and paid US$4.3 billion in criminal and civil penalties in early 2017.

In addition to the personal implications for employees who may find themselves under investigation and dealing with their own defences and convictions – which are unlikely to be covered by a corporate's directors' and officers' insurance in the event of a criminal conviction – a corporate's operations may be significantly affected by the forced re-allocation of scarce resources, and the shift of management focus to deal with monitors and the other consequences described here.

Follow-on litigation

As enforcement efforts by US and UK authorities continue to increase, so too have shareholder or counterparty claims based upon the underlying bribery allegations. Indeed, the public announcement of the initiation or resolution of a government-led investigation almost invariably triggers a shareholder class action or group litigation claim alleging issues with the corporate's public disclosures. For example, Rio Tinto is fighting fraud charges in the US brought by shareholders over the timing of market disclosures relating to a coal investment in Mozambique. Corporates may also face a derivative action claiming that directors and officers breached fiduciary duties by failing to implement necessary internal controls and policies to ensure compliance with relevant anti-corruption laws.

While many follow-on lawsuits may not survive a strike-out or motion to dismiss because they lack specific facts to establish the requisite state-of-mind on the part of the corporate's officers, the costs of settling such litigation can be substantial. For example, after Société Générale entered into a DPA with US and French

authorities relating to alleged bribery in Libya, it agreed to pay the Libyan Investment Authority €963 million in respect of the same issue: the dispute concerned over US$2.1 billion of trades that the Libyan sovereign wealth fund claimed had been secured as part of "*a fraudulent and corrupt scheme*" involving the payment of US$58.5 million in bribes by the bank's agents. Société Générale also issued a public statement, stating it wished "*to place on record its regret about the lack of caution of some of its employees*" and that "*Société Générale SA apologises to the LIA and hopes that the challenges faced at this difficult time in Libya's development are soon overcome*".

In addition to the settlement amount, the cost of defending civil litigation – often on multiple fronts – can be substantial and not necessarily covered by insurance or fully recoverable, even in the event of success. Given the financial stakes and reputational costs of follow-on litigation, corporates with global operations need to think strategically while navigating a criminal matter to mitigate further risk and limit potential exposure.

Consequences of future criminal violations

If a corporate has not satisfied its obligations under its agreement reached with the regulators, the risk of reoffending will not have been reduced. As a consequence, the regulator is likely to amend the terms of the agreement, extend the monitorship, or, depending on the seriousness of the recidivism, terminate any agreement and resume the prosecution.

For example, in April 2019, SCB was required to pay US$1.1 billion to settle charges brought by the DOJ and the FCA that it violated US economic sanctions and ignored red flags about its customers. The penalty came seven years after SCB first paid a US$667 million fine and signed a DPA with the DOJ to avoid criminal charges for alleged prior breaches of economic sanctions. The DPA was also extended by two years as a result.

The FCA can increase or decrease its financial penalty based on considerations of certain aggravating and mitigating factors, which include: whether the firm has complied with any rulings of another regulatory authority; the degree of its co-operation during the investigation; its previous disciplinary record and general compliance history; and any other relevant actions taken against the firm by other UK or international regulatory authorities.[4] Therefore, because SCB agreed to accept the FCA's findings, its penalty in the UK was reduced by 30% from £145.9 million to £102.2 million.

Reputational/*persona non grata* issues

Corporate criminal prosecutions make good press. Being at the centre of a negative media storm can do long-lasting damage to a corporate's reputation and share price, and not just in the jurisdiction where the problem originated. For example, Walmart's share price fell 8.2% in the three days after details of its alleged bribery were publicised, wiping approximately US$17 billion off its market value. Similarly, following the allegations of bribery concerning GlaxoSmithKline, its share price slumped by 3.5% in London and by 2.4% in New York. Most enforcement agencies track press stories globally and are likely to become aware of a corporate's problems elsewhere in the world. As noted above, bad press in one part of the world may prompt inquiries from enforcement agencies in other jurisdictions.

Corporates are also likely to be placed on various compliance watch lists (for example, World-Check), and may find it harder to deal with regulated businesses such as banks, accountants and lawyers, who are often required to undertake due diligence and know-your-customer checks prior to accepting new clients.

Other regulators

Separate from the foreign prosecution issue noted above, other regulators with jurisdiction (financial, data, professional, sanctions, competition) may also commence investigations or take action based on the facts of the prosecution/resolution.

Sanctions

A corporate found liable for breaching sanctions or assisting in a breach of sanctions may well become subject to sanctions itself.

Imprisonment

Prison sentences vary widely from country to country but the trend is towards longer sentences among countries that have recently updated their anti-bribery and corruption legislation. For example, Mexico has prison terms of up to 14 years in the most severe cases. Obviously, corporations cannot be sent to prison, but the threat of prison time is very real for any member of senior management who consents to, or participates in, corrupt activity.

In the UK in 2015, a former trader for UBS and Citigroup, Tom Hayes, was sentenced to 14 years in prison (reduced to 11 years on appeal) for manipulating LIBOR to enhance his trading results. In France, former Orange CEO Didier Lombard was sentenced to jail in December 2019 for heading up a restructuring linked to employee suicides. In the US, John Kapoor, former chief executive of Insys, was sentenced to five-and-a-half years in prison for a scheme to bribe doctors to prescribe the corporate's opioid spray.

Conclusion

It is apparent that consequences for corporates convicted of crimes can extend well beyond the payment of a finite sum. International co-operation and intelligence sharing in order to prevent corporate misconduct is expected to increase, and this in turn increases the likelihood of corporates getting caught.

The implications of this renewed global focus on enforcement are challenging for many corporates. The penalties are severe. Fines are increasing, and lengthy prison sentences are being handed down. That, together with the negative impact the taint of corruption can have on a corporate's reputation and business, mean corporates cannot afford to let their compliance guard slip – and when it does, they need to carefully consider all of the connected and collateral consequences.

Endnotes

1. FCA's Decision Procedure and Penalties Manual 6.5A.3.
2. https://www.fca.org.uk/news/press-releases/tesco-pay-redress-market-abuse.
3. https://www.ebrd.com/downloads/integrity/Debar.pdf.
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Who Owns a Bribe? And Why Should You Care?


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Published annually, the Corruption Perception Index tells a sorry tale of corruption, kleptocracy, fraud, graft and cronyism. It shows, year-in year-out, African, Eastern European and Latin American countries struggling with endemic problems. Not even Nordic countries, with their strong public sector records of keeping corruption at bay, are free from corruption in the private sector. Transparency International's 2019 Report flagged the Fishrot Files (Iceland), Danske Bank (Denmark), and Ericsson (Sweden). Strikingly, these Nordic examples each involve trails of contracts and money stretching far beyond their Nordic origin into countries such as Djibouti, Namibia, Vietnam, Cyprus and the Marshall Islands.

Any significant international commercial venture is pregnant with the risk that the foreign business will get sucked into the mire of fraud and corruption. When bribes have been paid and received, the two main villains cast themselves – the briber and the bribee (is there such a word?) need no audition. But who to cast as the deserving victim? The company, the assets of which have been misapplied to pay the bribe? Or the state, whose politician or official has abused and exploited his position of influence by accepting the bribe?

This chapter focuses on one specific type of corruption – bribery – and analyses recovery issues through the lens of ownership. It does so principally by reference to English law, and offshore law to which it is so closely related. These sources of jurisprudence are also highly relevant when considering the law in Anglophone African states.

No Remedial Trusts Under English Law

Under these systems of law, analysing ownership of a bribe is more important than it usually is, for example, under U.S, Australian and Canadian law. Unlike those systems, English law does not recognise the concept of the remedial constructive trust – a trust imposed by way of discretionary judicial remedy. In remedial trust jurisdictions, the judicial imposition of a constructive trust confers ownership on a claimant who, pre-judgment, was no owner at all. This remedy therefore operates retrospectively.

Remedial Trust – a US-based Example

A good example of the remedial constructive trust from our experience arose in the Chevron-Ecuador-Donziger litigation. Following the discovery of corrupt practices in litigation brought against it in Ecuador, Chevron brought a Racketeer Influenced and Corrupt Organizations Act (RICO) claim – a civil claim, not criminal proceedings – against the instigator in the US courts. The judge held that Mr. Donziger had set up a dishonest scheme to secure a massive award of damages against Chevron. His plan was to syphon the damages into a Gibraltar company, and then distribute the proceeds to various interested parties. The remedies granted at the conclusion of the RICO trial included the imposition of a remedial constructive trust over Donziger's shares in favour of Chevron. The trust arose not by prior operation of law, but solely by virtue of judicial order. As a consequence of this order, Donziger was obliged to sign over title to the shares to Chevron.

This could not happen under English law. English law only recognises institutional trusts, which arise by operation of law from the date of the circumstances giving rise to it. In some respects, under English law, the search is for a root of title much as would be the case in a property transaction in which the vendor demonstrates his ownership of the property he is selling. In asset recovery or defence under English and associated legal systems, ownership via an institutional constructive trust is a more pressing and relevant issue than elsewhere in the common law world.

So, a provisional answer to the question *"who cares about ownership of a bribe?"* is: anyone operating in the realm of institutional rather than remedial trusts. Although of vital importance in English law, it is still relevant in the United States and other remedial trusts jurisdictions because the institutional trust sits alongside the remedial trust and criminal forfeiture powers in the jurisprudential gun-rack.

With that in mind, let's look at a relatively common scenario from the shadowy world of corruption.

A Typical Scenario

Suppose a company executive bribes a senior politician or official. The politician or official invests the money in property and shares in a "rule of law" (i.e. reputable) jurisdiction. The politician's investments prosper. A new government chases down the exiled politician's assets, and asserts ownership rights through a proprietary claim over those assets, including the investments that had been seeded by the bribes. Under English law, there is a well-established basis for this assertion of ownership rights.

The Victim-State's Claim to Ownership

On one view, of course, the victim-state has not *directly* lost anything as a result of a bribe being paid to a corrupt senior politician or official. *Indirectly*, however, it can clearly be said that the victim-state did not receive full value for (say) the contractual concession that was granted as a result of the bribe which was paid.

This requires a little further analysis, but it lies at the heart of English (and offshore) law relating to bribes. If I pay $1 million dollars as a bribe to secure the right to buy oil for $100 million, in reality I was actually prepared to pay $101 million for that oil. The seller has been short-changed by $1 million as

a consequence of the corrupt way in which the transaction was executed. The recipient of the bribe should have handed those monies over to his principal. The recipient of the bribe has profited from his position, and should not be allowed to retain the money. As Lord Millet said, commenting on the old case of *Morison v. Thompson*,[1] *"where…a fiduciary…takes advantage of his position to make a profit for himself, the profit is the property of the principal"*.[2] Subject to any issues regarding the precise scope of fiduciary duties arising under the laws of the victim-state, it might be thought obvious that a senior politician, holding the power to grant a valuable contract to a third party, owed fiduciary duties to that victim-state.

And this ownership argument has subsequently been endorsed by the English Supreme Court in *FHR European Ventures LLP v. Cedar Capital Partners LLC*,[3] which authoritatively decided that unauthorised profits made by a fiduciary are held on trust for his principal.

"Show Me *All* the Money"

Usually, there is a time-lag between the receipt of the bribe by the corrupt politician or official and the discovery of the corrupt transaction. In that time, the bribe may have been invested. The benefits of an ownership claim which accrue to the victim-state can extend beyond the amount of the bribe. In the example given earlier in this chapter, our corrupt senior politician invested his ill-gotten gains shrewdly, and those investments prospered. Is the victim-state limited in its ownership claims to the amount of company used to bribe the politician, or can its claims go further?

In modern times, it was the courts of Hong Kong that first answered this question, delivering an unequivocal "yes" to a question which arose from facts worryingly close to their home. Mr. Reid, the head of the commercial crime unit responsible for enforcing Hong Kong's bribery laws, was convicted… of taking bribes. He had invested those bribes in certain assets, and the Attorney-General claimed on behalf of the Crown that those assets (real estate) were held on constructive trust in favour of the Crown. In a divergence from old English case law, this argument prevailed in Hong Kong. It took a number of years of judicial agonising in the courts of England before the old case law was given a decent burial by the Supreme Court in England.[4] If bribes have been invested successfully, the recipient must not only pay over the bribes themselves but assets derived from those bribes.

Crowbarring the Cronies – Not Necessarily Double-Recovery

Moreover, if bribes have been funnelled by the corrupt recipient into the hands of his cronies, ownership rights against the corrupt recipient can be coupled with compensatory rights against the cronies – without the need to give credit to the original recipient of the bribe for sums recovered from the cronies. By electing compensatory rather than restitutionary remedies against the cronies, the victim-state can broaden the recovery landscape. The remedy for dishonest assistance in a breach of fiduciary duty is compensatory not restitutionary. If the crony is held liable as a dishonest assistant, and pays compensation, then the sums recovered on this compensatory basis do not diminish the size of the restitutionary claim that can be pursued against the corrupt recipient of the bribes.

This was very recently illustrated by the decision of the Court of Appeal in *Marino v FM Capital Partners*.[5] Along with another director, the corrupt director of a company had, amongst other things, received and paid bribes. The company's claims against the other director were settled, and the company received the settlement sum from the other director. The company nevertheless refused to deduct those recoveries from its claim against the corrupt director. The Court of Appeal upheld the company's position, Sir Jack Beatson concluding that:

> *"…because claims against a particular defendant for restitution of bribe moneys are not concerned with loss to the claimant, the claimant's recoveries from third parties do not affect the particular defendant's liability to make restitution of the bribes received by that defendant or to account for any profits made."*

Disclaiming Ownership Rights – a Victim-State's Option

All of these considerations can make it attractive to a victim-state to assert ownership rights where a senior official or politician has received bribes. But it may be more attractive for the victim-state *not* to pursue its ownership rights. Successfully asserting ownership of assets currently held by third parties could expose the victim-state to the risk of garnishee or receivership attacks from all manner of creditors of the victim-state.

This might weigh heavily with the victim-state, not only in civil claims against the corrupt official or politician, but also when deciding whether to invite and how to respond to forfeiture proceedings brought by the host state. If the assets are identified as being located in a state with which the victim-state has a mutual legal assistance treaty (MLAT), the victim-state could invoke the MLAT and ask the host state to secure forfeiture of the assets and their repatriation. The victim-state may also enter into an *ad hoc* agreement with the host state for the repatriation of forfeited assets, as occurred in the recoveries made by Malaysia from the US government in the 1 MDB case. Moreover, under US criminal forfeiture law, if a forfeiture order is made, the government's ownership will relate back to the moment of the first overt criminal act. In addition, intermediate transactions may be voided under this relation back doctrine if forfeitable property has been transferred to third parties. A forfeiture order entered by a US criminal court will wipe the prior ownership slate clean, and declare that the property belongs to the US Government.

Oftentimes, an MLAT process which involves forfeiture proceedings will ultimately include an agreement between the host and victim-states under which the assets are divided between the two of them, and a share of the assets is repatriated to the victim-state. A characteristic term of a "purse-sharing" agreement is one which excludes any third-party rights. So, from the perspective of the victim-state, splitting the spoils with the host state will wipe out its ownership and produce a recovery of only part of what it previously owned.

On the other hand, a victim-state glancing anxiously at a queue of creditors might decide that disavowing ownership rights and recovering only a proportion of the assets be a better outcome than making a 100% recovery from the corrupt politician, only to see the benefit of that victory snatched away by third-party creditors.

Accordingly, in some circumstances, from the perspective of the victim-state, the capacity to exclude any third-party rights by means of a purse-sharing agreement with the host-state can be a very attractive feature. And there have been examples of a victim-state initially opposing the host nation's forfeiture proceedings, arguing that it is the true owner of 100% of the assets in question, and then flip-flopping – conceding the forfeiture, allowing the host state to secure title to the assets under the forfeiture proceedings, and negotiating a repatriation agreement with the host state. Half a sixpence is better than no sixpence.

The Victim-Company's Claim to Ownership

So far, this chapter has looked at ownership issues from the perspective of the victim-state. However, there can be a very different narrative and a competing legal analysis when viewed through the lens of the company whose money was used to bribe the politician or official.

If the company can properly be said to have known and approved of the corrupt transaction, then obviously the company can make no claims against the assets, whether in pursuit of ownership rights or otherwise. In that instance it is a perpetrator-company. But quite often, the executive who agreed to pay the bribe, and who caused the bribe to be paid, was acting covertly and without the knowledge or approval of the company. The company can credibly say that it knew nothing about the corrupt scheme or its execution. In this alternative scenario, the company can fairly describe itself as a victim-company. The victim-company can argue that its assets have been pillaged and misapplied. Can a victim-company argue that the bribe amounts to the misappropriation and misapplication of its assets? If so, might there be a seat at the ownership table for the victim-company?

If ownership rights can be asserted by a victim-company, they can be very valuable, not only in English and associated systems of law, but also in the context of US criminal forfeiture proceedings. This is because, despite the powerful tools of criminal forfeiture, the US courts have increasingly recognised the constructive trust as a pre-existing beneficial interest in property that can trump forfeiture claims brought by the government. In a recent decision, the interest of a beneficiary of a constructive trust and the government's in bribe payments arose at the same time. The 2nd Circuit decided that the beneficiary's interest defeated the government's claim under the relation back doctrine.[6] There are limits to Uncle Sam's long and strong forfeiture arm.

US federal law has an embedded choice of law relevant to the victim-company's position. In order to determine whether the victim-company has a valid ownership right, the court must first look to the law of the jurisdiction which is said to provide the origin of that ownership.[7] So, whether the ownership card played by the victim is indeed a trump card in US forfeiture proceedings may depend on whether those ownership rights validly exist under the law of England or any other foreign jurisdiction where the ownership interest or constructive trust has arisen.

One procedural route which the victim-company may choose to assert any ownership rights is to intervene in the forfeiture proceedings. Alternatively, the victim-company could take its own proceedings against the corrupt politician or official in the host state, and set up a competing claim to ownership of the assets. This is a difficult course for the victim-company to navigate, if only because it requires the company to keep on top of the way in which the host state and the victim-state are proceeding towards forfeiture. Timing will likely be critical. If the victim-company moves too slowly, it may find that the forfeiture door has already been slammed shut, conferring title to the assets on the host state. But if it can act nimbly, there is a legal analysis which could command a seat at the ownership table. It is possible to see this by building the argument in steps.

The Building Blocks of the Victim-Company's Claim

When the individual briber uses victim-company money to pay the bribe, he commits a breach of fiduciary duty. He is liable to the victim-company, even though the briber may truthfully say that the contract he was winning benefitted the victim-company. Under English law, a victim-company can indeed assert rights where its assets have been used for the purposes of bribery. In *E. Hannibal & Co Ltd v Frost*,[8] the bribe-paying managing director was successfully sued by the paying company, and his defence that he was paying bribes to secure orders for the benefit of that company was rejected. Although there are complicated issues regarding compensatory remedies in this situation, the case itself serves to demonstrate clearly that the victim-company can indeed be regarded by the courts as a victim.

Once the bribe is in the hands of the corrupt recipient, the victim-company has a claim against him. Company money corruptly passed by a dishonest executive into the hands of a politician can be subject to proprietary remedies. It can be said to represent *"…the fruits of fraud, theft or breach of fiduciary duty"*, which are the characteristics which *"…must be shown to establish a constructive trust…"*[9] The recipient of the bribe would be liable to the victim-company for *"knowing receipt"* of the bribe. This type of equitable liability – quite different from dishonest assistance in a breach of fiduciary duty – requires proof of the following ingredients: (a) disposal of assets in breach of fiduciary duty; (b) the beneficial receipt of those assets; and (c) knowledge on the part of the recipient that the assets are traceable to a breach of fiduciary duty.[10] Once the recipient is shown to be liable for knowing receipt, he will be treated as holding the monies on trust for the victim-company.[11]

Who Owes Fiduciary Duties? Not Just Office-Holders

It is not usually problematic to classify the briber as someone owing fiduciary duties to the victim. It is now well-established in English and offshore law that those owing fiduciary duties to a company are not just the directors or office-holders, but will include almost any individual who by virtue of his employment contract (including his job specification) is placed in a position of trust with regard to a specific matter. As Lord Justice Fletcher-Moulton quaintly observed in an Edwardian case, even an errand boy is obliged to bring back my change, and *"…is in fiduciary relations with me"*.[12] Fiduciary duties arise out of and are circumscribed by the contract under which an individual is engaged, and not solely by his status.[13] Once it is established that the briber owed fiduciary duties, and that the payment was in the nature of a bribe, the recipient is bang to rights for knowing receipt, with the consequence that the victim-company has established a constructive trust over the assets.

Now the victim-company can attempt to harness the jurisprudence that allows ownership rights to extend to the fruits of the recipient's investments. *"I want my money back and I claim ownership of all the investments bought with my money."*

Evaluating the Competing Ownership Claims of Victim-State and Victim-Company

An arm-wrestling match between a victim-state and a victim-company is subject to numerous legal cross-currents. It can fairly be said that the victim-company was the first owner, and the first victim of misconduct – effectively, the fiduciary paying the bribe has stolen company assets, so why should a victim-state take ownership over the prior claims of the victim-company? On the other hand, it can also be argued that the victim-company should be held vicariously liable for the misconduct of its fiduciary, so why should the victim-company be allowed to disavow the acts of its fiduciary so as to assert a claim to ownership?

The common law doctrine of vicarious liability is not an easy fit with ownership arising under the equitable concept of constructive trusts. And in some circumstances, the law does allow a company to disavow the acts of its dishonest fiduciaries. In the context of litigation between a company and its fraudulent directors, the English Supreme Court held that the illegal conduct of the senior executives need not be treated as that of the company of which they were directors. As Lord Neuberger stated:

> *"Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings."*[14]

The other side of the coin is the decision of the Court of Appeal in *Hamlyn v John Houston*,[15] in which it was held that the employer of an individual who paid a bribe was vicariously liable to the employer of the recipient for any damage caused by the corrupt course of conduct. However, the issue before the court was not one of ownership, but of liability to pay compensatory damages, so it is hard to conclude that it would represent the decisive argument in favour of a victim-state in an ownership tussle with a victim-company.

Moreover, the narrow focus of this chapter, concentrating on the proprietary issue, excludes the position of other third-party victims. The most obvious example is the company that unsuccessfully bids for a contract that was corruptly awarded to the victim-company on the back of a bribe. These third parties can have the capacity to put a spoke in the wheel of both victim-state and victim-company, for example by bringing civil RICO claims.

Not the Final Word

The final section in most chapters is usually headed "Conclusion". Not in this chapter. The preceding discussion makes plain why it would be over-ambitious to describe the last section of this paper as a conclusion. Instead, it is safer to circle back to the title of the chapter and simply say – *"So, who* **does** *own a bribe?"*

Endnotes

1. (1874) LR 9 QB 480.
2. "Bribes and Secret Commissions Again" (2012) CLJ 583.
3. [2014] 3 WLR 535.
4. *FHR European Ventures v. Cedar Capital Partners LP*; see endnote 3 above.
5. [2020] EWCA Civ 245.
6. *Federal Insurance Company v. United States*, 882 F.3d 348 (2nd Cir. 2018).
7. *United States v. Ramunno*, 599 F.3d 1269, 1273-74 (11th Cir. 2010).
8. [1988] 4 BCC 3.
9. *Bailey v. Angove's Pty Ltd* [2016] UKSC Civ 47, per Lord Sumption at paragraph 30.
10. *El Ajou v. Dollar Holdings* [1994] 2 All ER 685 at page 700, endorsed by the Privy Council in *Arthur v. Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 at paragraph 32.
11. *Arthur v. Attorney-Genral of the Turks & Caicos Islands* [2012] UKPC 30 at paragraph 37.
12. *In re Coomber* [1911] 1 Ch 723.
13. *Customer Systems v. Ranson* [2012] IRLR 769; *Helmet Integrated Systems v. Tunnard* [2007] FSR 16; *University of Nottingham v. Fishel* [2000] ICR 462.
14. *Jetivia SA and another v. Bilta (UK) Ltd (in liquidation) and others* [2015] UKSC 23.
15. [1903] 1 KB 81.

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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?

Australia has a federal system of government. The Commonwealth Director of Public Prosecutions (CDPP) is the primary prosecution authority responsible for prosecuting both indictable and summary criminal offences of a business crime nature (which are usually offences under Commonwealth laws). Several federal law enforcement authorities including, but not limited to, the Australian Federal Police (AFP), the Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO), the Australian Competition and Consumer Commission (ACCC) and the Australian Criminal Intelligence Commission (ACIC) investigate and refer matters to the CDPP for criminal prosecution. Each State and Territory also has its own prosecution authority and investigative agencies. They sometimes have overlapping roles with federal authorities as they also have the capacity to investigate and prosecute fraud, corruption, false accounting, and similar offences under the relevant State/Territory law.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As a general rule, the CDPP is responsible for prosecuting offences under Commonwealth laws, and State/Territory prosecution authorities are responsible for prosecuting offences under State/Territory laws.

As far as investigations are concerned, the law enforcement authority responsible for administering the legislation that creates the business crime will generally be responsible for investigating it. For example, the ASIC, as the corporate regulator, is responsible for investigating criminal breaches of directors' duties or insider trading under the *Corporations Act 2001* (Cth).

At the Commonwealth level, where an authority administers legislation that creates an offence but it does not have investigative powers, the matter is generally referred to the AFP for investigation. Furthermore, the AFP generally takes a role in investigations where it is necessary to utilise police powers such as the power of arrest and execution of search warrants.

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?

There are several statutes that provide for both civil and criminal enforcement of business crime. This is particularly relevant to matters investigated by the ASIC, the ACCC and the ATO. For example:

- the ASIC can investigate an alleged failure by a listed company to disclose price-sensitive information to the market as a possible crime, contravention of a civil penalty provision or as a matter in respect of which the ASIC may issue an infringement notice; and
- the ACCC, as the competition regulator, can investigate suspected cartel conduct as a possible crime or as a contravention of a civil penalty provision.

A civil penalty provision is one which imposes a standard of behaviour typically imposed by criminal law, but allows enforcement by civil process (and with a civil standard of proof). They are commonly found in statutes which create business crime offences. Contraventions of such provisions are pursued by the relevant law enforcement authority itself (and not the CDPP). Civil remedies include monetary penalties, injunctive relief and compensation orders to provide reparations to victims.

Proceeds of crime legislation also enable both conviction- and non-conviction-based forfeiture of the proceeds, or instruments, of crime. There are also a range of administrative orders that can be made, such as orders disqualifying a person from managing a corporation, obtaining an enforceable undertaking or issuing an infringement notice.

The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) provides for a suite of standard regulatory powers that certain federal agencies may invoke in respect of legislation which they administer. This regulatory regime is intended to bolster the relevant agency's monitoring and investigating powers, as well as enforcement powers through the use of civil penalties, infringement notices, enforceable undertakings and injunctions.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In November 2019, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the government agency responsible for investigating and disrupting money laundering, terrorism financing and other serious crime, commenced proceedings seeking civil penalty orders against Westpac Banking Corporation in the Federal Court of Australia. AUSTRAC alleges that Westpac committed over 23 million contraventions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), across billions of dollars' worth of transactions between 2011 and 2019. The matter has been highly publicised, not least because each individual contravention attracts a maximum penalty of A$21 million. Westpac has made a number of admissions in its defence and has set aside

A$900 million to cover its potential liability. In a similar case brought by AUSTRAC against the Commonwealth Bank of Australia, an agreed A$700 million penalty was ordered by the Federal Court of Australia in 2018 for 53,750 contraventions of the Act.

The criminal cartel case against Citigroup, Deutsche Bank, Australia and New Zealand Banking Group (ANZ) and six senior executives, which the CDPP commenced in June 2018, continues to be closely watched by the market due to its potentially far-reaching consequences. The charges involve alleged cartel arrangements between the Joint Lead Managers relating to trading in ANZ shares following an ANZ institutional share placement in August 2015. The proceedings are still at the committal stage, where an area of focus has been the manner in which the ACCC collected its evidence.

In August 2019, Kawasaki Kisen Kaisha Ltd (K-Line) was convicted after entering a guilty plea of engaging in cartel conduct and fined A$34.5 million by the Federal Court of Australia. This is the largest ever criminal fine imposed under the *Competition and Consumer Act 2010* (Cth). The cartel involving other shipping companies operated from at least February 1997 and affected the transportation prices of vehicles from the US, Asia and Europe to Australia. K-Line faced a maximum penalty of A$100 million, being 10% of its agreed annual turnover relating to its Australian business activities in the 12 months prior to the commencement of the offence. The court allowed a discount in light of K-Line's early plea, assistance and cooperation.

2 Organisation of the Courts

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

Virtually all federal criminal offences are prosecuted in the courts of the State or Territory where the alleged crime occurred, and the criminal procedures applicable in that State/Territory apply. Generally speaking, and with some minor exceptions, the States/Territories have three levels of courts, namely, Local/Magistrates' Courts, District/County Courts, and Supreme Courts. The Federal Court of Australia has specifically been vested with jurisdiction to deal with a narrow category of crimes, including offences under the *Competition and Consumer Act 2010* (Cth), although the Federal Government announced in March 2019 an intention to expand the Court's criminal jurisdiction in the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. However, no bill has yet been introduced into Parliament. The High Court is the highest court in Australia and has jurisdiction to hear appeals in criminal matters. There are no specialised criminal courts for particular crimes.

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

Often, there will be a right to a jury, but not in every case. All federal offences which are tried on indictment must be tried by jury under the Constitution. However, there are statutory mechanisms, at both the federal and State/Territory level, which enable some indictable offences to be heard summarily before a Magistrate alone where the maximum penalty is significantly moderated. Additionally, in certain circumstances, in some State/Territory jurisdictions, an accused charged on indictment for a State/Territory offence may apply or elect for a trial to proceed by a judge alone.

3 Particular Statutes and Crimes

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

• Securities fraud

The *Corporations Act 2001* (Cth) criminalises market misconduct, including, but not limited to, intentionally making false or misleading statements in relation to financial products (including securities). The statement maker must know or ought reasonably to have known that the statement is false or materially misleading, or not care whether the statement is true or false.

• Accounting fraud

The *Corporations Act 2001* (Cth) places a positive obligation on companies to keep financial records which correctly record its transactions and would enable true and fair financial statements to be prepared and audited. This is a strict liability offence and it is unnecessary to establish any particular mental state. The *Corporations Act 2001* (Cth) and other State/Territory laws also criminalise conduct where a person dishonestly destroys or conceals accounting records or dishonestly makes or publishes any statement that is false or misleading. In March 2016, Australia introduced two new false accounting offences in the *Criminal Code Act 1995* (Cth). These offences criminalise conduct where a corporation or an individual engages in either intentional or reckless false dealings with accounting documents which, in effect, are dealings that cover up the receipt or payment of illegitimate benefits.

• Insider trading

The *Corporations Act 2001* (Cth) criminalises conduct in which a person knows, or ought reasonably to know, that they have confidential, price-sensitive information about a financial product and intentionally deals with the financial product, procures another person to deal with the financial product or discloses the information to another person likely to trade in the financial product.

• Embezzlement

New South Wales (NSW) is the only Australian jurisdiction that retains a specific offence of embezzlement under its *Crimes Act 1900* (NSW). It criminalises conduct in which an employee intentionally misappropriates property entrusted to him or her by their employer. In other Australian jurisdictions, embezzlement conduct is dealt with under provisions relating to fraud, theft or other property offences.

• Bribery of government officials

The *Criminal Code Act 1995* (Cth) creates an offence of bribing a foreign public official. It prohibits a person from offering or providing a benefit to a person which is not legitimately due and is intended to influence a foreign public official in order to obtain or retain business or a business advantage. The Act also creates a similar offence for bribing Australian Commonwealth public officials. Various State and Territory laws similarly prohibit bribery, including of State/Territory government officials.

• Criminal anti-competition

See below under the sub-heading "Cartels and other competition offences".

• Cartels and other competition offences

It is an offence under the *Competition and Consumer Act 2010* (Cth) for a corporation to intentionally enter into, or give effect to, a

contract, arrangement or understanding which the corporation knows or believes contains a "cartel provision" relating to price-fixing, market-sharing, bid-rigging or restricting supply chain outputs.

• Tax crimes

Tax crimes and frauds against revenue are primarily prosecuted under the *Criminal Code Act 1995* (Cth) and the *Taxation Administration Act 1953* (Cth). The most serious tax crimes are generally pursued through various offence provisions under the *Criminal Code Act 1995* (Cth), which criminalises dishonest intentional conduct which is fraudulent and results in the loss (or risk of loss) of Australia's taxation revenue.

• Government-contracting fraud

Government-contracting fraud is generally prosecuted under general fraud and corruption offences under the *Criminal Code Act 1995* (Cth) or the relevant State/Territory criminal statute. For example, under the *Criminal Code*, it is an offence for a person to do anything with the intention of dishonestly obtaining a gain from a Commonwealth entity.

• Environmental crimes

Australia has an extensive array of environmental laws. The principal federal statute is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). It contains, in addition to civil penalty provisions, criminal offence provisions for non-compliance. However, most environmental laws are State/Territory-based, and vary from one State/Territory to another. Many State/Territory environmental laws impose strict liability criminal offence provisions for non-compliance.

• Campaign-finance/election law

The *Commonwealth Electoral Act 1918* (Cth) creates several federal offences relating to elections, including offences which prohibit bribery, the undue influencing of votes, and interference with political liberty. The Act also makes it an offence to fail to disclose details of donations to political parties over a certain amount. The States/Territories have similar statutes, some of which make it an offence for certain persons (e.g. property developers in NSW) to make political donations.

• Market manipulation in connection with the sale of derivatives

The *Corporations Act 2001* (Cth) prohibits a person from intentionally taking part in a transaction that has, or is likely to have, the effect of creating or maintaining an artificial price for trading in financial products on a financial market.

• Money laundering or wire fraud

The *Criminal Code Act 1995* (Cth) provides for several money laundering offences which are used to combat business crime. Money laundering offences will apply to persons who are dealing with money or property which constitutes the proceeds, or may become an instrument, of crime and have the requisite state of awareness. There are similar offences under the equivalent State/Territory laws. In addition, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) aims to prevent money laundering and the financing of terrorism by imposing a number of reporting and other obligations on the financial sector, gambling sector, remittance services providers and other entities which provide particular designated services. However, most of the penalties under that Act are civil, rather than criminal, in nature.

• Cybersecurity and data protection law

Australia has implemented the Council of Europe Convention on Cybercrime via amendments to several statutes: the *Mutual Assistance in Criminal Matters Act 1987* (Cth); the *Criminal Code Act 1995* (Cth); the *Telecommunications (Interception and Access) Act 1979* (Cth); and the *Telecommunications Act 1997* (Cth). Computer offences cover illegal access, modification or impairment of either data or electronic communication. These offences are generally prosecuted under the *Criminal Code Act 1995* (Cth) or the relevant State/Territory statute.

Personal information or data in Australia is protected principally through the *Privacy Act 1988* (Cth). It applies to the handling of such data by, *inter alia*, Australian federal government agencies and certain private sector organisations. In February 2018, the Notifiable Data Breaches scheme introduced an obligation on all agencies and organisations regulated under the *Privacy Act* to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm.

• Trade sanctions and export control violations

Trade sanctions are implemented in Australia by the following legislation and accompanying regulations:

- *Charter of the United Nations Act 1945* (Cth): international sanctions imposed by the United Nations Security Council; and
- *Autonomous Sanctions Act 2011* (Cth): sanctions imposed autonomously by Australia.

Australian export controls (and violations for breach) are regulated through a variety of statutes and administered by numerous government departments and agencies. Relevant legislation includes the *Customs Act 1901* (Cth) and the *Defence Trade Controls Act 2012* (Cth). The Defence and Strategic Goods List specifies goods, software or technology that is subject to those controls.

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

Under the *Criminal Code Act* 1995 (Cth), attempts are punishable as if the offence attempted had been committed. In order to be held criminally liable for an attempt, the person's conduct must be more than merely preparatory to the commission of the offence. It is not necessary that the attempted crime is completed. Further, a person may be found guilty even if the commission of the offence was impossible or the actual offence was committed. The State/Territory laws also provide for criminal liability for attempts.

For other inchoate crimes, see the response to question 10.1 below.

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?

It is commonly accepted that a corporation, as a separate legal entity, can be convicted of a criminal offence and have a criminal penalty imposed upon it. There are also numerous offences created under the statute that specifically apply to corporations, particularly in the area of occupational health and safety.

Under Part 2.5 of the Criminal Code, the Criminal Code applies to body corporates in the same way as it applies to individuals subject to any statutory modification. If intention, knowledge or recklessness is an element of a particular offence, it will be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence by an employee. The means by which such an authorisation or permission may be established include, amongst other things,

proving that a "corporate culture" existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision. However, a number of federal statutes contain alternative legislative attribution methods. In other Australian jurisdictions, generally speaking, a corporation may be found guilty of a criminal offence either on the grounds of vicarious responsibility or on the basis that the person who committed the acts and had the requisite mental state was the directing mind and embodiment of the company.

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

In order for personal criminal liability to ensue against a person, the prosecution authority needs to charge the individual as well as the company. Accessorial criminal liability of company officers is often provided for in a specific statutory provision. For example, a statute may provide that an officer will be liable if they were knowingly involved in the corporate offence, or alternatively if the corporate offence was committed with the consent, or connivance of, or was attributable to the neglect of, the officer. An officer may also be liable for a crime committed by the company if the officer aided, abetted, counselled or procured the commission of the offence. Alternatively, depending on the circumstances, directors or senior managers may be civilly liable under the *Corporations Act 2001* (Cth) for failing to exercise due care and diligence, for example, by failing to ensure that appropriate risk management systems and processes were in place.

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?

Prosecution authorities and law enforcement authorities generally do not have a policy or stated preference; however, they are more accustomed to charging individuals and are aware that this will often have a greater general deterrent effect. A determination of who is charged will ultimately be governed by whether there is a *prima facie* case, reasonable prospects of conviction and whether it is in the public interest (see the response to question 8.2 below).

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Australian law does not specifically recognise the concept of successor liability. Consequently, domestic mergers and acquisitions can be structured so that the successor entity avoids exposure to liability in Australia. However, where the court has approved a scheme for the reconstruction of a body or the amalgamation of two or more bodies, the court can make an order under s 413 of the *Corporations Act 2001* (Cth) transferring the liabilities of the transferor body to the transferee company.

5 Statutes of Limitations

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

At general law, there is no limitations period for the commencement of a prosecution for criminal offences unless a statute provides otherwise. However, criminal proceedings may be stayed to prevent injustice to the defendant caused by unreasonable delay. In some States/Territories, there are limitations periods for the prosecution of summary offences. Under the *Crimes Act 1914* (Cth), there is no limitations period for the prosecution of offences by individuals against a law of the Commonwealth where the maximum penalty exceeds six months' imprisonment or for the prosecution of offences by companies where the maximum penalty exceeds A$33,300. If the maximum penalty is less than those thresholds, a prosecution must be commenced within 12 months of the commission of the offence unless a statute provides for a longer period.

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

A charge of conspiracy to commit a serious offence is not subject to a limitations period. In matters involving a pattern or practice where there is no conspiracy, it is possible that any applicable limitations period may have expired for the older offences.

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

No, it cannot.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Most federal business crimes have some level of extraterritorial reach, and it is not uncommon for enforcement agencies to rely on extraterritorial jurisdiction. In making such laws, Parliament is able to rely on the external affairs power in the Constitution, which has been interpreted broadly by the High Court. However, in many cases, if the conduct constituting the alleged offence occurs wholly in a foreign country and the alleged offender is neither an Australian citizen nor an Australian body corporate, criminal proceedings must not be commenced without the Attorney-General's consent: *Criminal Code Act 1995* (Cth).

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

An investigation is generally commenced when a complaint is made or information comes to the attention of the relevant authority that gives rise to a suspicion that an offence may have been committed. Some authorities, however, have their own guidelines as to when an investigation will be initiated (see, for example, the AFP's Case Categorisation and Prioritisation Model).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Australian authorities both assist, and seek assistance from, foreign prosecution and investigation authorities under mutual

assistance and extradition legislation. The federal Attorney-General's Department is the central processing centre that facilitates formal cooperation between Australian and foreign authorities. The AFP also engages informally in what is termed Police to Police Assistance. In addition, regulatory authorities such as the ACCC and ASIC often work closely with their international counterparts in the course of their investigations, in some cases pursuant to international cooperation agreements.

7 Procedures for Gathering Information from a Company

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

Law enforcement authorities have a range of investigative tools which enable them to gather information and evidence when investigating business crimes. For example, authorities such as the ASIC, ACCC, ATO, and ACIC may issue notices compelling a person to produce documents, provide information and/or attend a compulsory hearing or examination to answer questions. Law enforcement authorities also have the power to access premises to conduct searches and seize materials, although usually it will be necessary to first obtain a search warrant. For some serious offences, law enforcement authorities will also have access to more intrusive covert powers.

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?

Certain authorities, such as those mentioned in the response to question 7.1 above, may issue notices which compel a company or individual to produce documents or provide information to the authority. The failure to comply with such a notice is an offence. Search warrant powers are also available to the AFP, and most authorities, upon application to a Magistrate. It is generally sufficient for the applicant to establish under oath or affirmation that s/he has "reasonable grounds for suspecting" that there is or shortly will be relevant evidential material at the premises.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Statutes that require the production of documents by a person or company in response to a law enforcement authority's notice are subject to any valid claims for legal professional privilege (LPP), unless the right to LPP is expressly abrogated by the statute in question. LPP is a substantive rule of law which protects confidential communications between a client and a lawyer, or with third parties, made for the dominant purpose of giving or obtaining legal advice or for use in actual or reasonably anticipated litigation. LPP may also be claimed over material caught by the terms of a search warrant. Investigative powers to obtain documents are not impacted by labour laws.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Data privacy laws in Australia do not provide an excuse for failing to produce employees' personal data in the circumstances set out in response to question 7.2 above. There are also no blocking statutes in Australia which may impede cross-border disclosure by law enforcement authorities to their overseas counterparts. Such disclosure is governed by Australian Privacy Principle 8 contained in Schedule 1 to the *Privacy Act 1988* (Cth).

7.5 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?

The government can demand that a company employee produce documents, or conduct a raid and seize documents, under the same circumstances set out in the response to question 7.2 above.

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

The government can make such a demand or conduct such a raid under the same circumstances set out in response to question 7.2 above. In addition, the *Telecommunications (Interception and Access) Act 1979* (Cth) empowers prescribed Australian enforcement agencies to apply for a warrant to covertly access communications stored by carriers and carriage service providers to assist in the investigation of domestic offences. Only the federal Attorney-General may authorise the AFP or State/Territory police to apply for a stored communications warrant on behalf of a foreign law enforcement agency. The disclosure to a foreign country of any information obtained will be subject to certain conditions.

Questioning of Individuals:

7.7 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?

There are now several authorities which have compulsory examination powers, such as those authorities referred to in the response to question 7.1 above. Those statutory powers enable the authority to compel an individual to attend a private examination or hearing to be questioned, under oath or affirmation, about matters relevant to an investigation. The relevant statute generally provides that the privilege against self-incrimination does not apply; however, certain protections are usually offered to the examinee if their answers may incriminate them, in particular that any incriminating responses will not be admissible against them in subsequent criminal proceedings. Nevertheless, there are criminal consequences for refusing to answer questions. The individual has the right to legal representation.

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

The response to question 7.7 above applies equally to a third person. Furthermore, once criminal proceedings are instituted, courts may issue subpoenas or summonses at the request of the prosecution authority compelling the attendance at court of a person to give evidence prior to or at the trial.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

See the response to question 7.7 above in relation to authorities with compulsory examination powers. In addition, law enforcement authorities who suspect a person has committed an offence will generally invite the suspect to voluntarily participate in a recorded cautioned interview towards the end of the investigation phase. When this occurs, the investigator must caution the suspect about their right to remain silent and have several other rights explained to them, including the right to contact a lawyer and to have them attend any questioning.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

A criminal case is initiated in accordance with the procedural rules applicable in the State/Territory where the crime is prosecuted. Each jurisdiction has its peculiar procedural nuances. Generally speaking, criminal cases are initiated through the issuing and service of a document which sets out the written charge which alleges the commission of an offence(s). The defendant will either be compelled to attend court to answer the charge through a summons, or arrested and brought before the court as soon as practicable to face the charge.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Australian prosecution authorities have publicly available prosecution policies which guide their decision-making. In general, a prosecutor must assess whether there is a *prima facie* case and reasonable prospects of conviction and then determine whether it is in the public interest to prosecute. Matters which are relevant to a prosecutor's assessment of each matter are set out within the policy.

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

There are currently no legal mechanisms for a pre-trial diversion process or a deferred prosecution in Australia. However, a defendant can make a "No bill" submission to the Director of the CDPP (and similar processes apply in the States/Territories). This is, in effect, an application to the Director to discontinue the prosecution. The Director, in extraordinary cases, will accede to a "No bill" submission where it would not be in the public interest to pursue the prosecution or it has become apparent that there is insufficient admissible evidence to prove the case. Such process does not allow the prosecution to be re-enlivened at a later date if the defendant fails to meet certain conditions.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

This is not applicable. Deferred prosecution and non-prosecution agreements are not currently available in Australia. However, on 2 December 2019, the federal government introduced the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (Cth) into Parliament. If passed, it will make deferred prosecution agreements available for specific serious corporate crimes. Under the bill, deferred prosecution agreements will require the approval of a former judicial officer, who must be satisfied that the terms of the agreement are in the interests of justice and are fair, reasonable and proportionate.

8.5 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 may apply.

Further to the matters set out in response to question 1.3 above, a law enforcement authority will consider all relevant facts and circumstances in determining the appropriate regulatory response, including the nature and seriousness of the alleged contravention and the strength of the available evidence. Further, if successful criminal action is taken, under various statutory regimes, a victim may be able to make a claim for a victim's compensation order from the sentencing judge for losses caused by the relevant criminal offence. Irrespective of whether criminal action is taken, the company may also, of course, be exposed to civil claims by third parties such as consumers, investors or shareholders.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The prosecution bears the legal burden of proof for each relevant element of an offence. The standard of proof on the prosecution is beyond reasonable doubt.

A legal burden can be placed on a defendant in certain circumstances; however, it must be express and need only be discharged to the standard of the balance of probabilities. An example is where the statute requires the defendant to prove a matter.

A defendant who relies on an exception, exemption, excuse or justification provided by the law creating the offence (i.e. as part of the definition of the ground of criminal liability) bears an evidential burden to point to evidence that suggests a reasonable

possibility that the matter exists or does not exist (this can include evidence which is led by or tendered through the prosecution). Once that burden has been discharged, the prosecution bears the legal burden of disproving the matter.

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

See the response to question 9.1 above.

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

In a prosecution for a federal indictable offence in a superior court, the jury is the arbiter of fact and determines whether a legal burden has been discharged. If a federal indictable offence proceeds summarily in a Magistrates' Court, then the presiding Magistrate is the arbiter of fact. The same situation applies for State/Territory offences unless there is provision for a superior court trial by a judge alone, in which case the superior court trial judge is the arbiter of fact.

10 Conspiracy / Aiding and Abetting

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

Under the *Criminal Code Act 1995* (Cth), a person who conspires with another person to commit a Commonwealth offence is guilty of the offence of conspiracy to commit that offence, and faces the same punishment as if they committed the substantive offence. To be found guilty: they must have entered into an agreement with one or more other persons; the parties to the agreement must have intended that an offence would be committed; and at least one party to the agreement must have committed an overt act pursuant to the agreement. Conspiracy is also an offence under the various State/Territory laws.

A person is also taken to have committed a substantive offence if they aided, abetted, counselled or procured the commission of that offence by another person, and is punishable accordingly. Importantly, that person may be found guilty even if the other person has not been prosecuted or has not been found guilty.

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?

The prosecution must prove that the defendant had the requisite state of mind to commit an offence. Without proof of this requisite state of mind, the person will be acquitted. Whilst for the most serious business crimes this will typically be intent, there are a growing number of offences where the requisite state of mind is not intent but knowledge, recklessness or negligence. For some offences, which impose strict or absolute liability, the prosecution does not need to prove intent or any other state of mind. In regard to these offences, the prosecution must merely prove that the conduct occurred, the circumstance arose or the result happened, as the case may be.

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?

A mistake or ignorance of the law is not a defence to a criminal charge in most circumstances. However, some offence definitions specifically provide for a mistake of law to constitute an excuse. In such cases, the defence bears the evidential burden of proof, while the prosecution bears the legal burden of disproving the defence.

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?

An honest and reasonable mistake of fact may render the defendant's conduct innocent and be a defence to criminal responsibility, unless this defence is excluded by the statutory offence. The defence bears the evidential burden of proof, while the prosecution bears the legal burden of disproving the defence (unless the legislation specifically provides for a reasonable mistake of fact defence, in which case the defence bears the legal burden).

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

As a general rule, there is no obligation to report a crime in Australia. However, there are certain exceptions. For example, in NSW, it is an offence for a person (including a company) who knows or believes that another person has committed a serious indictable offence to fail without reasonable excuse to report that matter to the NSW Police. Furthermore, certain industries may be subject to specific legislative or regulatory requirements which require reporting in certain circumstances, such as the breach reporting obligations imposed on Australian financial services licensees or the suspicious matter reporting obligations imposed on reporting entities by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

See the response to question 13.1 below regarding the consequences of voluntary disclosure.

13 Cooperation Provisions / Leniency

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

As a general rule, an offender who discloses that they have engaged in criminal conduct will still be prosecuted subject to there being a *prima facie* case, reasonable prospects of conviction

and that it is in the public interest to prosecute (but see the response to question 8.4 above). Nevertheless, the defendant can expect to receive a significantly moderated sentence because pleading guilty, cooperating with authorities and showing contrition (including by making reparation for any injury, loss or damage caused by the defendant's conduct) are all mitigating factors which a court must take into account in the sentencing process.

Published prosecution policies, guidelines and conventions, as well as statutes, provide for various legal mechanisms which can apply to persons who voluntarily disclosed their criminal conduct. This includes the granting of immunity from prosecution in extraordinary circumstances, or the investigating authority accepting an induced witness statement which cannot be used against the deponent.

The CDPP and the ACCC also have a publicly available policy which recognises that it is in the public interest to offer immunity from prosecution to a party who is willing to be the first to break ranks with cartel participants by exposing the illegal conduct and fully cooperating with both the ACCC and the CDPP.

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

There are some regulatory authorities, like the ACCC and ASIC, that issue public statements about the advantages of cooperating with them in both civil and criminal matters. Notwithstanding that the CDPP will take the views and recommendations of the relevant authority into account, it is ultimately for the CDPP (or its State/Territory counterparts where relevant) to make an independent determination about whether or not charges should be laid and the appropriate charges for most criminal matters.

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?

Prosecution policies and guidelines provide a foundation for the prosecution and the defendant to negotiate what charges should be proceeded with. Charge negotiations are encouraged and may result in the defendant agreeing to plead guilty to fewer than all of the charges they are facing, or to a less serious charge(s), with the remaining charges either not being proceeded with or taken into account without proceeding to conviction. The prosecution and defendant may also agree upon the facts on which the defendant will be sentenced.

Agreements on sentence are not enforceable or binding upon a sentencing court. Determining the appropriate sentence is entirely a matter for the court. The High Court has made it clear that the prosecution is not required, and should not be permitted, to proffer even a sentencing range to a sentencing judge (*Barbaro v the Queen* (2014) 253 CLR 58) and this decision will make it extremely difficult for prosecutor and defendant to ever agree on a sentence in exchange for a plea bargain. The High Court has also held that these restrictions do not apply to civil penalty proceedings (*Commonwealth v Director, Fair Work Building Industry Inspectorate and Others* (2015) 258 CLR 482).

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?

The ability to plea bargain is constrained by prosecution policies and guidelines of the CDPP and its State/Territory counterparts which provide that:

- the charges to be proceeded with should bear a reasonable relationship to the nature of the criminal conduct of the defendant;
- the charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
- there is evidence to support the charges.

The prosecution policies set out that agreements with respect to charge negotiation proposals must take into account all the circumstances of the case. The approval of the court is not required, although, as noted in the response to question 14.1 above, it is for the sentencing judge alone to decide the sentence to be imposed.

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 a sentence on the defendant? Please describe the sentencing process.

Australia has complex legislated sentencing regimes which require each judge to impose a sentence of a severity appropriate to all the circumstances of the offence. The starting point for any sentence is the maximum penalty prescribed by law which indicates the seriousness of the offending. The sentencing court must take into account certain relevant matters, identified in legislation, which are known to it and, in effect, relate to both aggravating and mitigating issues. In respect to business crimes, general deterrence is a particularly important consideration.

A sentence of imprisonment generally requires the court to specify a minimum period of time in actual custody (a non-parole period). There is an array of options for sentencing and orders that sentencing courts are empowered to make, so that offenders are adequately punished.

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.

The same sentencing principles which apply to individuals will apply to a corporation which is convicted unless it is not capable of application. Statutes prescribe statutory formulas which convert terms of imprisonment into significant financial penalties which can be imposed on corporations where the only penalty expressly provided for is imprisonment. Furthermore, some offence provisions will expressly provide for a specific maximum financial penalty and/or formula to calculate such a penalty.

16 Appeals

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

Appeal rights are a creature of statute. The defendant has a right of appeal in respect of a conviction which has arisen from a guilty verdict. Some, but not all, Australian jurisdictions enable

the relevant prosecution authority to appeal (or otherwise seek leave to appeal) an acquittal which has arisen from a not guilty verdict in constrained circumstances. Where an appeal statute permits an appeal against an acquittal, it only does so on a constrained basis.

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

Both the defendant and the prosecution have certain statutory appeal rights in relation to a sentence imposed by a judge. In some jurisdictions, the party appealing a sentence must first be granted leave to appeal. Generally speaking, courts will allow appeals against sentence where the sentence is found to be "manifestly inadequate" or "manifestly excessive" or where some other error of fact or law is demonstrated, warranting appellate intervention.

In general, where an appeal against a sentence is allowed, the re-sentencing can be done by the appeal court or remitted back to the original sentencing court to be dealt with further according to law.

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

The standard of review will be determined by the relevant statutory provisions in each jurisdiction. However, generally speaking, an appeal court may allow an appeal against a conviction if: the verdict is unreasonable or cannot be supported having regard to the evidence; there was a wrong decision on a question of law by the trial judge; or there was a miscarriage of justice on any other ground. Nonetheless, in most jurisdictions, if any of these grounds are established, an appeal may still be dismissed if the appellate court considers that no substantial miscarriage of justice has actually occurred.

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

Appellate courts generally have broad appeal powers to remedy an injustice at the trial. These include the power to: order a re-trial; set aside a conviction; or to enter a judgment of acquittal or of conviction for another offence.

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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?

The Federal Constitution of the Federative Republic of Brazil describes the powers of the Public Prosecutor's Office, a permanent institution that is charged with defending the legal order, the democratic system and inalienable social and individual rights.

The Public Prosecutor's Office that has jurisdiction over business crimes has different powers, depending on the type of crime, whether at the federal or state level. After the conclusion of the investigation and analysis by those working for the Public Prosecutor's Office, the prosecutors can bring criminal proceedings through a formal indictment (*denúncia*) that will be sent for trial by the courts, which are also divided into federal and state courts. There is also a provision for private criminal lawsuits, but the situations in which they can be brought are very restricted and must be allowed specifically by law. For example, in the context of business crimes, the crime of unfair competition can be tried through a private indictment (*queixa-crime*), which is called a criminal complaint.

Therefore, criminal cases are usually brought by state or federal Public Prosecutor's Offices, both of which have the authority to monitor the investigations conducted by the Civil Police and Federal Police.

The Constitution is also the source of the main provisions regarding structural divisions and the jurisdiction of the courts, for both ordinary and extraordinary courts. The former decide matters of fact and law and are the trial courts and first-level appellate courts, while the extraordinary courts are the Superior Court of Justice (STJ) and the Federal Supreme Court (STF), which hear only matters related to the application of federal law and the federal Constitution, respectively.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The division of jurisdiction between the federal and state Public Prosecutor's Offices to bring charges depends on the type of the crime involved, as well as the individuals involved in the conduct to be investigated.

In general, the federal justice system has jurisdiction over crimes that involve the interests of the federal government. Therefore, the Federal Prosecutor's Office should bring the criminal action if there is a violation of the interests of the federal government, a company owned by the federal government (e.g. Petrobras).

The state justice systems, in turn, have residual jurisdiction. In other words, the crimes that are not within the jurisdiction of the federal justice system must be heard and decided by the state justice systems.

The criminal procedure system contains methods that can be used to resolve jurisdictional conflicts. The courts use these to avoid improper criminal double jeopardy and trial by a body without jurisdiction.

Brazilian court system also includes specialised courts (i.e. electoral court).

In 2019, the electoral court system received attention when it declined jurisdiction over a large part of the crimes done within the framework of Operation Car Wash since the Federal Supreme Court ruled that it has jurisdiction to investigate, hear and decide cases of corruption when they simultaneously involve a campaign slush fund and other, regular crimes, such as money laundering. This point is relevant for business crimes since Operation Car Wash involved major Brazilian companies.

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?

There are civil and administrative mechanisms to control and fight business crimes, which must be reported to the federal and state Public Prosecutor's Offices so they can take the appropriate measures to investigate the crimes committed.

It is important to clarify that at the civil and administrative levels, the matters are investigated, tried and decided independently of the criminal trial. Moreover, the authorities that investigate and decide those proceedings are not the same as in the criminal sphere.

At the administrative level, the Federal Solicitor General (*Advocacia Geral da União*), or AGU, and the Federal Comptroller General (*Controladoria Geral da União*), or CGU, are responsible for hearing and deciding cases of crimes involving administrative misconduct and corruption. Crimes against the tax system are heard and decided administratively by Brazilian Federal Revenue and by the state Tax and Fee Courts, depending on the type of tax involved. On the other hand, infractions against the national financial system are punished by the Brazilian Central Bank. The Brazilian Securities Commission (*Comissão de Valores Mobiliários*), or CVM, is responsible for hearing and deciding cases involving the stock market. The Economic Defence Administrative Council (*Conselho Administrativo de Defesa Econômica*), or CADE, is charged with governing, investigating and hearing antitrust cases.

In the area of environmental crimes, each state has regulatory bodies to license and monitor companies, but generally the Brazilian Institute for the Environment and Renewable Natural Resources (*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis*), or IBAMA, is responsible for hearing and deciding cases at the administrative level.

Regarding civil proceedings, the state and federal Public Prosecutor's Offices also have authority to bring public civil actions for civil liability for damage to the environment, violation of the economic order, public or social property and any other diffuse or collective interest.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The number of investigations into business crime in Brazil has been increasing. This is especially true since Operation Car Wash, which began in 2014 and continues to increase as new investigations that have resulted from it are pursued in various Brazilian states, such as São Paulo, Rio de Janeiro and Paraná.

Over the past year, some of these operations have attracted media attention. These include Operation Fifth Year (*Operação Quinto Ano*), which found that various companies had paid amounts improperly and systematically to executives of Transpetro, in a kickback scheme that came to BRL 682 million.

Additionally, Operation Disguises of Mammon (*Operação Disfarces de Mamom*), which is phase 61 of Operation Car Wash, was launched. This investigation found an alleged payment of improper commissions to executives from the Odebrecht Group through a private bank structure and various companies created to disguise the origin of the illegally obtained money.

Operation Boss (*Operação Patron*) is another investigation that deserves mention. It broke up a criminal organisation that allegedly hid amounts related to the money changer Dário Messer, one of the main people involved in corruption schemes involving politicians and state and private companies in the state of Rio de Janeiro. Mr. Messer has fled to Paraguay. As a result of this operation, Senator and former President of Paraguay, Horácio Cartes, had an arrest warrant issued; however, he has not been detained.

2 Organisation of the Courts

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

A criminal proceeding involving business issues is generally begun with an indictment (*denúncia*) from a representative of the Public Prosecutor's Office that is filed with a trial court judge, who must analyse the evidence produced during the evidentiary phase of the proceeding and enter a judgment. Additionally, the trial court judge is often responsible for a court specialised in money-laundering, for example, where the judge will hear only cases related to that specific type of crime.

If there is an appeal by the prosecution or defence, the file will be sent to the first-level appellate court with jurisdiction. In other words, the case will be sent to a first-level state appellate court if it is being heard by a state court (*Tribunal de Justiça*) or a regional federal appellate court (*Tribunal Regional Federal*) if it is being heard by a federal court.

At the trial court level, cases are heard and decided by a single judge. At the first-level appellate court, cases are decided by a panel of three experienced judges. It is important to note that at a first-level appellate court, issues of fact and law, together with the evidence produced during the trial, can be reanalysed. In addition to the ordinary courts mentioned above, there are the extraordinary courts that are responsible for analysing matters related to the application of ordinary legislation, for the positions taken in case decisions and for the application of the Constitution. These courts cannot reanalyse matters of fact or evidence produced in lower courts because they serve only to analyse and apply the law. In Brazil, the extraordinary courts are the Superior Court of Justice and the Federal Supreme Court.

The Superior Court of Justice is responsible for applying ordinary legislation, international treaties ratified by Brazil, and the case decisions it has consolidated. The appeals heard by this court are called "special appeals" and the issues involving criminal matters are heard by two panels, each of which has five justices.

The Federal Supreme Court is a constitutional court responsible for safeguarding and guaranteeing the rules of the Brazilian Constitution, as well as monitoring constitutionality and conventionality control in cases of the adoption of international treaties ratified by Brazil, and their material constitutionality. Appeals heard by this court are called "extraordinary appeals" and issues involving criminal matters are heard by two panels, each of which is composed of five justices.

The decisions issued by ordinary courts are not automatically considered by the extraordinary courts because the appeal must prove the existence of a violation of ordinary legislation or a constitutional provision, making it more difficult to go before the court for a decision on questions of fact, for example.

It is important to mention the promulgation of Law 13,964/2019, late in 2019. This law is referred to as the Anticrime Package and has changed various codes and laws. Among its many innovations, this law seeks to implement a new structure in the judiciary to institute the new position of examining magistrate (*juiz de garantias*), who will be responsible for the decisions made during the investigatory phase. After indictment, another judge will be designated to oversee the criminal trial. This is designed to avoid potential contamination and prejudice to the impartiality of the trial judge in relation to the facts determined in the investigation and those heard in the criminal trial, meeting the requirements of Brazil's accusatory system. However, after heated argument, the Federal Supreme Court suspended the effectiveness of the innovations introduced by the Anticrime Package for an indefinite time, until the final decision in Action for a Declaration of Unconstitutionality #6298.

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

There is no legal provision for a jury trial in business crimes. In Brazil, juries have jurisdiction only to decide the crime of murder.

Despite this, in light of the numerous cases of corruption in Brazil, the Chamber of Deputies of the Brazilian Congress is considering Bill 836/2019, which would amend the Criminal Procedure Code to give juries jurisdiction to issue verdicts for the crime of giving or receiving a bribe when the improper advantage is equal to or greater than 500 monthly minimum wages, or in other words, greater than BRL 477,000. The bill also creates a specific procedure for trying these crimes. This bill is still being considered by the Brazilian Congress and it is unknown whether and when it will be approved.

3 Particular Statutes and Crimes

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

• Securities fraud

This crime is described in article 7 of Law 7,492/1986, which concerns crimes against the national financial system. The elements of the crime are an agent who issues, offers or trades, in any manner, securities that: a) are false or falsified; b) are not registered prior to issuance with the authority with jurisdiction, have terms different from those registered, or are improperly registered; c) without coverage or sufficient guarantees, under the terms of the law; and d) without prior authorisation from the authority with jurisdiction, when this is legally required. The same conditions can be applied when there is a fraud with property securities.

• Accounting fraud

Accounting fraud is defined in various Brazilian laws, particularly in relation to crimes against the tax system, where accounting fraud is used to evade taxes, for example. Additionally, accounting fraud can be part of illegal currency transactions. Article 10 of Law 7,492/1986 makes accounting fraud a crime against the national financial system, with an express provision related to falsified financial statements, which consists of inserting a false element or omitting an element that is required by law in the financial statements of a financial institution, insurance company or institution that is part of the securities distribution system.

• Insider trading

The crime of insider trading is found in article 27-D of Law 6,385/1976, which governs crimes against the capital market.

The elements of the crime are an agent using material information of which he is aware and that has not yet been disclosed to the market that is able to give the agent himself or another an improper advantage, through trading securities in his own name or that of third parties.

• Embezzlement

There are different types of embezzlement in the Brazilian Criminal Code, with articles 168 and 168-A describing those done by private persons and article 312 describing those done by a government employee.

The elements of the crime are met when a person improperly appropriates or diverts financial assets entrusted to him for personal satisfaction or to obtain an improper advantage for himself or for third parties. In the area of business crimes, there is a specific tax crime related to retaining social security contributions deducted from employees that are not sent to the proper authorities.

• Bribery of government officials

The crime of bribery in Brazil is divided into two types of crime, which are provided for in the Brazilian Criminal Code in articles 317 (receiving a bribe) and 333 (offering a bribe).

The crime of receiving a bribe is only committed by a government agent and the elements are met when he requests or receives an advantage or the promise of an advantage in exchange for some type of favour or benefit for a private party.

The crime of offering a bribe is committed by private parties and consists of offering or promising an improper advantage to a government agent, for him to do, not do or delay an official act. The offer or promise of an improper advantage can occur directly or indirectly, including through an agent, with it being necessary that the government agent have the official duty to do or not do the act, or in other words, its performance must be within his sphere of authority or jurisdiction.

The concept of government agent is broad and includes employees of the government itself, employees of public and mixed capital companies, or any individual who temporarily acts in a government position or function.

Finally, there is also the possibility of committing the crime of offering a bribe in an international commercial transaction. This consists of promising, offering or giving, directly or indirectly, an improper advantage to a foreign government agent, or to a third party, to encourage him to do, not do or delay an official act related to an international commercial transaction.

• Criminal anti-competition

This is provided for in article 4 of Law 8,137/1990, which describes crimes against the economic order.

This crime consists of abusing economic power, dominating a market or totally or partially eliminating competition through any type of agreement. Brazilian law provides strict punishment for anticompetitive practices, including cartels, bid-rigging, artificial price-fixing and dividing markets.

• Cartels and other competition offences

The crimes of forming a cartel and other anticompetitive practices are described in the General Bid Act (article 90 of Law 8,666/1993) and the Crimes Against the Economic Order Act (article 4 of Law 8,137/1990).

A cartel is one of the anticompetitive market practices and consists of the abuse of economic power for the purpose of dominating a market or totally or partially eliminating competition through any type of understanding or agreement between companies; whether through a cooperation agreement, understanding or alliance among offerors that seeks to artificially establish prices or quantities sold or produced, or regional control of the market by a company or group of companies; and the control, to the detriment of competition, of a distribution or supplier network.

• Tax crimes

Most tax crimes are defined in articles 1 and 2 of Law 8,137/1990.

It is a tax crime to eliminate or reduce a tax, or a social contribution tax and any accessory, by means of: a) the omission of information, or making a false declaration to tax authorities; b) fraud against a tax audit, including inaccurate information, or omitting a transaction of any nature in a document or book required by tax law; c) falsification or alteration of a tax receipt, invoice, trade acceptance bill, bill of sale, or any other document related to a taxable transaction; d) the preparation, distribution, supply, issuance or use of a document that is known or should be known to be false or inaccurate; and e) denying or not supplying, when it is mandatory, a tax receipt or equivalent document relative to the sale of merchandise or provision of a service that was actually done, or providing it in noncompliance with the law.

In most cases, the crimes are only definitively committed when there is a prior administrative proceeding of Brazilian Federal Revenue that determines the collectability of the taxes and their final value. Only after this can the Public Prosecutor's Office request the instatement of a police investigation to investigate tax crimes.

Additionally, there is a legal provision concerning the improper withholding of taxes owed on payroll, as well as social security contributions, for which cases a prior administrative proceeding is not necessary to begin criminal prosecution (article 168-A of the Brazilian Criminal Code).

• Government-contracting fraud

In Brazil, article 96 of Law 8,666/1993 covers government-contracting fraud, the elements of which are met when a fraud occurs to the prejudice of the Treasury through: a) arbitrary price increases; b) the sale, as genuine or perfect, of counterfeit or deteriorated merchandise; c) the delivery of one type of merchandise as being another; d) alteration of the substance, quality, or quantity of the merchandise; and e) unjust burdening, by any method, of the proposal or performance of the contract.

Likewise, the falsification and use of false documents for the purpose of contracting with the government are crimes. Additionally, committing any fraudulent act against the government is also a crime.

• Environmental crimes

Brazil has specific legislation about environmental crimes. Law 9,605/1998 concerns conduct that threatens the conservation of flora and fauna, pollution, urban planning, cultural heritage, or environmental administration. Additionally, although the majority of crimes require *mens rea*, it is possible in environmental law to hold companies, alone or together with natural persons, criminally liable, so long as the crime is committed on the decision of its legal or contractual representative, or its decision-making body, in the interest or for the benefit of the entity.

• Campaign-finance/election law

Election crimes are described in: articles 289–354 of the Electoral Code; the Elections Act (Law 9,504/1997); the Ineligibility Act (Supplementary Law 64/1990); and a few other laws.

Election crimes are defined as all the acts prohibited by law that are done by candidates and voters, during any phase of an election. They include, for example, offering bribes in elections: offering money, a present, or any advantage to a voter in exchange for his vote, even if the offer is not accepted. From the time a candidate enters the race until the winning candidate is certified, violations will be punished by prison, confinement, and a fine, as provided for in the Electoral Code and other laws.

In 2018, the Federal Supreme Court issued a decision prohibiting donations from companies to the electoral campaigns of candidates for positions in the executive and legislative branches. If the origin of amounts received by a party or candidate is not declared, an investigation can be opened to determine whether there was corruption, diversion of public funds, misappropriation, or fraud.

• Market manipulation in connection with the sale of derivatives

The crime of market manipulation is defined in article 27-C of Law 6,385/1976, which concerns crimes against the capital market.

This crime consists of conducting sham transactions or executing other fraudulent manoeuvres intended to increase, maintain or lower the quote, price, or trading volume of a security for the purpose of obtaining an improper advantage or profit, for oneself or another, or causing harm to third parties.

• Money laundering or wire fraud

The crime of money laundering is defined in Law 9,613/1998 and occurs when an agent hides or disguises the nature, origin, location, disposition, movement or ownership of goods, rights or securities coming, directly or indirectly, from a criminal violation.

The list of crimes that make it possible to receive resources that need to be covered is not short. The list is exhaustive: criminal organisations; drug trafficking; terrorism; trafficking persons or organs; diverting public funds; crimes against the government; and many others make up the list of possibilities. These are merely examples because, with the new Law 12,683/2012, which updated Law 9,613/1998, the crimes that make money laundering possible are no longer defined in a closed list, but were defined as a criminal violation. This expansion made it possible to recognise that any criminal violation is punishable.

• Cybersecurity and data protection law

Brazilian law has a specific crime against computer hacking in article 154-A of the Brazilian Criminal Code.

This law provides for criminal liability for crimes committed through the Internet, especially violations of security systems to obtain, adulterate or destroy data or information. Moreover, if the information is disclosed, published or causes an economic loss, the penalties are aggravated.

There is also criminal liability for those who produce, offer, distribute, sell or spread a computer device or program for the purpose of allowing the violation of the security of an information-technology device.

• Trade sanctions and export control violations

Brazilian criminal law provides for two types of crime in relation to trade and the export of merchandise: improper clearance; and smuggling, which are provided for in article 334 and 334-A of the Brazilian Criminal Code.

Improper clearance consists of avoiding, in whole or in part, the payment of a right or tax owed on the import, export, or consumption of merchandise. Additionally, one is also involved in a crime of improper clearance if he sells, displays for sale, keeps in a warehouse, or, in any way, uses for himself or another, in the performance of a commercial or industrial activity, merchandise from abroad that was brought clandestinely into Brazil or fraudulently imported or knows it is a product brought clandestinely into Brazil or fraudulently imported by a third party; or acquires, receives or hides, for his own benefit or that of another, in the performance of commercial or industrial activity, merchandise from abroad that is not accompanied by legal documentation or that is accompanied by documents that are known to be false.

The crime of smuggling is the act of importing or exporting prohibited merchandise. It is also considered smuggling when one clandestinely: imports or exports merchandise that depends on registration, analysis, or authorisation from a government agency with jurisdiction; brings back into Brazil merchandise destined for export; sells, displays for sale, keeps in a warehouse, or, in any way, uses for oneself or another, in the performance of commercial or industrial activity, merchandise prohibited by Brazilian law; and acquires, receives, or hides, for oneself or another, in the performance of commercial or industrial activity, merchandise prohibited by Brazilian law.

• Any other crime of particular interest in your jurisdiction

In Brazil, there is also the crime of criminal organisation. The elements of this crime are met when four or more people, with a structural organisation and division of labour, even if informal, work to directly or indirectly obtain an advantage of any nature through the commission of crimes for which the maximum penalties are greater than four years, or that are transnational in nature. This crime is described in article 1(1) of Law 12,850/2013.

Additionally, there is the crime of criminal association or conspiracy, which consists of the association of three or more people for the specific purpose of committing crimes. This crime is provided for in article 288 of the Criminal Code.

In 2019, Law 13,869/2019, which is referred to as the Abuse of Authority Act, was promulgated. This law introduced punishments for agents for: issuing a subpoena to a witness or suspect before obtaining a court order; conducting a wiretap or violating judicial secrecy without a court order; releasing a recording not

related to the evidence that is intended to be produced; continuing to interrogate a suspect who has decided to remain silent or who has requested a lawyer; interrogating at night when the suspect has not been caught in the act; and delaying an investigation without cause. These new crimes were created to punish the excesses of public agents during the course of investigations and proceedings and apply to civil servants and government authorities, both civil and military, from the three branches of government (executive, legislative and judicial), as well as to the prosecutor's office.

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

An attempt is considered the beginning of the execution of a crime that is not consummated solely due to circumstances outside the agent's will. Therefore, an attempt is, necessarily, an act of execution. It is necessary that the perpetrator have committed executory acts that were not consummated for reasons outside of his intent.

Regarding the application of the penalty, the closer the agent comes to consummating the crime, the smaller the decrease of the penalty that can be established in the event of conviction will be. For this purpose, the penalty for the crime the agent intended to commit is reduced by one-third to two-thirds.

It bears noting that preparatory acts are not punished unless they are elements of the crime, such as, the crimes of criminal association and terrorism.

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?

Brazilian criminal law requires *mens rea* for the majority of crimes. However, corporate entities and their employees can be held liable for environmental crimes when the crime is committed on the decision of its legal or contractual representative, or of its collegial decision-making body, to the company's benefit or interest.

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

Brazilian criminal law does not allow for strict liability. This being the case, managers, officers and directors will be found liable only when they participate in the commission of the illegal act, whether by act or omission.

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?

The Brazilian criminal investigation and criminal procedure system do not have different policies or preferences for investigating or prosecuting companies and natural persons. If both are criminally liable, they will be subject to the same type of criminal prosecution.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The Brazilian Constitution ensures as a fundamental right that no penalty will go beyond the person found guilty, with it being possible for the obligation to repair the harm and the declaration of loss of assets being, under the terms of the law, extended to the successors and executed against them, to the limit of the value of the assets transferred. Therefore, only those responsible for the criminal acts can be punished.

However, Law 12,846/2013 (the Anticorruption Act) ensures that Brazilian companies are strictly liable for acts against domestic and foreign governments, including acts of corruption, at the administrative and civil levels. Moreover, it establishes that the corporate entity's liability continues in the event of a change in its articles of incorporation, transformation, acquisition, merger or spinoff (article 4).

At the criminal level, there is no express provision in this regard. However, there are currently discussions regarding holding a successor company liable for repairing the harm resulting from ongoing environmental crimes.

In theory, there is no direct successor company liability in criminal law because one cannot be held liable for acts committed by third parties. However, the concept of a company's liability for crimes committed is still evolving in Brazil.

5 Statutes of Limitations

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

Enforcement-limitation periods in Brazilian criminal law are governed by the maximum penalty for the crime and are counted from when: (a) the crime was effectively consummated; (b) in the case of an attempted crime, the day on which the criminal activity ceased; and (c) for ongoing crimes, the day on which the ongoing crime ceased.

The enforcement-limitation period is two years for crimes punished by fines, and from three to 20 years for crimes punished by loss of liberty (articles 109 and 114 of the Brazilian Criminal Code). Additionally, when there is a conviction, the enforcement-limitation period must be calculated based on the penalty imposed by the judge, taking into account any tolling periods and the age of the convict at the time the sentence was issued, as well as the time limits provided for in the articles mentioned above.

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

A person cannot be tried for crimes for which the limitations period has already passed because the limitations period is a guarantee that the state cannot perpetuate criminal prosecution. Additionally, for ongoing crimes, for example, the enforcement-limitation period begins to run only when the last act of performance has occurred.

However, the Brazilian Constitution states that some crimes have no enforcement-limitation period. In other words, the state can try a person for these crimes at any time, regardless of when they were committed. These crimes are crimes of racism and activities by armed groups, whether civilian or military, against the constitutional order and the democratic state.

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

The limitations period can be tolled for reasons referred to as "impediments" or "suspensions". An impediment to a limitations period is one that prevents it from beginning to run.

With the entry into effect of Law 13,964/2019 (the Anticrime Package), there were changes to the possible causes for freezing the statute of limitations, with two new causes being included in the Criminal Code. Thus, the statute of limitations will not run: (i) so long as an issue upon which the recognition of the existence of the crime depends has not been resolved in another proceeding; (ii) while the agent is serving a sentence abroad; (iii) while a decision is pending on a motion for clarification or an appeal to upper-level courts, when inadmissible; and (iv) when a non-prosecution agreement has not yet been fulfilled or rescinded.

Suspension, in turn, occurs when the limitations period is already running and cause arises for its suspension. Legislation provides various causes for suspension: the defendant, served process by publication, does not appear for questioning or appoint a defence attorney; there is a conditional suspension of the case for crimes for which the minimum penalty is one year or less; the accused is abroad and is served process by letter rogatory; and when a consent decree is in effect in crimes against the economic order.

In tax crimes, the suspension of the running of the limitations period is possible when there is an instalment plan to pay the tax debt and when there has not been a definitive recording of the debt as being past-due.

It bears noting that there are also causes for the interruption of the running of the limitations period. In other words, there are situations causing the limitations period to be interrupted and waived: at the time of receipt of an indictment (*denúncia*) or complaint (*queixa-crime*) by the judge; on the publication of a sentence or appellate decision of guilt that can be appealed against; on the beginning or continuation of serving the penalty; and on recidivism.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

The exercise of criminal jurisdiction is defined by the principle of territoriality. Therefore, the authorities do not have jurisdiction to act independently outside of Brazil.

It is important to note that article 7 of the Brazilian Criminal Code defines exceptions for the application, in certain cases, of the principle of extraterritoriality, such as, for example: crimes that Brazil is obligated to fight by treaty or convention and those committed by Brazilians abroad.

Additionally, Brazil has various international legal cooperation agreements with other countries to facilitate the investigation of crimes committed abroad.

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

The way an investigation begins varies according to the type of criminal proceeding that will result from it. The possible types are unconditional public, conditional public, and on private initiative.

In crimes resulting in an unconditional public action, or in other words, those falling exclusively within the purview of the Public Prosecutor's Office, the police investigation can begin *ex officio*, or in other words, independently of the act of any individual, through a request from a judge, the Public Prosecutor's Office; on a request from the victim or his legal representative.

In conditional criminal proceedings, the beginning of the criminal prosecution must be tied to a complaint from the victim or his legal representative, as well as a request from the Minister of Justice. Only after the complaint, which is a formal demonstration of the intent to have the accused of the crime's liability investigated, will the criminal prosecution begin. However, it is important to clarify that although the complaint comes from private parties, the initiative to begin the prosecution comes from the Public Prosecutor's Office.

Investigations are generally conducted by the Civil Police and the Federal Police. After all the necessary investigatory work has been done, the case is sent for analysis by the Public Prosecutor's Office, which can file an indictment (*denúncia*) and begin a criminal prosecution or close the investigation.

The Federal Supreme Court has held that it is constitutional for the Public Prosecutor's Office to directly investigate crimes, as long as this is done for a reasonable time, with the rights and guarantees of any person who has been indicted or is under investigation being respected and with the hypotheses of the constitutional reservation of jurisdiction being observed, together with the professional prerogatives of the defence attorneys.

In a criminal proceeding on private initiative, the government's action depends on a request from the victim or his legal representative.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The Ministry of Justice and Public Safety, through the Department of Asset Recovery and International Legal Cooperation of the National Secretariat of Justice (DRCI/Senajus) is the central authority for international legal cooperation.

Requests for international legal cooperation in the criminal law area, such as letters rogatory and direct assistance, are received exclusively by government authorities: judges, employees of the Public Prosecutor's Office, police precinct captains, and public defenders. They are for the purpose of procedural notices (summonses, service of process and notifications), investigatory or evidentiary acts (taking testimony, obtaining documents, obtaining bank records, wiretaps, etc.), and certain measures to limit access to assets, such as freezing assets or money abroad.

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 police and the members of the Public Prosecutor's Office have an illustrative list of investigatory activities they can carry out to determine the facts described in the investigatory proceeding. Some are mandatory, such as, for example, a *corpus delicti* examination in the case of crimes that leave physical traces, while others are done at the discretion of the police and prosecution, who make this decision based on the particular circumstances of each case.

Generally, investigations to obtain evidence of business crimes basically use nonconfidential information made available by public agencies, examinations by experts, and the taking of formal testimony from those involved and witnesses. Additionally, it is possible to obtain confidential information, but only with authorisation from a judge, such as, for example: wiretaps; searches and seizures; requests for confidential banking and tax records; and the temporary or preventative custody of those involved.

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?

A company can be given notice to present documents and will be liable for contempt if it fails to do so. However, Brazilian criminal law and criminal procedure law are based on the fundamental principle that no one is obligated to give evidence against himself for an investigation or criminal proceeding to be concluded by the police and the courts. Moreover, there is no specific criminal provision obligating companies to provide documentary evidence to the authorities, except in specific cases, such as sending accounting and tax records for audits by Brazilian Federal Revenue, for example.

If there is sufficient evidence that a company has been involved in illegal conduct, a judge can issue a search warrant for documents and equipment at the company's facilities.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Brazilian law ensures the right to professional confidentiality between lawyers and their clients. Therefore, documents in the possession of an attorney cannot be arbitrarily seized unless the attorney has participated in the commission of a crime. In that case, a search warrant will only be appropriate when there is evidence that the lawyer has committed the crime, and even then, the warrant requires court authorisation. Moreover, the search warrant must be specific and detailed, and a representative of the Brazilian Bar Association must monitor the performance of the search.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

In August 2018, Law 13,709/18 (the General Personal Data Protection Act) was approved and is scheduled to become effective on August 20, 2020. The purpose of this law is to govern the handling of customers' and users' personal data by public and private companies.

To comply with the law, companies will have to make investments to implement an internal digital compliance structure and policy regarding the treatment of their customers' data. This applies to both public and private sector companies.

Essentially, the law prohibits the indiscriminate use of personal data given through registration and ensures citizens the right to know how their information will be handled and what specific uses will be made of it. The law requires companies to explain the reason they will use information to the information's owner, and they must have that person's prior and express consent before using it or transferring it to other companies.

However, there is currently no specific protection related to employees' or customers' digital information or the international transfer of personal data.

There is a major debate between the executive and legislative branches regarding the effectiveness of the General Personal Data Protection Act, which is scheduled to become effective on August 20, 2020, due to the National Data Protection Authority not yet having been created and as a result of the coronavirus pandemic, which has made it more difficult for companies to implement the new requirements introduced by the law. In principle, the General Personal Data Protection Act will go into effect on the scheduled date, except for the criminal provisions, which will become effective only in May 2021. However, this issue has not been fully resolved by the Brazilian Congress.

7.5 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?

As mentioned above, Brazilian criminal procedure law is based on the fundamental principle that no one is obligated to produce evidence against himself for an investigation or case to be concluded by the police and the courts. This rule applies to both companies and their employees. Additionally, arbitrary searches for evidence at an employee's workplace or personal office are not allowed – there must be evidence of participation in an illegal act and court authorisation, except when the employee is caught in the illegal act.

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

Searches and seizures are ways to obtain evidence and can only be done when authorised by a judge, based on a showing of sufficient evidence that the documents held by third parties are indispensable to the investigation. In this case, the requirements are exhaustive, and the scope of the search and seizure must be specific.

Questioning of Individuals:

7.7 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?

Employees, managers and officers of the company can be questioned by the Public Prosecutor's Office and by the police, as long as they are served a formal subpoena, at any time during the course of the investigation. They can also be questioned during

the evidentiary phase of a criminal trial by the lawyers of the parties, the prosecutor, and the judge who is hearing the case.

They can also be heard as witnesses, informants, persons under investigation, cooperating witnesses, or defendants in a criminal proceeding in person at a police department or prosecutor's office, as well as at the court where the case is being heard.

An individual can be heard at a location different from where the investigation or criminal trial is taking place through a precatory letter or letter rogatory, as well as through international cooperation agreements to which Brazil is a signatory.

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

Brazilian law allows for testimony from the victim, witnesses, informants, and cooperating witnesses during an investigation or criminal prosecution.

The victim will be questioned both during the investigation and the criminal trial so that they can present their version of the facts.

Witnesses have a legal duty to cooperate with justice and help clarify the facts, as well as to state the truth, under penalty of perjury.

Informants are individuals who have a very close relationship with the accused, such as relatives and close friends, or have a personal interest in the resolution of the proceeding. They can be questioned during the criminal prosecution, but they do not have a duty to tell the truth.

Cooperating witnesses are individuals who have signed a plea agreement with the police or the Public Prosecutor's Office and are questioned during the criminal prosecution as part of their agreement. Their statements must say exactly how the crime occurred or how the criminal organisation operated, under penalty of breaching the plea agreement.

Additionally, they can be heard as a witness, informant, person under investigation, cooperating witnesses, or defendant in a criminal prosecution by appearing in person at a police department or prosecutor's office, as well as at the court where the trial is being conducted.

A third person can be heard at a location different from where the investigation or criminal trial is taking place through a letter rogatory, as well as through international cooperation agreements to which Brazil is a signatory.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

As mentioned above, there is a right against self-incrimination, which means that a suspect, person under investigation, person indicted, witness or the accused is not obligated to produce evidence against himself. This principle is the source of the right to remain silent, meaning that, during an investigation or criminal prosecution, the party being questioned must be formally advised by the authorities that he has the right to remain silent and that the exercise of this right cannot be used against him.

Additionally, a person questioned by the police, a prosecutor, or a judge has the right to be accompanied by an attorney.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated with the filing of a formal indictment (*denúncia*) by the Public Prosecutor's Office with a criminal law judge at the trial court level. The indictment (*denúncia*) must be based on an investigation conducted by the Civil Police or Federal Police or by the Public Prosecutor's Office.

Additionally, it is possible for a criminal case to begin with the filing of a criminal complaint (*queixa-crime*), which can only be done by the victim or his legal representative. However, only private criminal law crimes, such as crimes against one's honour and intellectual property crimes, proceed in this manner.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

To charge an individual with a crime, there must be sufficient evidence of the authorship and materiality of the criminal conduct. Additionally, the indictment (*denúncia*) must describe the criminal act, with all of its circumstances, the identity of the accused or identifying factors that make it possible to identify him and the classification of the crime (article 41 of the Brazilian Criminal Procedure Code).

In the case of environmental crimes, in relation to an indictment (*denúncia*) against a company, in addition to the requirements mentioned above, it must be shown that the crime was committed on the decision of its legal representative or its collegial decision-making body, in the interest of or for the benefit of the corporate entity.

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

Brazilian criminal law allows for the possibility of less serious crimes, meaning crimes with a maximum penalty of up to two years, being resolved in a noncriminal manner through a civil agreement, a pre-trial diversion or deferred prosecution.

A civil agreement is an agreement between the victim and the accused that resolves the criminal issue and is applicable in crimes for which the prosecution is conditional or by private initiative.

The law allows the Public Prosecutor's Office to make an agreement with the accused that establishes an alternative penalty, before filing an indictment (*denúncia*). If the accused accepts the proposed agreement and performs the agreed penalty, the case is dismissed. The prosecutor can propose such a pre-trial diversion when there is evidence that the accused committed a less serious crime and is a first offence, in addition to meeting other legal requirements. The accused can only receive another pre-trial diversion after five years have passed.

Finally, as long as the accused is not being tried for and has not been found guilty of another crime, the law allows a deferred prosecution to be proposed. In this case, the prosecution is suspended for from two to four years and the accused must meet certain legal conditions during that time.

If the accused accepts the proposed deferred prosecution and meets the specified requirements, the case is dismissed.

Additionally, Law 13,964/2019 (the Anticrime Package), introduced, in article 28-A in the Brazilian Criminal Code, the new business crime tool of criminal non-prosecution agreements. This broadly expands the previous possibilities for reaching agreements with the government – especially the prosecutor's office – before being formally accused of committing a crime.

A criminal non-prosecution agreement can be entered into as long as the investigation is not closed, with it being required that the person being investigated admit to having committed a crime. Other requirements include the crime committed not involving violence or a serious threat and not having a minimum penalty of greater than four years. After being formalised, a hearing will be held to certify the agreement, with the judge hearing the person being investigated in the presence of his or her lawyer to determine that the agreement is voluntary and legal.

Once the agreement is performed, the criminal proceeding is dismissed without the person under investigation acquiring a criminal record.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Civil agreements, pre-trial diversions and deferred prosecutions must be ratified by an order from the judge.

8.5 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 may apply.

Independently of or in addition to a criminal conviction, the accused can be subject to civil and administrative penalties, which are independent of the criminal proceedings.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

For business crimes, the Public Prosecutor's Office has the burden of proof. In other words, it must prove the allegations stated in the indictment (*denúncia*). At the end of the criminal case, if the involvement of the accused in the act has not been proven, he must be found not guilty. On the other hand, the defence can prove the allegations it has made.

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

The evidence presented must be sufficient to prove that the accused committed the crime beyond a reasonable doubt. The judge weighs the evidence to reach a conclusion when he enters the verdict. This means that if there is a doubt regarding the defendant's involvement in the illegal activity, he must be found not guilty, in keeping with the principle of *in dubio pro reo*.

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

In a criminal trial, the judge enters his decision sitting alone. An appeal will be heard by the first-level appellate court, with a decision made by a panel of three judges sitting jointly.

10 Conspiracy / Aiding and Abetting

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

Brazilian criminal law provides for the liability of a person who is a joint perpetrator or participant. Article 29 of the Brazilian Criminal Code states that a person who in any way assists in the crime is subject to the penalties for it, to the extent of his guilt. Additionally, the penalty must be established based on the extent of the defendant's participation in the illegal act committed. This means that if his participation in crime is less, the penalty should be reduced by one-sixth to one-third.

Liability for being a joint perpetrator or participant is fully applicable to business crimes.

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. Brazilian criminal law allows crimes to be punished as intentional, when the defendant has the actual intent to commit the crime, or as negligent, when this intent is lacking. As a rule, crimes require intent, with crimes of negligence being the exception.

The prosecution has the burden of proof for specific intent. However, the defence can also produce evidence during the evidentiary phase to prove lack of specific intent to commit the crime, which can lead to a finding of not guilty.

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?

In Brazilian criminal law, ignorance of the law is no excuse. However, the law allows for a finding of not guilty or punishment for negligence when there is an error regarding the legal prohibition of the conduct.

It should be noted that the legal scholarship and case decisions are not settled regarding whether the prosecution or defence has the burden of proof for this. However, the majority holds that the defence has the burden of proving an error regarding the legal prohibition.

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, this is possible. An error regarding the elements of the crime means no negligence and the crime is not punishable as intentional, only if the law provides for negligence. If there is no provision for negligence, the conduct does not meet the required elements of the crime and there is no guilt. In this case, the defence has the burden of proof and must prove that the accused did not correctly perceived the facts.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

As a general rule, an individual who discovers criminal conduct at a company does not have a legal duty to report the crime to the authorities.

However, this rule does not apply to persons who, because of the position they hold, have a legal duty to report in order to avoid the commission of crimes. This applies, for example, to a compliance officer who is responsible for supervising and preventing business crimes.

A compliance officer acts as a guarantor. In other words, adopting internal mechanisms and procedures to prevent and control noncompliance by the company is the systemisation of an oversight model. The delegation of the activities of designing, implementing, and managing this structure to the compliance officer means he assumes the duty of a basic guarantor of the business owner and cannot escape the duty to act to correct or halt improper conduct that he discovers or he will be held criminally liable for his conduct by act or omission, as a joint perpetrator or participant.

Additionally, in relation to a company's hierarchal structure, the company's top management can be held liable on the basis of the theory of wilful blindness or on the *de facto* domain control theory.

On the other hand, Law 9,613/1998 provides an exhaustive list of institutions and companies that have a duty to give notice to the Financial Activities Control Council (*Conselho de Controle de Atividades Financeiras*), or COAF, reporting suspect financial transactions that could indicate the crime of money laundering. These companies include financial institutions and jewellers.

Finally, in specific situations only, criminal law provides that voluntary reporting of a crime can lead to a leniency agreement or turning state's evidence, with a reduction in any fine or penalty imposed.

13 Cooperation Provisions / Leniency

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

Leniency agreements are entered for antitrust crimes or acts that harm the government.

At the administrative level, a leniency agreement can be entered into with the Economic Defence Administrative Council (*Conselho de Administrativo de Defesa Econômica*), or CADE, that eliminates the administrative penalty as long as the accused cooperate with the investigation and the result of this cooperation leads to the identification of the others involved in the violation and obtaining information and documents that prove the reported or investigated infraction, so long as the General Superintendency of the Economic Defence Administrative Council is not aware of a prior report of the violation, or a reduction of the applicable administrative penalties by two thirds, if the violation has already been reported.

At the criminal level, entering into a leniency agreement results in the tolling of the limitations period and impedes the filing of an indictment (*denúncia*) against the person benefiting from the leniency agreement decree regarding the economic crimes described in the Economic Crimes Act (Law 8,137/1990), and in other crimes directly related to forming a cartel, such as those described in the General Bidding Act (Law 8,666/1993) and in article 288 of the Criminal Code (criminal association). Once the terms of the leniency agreement are complied with, the crimes described above automatically become unpunishable (article 87 of Law 12,529/211, read together with article 249(1) of the Economic Defence Administrative Council's Internal Regulations).

Additionally, leniency agreements are also provided for in Law 12,846/2013 (Clean Business Act/Anticorruption Act). These benefit companies liable for acts that harm domestic or foreign governments as defined in article 5 of that law. These leniency agreements are entered into by the highest authority in each agency or entity, with the Federal Comptroller General (*Controladoria Geral da União*), or CGU, being the agency with this power in the federal executive branch. This kind of leniency agreement can only be entered into with corporate entities.

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

In the leniency agreement or agreement to turn state's evidence, the cooperating party must provide a detailed list of the anti-competitive or criminal conduct, with all of its circumstances, indicating the other participants in the illegal acts, presenting evidence that can prove them, or at least indicating the evidence that can be obtained during the course of the investigation.

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?

It is not possible to decline to present a defence against charges brought in a criminal proceeding. In Brazil, the only possibility for being acquitted, having a penalty reduced, or agreeing to a set penalty is in cases in which a party enters into an agreement to turn state's evidence, which can occur in two ways: (i) the accused confesses to the crime and reveals information, hoping that his cooperation will be taken into account by the judge at sentencing, thereby reducing the penalty; or (ii) when the accused enters into a written agreement with the Public Prosecutor's Office, stating the conditions of the cooperation and the benefits that will be granted.

Even so, in the criminal trial of the other accused, the person who has turned state's evidence will participate in the case and

must present his technical defence so that it cannot be declared null in the future.

Recently, the Federal Supreme Court entered a decision holding that the police chief can also enter into agreements for persons under investigation to give state evidence during police investigations.

A criminal non-prosecution agreement (article 28-A of the Criminal Procedure Code) ensures that the person under investigation will not be charged with a crime, or in other words, the agreement will be entered into before charges are filed. For this reason, it is not an adversarial proceeding.

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?

Agreements to turn state's evidence apply only to some crimes, such as, for example, money laundering. The person who has turned state's evidence can receive a reduced penalty or be acquitted, depending on how effective his confession is for determining the facts.

In Brazil, the possibility of turning state's evidence is generically provided for in articles 13 and 14 of Law 9,807/99 and, specifically, in article 6 of Law 9,034/95 (fighting organised crime); article 1(5) of Law 9,613/98 (money laundering); the sole paragraph of article 8 of Law 8,072/90 (heinous crimes); the sole paragraph of article 16 of Law 8,137/90 (tax crimes); article 25(2) of Law 7,492/86 (crimes against the national financial system); and article 41 of Law 11,343/06 (drug dealing). Additionally, there is a provision for cooperation in article 159(4) of the Criminal Code (extortion through kidnapping).

The requirements contained in agreements to turn state's evidence are generally an obligation not to contest the accusation during the evidentiary phase of the trial, to confess to the crime, to identify the members of the criminal organisation, together with its structure and the division of duties, to recover the product of the crime in whole or in part, in order that the prosecution can produce evidence and obtain a guilty verdict against the other parties who were involved.

With the implementation of criminal non-prosecution agreements (article 28-A of the Criminal Procedure Code), there was another innovation in the negotiation tools involving criminal investigations before charges are filed. A non-prosecution agreement is at the discretion of the prosecutor's office and can be offered as long as the investigation has not been closed and the person under investigation confesses to a crime that was committed without violence or serious threat, for which the minimum penalty is less than four years.

Finally, agreements to turn state's evidence and for non-prosecution must be approved by the parties and signed and ratified by a judge at a hearing held specifically for that purpose.

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 a sentence on the defendant? Please describe the sentencing process.

Article 68 of the Brazilian Criminal Code provides that judges must follow a three-step system when entering a sentence in a criminal trial. The judge first establishes the base penalty on the basis of guilt, prior record, social conduct, personality, motives for the crime, and the circumstances and consequences of the crime, as well as the behaviour of the victim; he then analyses the aggravating circumstances (recidivism, crimes against children or the elderly) and attenuating circumstances (confession, whether the defendant is over 70 years of age, etc.); and, finally, he applies the reasons for increasing (a continuing crime) and decreasing the penalty (attempted crime).

Finally, in the case of a finding of guilt, the judge must analyse whether the penalty imposed can be replaced by a penalty restricting rights or whether the performance of the penalty can be suspended for the defendant to undergo a punishment less strict than imprisonment.

Under article 60 of the Brazilian Criminal Code, a judge can also adopt special criteria for the application of the penalty of a fine, so long as he complies with the following rules: regarding the crime of which the accused is guilty, the judge establishes the number of fine-days, between a minimum of 10 and a maximum of 360, based on the criteria of the judicial circumstances of the crime. When the fine-days are established, the judge establishes the amount of each fine-day, which cannot be less than 1/30 of the highest minimum monthly wage in effect at the time of the act or greater than five times that same wage. He must also take into account the defendant's economic situation and the seriousness of the crime, and if the fine is insufficient, he can triple it.

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.

In relation to a finding of criminal liability for a company that has committed environmental crimes (noting that this is the only type of crime for which a corporate entity can be held criminally liable), the rules for applying the sentence are different. The possible penalties in this case are the penalty of a fine, penalties restricting rights and the imposition of an obligation to provide community service. Regarding penalties restricting rights, the judge can impose a partial or complete restriction on the company's activities; the temporary interdiction of facilities, construction work, or activities; or a prohibition on contracting with the government or receiving subsidies, grants or donations. Additionally, the company must repair the environmental harm caused.

16 Appeals

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

Yes. In Brazil there is a legal opportunity to appeal a guilty or not guilty verdict. Additionally, both the defendant and the prosecution have the right to appeal to a first-level appellate court and to the second-level appellate courts (the Superior Court of Justice and the Federal Supreme Court).

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

Yes. A sentence can be appealed by both the defendant and the prosecution.

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

The first-level appellate courts, which hear appeals, can reanalyse the facts, the evidence and the application of criminal law

in the specific case. This means there can be an appellate decision that is different from the decision entered by the trial court judge in relation to the grounds and the penalty, which can be reduced or increased and for which a penalty of prison can be changed to one restrictive of rights. Additionally, the appellate court can enter a verdict of guilty or not guilty.

It is important to emphasise that in cases in which only the defence can appeal, with the verdict having become final and unappealable for the prosecution, the decision cannot be changed unfavourably for the defendant – it can only be maintained or made lighter for the defendant, in keeping with the principle of *non reformatio in pejus*.

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

If the sentence is upheld in full, an appeal can be made to the extraordinary courts (Superior Court of Justice and Federal Supreme Court), but such an appeal must meet the requirements for being heard by these courts (as mentioned in question 16.3).

In the case of the Superior Court of Justice, it must be shown that the ordinary courts did not properly apply or ignored federal law or case decisions. An appeal to the Federal Supreme Court, in turn, must be shown that the controversy has general repercussions and that the Brazilian Constitution was not respected by the courts below. It should be noted that, in these appeals, the evidence and the facts are not reanalysed by the justices, who analyse only the application of the law, of the case decisions, and of the Brazilian Constitution.

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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?

The Crown Prosecution Service (CPS) prosecutes most crimes, including many business crimes. The Serious Fraud Office (SFO) investigates serious and complex economic crime. Other enforcement authorities include: the National Crime Agency (NCA), which deals with serious and organised crime; the Financial Conduct Authority (FCA), which regulates financial services and prosecutes offences including market abuse and insider dealing; the Competition and Markets Authority (CMA), which deals with criminal cartels; and HM Revenue and Customs (HMRC), which prosecutes tax offences.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The CPS is the main prosecutor dealing with a wide gamut of offences which are typically investigated by the police. It has some specialist divisions, for example, fraud and extradition. Other agencies tend to specialise as per above.

Where more than one enforcement agency can prosecute the same conduct, they may determine the allocation of cases by reference to a memoranda of understanding between agencies.

The National Economic Crime Centre (NECC), made up of representatives of the main criminal and regulatory enforcement authorities, is now in place to coordinate and task the UK's response to economic crime. Its objective is to identify and prioritise investigations and maximise the use of new powers introduced under the Criminal Finances Act 2017.

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?

Agencies possessing regulatory and enforcement powers can administer civil penalties. For example, the FCA can fine companies and individuals as well as withdrawing their authorisation to carry out regulated activities. The SFO, the NCA, HMRC, CPS and the FCA can begin civil recovery proceedings to recover assets acquired through illegal activities, including the use of Unexplained Wealth Orders (UWOs). The FCA and HMRC have the power to conduct civil enforcement actions such as injunctions, restitution and insolvency orders. The CMA can impose financial penalties and apply for director disqualification orders.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In January 2020, the SFO secured the conviction of an individual for failing to supply documents as required, contrary to section 2 (3) of the Criminal Justice Act 1987. The defendant was ordered to pay a fine of £800 and the SFO's costs. Despite the relatively small sentence, prosecutions for failure to comply with the SFO's powers under section 2 are uncommon. The SFO confirmed that the defendant was not a suspect in the underlying SFO investigation into ENRC.

In February 2020, as part of a retrial, the three remaining Barclays Bank executives were acquitted of conspiracy to commit fraud and false representation. The individuals had been charged by the SFO regarding the provision of a US$3bn loan by Qatar during the financial crisis. The SFO had originally charged Barclays Bank Plc and four former executives, including the former Chief Executive. Prior to the first trial in 2019, the Crown Court dismissed the charges against the corporate entity and a subsequent application for the charges to be reinstated was refused by the High Court. The Court of Appeal later upheld a ruling by the Crown Court that there was no case to answer against the former Chief Executive.

In February 2020, the Court of Appeal dismissed an appeal by Ms Zamira Hajiyeva – the wife of jailed Azerbaijani banker Jahangir Hajiyev – to discharge the Unexplained Wealth Order secured against her by the NCA in 2018. This was the first time the Court of Appeal had been asked to consider a UWO.

Following this, in April 2020, the High Court discharged three UWOs obtained by the NCA in 2019. This is the first occasion the High Court has discharged a UWO. The three UWOs related to London properties owned by the family of a former senior Kazakh official. In discharging the UWOs, Mrs Justice Lang was critical of the evidence relied on by the NCA and its failure to properly consider evidence of ownership presented by the respondents. The NCA have announced their intention to appeal the ruling in what will be an eagerly awaited Court of Appeal judgment on the evidential expectations of the UWO regime.

In July 2020, the SFO secured convictions against two former executives on charges of conspiring to give corrupt payments to secure contracts in Iraq. The two men, both connected to Unaoil, were sentenced to three and five years' imprisonment, respectively. The convictions follow the guilty pleas of co-conspirator in July 2019.

The SFO announced, in late January 2020, the seventh (and largest) Deferred Prosecution Agreement (DPA) to date, with global aerospace company, Airbus SE. It comes almost four years since the SFO began investigating the company over allegations of bribery. Pursuant to the DPA, Airbus agreed to pay a fine and costs amounting to €991m to the SFO. Perhaps in a sign of things to come, the DPA was part of a coordinated global resolution, with Airbus also paying out fines to France and the United States. The question of charges being brought against individuals connected with the conduct remains a live one.

2 Organisation of the Courts

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

Criminal cases are tried in the Magistrates' Court and the Crown Court. The Magistrates' Court deals with less serious offences, which are decided by a District Judge or a panel of lay Magistrates. More serious crimes are tried at the Crown Court by a Judge and jury. Appeals of Crown Court decisions are considered by the Court of Appeal. Exceptionally, further appeals may be heard by the Supreme Court when a point of law is to be decided.

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

There are three types of offences: indictable-only; either-way; and summary. The former, more serious offences, are tried by a jury; the latter, less serious offences are heard at the Magistrates' Court and either-way offences can be heard by either and the accused has the right to elect a Crown Court trial. All Crown Court trials are before juries.

3 Particular Statutes and Crimes

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

• Securities fraud

Under the Financial Services Act 2012, it is an offence for a person to knowingly or recklessly make misleading statements in relation to relevant investments or to dishonestly conceal information in connection with a statement. These offences require proof of intention or recklessness to induce another person's dealing in securities.

It is also an offence to engage in a course of conduct which intentionally or recklessly creates a misleading impression as to the market in, or the price or value of, any investment. That impression must induce another to deal or not to deal in that investment, with an intent to make a gain to oneself or loss to another.

• Accounting fraud

Under the Theft Act 1968, a person is guilty of accounting fraud if he dishonestly, with a view to gain for himself or another, or with intent to cause loss to another:

(a) destroys, defaces, conceals or falsifies any account, record or document required for an accounting purpose; or

(b) in furnishing, producing or making use of any information or account, does so with the knowledge that it is or may be misleading, false or deceptive in a material particular.

• Insider trading

Under the Criminal Justice Act 1993, it is an offence for a person who has inside information to deal in securities, encourage another to deal, or disclose inside information to another (other than in the proper course of his employment). Statutory defences are available, for instance, if the person can show that he would have done what he did even if he did not possess the information.

• Embezzlement

There is no specific offence of embezzlement. Rather, such conduct is likely to be prosecuted as a fraud or theft offence. The Fraud Act 2006 criminalises fraud perpetrated in various ways including by abuse of position and by false representation.

• Bribery of government officials

The Bribery Act 2010 creates offences of bribing and receiving bribes (whether in the public or private sector), bribery of foreign public officials, as well as an offence for commercial organisations which fail to prevent bribery by persons associated with them (such as an employee, agent or joint venture partner). The Act describes various ways in which bribery can be committed but, in general, it is committed where a person offers, promises or gives (or requests or accepts) a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly.

Failing to prevent bribery is regarded as a 'strict liability' offence but is subject to a statutory defence if the company can show it had 'adequate procedures' in place to prevent persons associated with it from bribing.

The Bribery Act 2010 applies to conduct post-dating 1 July 2011. Prior to this, bribery of government officials may be prosecuted under the common law or pre-existing statutes prohibiting the corruption of local government bodies and central government employees.

• Criminal anti-competition

A criminal anti-competition offence may be committed if an individual agrees with one or more others to make or implement, or cause to be made or implemented, certain types of anti-competitive conduct, including price-fixing and market sharing, etc. Dishonesty is not a required element. Statutory defences include the absence of an intention to conceal the arrangement.

• Cartels and other competition offences

See above. Please note also that the CMA can deal with cartels and competition offences under civil enforcement powers.

• Tax crimes

There are various statutory offences for defendants who knowingly evade duties and taxes (including income tax and value-added tax). For serious cases of failing to declare offshore income, it is not necessary to prove intent. It is also an offence if corporate entities fail to prevent persons associated with them from facilitating UK or foreign tax evasion offences. The government intends to create a public register, requiring overseas companies buying UK property to disclose the ultimate owners in order to reduce tax-related crime.

• Government-contracting fraud

There is no specific offence relating to government-contracting fraud. Such conduct is likely to be prosecuted as a bribery, fraud or corruption offence.

• Environmental crimes

The Environmental Protection Act 1990 criminalises unauthorised waste management and emissions into the environment. The Clean Air Act 1991 covers offences relating to smoke pollution from industrial premises and the Water Industry Act 1991

covers offences relating to the supply of water which is unfit for human consumption.

• Campaign-finance/election law

The Representation of the People Act 1983 contains the principal electoral offences, including: 'undue influence' and 'bribery' to compel or induce any voter to vote or refrain from voting. The Political Parties, Elections and Referendums Act 2000 contains various offences in relation to breaches of limits on campaign expenditure. The Electoral Administration Act 2006 creates offences of supplying false information to the Electoral Registration Officer and making a fraudulent voting application.

• Market manipulation in connection with the sale of derivatives

Market manipulation, generally, is governed by the FCA by reference to the Market Abuse Regulation and may be dealt with on a regulatory or criminal basis. There is no specific offence regarding market manipulation and the sale of derivatives. However, it is an offence to make misleading statements or impressions in relation to the setting of a 'relevant' benchmark. At present, eight benchmarks, including the London Interbank Offered Rate (LIBOR), are specified by the UK Treasury.

• Money laundering or wire fraud

The Proceeds of Crime Act 2002 (POCA) prohibits the concealment, possession, acquisition, retention, use or control of criminal property, and being concerned in an arrangement to carry out such activities. 'Criminal property' constitutes a person's benefit from criminal conduct. 'Criminal conduct' is conduct which is an offence in the United Kingdom or would constitute an offence in the UK if it occurred there. Criminal property must represent a person's benefit from actual criminal conduct (other than the alleged money laundering itself).

The UK has no equivalent to the U.S. offence of 'wire fraud'.

• Cybersecurity and data protection law

The Computer Misuse Act 1990 (CMA) provides for the prosecution of cybersecurity offences. For instance, it criminalises the intentional unauthorised access to computer material, as well as unauthorised acts which cause serious damage to human welfare, the economy or national security. The making or supply malware is also an offence. The Investigatory Powers Act 2016 criminalises the unlawful interception of communications. The Data Protection Act 2018 criminalises obtaining or disclosing personal data without consent.

• Trade sanctions and export control violations

The UK applies UN, EU and domestic trade sanctions as a political response to international security issues. These include import and export controls, financial sanctions and travel bans. Military and dual-use goods are subject to export controls through a licensing system. Breaches and circumvention of trade sanctions and export controls may be punishable by administrative penalties or criminal prosecution.

• Any other crime of particular interest in your jurisdiction

The Modern Slavery Act 2015 criminalises slavery, servitude and forced labour. Courts consider whether the victim was forced to work in exploitative conditions, including being threatened into working without pay.

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

Inchoate offences include assisting, encouraging, inciting, attempting offences and conspiracy to commit crimes. A person is guilty of an attempt if they have the requisite intent and perform an act which is 'more than merely preparatory' to the commission of the offence. A person can still be guilty of attempting an offence even if the crime is not completed.

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?

A corporate entity has a distinct legal personality and liability is determined by statute via the appropriate attribution principle. Generally, a company is only liable where a 'directing mind' (i.e. a director or officer) is guilty of an offence. Exceptions include the failure by a commercial organisation to prevent bribery or facilitation of tax evasion (as set out above) where the entity is strictly liable, subject to relevant defences.

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

Depending on the statutory provision in question, separate personal liability may also arise if the offence was committed with the consent or connivance of a company officer. Individuals may also be liable for inchoate offences (see question 3.2). Finally, under the Financial Services (Banking Reform) Act 2013, senior managers of financial institutions are subject to criminal liability if it is proved they engaged in 'reckless misconduct' causing an institution to fail.

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?

The decision to prosecute an entity or individual is determined by each prosecuting agency's own policy and in accordance with the Code for Crown Prosecutors. It is well recognised that the prosecution of a company should not be a substitute for the prosecution of culpable individuals. However, there are public interest factors that must be considered. Factors tending against prosecution include the availability of civil or regulatory remedies that are likely to be effective and more proportionate, and a genuinely proactive approach adopted by the company when the offending is brought to their notice. UK companies may also enter into a DPA in respect of a variety of financial crimes.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

There is no defined concept of 'successor liability' whereby a purchaser that acquires the stock of a seller automatically becomes criminally liable for the acquired entity's historical criminal acts. The purchaser might be liable for money laundering offences if it knows or suspects that the proceeds of criminality remain within the business. Such proceeds of crime may also be the subject of civil recovery proceedings.

5 Statutes of Limitations

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

There are no limitation periods for the prosecution of serious criminal offences. For summary-only offences, proceedings must commence within six months from the time when the offence was committed or discovered. The limitation period for civil cases is generally six years.

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

For crimes triable on indictment, and which includes crimes charged as a conspiracy, no limitation periods apply.

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

No, they cannot.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Generally, some nexus to the UK must be established to invoke jurisdiction. Often, this is that some element of the offence occurred in the UK.

Some offences have extraterritorial effect. To illustrate, liability arises for failing to prevent the facilitation of overseas tax evasion. For bribery offences, individuals or corporate bodies with a 'close connection' to the UK, such as British citizens, residents and incorporated entities, may be prosecuted even where no act or omission, which formed part of the offence, took place in the United Kingdom. The SFO has pursued foreign bribery by prosecuting conduct in Africa, Europe, the Middle East, and Asia, so it is fair to conclude that certain enforcement agencies often rely on extraterritorial jurisdiction.

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

Most investigations begin when a complaint is made or there are circumstances suggesting that a crime may have been committed. Specialist enforcement agencies will apply criteria when determining whether to investigate. The SFO, for example, considers factors such as the value of the alleged fraud and whether there is significant public interest. The FCA considers whether an investigation is in line with its statutory objectives.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Mutual Legal Assistance (MLA) is a method of cooperation between states for obtaining assistance in the investigation or prosecution of criminal offences. The UK is party to bilateral and multilateral treaties governing arrangements for the exchange of information. The European Investigation Order (EIO) streamlines MLA within the EU. Such requests will generally involve obtaining evidence and information from, and securing assets situated in, the requested state, or obtaining freezing orders. Informal assistance is often provided between enforcement agencies directly. The NCA's UK International Crime Bureau facilitates cooperation with international law enforcement agencies. The UK is a member of Europol, Sirene, and INTERPOL.

7 Procedures for Gathering Information from a Company

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

If a company or individual is suspected of committing a business crime, investigating bodies have the power to arrest suspects, search following arrest, and conduct interviews 'under caution'.

Additionally, agencies such as the NCA, the FCA, the CMA and the SFO can compel third parties to answer questions, provide information or documentation in respect of matters pertinent to an investigation (such material is often subject to restrictions on its use in related criminal proceedings). If the recipient of a compelled notice refuses to provide disclosure of information, a court has the power to make an order to grant entry in relation to the premises where that material may be stored. It is an offence to fail without reasonable excuse to provide answers or to knowingly or recklessly provide an answer which is false or misleading in a material particular.

In 2018, the High Court held that compulsory notices issued by the SFO can have extraterritorial application to foreign companies, requiring them to produce documents held overseas where there is a sufficient connection between the company and the jurisdiction. The Supreme Court has granted leave to appeal this decision and that case is pending.

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?

See question 7.1 above regarding powers to compel the production of documents or information.

The power to raid a company under investigation by attending the premises and seizing documents may be executed upon the authority of a search warrant. A search warrant may be issued if the court has relevant grounds for believing than an indictable offence has been committed, and that there is material likely to be of substantial value and is relevant evidence.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Documents which contain legally privileged communications (whether legal advice privilege or litigation privilege) cannot be compelled for production. However, if it is not reasonably practicable to separate legally privileged materials from non-privileged materials, those items may be seized. An independent third party, such as a barrister, may be instructed to isolate legally privileged materials to ensure they are not made available to the investigating body. Generally, legal privilege extends to relevant communications with in-house counsel.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Under the GDPR, employers are processors of their employees' personal data, and therefore they have obligations only to store as much employee data as is necessary for lawful purposes, for as long as is necessary, and in a secure system. Employees may ask for their personal data to be erased and not transferred without consent. Exceptions apply where authorities require personal data to investigate criminal activity.

Any transfer or disclosure of personal data, when requested by a foreign body outside of the European Economic Area (EEA), must be based on an international agreement, with exceptions for cross-border transfers that would be in the public interest or in connection with legal proceedings.

Post Brexit, the transition arrangements are legislated to be in place until 31 December 2020. During this period, EU law continues to apply, including GDPR. Looking forward, much will depend on what, if any, new relationship is negotiated between the EU and the UK. In the interim period, the UK Information Commissioner's Office has published guidance which indicates that the UK would be considered a "third country" for the purposes of the EU GDPR.

7.5 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?

See questions 7.1 and 7.2.

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

See questions 7.1 and 7.2.

Questioning of Individuals:

7.7 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 the individual is not a suspect, but a potential witness, see question 7.1 regarding powers to compel any individual to answer questions or release information at any given location. If the individual is a suspect, see question 7.9.

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

A third party who is not a suspect may not be arrested for questioning. However, there are circumstances in which a witness can be compelled to provide a deposition in a criminal trial. See also question 7.1 regarding powers to compel a third party to answer questions or provide information.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

A suspect interviewed 'under caution' has a right to remain silent, which in effect, is the privilege against self-incrimination. However, such privilege is not unfettered as the failure to provide an explanation that is later relied on in a person's defence may lead to the drawing of an adverse inference by the jury. Persons interviewed under caution have a right to legal representation.

Where a person is not interviewed under caution, but compelled to answer questions, see question 7.1. It is not a reasonable excuse to refuse to answer questions by asserting a right against self-incrimination. Information obtained via the use of compelled powers cannot be used against an individual in subsequent criminal proceedings against them, unless certain exceptions apply. There is no absolute right to legal representation but agencies such as the SFO have established protocols regarding the practice of compelled interviews and the role of lawyers in this process.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases may be initiated in several ways. Defendants may be charged by a police officer at the police station, and then produced or bailed to attend a Magistrates' Court. Alternatively, a prosecutor may lay an 'information' before the court, and the court may issue a summons requiring the defendant to attend. If the defendant is a company, proceedings commence by summons. In some cases, prosecutors charge suspects in writing and request that they present themselves at court on a specific date.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The CPS must abide by the Code for Crown Prosecutors ("Code"), which requires them to be satisfied that there is sufficient evidence for a realistic prospect of conviction and that the prosecution is in the public interest. Other Public Prosecutors are not strictly bound to apply the Code but do so as a matter of convention and good practice. Private Prosecutors are also not obliged to apply the Code but also do so as proceedings may otherwise be taken over and terminated by the Director of Public Prosecutions.

Prosecutors may consider certain criteria when deciding to pursue criminal or civil enforcement measures. For instance, the FCA in determining if a criminal prosecution is appropriate in market abuse cases will consider facts such as: the seriousness of the misconduct; the impact on victims; and the effect of misconduct on the market.

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

DPAs are available to companies only for fraud, bribery and other economic crime. The agreement allows a prosecution to be suspended for a defined period provided satisfaction of certain conditions. These include full cooperation with the investigator and cooperating with the future prosecution of individuals. Fines, compensation and compliance-monitoring may also be imposed.

There is no equivalent of a DPA for individuals. Depending on the nature of the offence, an individual may be eligible to receive a caution or conditional caution from the police to avoid criminal prosecution that could result in conviction.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

DPAs must be approved by the Crown Court. The court will only approve an application if it decides that the DPA is in the interests of justice and its terms are equitable, reasonable and proportionate.

8.5 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 may apply.

In most cases, the imposition of a criminal penalty means it is not necessary to impose additional civil remedies. Sometimes, civil penalties may be imposed under a regulatory regime (for example, by the FCA) and following criminal enforcement (e.g., by the SFO or the NCA). This tends to be limited to the most egregious conduct where civil and criminal enforcement arguably achieve different aims. Civil recovery orders can be sought to recover the proceeds of crime, even where a criminal prosecution has not taken place.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The general rule is that the prosecutor bears the legal burden of proving all elements in the offence. However, statute may expressly cast on the accused the burden of proving particular issues.

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

If the burden rests with the prosecution, they must prove their case beyond reasonable doubt (i.e. to a standard where the jury is sure of the defendant's guilt). Where it rests with the defence, the standard is on a balance of probabilities.

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

At the Magistrates' Court, the arbiter of fact will be the Judge or lay justices comprising of the bench. At the Crown Court, the jury is the arbiter of fact. The Judges in both Courts decide whether the prosecution has satisfied its burden of proof. If the Judge decides that, taken at its highest, a reasonable jury, properly directed, could not convict the defendant based on the evidence relied upon by the prosecution, the Judge will direct that the defendant has no case to answer and direct the jury to acquit. In relation to matters where the burden rests on the defence to prove a particular issue or defence, it is up to the jury to decide whether on the basis of the case put forward, the burden is satisfied on a balance of probabilities.

10 Conspiracy / Aiding and Abetting

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

Yes. A person can be guilty of conspiring to commit an offence and may be punished to the same extent as if guilty of the substantive offence. A person may also be guilty of an offence if he intentionally encourages, assists, aids, abets, counsels or procures the commission of an offence and may be punished to the same extent as a principal offender.

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?

Most criminal offences require proof that the defendant had the requisite intent to commit the crime, and if it cannot be proved by the prosecution such that the jury can be sure, the defendant must be acquitted. In relation to offences which require proof of dishonesty, the Supreme Court decision in *Ivey* held that the conduct in question must be dishonest by the standards of ordinary, reasonable and honest individuals.

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?

No, a defendant's ignorance of the law is not a defence.

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?

It is not a defence *per se* to be ignorant that the conduct was unlawful. However, if the defendant raises a genuine mistake of the facts, i.e. he was unaware of the conduct in question, the burden rests on the prosecution to prove that he did.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no obligation to report criminal offences. However, for persons and entities in the 'regulated sector' (including financial institutions, auditors, accountants and legal professionals), there are separate obligations under the POCA to report suspected money laundering or terrorist financing activities. Failure to do so could result in criminal prosecution.

If an individual or entity voluntarily discloses their own criminal conduct, credit for doing so may manifest in several ways – see below.

13 Cooperation Provisions / Leniency

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

If a person voluntarily discloses criminal conduct or cooperates in a criminal investigation, the Serious Organised Crime and Police Act 2005 (SOCPA) allows for prosecutors to enter into a non-prosecution or sentence-related agreement with the offender, in return for their cooperation.

Alternatively, if a person is prosecuted, acceptance of guilt at an early stage entitles the person to a one-third discount on the eventual sentence. This is known as 'credit for an early guilty plea', and it also applies to corporate defendants. The later the plea, the less credit is given.

Whether a corporate entity has self-reported criminal conduct is a relevant consideration when determining eligibility for a DPA (see question 8.3).

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

See question 8.3 for leniency when applying for a DPA. Although not compulsory, companies that wish to avoid prosecution by entering into a DPA will generally have to self-report their offending conduct. See question 13.1 regarding credit for sentences imposed following prosecution.

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?

A defendant may seek to plead guilty on reduced charges, or to plead guilty on the basis of a particular set of facts, known as a 'basis of plea'. However, it is not possible to agree the sentence in advance as it is the Court which ultimately determines sentence; any 'basis of plea' must also be approved by the Court. In serious or complex fraud cases, defendants may enter into agreements with the prosecution that include a joint submission as to sentence. The court may, at its discretion, give a judicial indication of sentence, known as a 'Goodyear' indication. If an indication is given, and the accused accepts it, the Judge is bound to give the indicated sentence.

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?

See question 14.1 above.

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 a sentence on the defendant? Please describe the sentencing process.

Sentencing is not a static exercise but one which takes into account: the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences. Courts are required to have due regard to sentencing guidelines. Guidelines are available for business crime offences such as theft, fraud, bribery and money laundering offences. If there is no sentencing guideline available for a particular offence, the court will turn to case law to decide the appropriate level of sentence.

In terms of the sentencing process, the case is generally opened by the prosecutor who sets out the facts of the case and the role played by the defendant. The defendant's lawyer will present submissions in mitigation on behalf of the defendant. All parties will have regard to the relevant sentencing guidelines or case law.

In cases where sentencing guidelines apply, the Court will have regard to culpability, harm, aggravating and mitigating features of the offence, and any cooperation shown by the defendant. Any credit for early guilty pleas will be applied (both to the level of imprisonment and/or financial penalty).

Finally, the court will have regard to the totality of the sentence, especially if sentencing for more than one offence and taking into account proportionality. The Court will also consider whether any ancillary orders, such as confiscation, compensation, or company disqualification, are appropriate.

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.

See question 15.1 regarding the purposes of sentencing, sentencing guidelines and case law, which applies equally to corporations, even though the only penalty available is a financial one. In calculating the amount of financial penalty, the court will have regard to the turnover/profit, the level of cooperation (if any), and any actions taken to remediate the offending conduct. For offences that can valued at a monetary level, e.g., fraud, money laundering or bribery and corruption, the court may also take into account the value of the offence and the impact it had on victims.

16 Appeals

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

Following conviction, a defendant may appeal against the conviction. A not guilty verdict cannot be appealed. However, in exceptional circumstances the prosecution may seek a retrial in relation to some serious crimes if there is new and compelling evidence of guilt and it is in the interests of justice to have a retrial.

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

Defendants can appeal any sentence that is not fixed by law. The Attorney General can also refer sentences certain serious offences to the Court of Appeal for review (see question 16.3).

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

A defendant may be granted leave by a senior Judge to appeal against his conviction if the conviction was potentially 'unsafe'. Grounds include: the wrongful admission or exclusion of evidence; inconsistent verdicts; or the conduct of the trial Judge or lawyers. Defendants may appeal against a sentence if they believe the sentence is wrong in law, or it was manifestly excessive. In some cases, the Attorney General can appeal if the sentence given was 'unduly lenient'.

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

If a defendant wins an appeal against his/her conviction, then the appellate court will quash the conviction and the defendant will either be sent for retrial or acquitted. If the appellate court allows an appeal against a sentence, they will re-sentence the defendant.

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Peters & Peters is recognised for its "outstanding global financial crime practice that is frequently called upon to act in significant cases". Four decades ago, we were the first UK practice to develop a specialist white-collar crime team and we remain at the cutting-edge of the discipline to this day. Our substantial experience encompasses all manner of business crime issues, including multi-jurisdictional criminal and financial regulatory investigations, fraud, bribery and corruption, cartels/competition law, tax, sanctions, private prosecutions and restraint and confiscation.

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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 usually prosecuted by a public prosecutor. Upon completion of his/her investigation, a matter considered to have sufficient evidential support will be referred to trial, generally before the criminal court of first instance (*Tribunal correctionnel*) for a trial without a jury. In unusually complex or large business crime cases, the public prosecutor may refer the matter to an investigating judge (*juge d'instruction*), who will then conduct an investigation (*instruction*) and decide whether or not to refer the matter to trial.

These enforcement authorities usually operate at a regional level, working with local police units. Certain criminal violations – such as complex criminal environmental cases – are usually handled by the public prosecutors or investigating judges of specialised offices (*pôles*).

Since 2013, France has had a national prosecutorial office dedicated to financial matters (*Parquet National Financier*, "**PNF**"). The PNF is composed of 17 public prosecutors. It has nationwide jurisdiction to prosecute complex financial crimes. Occasionally, when a financial case is complex and/or requires specific investigating measures, the PNF may refer the case to the investigating judges of the Paris court (*pôle financier du TGI de Paris*).

Certain business crimes are prosecuted by administrative agencies. For instance, cartels are prosecuted by the Competition Authority (*Autorité de la Concurrence*) while other anticompetitive behaviours can be prosecuted as ordinary crimes; market abuses (i.e., insider trading, market manipulation and dissemination of false information) are prosecuted either by the PNF or the Financial Markets Authority (*Autorité des Marchés Financiers*, "**AMF**").

Under certain conditions, victims of business crimes may also initiate prosecution, either by bringing cases directly before trial courts, or by requesting the appointment of an investigating judge.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

For most financial crimes – including corruption, influence peddling, tax fraud, money laundering, etc. – the PNF has concurrent jurisdiction with regional public prosecutors. In practice, however, complex financial cases are handled by the PNF.

For market abuse crimes, the PNF has exclusive jurisdiction (i.e., regional public prosecutors cannot prosecute), provided that the case is not prosecuted by the AMF. Since March 2015, market abuses have only been subject to one type of prosecution, either criminal (PNF) or administrative (AMF). Once a first-level investigation has been carried out (usually by the AMF investigators), the AMF and the public prosecutor will decide whether the prosecution will be criminal or administrative.

In any case, the PNF or the public prosecutors may decide to refer a case to an investigating judge.

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?

Several administrative agencies are responsible for administrative enforcement of certain business crimes:

- The Competition Authority is the enforcement authority for cartels involving corporations (enforcement against individuals participating in a cartel is led by regular criminal authorities).
- The AMF is the enforcement authority for market abuses, provided it is not enforced criminally by the PNF (see question 1.2).
- The Prudential Control and Resolution Authority (*Autorité de Contrôle Prudentiel et de Résolution*, "**ACPR**") is the enforcement authority for non-compliance with anti-money laundering and anti-terrorist obligations of banks and insurance companies.
- The French Anti-Corruption Agency (*Agence Française Anti-corruption*, "**AFA**") is the enforcement authority for non-compliance with the obligation to implement corporate compliance programmes.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

On February 20, 2019, the Paris criminal court convicted Swiss bank UBS AG of illegal solicitation of financial services and aggravated laundering of the proceeds of tax fraud, and imposed a fine of €3.7 billion. This is by far the largest fine ever imposed by a French criminal court. UBS AG appealed that decision.

On September 3, 2019, Google Ireland Limited and its French subsidiary Google France entered into a French-style deferred prosecution agreement (known as a CJIP) with the PNF and agreed to pay a total €500 million to settle charges of alleged tax fraud.

On January 29, 2020, Airbus SE also entered into a CJIP with the PNF and agreed to pay €2.1 billion to settle criminal charges of alleged bribery, including bribery of foreign officials. This

settlement was part of the global resolution totalling €3.6 billion with French, U.K. and U.S. enforcement authorities to settle charges including alleged bribery of foreign officials and breach of U.S. arms export regulation.

In late 2019 and early 2020, the AMF Enforcement Committee also imposed important fines to a number of U.S. and U.K companies, including €5 million against Bloomberg LP for dissemination of false information; and €20 million against Morgan Stanley & Co International Plc for price manipulation of sovereign bonds and of a sovereign bond futures contract. These companies have appealed the decisions.

2 Organisation of the Courts

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

Criminal violations are divided into three categories, which determine the applicable procedures and the participants in the process.

High crimes (*crimes*) are criminal matters punishable by imprisonment of more than 10 years. They are always prosecuted by an investigating judge and are tried before a mixed jury in a special court (*cour d'assises*). Since May 2019, a new type of criminal court (*cour criminelle*) is being tested for a three-year period in several local districts. This court has jurisdiction over high crimes punishable by up to 15 to 20 years in prison, except in case of recidivism. Trial before this court does not take place before a jury, but before a panel of five judges.

Ordinary crimes (*délits*) are violations punishable by imprisonment from two months up to 10 years and by financial penalties. They are generally prosecuted by a public prosecutor, with an investigating judge appointed in cases of complex violations. Ordinary crimes are tried before a criminal court of first instance without a jury (*tribunal correctionnel*).

Misdemeanours (*contraventions*) are violations punishable by financial penalties, and they are tried by a police court (*tribunal de police*).

Most business crimes are ordinary crimes. However, some business crimes are not treated as ordinary crimes, but rather as "administrative offences". As such, they are not tried before regular criminal courts. For instance, cartels are tried before the Competition Authority, and market abuses are tried before the AMF Enforcement Committee (unless they are subject to regular criminal prosecution by the PNF).

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

Since most business crimes fall within the category of ordinary crimes, they are usually tried before a criminal court of first instance (*tribunal correctionnel*) before professional judges and without a jury.

3 Particular Statutes and Crimes

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

• Securities fraud

Most of the regulations governing securities violations originate from the 2014 EU market abuse regulation n°596/2014 and the April 16, 2014 directive n°2014/57/EU. The regulation and directive have been codified in the French Monetary and Financial Code (*Code Monétaire et Financier*, "**CMF**").

The main offences related to financial markets are insider trading (*délit d'initié*) and market manipulation (*manipulation de marché*) (see below).

If prosecuted by the PNF, an individual found guilty of market abuse may be sentenced by a criminal court to five years' imprisonment and a €100 million fine, or 10 times the amount of the profit realised. A corporation may be penalised with a €500 million fine, 10 times the amount of the profit realised, or 15% of its annual consolidated turnover. If prosecuted by the AMF, an individual does not face a prison sentence but may be sentenced to a €100 million fine or 10 times the amount of the profit realised. A corporation may be penalised with a €100 million fine, 10 times the amount of the profit realised, or 15% of its annual consolidated turnover.

Awareness of committing a violation is required to establish a criminal offence, but it is usually not required to establish an administrative offence. Attempted market abuse is punishable before both the criminal courts and the AMF Enforcement Committee.

• Accounting fraud

Pursuant to Article L.242-6 of the French Commercial Code, directors may be criminally liable for falsifying financial statements. This offence is punishable by up to five years' imprisonment and a €375,000 fine.

Fraudulent management leading to bankruptcy is punishable by up to five years' imprisonment and a €75,000 fine (Article L.654-3 *et seq.* of the Commercial Code). Fraudulently organising one's insolvency in order to evade a criminal conviction or a civil sanction is punishable by up to three years' imprisonment and a €45,000 fine (Article 314-7 of the Criminal Code).

• Insider trading

The insider trading crime (*délit d'initié*), which can only be prosecuted by the PNF, is defined by Article L.465-1 of the CMF. The related administrative offence (*manquement d'initié*), to be prosecuted by the AMF, is defined by Article 8 of the EU market abuse regulation.

Insider trading is committed when a party deals – or recommends that another person deal – in securities on the basis of insider information, that is, information that is not publicly known and which would affect the price of the securities, if it were made public.

The regulation against insider trading applies to any person who possesses inside information as a result of their: (a) position as a member of the administrative, managerial or supervisory bodies of the issuer; (b) position in the capital of the issuer; (c) access to the information through the exercise of his or her employment, profession or duties; or (d) involvement in criminal activities. The prohibition also applies to any other person who possesses insider information under circumstances in which that person knows or ought to know that it is inside information.

For applicable sanctions, see above: "Securities fraud".

• Embezzlement

The misuse of corporate assets (*abus de biens sociaux*) is an offence that concerns corporate managers who directly or indirectly use corporate property for purposes which are inconsistent with the interests of the company they manage (Articles L.241-3 and L.242-6 of the Commercial Code). It is punishable by five years' imprisonment and a fine of €375,000. If the offence was facilitated by foreign accounts, the offence is punishable by seven years' imprisonment and a fine of €500,000.

Breach of trust is an offence that consists of the misappropriation of funds or property, which were received based on

an understanding that they would be handled in a certain way (Article 314-1 of the Criminal Code). This offence is punishable by three years' imprisonment and a fine of €375,000.

• Bribery of government officials

Both passive corruption and active corruption are unlawful under French law. Passive corruption occurs when a domestic or foreign public official unlawfully solicits or accepts a bribe, either directly or indirectly. Active corruption occurs when another person, either directly or indirectly, unlawfully induces, or attempts to induce, a domestic or foreign public official or private actor to accept a bribe (Articles 433-1 and 433-2 of the Criminal Code).

For individuals, bribery is punishable by up to 10 years' imprisonment and a fine of up to €1 million, or up to twice the amount gained in the commission of the offence. For companies, the fine is up to €5 million or up to 10 times the amount gained.

Influence peddling is also punishable under French law. This offence consists of the abuse of one's real or apparent influence with intent to obtain advantages, employment, contracts or any other favourable decision from a public authority or the government. It is punishable by five years' imprisonment and a fine of €500,000.

• Criminal anti-competition

Under French law, cartels are not criminal wrongdoings but are administrative offences (see below, "Cartels and other competition offences"). However, it is an ordinary crime (*délit*) for any individual – but not a corporate entity – to fraudulently participate personally and significantly in the conception, organisation, or implementation of a cartel (Article L.420-6 of the Commercial Code). The criminal sanction amounts to four years' imprisonment and a €75,000 fine.

Other anti-competitive practices may be criminally prosecuted: selling a product at a loss (*revente à perte*) is punishable by a €75,000 fine (Article L.442-5 of the Commercial Code), and artificially modifying the price of goods and services (*action illicite sur les prix*) is punishable by two years' imprisonment and a €30,000 fine (Article L.443-2 of the Commercial Code).

• Cartels and other competition offences

Cartels are prohibited by Article L.420-1 of the Commercial Code. This statute prohibits concerted practices, agreements, express or tacit cartels, or combinations when they aim to limit market access, serve as barriers to price determination by the free market, limit or control production, market investment or technical development, or share markets or sources of supply.

Under Article L.420-2 of the Commercial Code, a corporation or a group of corporations is also prohibited from abusing a dominant position in an internal market or in a substantial part of an internal market. The following actions could constitute abuse of a dominant position: a refusal of sale; tied sales; discriminatory sales terms; or the breaking of an established commercial relationship, for the sole reason of a refusal by a commercial partner to submit to unjustified commercial terms. The exploitation by a corporation or a group of corporations of a client or a supplier's state of economic dependence is also prohibited by the same article.

Offering sale prices or determining consumer prices that are abusively low compared to the cost of production, transformation and commercialisation, where these offers or practices have as a goal or could have the effect of eliminating from a market or preventing access to a market with respect to an enterprise or one of its products, are also prohibited by Article L.420-5 of the Commercial Code.

These competition offences are prosecuted and sanctioned as administrative violations by the Competition Authority. According to Article L.464-2 of the Commercial Code, the Competition Authority may take any of the following actions:

- Order the end of the anti-competitive activity within a fixed period or impose specific conditions.
- Accept commitments proposed by companies or organisations that are likely to rectify their competition issues that may amount to competition violations.
- Apply an immediate pecuniary sanction or apply a pecuniary sanction in the event of a failure to respect the terms of an injunction, or of a failure to respect commitments that have been accepted.

The maximum sanction for an individual is €3 million, and the maximum sanction for an entity is 10% of its global annual turnover before taxes. Final decisions of the Competition Authority may be appealed before the Paris Court of Appeal.

• Tax crimes

Tax fraud is an ordinary crime (*délit*) prohibited by Article 1741 of the General Tax Code (*Code Général des Impôts*): "Anyone who fraudulently evades assessment or payment in whole or in part of the taxes with which this Code is concerned or attempts to do so, whether by wilfully omitting to make his return within the prescribed time, by wilfully concealing part of the sums liable to tax, by arranging his insolvency, by obstructing the collection of tax by other subterfuges, or by acting in any other fraudulent manner, shall be liable."

Tax fraud is punishable by five years' imprisonment and a €500,000 fine or up to double the proceeds of the offence. If committed by an organised group, and in some limited circumstances (including foreign domiciliation), tax fraud is punishable by seven years' imprisonment and a €3 million fine or up to double the proceeds of the offence. Because they face a maximum fine of five times that which is applicable to natural persons, legal entities responsible for tax fraud may pay a fine of up to €15 million, or 10 times the proceeds of the offence.

• Government-contracting fraud

Government-contracting fraud mainly refers to favouritism (*favoritisme*). For a public official, favouritism means conferring an unjustified competitive advantage to a person that would lead to different treatment among candidates. This offence is punishable by up to two years' imprisonment and a €200,000 fine (Article 432-14 of the Criminal Code).

• Environmental crimes

Criminal environmental offences are outlined in both the Criminal Code and the Environmental Code.

The Criminal Code contains only one specific crime relating to the environment: "ecologic terrorism", which is defined as "the introduction into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment" (Article 421-2 of the Criminal Code).

Although not directly related to the protection of the environment, several other provisions are also used as legal bases for prosecution when damage to the environment occurs: endangering the lives of others (Article 223-1 of the Criminal Code), unintentional injury (Articles 222-19 and 222-20 of the Criminal Code), and manslaughter (Article 221-6 of the Criminal Code).

The Environmental Code contains numerous specific criminal offences relating to the environment, including, for instance, offences related to water pollution, air pollution, nuclear materials, protected species, ozone-depleting substances, and ship-source pollution.

• Campaign-finance/election law

Pursuant to Article L.52-8 of the Electoral Code, it is unlawful for businesses to finance electoral campaigns. Individuals'

contributions may not exceed €4,600 per person. Candidates or funders who violate this provision face sanctions of up to three years' imprisonment and a fine of up to €45,000, pursuant to Article L.113-1 of the Electoral Code.

• Market manipulation in connection with the sale of derivatives

The market manipulation crime (*manipulation de marché*), which can only be prosecuted by the PNF, is defined by Article L.465-3-1 of the CMF. The related administrative offence, to be prosecuted by the AMF, is prohibited by Article 12 of the EU market abuse regulation. Both offences apply in connection to the sale of financial instruments, including derivatives.

Market manipulation applies to any person who: (i) enters into a transaction that gives false or misleading signals to the market or secures the price of a financial instrument at an abnormal or artificial level; (ii) enters into a transaction that affects the price of a financial instrument by means of employing a fictitious device or any other form of deception or contrivance; or (iii) disseminates information that gives false or misleading signals to the market or is likely to secure the price of a financial instrument at an abnormal or artificial level, if the person who disseminated the information knew, or ought to have known, that the information was false or misleading.

For applicable sanctions, see above: "Securities fraud".

• Money laundering or wire fraud

Money laundering consists of fraudulently hiding the origin or the nature of funds or property (Article 324-1 of the Criminal Code). Individuals may be punished by up to five years' imprisonment and a €375,000 fine. These sanctions are doubled if committed by an organised group. Entities committing money laundering may be subject to a fine of €1,875,000 (€3,750,000 if committed by an organised group). These fines may be raised to up to half of the value of the property or funds with which the money laundering operations were carried out (Article 324-3 of the Criminal Code).

"Mail fraud" and "wire fraud" provisions of the U.S. Criminal Code (18 U.S.C. §§1341 and 1343) do not have a French equivalent. Rather, fraudulent conduct can be an element of various criminal provisions arising under the Criminal Code.

• Cybersecurity and data protection law

Principal cyber activities criminalised under French law are intrusions into information systems, removal or alteration of data, breach of data (such as passwords, email addresses and home addresses), the infection of a company's network by a Trojan horse, telephone tapping or call recordings, theft of computer files and documents, theft of digital identity and phishing attacks. Pursuant to Articles 323-1, 323-2 and 323-5 of the Criminal Code, sanctions range from two to five years' imprisonment, fines of up to €300,000, and ancillary sanctions such as forfeiture, debarment and deprivation of civil rights.

• Trade sanctions and export control violations

Trade sanctions and export control violations are prohibited by Article 459, para. 1, of the Customs Code, which imposes five years' imprisonment, confiscation of the object of the infraction, confiscation of the means of transport used for the fraud, confiscation of the goods or assets that are the direct or indirect product of the offence and a fine equal to, at a minimum, the amount at issue, and at maximum, double the proceeds of the offence or attempted offence.

Any person who induces the commission of one of the offences under Article 459, para. 1, of the Customs Code by means of writing, propaganda, or publicity may be subject to five years' imprisonment and a fine ranging from €450 to €225,000 (Article 459, para. 3, of the Customs Code).

• Any other crime of particular interest in your jurisdiction

Swindling (*escroquerie*): depriving a physical person or a company of money, a thing of value or services, or inducing the discharge of a debt by trickery, including by use of a false name, identity or pretences (Article 313-1 of the Criminal Code).

Breach of trust (*abus de confiance*): misappropriation of funds or property received based on an understanding that they would be handled in a certain way (Article 314-1 of the Criminal Code).

Taking advantage (*abus de faiblesse*): causing a victim to act or abstain from acting in a way that causes the victim injury, by taking advantage of a state of ignorance, weakness or vulnerability, including through use of psychological pressure (Article 223-15-2 of the Criminal Code).

Extortion (*extorsion*): obtaining anything of value (information, funds, signatures, etc.) through violence or threat of violence (Article 312-1 of the Criminal Code).

Falsification (*faux*): fraudulent alteration of the veracity of a document or other medium that creates a right or obligation (Article 441-1 of the Criminal Code).

Consumer fraud (*tromperie*): deceiving a purchaser regarding the nature, quality, quantity or appropriateness of merchandise (Article L.213-1 of the Consumer Code).

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

Yes, there is liability for inchoate crimes in France. Pursuant to Article 121-5 of the Criminal Code, the attempt to commit a crime is punishable when, in the process of its execution, the wrongdoing was stopped or prevented from achieving its effect due to circumstances beyond the control of the actor. Attempts to commit a serious crime (*crimes*) are always punishable. Attempts to commit an ordinary crime (*délit*) are punishable only if provided for by the law (Article 121-4 of the Criminal Code). One who attempts to commit a crime faces the same maximum sanctions as one who commits a crime.

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?

Corporations – or legal entities other than the French state – may be held criminally responsible under Article 121-2 of the Criminal Code. Such entities may be found guilty for acts committed on their behalf (or for their benefit) by responsible individuals, referenced in the Code as "organs" or "representatives" of the entities.

An "organ" is generally an individual or group of individuals exercising powers inherent in their position in the entities or derived from an entity's constituent documents or internal governance. A "representative" is generally someone to whom certain responsibilities have been delegated by the entity. Court decisions are still in the process of clarifying who may be characterised as an "organ" or "representative".

The principal sanction incurred by corporate entities is a fine. The maximum amount of this fine is five times the fine that would be applicable to natural persons for the same crime. In the case of high crimes (*crimes*), when the law makes no provision for a fine to be paid by a natural person, the fine incurred by a corporate entity is €1 million. Corporate entities may also be

punished with one or more additional penalties including: placement under judicial supervision; debarment; prohibition from offering securities to the public or listing securities on regulated markets, either permanently or for a maximum of five years; and/or forfeiture of property that was used or intended for the commission of the offence or property resulting from the crime.

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

The establishment of corporate criminal responsibility does not exclude the possibility of individual responsibility for the same facts. Aside from any corporate criminal responsibility, a managing director (*chef d'entreprise*) may be criminally responsible for acts committed within a corporation subject to his supervision, unless these acts fall within the scope of a specific delegation of authority to another officer or employee in relation to a specific activity (e.g., employee's health and safety).

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?

In a non-binding memorandum (*circulaire*) to public prosecutors, dated February 13, 2016, the French Ministry of Justice recommends the pursuit of both the legal entity and the individual (organ or representative) if the offence is considered to have been intentionally committed. Otherwise, the prosecution should only target the corporation.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The French Court of Cassation has dismissed criminal proceedings against an acquiring company for acts previously committed by the target company. In a March 2015 decision, the European Court of Justice held otherwise, ruling that an acquisition results in the transfer to the acquiring company of the obligation to pay the fine imposed by a final decision, issued after the acquisition, for infringements of employment law committed by the target company prior to that acquisition. However, in a decision dated October 25, 2016 (No 16-80366), the French Court of Cassation maintained its traditional position.

5 Statutes of Limitations

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

In February 2017, a new law extended the statute of limitations applicable for criminal prosecution. The limitations period has been extended to 10 to 20 years for high crimes (*crimes*) and three to six years for ordinary crimes (*délits*). For concealed infringement, the limitations period for prosecution begins running from the day on which the infringement is established. However, this period must not exceed 30 years for high crimes and 12 years for ordinary crimes from the day on which the crime was committed.

These new statutes of limitations apply to all crimes since March 1, 2017, including crimes committed prior to this date, if the previously applicable statute of limitations has not expired prior to such date.

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

The limitations period starts running once the offence is entirely completed. For continuous offences – offences that are not completed instantly but over a period of time – the limitations period begins running only once the offence has reached completion. A continuous offence may therefore be prosecuted during its commission and during the provided limitations period after its completion. For concealed infringement, the limitations period for prosecution starts from the day on which the infringement is established (see above: question 5.1).

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

Limitations periods may be either "interrupted", at which point the limitations period starts anew following the interruption, or "suspended", at which point the remaining period keeps running after the suspension. The statutes of limitations reform from February 2017 codified situations giving rise to interruptions and suspensions of limitations periods, referring to previous case law:

- Interruption is caused by: any acts by the public prosecutor or any civil party to initiate proceedings; any investigative acts by the public prosecutor, the police, any authorised agent or the investigating judge to search and prosecute the actor; or any judicial decision (Article 9-2 of the Code of Criminal Proceeding).
- Suspension is caused by: any legal obstacle or acts of *force majeure* that make the opening of criminal proceedings impossible (Article 9-3 of the Code of Criminal Proceeding).

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

French criminal law applies to offences for which one component has taken place on French soil, the perpetrator is a French national or corporation, or the victim is French (Articles 113-6 to 113-12 of the Criminal Code).

Specifically for acts of corruption and influence peddling, French law applies to acts committed abroad, so long as the perpetrator is a French national, a French resident or someone engaged in, in whole or in part, business in France (regardless of the nationality of the victim).

Criminal procedures applicable to prosecutions of acts committed outside of France may be different from procedures that are applicable to domestic crimes.

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

For most business crimes, investigations are initiated and led by a public prosecutor (such as the PNF). Sometimes the public

prosecutor may refer the case to an investigating judge, who then leads the investigation and has the discretion to either drop some or all of the charges or to turn the case over for trial. Both the public prosecutor and the investigating judge work in close connection with the police.

Investigations are usually opened on the basis of victim complaints, reports from another public authority, or press reports. If the public prosecutor does not prosecute, victims may request that an investigating judge commence a criminal investigation and may participate in the investigation (and in the trial) as "civil parties" (*parties civiles*).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

In May 2017, the European Investigation Order (*Décision d'Enquête Européenne*) entered into force (Articles 694-15 to 694-49 of the Code of Criminal Procedure). This new tool created by EU Directive 2014/41/EU of April 3, 2014 aims to simplify and speed up cross-border criminal investigations in the EU. It enables judicial authorities in one EU Member State to request that evidence be gathered and transferred from another EU Member State. This new instrument replaces the existing fragmented legal framework for obtaining evidence within the EU.

France is also a signatory to a number of international agreements providing for cooperation in criminal matters. These include: bilateral extradition agreements with France's trading partners; European conventions relating to extradition from France to other European countries; more specialised agreements, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, which requires cooperation among its signatories; numerous bilateral mutual legal assistance treaties; and memoranda of understanding with most of France's trading partners.

France has designated a special office of the Ministry of Justice to handle requests made under such treaties. The Ministry of Justice, the AMF and other organisations also have practical relationships with their foreign counterparts (such as the U.S. Securities and Exchange Commission). The U.S. currently stations a federal prosecutor and several agents of the Federal Bureau of Investigation at its embassy in Paris. Their work includes coordinating cross-border cooperation with their French counterparts, with whom they generally have a good relationship.

7 Procedures for Gathering Information from a Company

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

Both the public prosecutor and the investigating judge, who work in conjunction with the police, have a full range of investigative powers (e.g. dawn raids, seizure of documents, wire taping and interviews). The scope of these prosecution powers will generally vary depending on the type of investigation. Investigations may take three different forms:

- A "flagrant offence investigation", led by the public prosecutor (*enquête de flagrance*), occurs when a crime punishable by imprisonment is in the process of being committed or has just been committed or if the suspect is found in the possession of something which would implicate his or her participation in the offence. This investigation allows for a wide variety of temporary detention, interrogation, search and seizure powers.
- A "preliminary investigation", led by the public prosecutor (*enquête préliminaire*), may be used in any case, regardless of the nature of the crime. Suspects must normally give their consent to searches or seizures. In general, no coercive measures are allowed.
- A "judicial investigation", led by an investigating judge (*information judiciaire* or *instruction*), occurs when the investigating judge is appointed by a public prosecutor. The investigating judge enjoys very broad powers of arrest, interrogation of witnesses and suspects, search and seizure.

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?

Both the public prosecutor and the investigating judge may demand that a company under investigation produce documents and/or raid a company. The circumstances will depend on the type of investigation (see above: question 7.1). Administrative authorities with authority to investigate and sanction administrative offences (such as the AMF or the ACPR) may also conduct investigations and demand that documents be produced; however, for these authorities, judicial authorisation is usually required for any raid involving seizure of documents.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

During a raid, all employee documents may be seized irrespective of whether they are personal or work-related. The banking secrecy rule (*secret bancaire*) may not be invoked.

The only available protection is "professional secrecy" (*secret professionnel*), the French near equivalent of "attorney-client privilege", which protects all communications between external counsel members of the bar (*avocat*) and their clients from disclosure. Professional secrecy therefore provides significant protection to individuals under investigation. In-house counsel are, however, not considered members of a bar, and professional secrecy does not protect their communications with the officers or employees of the company.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

No labour law impacts the collection, processing, or transfer of employees' personal data in the context of criminal investigations. All documents, files, emails, etc. located on an employee's

device provided by the employer may be seized during police raids, irrespective of whether they are personal or work-related.

With regard to data protection, Law No. 2018-496 of June 20, 2018, which implements EU Directive 2016/680 of April 27, 2016, lays down the rules related to the protection of natural persons with respect to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the enforcement of criminal penalties. The subjects of the data – including employees – have certain rights outlined in Articles 70-18 to 70-20 of the Law (e.g. right of access, rectification or erasure of personal data). However, under certain conditions, these rights may be restricted in order to, for instance, avoid obstructing official or legal inquiries, investigations or procedures or avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the enforcement of criminal penalties. If the personal data are contained in a judicial decision, record or case file processed in the course of criminal investigations and proceedings, right of access, rectification or erasure of personal data are governed by provisions of the Code of Criminal Procedure.

Cross-border disclosure may be impeded by the French blocking statute (Law No. 68-678 of July 26, 1968, as amended in 1980), which makes it a criminal offence for any person to provide information of scientific or commercial value to a foreign investigator or court for use in a non-French judicial or administrative proceeding, other than through the exercise of an international agreement.

7.5 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?

See above: questions 7.1 and 7.2.

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

Authorities may order any third party to produce documents relevant to an investigation. Third parties may not invoke professional secrecy, unless they have "legitimate grounds". In a memorandum (*circulaire*) of May 14, 2004, the French Ministry of Justice interpreted "legitimate grounds" restrictively. Unless they are suspects, third parties may not be raided.

Questioning of Individuals:

7.7 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?

Employees, officers, or directors of a company under investigation may be questioned in custody (*garde à vue*) if there are one or more plausible reasons to suspect that they have committed, or attempted to commit, a crime punishable by a prison sentence (Article 62-2 of the Code of Criminal Proceeding). The questioning may last for a period of 24 hours (subject to several renewal periods, depending on the crime). They may be assisted by an attorney.

They may alternatively be questioned under a non-custodial regime (*audition libre de suspect*). They must give their consent and must be notified of the date and nature of the crime, as well as of their right to attorney representation and right to terminate the interview and leave at their discretion (Article 61-1 of the Code of Criminal Proceeding).

If there is no plausible reason to suspect that they have committed or have attempted to commit a crime, they may only be interviewed as witnesses, with no right to assistance by counsel (Article 62 of the Code of Criminal Proceeding).

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

If there is no plausible reason to suspect they have committed or attempted to commit a crime, third parties may be questioned as witnesses (see above: question 7.7).

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Suspects questioned under the *garde à vue* or *audition libre* regimes have a right to be assisted by an attorney (see above: question 7.7). They also have a right to remain silent. In theory, no inferences may be drawn from silence, but in practice, the court will usually question the defendant's "refusal" to answer questions asked by authorities.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated by public prosecutors, or under certain conditions by the victims of crimes (see questions 1.1 and 6.2).

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

For most crimes, the decision to charge a defendant belongs to a prosecutor; subject, however, to policy guidelines that may be established by the Ministry of Justice. Where no investigating judge is appointed, the public prosecutor also has the authority to refer the defendant to trial before the criminal court of first instance for trial (*citation directe*).

In complex cases, the public prosecutor may request that the presiding judge of the local court appoint an investigating judge to investigate the facts that the prosecutor lays out. Under certain conditions, victims may also request that an investigating judge investigate the facts they set out in a complaint. If the investigating judge decides that there are important and consistent indications of culpability of a person or entity, this defendant will be put under formal investigation (*mise en examen* status), which provides the defendant with certain rights and protection. The investigating judge may eventually either drop some or all of the charges against a defendant, or decide to refer the defendant to trial.

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

A pre-trial guilty plea procedure exists for most ordinary crimes, including business crimes (*comparution sur reconnaissance préalable de culpabilité*, "**CRPC**"). This procedure may be initiated by the public prosecutor of his own initiative, at the request of the defendant or, under certain conditions, by an investigating judge. The defendant agrees to plead guilty to a particular charge in return for a more lenient sentence. The public prosecutor may propose a prison sentence not exceeding three years and a fine not exceeding the maximum amount faced before the criminal court. If the defendant accepts the agreement, the agreement can only become effective with the approval of the court. If the defendant refuses the proposed agreement, the case will be tried in the usual way.

Specifically for corruption, influence peddling, tax fraud and laundering of proceeds of tax fraud, the Sapin II Law of December 2016 introduced a new procedure called a *convention judiciaire d'intérêt public* ("**CJIP**"), which is roughly similar to a Deferred Prosecution Agreement in the U.S. and the UK. The CJIP permits a public prosecutor to propose an agreement by which a corporation, without admission of guilt, would agree to pay a fine as high as 30% of its annual turnover and may agree to certain other obligations, such as the implementation of an enhanced compliance programme and supervision by a monitor. If an investigating judge leads the investigation, and the corporation is under formal investigation (*mise en examen*), the defendant corporation may only benefit from a CJIP upon formal acknowledgment of the facts and its legal characterisation – still without an admission of guilt – and once the investigating judge has concluded that there exist sufficient facts to constitute the commission of a criminal offence. If victims are identified, the CJIP must also provide for their compensation for losses resulting from the wrongdoing, which must be paid within one year. A CJIP may only be finalised following approval by a judge at a public hearing, at which the judge reviews the validity and regularity of the procedure, as well as the conformity of the amount of the fine to the statutory limit and the proportionality of the agreed-upon measures. The decision may not be appealed, and the agreement does not have the effect of a conviction. If the corporation observes the terms of the agreement, the charges will be dismissed, giving the corporation protection against prosecution in France for the facts giving rise to the CJIP. On June 27, 2019, the PNF and the AFA published their first joint guidelines on the CJIP procedure.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

See question 8.3. A CJIP may only be finalised following approval by a judge at a public hearing, at which the judge reviews whether the procedure has been correctly implemented, that the agreed upon sanction is within statutory limitations, and that the overall sanction is in proportion to the facts giving rise to the CJIP. Courts conduct similar reviews in respect of CRPCs.

8.5 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 may apply.

Any victim who has personally and directly suffered harm due to a criminal offence may participate in the criminal procedure as a civil party and seek damages before the criminal court (Article 2 of the Code of Criminal Procedure).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

There is a presumption of innocence in France – a person is presumed innocent until proven guilty. It is for the public prosecutor to build the case and to produce sufficient evidence at trial in order to convince the court of the defendant's guilt. Any remaining doubt should weigh in favour of the defendant.

With respect to affirmative defences, the burden of proof shifts to the party raising them.

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

There is no statutory standard of proof to be met by the prosecution. Trial judges rule on the basis of their "innermost convictions" (*intime conviction*).

Because a public prosecutor has the burden of proving the defendant's guilt, he must convince the court that all factual and legal elements of the offence have been met and that the defendant had the requisite intent to commit the offence.

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

Trial judges decide on the facts and assess whether the prosecutor and the defendant have both satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

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

Yes, French law recognises the principle of "aiding and abetting" (*complicité*). An accomplice is a person who knowingly provided assistance and facilitated the preparation of a criminal offence. A person is also an accomplice if he or she has precipitated an offence through gifts, promises, threats, orders, abuse of authority or power or has given instruction to commit it. The accomplice may be punished in the same manner as the principal perpetrator of the offence, and may incur the same maximum penalty (Articles 121-6 and 121-7 of the Criminal Code).

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?

Under French criminal law, crimes may be either intentional or unintentional. Where intent is required, it falls on the public prosecutor to prove that the defendant intended to commit the crime for which he or she is being prosecuted.

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?

Ignorance of the law is generally not a defence. However, there exists one statutory defence based on an erroneous understanding of the law: if a defendant, based on a mistake in the law that he or she was not in a position to avoid, can prove that he or she believed that the action could be legitimately performed, then the defendant is not criminally liable (Article 122-3 of the Criminal Code).

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?

Ignorance of the facts does not constitute a defence. Where a defendant ignores that he or she has engaged in conduct that he or she knows is unlawful, this may open the possibility of a lack of intent defence, depending on the nature of the crime at issue.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Any person who has knowledge of a high crime, the consequences of which it is still possible to prevent or limit, must report it to the authorities. Failure to report may be punished by three years' imprisonment and a fine of €45,000 (Article 434-1 of the Criminal Code). This obligation does not, however, apply to persons bound by statutory professional secrecy obligations (including external counsel).

Auditors must report business-related offences that they are aware of to a public prosecutor. Failure to report is punishable by five years' imprisonment and a €75,000 fine (Article L.820-7 of the Commercial Code).

Civil servants who, in the performance of their duties, become aware of a crime must report it without delay to the public prosecutor and must provide all relevant information, minutes and documents relating to the report (Article 40 of the Code of Criminal Procedure). However, failure to report is not punishable.

Whistle-blowers may reveal possible criminal activity to French authorities. A person who legally qualifies as a whistle-blower and complies with the procedure for reporting provided by this law may not be held criminally liable for disclosing confidential information, as long as this action was necessary and proportionate to the safeguards of the interests involved. The whistle-blower may not be discriminated against nor have his or her employment terminated on the grounds of this disclosure.

There is no provision under French law for the payment of a "bounty" to a whistle-blower. However, since 2017, the French tax administration may reward "informants" who report misconducts relating to specific French provisions governing international taxation. The amount of the reward is calculated by reference to the evaded amounts.

13 Cooperation Provisions / Leniency

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

France has no strong traditions or criminal procedures that encourage "self-reporting". Since 2013, however, perpetrators or accomplices to an offence of bribery or influence peddling of public officials or judicial staff will have their sanctions reduced by half if, by having informed administrative or judicial authorities, they enabled them to put a stop to the offence or to identify other perpetrators or accomplices. In a non-binding memorandum (*circulaire*) to public prosecutors dated January 31, 2018, the French Ministry of Justice also recommended that public prosecutors take into account self-reporting when deciding whether to offer a CJIP (the French-style DPA) to a corporation and when negotiating the amount of the fine. In non-binding guidelines dated June 26, 2019, the PNF and the AFA also said self-reporting would be taken into account in the context of CJIP resolutions. With regard to cartels, the first company to alert the authorities may avoid prosecution.

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

Apart from leniency programmes available before the French Competition Authority in the context of competition-related offences, no guidelines have been issued.

However, in the context of some specific corporate crimes (e.g. corruption and tax fraud), the PNF and other prosecutors' offices have discretion to propose resolving a case through a CJIP. The guidelines dated June 26, 2019 list factors that will be considered by the PNF before deciding to do so, including: (i) self-reporting within a reasonable time following the discovery of misconduct; and (ii) the degree of cooperation with prosecution authorities. In that context, cooperation primarily means conducting a thorough internal investigation, resulting in a report that is made available to the PNF along with all relevant documents and testimony. The CJIP concluded between the PNF and Airbus SE in January 2020 provides useful indications about the degree of cooperation expected by the PNF.

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?

See question 8.3.

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?

See question 8.4.

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 a sentence on the defendant? Please describe the sentencing process.

Sentencing guidelines are alien to the French system. French courts have the discretion to impose penalties of up to the maximum amount provided for by statutes. The sanction must, however, be proportionate to the seriousness of the offence and to the offender's personality. For each offence, the statutes provide for the maximum jail time and fine amount faced by natural persons. Legal entities face fines of up to five times the amount applicable to natural persons.

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.

In addition to respecting sentencing rules codified in the Criminal Code and the Code of Criminal Procedure, courts must respect formal requirements related to discussions and decisions (debates among judges sitting on the court are in chamber with no-one from the public, decisions must be in writing and set out the reasons for the decisions, decisions must be first given during an oral hearing, etc.).

16 Appeals

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

Yes, guilty or non-guilty verdicts are appealable by the defendant and by the public prosecutor. A civil party (*partie civile*) may only appeal the part of a non-guilty verdict that relates to damages.

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

Yes, a criminal sentence may be appealed by both the defendant and the public prosecutor. A civil party (*partie civile*) may only appeal a criminal sentence following a guilty verdict with respect to the amount of damages granted by the criminal court.

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

The standard of review utilised by the criminal court of appeals is identical to the standard used in the court of first instance. An appeal is essentially a *de novo* review: an appeal takes the form of a retrial by the appellate court based on elements of law and fact. By contrast, court of appeals decisions may be subject to review by the French Court of Cassation only on issues of law.

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

Under French criminal law, an appeal has suspensive effect. Courts of appeals have the authority to acquit the accused (of all charges or of some counts) or to modify the sentence.

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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?

In Germany, public prosecutor's offices are responsible for the prosecution of "general" criminal offences. Public prosecutors act on a regional level. Their jurisdiction is generally determined by the place where the crime is committed. Public prosecutors are in command of police forces who conduct the actual investigation.

Apart from genuine criminal offences, other authorities are in charge of investigating criminal offences that require special knowledge:

- Violations of the German Securities Trading Act (WpHG), i.e. regulatory market manipulations, may be investigated by the Federal Financial Supervisory Authority (BaFin).
- Violations of anti-trust law are investigated by the Federal Cartel Office (*Bundeskartellamt*, FCO). Further, the European Commission in Brussels may investigate in case of suspected violations that affect trade between Member States of the European Union.
- Violations against foreign trade law and illegal employment are investigated by the customs authorities.
- Tax crimes are prosecuted by the tax authorities.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

If a case that is investigated by a specialised authority, as mentioned above, is intertwined with other crimes, the public prosecutor can investigate next to the specialised authority or, subject to the specific offence, step in and assume the lead of the investigation. For example, as far as anti-trust law violations are concerned, the FCO can investigate and impose fines against companies. The public prosecutor remains responsible for investigations of individuals.

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?

There is no civil law enforcement by public authorities. A party damaged by crime may seek claims for compensation by filing a civil lawsuit. In this context, the damaged party can rely on support by official authorities. The authorities can, *i.a.*, secure asset recovery by seizing assets of the perpetrator or by freezing bank accounts. The damaged party is usually entitled to inspect the criminal file to collect evidence for claims for damages.

An administrative fine according to the regulatory offences act (OWiG) can be imposed on a company if their representatives commit criminal offences or violations of the regulatory offences act. In this regard, the most "common" offence committed by a representative is the omission to prevent criminal behaviour from within the company. Hence, if a company fails to put in place adequate compliance measures and then an employee or representative commits criminal offences, and an administrative fine of up to €10,000,000 can be imposed.

Please note: Administrative fines may lose their importance soon since the national government has just released a code on corporate criminal liability, which will come into force soon (please see question 4.1). According to the draft, companies subject to corporate criminal liability most likely will not face administrative fines for the same offence.

Additionally, there is the possibility of profit skimming (Sec. 73 StGB, 17 OWiG). Authorities are entitled to skim all profits resulting from criminal behaviour without any limit. This, for example, led to a total fine/profit skimming against Volkswagen in the VW diesel emissions scandal of €1,000,000,000. Apart from this, the FCO imposes administrative fines amounting up to several billion euros against companies for anti-trust law violations on a regular basis.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

After the "Dieselgate" case dominated the press and legal practice in the last years, recent cases have involved the "Cum-Ex" case, in which numerous banks, companies and even law firms are under suspicion of having violated tax law and defrauded the state by claiming non-justified tax reimbursement. Apart from that, the very recent bankruptcy of DAX-listed company Wirecard is a prominent case with alleged accounting fraud reaching nearly €2.0 billion.

2 Organisation of the Courts

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

The Local Court (*Amtsgericht*), the Regional Courts (*Landgericht*) and the Higher Regional Court (*Oberlandesgericht*) have jurisdiction

in the first instance. The local courts may only impose prison sentences of up to four years in prison. Therefore, they are only in charge in cases of less serious crimes. Many regional courts provide for special chambers for white-collar crime stacked with particularly experienced judges. The Higher Regional Courts are only concerned in very few special cases such as terrorism or intelligence crime.

In the second instance, the Regional Courts, the Higher Regional Courts and the Federal Court of Justice (*Bundesgerichtshof*) have jurisdiction depending on the court of the first instance and the nature of the appeal.

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

German law does not provide for jury decisions.

3 Particular Statutes and Crimes

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

• Securities fraud

Sec. 264a of the German Criminal Code (StGB) prohibits the advertising of securities with false information. It is not necessary that the addressees of the advertising also bought the advertised securities.

The second important section is "general fraud" (Sec. 263 StGB). The scope is extensive. Criminal liability requires that the perpetrator deceives another person which causes a misconception because of which the deceived person damages his own assets. The perpetrator must have acted not only with intent but also with the intention to enrich himself or a third party. A factual damage is not necessary, but it is sufficient if a realistic threat to the assets of the deceived person has occurred.

• Accounting fraud

A member of a company's board or supervisory board who misrepresents or disguises the circumstances of the company in the opening balance sheet, the annual financial statements or the management report can be liable for accounting fraud (Sec. 331 of the German Commercial Code). In such cases there is also a high risk for bankruptcy offences (Secs 283 StGB *et seq.*). If managers manipulate financial figures to reach personal goals, e.g. through fake turnover, they can also be liable for fraud (Sec. 263 StGB).

• Insider trading

German law prohibits several forms of insider trading: attempting or engaging in insider trading; tempting or instigating a third party to engage in insider trading; and unlawfully disclosing insider information. Insider trading is defined as when a person acquires or sells a financial instrument directly or indirectly using insider information for his own account or that of third parties.

• Embezzlement

Embezzlement is one of the most controversial but also one of the most relevant criminal offences under German law. In a nutshell, criminal liability results out of an abuse of power of attorney regarding third parties' assets. Thus, only persons who are entrusted with the management of foreign assets can become perpetrators. This especially includes officers, directors and managers.

One of the most controversial cases in the last few years resulted in sentences for embezzlement against several bank managers who had made very risky business decisions. The courts held that this can be regarded as criminal offence if a damage for the bank was realistic and the managers had "closed their eyes" against such risk. In another very popular case, an ex-manager was found guilty for embezzlement because he had received inadequate bonus payments and used company transportation for private travel.

• Bribery of government officials

German law prohibits the bribing of German and foreign public officials in Germany as well as abroad. The benchmark for bribery is relatively low. It is already punishable to offer an advantage to a public official without influencing the public official's decisions at all (Secs 333 and 334 StGB).

Not just persons working for the government are regarded as public officials. It depends on the individual role of the person. The question of who qualifies as a public official does not depend on their formal role/position but on their individual function; it is sufficient that the person performs public administration tasks on the instructions of the administration.

• Criminal anti-competition

Bribing business partners' employees or representatives leads to criminal liability for both the giving and the receiving party. It is prohibited to offer, promise or grant (or to demand, be promised or receive) advantages if the receiving party, in return, breaches their duties towards their employer regarding the purchase of goods or commercial services.

Bribery in international business may be also punishable under Sec. 299 StGB. However, this will only be the case if German law can be applied to the offence. For example, if an act of bribery (only took) place abroad, German criminal law can (according to Sec. 7 StGB) still be applied, if the offender is German at the time of the crime and the crime is also punishable in the country where the crime was committed.

• Cartels and other competition offences

Restrictions of competition and abuse of national market power are prosecuted. Violations of these laws are administrative offences and can therefore be sanctioned with fines (Sec. 81 GWB, 30 OWiG). Both the EU Commission and the FCO use so-called key witness/bonus rules to determine cartels. A member of a cartel can avoid a fine or get a substantial reduction of its fine if it reports the cartel to the authorities.

Sec. 298 StGB prohibits agreements that restrict competition in tenders. Anyone submitting an offer in a tendering procedure for goods or services based on an illegal pricing agreement is liable to prosecution. The illegal pricing agreement does not have to lead to an award for one of the participating parties. The fact that the offer is based on an illegal agreement threatening the free market is sufficient for criminal liability.

• Tax crimes

A company's officer who provides incomplete or incorrect information or leaves the tax authorities unaware of tax-relevant information can be held liable for tax evasion (Sec. 370 AO). This often leaves managers in problematic situations after or during internal investigations. If they receive knowledge of criminal behaviour such as embezzlement or even bribery, this can lead to a duty to report such to the tax authorities since they may lead to errors in past tax declarations.

• Government-contracting fraud

Subsidy fraud (Sec. 264 StGB) requires fraudulent misrepresentation of facts relevant to subsidies to the subsidy provider by providing false information or certificates or by using the benefits in kind or in cash contrary to the subsidy restrictions. An actual financial loss of the subsidy provider is not necessary.

• Environmental crimes

German law provides for criminal offences in case of violation of administrative law regarding the areas of water, soil, nature, emission, radiation protection and protection against improper waste handling. The relevant provisions can be found in the StGB and in Codes of specific areas on administrative law. The respective offence presupposes a violation of the underlying regulations of administrative law.

• Campaign-finance/election law

Political parties are obliged to publish an annual report on the donations, which is examined by the President of the German Parliament. Donations over €10,000 must state the name of the donor. The law prohibits donations from certain donors such as public corporations, political foundations, certain foreign donors and anonymous donors. If a party violates these obligations, penalties apply.

• Market manipulation in connection with the sale of derivatives

Illegal market manipulation includes giving false or misleading signals about the supply, demand or price of a financial instrument by entering into a transaction, placing a trading order or any other action.

The ban on market manipulation covers in particular all financial instruments traded on a regulated market or organised trading system. In addition to securities (such as shares and bonds), this also includes money market instruments or derivative transactions if these depend on the price or value of a financial instrument or can have an impact on it. The ban also expressly includes goods traded on a domestic market and foreign currencies.

• Money laundering or wire fraud

Transfers of illegally acquired assets into the legal financial and economic cycle are regarded as money laundering, Sec. 261 StGB. All assets representing a certain value can be subject to money laundering, including cash and book money, securities, receivables, movable and immovable objects and electronic money.

However, only assets resulting out of specific criminal offences can be subject to money laundering. This includes, on the one hand, all felonies, i.e. offences punishable by imprisonment for no less than one year, and, on the other hand, offences that are explicitly named in Sec. 261 StGB including bribery and corruption or fraud and embezzlement in severe cases.

In contrast to receiving stolen goods (Sec. 259 StGB) the assets do not have to come directly from a preliminary offence. Money laundering also occurs when a surrogate object replaces the object directly derived from the offence. Sec. 261 StGB also applies to assets obtained abroad if the original offence is punishable abroad.

• Cybersecurity and data protection law

Sec. 202a StGB penalises the spying of data, meaning unauthorised access to data which is secured against unauthorised access by overcoming such access security. Sec. 202b StGB, extends the protection of secret areas, as special security access is not needed. Criminal liability requires that the offender obtains the data for himself or another person using technical tools. No storage or other recording is required for this. In addition to that the preparing of spying on data and catching of data as well as the trade with illegally obtained data are punishable (Sec. 202c, d StGB).

Data protection is regarded as an important matter in Germany. The Federal Data Protection Act (BDSG) prohibits the collection, processing and use of personal data in general. It is only permitted if either a clear legal basis is given or if the person concerned has expressly given his or her consent. Violations can be punished with severe penalties up to three years of imprisonment. It is of particular importance for international companies to know these legal regulations, as it is possible in many cases that German data protection law may apply to these companies, even if the company's registered office is not in Germany (Sec. 1 BDSG).

• Trade sanctions and export control violations

Like other countries, Germany restricts foreign trade regarding certain products, destinations and receiving parties. The main regulations in this regard are contained in the German Foreign Trade Act (AWG) specified on sanctions and embargo lists by German and European authorities.

Intentional violations of the AWG are usually a felony. In German law, intent can already be assumed if the offender considers the violation of the law as possible and accepts it approvingly. Negligent violations of the AWG are mainly punished as an administrative offence.

• Any other crime of particular interest in your jurisdiction

The German Code on the Protection of Business Secrets (GeschGehG) is relevant regarding the theft or abuse of business secrets. Criminal liability can result out of the betrayal of business and company secrets to unauthorised third parties by managers or staff as well as industrial espionage. In addition to this, also the exploitation of trade secrets that were subject to illegal extraction is a criminal offence. Exploitation includes any kind of economic use by unauthorised third parties.

Companies, however, must prove that they have taken adequate protective measures regarding a business secret or risk losing legal protection.

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

The attempt of an offence is only punishable if expressly provided for by the law. Nevertheless, the attempt of a felony (any crime carrying punishment of at least one year in prison) is always punishable.

To be held criminally liable for an attempt in either case, the perpetrator's conduct must be intentional and more than merely preparatory to the actual offence. The criminal intent must manifest itself through an act proximate to the conduct prohibited by law.

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?

The German criminal code does not yet provide for corporate criminal liability. Regarding administrative fines and profit skimming, please see above question 1.3.

Please note: The national government has just recently released a draft for a code on corporate criminal liability, the so-called *Verbandssanktionengesetz* (VerSanG). The new law is expected to come into force soon.

The draft includes a legal duty for prosecutors to investigate against companies (this is not the case today but subject to prosecutor's discretion). Companies, according to the draft, face sanctions if their legal representatives either commit criminal

offences or fail to implement adequate measures that would have prevented a criminal offence committed by somebody else from within the organisation (such as employees or associated persons). The criminal offence leading to corporate criminal liability does not necessarily have to be committed in Germany. If a company has its seat in Germany, corporate criminal liability can also arise from criminal offences committed abroad if they are linked to the company's business.

The draft provides for very high fines that can be imposed on corporates (a maximum penalty of 10% of turnover at group-level for companies with annual turnover of more than €100,000,000). On the other hand, corporates will have certain procedural rights and can reduce sanctions such as penalties by demonstrating that they had implemented adequate compliance measures and by conducting internal investigations and cooperating with the authorities.

The requirements for internal investigations that can actually lead to a reduction of penalties are very complex and subject to criticism both by the economy and law firms. A company will have to employ independent investigators (not defence lawyers) and share all results with the authorities.

Legal privilege will not apply to documents gathered in such investigations. Hence, the question of whether to appoint independent investigators and the scope of investigations will become quite a challenge for decisionmakers in the future.

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

As stated in question 1.3, a fine can only be imposed on a company if the representative of the company has committed a criminal offence or a violation of law. The same will apply under the VerSanG. In many cases, the prosecution argues that the representatives have violated their duty to implement adequate measures to prevent criminal offences from within the company. Hence, the prosecutor will always need liability of a representative to impose a fine on the company. There is a high motivation for the prosecutor to prove personal liability of the representative to reach that goal.

Additionally, there is a trend to claim for damages against directors based on the allegation that they have not prevented criminal behaviour within the company or failed to implement an adequate compliance management system. The goal is usually to recover investigation costs after legal reconditioning of compliance cases.

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?

Please see question 4.2 above.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The successor in a merger or acquisition context can be held liable for earlier breaches of law by the target company prior to the transaction. It is the idea that corporations shall not be released from liability by performing a change of control.

5 Statutes of Limitations

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

The statute of limitations depends on the maximum penalty provided for the respective offence. The period ranges from three to 30 years. Most business crimes carry limitation periods of five years.

In most cases, the limitations period commences with completion of the offence. Determining the exact date of completion can be difficult and controversial. This concerns particularly offences which only require the establishment of a hazard. German criminal law knows offences that do not require any actual violation of a legally protected right/legal asset, but only the establishment of a hazard through a specific action depicted by law. The most prominent examples are pricing agreements between participants in tenders as well as bribery and corruption.

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

With expiration of the limitations period, an offence is time-barred and cannot be prosecuted.

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

The limitations period is interrupted by investigational measures by criminal authorities, most importantly initial interrogation of the accused, order of seizure or search warrant, issue of warrant for arrest. The interruption starts the limitations period anew but may not exceed twice the statutory limitations period.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

As a principle, German enforcement agencies can only act on German territory. To investigate abroad, German enforcement agencies need to cooperate with foreign authorities. This, however, does not mean that German authorities are only interested in criminal behaviour taking place on German territory. Regardless of the place of the criminal act, they are entitled to investigate all cases in which German criminal law is applicable.

Primarily, German criminal law applies to criminal acts either committed on German territory or leading to a result on German territory. But German criminal law is also applicable for German citizens committing criminal acts abroad and in cases where either German citizens or German companies are victims of criminal acts committed abroad. In either case, however, German criminal law only applies if the offence itself is also considered a criminal offence in the foreign country where it is committed.

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

The initiation of criminal investigations requires a so-called initial suspicion. This means that, based on facts, there are indications for a prosecutable criminal offence. This is a very low benchmark. If initial suspicion is given, the prosecutor is bound to initiate criminal proceedings against individual persons. Please note that, according to the draft for the VerSanG, this also applies to companies. Some (minor) criminal offences require an additional application for criminal investigation by the damaged party.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Inside the European Union, there are organisations such as Europol and EUROJUST that coordinate between the criminal authorities of Member States of the European Union. Apart from this, the cooperation depends on the existence of bilateral agreements or the Law on international legal assistance in criminal matters. There is a growing trend to informally contact foreign authorities and tip them off in cases where authorities in one country cannot investigate a case due to a lack of applicability of their respective national law.

7 Procedures for Gathering Information from a Company

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

Criminal authorities are entitled to various investigational measures such as dawn raids, seizure of documents, scanning of bank accounts, summoning witnesses or to more specific measures such as wiretapping, electronic searches, etc. Every individual measure has specific requirements and most of them require a warrant by the local criminal court prior to taking the respective measure. This especially applies to dawn raids and seizure orders. In urgent cases, however, the prosecutor can order such measures him-/herself.

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?

Even though under current law, a company can never be considered a perpetrator, German criminal procedure law provides for the right to impose investigative measures such as dawn raids and seizures on third parties like companies if necessary, to gather evidence.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The legal privilege which grants absolute protection from seizure by authorities only applies in the relationship between a person accused as perpetrator in criminal proceedings and his/her personal defence lawyer.

In a judgment from early 2018, the Federal Court held that there is no absolute protection from seizure of documents produced in internal investigations in general. According to the current law, a corporation could be regarded as accused person if the prosecution has already formally initiated an investigation aiming for a fine against the corporation or when the authorities are investigating against the corporation or their representatives. There are, however, no strict rules on when authorities must initiate investigations against companies.

The legal situation remains very unclear now. The draft for the VerSanG does not provide for clear rules that would change this. Notably, no legal privilege will be granted on documents gathered in internal investigations.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

As already mentioned under question 3.1, there are strict regulations on how companies may handle personal data of their employees or customers. In general, the disclosure of personal data is not permitted. However, the law offers some exceptions. One of these exceptions allows companies to disclose personal data to law enforcement authorities if this is necessary to prosecute criminal offences and if the interests of the person concerned do not conflict with this (Sec. 24 BDSG).

7.5 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?

The seizure of documents is possible if they are required as evidence in criminal proceedings (Sec. 94 StPO). In this context, it does not matter if the person possessing the documents is an accused person or a third party. Dawn raids, as mentioned above, require a warrant by the local court.

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

Please see question 7.5.

Questioning of Individuals:

7.7 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?

It depends on the question whether the person is to be interrogated as an accused person or as a witness. There is no status in-between. As unpleasant as it may be for someone to be regarded as the accused by the authorities, this also has legal advantages. Unlike a witness, an accused has a comprehensive right to remain silent before authorities or in court. A witness must provide information to the authorities and can only remain silent on certain topics if he/she were to incriminate himself by the statement (Sec. 55 StPO).

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

A third person is always questioned as a witness (please see question 7.7).

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Please see question 7.7. The accused and the witness have the right to have a defence attorney present when questioned by the police, public prosecutor or judge.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The public prosecutor is obligated to initiate criminal if there is "*initial suspicion*". Please see question 6.2.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

If the investigation leads to the conclusion that there is sufficient suspicion of a criminal offence, the public prosecutor's office is obliged to bring action before the criminal court against individuals. If not, he can terminate the proceedings in general or terminate in combination with the imposition of a minor fine or duty.

Regarding companies, please see question 4.1, the decision to charge is at the prosecutor's discretion.

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

If the accusation concerns a minor offence, there is the possibility that the prosecutor waives the charge (Sec. 153, 153a StPO). This requires that the public interest in the prosecution of the offence can be eliminated through certain instructions or obligations imposed on the offender. For example, the order to compensate the injured party or to make donations.

The draft for the VerSanG does provide for rules on reduction of penalties imposed on companies under certain pre-conditions. Since such decisions usually result out of negotiations between the defence lawyer, prosecution and the court they can, in practice, be understood as a type of deferred prosecution agreement. If the criminal offence can be considered minor, the penalty can be suspended and combined with a formal warning and requirements such as the obligation to compensate harmed parties or to make donations to the national treasury. Additionally, the court can order the company to implement preventive measures and appoint a neutral expert to analyse the company's efforts. The latter, to our understanding, could be comparable to a monitor under US law.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

In addition to the consent of the culprit and the prosecutor, the consent of the respective court is also required. The case is closed as soon as the offender has entirely fulfilled the imposed obligations. If the offender does not fulfil the conditions within the time limit set for him, the public prosecutor's office can still press charges.

8.5 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 may apply.

The defendant can be subject to profit-skimming. The prosecution is entitled to seize assets resulting out of criminal behaviour. If the object itself cannot be confiscated, the value of the object can be confiscated as a replacement. The confiscated item or money can be reclaimed by the injured party if there is a substantiated claim for restitution (Sec. 459 h StPO).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof lies with the public prosecutor, who must present evidence that all conditions of the accused crime have been met by the accused during the criminal proceedings. However, the criminal proceedings are not contradictory. The court has the responsibility to examine all necessary evidence to determine the truth. For this reason, it is up to the court to pick the witnesses and other evidence that will be heard or examined in court.

The defence and the public prosecutor have the right to request that additional witnesses are heard or that other evidence is examined by the court. The court can only reject this request under very strict legal conditions.

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

The court must be convinced without any doubt that the defendant has fulfilled all the conditions of the relevant criminal provision.

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

This duty lies with the court.

10 Conspiracy / Aiding and Abetting

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

Incitement to a criminal offence is a criminal offence itself. The instigator must act with intent regarding the instigation as well as the criminal offence that the other person will commit.

Aiding and abetting is also a criminal offence, Sec. 27 StGB and requires that the offender intentionally supports the main offender in his criminal offence in any way (even only psychologically).

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?

Criminal liability requires intent except regarding offences which can expressly be committed negligently. However, intent does not require that the offender absolutely wants the success of the crime. It is sufficient if he accepts the possibility of the offence and approves of it. Some offences require a special form of intent. For example, regarding fraud the perpetrator must not only act intentionally but also with the intention to enrich himself or a third party.

As with all other elements of the crime, the burden of proof lies with the court.

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?

If the offender acts without the awareness of wrongdoing, the criminal punishment may be no longer possible according to Sec. 17 StGB. However, this only applies if the culprit's misconception was unavoidable. German law places very high demands on the unavoidability of such a misconception, so that the unavoidability can only be assumed in extraordinary cases.

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?

If the defendant was ignorant of the facts of the case, he cannot be convicted of crimes that require intent (Sec. 16 StGB). Criminal liability for negligence is nevertheless possible. Here, too, the court must investigate clues and must undoubtedly be convinced that the defendant was fully aware of the facts of the case.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no general duty to report crimes to authorities. Nonetheless, in most cases the voluntary disclosure of an illegal offence can have a positive effect on the imposed amount of the penalty.

13 Cooperation Provisions / Leniency

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

Please see question 12.1; the reporting of criminal behaviour (except for tax offences) does not mandatorily lead to impunity. However, in most cases the authorities take such behaviour into account in favour of a lower penalty but there are no guidelines for this. Only in anti-trust investigations can the party of illegal pricing agreements who confesses first and discloses the illegal behaviour "claim" impunity or a discharge on fines.

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

Please see question 13.1.

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?

A confession is usually considered positively by the court in determining the penalty. In most cases it leads to a reduction of the penalty, but it is not possible to trade a confession for a precisely negotiated punishment.

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?

Within the bounds of a plea bargaining (Sec. 257c StPO), the defendant can be promised an upper and lower limit of the penalty for a confession. However, it is formally not possible to agree to a specific penalty. The plea bargain is supposed to be negotiated in the main public hearing and the court, the prosecutor and the defendant must agree.

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 a sentence on the defendant? Please describe the sentencing process.

The law contains a minimum and maximum penalty for each criminal provision. The court determines the specific amount of the penalty by considering the individual aspects of the case. Such aspects are, for example, the motivations for the crime, the defendant's attitude and willingness to commit the crime, the way in which the crime was committed, the consequences of the crime, the defendant's background (especially previous convictions), the defendant's behaviour after the crime and efforts to remedy the damage.

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.

The basis for the calculation of administrative fines is the significance of the administrative offence and the accusation made against the offender. The economic circumstances of the corporation can also be taken into consideration. It is important that the fine exceeds the economic advantage that the corporation has gained from committing the administrative offence (Sec. 17 OWiG).

16 Appeals

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

A guilty verdict may be appealed by the defendant or the public prosecutor. An acquittal can only be appealed by the public prosecutor.

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

A guilty verdict is always combined with the concrete determination of the punishment. Both the defendant and the public prosecutor may appeal the verdict. The appeal can only be limited to the sentence, but in most cases the verdict as a whole is challenged with the appeal.

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

Verdicts can be appealable on the grounds of violations of the law and that the facts do not carry the sentence and allow for another decision. Where an appeal is lodged on ground of fact and law, the appeal court fully reviews the verdict so that the trial of the first instance is repeated. In case of an appeal on grounds of law, the court only verifies whether the court of first instance has applied the laws correctly. Evidence in the first instance will not be examined.

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

If the appeal is made on grounds of fact and law, the appeal court repeals the first instance verdict and imposes a new verdict.

If the appeal is lodged only on ground of violation of a law, the appeal court has two opportunities. It can annul the verdict of the first instance court and instruct the court of first instance to decide on the case again. In this case, the court must follow the legal opinion of the court of appeal in its new decision, or the appeal court may repeal the verdict of the first instance and pass a verdict itself or suspend criminal proceedings.

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AGS Legal are a boutique law firm specialised on white-collar crime matters and dispute resolution formed by spin-offs of international law firms. Since their foundation in 2012, AGS have continuously been listed as one of the top 10 law firms in this area in Germany. AGS offers high quality advice for companies, directors and officers in all concerned legal fields in white-collar cases such as corporate defence, fraud litigation, internal investigations, bribery and corruption, asset recovery, D&O-liability, data protection and labour law, as well as preventive measures.
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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?

Prosecution is always initiated by the Prosecutor's Office. There is one Prosecutor's Office with every First Instance Court (which roughly covers a prefecture). There are also Prosecutors with the Court of Appeal (12 circuits), and there is a Prosecutor with the Supreme Court. An investigation is always supervised by a Prosecutor. The majority of cases are handled by Prosecutors of the First Instance Court (who may receive guidelines or orders for specific investigations by their superiors). In exceptional cases, a Prosecutor with the Court of Appeal may step in and conduct or co-ordinate the proceedings. In recent years, two separate Prosecutorial Offices have been established, specialising in the prosecution of economic crimes and corruption:

- The Prosecutor for Financial Crime (currently arts 33 and 34 of the Greek Code of Criminal Procedure), with powers to prosecute and supervise investigations of financial fraud, criminal tax offences, financial and economic crimes against the State, state-owned entities or broader public interest.
- The Anti-Corruption Prosecutor (currently arts 35 and 36 of the Greek Code of Criminal Procedure), with powers to prosecute and supervise investigations of serious crimes resulting in financial loss of the State or state-owned entities involving government and public officials.

Both the above Prosecutors are higher-ranking Prosecutors (Court of Appeal Prosecutors) and may request the co-operation of Public Prosecutors with the First Instance Court, the Police, regulatory authorities, other administrative authorities and/or other enforcement agencies in the course of their investigations.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Other enforcement agencies are acting in co-operation and under the orders of the Prosecutor(s). It is most common for the Economic and Financial Crime Unit to make necessary preliminary investigations, evidence gathering, reports, etc. following a prosecutorial order. In cases of money laundering, the Hellenic FIU gathers all necessary information and evidence, and if they believe that there is enough to support a criminal case, they forward it to the Prosecutor's Office. The Prosecutor opens a case against the natural person or officers of an entity, following standard criminal procedure, i.e. conduct of a preliminary investigation, filing of charges and referral to investigation (conducted by an Investigating Judge). It is notable that the timeframe for executing the above procedural steps varies depending on the nature of the case. It is not unusual in serious and complex cases (e.g. corruption, large-scale money laundering and fraud) for enforcement agencies and the Prosecutor to take action in order to secure evidence (by issuing a warrant for search and seizure or issuing freezing orders), before the actual filing of charges and before persons of interest are called for questioning. On some occasions, Regulatory Bodies (e.g. the Hellenic Capital Market Commission or the Competition Commission) conduct their investigations in respect of breach of regulations within their competence, and if they also come across evidence of criminal conduct, they gather evidence and send a report to the Prosecutor to decide on further steps. Regulatory Bodies conduct investigations (during which certain provisions for criminal investigations apply, i.e. examination of witnesses, evidence-gathering) but they cannot initiate criminal charges. This responsibility always lies with the Prosecutor. In principle, it is the responsibility of the Prosecutor's Office to decide which body investigates under the Prosecutor's supervision, unless there are specific provisions by Law (Prosecutor against Financial and Economic Crime and Prosecutor against Corruption).

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?

It is usual to have civil or administrative enforcement, either by means of the private pursuit of claims (e.g. the civil claim of one entity or person against another) or by means of the law in cases of tax offences, subsidies fraud, money laundering, securities fraud, bribery and cartel offences. These measures are imposed by the competent agency according to the entity's status (e.g. the Capital Market Commission, the Revenue Service, special departments of the Ministry of Finance, etc.). As a general rule, the competent agency for imposing these types of sanctions is the one supervising the entity's registration, licences, regulation, etc.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Following long-term investigations into defence contracts and corruption allegations, two more cases were referred to trial. Evidence was gathered through judicial mutual assistance (cross-border investigations) and the provisions of tax and anti-money laundering regulation. In addition, a high-profile investigation

was opened involving the main natural gas provider in Greece, a (partially) state-owned company and one of the largest manufacturers of fertilisers and chemicals regarding the energy supply contracts between them. The contracts are under investigation on suspicion of fraud and money laundering.

2 Organisation of the Courts

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

There are two types of Criminal Courts in Greece. Courts with judges, which try most offences (misdemeanours and felonies) and mixed Courts (with judges and jurors), which try only certain types of felony offences, mainly homicides, lethal injuries, rape and child sexual abuse.

Serious felony charges relating to corruption, misappropriation of property, fraud, organised crime, etc. are tried by multi-member Courts constituted solely of judges sitting with the Court of Appeal, hearing the case either in first instance (three-member panel) or on appeal (five-member panel).

Jurisdiction between types of Courts is provided for by the Greek Code of Criminal Procedure ("GCCP"), arts 109–116.

Starting from July 1st 2019, there is special provision for One-Member Court for felonies (One Judge), which have jurisdiction to try cases of defendants that do not contest or accept the charges and proceed to a settlement agreement with the Prosecutor. In such cases, the One-Member Court of Appeal accepts the settlement agreement and moves to the sentencing stage. This is a completely new procedure under Greek Law (Prosecutor-defendant agreement). According to the provisions of the Greek Code of Criminal Procedure, these settlements may be applicable to most non-violent financial and economic crimes. Crimes punishable with a life-sentence, acts committed in the context of organised crime and sexual offences are excluded from the relevant provisions.

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

There is no provision under Greek law for choosing a jury over a Court of judges. Jurisdiction rules are set out expressly by the GCCP and are obligatory.

3 Particular Statutes and Crimes

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

• Securities fraud

Special provisions of Law 4443/2016 and other legal provisions have updated internal legislation in order to comply with EU capital market legislation. Misrepresentation of information and/or making transactions using fraudulent means in order to manipulate market share prices for purposes of personal gain are forbidden. The perpetrator must act with intent (intent as opposed to negligence. Levels of intent may vary depending on applicable law).

• Accounting fraud

The basic rule of fraud may apply (art. 386 of the Greek Criminal Code, or "GCC") and/or Law 4174/2013 (tax code and tax standards), which provides criminal penalties for false registrations in the accounting books or not registering transactions. There are also provisions in legislation for companies limited by shares (Law 4548/2018, which reformed company law), for criminal sanctions for inaccurate or false balance sheets, false or inaccurate declarations on the financial status of the company, etc. The acts are punishable when committed with intent (intent as opposed to negligence. Levels of intent may vary depending on applicable law).

• Insider trading

Special provisions are contained in Law 4443/2016 (as is in force) on Stock Exchange Transactions. Using inside information to gain profit from transactions on specific market shares is punishable. The perpetrator must act with intent (intent as opposed to negligence. Levels of intent may vary depending on applicable law).

• Embezzlement

Art. 375 of the GCC stipulates that the perpetrator, knowing that (due to a legal provision, e.g. manager, trustee, etc.) he is in charge of the property of another person or entity, acts as the owner of the property by encompassing the property as his own assets.

• Bribery of government officials

Art. 236 of the GCC (active bribery). The person who promises or grants directly or indirectly any type of benefits to a public official or third person for performing acts contrary to his duties or failing to act within his duties is punishable. The perpetrator must act with intent (intent as opposed to negligence. Levels of intent may vary depending on applicable law).

• Criminal anti-competition

Law 3959/2011 has made extensive changes to anti-competition legislation (which now conforms to EU legislation). Punishable criminal acts include forming a cartel and abusing one's market dominating position. The perpetrator must act with intent (intent as opposed to negligence. Levels of intent may vary depending on applicable law).

• Cartels and other competition offences

Law 3959/2011 also provides for cartel offences like market sharing, bid rigging, price fixing, etc. The perpetrator must act with intent (intent as opposed to negligence).

• Tax crimes

Law 4174/2013, arts 66 and 67 mainly concern avoiding the declaration and payment of taxes or income, or issuing and/or accepting false invoices and/or making false registrations of transactions. These acts are punishable when the perpetrator has committed them with intent (intent as opposed to negligence. Levels of intent may vary depending on applicable law).

• Government-contracting fraud

The general provision for fraud applies (art. 386 of the GCC) This is applicable where the perpetrator intends to gain profit against the State's property by making false representations, or withholds facts and in this way succeeds in receiving money. Fraud committed against the State is punishable with higher sentences.

• Environmental crimes

Environmental crimes are provided for in Law 1650/1986, Law 4042/2012 and a series of regulations or specific ministerial decisions issued in accordance with the general legal provisions for categories of businesses and industries, and range from failure to obtain licences or required permits to causing large-scale

contamination as a result of serious violations of rules and regulations applicable in a business/industry. These acts are punishable even if committed by negligence (depending on the official position of the perpetrator, the duties and certain provisions of the law and respective regulations). Environmental crimes are punishable if they are committed with intent or by negligence.

• Campaign-finance/election law

Campaign-financing during or before an election has limitations provided for in Law 3023/2002. Different sets of rules apply depending on the amount and/or timing of financing/donations. Certain breaches of these rules are also punishable by criminal law provisions.

• Market manipulation in connection with the sale of derivatives

Market manipulation and inside trading is provided for in Law 4443/2016, which regulates all stock market transactions. Punishable acts include the use of confidential information in promoted transactions for the purposes of financial gain, pursuing a transaction under fraudulent or misleading circumstances, and manipulation of prices, etc.

• Money laundering or wire fraud

Money laundering is punishable according to Law 4557/2018. Said Law integrated all provisions and obligations provided for in international instruments and recommendations as well as EU Directives. Punishable acts include conversion and transfer of assets or property, concealment or cover-up of illegal origin of the assets, possession or management of illegal assets, use of the financial/banking system for placements or transfers of illegal assets.

• Cybersecurity and data protection law

Greece has ratified the Budapest Convention on Cybercrime and has also adapted internal legislation to the European Directive on attacks against information systems (2013/40/EU). There is a complex of provisions in force for punishment of attacks against information systems and infrastructure, unauthorised processing of data, interception, computer-related forgery and fraud, etc. As regards data protection, there are provisions in legislation for criminal punishment of illegal disclosure of data, collection and processing without consent as well as illegal use or trading of such data.

• Trade sanctions and export control violations

There are special criminal provisions in respect to violations in relation to trade and exports, many of them included in the tax and customs legislation and regulation or other special legislation.

• Any other crime of particular interest in your jurisdiction

Another category of business-related crimes is that of offences related to health and safety at work. There are complex legal provisions regarding obligations of businesses to comply with health and safety standards. Lack of health and safety standards or poor implementation result in administrative fines and/or other measures (e.g. suspension of activities) and may be punishable criminal offences.

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

Yes. Art. 42 of the GCC stipulates that a person "who has decided to commit a felony or a misdemeanour and has at least commenced perpetration of the criminal act is punished, if the act was not completed, with a lesser sentence".

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?

In Greek law, companies and entities are not criminally prosecuted. The structure and pre-requisites of most legal provisions in terms of knowledge and intent are applicable to individuals. However, Greece has ratified a series of treaties and conventions on various aspects of fraud and corruption, which call for measures against entities in cases where they benefit from the criminal actions of their employees. These provisions have been included, among others, in Law 2803/2002 (Protection of the Financial Interests of the European Community), Law 3666/2008 (UN Convention on Combating Corruption), Law 3560/2007 (Criminal Law Convention on Corruption and Additional Protocol), Law 4557/2018 (Money Laundering and Prevention of Terrorism Funding), Law 2656/1998 (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), and Law 4042/2012 (Environmental Offences). The entity's liability is not criminal in the strict sense of the term but includes a series of administrative measures usually in the form of fines. Liability of the entity is dependent on the liability of the entity's employees.

Law 4557/2018 (Anti-Money Laundering Legislation) contains the basic provisions for entity liability, which is not "criminal" *strictu sensu* but liability in the form of administrative sanctions and fines. These provisions are applicable to a wide range of criminal offences – listed as predicate offences in the same Law. The entity may be held liable if the criminal act committed by a director or a person with power to represent the entity and the offence was committed for the benefit or on behalf of the entity.

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

Crimes related to an entity are usually committed by its managers, officers and/or directors. These individuals may be personally liable (where applicable), but their acts trigger the entity's liability only when they meet the criteria (objective and subjective) of the relevant legal provisions. In some types of offences, e.g. tax offences, there are special provisions as to which persons are deemed liable under the relevant law. These legal provisions may expand or restrict liability to individuals holding certain positions in an 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?

Criminal proceedings are initiated against individuals and not against entities. The Prosecutor is under obligation to pursue a case if certain procedural pre-requisites are satisfied and does not have the discretion to make a choice or preference during the earlier stages of prosecution. It is noted that the Prosecutor is obliged to gather all evidence (not only incriminating but also exonerating). Differentiation can evolve at a later stage of proceedings by application of certain provisions on leniency measures (e.g. art. 263A of the GCC) in respect to corruption acts.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

As already stated, entities are not criminally liable, *stricto sensu*, but they may face consequences in the form of administrative fines or other measures. Due to the nature of these penalties (administrative penalties enforceable through administrative proceedings) the successor entity, as a principle, will continue to be liable. This is almost always the case with obligations of the acquired/merged entity related to tax offences and irregularities.

5 Statutes of Limitations

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

The general rules of limitations periods are set out in arts 111–116 of the GCC. The limitation time for felonies punishable with a life sentence or serious financial crimes against the State or state-owned entities is 20 years. Felonies punishable with imprisonment (five to 20 years) are time-barred after 15 years, and misdemeanours punishable with sentences of up to five years are time-barred after five years. As a matter of principle, calculation of said times is done from the time of the act, unless there is a special legal provision).

Limitation times are suspended for five years (felonies) or three years (misdemeanours) while the case is pending before a Court and until an irrevocable decision is delivered or there is a legal obstacle in prosecuting and/or continuing prosecution. This five-year extension is not valid in cases where there is suspension of the proceedings by law, following certain provisions of the GCCP. There are special provisions for cases relating either to the country's international affairs (art. 29 of the GCCP) or cases that are very closely connected to other criminal cases already pending, and their outcome is of major importance to the suspended criminal case (art. 59 of the GCCP).

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

The fact that the acts may belong to a pattern or practice of criminal acts is not enough by itself to prevent application of the limitations period unless otherwise specified.

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

See above, question 5.1.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Greek enforcement agencies have no authority outside Greek jurisdiction. Any type of enforcement would require use of bilateral or multilateral instruments on mutual assistance and/or enforcement of judgments.

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

The main investigations (conducted by a judge) are always initiated following a Prosecutor's order. Preliminary investigations also need to be ordered by a Prosecutor, unless the Agency or Enforcement Authority has the power by law to gather evidence and information through a preliminary inquiry and submit a request to the Prosecutor for further steps of investigation. Before initiation of the main investigations, the Prosecutor conducts a preliminary inquiry for gathering and securing evidence and for the purposes of determining the criminal acts which he will prosecute.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Prosecuting authorities have formal mechanisms for co-operating with foreign Prosecutors (most commonly using the provisions for mutual assistance in criminal matters in the EU or the provisions of other bilateral agreements with third countries). Some agencies also have a network to exchange information (e.g. through Europol, the Schengen Information System, Economic and Financial Crime Units or Customs Agencies).

Greek prosecuting authorities and enforcement agencies address frequently mutual assistance requests to other countries and are generally co-operative with foreign authorities when evidence/information is requested.

7 Procedures for Gathering Information from a Company

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

After a Prosecutor has initiated a preliminary inquiry or during the course of an investigation by an investigating judge, there are several provisions in the Greek Code of Criminal Procedure (arts 251–268 of the GCCP), the Constitution and relevant laws regulating how information and evidence is obtained.

Depending on the type of evidence or information, different sets of rules apply. As a principal, confidentiality of communications is lifted, following a decision by a Judicial Council (panel of three judges deciding *in camera*). Strict rules apply in searches and seizures in homes and professional establishment (the presence of a member of the judiciary is necessary, otherwise the search is void). Protective rules also apply to client-attorney privilege. It is noted that the Prosecutor for Financial and Economic Crime, the Anti-Corruption Prosecutor and investigating judges who conduct investigations related to economic crime, corruption act, organised crime and terrorism are given more powers and have direct access to numerous information such as tax records, bank records and transactions, speedy lifting of communications secrecy, etc.

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?

Following an order by the Prosecutor, and in respect of what the investigating officials are looking for, they may request a company to produce documents and, within the context of a main investigation, search the premises of a company and seize documents, computers, or other material relevant to the investigation. The investigating officials have guidelines from the Prosecutor and/or the Judicial Council for the kind of evidence which they are allowed to request and seize. A report of search and seizure is drafted on site, wherein the company officials under investigation may ask to include any objections or observations which they may have on the procedure or type of documents handed to the investigating authorities.

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

According to art. 212 of the GCCP, information in the possession of clerics, lawyers, doctors, pharmacists and military diplomatic officials is considered privileged. During a search of the company premises, the company may declare that certain documents are privileged information pursuant to art. 212 of the GCCP. If the investigating authority contests this assertion, they confiscate the documents, seal them without acquiring knowledge of their content and request from the competent professional association (the Bar for lawyers or Medical Association for doctors) to decide on the confidentiality of seized documents. The general rule is that documents containing privileged information may not be included in the confiscated documents. It is also noted that under Greek law, there is no differentiation (in terms of protection of privilege) between in-house attorneys or external counsel. Restrictions are not applicable when a person protected by privilege (lawyer, doctor, cleric, etc.) is under investigation as an accomplice of the criminal act. Personal documents of employees are protected to a certain extent, depending on the specifics of each case.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

As of 24/5/2018, Greece has the EU GDP Regulation in force, as in all other EU countries. In addition, there are provisions in respect to the protection of correspondence, protection of privileged information (e.g. attorney-client privilege) and protection of private life, which may be applicable in circumstances where processing of data of employees are sought after. These restrictions may be not applicable if personal data is collected or processed within the context of a criminal investigation. In cases where this information is requested for disclosure in other jurisdictions, restrictions may apply depending on the scope of collection and disclosure.

7.5 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?

As noted already, an investigating judge has the power to ask for any document relevant to the investigation of the crime. If the investigating judge believes that crucial evidence is in the possession of the company employee, he may request that the employee produce the evidence (restrictions of privileged information and secrecy of communications apply). If an investigation is in its preliminary stages (conducted by the Police), the Prosecutor may also request that the company employee produces documents.

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

Investigating authorities or the Prosecutor may request a third person or entity to produce documents or other evidence (restrictions on privileged information and secrecy of communication apply) and perform a home (for persons) or premises (for entities) search in accordance with the provisions of the GCCP.

Questioning of Individuals:

7.7 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?

All authorities with the power to conduct investigations in their field (e.g. the Prosecutor, the Police, the Financial and Economic Crime Unit, the Capital Market Commission) may request that individuals give statements following an order by the Prosecutor or in accordance with specific legal provisions. In cases of serious business crimes, it is usually the Prosecutor who orders a specific person to give a statement either as a witness or as a suspect (witness under caution). If the individual is called as a witness, he appears before the authority that has received the Prosecutor's order or the Prosecutor and gives a statement under oath. If the individual is called as a suspect, he has the right to request copies of the case file and time to prepare for questioning. At this preliminary stage, he is also entitled to a defence attorney who may be present during questioning and may also file written submissions in his defence. Privilege against self-incrimination always applies, both for witnesses and suspects. Suspects also have the right to remain silent.

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

Third persons can also be requested to give evidence as witnesses or suspects, following the request of the Prosecutor. It is common for Prosecutors to request the opening of a preliminary investigation – to be conducted by the Police or other

authorities – at the first stages of evidence gathering, thus the authority conducting the investigation is not restricted in how many or which people it submits to questioning, unless otherwise indicated by the supervising Prosecutor. In any case, the individual may refuse to disclose self-incriminating information. Witnesses (individuals called to testify under oath) are obliged to appear before the authorities.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

In all cases where questioning of individuals is involved, relevant provisions of the Greek Code of Criminal Procedure apply, i.e. the right to avoid self-incrimination, the right to an attorney, time to prepare one's defence, etc. (arts 100–104 and 240–241 of the GCCP). The structure of pre-trial procedure is such that a suspect may have full representation by a defence attorney and full protection of his rights. All privileges as described above (see questions 7.6 and 7.7) apply.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

A criminal case is initiated by the Prosecutor. The Prosecutor may initiate a criminal case following a criminal complaint (by an individual or an entity) against certain persons, or information submitted to the Prosecutor's Office by another authority, or even information that has come to the knowledge of the Prosecutor's Office through the press or other sources. Certain types of financial crimes may only be prosecuted if the victim files a request to open criminal procedures.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The charging of entities or individuals depends on the amount and quality of *prima facie* evidence gathered during the preliminary investigation. If evidence and information gathered indicates that a criminal act has been committed, the Prosecutor files charges against all involved individuals. Entities are not charged – as they do not have criminal liability – but may face sanctions in the form of administrative penalties if found liable.

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

The general rule is that after the initiation of investigating proceedings, there can be no diversion or deferred prosecution. However, there are exceptions to this rule:

- For crimes of fraud and misappropriation, the investigation may be dismissed if the victim is fully compensated or files a request to withdraw the charges.
- When investigating acts of organised crime, the Prosecutor may not initiate proceedings against the individual that offers substantial information on the criminal organisation or acts committed or to be committed. If charges have already been brought against this individual for having committed a criminal act within the criminal organisation, the procedure continues and the case is referred to trial, and the co-operating individual receives a lesser sentence (art. 187B of the GCC).
- In investigations of corruption acts there may be differentiation in prosecution and indictment (following a decision by the Judicial Council) or complete suspension of the procedure when the rules of art. 263A of the GCC apply, i.e. providing substantial information/evidence to the authorities in respect to such acts.
- When the defendant decides not to contest the charges and enters into a plea-bargaining agreement with the Prosecutor on the basis of admitting a criminal act in exchange for a lesser sentence. Differed prosecution agreements are not applicable in violent crimes or crimes punishable with a life sentence.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

See above question 8.3.

8.5 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 may apply.

Civil remedies or penalties are not directly connected to a criminal investigation in the sense that the Prosecutor is not a party to the proceedings (as plaintiff). A civil claim may be filed against the defendant by the victim of the crime, who may also be a party to the criminal proceedings (to support the charges) with full access to the case file, participation in all pre-trial and trial stages, etc. The civil claimant may refer his/her civil claim before a Civil Court and ask for compensation on the basis of the criminal act committed against him/her.

Furthermore, civil sanctions, such as the confiscation of the proceeds of crime or other tainted assets, may apply.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In the Greek system, the burden of proof lies primarily with the prosecution. The Prosecutor, when referring the case to trial, needs to include all evidence necessary to substantiate it. It should be noted, however, that under Greek law, the Prosecutor is not a party to the trial, i.e. the Prosecutor is not a plaintiff, but rather a judicial authority with the power to prosecute and refer cases to trial but is also under the obligation to gather any exonerating evidence for the defendant as well. Regarding affirmative defences, the burden of proof lies with the party raising such defence.

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

The standard of proof for delivering a guilty or non-guilty verdict is proof beyond reasonable doubt.

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 decides on proof beyond reasonable doubt. The decision does not need to be unanimous. Since the most serious criminal cases are heard by multi-member Courts, a decision by the majority is sufficient.

10 Conspiracy / Aiding and Abetting

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

According to arts 46 and 47 of the GCC, individuals participating in a criminal act are also criminally liable. Art. 46 of the GCC provides that individuals instigating (causing the perpetrator's act) or directly aiding (principal accessory) the perpetrator in committing a crime are punishable as the perpetrator. Art. 47 of the GCC provides that an individual assisting the perpetrator before or during the act (simple accessory) is punishable with a lesser sentence.

Instigators and accessories are liable for the act of the perpetrator, provided that they have the intent to instigate, aid or assist in committing the act, and that they also have knowledge of the basic elements of the crime. Their liability is not assessed objectively in retrospect, but is based solely on the actual crime committed by the perpetrator but also subjectively in relation to his disposition and knowledge of the criminal act.

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?

Intent is one of the basic elements of the crime (intent should cover all aspects of a criminal act). As already explained (under section 9), the burden of proof lies primarily with the Prosecutor, who files the charges and is the basis for the indictment. The indicting decision always refers to the intent of the defendant (in relation to the structure and pre-requisites of the legal provision). In order to have a guilty verdict, the Court has to be satisfied that the defendant's intent has been proven beyond reasonable doubt.

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?

The defendant may argue ignorance of law, which is provided for in art. 31 of the GCC and – if applied – the defendant is found not guilty. However, plain ignorance of a legal provision punishing an act is not enough to meet the criteria of art. 31 of the GCC. It should be proven beyond reasonable doubt that the defendant erroneously had the belief that he was acting lawfully and, moreover, that this error is excusable. This is the case when the defendant had taken all reasonably expected steps to establish that he was acting in accordance with the law. In cases where criminal liability is closely connected to a person's position or capacity (e.g. manager of an entity in respect of the entity's tax obligations or applicable industry/market regulations), a defence based on ignorance of the law may not be effective.

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?

The defendant may argue ignorance of the factual elements of a criminal act, according to the provisions of art. 30 of the GCC. The Court must be satisfied that the defendant was ignorant of the facts that would constitute the factual basis of the act (e.g. the defendant has no knowledge that the money which he receives is the proceeds of crime). If the Court finds that the defendant's ignorance of the facts is a result of negligence, the defendant is punished for an act committed in negligence (where applicable).

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

A person is under an obligation to report to the authorities a serious crime which is going to be committed if he receives reliable information in this respect. Public officials who become aware that a criminal act (of those prosecuted *ex officio*) has been committed, are also under obligation to report it. In both cases, failure to report is punishable as a criminal offence.

As regards entities, there is no general obligation to report but special provisions may be applicable, thus there may be an obligation to report misconduct under specific regulatory or legal provisions (e.g. anti-money laundering legislation).

13 Cooperation Provisions / Leniency

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

There is no general rule for leniency measures through co-operation in a criminal investigation. There are provisions, though, for specific types of crimes such as organised crime, terrorism, corruption, drug trafficking and cartel offences. As a general rule, co-operation is considered as a "mitigating factor" under art. 84 (2) of the GCC, resulting in a reduction of the sentence. Provisions on leniency measures apply to individuals and not entities. Entities are not criminally prosecuted.

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

Due to the fact that leniency measures are not covered by a general rule, conditions and requirements may vary. In principle, however, the party requesting leniency is required to disclose substantial information for exposing criminal acts or disclosing valuable information for the progress of an investigation. Leniency procedures are provided for entities only in the context of special legislation and specific offences. The extent of cooperation with the authorities and undertaking the obligation to set rules in order to avoid misconduct in the future are considered as important factors in the leniency procedures.

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?

As of July 1st 2019, plea-bargaining provisions are in force under the new Code of Criminal Procedure. The procedure is applicable to most financial and economic crimes. Violent crimes, sexual offences and acts in the context of a criminal organisation are excluded.

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?

Being a new procedure, there are no guidelines available and no feedback. According to these new provisions, the defendant is entitled to request from the Prosecutor the opening of a plea-bargaining procedure. There are generally two types of proceedings depending on the extent to which the defendant has compensated the victim. In cases of complete compensation, provided sentences are minimum. The Agreement, as well as the case file is always reviewed by a Court. The Court retains the right to review the case independently of the plea-bargaining agreement and make adjustments in favour of the defendant on points of law. The decision is appealable only on points of law.

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 a sentence on the defendant? Please describe the sentencing process.

The Greek Criminal Code (arts 79–85) sets out the guidelines for imposition and calculation of sentences. The Court examines basic elements at the stage of sentencing: severity of the act; and personality of the defendant. The Court also examines – following a request by the defence – the application of mitigating circumstances, which may lead to a lesser sentence. Such circumstances are, for instance: lack of prior involvement in criminal acts; good behaviour after the act; showing true remorse after the act; and making efforts to amend or lessen the negative impacts of their actions. These provisions are only applicable to individuals.

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 entities are involved, fines and other measure are decided and imposed by the competent Regulatory Body or the Financial and Economic Crime Unit (depending on the type of entity). The "sentence" depends on the severity of the offence, any benefits or gains acquired by the entity, duration of the violation, etc.

16 Appeals

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

A guilty verdict is always appealable by the defendant – provided that he was handed a sentence over three months (for lesser misdemeanours) or five months (for more serious misdemeanours). Guilty verdicts for felony charges are appealable when sentences of more than two years are handed to a defendant. Guilty verdicts are also appealable by the Prosecutor.

The Prosecutor is entitled to appeal against a non-guilty verdict but is under legal obligations to give specific and detailed reasoning to substantiate an appeal, otherwise it is inadmissible. A non-guilty verdict is also appealable by the defendant if the Court's decision includes reasoning that is needlessly harmful to his/her reputation.

The Prosecutor with the Supreme Court may file an appeal on points of law against any Court decision.

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

Sentencing takes place after the guilty verdict and is included in the Court's decision; technically, it is not a separate procedure. As a matter of practice, when appealing against the verdict, the defendant or the Prosecutor can also appeal against the sentence. It is possible, however, to appeal only against the sentence (especially when there is a certain claim for application of mitigating circumstances or specific rules of sentencing).

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

The appellate Court proceeds with a full review of the case. All aspects of the case are re-examined either from a legal point of view (substantiation of charges, procedure faults, etc.) or on the merits (evidence).

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

Depending on the grounds of the appeal (merits, legal grounds, etc.), the Court may acquit the defendant (for all or some of the charges), dismiss the charges against him (partially or completely) or lessen his sentence.

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Established in 1986, Anagnostopoulos is a leading criminal law and litigation practice offering high-value services in all aspects of business crime, with sophisticated advice in relation to criminal and regulatory risk management of corporates and individuals around the world.
Over the years, the firm has built a strong reputation as a high-end specialist firm recognised for its dynamic approach and full commitment to the client's needs whilst upholding the highest standards of ethics and professional integrity. The firm responds to emerging needs of corporate clients, drawing upon a solid knowledge base in corporate criminal liability, internal company investigations and compliance procedures, corruption practices and cartel offences to offer tailor-made solutions and effective representation.

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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?

The Hong Kong Police Force is generally responsible for maintenance of law and order in Hong Kong, and is bestowed with powers to conduct criminal investigations and commence prosecutions. There are specialist units within the Hong Kong Police Force that deal with business crimes. For example, the Commercial Crime Bureau ("CCB") prosecutes serious and complex commercial fraud, and the counterfeiting or forgery of currency, commercial instruments and credit cards. The Cyber Security and Technology Crime Bureau ("CSTCB"), which used to be one of the CCB's divisions, was recently established in 2015 to specifically handle computer and technology crimes. On the other hand, the Organized Crime and Triad Bureau (the "OCTB") prosecutes organised crimes and syndicated criminal activities including money laundering.

The Independent Commission Against Corruption ("ICAC") is the independent investigative authority for prosecuting bribery and corruption offences both in the public and private sectors in Hong Kong. Customs & Excise ("C&E") prosecutes crimes concerning intellectual property rights infringement, illegal imports and exports, dutiable commodities as well as unfair trade practices.

With respect to offences in the financial market, the Securities and Futures Commission ("SFC") has extensive powers to investigate, discipline and prosecute financial institutions, licensed persons and market participants on various forms of market misconduct including insider dealing, price rigging, false trading and market manipulation together with other types of regulatory offences.

Regarding the insurance industry, the Insurance Authority ("IA") is responsible for regulating and supervising the insurance industry and for the protection of existing and potential policy holders. It was established in 2015 but only took over the regulatory functions of the then Office of the Commissioner of Insurance in 2017. Recently, in September 2019, the IA also took over the regulation of insurance intermediaries from the three Self-Regulatory Organizations, namely the Insurance Agents Registration Board, the Hong Kong Confederation of Insurance Brokers and the Professional Insurance Brokers Association with extensive investigation powers.

While Hong Kong is a Special Administrative Region of the People's Republic of China, its legal system and legal enforcement authorities are entirely distinctive from that of Mainland China under the "one country, two systems" policy. As such, there is no distinction of enforcement authorities at the national and regional levels within Hong Kong.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The Department of Justice ("DOJ") has the overall responsibility for conducting criminal prosecutions in Hong Kong, while the aforesaid authorities initiate investigations based on the nature of the business crimes as described in question 1.1 above. The DOJ works with these investigative authorities by providing legal advice, making prosecution decisions and representing the government in legal proceedings, particularly on cases that are complex in nature or those that involve important points of law or public interest issues. In practice, prosecution at the summary level (i.e., at the Magistrates' courts, which are the lowest level of criminal courts in Hong Kong) involve simple cases that are processed by the investigative bodies themselves and may not require the specific involvement of the DOJ.

In determining whether or not to prosecute, the DOJ and these investigative authorities generally consider two issues: first, is the evidence sufficient to justify the institution of criminal proceedings? And second, if it is, does the public interest require a prosecution to take place?

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?

Some of the agencies mentioned in question 1.1 above have powers to impose civil and administrative penalties.

For example, the SFC enforces the provisions of the Securities and Futures Ordinance under a dual civil and criminal regime – it can either bring a market misconduct case before a civil tribunal named the Market Misconduct Tribunal ("MMT") or commence prosecution in the criminal courts.

For matters before the MMT, the SFC can seek civil sanctions against a person found to have engaged in market misconduct such as payment of restitution, disqualification as a director, liquidator, or receiver or manager of a corporation, "cold shoulder order" (i.e. prohibition from dealing directly or indirectly in the Hong Kong financial market) and "cease and desist order" (i.e. a form of permanent injunction against the misconduct in question).

For regulatory matters, the SFC can take out disciplinary actions by itself against licensed persons or corporations, such as revocation or suspension of licences, prohibition of application for licences, fine and reprimand.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

HKSAR v Cheung Chun Yuen, Barry **[DCCC718/2017]**
Barry Cheung Chun-yuen, a former high-flying businessman and former member of the Executive Council of Hong Kong, was charged with conspiracy to defraud (contrary to Common Law and punishable under section 159C(6) of the Crimes Ordinance (Cap. 200)) and fraud (contrary to section 16A of the Theft Ordinance (Cap. 210)) in 2017. Prosecutors had accused Barry Cheung and Jacky Choi, the Chief Financial Officer working for Barry Cheung, of conspiring, between May 2012 and May 2013, to hide the true financial position of the Hong Kong Mercantile Exchange, in which Cheung was the Chairman, executive director and major shareholder. Cheung and Choi had thereby misled the SFC into authorising the Exchange to provide automated trading services in Hong Kong.

Barry Cheung was further accused of deceiving a company called Sinomax Finance in the amount of HK$30 million in April 2013 for the benefit of New Effort Holdings, a British Virgin Islands-based firm wholly owned by Barry Cheung, who was the majority shareholder in Hong Kong Mercantile Exchange.

On 17 July 2020, Cheung was convicted and sentenced to four years' imprisonment and was also disqualified from acting as a company director for the next five years.

2 Organisation of the Courts

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

Criminal prosecutions can be brought at different levels of criminal courts in Hong Kong depending on the gravity of the offence and the potential sentencing that the charges would attract.

Magistrates' Courts – For less serious offences, charges can be brought at Magistrates' Courts, which can impose a maximum of two years' imprisonment for a single charge and three years' imprisonment for multiple charges.

District Court – For more serious cases, charges can be brought at the District Court, which can impose up to a maximum of seven years' imprisonment.

Court of First Instance of the High Court – For offences of a severe gravity or significant scale, government enforcement agents can bring charges at the Court of First Instance at the High Court, which can impose a maximum sentence of life imprisonment (this is subject to the statutory maximum penalty of the particular offences concerned).

Criminal appeals are generally handled by the Court of First Instance, the Court of Appeal and the Court of Final Appeal ("CFA").

There are no specialised criminal courts for particular crimes.

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

Criminal trials are conducted before a jury in the High Court, including those concerning business crimes. However, there is no right to a jury trial at the Magistrates' Courts or the District Court.

3 Particular Statutes and Crimes

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

• Securities fraud

Under the Securities and Futures Ordinance, it is an offence for a person to employ any device, scheme or artifice in a transaction involving securities, futures contracts or leveraged foreign exchange trading, with intent to defraud or deceive. Similarly, under section 300 of the Securities and Futures Ordinance, it is an offence to engage in any act, practice or course of business that is fraudulent or deceptive, or would operate as fraud or deception.

• Accounting fraud

Under section 19 of the Theft Ordinance, a person is guilty of false accounting if he destroys, defaces, conceals or falsifies any account, record or document required for an accounting purpose, or where he produces or makes use of any such account, etc., knowing it is or may be misleading, false or deceptive in a material particular. The offender must have acted dishonestly with a view to gain for himself or another, or with intent to cause loss to another.

• Insider trading

"Insider trading" is termed "insider dealing" in Hong Kong, and it is an offence under section 291 of the Securities and Futures Ordinance. In general terms, it is an offence for a person who has insider information to deal in securities, encourage or procure another person to deal in such securities, or disclose insider information to another knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing, etc.

• Embezzlement

There is no specific offence of embezzlement in Hong Kong. Such conduct will likely be prosecuted as fraud or theft under the Theft Ordinance, or conspiracy to defraud under the common law.

A person commits fraud under section 16A of the Theft Ordinance if he by any deceit and with intent to defraud induces another person to commit an act which results in benefit to any person other than the person being defrauded, or results in prejudice or a substantial risk of prejudice to any other person.

In respect of theft, a person commits an offence under section 9 of the Theft Ordinance if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Further, under common law, it is an offence for two or more persons to agree dishonestly with the purpose of causing economic loss to, or putting at risk the economic interests of another; or, with the realisation that the use of those means may cause such loss or put such interests at risk. While an intention to defraud is a necessary element, actual detriment need not be shown.

• Bribery of government officials

This is an offence under section 4 of the Prevention of Bribery Ordinance that prohibits a person from offering any advantage to a public servant as an inducement to or reward for that public servant's performance or forbearance in performing any act in his capacity as a public servant. For the recipient side, it is also an offence for the public servant to accept any advantage as an inducement or reward.

• Criminal anti-competition

Competition regulation in Hong Kong is still in its infancy. The first cross-sector competition legislation in Hong Kong, the Competition Ordinance, came into full force on 14th December 2015.

The Competition Ordinance includes three rules prohibiting anti-competitive conduct:

- The first conduct rule: This prohibits agreements and concerted practices that restrict competition. This covers serious cartel activities among competitors (that is, horizontal conduct), which include market sharing, price fixing, bid-rigging and output restriction.
- The second conduct rule: This prohibits abuse of substantial market power.
- The merger rule: This prohibits mergers that substantially stifle competition in the telecommunications sector. Unlike other jurisdictions, there is no general merger control regime under the Competition Ordinance.

It is noteworthy that under the Competition Ordinance, no criminal offences or sanctions will be imposed for engaging in anti-competitive conduct. The penalties are essentially civil and regulatory in nature. The only exception is that criminal sanction can be imposed on any party that obstructs any aspect of a dawn raid by the Hong Kong Competition Commission; for instance, destroying or falsifying documents or providing false or misleading documents or information.

• Cartels and other competition offences

The following cartel activities among competitors are considered serious anti-competitive conduct under the Competition Ordinance:

(a) Price Fixing: agreeing on customer prices, discounts and price range.
(b) Market Sharing: allocating products/customers/territories among competitors.
(c) Bid-Rigging: circumventing bidding or tender processes by agreeing with competitors on bidding term.
(d) Output Restriction: controlling production or sales output to drive up prices.
(e) Group Boycotts: agreeing not to deal with a specific party.

As mentioned above, these offences will only attract civil or regulatory sanctions.

• Tax crimes

There are numerous revenue and customs-related offences in Hong Kong. The most commonly prosecuted offence is tax evasion under section 82(1) of the Inland Revenue Ordinance, whereby a person commits an offence if he wilfully, with intent, evades tax in Hong Kong by, for instance, making any false statements in his tax return or in any answers to the questions raised by the Inland Revenue Department.

• Government-contracting fraud

There is no specific offence relating to government-contract fraud. Generally speaking, this can be prosecuted as fraud under the Theft Ordinance or bribery under the Prevention of Bribery Ordinance (see above).

• Environmental crimes

There are different types of environmental crimes in Hong Kong. For example, unauthorised land filling and fly-tipping activities are offences under the Waste Disposal Ordinance. A person commits an offence if he uses any land or premises for the disposal of waste without the necessary licence from the Director of Environmental Protection to use the land or premises for that purpose.

• Campaign-finance/election law

The election law is generally regulated under the Elections (Corrupt and Illegal Conduct) Ordinance.

Under this Ordinance, any person who provides, or meets all or part of the cost of providing any food, drink or entertainment for another person as an inducement to or a reward for that person or a third person to vote or not to vote at the election for particular candidate(s) shall be guilty of an offence.

Any person who solicits, accepts or takes food, drink or entertainment as an inducement or reward for performing the above act shall likewise be guilty of an offence.

In addition, only a candidate and election expense agent appointed by him can incur election expenses. Any person who incurs election expense without the candidate's authorisation is liable to commit an offence under this provision.

• Market manipulation in connection with the sale of derivatives

False trading and price rigging are offences under the Securities and Futures Ordinance regarding market manipulation in connection with the sale of derivatives.

False trading is essentially concerned with the creation of a false or misleading appearance of active trading in securities or futures contracts, or false or misleading appearance as to the price of or market in securities or futures contracts.

Price rigging under section 296 of the Securities and Futures Ordinance prohibits any sort of fictitious or artificial transaction or device undertaken with the intention of, or being reckless as to whether or not it has the effect of, maintaining, increasing, reducing, stabilising or causing fluctuations in the prices of securities and futures.

• Money laundering or wire fraud

Under section 25 of the Organized and Serious Crimes Ordinance, it is, in general terms, an offence to deal with the proceeds of an indictable offence if the alleged offender knows or has reasonable grounds to believe that this is the case.

• Cybersecurity and data protection law

There are no specific offences which prohibit computer hacking or phishing/malware in Hong Kong. Such conduct generally falls within section 161 of the Crimes Ordinance, whereby a person commits an offence if he accesses a computer with criminal or dishonest intent. The main purpose of this offence is to penalise illegal access to a computer system and dishonest access in furtherance of criminal offences. Whilst "computer" is not defined under the Crimes Ordinance, recent cases held that mobile phones and smartphones are "computers" under section 161.

Computer hacking may also fall under the offence of criminal damage, contrary to sections 59(1A) and 60(1) of the Crimes Ordinance if such conduct involves altering or erasing any programme or data held in a computer or to add any program or data to the contents of a computer.

Internet scams or email fraud could also be punished under the headings of fraud or theft under appropriate circumstances.

• Trade sanctions and export control violations

The United Nations Sanctions Ordinance (Cap. 537) (the "UNSO") is enacted in Hong Kong to implement resolutions of

the Security Council of the United Nations against certain countries, by virtue of which Hong Kong's trade and other activities with such countries are subject to restrictions. For example, pursuant to the UNSO, Hong Kong is prohibited against engaging in any financial transactions related to petroleum from Libya aboard certain ships, and against providing financial support for trade with persons connected with the Democratic People's Republic of Korea.

• Any other crime of particular interest in your jurisdiction

The amendments to the Trade Description Ordinance ("TDO") came into operation on 19th July 2013 and are aimed at promoting fair trade, enhancing protection for individual consumers and preventing unfair business practices in Hong Kong.

The amended TDO now prohibits specified unfair trade practices deployed by traders against consumers, including false trade description of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepting payment. It is applicable to any person or company that operates as traders in Hong Kong or has a place of business in Hong Kong.

C&E is the principal agency responsible for enforcing the TDO, and it has been robust in performing routine patrol and inspections of business premises as well as undercover operations to ensure traders' compliance in recent years.

Any trader who contravenes the amended TDO commits a criminal offence and shall be liable for a maximum penalty of HK$500,000 and imprisonment of five years upon conviction. In addition, the court may grant a compensation order against the convicted trader to cover the financial loss of victim customers. Customers can also commence civil actions against the trader for loss and damages suffered as a result of the latter's contravention of the TDO.

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

Yes, there is liability for inchoate crimes in Hong Kong.

Generally speaking, under the Crimes Ordinance, a person can be liable for attempting to commit a crime if, with intent to commit an offence, he does an act which is "more than preparatory" to the commission of the offence. A person may be guilty of attempt even if it would be impossible to commit the substantive offences.

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?

Under the Interpretation and General Clauses Ordinance, the term "person" in any statute is defined as including any public body and any body of persons, corporate or unincorporated.

Accordingly, a corporate body can technically commit most offences, except those:

- For which imprisonment is the only penalty available (for example, murder).
- That by their nature can only be committed by natural persons in their personal capacity rather than as an agent of the corporation (for example, rape).

Hong Kong has followed the common law principles of England and Wales in ascribing corporate criminal liability under two main heads:

- **The identification principle.** A corporation may be criminally liable for the criminal acts of the directors and managers who represent its directing mind and will, and as an embodiment of the company. It generally applies to senior officers or board members of a company whose acts are capable of being imputed to the company under this principle.
- **Vicarious liability.** A corporation may be held criminally liable for the unlawful acts of its employees or agents, typically in strict liability offences or regulatory matters such as industrial safety, environmental regulations, food and hygiene, and so on.

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

Yes, personal liability for company officers is often specifically stipulated in statutory provisions whereby a company commits an offence with the consent or connivance of, or because of the negligence of, the officers concerned. The officers will be liable for the like offence provided that each and every element of an offence is proved beyond reasonable doubt by the prosecution.

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?

The Prosecution Code of the DOJ is silent on this point. The government authorities generally have the discretion to decide whether to pursue an individual, an entity, or both. Such decisions are normally made on a case-by-case basis based on sufficiency of evidence and public interest.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

A merger or acquisition may be done through purchasing of a target company's shares, or by way of transfer of business from the target company to a successor.

If a buyer purchases shares in a target company, given that the target company has a separate legal entity, any liability including criminal ones would continue to attach to the target company.

If the merger or acquisition involves a transfer of the target company's business, the successor may be held liable for all debts and obligation arising out of the previous owner. The Transfer of Businesses (Protection of Creditors) Ordinance (the "TBPCO") provides that whenever a business is transferred, the purchaser shall, notwithstanding any agreement to the contrary, become liable for all the debts and obligations arising out of the carrying on of that business by the vendor, unless the procedures set down in the TBPCO are followed. These procedures require the parties to publish a notice of transfer not more than four months and not less than one month before the date the transfer takes place.

That said, such successor liability only covers civil but not criminal liabilities.

5 Statutes of Limitations

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

There are no limitation periods for prosecuting indictable offences, which are generally more serious in nature. However, for offences which are triable in the Magistrates' Courts only, proceedings shall generally be commenced within six months from the time when offence arose.

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

Offences relating to conspiracy are generally indictable offences which are not subject to any limitation period.

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

No, they cannot.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

In general terms, the basic common law principle applicable to Hong Kong is that domestic criminal courts only have jurisdiction over criminal offences that are committed within the territorial limits of Hong Kong, and cannot assert extra-territorial jurisdiction.

Further, pursuant to Article 4(1) of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto, the parties shall not carry out in the other's territory the exercise of extraterritorial jurisdiction and performance of functions that are reserved exclusively for the authorities of that other country by its domestic law. Such enforcement activities against transnational crimes would therefore require international cooperation.

Certain exceptions to this principle are provided in the Criminal Jurisdiction Ordinance and the CFA's landmark decision in 2010 (*B v The Commissioner of the Independent Commission Against Corruption*) concerning the Prevention of Bribery Ordinance ("POBO"). The CFA decision clarified the extra-territorial reach of the POBO, which concerned advantages offered by persons in Hong Kong to foreign agents for their acts or forbearance outside Hong Kong.

The CFA found that the POBO applies where the advantage is offered in Hong Kong, even if the recipient is a foreign public official residing outside Hong Kong, and the conduct relates to their activities in a foreign jurisdiction. Nevertheless, the CFA stated that the extra-territorial element would only be a limited one: it is directed against offers made in Hong Kong and targets the offeror only.

This landmark CFA decision applies the POBO in a similar (although limited) sense to the Bribery Act 2010 in the UK or the Foreign Corrupt Practices Act 1977 in the US.

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

Government authorities can commence an investigation upon receipt of information from a complainant or other sources of information, or upon having reasonable suspicion of any form of crime or misconduct.

The CCB, ICAC and SFC investigations are commonly triggered by reports made by complainants, who are usually victims or aggrieved parties of the crime concerned.

The ICAC also accepts complaints that are made anonymously. Media reports and self-reporting by corporations or their employees concerning a particular crime may also trigger investigations by these agencies.

In addition, the SFC monitors the stock market through its Market Surveillance System, which contains real-time market transaction data, and proactively identifies any irregular and unusual market activities and commences investigations.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The Hong Kong authorities cooperate with foreign prosecutors in investigation, prosecution and prevention of crimes and in the conduct of criminal proceedings pursuant to the terms of international treaties, bilateral agreements of mutual legal assistance or memoranda of understanding between enforcement authorities.

In early 2019, the Hong Kong Government proposed an amendment bill to the Fugitive Offenders Ordinance with a view to allowing criminal suspects to be transferred to jurisdictions with which Hong Kong has no extradition agreement with, including mainland China, Taiwan and Macau. It triggered massive protests in Hong Kong against the proposed bill in mid-2019, as a result of which the government announced that the bill be stalled.

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 government generally has the power to obtain search warrants to search suspicious premises and seize documents, arrest suspects and interview them under caution. In addition, the SFC also has the power to issue a notice compelling a person to produce documents or to answer questions relevant to the investigation, whereas the ICAC has the power to compel a suspect to produce a statutory declaration setting out particulars of his properties, expenditures and liabilities and provide all documents in relation to such.

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?

As mentioned in question 7.1, certain authorities may issue a notice to demand a company to produce documents. The

general criteria for issuing such a notice are that there are reasonable suspicions that an offence has been committed, and that the recipient of the notice is in possession of such information or documents.

The authorities can also apply to the courts for a search warrant to raid a company and seize documents, and this often occurs if they take the view that issuing a notice may likely prejudice the investigation or tip-off the suspects who are at large.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Yes. The company can assert the following to protect themselves against production or seizure in relation to documents prepared by in-house attorneys or external counsel, or communications with in-house attorneys or external counsel:

Legal professional privilege ("LPP") – the concept of LPP is well-recognised in Hong Kong. The two main categories of LPP are:

(1) legal advice privilege, which applies to communications between clients and their lawyers made for the purpose of giving or receiving legal advice. Advice from in-house lawyers is also generally privileged, provided that the in-house lawyer was performing a legal function in entering into such communications with a certain party;
(2) litigation privilege, which applies to communications between lawyers (and in some circumstances their clients) and third parties made for the dominant purpose of obtaining legal advice or collecting evidence in respect of existing or contemplated litigation; and
(3) any public interest grounds that such materials should not be produced to the authorities.

In practice, when the company or its legal representatives claim LPP on certain documents, such materials will be placed in sealed envelopes by the authorities in the presence of the company's authorised representatives and shall not be used for investigation purposes in the interim. The target company is at liberty to take out an application to the Hong Kong courts to argue that such materials are covered by LPP and should not be disclosed to the authorities.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

According to the Personal Data (Privacy) Ordinance (Cap. 486), employers are required to abide by the six data protection principles whilst collecting personal information from employees. The six data protection principles include:

- Personal data must be collected in a lawful and fair way, for a purpose directly related to a function/activity of the data user.
- Practicable steps shall be taken to ensure personal data is accurate and not kept longer than is necessary to fulfil the purpose for which it is used.
- Personal data must be used for the purpose for which the data is collected or for a directly related purpose, unless voluntary and explicit consent with a new purpose is obtained from employees.
- Employers need to take practicable steps to safeguard personal data from unauthorised or accidental access, processing, erasure, loss or use.
- Further, employers must take practicable steps to make personal data policies and practices known to the employee regarding the types of personal data it holds and how the data is used.
- Employees must be given access to his/her personal data and allowed to make corrections if it is inaccurate.

The prohibition or restriction in relation to cross-border disclosure of personal information from Hong Kong to overseas is yet to be enacted. Once this section is enacted, it is anticipated that employers will be prohibited or restricted from transferring personal data of its employees to jurisdictions outside Hong Kong, unless such transfer is made in accordance with the PDPO. In addition, appropriate measures will likely be established to safeguard the confidentiality of such personal data in the receiving jurisdiction.

7.5 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?

The same principles stated in question 7.2 above shall apply.

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

The same principles stated in question 7.2 above shall apply.

Questioning of Individuals:

7.7 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 an employee, officer or director of a company is suspected of committing a criminal offence, he may be arrested by the authorities and thereafter subject to questioning by way of cautioned interview.

Alternatively, if the company is suspected of committing a crime, it can authorise an employee, officer or director to attend the cautioned interview and answer questions on its behalf.

The interview usually takes place at the offices of the government authorities concerned.

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

Third parties (who are likely witnesses instead of suspects) cannot be arrested or compelled to attend interviews for questioning. However, the authorities can invite these third parties for interviews or issue a production notice as mentioned in question 7.1 above to compel them to provide information.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Both the common law and the Hong Kong Bill of Rights Ordinance provide that: (1) a person has the right not to be compelled to testify against himself or to confess guilt, i.e., the right against self-incrimination; and (2) a person in custody is also entitled to consult privately with a lawyer and have the lawyer's representation during questioning.

No adverse inference may be drawn from the accused's silence.

It should be noted that an interview at the SFC is fundamentally different from that of other law enforcement agencies such as the police or the ICAC. Given the SFC's role as the regulator and gatekeeper of the financial market, the right to silence in SFC interviews is taken away by virtue of the Securities and Futures Ordinance. The interviewee is under a strict duty to answer all the questions raised by the SFC, failing which it would constitute a criminal offence.

Nevertheless, the interviewee can protect himself by making a "section 187 declaration" under the Ordinance if he considers that his answer to a particular question might tend to incriminate him. Once the declaration is made, any answer in that connection shall not be admitted as evidence in criminal proceedings against him save for a number of limited exceptions. The effect of such declarations, however, cannot be extended to disciplinary or civil and administrative proceedings.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Generally speaking, the government authorities initiate criminal prosecutions by laying charges against the individual defendants, or issuing summons to summon them to attend court. For company defendants, criminal proceedings are initiated by way of summons.

After charging an accused, the authorities are required to bring him before a magistrate at the earliest opportunity. In practice, this would be done within 48 hours of laying the charge.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

In deciding whether to bring criminal charges, the DOJ has to abide by the Prosecution Code (latest version dated 2013) which stipulates two requisite components: sufficiency of evidence; and public interest.

In assessing the sufficiency of evidence, the DOJ has to consider whether there is admissible and reliable evidence to support a prosecution and, together with any reasonable inferences able to be drawn from it, the offence will likely be proven. The test is, therefore, whether the evidence demonstrates a reasonable prospect of conviction.

The DOJ will also consider the following non-exhaustive list of factors in evaluating whether a prosecution would be in the public interest:

(1) The nature and circumstances of the offence, including any aggravating or extenuating circumstances.
(2) The seriousness of the offence.
(3) Any delay in proceeding with a prosecution and its causes.
(4) Whether or not the offence is trivial, technical in nature, obsolete or obscure.
(5) The level of the suspect's culpability.
(6) Any cooperation from the suspect with law enforcement or demonstrated remorse: the public interest may be served by not prosecuting a suspect who has made admissions, demonstrated remorse, compensated a victim and/or cooperated with authorities in the prosecution of others.
(7) Any criminal history of the suspect.
(8) The attitude, age, nature or physical or psychological condition of the suspect, a witness and/or a victim.
(9) The prevalence of the offence and any deterrent effect of a prosecution.

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

Generally speaking, the defence cannot agree with the government to resolve a criminal matter by pre-trial diversion or deferred prosecution.

For the less serious offences concerning individuals, the defendant or his lawyer can make a written application to the DOJ to negotiate a bind-over *in lieu* of a criminal conviction. However, this very rarely applies to business crimes such as fraud, bribery or financial crimes.

According to the Prosecution Code, the DOJ has to consider the following before granting a bind-over:

(a) whether the public interest requires the prosecution to proceed;
(b) whether the consequences to the offender would be out of all proportion to the gravity of the offence;
(c) the likely penalty in the event of conviction;
(d) the age of the offender, his or her record, character, mental state (at the time of offending and presently);
(e) the views of the victim; and
(f) the attitude of the offender to the offence.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

This is not applicable in Hong Kong.

8.5 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 may apply.

The criminal courts have powers to make a compensation order to a victim in respect of personal injury, loss or damage which results from the offence in question. This compensates the victim in a summary way, which avoids the need for civil proceedings. It should be noted that a compensation order cannot be made alone, and it must be done at the same time as the sentence or other order.

In particular, there are mandatory restitution orders against an accused who is convicted of a corruption or bribery offence under the Prevention of Bribery Ordinance. The restitution order may be enforced in the same manner as a civil judgment of the High Court.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

According to the Hong Kong Bill of Rights Ordinance, any person charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law. The burden of proof rests with the prosecution – it is for the prosecution to establish the accused's guilt by proving every element of the crime charged. The defendant has the burden to prove every element of any affirmative defence raised on a balance of probabilities.

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

The general rule is that the prosecution must prove the accused is guilty "beyond reasonable doubt". Where the burden lies with the defence, the standard of proof is on a balance of probabilities.

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

In the Magistrate's Court and the District Court, the magistrate or judge are arbiters of both fact and law. In the High Court, the jury is the arbiter of fact while the judge is the arbiter of law.

10 Conspiracy / Aiding and Abetting

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

The general foundation of secondary party liability in Hong Kong is the Criminal Procedure Ordinance, which states that any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence. To establish this liability, it is necessary both to ascertain the substantive offence alleged to have been committed by the parties, and also to identify the party who is to be treated as the principal.

Further, under the Crimes Ordinance, where two or more persons agree to commit a criminal act, they may be liable for conspiracy to commit a substantive offence.

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. Where the law defines an offence as requiring a particular state of mind by the defendant, the prosecution has to prove beyond reasonable doubt that the defendant possessed the required state of mind to commit a crime.

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?

No, ignorance of the law is not a defence under the laws of Hong Kong.

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?

This defence is available when the defendant's honest and reasonable mistake of fact negates the requisite state of mind for the offence. It is a defence which the defendant bears the onus of establishing to the standard of the balance of probabilities. If the defendant only adduces some evidence of such a defence, but not sufficient evidence to establish it on the balance of probabilities, then the defence fails.

For example, in bribery offences, if the defendant can adduce evidence on a balance of probabilities that he had a reasonable and honest (albeit erroneous) belief that the acceptance of gifts as an employee is permitted due to particular circumstances, he should be acquitted since this mistake prevented him from forming the requisite intent to commit the offence.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

The general rule is that a person or entity is not under any positive obligation to report crimes or provide assistance in any criminal investigations to the government in Hong Kong. Failure to report crimes does not generally attract any criminal liability.

However, for certain offences, a person or entity may be under positive duty to report crimes. According to the Organised and Serious Crimes Ordinance, when a person knows or suspects that any property represents (a) the proceeds of drug trafficking or other indictable offences or was, or is intended to be, used in connection with such offences, or (b) terrorist property, he or she should, as soon as reasonably practicable, report his or her knowledge or suspicion to the Joint Financial Intelligence Unit or compliance officer designated by his or her employer for anti-money laundering purposes. Failing to do so would constitute a criminal offence.

Voluntary disclosure would operate as a powerful mitigating factor if he is eventually prosecuted and convicted. Further, it would facilitate the prosecution authorities' decision on whether immunity should be granted, although this is not guaranteed.

13 Cooperation Provisions / Leniency

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

If a person voluntarily discloses his criminal conduct to the government by way of self-reporting or cooperates with the authorities in a criminal investigation against him, it would operate as a powerful mitigating factor if he is eventually prosecuted and convicted. He may receive as much as a two-thirds reduction in sentence. Further, it would facilitate the prosecution authorities' decision on whether immunity should be granted, although this is not guaranteed.

The prosecution will have to abide by the Prosecution Code in deciding whether to grant immunity. The balancing process involved will be strongly influenced by:

(a) the nature of the evidence the witness may be able to give and its significance to the prosecution of the case;
(b) the antecedents of the witness;
(c) his perceived credibility (including the fullness of his disclosure of facts and matters within his knowledge) and any discernible motive for not telling the whole truth (including the receipt, promise or expectation of a benefit);
(d) his level of involvement in the offence being prosecuted (which should generally be lower than that of the offender being prosecuted); and
(e) the presence of any supporting evidence.

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

There are no formal voluntary disclosure programmes in place in Hong Kong that can qualify an entity for amnesty or reduced sanctions. It will be determined by the authorities on a case-by-case basis. However, full and frank disclosure of all circumstances of the case is expected.

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?

Yes. The defendant can agree with the prosecution to plead guilty to reduced number of charges or charges of lesser gravity on the basis of a set of agreed facts to resolve the criminal proceedings expeditiously.

However, plea bargains in the sense of reaching an agreement with the prosecution as to the sentence are not permitted.

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?

Pursuant to the Prosecution Code, three tests must be satisfied before entering into a plea bargain: (a) there is admissible evidence available to prove the charges to which pleas have been offered; (b) the charges adequately reflect the criminality of the conduct alleged against the accused; and (c) the charges give to the court adequate scope to impose penalties appropriate to address that criminality.

Further, in all cases where negotiations are under way, the prosecutor should consult where appropriate with the investigator-in-charge of the case and any victim of crime, so as to inform them of the action being contemplated and of the reasons for it. The prosecutor must receive their views and take them reasonably into account when decisions are being made – not by way of instructions but as another means of informing such decisions.

The court is generally not involved in the plea bargain process, but the basis of plea is always subject to the approval of the court.

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 a sentence on the defendant? Please describe the sentencing process.

The sentencing process is an overall assessment of the available evidence and legal issues, and is by no means a purely mathematical exercise. The court will first of all ascertain the maximum penalty that may be imposed for the offences, and determine if there is any statutory minimum or mandatory sentence. Second, the court will consider any tariff or sentencing guidelines laid down by higher courts which are binding. Third, the court will assess the gravity of the offence and take into account any aggravating (such as breach of trust, premeditation, etc.) or mitigating factors (such as restitution) in the facts.

The court will then turn to consider the defendant's personal background, such as his education, employment history, any contribution to the society and whether he is of clear record. His motive for committing the crime and his behaviour since the commission of the offence will also be evaluated, for example, whether he fully cooperates with the investigation authorities, pleads guilty at the first available opportunity and takes remedial measures after the offence.

Generally speaking, a one-third discount is available for a plea of guilty. According to a recent Court of Appeal decision, the court laid down further sentencing guideline whereby less than a one-third discount will be granted for a belated plea of guilty which is entered sometime after the plea hearing or during trial.

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.

The principles stated in question 15.1 shall also apply to sentencing of a corporation in a similar way.

16 Appeals

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

Yes. The defendant can appeal a guilty verdict after trial. While the prosecution cannot appeal a non-guilty verdict, it can do so by way of "case stated" where the trial judge has erred in law or acted outside his/her jurisdiction.

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

Yes. The defendant can lodge an appeal against a sentence and the prosecution can apply for a review of the sentence.

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

- **Appeal against conviction** – the court must allow an appeal against conviction if it takes the view: (a) that the conviction is unsafe or unsatisfactory; (b) that there is a wrong decision on a point of law; or (c) that there was material irregularity in the course of the trial.
- **Appeal against sentence** – in allowing an appeal against a sentence, the appellant must show that the sentence was wrong in principle, that it was manifestly excessive, that it was based on a wrong factual premise or matters were wrongly taken into account, or that circumstances have changed significantly since the sentence was imposed, which warrant a different sentence.

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

For an appeal against conviction, the appellate court may quash the conviction and enter a verdict of acquittal. The appellate court may also order a re-trial.

For an appeal against sentence, the appellate court may uphold the original sentence, or increase or decrease the sentence imposed by the lower court.

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- Recommended in *Who's Who Legal Global Elite Thought Leaders – Business Crime Defence 2019 & 2020* as a thought leader.
- Recommended in *Who's Who Legal – Investigations 2019 & 2020* as an expert.
- Recommended in *Doyles' Guide 2020* for white-collar crime, corporate investigations and criminal law.
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Established in 1975, Haldanes is a Hong Kong-based law firm which specialises in criminal defence, competition law, commercial litigation & dispute resolution, commercial & entertainment and matrimonial law. The firm has a strong reputation across all of its practice areas, and its excellence has been acknowledged by various awards bodies including *Who's Who Legal*, *Asian Legal Business Awards*, *Chambers & Partners*, *The Legal 500*, *Doyle's Guide*, *Benchmark Litigation* and *China Business Law Award*.

In particular, Haldanes has been awarded the "Criminal Law Firm of the Year 2019" by *Asian Legal Business Awards* for the 20th consecutive year since 2000. Also, three partners of Haldanes, including Mr. Felix Ng, are recommended as experts and thought leaders by *Who's Who Legal 2020 – Business Crime Defence* and *Who's Who Legal 2020 – Investigations*.

In relation to criminal defence and regulatory work, Haldanes has a wealth of experience in dealing with the Hong Kong Police Force, the Independent Commission Against Corruption, the Commercial Crime Bureau, the Immigration Department, the Inland Revenue Department, the Customs and Excise Department, the Securities and Futures Commission, the Stock Exchange of Hong Kong, the Hong Kong Monetary Authority and the Competition Commission.

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India


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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?

India has a quasi-federal political structure comprising 29 states and seven centrally administered Union Territories. It has a democratically elected Union Government (also called the Central Government) and each state has its own democratically elected state Government. The police are a state subject, and therefore both the establishment and maintenance of a police force are in the hands of the state Governments. Each state has a police force. Investigations are normally handled by the police force of the state where the crime has been committed.

However, there is unified (all India) legislation under the Indian Penal Code, 1860 (IPC) and the Code of Criminal Procedure, 1973 (CrPC) for substantive and procedural laws relating to crime.

The Central Government has established a central investigative agency called the Central Bureau of Investigation (CBI). The CBI has its own prosecution wing called the Directorate of Prosecution.

It is also involved in serious crimes where it is necessary to procure the services of an agency independent of local political influence.

Where needed, the CBI can be assisted by specialised wings of the Central Government, especially in economic or cross-border crimes including the Serious Fraud Investigation Office, which is a multidisciplinary organisation under the Ministry of Corporate Affairs consisting of experts in the field of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation for detecting white-collar crimes/fraud.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The CBI will not investigate a crime in a state without the prior consent of that state. The Supreme Court or the High Court can, however, direct the CBI to investigate the crime without the consent of the state (or the Centre).

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?

The Government of India, under the Department of Revenue, has set up various agencies to enforce the law and combat crime. Some of the significant ones are:

(1) The Central Economic Intelligence Bureau (for various economic offences, and the implementation of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974).
(2) The Directorate of Enforcement (DOE) (for foreign exchange and money laundering offences, and implementation of the Federal Emergency Management Agency and Prevention of Money Laundering Act, 2002 (PMLA)).
(3) The Central Bureau of Narcotics (for drug-related offences).
(4) The Directorate General of Anti-Evasion (for central excise-related offences).
(5) The Directorate General of Revenue Intelligence (for customs, excise and service tax-related offences).
(6) The Securities and Exchange Board of India (SEBI) (to protect the interests of investors in securities and to promote their development, and to regulate the securities market and for matters connected therewith).
(7) The Directorate General of Income Tax (Investigation).
(8) The Financial Intelligence Unit, India (for the collection of financial intelligence to combat money laundering and related crimes).
(9) The Directorate General of Foreign Trade under the Ministry of Commerce and Industry (to monitor and curb illegal foreign trade).
(10) The Competition Commission of India (for anti-competitive trade practices).

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Yes, the country has witnessed a spate of business-related crimes. One such case relates to an Indian public bank, Yes Bank Limited. It is alleged that the Bank was extending high-value loans to select borrowers *in lieu* of personal gratification. The CBI filed its first charge sheet in June 2020 against eight entities including the founder of the bank, Mr. Rana Kapoor, on charges involving cheating, fraud, conspiracy, corruption and violation of lending norms. The DOE had earlier in May 2020 filed its charge sheet for charges of money laundering. The agency estimated the size of fraudulent deals at USD 1 billion (above Rs. 7,000 Crores approximately).

2 Organisation of the Courts

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

The specialised and exclusive criminal courts constituted in each state are:

(i) courts of Judicial Magistrates, second class;
(ii) courts of Judicial Magistrates, first class (in metropolitan areas, these are called courts of Metropolitan Magistrates); and
(iii) courts of Session.

Each state is divided into administrative divisions called Districts. Each District consists of a Sessions Court and courts of Judicial Magistrates. In metropolitan areas, Judicial Magistrates are called Metropolitan Magistrates.

Special courts are set up to deal with cases investigated by the CBI and to deal with offences under specialised statutes, for instance, under the Companies Act, 2013 and under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

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

No, there are no jury trials in India.

3 Particular Statutes and Crimes

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

• Securities fraud

The Securities and Exchange Board of India Act, 1992 (SEBI Act) and Rules framed thereunder deal with frauds related to securities and the issue, purchase or sale of security and the contravention of the aforesaid statutes. Fraud includes any act, expression, omission or concealment committed, whether in a deceitful manner or not by a person with his connivance or by an agent to deal in securities (whether or not there is any wrongful gain or avoidance of any loss), and also includes a knowing misrepresentation of the truth or concealment of material fact.

Under the SEBI Act, the Board set up thereunder has the power to prohibit fraudulent or unfair trade practices relating to securities markets. Penalties include a fine for failure to furnish information, failure by any intermediary to enter into any agreement with clients, failure to redress investors' grievances, etc.

• Accounting fraud

Accounting fraud includes forgery, falsification of accounts, professional misconduct including failure to disclose a material fact which is not disclosed in a financial statement, and failure to report a material misstatement which is to appear in a financial statement. Under the Companies Act, 1956, the Central Government is empowered to inspect the books of accounts of a company, direct special audits, order investigations and launch prosecutions. The IPC sets out the punishment for forgery and falsification of accounts.

• Insider trading

The SEBI Act prohibits insider trading. No "insider" shall (directly or indirectly) deal in securities of a listed company when in possession of unpubliahws price-sensitive information (UPSI). Also, an insider cannot communicate, counsel or procure UPSI. Prosecutions are launched by SEBI to prohibit insider trading in securities. In furtherance of its stance against insider trading, SEBI also notified the Prohibition of Insider Trading Regulations, 2015 as amended in 2018. With the introduction of the Regulations, the scope of who is an "insider" or a "connected person" is significantly widened. Therefore, any person, whether or not related to the company, may come within the purview of the Regulations if he is expected to have access to, or possess, UPSI. The new Regulations specifically define trading and prescribe a more structured disclosure regime. The Regulations prescribe for initial and continuous disclosures to be made by certain categories of persons in a company whose securities are listed on a stock exchange, along with public disclosure requirements for the company. Further, the Board of every listed company is required to formulate and publish its policy and a code of practices and procedures regarding disclosure of UPSI to determine what will constitute a "legitimate purpose" for holding on to UPSI, whistle-blower norms for reporting leaks of UPSI, and inquiry norms for determining the source of leaks.

• Embezzlement

Embezzlement under the IPC includes criminal breach of trust and dishonest misappropriation of property. The person entrusted with such property should have either dishonestly misappropriated or converted to his own use the property concerned, or have used and disposed of that property in violation of law. The offence carries imprisonment for a term which may extend to two years or a fine, or both.

• Bribery of government officials

The law dealing with the bribery of Government officials is contained in the Prevention of Corruption Act, 1988. The following offences by public servants/other persons/commercial organisations attract a penalty under the Act:

(i) Taking gratification other than legal remuneration in respect of an official act.
(ii) Taking gratification by corrupt or illegal means to influence a public servant.
(iii) Taking gratification for the exercise of personal influence with a public servant.
(iv) A public servant obtaining valuable things without consideration from the person concerned in proceedings, or business transacted by such public servant.
(v) Any person who gives or promises to give undue advantage to a person with an intent to induce or reward a public servant to perform their public duty "improperly".
(vi) Any person associated with a commercial organisation who gives or promises to give undue advantage to a public servant to obtain or retain business or an advantage in the conduct of the business for such commercial organisation.

The Act also provides for punishment for abetment by a public servant, whether or not the offence has been committed. For all the above offences, the acceptance, or agreement to accept or attempt to obtain such gratification or give or promise to give an undue advantage to a public servant, is enough to constitute an offence. Further, a public servant may also be charged for criminal misconduct, wherein the public servant abuses his position to gain a pecuniary advantage for himself or any other.

Other acts, such as the IPC, the Benami Transactions (Prohibition) Act and the PMLA, are also used for penalising acts such as the bribery of Government officials.

• Criminal anti-competition

The Indian anti-competition laws do not envisage any criminal prosecution (see below).

• Cartels and other competition offences

Under Indian law, remedies for cartel and other competition offences are civil in nature, i.e. in the form of a cease and desist order or penalty, or both. However, wilful disobedience of these orders or failure to pay the penalty may result in imprisonment for a term which may extend to three years, or a fine which may extend to Rs. 250,000,000. The Magistrate has the power to

take cognisance of the offence, provided that it is on the basis of a complaint filed by the Competition Commission or a person authorised by it.

• Tax crimes

Under the Income Tax Act, 1961, the Customs Act, 1962, the Central Sales Tax Act, 1956 & VAT, and the Central Excise Act, 1944, various tax crimes (such as tax evasion, smuggling, customs duty evasion, value-added tax evasion, and tax fraud) are prosecuted. It should be a deliberate act by a person and not an act of negligence, *viz.* a "deliberate act or omission prohibited by law".

• Government-contracting fraud

See "Bribery of government officials" above.

• Environmental crimes

The significant statutes dealing with the subject are: (i) the Water (Prevention and Control of Pollution) Act, 1974; (ii) the Air (Prevention and Control of Pollution) Act, 1981; and (iii) the Environment (Protection) Act, 1986.

- The Water (Prevention and Control of Pollution) Act, 1974
  Any person who knowingly causes or permits any poisonous, noxious or polluting matter into any stream, well, sewer, land or otherwise contravenes the provisions of the Act, is liable to imprisonment for a term no shorter than 18 months, but which may extend to six years and a fine. A subsequent contravention shall render the person liable for imprisonment for a term no shorter than two years, but which may extend to seven years and a fine. The functioning of the Act is entrusted to Pollution Control Boards.
- The Air (Prevention and Control of Pollution) Act, 1981
  Once again, the functioning of the Act is entrusted to the Pollution Control Boards, and they lay down the standards for emission of air pollutants into the atmosphere.
- The Environment (Protection) Act, 1986
  This is an omnibus Act, under which the Central Government is empowered to protect and improve the quality of the environment. The Act works through delegated legislation. A significant statutory Rule framed under this Act is called the "Hazardous Waste (Management and Handling) Rules, 1989". Violation of any Rule framed under the provisions of the Act renders the offender liable for imprisonment for a term which may extend to five years (with a fine), and if the contravention continues beyond a period of one year, the term of imprisonment may extend to seven years.

• Campaign-finance/election law

The law regulating elections and electoral campaigns in India is the Representation of the People Act, 1951 (RPA) and the Conduct of Elections Rules, 1961 framed thereunder. The RPA contains provisions regulating the activities of both individual candidates and political parties. The RPA provides for fixing a ceiling on the expenditure that may be incurred by candidates. At present, a candidate standing for election to the Lower House (*Lok Sabha*) may incur an expenditure of up to USD 100,000 (approximately) for all states except for Arunachal Pradesh, Goa, Sikkim, Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep and Puducherry, where it is USD 90,000 (approximately), and a candidate for election to the state Assembly may incur an expenditure of up to approximately USD 47,000 in all states except Arunachal Pradesh, Goa, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Puducherry, where it is USD 35,000 (approximately). However, it is provided that the following expenditure incurred by a candidate shall be excluded: party and supporter expenditures not authorised by the candidate; and expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating the programme of the political party.

Candidates who exceed these limits face the prospect of disqualification and annulment of their elections by the Election Commission. It is mandatory for political parties to declare their income, assets and liabilities, electoral expenses and contributions received, thereby bringing about greater transparency in campaign finance.

The Companies Act, 2013 regulates corporate contributions to individual candidates and political parties. It mandates that the amount contributed must not exceed 7.5% of the average profits of the past three years. Any contravention would result in a pecuniary liability of up to five times the contributed amount and imprisonment for a maximum period of six months.

Political parties are entitled to accept any amount of contribution voluntarily offered by companies other than Government companies under the RPA. It does, however, place an absolute restriction on contributions from foreign sources.

The Income Tax Act, 1961 provides that corporations are allowed a deduction from the total income to the extent of contributions made to political parties. There is an absolute prohibition on foreign contributions to any candidate for election or to a political party or office bearer thereof. Both the RPA and the IPC provide for sanctions on candidates and political parties for violation of the provisions regulating campaign finance. Civil penalties, *inter alia*, include disqualification for bribery/violating rules relating to campaign finance for a period of up to six years. The criminal penalties, *inter alia*, include imprisonment for furnishing false information, violation of foreign contribution rules, and failure to maintain election accounts. In cases where the offences are punishable by imprisonment, or a fine, or both, the Election Commission files written complaints in the court of the jurisdictional Magistrate for prosecuting the offenders.

• Market manipulation in connection with the sale of derivatives

The sale of derivatives is controlled by the provisions of the Securities Contracts (Regulation) Act, 1956 (SCR Act) and the SEBI Act, as well as the Rules, Regulations and Circulars issued thereunder.

Section 12A of the SEBI Act prohibits the use of manipulative and deceptive devices, insider trading and substantial acquisition of securities. It provides that no person shall, *inter alia*, use or employ in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the SEBI Act or the Rules or Regulations made thereunder. Contravention of said provisions is punishable under Section 24 of the SEBI Act, with imprisonment for a term which may extend to 10 years (with a fine which may extend to Rs. 250,000,000 or both).

• Money laundering or wire fraud

Offences related to money laundering are dealt with under the provisions of the PMLA. The offences are mentioned in the Schedule to the Act. The Act lays down obligations on Reporting entities (i.e. banking companies, financial institutions and intermediaries), *inter alia*, in relation to maintenance of records, confidentiality of information, etc. The Reporting entities are under an obligation to furnish information to the Financial Intelligence Unit – India (a central national agency responsible for processing, analysing and disseminating information relating to suspect financial transactions). An investigation can be initiated only by authorities designated by the

Central Government, including the DOE. The Act provides that the Central Government may enter into an agreement with the government of any country outside India for: (a) enforcing the provisions of the Act; or (b) exchange of information for the prevention of any offence under the Act or under the corresponding law in force in that country or an investigation of cases relating to any offence under this Act. The PMLA provides for rigorous imprisonment for a maximum period of seven years in cases of conviction for the offence of money laundering.

• Cybersecurity and data protection law

The Information Technology Act, 2000 (IT Act) and the Amendment Act, 2008 deal with technology in the fields of e-commerce and e-governance, as well as prescribe punishment for offences committed under the IT Act. The IT Act extends to offences or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

The IT Act prescribes punishment for various offences including cyber-terrorism, identity theft, violation of privacy, sending offensive messages, etc. The Amendment Act, 2008 also provides for data protection by a body corporate and states that it shall be liable to pay damages by way of compensation to a person if the corporate is negligent in implementing reasonable security practices, thereby causing wrongful gain or loss to any person.

The IPC (as amended by the IT Act) now penalises several crimes which include forgery of electronic records, destroying electronic evidence, etc.

Section 43 of the IT Act enlists the offences related to the introduction of viruses to a computer network, disruption of computer network or denial of access to the computer system, etc.

The CBI has notified a Cyber Crime Investigation Cell which has been in force since March 3, 2000. It has a pan-India jurisdiction and can look into the offences punishable under the IT Act as well as into other high-technology crimes. A majority of states including Delhi, Mumbai, Bangalore, Gujarat, etc. have their own Cyber Crime Cell to handle offences within their jurisdiction.

The Ministry of Home Affairs, on October 5, 2018, approved a scheme titled the Indian Cyber Crime Coordination Centre (I4C) scheme. It is proposed that under the scheme, a national cybercrime coordination centre will be set up for law enforcement agencies of the states and the Union Territories to handle issues related to cybercrime.

• Trade sanctions and export control violations

The Foreign Trade (Development and Regulation) Act, 1992 is an Act to provide for regulation of foreign trade and for matters connected with or incidental thereto. Under the Act, the Central Government has the power to make provisions for prohibiting, restricting or otherwise regulating the import and export of goods. The Act provides that persons are only permitted to engage in the activities of import or export under an Importer-Exporter Code Number granted by the Director General of Foreign Trade, Ministry of Commerce and Industries. Such Code stands to be suspended or cancelled if the Director General believes that a person has made an export or import in a manner gravely prejudicial to the trade relations of India, or to the interest of other persons engaged in imports or exports, or has brought disrepute to the credit or the goods of the country. The Central Government has the power to impose quantitative restrictions (subject to a few exceptions) if it is satisfied that the imports cause or threaten to cause serious injury to the domestic industry.

• Any other crime of particular interest in your jurisdiction

- The Banning of Unregulated Deposit Schemes Act, 2019 was enacted by Parliament on July 31, 2019. The Ministry of Finance, on February 12, 2020, notified the Banning of Unregulated Deposit Schemes Rules 2020 (Rules). The Act provides for a comprehensive code to regulate deposit schemes in order to protect the interest of depositors. Amongst other things, it bans solicitation and receipt of unregulated deposits, creates a framework for reporting and monitoring of deposit schemes, and sets out a prosecution and penalty mechanism for its enforcement. It contemplates punishment of up to 10 years and fines of up to Rs. 50 Crores for violations.
- The Fugitive Economic Offenders Act, 2018 deals with deterrence measures against "fugitive economic offenders" who evade criminal trials for economic offences by absconding even before a formal criminal complaint is filed. A "fugitive economic offender" is defined as an individual against whom an arrest warrant in relation to a "Scheduled Offence" has been issued by an Indian court, and who has left India, or being abroad refuses to come to India in order to avoid criminal prosecution. A "Scheduled Offence" in relation to which the arrest warrant is issued, refers to an offence specified under the Schedule of the Ordinance, where the total value involved in such offence is Rs. 100 Crores or more. Scheduled Offences include money laundering, customs evasion, insider trading, etc. The Act makes provisions for special courts constituted under the PMLA to declare a person as a fugitive economic offender.
- The Parliament has passed the Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act, 2015 (on May 27, 2015) and the Companies (Amendment) Act, 2015 (on May 26, 2015) to improve transparency and combat business crime.
- The Government's focus has also been on tackling cybercrimes. In February 2017, the Reserve Bank of India (India's central bank) constituted a Standing Committee on Cyber Security to establish an ongoing system of security review and analysis of emerging threats to protect the banking system in India.

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

Yes; however, not every inchoate crime is punishable under Indian laws. An attempt to commit a crime has not been defined under the IPC. Various judicial decisions have laid down the elements constituting the offence to include: (a) the intention to commit that offence; (b) once the preparations are complete and with the intention to commit any offence, performing an act towards its commission; and (c) that such an act need not be the penultimate act towards the commission of the offence but must be an act during the course of committing that offence.

In some cases, the commission of an offence, as well as the attempt to commit such offence, is dealt with under the same section and the extent of punishment prescribed is the same for both, e.g. bribery. In some cases, attempts are treated as separate offences (e.g. an attempt to commit murder or robbery). In very few cases, preparation to commit an offence is a crime.

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?

An earlier view was that a company/legal entity does not have the *mens rea* for the commission of an offence. However, various judicial decisions have clarified the position that a company/legal entity is virtually in the same position as any individual, and may be convicted of a breach of statutory offences including those requiring *mens rea*.

Most statutes have a clause covering criminal liability of a corporate, which typically reads as follows:

> *"Offences by companies – (1) where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.*
> *Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence."*

The circumstances under which an employee's conduct can be imputed to the entity are:

(a) The employee must be acting within the scope and course of his employment.

(b) The employee must be acting, at least in part, for the benefit of the corporation, regardless of the fact that it actually receives any benefit or whether the activity might even have been expressly prohibited.

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

Yes; in India, there is personal liability for managers, officers and directors for aiding, abetting, counselling or procuring the commission of any offence. (See also question 4.1.)

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?

See question 4.1. Usually, both are pursued. There have been judicial pronouncements wherein it has been held that impleading the company as an accused is *sine qua non* for prosecution of the directors/individuals employed with the company.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

To a large extent this will depend on the mode of merger or acquisition. In a court-approved merger, the court-sanctified scheme will itself provide for successor liabilities. Generally, in a simpliciter case of acquisition of assets (slump sale mode), liability will not follow.

The Supreme Court in *McLeod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri and others*, 2014(8) SCALE 272 held the successor entity liable to pay damages for any default in remitting provident fund (social security) contributions. The said default was committed by the transferor entity prior to the date of transfer of employees. The Supreme Court clarified that the transferee shall not stand absolved of the liabilities even if such liabilities have been specifically assigned to the transferor entity by way of an express agreement.

In addition, the Courts have enumerated five circumstances under which successor liability can be recognised:

(1) express or implied assumption of liability;

(2) transfer of asset by the purchaser for fraudulent purpose of escaping liability for the seller's debt;

(3) mere continuation of the enterprise amounting to consolidation or *de facto* merger;

(4) the purchasing corporation is merely continuation of the seller for continuity of the enterprise; and

(5) charge on the property.

5 Statutes of Limitations

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

In India, the CrPC provides for the calculation of a limitations period. As per Section 468 thereof, no court can take cognisance of an offence after expiry of (a) six months, if the offence is punishable only with a fine, (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year, or (c) three years, if the offence is punishable with imprisonment for a term not exceeding three years. The limitations period commences on the date of the offence. However, with regard to certain economic offences/business crimes, the Economic Offences (Inapplicability of Limitation) Act, 1974 provides that provisions of the CrPC relating to limitation shall not apply in relation to, *inter alia*, the following statutes:

(i) The Income Tax Act, 1961.
(ii) The Companies (Profits) Surtax Act, 1964.
(iii) The Wealth Tax Act, 1957.
(iv) The Gift Tax Act, 1958.
(v) The Central Sales Tax Act, 1956.
(vi) The Central Excises and Salt Act, 1944.
(vii) The Customs Act, 1962.
(viii) The Emergency Risks (Goods) Insurance Act, 1971.

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

Yes, if it is a "continuing offence" (as opposed to an offence committed once and for all), a fresh period of limitation shall begin to run at every moment of time during which the offence continues.

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

The limitations period can be tolled in the following circumstances, if the court is satisfied that the delay has been properly explained or if it is necessary to do so in the interest of justice:

(i) the time during which a person has, with due diligence, been prosecuting another action against the offender in another court of first instance, court of appeal or revision, if it relates to the same facts and is prosecuted in good faith in another court which could not entertain it or want of jurisdiction or another cause of a similar nature;

(ii) where the institution of the prosecution has been stayed by an injunction or order (the time excluded is the period during which the injunction or stay operated);

(iii) where the previous sanction of the Government is required for the institution of the offence (the time excluded is from the date of the application for obtaining the sanction to the date it is obtained); and

(iv) the time during which the offender has been absent from India or has avoided arrest by absconding or concealing himself.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Under the provisions of the PMLA, if an order is passed freezing any property of a person in possession of proceeds of crime, and such property is situated outside India, the concerned authority may request the appropriate court in India to issue a Letter of Request to a court or authority in the Contracting State to execute the order. "Contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise. (Please also see question 6.3.)

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

Normally, investigations are initiated by the filing of a report with the concerned police station, called a First Information Report (FIR). Based on the FIR, the police then initiate an investigation. The procedure for conducting an investigation is prescribed in the CrPC.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, under the provisions of the CrPC (Section 166A), there are formal mechanisms for cooperating with foreign enforcement authorities. One such mechanism is via a Letter Rogatory or a Letter of Request.

During the course of an investigation into an offence, an application can be made by an investigating officer stipulating that evidence is available in a country or place outside India. Subsequently, the court may issue a Letter of Request to such court or authority outside India to examine any person acquainted with the facts and circumstances of the case and to record his statement. The court may also require that such person or any other person produce any document or thing which may be in his possession pertaining to the case, and forward all the evidence to the court issuing such Letter.

In addition to the above, Indian legal regime also provides for other forms of cooperation with foreign enforcement authorities, such as the CBI that serves as the National Central Bureau for the purpose of correspondence with ICPO-INTERPOL to cooperate and coordinate with each other in relation to the collection of information, the location of fugitives, etc. The Double Tax Avoidance Agreements and finalised Tax Information Exchange Agreements strengthen the exchange of information relating to tax evasion, money laundering, etc. Further, Mutual Legal Assistance Treaties (MLATs) facilitate cooperation in matters relating to service of notice, summons, attachment or forfeiture of property or proceeds of crime, or execution of search warrants. MLATs have been given legal sanction under Section 105 of the CrPC.

India has also adopted the Convention on Mutual Legal Assistance in Criminal Matters. It has operationalised agreements with 39 countries so far.

On March 10, 2016, the Central Government gave its approval for signing and ratification of the Bay of Bengal Initiative on Multi-sectoral Technical and Economic Cooperation (BIMSTEC) Convention on Mutual Legal Assistance in Criminal Matters. The BIMSTEC comprises seven countries – Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand. The Convention aims to enhance the effectiveness of the Member States in the investigation and prosecution of crimes, including crimes related to terrorism, transnational organised crime, drug trafficking, money laundering and cybercrimes.

India signed and ratified the United Nations Convention against Corruption on May 9, 2011.

7 Procedures for Gathering Information from a Company

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

Generally, the investigation agencies have statutory power to obtain documents, records and other information from any person, including employees, and to record statements as required. The authorities can conduct search and seizure operations at the premises of the companies or their employees, including directors. Under the PMLA, the DOE has the power to require banks to produce records and documents relating to suspect transactions. Electronic evidence may also be procured under Section 69 of the IT Act.

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?

Please see question 7.1 above.

A court or an investigating agency which considers that the production of any document or thing is necessary for the purposes of an investigation, inquiry, trial or other proceeding, may issue summons or a written order for production of such document or thing. A search warrant may also be issued if the court has reasons to believe that the person to whom the summons has been issued will not comply. A search and seizure operation may be conducted with respect to suspected stolen property, forged documents, and objectionable articles, including counterfeit coins, currency notes, false seals, etc. The police officer also has the power to seize certain property which is alleged or suspected to be stolen, and which creates suspicion of commission of the offence.

Under the PMLA, if there are suspected violations of the Act, the DOE can demand production of documents during investigation, and attach and seize properties of those involved in money laundering.

For information to be procured under Section 69 of the IT Act, the Central Government, state Government or any of its officers must be satisfied that collection of such information/evidence is expedient in the interest of factors such as sovereignty of the state, public order, etc.

Authorities under special statutes, including fiscal statutes, have also been empowered thereunder to compel production of documents if considered necessary for any inquiry or investigation.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Indian law recognises privilege or non-disclosure of documents in limited circumstances. Insofar as Government documents are concerned, privilege can be claimed only on the grounds that disclosure will be injurious to public interest (including national security or diplomatic relations).

Communication between husband and wife during marriage is generally privileged.

Lawyer/client communication is privileged if it is made in the course of, or for the purposes of, professional employment.

Mere confidentiality or protection of business secrets is not a ground to resist production of documents. In some cases, the court may examine the document concerned confidentially to judge its relevance/admissibility before ordering its production.

As an exception, the labour laws of India do not protect personal documents of employees even if they are located in company files.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The IT Act contains specific provisions intended to protect electronic data (including non-electronic records or information that has been or is currently or is intended to be processed electronically). Section 43A of the Information Technology (Amendment) Act, 2008 provides for protection of "sensitive personal data or information" (SPDI) and deals with compensation for negligence in implementing and maintaining reasonable security practices and procedures in relation to SPDI.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 lay down the manner in which collection and processing of data is regulated.

Rule 5 of the same states that SPDI shall not be collected unless it is necessary for a person or body corporate to collect such information to carry out its lawful purpose. Additionally, the provider of such information must consent to the collection of information in writing, which he may also withdraw at any point.

Further, Rule 6 lays down that any disclosure of SPDI requires prior permission of the provider of this information.

The Rules require every company to have in place such information security practices, standards, programmes and policies that protect the collected information appropriately.

India does not presently have any blocking statutes or domestic laws that may impede cross-border disclosure. A Bill titled the Personal Data Protection Bill, 2019 was introduced in Parliament in December 2019 and referred to a Joint Parliamentary Committee (Standing Committee) in March 2020. The Bill seeks to create provisions, *inter alia*, to protect the autonomy of individuals in relation to their personal data, to specify where the flow and usage of personal data is appropriate, and to lay down norms for cross-border transfer of personal data.

7.5 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?

Please see question 7.2.

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

Please see question 7.2.

Questioning of Individuals:

7.7 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?

The CrPC empowers the investigating authority to examine any person who appears to be acquainted with the facts and circumstances of the case being investigated. Normally, the questioning takes place at the office of the investigation agency. Similar powers have been given to investigation agencies under other special statutes.

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

Please see question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

In India, the right of silence is available only for an accused individual. This does not apply to a person under investigation. At the same time, any confession made to a police officer is inadmissible in evidence, and a person cannot be compelled to sign any statement given by him to a police officer in the course of an investigation. Such a person does not have a right to be represented during questioning. He is, however, entitled to an advocate of his choice during interrogation, though not to be present throughout interrogation. The assertion of the right of silence will not result in an inference of guilt at trial. The accused is presumed innocent until he is proved guilty.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

(i) A Magistrate may take cognisance of an offence in the following manner (Chapter XIV of the CrPC):
- (a) upon receiving a complaint constituting an offence;
- (b) upon a police report;
- (c) upon information received from any person other than a police officer; or
- (d) upon his own knowledge that such offence has been committed.

(ii) In cases described under (i) (a) above:
- (a) An individual (of any nationality) or a corporate entity may file a complaint in the court of the jurisdictional Magistrate in respect of a crime.
- (b) Complaints may also be filed by statutory authorities under various enactments; for instance, for evasion of income tax, a complaint is filed by the competent authority under the Income Tax Act in the court of the jurisdictional Magistrate.

(iii) In cases described under (i) (b) above:
On completion of an investigation, the police force is required to file a report (whether an offence appears to have been committed or not). This is referred to as a charge sheet, and is filed in the court of the jurisdictional Magistrate. On receipt of such police report, the Magistrate takes cognisance of the offence and issues summons to the accused persons named therein.

(iv) In cases described under (i) (c) above:
The Magistrate may also take cognisance of an offence on the basis of information received by him, other than from a police officer. This may be information received from an unnamed source or an informer.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Please see question 4.3 above.

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

There is no such procedure.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Please see question 8.3.

8.5 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 may apply.

In India, a defendant can additionally be subjected to civil penalties or remedies. However, civil penalties or remedies cannot be used as a substitute for the criminal disposition. Under criminal remedies, the CrPC provides for compensation to any person for any loss or injury caused by the offence if the court is of the opinion that it would be recoverable by such person in a civil suit.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof in criminal cases lies on the prosecution, and does not shift during the trial. Under Sections 101 and 102 of the Evidence Act, it may shift from party to party. With respect to affirmative defence, generally, the party taking such defence bears the burden of proof.

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

The prosecution is required to prove its case "beyond all reasonable doubt". Criminal cases are governed by a higher standard of proof as compared with civil cases (where only "preponderance of probabilities" is required to be proved). Where the accused pleads an exception in law, it has the same burden as in a civil case (i.e. preponderance of probabilities).

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

The Judge is the arbiter of fact and determines whether the prosecution has satisfied its burden of proof. There are no jury trials.

10 Conspiracy / Aiding and Abetting

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

Yes, a person who conspires or assists another to commit a crime can be held liable. These acts include abetment, conspiracy and acts done in furtherance of a common intention. An offence of "abetment" arises when a person voluntarily causes or procures, or attempts to cause or procure, a thing to be done, and is said to instigate the doing of that thing by wilful misrepresentation or wilful concealment of a material fact which one is bound to disclose (Section 107, IPC). A person will also be liable for abetment if he abets the commission of any act beyond India which would constitute an offence if committed in India (Section 108A, IPC). Criminal conspiracy (Section 120A, IPC) arises when two or more persons agree to commit or cause an illegal act to be done or an act which is not illegal, by illegal means. For acts done "in furtherance of a common intention" (Section 34, IPC), the two elements required to be established are common intention and participation of the accused in the commission of the offence.

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, lack of requisite intent/*mens rea* to commit a crime is a defence to a criminal charge. Virtually every offence under the IPC requires criminal intent or *mens rea* in some form or another. The burden of proof lies on the prosecution and it must be proved "beyond all reasonable doubt". However, in some cases, the law has omitted to prescribe a particular mental condition, and in these cases, the doctrine of *mens rea* is not applicable, e.g. negligence.

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?

The maxim "*ignorantia juris non excusat*" (i.e. ignorance of law is not an excuse) applies.

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?

Sections 76 and 79 of the IPC provide for a mistake of fact as an exception and a complete defence to a criminal charge. The necessary prerequisites here are: that the act must be due to ignorance of fact; and that there must be good faith, i.e. reasonable care and caution in doing the act. The burden of proof to prove the exception will lie on the accused/defendant. (See question 9.2 above.)

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

If a person knows or has reason to believe that an offence has been committed and intentionally omits to give such information, where he is legally bound to disclose such information, he will be held liable for failure to report (Section 202, IPC). The punishment would include a term which may extend to six months or a fine, or both. Please see question 13.1 for leniency/credit for voluntary disclosure.

13 Cooperation Provisions / Leniency

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

The power to grant a pardon can be exercised by the Magistrate during the investigation into an offence. The provision for pardon applies only to cases triable by the Sessions Court, i.e. where the offence would attract a punishment of imprisonment of seven years or more. (For other cases, see the provisions relating to plea bargaining in section 14 below.) A pardon is granted with a view to obtaining evidence from any person supposed to have been directly or indirectly concerned with or privy to an offence. A condition for the grant of pardon is that the person makes a full and true disclosure of all facts within his knowledge. Any person who accepts a tender for pardon shall be examined as a witness in the trial.

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

Where a person has accepted a tender of pardon (as described in question 13.1 above) and it is alleged by the public prosecutor that such person has wrongfully concealed an essential fact or given false evidence, or has not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered or for any other offence which he appears to have been guilty of, and also for the offence of giving false evidence.

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?

(Sections 265A to 265L, CrPC.) Plea bargaining is available only for offences that are penalised by imprisonment for fewer than seven years. However, if the accused has previously been convicted of a similar offence, then he will not to be entitled to plea bargaining. It is not available for offences which might affect the socio-economic conditions of the country or for offences against a woman or a child below 14 years of age. A charge sheet must be filed with respect to the offence in question, or a Magistrate must take cognisance of a complaint before plea bargaining can proceed.

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?

The accused is required to file an application for plea bargaining in the court where the trial is pending. On receiving the application, the court must examine the accused *in camera* to ascertain whether the application has been filed voluntarily. The court must then issue notice to the public prosecutor and the investigating officer (if the case is instituted on a police report) or the complainant (if the case is instituted otherwise) to work out a mutually satisfactory disposition of the case. The negotiation of such a mutually acceptable settlement is left to the free will of the prosecution (including the victim) and the accused. If a settlement is reached, the court can award compensation based on the outcome to the victim, and then hear the parties on the issue of punishment. The court may release the accused on probation if the law allows for it. If a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such punishment; in other cases, the accused may be sentenced to a quarter of the punishment provided or extendable for

such offence. The accused may also avail of the benefit under Section 428 of the CrPC, which allows for setting off the period of detention undergone by the accused against the sentence of imprisonment in plea bargained settlements. The court must deliver the judgment in an open court. This judgment is final, and no appeal can be made.

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 a sentence on the defendant? Please describe the sentencing process.

When the court determines that a defendant is guilty of a crime, it may order either a fine or imprisonment or both, depending on the statutory provisions and the severity of the crime. The court may, while passing judgment, order the whole or any part of the fine or imprisonment period to operate. The court's imposition of a sentence is largely discretionary in nature. An order to pay compensation may include expenses incurred in the prosecution. With regard to criminal misappropriation, criminal breach of trust or cheating, it would include compensating the *bona fide* purchaser or victim. If the Magistrate finds the accused not guilty, he shall record an order of acquittal (Section 248, CrPC). If the accused is convicted, the Judge shall hear him on the question of sentence and then pass the sentence according to law, unless there is an order to release the person on probation of good conduct or after admonition (Section 235, CrPC). It should be mentioned that in India, imposition of a sentence for a business crime is generally not perceived to be harsh.

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.

The court must look into the facts and circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, and all other attendant circumstances which would enter into the area of consideration.

16 Appeals

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

Yes, there is at least one statutory right of appeal. Thereafter, a discretionary appeal may lie to the High Court and thereafter to the Supreme Court of India, depending on the facts.

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

Both parties are entitled to appeal if they are dissatisfied with the verdict in whole or in part.

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

If an appeal is from a Magistrate's Court to a Sessions Court, then there is a full review of facts, appreciation of evidence as well as law. If the appeal is to the High Court or the Supreme Court, the review would be confined to issues of law alone, unless there is a gross miscarriage of justice or error apparent on the face of the record. However, if the appeal is from a Magistrates' Court or a Sessions Court on a sentence of more than seven years to a High Court, then there is a full review of facts, appreciation of evidence as well as law. The review by the Supreme Court would be the same as stated above.

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

If the appellate court upholds the appeal (Section 386, CrPC), it may:

(a) From an order of acquittal, reverse such order and direct that further inquiry be made or the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence.

(b) In an appeal from a conviction or for enhancement of sentence, it may:
  (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction subordinate to the appellate court or committed for trial;
  (ii) maintain the sentence; or
  (iii) with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence but not enhance the same.

(c) In an appeal from any other order, alter or reverse such order.

(d) Make any amendment or any consequential or incidental order that may be just and proper.

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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?

In Israel, the principal prosecution body is the State Attorney's Office, and accused parties are prosecuted through the District Attorney's Office. There are two units within the State Attorney's Office that are tasked with the handling and prosecution of economic offences – the Tel Aviv District Attorney's Office (Taxation and Economics) and the Economic Department, which have equivalent authorities and specialise in prosecuting those suspected of having committed business crimes.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The different governmental authorities in Israel are each vested with authority for investigating particular offences, such as: the Israel Securities Authority ("the ISA"), which investigates capital market-related offences; the Israel Competition Authority ("the ICA"), which investigates antitrust and competition-related offences; and the Israel Tax Authority ("the ITA"), which investigates tax-related offences. Additional offences, including corruption, fraud and any other economic offences, will be investigated by the various units within the Israeli Police.

Some of the investigative authorities also act as prosecutors, such as the ICA and the ITA. For other business-related offences, especially in substantial and complex cases, the case will be transferred to either the Taxation and Economics unit or the Economic Department within the State Attorney's Office.

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?

Certain regulatory authorities also have administrative powers for dealing with business crimes. The Securities Law allows for the initiation of administrative enforcement proceedings, so that most offences can be enforced either through the institution of criminal or administrative proceedings, based on the severity of the offence. The ICA can likewise impose administrative enforcement measures, based on the authorities vested in it under the Economic Competition Law, and the ITA has established ransom committees that have the power to impose a ransom as an alternative to criminal proceedings in tax-related offences.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Israel has witnessed several major business crime cases, one of them being the case of the sitting Prime Minister, Benjamin Netanyahu, who has been indicted for having committed several offences. The most prominent case is that titled "Case 4000", which deals with the conduct of certain senior officers in a leading communications company, where Prime Minister Netanyahu has been indicted for having taken a bribe and acting in a conflict of interests, by interfering with regulatory decisions that benefitted those companies.

2 Organisation of the Courts

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

There are three judicial instances: Magistrates' Courts, which are located in many cities in Israel; six District Courts; and the Supreme Court in Jerusalem. Indictments are filed with either the Magistrates' Court or District Court, based on the severity of the offence. In general, the courts do not possess specific expertise, and indictments are usually filed with the court based on the geographical location of the investigation unit, with a few minor exceptions.

The Israel Supreme Court has a number of functions: it serves as an appellate court over District Court decisions; it is vested with authority for making decisions about further hearings or retrials; and it also sits as the High Court of Justice.

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

There is no right to a jury in business crime trials.

3 Particular Statutes and Crimes

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

• Securities fraud

Section 54(a) of the Securities Law prohibits a person from acting in relation to securities by making misrepresentations which are either false or conceal the true facts, and section 54(b) of the Securities Law prohibits fraudulently influencing fluctuations in the price of securities.

• Accounting fraud

Section 53 of the Securities Law provides that any person who misleads a reasonable investor by means of a prospectus that is not approved by the ISA, or includes misleading items in a prospectus, shall be liable to five years' imprisonment or a fine.

Section 423 of the Penal Law, which provides that if an officer of a corporation enters a false item in a document of the corporation, with the intent to deceive, he/she shall be liable to up to five years' imprisonment.

• Insider trading

Section 52 of the Securities Law prohibits any person who possesses insider information from delivering or giving an opinion regarding insider information to another person, where such person knows that the recipient of such insider information will make unlawful use thereof.

• Embezzlement

Embezzlement offences in fact constitute offences of theft, which are committed by people in whom a certain trust is given and who are entrusted with property or economic resources.

• Bribery of government officials

Sections 290 and 291 of the Penal Law prohibit the giving or taking of bribes. The Penal Law describes a bribe as any consideration having a benefit, in money or money's worth, which is given to a public official in order to enable him to act in relation to his position. The definition ascribed to the term "gift" under Israeli law is extremely broad, so that any benefit can be considered a bribe.

• Criminal anti-competition

Section 4 of the Antitrust Law prohibits a person from being party to a restrictive arrangement, which is defined as an arrangement between persons who conduct business, pursuant to which one of the parties restricts himself in a way that might prevent or reduce competition in business situations.

Additional offences under the Antitrust Law include: failure to comply with the conditions on whose basis the restrictive arrangement was approved; failure to notify about the merger of companies; and abuse by a monopolist of its monopoly power.

• Cartels and other competition offences

See our response to "Criminal anti-competition" above.

• Tax crimes

Section 117A of the Value Added Tax Law provides that any person who transfers assets without effectively transferring control over them or distributes his assets in the company amongst its members, with the intention of preventing the collection of tax, shall be liable to two years' imprisonment.

Section 220 of the Income Tax Ordinance provides that a person who intentionally evades tax, deliberately omits an item from an income tax report, provides false information about his income or uses fraud or trickery to evade tax or assists someone else to evade tax, shall be liable to seven years' imprisonment.

• Government-contracting fraud

No specific reference is made in Israeli law regulating these offences.

• Environmental crimes

The main pieces of legislation that deal with the environment and related matters are the Clean Air Law, the Water Law, the Collection and Disposal of Waste for Recycling Law, the Hazardous Substances Law, etc. Examples of specific conduct include: the discharge of pollutants into bodies of water without a permit; the improper removal and disposal of asbestos-containing materials; and the disposal of hazardous waste in unauthorised areas.

• Campaign-finance/election law

The Political Parties Financing Law regulates the sources of funding of political parties that are represented in the Israeli Parliament.

In addition, section 122 of the Knesset Elections Law provides that using improper means in order to influence a voter to vote or prevent him from voting, *inter alia*, by giving a bribe, making threats or in any other manner, shall be liable to five years' imprisonment or a fine.

• Market manipulation in connection with the sale of derivatives

See our response to "Securities fraud" above.

• Money laundering or wire fraud

Sections 3 and 4 of the Prohibition on Money Laundering Law prohibit doing anything with property that is sourced from the commission of a criminal offence, or aimed at hiding its source and the identity of its owners.

• Cybersecurity and data protection law

The Computers Law enumerates a long list of criminal offences, such as intrusion and hacking of computers, the creation and distribution of viruses, computer disruption or interference and creating false information.

• Trade sanctions and export control violations

The Defence Export Control Law and the Trading with the Enemy Ordinance both provide criminal sanctions for trading and exporting goods that may endanger Israel's national security. According to these provisions, maintaining economic relations with an enemy state or exporting defence equipment without authorisation constitute serious offences.

• Any other crime of particular interest in your jurisdiction

Fraud and breach of trust are offences that could be committed by a public servant (section 284 of the Penal Law) or an officer in a corporation (section 425 of the Penal Law), where the public servant or the officer becomes involved in a conflict of interest situation or in order to prefer his personal interest over the interest vested in the public or the corporation.

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

Yes, section 25 of the Penal Law provides that a person will be found liable for attempting to commit an offence if, in order to

commit it, he performs an act that does not only entail preparation and the commission of the offence is not completed.

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?

In Israel, a corporation may be found liable and prosecuted for criminal offences committed by its organs.

Section 23(a)(2) of the Penal Law sets out the scope of corporate criminal liability for offences committed by a corporation's organ. This section provides that criminal liability can be imposed directly on corporations, if, under the circumstances, the organ's actions and criminal intent or his negligence can be regarded as the actions and criminal intent or negligence of the corporation. Moreover, a corporation may be responsible for "strict liability" offences committed by any of its employees in the course of their role in the corporation.

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

Yes. In Israel, a corporation's officers have indirect (vicarious) liability for offences committed by the corporation. In practice, the implication is that where an offence is committed by the corporation pursuant to a law which makes provision for vicarious liability, the corporation's officers can also be found personally liable for such offence.

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?

The rule is that where an offence is committed by a corporation, any person who was involved in the commission of such offence will be prosecuted. Guidelines published by the State Attorney ("Guideline 1.14") provide that, generally, the prosecution will act to ensure that it will not be possible for an organ, who committed the offence, to evade liability due to the sole prosecution of the corporation.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Section 323 of the Companies Law is the provision that caters for the outcome of a merger pursuant to which, *inter alia*, the surviving company shall be regarded as the target company in all legal proceedings. However, the Companies Law does not contain any provision that imposes direct liability on the acquired company. Guideline 1.14 provides that in these situations, the State Attorney must consult with the Deputy State Attorney for Criminal Matters.

5 Statutes of Limitations

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

Sections 9–10 of the Criminal Procedure Law set out the statutory limitation periods with respect to offences or for the imposition of penal sanctions. The general rule is that a person cannot be prosecuted for an offence that was committed after the passage of a substantial period of time, taking into consideration the nature of the offence.

The period of prescription begins to be counted from the date the offence was committed.

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

Yes. An offence occurring outside the limitations period can be prosecuted as part of a "chain offence". This concerns an offence whose structure comprises of links, each of which contain hallmarks of the same type of criminal event that are interlinked and form one chain by way of a common mental background. Pursuant to a Supreme Court case, the period of prescription with respect to a chain offence commences upon conclusion of the last "link" in the chain.

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

Yes. In the past, investigations carried out by the law enforcement authorities would result in the period of prescription being "reset" and being counted anew. In 2019, the Criminal Procedure Law was amended to take into account the fact that investigations that are carried out prior to the lapse of the applicable prescription period shall be afforded an extended period of prescription, albeit in a limited and measured manner of between two and five years at most.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Firstly, the Penal Law provides that the Israeli law will apply to offences that are committed by an Israeli citizen or resident outside the territory of Israel, upon the fulfilment of certain conditions as enumerated in the law. Secondly, the provisions of the Penal Law will apply also with respect to an offence that is committed outside the territory of Israel against an Israeli citizen or resident, for serious offences and only if the perpetrator was not extradited to another country for the same offence and was not prosecuted.

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

In Israel, investigations are initiated by means of a complaint that is received about the commission of an offence or based on intelligence that an offence was committed or is about to be committed. The decision to initiate an investigation will be given by the supervisor of the relevant investigation authority.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes. Cooperation with the applicable foreign enforcement authorities will be done through the International Department within the State Attorney's Office, pursuant to the International Legal Assistance Law. In addition, cooperation with foreign enforcement authorities may also be sought based on international treaties that specifically facilitate such collaboration and the provision of mutual legal assistance.

7 Procedures for Gathering Information from a Company

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

As part of the powers vested in the investigation authorities with respect to the gathering of information, such authorities also have the power to question suspects and witnesses and to detain suspects during the course of the investigation. Moreover, the investigation authorities also have the power to gather additional documents and evidence, but to do so would require applying for and obtaining a search warrant from the court.

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?

For these purposes, as mentioned above, the investigative authority must be equipped with a search warrant issued by a court.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

A company under investigation must produce, subject to issuance of a search warrant by the court, any document whose production is demanded, save where the document is subject to some type of privilege. Attorney-client privilege applies to documents exchanged between the client and his attorney and being inextricably linked to the professional services, regardless of whether the documents were in the possession of the attorney or the client.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Israeli case law provides that a company (*viz.*, the employer) may not engage in workplace surveillance and monitor the personal correspondence maintained by an employee in his personal inbox or in an integrated inbox. The employer may access the content of the employee's personal correspondence only after expressly requesting the advance consent of the employee to do so and subject to the employee consenting to the same freely and wilfully.

No specific legislation has been enacted in Israel concerning cross-border disclosure of personal information.

7.5 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?

Generally, upon the issuance of a search warrant by a court, the enforcement authorities can enter the premises of a company and seize documents from any office in the company, including those in the possession of the company's employees. However, a specific search warrant is needed with respect to conducting a raid of the home of an employee.

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

As mentioned above, in order to raid the home or office of any person and seize documents, the enforcement authorities must be equipped with a search warrant.

Questioning of Individuals:

7.7 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 it is suspected that an offence has been committed involving a company, an employee, officer or manager of the company may be summoned for investigation purposes. Generally, the investigation will be carried out in the offices of the investigative unit.

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

See our response above, *mutatis mutandis*.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

In Israel, suspects have both the right to remain silent and to consult with an attorney. However, an attorney may not be present during the actual investigation. At the investigation stage, the right to remain silent is afforded to a suspect with regard to any question posed to him. Contrarily, a witness has the right to assert privilege against self-incrimination, whereby the witness is exempted from responding to questions that

might incriminate him. Exercising the right to remain silent may potentially lead to the strengthening of the evidence against the suspect in court.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

As noted in our response to question 6.2 above, investigations are initiated by means of a complaint or based on intelligence sources. Upon conclusion of the investigation, the investigation authority will transfer the case to the Prosecution Division or the State Attorney's Office, as applicable, which will then examine the investigation material in order to decide whether an indictment should be filed.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Regarding individuals, the prosecutor will file an indictment if he finds that there is a reasonable chance of conviction, based on the evidence in the case.

When considering the prosecution of a corporation, the prosecutor will also need to evaluate other considerations, including: the severity of the offence and its circumstances; the characteristics of the corporation under suspicion; and the scope of involvement of the corporation's officers in commission of the offence, etc.

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

According to the Criminal Procedure Law, a prosecutor can reach a "conditional arrangement" with a suspect if he views that the circumstances of the case as a whole deem it appropriate that the suspect not be prosecuted. Such type of arrangement will be reached for most offences that are considered relatively minor.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Conditional arrangements need not be judicially approved, and the entry into such type of arrangements falls within the discretion of the prosecution.

8.5 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 may apply.

In Israel, no civil sanctions are available in criminal proceedings, but any person who considers himself as having been harmed by a criminal act committed by someone else can file a civil lawsuit.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof generally vests in the prosecution for demonstrating guilt on the part of the accused. The initial burden of proving the existence of an affirmative defence applies to the defendant, and then the prosecution must prove that the defence did not apply, in order for the defendant to be convicted.

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

The standard of proof for a crime is "beyond reasonable doubt" (96%–98%) and only if proof of guilt in such scope is established, will a conviction be possible.

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

The judges presiding over the case are the arbiters who will be determining both the factual and legal matters. Accordingly, the role of the judges concerns making decisions with regard to whether the parties indeed satisfied the burden of proof as imposed on them by law.

10 Conspiracy / Aiding and Abetting

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

The crime of aiding and abetting is a secondary offence that is anchored in the Penal Law and needs to become part and parcel of the main offence. The physical elements (*actus reus*) of aiding and abetting includes committing an act that has the potential of aiding and abetting, prior to the commission of the main offence or while committing same. The mental element (*mens rea*) required in order to obtain a conviction for aiding and abetting is awareness of the elements of the *actus reus*, as well as the intention to aid and abet.

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?

Pursuant to the Penal Law, in order to prove the elements of the offence, it is necessary to also prove the mental element (*mens rea*) of the perpetrator. Most offences require awareness of the physical element (*actus reus*), the circumstances and the possibility that the outcome of the offence will materialise. Sometimes, specific "intent" of the perpetrator is also required, and there are offences that do not require proof of *mens rea* at all.

With respect to *mens rea*, and the element of intent in particular, the burden of proof vests in the prosecution.

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?

Principally, ignorance of the law does not absolve a perpetrator from guilt, as regulated in section 34S of the Penal Law. Nonetheless, the section specifies that if the mistake was reasonably inevitable, then the defence of an accused, who was unaware that the act committed by him was illegal, will apply. Both the burden demonstrating that the accused did not know that the act committed by him was illegal, as well as the burden for presenting evidence that this concerned a mistake that was reasonably inevitable, vest in the accused.

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?

Pursuant to section 34R of the Penal Law, a person who commits an act while imagining a different factual situation shall bear criminal liability to the extent he would have been required to bear the same had the situation truly existed as imagined by him. The defence of a mistake of fact shall apply only with respect to an honest mistake, where the accused believed that the real factual situation did not actually exist.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Generally, no person or entity is duty-bound to report an offence that has been committed, with few exceptions concerning various reporting obligations of corporations to specific entities, such as the stock exchange, insurance companies or the Ministry of Environmental Protection. Nonetheless, section 262 of the Penal Law obliges a person, who knows that someone is about to commit a crime, to take reasonable measures in order to prevent its commission, such as reporting to the Police.

Regarding credit for disclosure of offences, there are law enforcement agencies that grant exemption from criminal liability for individuals or corporations that participate in the process of "voluntary disclosure", such as the ITA. In these proceedings, exemption from criminal liability is granted only for full disclosure and in situations where no prior investigation was initiated regarding the facts of the disclosure.

13 Cooperation Provisions / Leniency

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

See our answer to question 12.1 above regarding voluntary disclosure.

In addition, it should be noted that with regard to corporations, Guideline 1.14 provides that cooperation by a corporation with the enforcement authorities can constitute a consideration against the prosecution of the corporation. Nevertheless, cooperation with the enforcement authorities will not lead to automatic immunity from prosecution.

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

According to Guideline 1.14, for the purpose of evaluating the question of prosecution, the following will be examined, *inter alia*: the timing of disclosure of the information; if the disclosure was made voluntarily; the scope of disclosure of the information; and the extent of cooperation with the enforcement authorities, etc.

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?

There is no procedure under Israeli criminal law allowing for a conviction or the imposition of a sentence without admission, or for application of a plea of "no contest".

On the other hand, in Israel, most criminal cases that are adjudicated in court end with plea bargains (approximately 80% each year), which include an admission by the accused of all or part of the facts included in the indictment, usually in exchange for a mitigated sentence.

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?

In Israel, the authority for entering into plea bargains is not anchored in legislation, and it evolved both in case law and guidelines published by the State Attorney's Office (Guideline No. 8.1). In accordance with the guideline and case law, the discretion for entering into a plea bargain vests in the prosecution, which will need to evaluate the relevant considerations, including: the evidentiary difficulties in proving the offence; the severity of the offence; and the circumstances surrounding the victim, etc.

In any event, a plea bargain requires the approval of the court, which is not subject to the agreement of the prosecution and the accused. In most cases, however, the court would be inclined to approve a plea bargain and only in exceptional cases will it not do so.

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 a sentence on the defendant? Please describe the sentencing process.

After the accused is convicted, the court should impose the sentence according to sections 40A–40N of the Penal Law, which deals with constructing discretion in the sentencing. In accordance with these sections, the judge will firstly be required to determine the range of sentencing deemed appropriate in the circumstances of the case, taking into account the circumstances surrounding the commission of the offence, such as: the planning that preceded the offence; the consequential damage caused by it; and the role played by the accused in committing the offence, etc. Thereafter, the court will impose a sentence on the accused within such range, taking into account the circumstances surrounding the accused himself, including his criminal record, the assumption of responsibility by the accused, the extent of his cooperation with the enforcement authorities, 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.

With respect to corporations, the same criteria apply as mentioned above. Nevertheless, there are offences for which corporations can be imposed with a higher fine than that imposed on individuals, such as a bribery offence, for which a fine double that for individuals can be imposed.

16 Appeals

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

In Israel, both the accused and the State have the right to appeal to a higher instance, meaning that a right of appeal exists for both acquittals and convictions.

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

See the answer to question 16.1 above.

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

Generally, the standard of intervention of an appellate court for review purposes exists only in cases of a legal error on the part of the trial court, with the rule being that an appellate court will not interfere with the findings of fact apart from in exceptional cases.

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

The appellate court may uphold the appeal, in whole or in part, and alter the judgment rendered by the former instance or revoke it and render another in its place, or can return the case, with instructions, to the trial court. If the appellate court upholds the appeal as aforesaid, it can impose on the accused any sentence the trial court would have been vested with the authority to impose.

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Our group is recognised for providing legal representation to international corporations and leading Israeli companies and key officers therein, in complex, high-profile litigation cases of strategic importance, in a wide range of criminal proceedings. Our services encompass all stages of legal proceedings, from criminal investigation, through hearings and contacts with various law enforcement agencies and regulators, all the way to the trial stage and appeals at all judicial instances.

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Italy

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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?

The authorities that can prosecute are Public Prosecutors, who are assisted by the "Police Forces", which include the State Police, the *Carabinieri* and the Financial Police.

There are no autonomous authorities at the regional level that can prosecute business crimes.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As mentioned in question 1.1, the Public Prosecutors are the only authorities that can prosecute, with the assistance of the Police Forces.

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?

Yes, there is administrative enforcement against unlawful conduct, which can also amount to business crimes. In principle, such administrative enforcement runs in parallel (and in addition) to the criminal one, on the basis of an autonomous set of provisions attributing to specific "regulators" the power to assess the relevant violations and to apply the related administrative sanctions. The main regulators are the following:

(i) the Consob (National Commission for the Companies and the Stock Exchange; the "Italian SEC"), whose task is to ensure the transparency and the correct functioning of the financial market, and in order to achieve this goal is provided with extensive powers of investigation (i.e.: to compel company officers to attend an interview and to provide documentation; to conduct inspections at companies' premises; and to seize assets, under specific conditions, etc.), and it can be assisted by the Financial Police. Where Consob assesses relevant violations, it applies administrative sanctions, mainly consisting of significant fines (which, in cases where the conduct also amounts to a criminal offence, such as in cases of insider trading and market manipulation, are applied in addition to the criminal sanctions, but with the duty to take into account the other sanctions already applied; see Legislative Decree no. 107/2018, and the judgment of the European Court of Human Rights, *Grande Stevens v. Italy*, of March 4, 2014, maintaining that the multiple sanctions resulted in a violation of the *ne bis in idem* principle);

(ii) the so-called Antitrust Authority, whose task is to ensure free competition within the Italian market, especially by counteracting cartels and abuse of dominant position. It is provided with extensive powers of investigation (very similar to the ones of the Consob mentioned above) and, where it finds serious violations, it has the power to apply significant fines (up to 10% of the company's previous year turnover). It should be noted that in the Italian system, abuses of dominant position do not amount to criminal offences, and cartels only to a limited extent where they affect public tenders; therefore only administrative enforcement is applicable in most cases; and

(iii) the tax authorities, whose task is to collect taxes and to prevent, assess and punish tax violations. In contrast to the Consob and the Antitrust Authority, they are not an "independent body". They are provided with extensive powers of investigations, and where they assess tax violations, they apply related fines. It should be noted that the most serious tax violations can also amount to a criminal offence; in those cases, the tax proceeding (and litigation) and the criminal proceeding proceed in parallel. As of 2020, the most serious tax crimes can also be considered predicate offences for corporate criminal liability under Legislative Decree no. 231/2001. See Section 4.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Yes, investigation and prosecution of business crime is constantly increasing. The following prosecution and trials can be mentioned:

(i) a trial is currently pending before the Milan Court of first instance, against the companies Eni and Shell, their top managers, the former Minister of petroleum of Nigeria and some Italian and foreign individuals, in relation to the alleged offence of bribery of Nigerian public officials (President, Minister of Petroleum and Attorney General of Nigeria), in relation to the granting in 2011 by the Nigerian government to the subsidiaries of Eni and Shell of the oil-prospecting licence of an oil field located in the offshore territorial waters of Nigeria;

(ii) in September 2018, a judgment was issued by the Milan Court of first instance towards the companies Eni and Saipem, their top managers, and some of Saipem's foreign agents, in relation to the alleged offence of bribery of Algerian public officials, with respect to the adjudication

of seven tenders in Algeria in the period 2007–2010. The Court acquitted Eni and its top managers, and convicted Saipem and its top managers and agents, to sentences up to five years and six months' imprisonment. In January 2020, the Milan Court of Appeal issued a judgment of acquittal for all defendants; and

(iii) in January 2018, the Milan Court of Appeal acquitted the former top managers of Finmeccanica and AgustaWestland from the charges of corruption of Indian public officials, in relation to the adjudication of a tender in 2010 for the supply to the Indian government of 12 helicopters. The judgment was confirmed by the Court of Cassation in May 2019, and it has become *res iudicata*.

2 Organisation of the Courts

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

The criminal jurisdiction is exercised by professional judges (magistrates), regardless of the kind of crime, with the exception of army crimes (art. 1 of the Italian Code of Criminal Procedure; hereinafter, "ICCP"). The main judicial bodies are the following:

(i) Court of First Instance (constituted of a solo judge, or three professional judges, depending on the seriousness of the crime/length of imprisonment provided for by law);

(ii) Court of Appeal (second instance; ordinarily constituted of three professional judges); and

(iii) Court of Cassation (third instance; ordinarily constituted of five professional judges).

There are no specialised criminal courts for particular categories of crimes, but with respect to certain serious crimes (such as murder, genocide, etc.; see the list under art. 5 of the ICCP), the so-called "popular" (non-professional) judges also participate in the courts. These courts are called, respectively, the Court of Assize of First Instance and Court of Assize of Appeal (in both cases, constituted of two professional judges and six "popular judges").

The jurisdiction over business crimes is determined on the basis of the mentioned criteria: in general terms, these crimes are decided by collective courts, but not by the Court of Assize (and so without the participation of "popular judges").

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

No. As mentioned in question 2.1, "popular judges" only participate with the Court of Assize, which does not have jurisdiction over business crimes. However, it should be noted that, in the Italian system, the role of "popular judges" is much less relevant than the one of a jury in Anglo-Saxon systems, because professional judges participate in and influence the formation of the verdict.

3 Particular Statutes and Crimes

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

• Securities fraud

The main statute used in this respect is that related to the offence of "market manipulation", which is provided by Legislative Decree no. 58/1998 (the so-called Finance Unified Text; art. 185). It provides for the punishments of imprisonment from two to 12 years and a fine from EUR 40,000 to EUR 10 million for any individual who spreads false news or carries out sham transactions or other deceptions that are concretely able to cause an alteration of the price of financial instruments. The amount of the fine can be additionally increased by the judge in the most serious cases. The mental element required is intent.

The general statute of "fraud" can be used in residual cases (art. 640 of the Italian Criminal Code; hereinafter, "ICC"). It provides for imprisonment of up to three years (and up to five years in case of aggravating circumstances) for anyone who, using devices or deception, obtains an undue profit for himself or others, causing damage to others. The mental element required is intent.

• Accounting fraud

The statute used is the one of "false accounting" (arts 2621–2622 of the Civil Code, whose definition and reach was broadened by Law no. 69/2015, entered into force on June 14, 2015). With respect to listed companies, it provides for imprisonment from three to eight years for directors, chief executives, internal auditors and liquidators who, with the purpose of obtaining an undue profit, wilfully indicate material facts not corresponding to the truth in the balance sheets, reports or other corporate communications directed to the shareholders or to the public, or who wilfully omit relevant material facts whose communication is imposed by the law on the economic, patrimonial or financial situation of the company or of the group to which it pertains, in a way concretely able to induce others in error. The mental element required is intent.

For non-listed companies, punishment is ordinarily imprisonment from one to five years.

• Insider trading

The statute of the "insider trading" offence is contained in Legislative Decree no. 58/1998 (the so-called Finance Unified Text; art. 184). It provides for the punishments of imprisonment from two to up to 12 years and a fine from EUR 40,000 up to EUR 6 million for any individual who, being in possession of non-public information by virtue of his quality as a member of administrative, managing or supervisory bodies of the issuer corporation, or as shareholder of the issuer corporation, or by performing an employment activity, profession or function, also public, or an office:

(a) purchases, sells or carries out other transactions, directly or indirectly, on behalf of himself or of a third party, on financial instruments by using the mentioned information;

(b) communicates the mentioned information to others, out of the normal relation of employment, profession, function or office; and

(c) exhorts or induces others, on the basis of the mentioned information, to carry out some of the transactions indicated under point (a) above.

The mental element required is intent.

• Embezzlement

The corresponding statute is the one of "misappropriation" (art. 646 ICC). It provides for the punishment of imprisonment for up to three years for anyone who, in order to obtain an undue profit for himself or others, misappropriates the other money or movable thing which he possesses under any title. The mental element required is intent. A specific criminal complaint filed by the injured person is a pre-condition for the criminal action, unless there are aggravating circumstances.

• Bribery of government officials

The bribery offences relating to domestic public officials are provided for by arts 318–322 ICC and by art. 346-*bis* ICC, and their sanctions, in principle, equally apply to the public official

and the private briber (art. 321 ICC). In particular, the ICC provides for the following forms of domestic bribery, the essence of which is the unlawful agreement between the public official and the briber:

(i) "proper bribery", which occurs when the public official, in exchange for performing (or having performed) an act conflicting with the duties of his or her office, or in exchange for omitting or delaying (or having omitted or delayed) an act of his or her office, receives money or other things of value, or accepts a promise of such things (art. 319 ICC). Punishment is imprisonment from six years to 10 years, and it can be increased due to "aggravating circumstances";

(ii) "bribery for the performance of the function", which occurs when the public official, in connection with the performance of his or her functions or powers, unduly receives, for him/her or for a third party, money or other things of value or accepts the promise of them (art. 318 ICC). It should be noted that Law no. 190/2012 has significantly broadened the reach of this offence, which now relates to the receiving of money or other things of value, by the public official, either in exchange for the carrying-out of a specific act not conflicting with the public official duties (as it was also in the previous version), or for generally putting the public office at the potential availability of the briber, even in the absence of a specific public act being exchanged with the briber. Punishment is imprisonment from one to six years, and it can be increased due to "aggravating circumstances";

(iii) "bribery in judicial acts", which occurs when the conduct mentioned under the first two points above is taken for favouring or damaging a party in a civil, criminal or administrative proceeding (art. 319-*ter* ICC). Punishment is imprisonment from six years to 12 years, and it can be increased due to "aggravating circumstances";

(iv) the offence of "unlawful inducement to give or promise anything of value", introduced by Law no. 190/2012, which punishes both the public official and the private briber, where the public official, by abusing his or her quality or powers, induces someone to unlawfully give or promise to him/her or to a third party money or anything of value (art. 319-*quater* ICC). Punishment is imprisonment from six years to 10 years and six months for the public official, and up to three years for the private briber, and they can be increased due to "aggravating circumstances". It should be noted that, under the previous regime, only the public official was responsible for the mentioned conduct, in relation to the differing offence of "extortion committed by a public official" (art. 317 ICC), whilst the private party was considered the victim of the crime. In the new system, the offence of "extortion committed by a public official" (art. 317 ICC) only applies to the residual cases where the private party is "forced" by the public official to give or promise a bribe: in relation to such cases, the private party is still considered the victim of the crime, and the offence entails the exclusive criminal liability of the public official;

(v) the offence of "trafficking of unlawful influences", introduced by Law no. 190/2012 and amended by Law no. 3/2019, which punishes anyone who, out of the cases of participation in the offences of "proper bribery" and "bribery in judicial acts", unduly makes someone giving or promising, to him/her or others, money or other advantage, as consideration for his/her unlawful intermediation towards the public official, or as consideration for the carrying out of an act conflicting with the office's duties, or the omission or delay of an office's act. Criminal responsibility also equally applies to the private party who unduly gives or promises money or other advantage (art. 346-*bis* ICC). Punishment is imprisonment from one year to four years and six months, and it can be increased due to "aggravating circumstances"; and

(vi) "instigation to bribery", which occurs when the private party makes an undue offer or promise that is not accepted by the public official, or when the public official solicits an undue promise or payment that is not carried out by the private party (art. 322 ICC). Punishments provided for "proper bribery" and for "bribery for the performance of the function" apply, and are reduced by one-third.

With respect to bribery relating to public officials of foreign States and of international organisations (such as the UN, OECD, etc.), the mentioned domestic bribery offences do apply, but with the limitation that only active corruption is punished (namely, only the private briber, on the assumption that the foreign public officials will be punished according to the laws of the relevant jurisdiction; art. 322-*bis* ICC).

• Criminal anti-competition

As explained in question 1.2, in the Italian system, abuses of dominant position do not amount to criminal offences, and cartels only to a limited extent where they affect public tenders; therefore only administrative enforcement is applicable in most cases.

In particular, the alteration or threat to the regularity of a public tender, made by anyone by violence, threat, gifts, promises or other fraudulent means, is a criminal offence punished with imprisonment from six months to up to five years (art. 353 ICC). In turn, the abstention from competing in a public tender, as a result of the receiving or promise of money or other benefit, is a criminal offence punished with imprisonment for up to six months or with a fine (art. 354 ICC).

• Cartels and other competition offences

See above (the answer on criminal anti-competition).

• Tax crimes

The regulation on tax crimes is contained in Legislative Decree no. 74/2010. The most relevant tax criminal offences are the following:

- submitting a fraudulent tax return by using false invoices (for non-existing transactions). Punishment is imprisonment from four to eight years (art. 2);
- submitting a fraudulent tax return by using other fraudulent means. Punishment is imprisonment from three to eight years (art. 3);
- submitting a false tax return. Punishment is imprisonment from two to four-and-a-half years (art. 4);
- failure to file a tax return. Punishment is imprisonment from two to five years (art. 5);
- issuing of false invoices (for non-existing transactions). Punishment is imprisonment from four to eight years (art. 8);
- concealment or destruction of account books. Punishment is imprisonment from to seven years (art. 10); and
- fraudulent subtraction to the payment of tax. Punishment is imprisonment from six months to four years (art. 11).

In most of the mentioned offences, the achievement of a specific amount of tax evasion (higher than a certain threshold) is a pre-condition of the offence (i.e.: more than EUR 30,000 for a "fraudulent tax return by using other fraudulent means"; more than EUR 50,000 for a "failure to file the tax return"; and more than EUR 100,000 for a "false tax return").

The mental element required is always the intent to evade income tax or VAT (or to allow third persons to evade taxes).

• Government-contracting fraud

Italian law provides for a specific offence of "fraud in public supplying" (art. 356 ICC). It provides for the punishment of imprisonment from one to up to five years for anyone who commits a fraud in the execution of supplying contracts signed with the government or in the performance of the related contractual duties. The mental element required is intent.

Furthermore, as previously explained, the general statute of "fraud" can be used in residual cases, and it expressly provides as aggravating circumstances (increasing the punishment to up to five years' imprisonment) the perpetration of the fraud against the State (art. 640 ICC). The mental element required is intent.

• Environmental crimes

The Italian criminal system aimed at protecting the environment has been amended by a significant reform introduced by Law no. 68/2015. The reform has inserted new criminal offences within the body of the ICC (new arts 452-*bis* to 452-*decies*), and it has significantly increased the applicable punishments, in the event of damage or of concrete risk to the environment, in order to satisfy a need of protection and accountability generated by the failures and lack of effectiveness of the previous regime.

In essence, the most relevant criminal offences are those of environmental pollution and environmental disaster. The offence of environmental pollution punishes, with imprisonment from two to up to six years, and with a fine, anyone who abusively generates a significant and measurable alteration or deterioration of waters, air, soil or subsoil, or of an ecosystem, or of the biodiversity of flora and fauna (art. 452-*bis*). In turn, the offence of environmental disaster punishes, with imprisonment from five to up to 15 years, anyone who generates an environmental disaster, defined as: (1) the irreversible alteration of the balance of an ecosystem; (2) the alteration of the balance of an ecosystem whose elimination results are particularly burdensome and achievable only with exceptional measures; and (3) the damage to public safety due to the relevance of the fact, for the extension of the alteration or of its dangerous effects or for the number of the persons injured or exposed to danger (art. 452-*quater*).

For both mentioned criminal offences, the mental element required is intent. However, the same facts are also punished in the event of mere negligence, but the applicable punishments are reduced from one-third to two-thirds.

• Campaign-finance/election law

The most relevant criminal offences are provided for by Law no. 195/1974 (art. 7), which prohibits political financing by public bodies and/or public entities, and that with respect to private corporations provides that such financing must be approved by the competent corporate body, and must be properly registered in the balance sheet. Anyone who violates the mentioned provisions is punished with imprisonment from six months to up to four years, and with a fine of up to three times the amount of the unlawful financing. The mental element required is intent.

• Market manipulation in connection with the sale of derivatives

See the answer above in relation to securities fraud.

• Money laundering or wire fraud

Money laundering is a criminal offence provided for by art. 648-*bis* ICC that punishes the conduct of anybody who, with knowledge and intent, substitutes or transfers money, goods or other things of value deriving from an intentional crime or carries out, in relation to that benefit, any transactions in such a way as to obstruct the identification of their criminal provenance. Until January 2015, a condition for applying the money laundering offence was that the offender had not participated in the predicate offence (if the offender did participate, he was only responsible for that offence); this condition is not required any more under the new regime, where also the so-called "self-money laundering" is punishable.

The punishments are imprisonment from four to 12 years and a fine from EUR 5,000 to EUR 25,000, always with the confiscation of the relevant money/goods in case of conviction.

Furthermore, additional punishments, such as disqualification from holding public offices, disqualification from practising a profession or art, and temporary disqualification from managing corporations or enterprises, are ordinarily applicable (arts 28 *ff.* ICC).

As for the *mens rea*, the law requires knowledge about the unlawful provenance of the money, goods or other things of value, and knowledge and intent to substitute or transfer them, or to carry out transactions which could obstruct the identification of their criminal provenance. Therefore, from a theoretical point of view, a strict liability standard and a negligent standard have to be excluded. However, in practice, prosecutors and courts tend to infer (and even presume) knowledge and intent from objective circumstances, in a way that often extends the reach of the offence to include mere negligence cases.

• Cybersecurity and data protection law

The unlawful access to data processing systems is punished by art. 640 ICC with imprisonment from six months to up to three years, increased to up to five years in the event aggravating circumstances are applicable.

• Trade sanctions and export control violations

According to art. 18, paras 1 and 2, of Legislative Decree no. 221/2017, anyone who carries out export transactions of dual use goods without the required authorisation or with an authorisation obtained providing false statements or documentation, is punished with imprisonment from two years to six years or with a fine from EUR 25 to EUR 250. Where export transactions of dual use goods are carried out without complying with the duties imposed by the authorisations, punishments are imprisonment from one year to four years or a fine from EUR 15 to EUR 150.

In the event of conviction, confiscation of the goods which are the subject of the relevant transactions is applied (art. 18, para. 3).

The mentioned criminal sanctions apply to individuals; with respect to entities, they apply to the officers who acted on behalf of the entity, and to anyone that, with knowledge and intent, contributed to the relevant violation.

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

Yes, the ICC provides for the autonomous crime of "attempt", on the condition that the conduct of the offender is:

(i) able to complete the crime; and

(ii) unequivocally directed to commit the crime (art. 56 ICC).

The ability to complete the crime has to be evaluated in concrete terms, and at the moment of the action. In turn, the direction of the conduct should objectively reveal the intention to perpetrate the crime.

The punishments for the crime of "attempt" are the same as those which are applicable to the completed crime, but substantially reduced (from one-third to two-thirds). If a person willingly interrupts the action, and the portion of action performed does not amount by itself to a different crime, criminal responsibility is excluded.

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?

As of 2001, prosecutions can be brought against entities in relation to a compulsory list of criminal offences committed by their managers or employees (Legislative Decree no. 231/2001). The list of offences has been constantly updated and broadened, and it currently covers many business crimes (such as: corruption; tax fraud; fraud against the State; market manipulation; insider trading; false accounting; money laundering; handling stolen goods; health and safety crimes; intellectual property crimes; infringement of trademarks; and environmental crimes). The employee's conduct can be imputed to the entity on the condition that the offence was committed in the interests of, or for the benefit of, the entity. The entity's responsibility is qualified by the law as an "administrative offence", but the matter is dealt with by a criminal judge in accordance with the rules of criminal procedure, in proceedings which are usually joined with the criminal proceedings against the entity's employees.

Where the offence is committed by an "employee", an entity can avoid liability by proving to have implemented effective "compliance programmes" designed to prevent the commission of that type of offence (art. 7). Where the offence is committed by "senior managers", the implementation of effective "compliance programmes" does not suffice, and the corporations' responsibility is avoidable only by proving that the perpetrator acted in "fraudulent breach" of corporate compliance controls (art. 6).

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

Yes, as explained under question 4.1, the commission of a qualified criminal offence by the entity's employees or managers is a pre-condition for imputing the mentioned "administrative responsibility" to the entity. In that scenario, the entity's employees or managers are subject to personal criminal responsibility in compliance with the general rules, and punished accordingly.

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?

Yes, according to the legal criteria, where the relevant requirements are met, both the individual and the entity must be pursued, without any possibility to give preference to one or the other.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Yes, the law expressly provides that successor liability applies in the event of merger, spin off, etc. (art. 42 of Legislative Decree no. 231/2001).

5 Statutes of Limitations

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

According to Italian law, the statute of limitations begins running at the moment the crime is committed and, in the event of so-called "permanent crimes", at the moment such continuation has stopped (art. 158 ICC).

In relation to each crime (with a few exceptions for the most serious offences, to which the statute of limitations does not apply), Italian law provides for a first limitations period equal to the maximum period of imprisonment which the law provides for the same crime, and this cannot be fewer than six years (art. 157 ICC). In the event that no qualified activity of investigation is carried out within that period (such as a request of interrogation of the suspect, a request of committal for trial, an order of pre-trial custody, the fixing of a preliminary hearing, etc.), the crime is considered extinguished.

On the contrary, in the event that a qualified activity of investigation is carried out, then the original limitations period is extended for an additional period equal to one-quarter of the original time. If no final conviction is reached within that longer period, the crime is considered extinguished.

For crimes committed as of August 4, 2017, Law no. 103/2017 has provided for a *de facto* extension of the limitations period in the event of conviction in first or second instance (i.e. after such convictions, the statute of limitations is suspended, and it does not run, for a maximum period of one year and six months in each instance).

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

As explained in question 5.1, in the event of so-called "permanent crimes", the statute of limitations begins running at the moment such continuation has stopped. However, once the limitations period has expired, prosecution is no longer admitted. The same principle applies to the "conspiracy", which is provided by Italian law as an "autonomous crime", performed by three or more individuals who create an association aimed at committing several offences (art. 416 ICC). The limitations period for the conspiracy, which is, in principle, equal to seven years (extendable by one-quarter, to up to eight years and nine months), starts running for each member from the moment he or she gave the last contribution to the criminal association.

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

Yes, the running of the statute of limitations is tolled in particular cases, such as the following:

(i) when the criminal proceeding is suspended, in view of a decision of another court (such as the Italian Constitutional Court, etc.); and

(ii) when the criminal proceeding is temporarily suspended due to a legitimate impediment to attend from the defendant or his defence lawyer.

The time bar starts running again from the day on which the cause of the suspension has stopped.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

The general governing principle is the territoriality one, according to which Italian courts have jurisdiction on all offences considered committed within the Italian territory: namely, when at least a segment of the prohibited conduct, or the event, take place in Italy, regardless of the nationality of the offender (art. 6 ICC). This principle suffers a derogation in favour of the "extraterritorial" jurisdiction only to a very limited extent, and under stringent requirements (presence in Italy of the suspect, request of the Italian Minister of Justice, unsuccessful extradition proceedings, etc.; see arts 9 and 10 ICC).

However, in relation to corruption offences, the reach of Italian courts has been significantly extended since 2000, in such a way to include corruption of foreign public officials (including officials of the EU institutions and of EU Member States), further to the implementation by Law no. 300/2000 of the OECD Anti-Bribery Convention of Paris of 1997, and of the EU Anti-Corruption Convention of Brussels of 1997.

The mentioned legal framework allows investigations and prosecutions for the corruption of foreign public officials, on condition that at least a segment of the prohibited conduct (i.e. the decision to pay a bribe abroad) takes place in Italy.

Also, with respect to other business crimes, such as tax fraud, money laundering, market manipulation, etc., the existence of the Italian jurisdiction is broadly asserted by Italian prosecuting authorities, and broadly affirmed by Italian courts, and further, with respect to foreign nationals and foreign residents, on the basis of the mentioned principles, and of the relating principle concerning the participation as accomplices in a criminal conduct taken in Italy by other offenders (art. 110 ICC).

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

First of all, it should be noted that Italian Public Prosecutors are not related to the government, but are professional magistrates. Their duties to bring criminal actions are compulsory and not discretionary (art. 112 of the Constitution): such that where there is a "notice of crime" (a notice regarding specific facts potentially constituting a crime), the Public Prosecutor has a duty to open a formal criminal proceeding, to start investigations, and subsequently – if he assesses that the requirements of a crime are met – to bring a criminal prosecution, by requesting the "committal for trial" of the suspect.

The time limit for carrying out and concluding the so-called "preliminary investigations" is six months, extendable up to a maximum of two years (running from the date on which a "notice of crime" is formally registered in a special registrar).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, Italian Public Prosecutors do cooperate with foreign Prosecutors. Where there is an international treaty in force with the relevant foreign country, this governs the mutual assistance to be provided, including the Treaty on the European Union and the related EU law. In the absence of a treaty, cooperation is governed by the specific provisions of the ICCP (art. 696).

A request to a foreign authority for gathering evidence abroad (i.e., interrogation of suspects and witnesses, search and seizure, etc.) can be made by Italian Public Prosecutors, usually through the Italian Minister of Justice, but the treaties usually reduce the formalities and expedite the procedure. In turn, where a request for assistance is made from foreign authorities to the Italian ones, both the Italian Minister of Justice and the competent Italian Public Prosecutor usually have to approve it, and the execution of the request pertains to the Public Prosecutor or judge (the so-called "Judge for the Preliminary Investigations") depending on what Italian law provides in relation to the nature of the act to be carried out.

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 Prosecutors' powers of investigation are extensive. In particular, they are empowered to:

- compel a person to attend an interview (both witnesses and suspects);
- compel the provision of information and the production of "determined things" and documents (including documentation and correspondence possessed by banks);
- issue search warrants to search premises (where there are reasonable grounds to believe that in a certain place there are items related to the crime) and seize relevant items and documents (the items related to the crime, which are necessary for the assessment of the facts; art. 253 ICCP); and
- seize documentation relating to bank accounts (where there are reasonable grounds to believe that they are related to a crime; art. 255 ICCP).

Public Prosecutors are not empowered to autonomously issue phone tapping and freezing orders, but can make applications to a competent judge, which in practice often authorises them (art. 267 ICCP).

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?

As explained in question 7.1, Public Prosecutors are empowered to issue search warrants and to raid a company where there are "reasonable grounds" to believe that in a certain place there are "items related to the crime" (art. 247 ICCP). In that context, they can seize items and documents "related to the crime", which are "necessary for the assessment of the crime" (art. 253 ICCP). In practice, the threshold is very low and companies are raided frequently.

Theoretically, Public Prosecutors could avoid a raid and request companies to produce documents every time such documents are "necessary" for the investigations. In practice, however, raids are more often used, in order to benefit from the element of surprise.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Theoretically, Public Prosecutors do not have the power to seize, or request the production of, documents which are subject to legal professional privilege (i.e. correspondence between the suspect and his defence lawyer, or documents regarding the suspect's criminal defence) unless such documents represent the so-called *corpus delicti* ("elements of the crime"; art. 103 ICCP). In practice, however, protection granted by legal professional privilege is more effective at trial – to prevent the use as evidence of documents covered by privilege – than at the stage of the investigations (where documents covered by privilege are often seized).

In the event of a criminal investigation, Italy's labour law does not protect personal documents of employees from search and seizure.

Theoretically, lawyers, expert witnesses, etc., cannot be compelled to testify in relation to matters known only because of their profession, and to deliver documents possessed because of their profession. However, courts (and to some extent, prosecutors), if they consider that such an objection is ill-founded, can order the deposition and seizure of those items (arts 200 and 256 ICCP).

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Yes, the EU Regulation 679/2016 (General Data Protection Regulation – "GDPR") entered into force in Italy, as in all EU Member States, as of May 25, 2018.

7.5 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?

See the answer to question 7.2.

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

See the answer to question 7.2.

Questioning of Individuals:

7.7 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?

Public Prosecutors can order that an employee, officer, or director of a company under investigation, or more in general a "third person", submit to questioning if in their view he/she can provide useful information for the purposes of investigation. The interview takes place at the Prosecution's Office.

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

See the answer to question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

"Suspects" required to attend interviews with Public Prosecutors and Judicial Police have a right of silence ("privilege against self-incrimination"), from which adverse inferences cannot legally be drawn, and they have a duty (not only the right) to have legal representation (art. 64 ICCP). On the contrary, "witnesses" have a duty to answer questions truthfully (otherwise, the offence of false deposition is perpetrated) and do not have the right to legal representation.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

As explained under question 6.2, where there is a "notice of crime", the Public Prosecutor has a duty to open a formal criminal proceeding, to start investigations, and subsequently – if he assesses that such a "notice of crime" against a certain suspect is grounded – to bring a criminal prosecution by requesting the "committal for trial" of the suspect. In the event that the Public Prosecutor assesses that the "notice of crime" against a certain suspect is ungrounded, he requests the dismissal to the competent judge (the so-called Judge for the Preliminary Investigations).

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

As explained in question 8.1, according to the law, the Public Prosecutor has a duty to request the "committal for trial" of a suspect if the "notice of crime" against him is grounded. In practice, such legal threshold means that in the Public Prosecutor's view, the evidence gathered during the preliminary investigations can successfully support the charges in the trial. As far as entities are concerned, see question 4.1 with regard to the peculiar additional requirements for the entities' liability.

It should be noted that, further to a request of committal for trial ("indictment"), the decision to issue a decree of committal for trial is taken by a judge (the so-called "Judge for the Preliminary Hearing") at the end of the Preliminary Hearing. A decree of committal for trial is issued when, in the judge's view, the evidence gathered by the Public Prosecutor during the investigations can successfully support the charges in the trial. When negative, the judge issues a decision of dismissal.

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

As explained in questions 6.2 and 8.2, criminal action is compulsory and not discretionary, and it cannot be dropped by the Public Prosecutor (unless he assesses that no crime was ever committed by the relevant suspect, and then requests, accordingly, a dismissal to the competent judge). With respect to corporations, the decision of dismissal is directly issued by the Public Prosecutor (art. 58 Legislative Decree no. 231/2001). Deferred prosecution or non-prosecution agreements are not provided for by the Italian system. With respect to individuals, under certain conditions, plea bargaining with prosecuting authorities is recognised by Italian law. It has to be approved by the competent judge, the punishment agreed upon cannot be more than five years' imprisonment, and it is substantially considered a conviction sentence (arts 444–445 ICCP). With respect to corporations, in relation to less serious violations and to criminal offences for which the corporate managers or employees would be entitled to plea bargaining, a similar mechanism of plea bargaining is available for the corporation (art. 63 Legislative Decree no. 231/2001).

Furthermore, under certain conditions, a civil settlement with the person injured, aimed at compensating damages, can qualify as a "mitigating circumstance" to reduce the criminal sentence.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

As explained in question 8.3, deferred prosecution or non-prosecution agreements are not provided for by the Italian system. In particular, there is no formal mechanism for corporations to cooperate with the investigation, or to disclose violations in exchange for lesser penalties (with the exception of the plea bargaining explained in question 8.3). However, a certain degree of cooperation with the prosecuting authorities before trial (in terms of removal of the officers or members allegedly responsible for the unlawful conduct, implementation of compliance programmes aimed at preventing the same types of offences, compensation for damage, etc.) can have a significant impact on reducing the pre-trial and final sanctions applied to the corporation (see arts 12 and 17 of Legislative Decree no. 231/2001, which provide for the non-applicability of disqualifications, and the reduction of fines from one-half to two-thirds in the event of complete compensation for damage, implementation of a compliance programme effectively able to prevent the same type of offence, and restitution for confiscation of the proceeds of crime).

8.5 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 may apply.

Yes, in the event that the criminal offence has caused economic or non-economic damage, the author bears civil liability for the restitution and damages (art. 185 ICC). The person injured by the crime can obtain compensation for the damage suffered directly within the criminal proceeding, by enforcing a specific civil action in that context (the so-called "standing as a civil party").

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Art. 27, para. 2, of the Italian Constitution provides that a defendant cannot be considered guilty until the final conviction. In line with this presumption of innocence, the Italian rules on evidence provide that the burden of proof, for each element of the business crimes identified above, lies with the Prosecution's Office. Where the defendant raises an affirmative defence, the related burden of proof lies with him. In the event that the trial court admits some elements of evidence for the prosecution, the defendant always has the right to the admission of the so-called "contrary evidence" (art. 495, para. 2, ICCP).

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

The Public Prosecutor must prove guilt "beyond any reasonable doubt" (art. 533, para. 1, ICCP). It should be mentioned that the standard "beyond any reasonable doubt" was only recently expressly introduced in the Italian system (by Law no. 46 of 2006), and that in most cases, it is applied by professional judges and not by a jury (see question 2.1); thus, the effectiveness of the principle is generally lower than in the Anglo-Saxon system.

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

The only arbiter of fact in a criminal trial is the judge/court, on the basis of the evidence produced by the parties or evidence that he exceptionally ordered to be produced. The judge's convincement is free; however, his decision must comply with the legal provisions concerning the evaluation of evidence (arts 192 *ff.* ICCP) and the grounds for judgment (art. 546, para. 1, letter e, ICCP).

10 Conspiracy / Aiding and Abetting

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

Yes. With respect to the elements and sanctions for the autonomous crime of "conspiracy", which requires in any case the creation of a stable organisation aimed at committing several offences, see the answer to question 5.2. Where a person contributes to the commission of a criminal offence, without fulfilling the more stringent requirements provided for the conspiracy, he is criminally liable for that offence together with the other offenders, under the concept of "participation in a crime" (arts 110 *ff.* ICC). The general principle is that each individual taking part in the crime is considered an offender, and bears a criminal responsibility equal to the others. However,

specific aggravating and mitigating circumstances do apply, in order to modulate the criminal responsibility in line with the contribution given by each participant (arts 112–114 ICC).

The case of "participation to a crime" should be distinguished from the autonomous crime of "abetting", which applies in relation to the conduct of anyone who, after the commission of a crime, and out of cases of "participation to a crime", helps someone to elude the investigations of the authority, or to escape its reaches (art. 378 ICC). In essence, in the latter case, there is no previous agreement to contribute in a common unlawful activity, and the conduct of the abetter takes place only after a crime has already been committed.

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, absolutely. All business crimes (with a few exceptions) require intent as a mental element, whilst negligence and recklessness theoretically are not sufficient. The burden of proof in this respect is with the Prosecution's Office, as explained under questions 9.1 and 9.2. However, it should be noted that Prosecutors and courts tend to infer, and even to presume, knowledge and intent from objective circumstances in such a way as to significantly broaden the notion of intent.

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?

This defence can be raised successfully only in very limited and exceptional situations. In particular, ignorance (or the mistake) of criminal law does not exclude the criminal responsibility, except in the case of "inevitable ignorance" (art. 5 ICC). The cases of "inevitable ignorance" were identified by a decision of the Constitutional Court (no. 364 of March 24, 1988), and they refer to, in essence, exceptional cases where the person was misled by wrong indications given by the public authority, or by seriously contradicting rulings issued by the courts. This is confirmed by the consolidated case law, according to which a person, and especially a professional or entrepreneur, has a duty to gather information on the lawful nature of his actions and, in cases where doubt still remains after that, he has a duty to abstain from taking the relevant conduct.

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, the "mistake of fact", in the event that it affects the essential elements of the unlawful conduct, excludes the criminal responsibility because it excludes the mental element (intent) of the crime (art. 47, para. 1, ICC). The burden of proof with respect to the existence of such "excuse" is with the defence. It should be mentioned, however, that the sphere of application of such defence is, in practice, rather limited.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

No. Italian law does not provide for a general duty of individuals or corporations to report crimes to the competent authorities (Prosecution's Offices and Police). With respect to leniency, see the answers to questions 13.1 and 13.2.

However, specific provisions, such as anti-money laundering, require individuals working in certain sectors to make disclosures to competent authorities (the Financial Intelligence Unit) about "suspicious transactions". Such a "duty of disclosure" was originally imposed only on financial intermediaries (banks, etc.), but it was then extended to tax accountants, notary publics and lawyers, on the condition that they perform an activity of a "financial nature".

Failure to report a "suspicious transaction" does not amount to a criminal offence, but is penalised by the imposition of fines and other administrative sanctions.

13 Cooperation Provisions / Leniency

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

Italian law provides express benefits for disclosure only with respect to individuals in the context of mafia and terrorism crimes and, as of January 2019, for corruption crimes. As for corruption, the benefit consists of exemption from criminal responsibility, and individuals are subject to the following stringent requirements: self-reporting has to be made within four months of the offence and prior to receiving notice that they are subject to investigation; and it should provide the authorities with useful and concrete indications to secure the evidence of the crime and to identify the other offenders. With respect to the other business crimes, it can be stated that, on a case-by-case basis, a certain degree of cooperation can produce positive effects, especially if joined with the compensation of damage in favour of the injured party (this could qualify as one or more "mitigating circumstances", able to reduce the future sentence). See the answer to question 13.2 also.

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

As explained in question 8.4, there is no formal mechanism for corporations to cooperate with the investigation, or to disclose violations in exchange for lesser penalties (with the exception of the plea bargaining explained in question 8.3). However, a certain degree of cooperation with the prosecuting authorities before trial (in terms of removal of the officers or members allegedly responsible for the unlawful conduct, implementation

of compliance programmes aimed at preventing the same types of offences, compensation for damage, etc.) can have a significant impact on reducing the pre-trial and final sanctions applied to the corporation (see arts 12 and 17 of Legislative Decree no. 231/2001, which provide for the non-applicability of disqualifications, and the reduction of fines from one-half to two-thirds in the event of complete compensation for damage, implementation of a compliance programme effectively able to prevent the same type of offence, and restitution for confiscation of the proceeds of crime).

In particular, in the event of "criminal responsibility" (see question 4.1), corporations are subject to sanctions constituted of fines, disqualifications and confiscation. Disqualifications can be particularly afflictive as they can also be applied at a pre-trial stage, as interim coercive measures, and they can consist of the suspension or revocation of government concessions, debarment, exclusion from government financing, and even prohibition from carrying on business activity (arts 9–13 of Legislative Decree no. 231/2001).

Cooperation with the prosecuting authorities before trial, in the forms mentioned above, can prevent or reduce the pre-trial disqualifications, and those applicable to the final sentence (art. 17 of Legislative Decree no. 231/2001).

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?

As explained in question 8.3, under certain conditions, plea bargaining with prosecuting authorities is recognised by Italian law. It has to be approved by the competent judge, the punishment agreed upon cannot be more than five years' imprisonment, and it is substantially considered a conviction sentence (arts 444–445 ICCP). See also question 8.3 for the applicability to corporations.

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?

Yes, see the answers to questions 8.3 and 14.1.

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 a sentence on the defendant? Please describe the sentencing process.

The court determines the concrete punishment, mostly the extension of imprisonment, within the minimum and maximum limits that the law provides in relation to each crime (art. 132 ICC). The most relevant criteria which the court has to take into account are the following:

(i) all modalities of the action;
(ii) seriousness of the damage or danger caused to the person injured by the crime;
(iii) intensity of intent or degree of negligence; and
(iv) criminal capacity of the offender (art. 133 ICC).

The concrete punishment has to be increased or decreased (usually by one-third) where aggravating or mitigating circumstances have to be applied.

Furthermore, additional reductions (usually of one-third) apply in the event that the defendant chooses an alternative route to the "ordinary trial" (such as "abbreviate trial", 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.

The court must verify the existence of the elements indicated under question 4.1, which are pre-conditions for the corporation's liability. As a general principle, the corporation's liability requires the positive assessment that a relevant criminal offence was committed by its managers or employees, in the interests or for the benefit of the corporation. However, the corporation's liability can also be affirmed in some peculiar cases in which a conviction against the individuals (managers or employees) cannot be issued (such as when the crime is time-barred, or the offender is not chargeable or has not been identified, or is deceased).

16 Appeals

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

Yes, a guilty or a not guilty verdict can be appealed by both the Public Prosecutor and the defendant before the Court of Appeal (art. 593, para. 1, ICCP).

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

As indicated in question 16.1, both the Public Prosecutor and the defendant can appeal a guilty verdict by attacking the aspects of the decision of first instance that they want to be amended, in order to obtain a ruling more favourable to their respective positions.

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

The Court of Appeal has "competence" on the case only to the extent of the grounds of appeal, and not on the decision of first instance as a whole (art. 597 ICCP).

A renewal of the gathering of evidence (especially examination of witnesses), or the taking of new evidence, takes place before the Court of Appeal only in the event that the Court considers it necessary to decide the case (art. 603 ICCP).

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

In cases of an appeal made by the Prosecutor:

(i) against a decision of conviction: the Court of Appeal can qualify the crime as a more serious one and apply a more serious punishment (i.e. the court can increase the period of imprisonment); or
(ii) against a decision of acquittal: the Court of Appeal can change the verdict from not guilty to guilty, or it can acquit the defendant on different grounds.

In cases of an appeal made by the defendant, the Court of Appeal can change the verdict from guilty to not guilty, or in any case issue a decision more favourable to the defendant. In cases of an appeal made only by the defendant, the Court of Appeal cannot apply a more serious punishment, and cannot acquit the defendant on the basis of less favourable grounds (art. 597 ICCP).

The decision of the Court of Appeal can be appealed by both the Public Prosecutor and the defendant before the Supreme Court (the so-called Court of Cassation). The Supreme Court cannot decide on factual issues, only on violations of law.

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Studio Legale Pisano is an Italian boutique firm that specialises in all areas of white-collar crime, including corporate criminal responsibility, corruption, market abuse and false accounting, tax crimes, money laundering, fraud and recovery of assets, bankruptcy crimes, environmental and health and safety crimes. The firm also provides assistance in the course of regulatory investigations and specialises in transnational investigations and related aspects of mutual legal assistance and extradition. Studio Legale Pisano benefits from the expertise of specialists in criminal and international law, and interacts daily with counsel of various jurisdictions. The firm has a history of representing prominent individuals and entities in high-profile Italian criminal proceedings, in extradition proceedings, and in the frame of foreign proceedings for judicial review of search and seizure and freezing orders, and carries out internal investigations on behalf of foreign multinationals and Italian companies.

Studio Legale Pisano

Japan


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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?

(1) Authority for prosecution
Public prosecutors are basically the sole authority for the prosecution of any crime except in very limited cases (e.g., verdict by Committee for Inquest of Prosecution).

(2) Investigative authorities
  (a) Police officers
  Under the Code of Criminal Procedure (the "CCP"), the primary investigative authority is police officers. After conducting an investigation, police officers send the case to public prosecutors.
  (b) Public prosecutors
  Public prosecutors can, and often actively investigate cases of business crimes by themselves or by instructing police officers.
  (c) Other administrative officers
  Officers of some administrative agencies have investigative authority over certain business crimes. For example, officers of the Japan Fair Trade Commission (the "JFTC") can investigate specific criminal violations of the Antimonopoly Act (the "AMA"). After conducting a criminal investigation, the administrative agency could file an accusation with public prosecutors.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Each investigative authority may conduct investigations at its discretion within its authority. While there is no rule on how to allocate cases, administrative officers specialised in the area of business crime often take the lead in investigations.

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?

(1) Civil enforcement
There is no civil enforcement against business crimes in Japan.

(2) Administrative enforcement
Certain administrative authorities have the power to impose surcharges (*Kachokin*) on specific violations of certain regulations. For example, the JFTC has the power to impose surcharges on "unreasonable restraint of trade" including cartels, bid rigging affecting prices, private monopolisation and other unfair trade practices violating the AMA.
Also, in certain regulated industries, even if surcharge or criminal sanction is not applicable, the competent regulatory authority could request a reporting of potential misconduct and revoke the licence of such regulated business operators.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

A former CEO of a major global automobile manufacturer was arrested and prosecuted by the special investigation team of the Tokyo Public Prosecutors Office for false statements in annual securities reports and an aggravated breach of trust. He fled abroad during his bail and the criminal proceeding was suspended.

2 Organisation of the Courts

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

The Japanese criminal court system is a three-tiered unitary system that does not have a specialised criminal court. The first instance of the three tiers is in the district courts or the summary courts. With respect to most business crime cases, the district courts have first instance jurisdiction, the high courts have second instance (appellate) jurisdiction and the Supreme Court is the highest and final court. Causes for appeal to the Supreme Court are limited to certain critical issues (e.g., violation of the Constitution).

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

Japan does not have a jury system, but has the "*saiban-in* system" (the lay judge system). Under this system, six members of the *saiban-in* (lay judges) and three professional judges make a panel, and the panel renders a judgment including fact-finding and sentencing. As this system is applied only to serious felonies such as homicide, cases of business crime are usually not subject to this system.

3 Particular Statutes and Crimes

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

• Securities fraud

Various types of fraudulent acts in connection with transactions of securities, such as market manipulation, spreading rumours in order to manipulate stock prices and false statements in annual securities reports and other disclosure documents required under the securities regulation, are punishable based on the Financial Instruments and Exchange Act ("FIEA").

• Accounting fraud

In addition to false statements of financial information in violation of the securities regulation, paying excessive dividends over the statutory distributable profit, including false accounting, is punishable based on the Companies Act.

• Insider trading

(1) Insider trading by corporate insiders
The FIEA provides that officers, employees, and agents of a listed company (including its parent company and subsidiaries) and other statutory defined corporate insiders who knows any non-public material fact pertaining to the business or other matters of a listed company ("Material Fact") are prohibited from making a sale, purchase or other transfer for value or acceptance of such transfer for value of shares of the listed company until and unless such facts have been publicly disclosed.
Material Facts are statutorily defined as: (a) decisions by those who are responsible for executing operations of a listed company to carry out certain important matters; (b) occurrence of certain important events in a listed company; (c) significant difference between the latest publicised forecasts of sales, current profits, net income, or other account title of a listed company and new forecasts prepared by the company; and (d) any other important matters which would have a significant influence on investors' decisions. Such facts regarding the subsidiaries of a listed company are also included in the definition of "Material Fact".

(2) Insider trading in connection with a tender offer
The FIEA provides that purchasers of shares who know facts concerning a launch of a tender offer, and sellers of shares who know facts concerning a termination of a tender offer, are prohibited to trade shares of the listed company until and unless such facts have been publicly disclosed.

(3) Tip-offs
The FIEA provides that corporate insiders are prohibited from tipping off non-public Material Facts to other persons, or from recommending other persons to engage in trading for their own profit or avoidance of loss.

• Embezzlement

The Penal Code provides that a person who embezzles property in his/her possession which belongs to another person (e.g., employing company or customer) shall be punished.

• Bribery of government officials

The Penal Code provides that accepting, soliciting or promising to accept a bribe, or giving, offering or promising to give a bribe, in connection with the duties of Japanese public officers, are punishable.

The Unfair Competition Prevention Act (the "UCPA") provides that giving, offering, or promising to give money or any other benefit to foreign public officers in order to have the officers act or refrain from acting in a particular way in relation to the duties of officers or in order to obtain a wrongful gain with regard to international commercial transactions is punishable.

• Criminal anti-competition

The AMA criminalises certain conducts such as private monopolisation and unreasonable restraint of trade (e.g., cartels, bid rigging).

• Cartels and other competition offences

Please see "Criminal anti-competition" above.

• Tax crimes

Tax evasion is punishable under laws prescribed for each type of tax. For example, tax evasion or receiving a refund through deception or other wrongful acts, such as making false documents or creating a secret bank account.

• Government-contracting fraud

There is no specific statute prohibiting government-contracting fraud. However, defrauding property of the government may constitute criminal fraud and bid rigging in relation to a government contract constitutes a crime under the Penal Code.

• Environmental crimes

Polluting water that is intended for human drinking or supplied to the public for drinking is punishable based on the Penal Code. Certain violations of the Air Pollution Control Act, such as violations of emission standards for soot and smoke prescribed by an ordinance, are punishable. The Waste Management and Public Cleansing Act prohibits the disposal of certain waste and toxic chemicals and requires business owners to provide notice to the government before importing, manufacturing or using new chemicals.

• Campaign-finance/election law

The Public Offices Election Act prohibits various actions in connection with elections, such as bribery, unlawful donations by a candidate and so on.

If an elected person is subsequently found guilty of having committed any of the above crimes, subject to a very limited number of exceptions, the election of such person shall automatically become void. Additionally, an elected person may lose his/her position if a person in his/her campaign has committed the crimes above.

• Market manipulation in connection with the sale of derivatives

The following are prohibited as "market manipulation" under the FIEA:

(1) conducting a series of trades that mislead other investors into thinking that trading of a certain listed security is active, with the purpose of having other investors become willing to trade such security;

(2) conducting a series of trades to influence the market price of such security for the same purpose; and

(3) making trades without the intention of effecting a transfer of rights (wash sales), or conspiring with others on certain trades (collusive trading) with the purpose of misleading other investors, such as leading them to believe that the trading is active.

Disseminating information in connection with the sale of securities that is inconsistent with the facts and/or has no rational basis, for the purpose of trading or influencing the price of securities, is prohibited by the FIEA as "spreading rumours".

• Money laundering or wire fraud

Money laundering is punishable based on the Anti-Drug Special Provisions Act and the Act on Punishment of Organized Crime and Control of Crime Proceeds. The former prohibits concealment and receipt of drug crime proceeds. The latter prohibits concealment and receipt of crime proceeds, and managing an enterprise by the use of crime proceeds. There is no statute that specifically criminalises wire fraud, but a wire fraud could be punishable under the Penal Code or other Acts.

• Cybersecurity and data protection law

The Act on Prohibition of Unauthorized Computer Access prohibits use of an identification code of another person or other information or commands to a computer via telecommunications lines in order to operate a computer in a manner which is not allowed or authorised.

Obtaining profits from creating a false electromagnetic record by giving false information or a wrongful command to a computer is punishable under the Penal Code.

• Trade sanctions and export control violations

The Foreign Exchange and Foreign Trade Act criminalises certain conducts, including export or brokerage of controlled goods or technology related to weapons of mass destruction or conventional arms without a licence.

• Any other crime of particular interest in your jurisdiction

The UCPA prohibits misrepresenting information on goods or services, in an advertisement thereof, or in a document or a communication used in a transaction thereof, in a manner that is likely to mislead the public as to the place of origin, quality, contents, manufacturing method, use, or quality of such goods or services. In recent years, some manufacturers were convicted for falsification of quality data of their products under this statute.

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

An attempt to commit criminal conduct is punishable only when it is specifically criminalised under the relevant statutes. Additionally, the Act on Punishment of Organized Crime and Control of Crime Proceeds criminalises conspiracy of certain crimes.

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?

In principle, only a natural person is criminally liable under Japanese law. An entity may be held criminally liable only when there are specific provisions for punishment prescribed in the form of a dual liability provision ("*ryobatsu-kitei*"). A dual liability provision makes entities, including corporations, punishable together with the natural person who is employed by the entity and actually committed the offence, unless the judicial person proves that it was not negligent in appointing or supervising that natural person, or that it was not negligent regarding the measures it took to prevent the crime.

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

In addition to the case of dual liability described in question 4.1 above, when there is a triple liability provision ("*sanbatsu-kitei*"), the representative of the entity in which the offender is employed may be held liable when such representative did not take necessary measures to prevent the crime. For comparison, the AMA and the Labour Standard Act have such provisions.

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?

There is no written public policy as to when to pursue an entity, an individual, or both. While an entity can be convicted only if a certain natural person is criminally liable, a prosecutor sometimes indicts only an entity and suspends an indictment against a natural person when the case is found to not be egregious.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

There seems to be no intensive discussion about criminal successor liability in Japan because only a natural person can be principally liable in the criminal context. While the successor may not be held liable for the predecessor's conduct in an asset deal, the successor's liability cannot be ruled out in case of a merger.

5 Statutes of Limitations

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

The enforcement-limitations period starts from the time when the criminal act has ceased. In the case of complicity, the period with respect to all accomplices starts from the time the final act of all accomplices has ceased. The limitations periods are stipulated depending on the type and amount of the statutory penalty.

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

Where two or more separate criminal conducts are deemed a single criminal act in substance, the limitations period with respect to the entire crime starts from the time that the final act of the entire crime has ceased.

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

The limitations period is tolled if the offender is outside Japan or in other limited circumstances.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Japanese enforcement agencies do not have any jurisdiction to enforce their authority outside Japan, even though the Penal Code stipulates that persons who committed certain serious crimes outside Japan are punishable under Japanese law.

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

Except as provided by law, an investigative or administrative authority may initiate the investigation at its discretion. The investigative authority initiates investigations based on various triggers such as a complaint, an accusation, a report from other administrative organs, or a surrender.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Regarding the request of foreign authorities for investigative cooperation, the Act on International Assistance in Investigation and Other Related Matters ("AIAI") provides requirements and procedures for investigative cooperation through either diplomatic channels or Interpol. The AIAI permits cooperation only if (1) the offence is not a political crime, (2) the offence also would constitute a crime under the laws of Japan if it were committed in Japan, and (3) the requesting authority submits a statement that the cooperation is indispensable. If such requirements are satisfied, prosecutors or police officers will conduct the investigation, and the evidence collected will then be provided to the requesting authority. In addition, the Japanese National Police Agency ("NPA") also cooperates with foreign authorities as a member of the International Criminal Police Organization if the abovementioned requirements (1) and (2) are satisfied.

When Japanese enforcement agencies request foreign enforcement agencies to conduct investigations and report the results of the investigations, they rely on the cooperation of such foreign agencies based upon treaties or international comity with these jurisdictions.

7 Procedures for Gathering Information from a Company

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

Police officers and prosecutors have authority for compulsory investigations which include search, seizure, inspection, arrest and detention upon a warrant issued by a judge. Articles 33 and 35 of the Constitution state that no person shall be apprehended, searched, or seized except upon a warrant issued by a judge, unless he/she is committing or has just committed an offence.

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?

When there is a need for gathering documents, in many cases, investigative authorities request a relevant company to voluntarily produce documents and the company cooperates voluntarily with an investigation without a warrant in Japan. However, if a company declines to cooperate with an investigation, an investigative authority may conduct a search, seizure, or inspection with a warrant issued by a judge.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Presently, since Japanese law does not currently apply attorney-client privilege, companies cannot refuse the seizure of items containing communication between them and their attorneys.

An amendment of the AMA was promulgated in June 2019 and when the amendment comes into effect, attorney-client privilege will apply to an administrative investigation regarding an international agreement which provides for unreasonable restraint of trade as long as targeted documents meet the required elements.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Under the Personal Information Protection Act ("PIPA"), companies or entities shall not, in principle, make transfers of personal data to a third party, including cross-border transfers, without the data subject's consent. However, when (i) the transfer is in accordance with laws and regulations, and (ii) there is a need to cooperate with a state organ, a local government, or a person entrusted by them performing affairs prescribed by laws and regulations, and when a data subject's consent is likely to impede the performance of such affairs, companies or entities may transfer personal data without the data subject's consent. Thus, PIPA does not impact the collection, processing, or transfer of employees' personal data.

7.5 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?

The answer to this question is the same as the answer to question 7.2.

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

The answer to this question is the same as the answer to question 7.2.

Questioning of Individuals:

7.7 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?

The government cannot compel an employee, officer, or director of a company to submit to questioning, unless they are under arrest or detention. Even when they are under arrest or detention and are obliged to submit to questioning, they have the right to remain silent. The questioning can take place in an office of the authority, in the company or any other location.

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

The answer to this question is the same as the answer to question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

In principle, the person being questioned does not have a right to be represented by an attorney during questioning and attorney-client privilege does not apply in the context of criminal investigation under Japanese law.

On the other hand, Article 38, paragraph (1) of the Constitution states that no person shall be compelled to testify against himself/herself and there is no statutory adverse inference by exercising that right. Thus, there is a right against self-incrimination and the assertion of the right does not result in an inference of guilt at trial.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Public prosecutors may initiate a criminal case by filing an indictment with a criminal court.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

There are no written guidelines or standards governing the prosecutor's decision to charge an entity or individual with a crime. Public prosecutors exercise their discretionary power to decide whether to initiate prosecution considering the characteristics of the suspect, the gravity of the offence, his/her situation after the offence, and other circumstances.

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

Prior to the introduction of the Japanese version of plea bargaining created by an amendment to the CCP, which took effect on June 1, 2018, there was no official pre-trial agreement to defer prosecution in Japan.

The Japanese plea bargaining system can function as a deferred prosecution agreement though it has significant differences with the plea bargaining system in the U.S. Under this system, a prosecutor may enter into an agreement with a suspect or a defendant, that includes a corporate entity, with the consent of his/her attorney, under which the prosecutor agrees to drop or reduce criminal charges, or provide favourable treatment only when the suspect or defendant cooperates in the investigation against other individuals or corporate entities with respect to certain types of crimes. This includes, but is not limited to, bribery, embezzlement, tax fraud, crimes under the AMA, the FIEA or other specific laws stipulated by the CCP, and relevant government ordinances. According to the CCP, cooperation in investigations against other suspects or defendants include making a statement of the true facts to the investigation authorities, testifying the true facts as a witness in court and providing evidence. The prosecutor has the authority to determine whether to enter into an agreement by taking into consideration the factors stipulated in the CCP.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

The court has no authority to be involved in plea bargaining in any case.

8.5 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 may apply.

In addition to criminal disposition to an investigation, a defendant can be subject to civil remedies if his/her conduct constitutes a tort. In principle, complaints claiming for damages in tort are filed with a civil court and dealt with separately from the criminal case. However, under the restitution order system, complaints claiming for damages in tort may be filed to a criminal court and the judge presiding in the criminal case has the power to render a judgment ordering the defendant to pay damages, only after the court has found the defendant guilty.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In criminal cases, the public prosecutor bears the burden of proof of all the charges. If a defendant claims affirmative

defences, such as justifiable causes, the public prosecutor bears the burden of proof that there are no such causes.

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

The public prosecutor must prove the charges beyond a reasonable doubt, because the defendant is presumed innocent until such defendant is convicted.

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

The judge, or the panel of judges and lay judges in certain cases, is the arbiter of fact and determines whether or not the public prosecutor has satisfied his/her burden of proof.

10 Conspiracy / Aiding and Abetting

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

The Penal Code has provisions that hold a person criminally liable for the acts of others.

(i) Co-principals
Two or more persons who jointly committed a crime are all principals. If two or more persons agree with each other to commit a specific crime relying on the other's actions to commit the crime, and one of these persons takes some action based on the conspiracy, then the persons who carried out the crime through the agreement including those who did not take any direct action to commit the crime, are all principals.

(ii) Inducement
A person who induces another to commit a crime is criminally liable and the range of punishment is same as a principal. A person who induces another to induce a crime is also liable.

(iii) Accessory
A person who aids a principal is an accessory to a crime, criminally liable and the range of punishment is less than a principal.

(iv) Conspiracy
The Act on Punishment of Organized Crimes and Control of Crime Proceeds criminalises conspiracy of certain organised crimes, e.g., fraud, embezzlement, bribery.

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?

The Penal Code stipulates that an act performed without criminal intent is not punishable unless otherwise stipulated by the law. The code and other laws provide for crimes by negligence. The public prosecutor bears the burden of proof with regard to whether a defendant had the requisite intent at the time of the offence.

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?

Ignorance of the law is not a defence to a criminal charge.

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?

Ignorance of the facts is a defence because it means there is a lack of criminal intent. The public prosecutor bears the burden of proof with regard to whether a defendant had the knowledge of the facts at the time of the offence.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Government officers at both the local and national levels are obligated to file a complaint with public prosecutors if they believe that a crime has been committed. Other persons or entities basically have no legal obligation to file a complaint, and are not liable for failing to do so unless the law (e.g. the Insurance Business Act) requires certain regulated entities to file notifications when they believe that a crime has been committed in such entities.

The leniency and similar systems are addressed in Section 13 below.

13 Cooperation Provisions / Leniency

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

(1) Surrender (Penal Code)
The Penal Code stipulates that a criminal sanction may be reduced if a person who committed the crime surrendered himself/herself before being identified as a suspect by an investigative authority. The court decides whether and how much to reduce the penalty considering all the circumstances of the case.

(2) Leniency under the AMA
With respect to crimes under the AMA as mentioned in question 3.1, the JFTC does not file an accusation to public prosecutors and impose surcharges against the first applicant who reported criminal activities to the JFTC before the JFTC's investigation has commenced.

(3) Plea bargaining
As addressed in question 8.3, a plea bargain could be available in the case of voluntary disclosure of criminal conduct.

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

(1) Plea bargaining system under the CCP
Under the plea bargaining system, in order for a corporate entity to negotiate with a prosecutor and enter into an agreement, the entity may be required to provide probative and adequate evidence against a criminal charge of an executive or an employee in the entity or another entity.

(2) Leniency programme for immunity or reduction of surcharges under the AMA
As an administrative procedure, the AMA stipulates a leniency programme under which a corporate entity that voluntarily reports a violation to the JFTC may be granted immunity or a reduction of surcharges under specific conditions. With respect to a cartel, up to five entities involved with a cartel may be provided leniency if they report facts that have not been identified by the JFTC. The percentage of reduction of surcharges is as follows:
(i) First applicant: 100%.
(ii) Second applicant: 50%.
(iii) Third to fifth applicants: 30%.

If entities report the facts after the initiation of an investigation by the JFTC, only three entities may receive a reduction of 30% in surcharges.

After the amendment of the AMA promulgated in June 2019 becomes effective, the percentage of reduction of surcharges for applicants except the first one is determined by the JFTC considering the extent of cooperation and sixth and later applicants may receive a reduction in surcharges.

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?

The plea bargaining system in Japan is available only if a suspect or defendant cooperates in the investigation against another person and it is not available merely if a suspect or defendant voluntarily decides not to contest and cooperate with the investigation into his or her own case. However, the prosecutor may consider a voluntary declination of a suspect or defendant when the prosecutor decides on an indictment or a recommendation of sentencing at his or her discretion.

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?

As stated in question 8.3, a prosecutor has wide discretion as to whether to enter into plea bargaining with a defendant, taking into account the factors stipulated in the CCP. The court has no authority to be involved with plea bargaining in any case.

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 a sentence on the defendant? Please describe the sentencing process.

There are no fixed guidelines or standards governing the court's sentencing.

While the judge decides a sentence at his discretion within the statutory range of penalty, the judge seeks uniformity of sentence to some extent by referring to precedents, and this practice is said to have created informal, *de facto* standards for sentencing.

There is no sentencing procedure independent from a fact-finding procedure.

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.

The court may impose fines on a corporation only when there are dual liability provisions. No other elements are required. Please refer to the answers in Section 4.

16 Appeals

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

Appeals are allowed for both the defendant and the prosecutor. Any guilty judgment is appealable by the defendant, and any non-guilty judgment is appealable by the prosecutor.

Judgments rendered by the district courts or summary courts are appealable to the High Court. An appeal to the High Court (*Koso*) is allowed on the grounds of non-compliance with procedural law, errors in fact-finding, errors in application of law, or inappropriate sentencing.

Judgments rendered by the High Court are appealable to the Supreme Court. Even though an appeal to the Supreme Court (*Jokoku*) is allowed only on the grounds of a violation of the Constitution and a violation of judicial precedents, the Supreme Court has discretionary power to take the case and squash judgments rendered by the High Court on the grounds of legal errors, errors in fact-finding or inappropriate sentencing.

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

There is no independent sentencing procedure. The prosecutor and the defendant present aggravating and mitigating factors respectively together with the assertion of facts. As explained in question 16.1, the defendant and the government are both allowed to appeal on the ground of inappropriate sentencing.

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

The High Court's standard of review is generally the same as the district court's standard, and the Supreme Court applies a higher standard of review, which requires a clear and substantial error.

The High Court is not allowed to quash a lesser court's judgment unless an error in the judgment would have affected the main clause of the judgment.

The Supreme Court is not allowed to quash a High Court's judgment on the grounds of legal errors, errors in fact-finding or inappropriate sentencing, unless sustaining the judgment would be clearly contrary to justice.

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

If the appellate court upholds the appeal, the appellate court quashes the trial court's judgment and, in most cases, at the same time renders its own judgment, replacing the original judgment.

In a small number of cases, the appellate court quashes the trial court's judgment and remands the case to the court of prior instance.

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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?

In principle, prosecutors at the Korean Prosecutor's Office (the "KPO") have a general authority to prosecute crimes (Article 246 of the Korean Criminal Procedure Act (the "KCPA")).

In addition to Article 246 of the KCPA, Korea recently enacted the Act on Establishment and Management of the Investigation Bureau for Crimes by High-ranking Public Officials (the "Investigation Bureau Act"), which came into effect on 15 July 2020. This Act grants the authority to investigate and prosecute certain prescribed crimes committed by high-ranking public officials to a special body called the Investigation Bureau for Crimes Committed by High-ranking Public Officials (the "Investigation Bureau"). Currently, the Investigation Bureau is undergoing an establishment process (as of August 2020).

Meanwhile, as Korea does not have a federal system, municipal governments have no separate enforcement authorities to prosecute crimes.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The principal authorities are the KPO, the Korean National Police Agency (the "KNPA") and the Investigation Bureau. Aside from these general agencies, special police officers may be appointed for matters of forestry, marine affairs, monopoly, or tax among the officials at relevant authorities (Article 197 of the KCPA). In addition, a special prosecutor may be appointed to deal with a specific matter by enactment of a special law.

To further explain the general agencies, the KPO has been the sole authority for criminal prosecution and leading authority for criminal investigation. The power to prosecute crimes has been given solely to the KPO by the KCPA. Furthermore, the power to investigate crimes has been principally bestowed to two agencies, the KPO and the KNPA, with superiority given to the KPO. Pursuant to Article 196, Subsection 1 of the KCPA, the KPO directs and supervises the KNPA's criminal investigations at the present time.

However, recent amendments of the KCPA and the KPO Act together with the new legislation of the Investigation Bureau Act in 2020 are changing this existing structure. In practice, we expect that the changes will start to be observed from 2021 at the earliest, which can be summarised as follows:

Investigation

Authority for investigation will be principally distributed to three agencies: the KPO; the KNPA; and the Investigation Bureau.

- **The KPO**: Until the end of 2020 at least, or until the establishment process of the Investigation Bureau is completed, the KPO will remain the leading and superior state authority for criminal investigation, with precedence over the KNPA. However, from the beginning of 2021 and when the Investigation Bureau is ready to perform its mandates, the KPO's leading position will be weakened.
- **The KNPA**: Unlike its present position, the KNPA will be an independent investigation agency equivalent to the KPO. The KNPA, in principle, will not be under the direction of the KPO and will have the power to conclude a case by deciding not to seek prosecution. Conversely, the KPO's authority to initiate an investigation will be limited to certain types of crimes, such as corruption crimes, business crimes, crimes by public officials, campaign and election crimes, crimes relating to national defence, and crimes causing a large-scale catastrophe (Article 4, Subsection 1 of the KPO Act amendment). For crimes over which the KPO can take initiative, the KNPA should hand over cases under its investigation when a prosecutor at the KPO requests such (Article 197-4 of the KCPA amendment). On the other hand, for the remainder of crimes, the KNPA may lead criminal investigations, while the KPO may exercise its investigation authority secondarily by requesting to perform supplementary investigations from the KNPA if it is necessary to determine whether to prosecute a crime (Article 197-2 of the KCPA).
- **The Investigation Bureau**: Article 2 of the Investigation Bureau Act provides that the Investigation Bureau has limited jurisdiction to perform investigations over personnel and other crimes described as follows:
  - (i) **Personal Jurisdiction**: President of Korea, Members of Parliament, Chief Justice, Justices and judges of the Korean Judiciary (including those at Korean Constitutional Court), prosecutors at the KPO, police officers at the KNPA, public officials for political service and public officials in Class III or higher as described in the State Public Officials Act, and their families (including accomplices or accessories).
  - (ii) **Subject Matter**: Enumerated crimes include bribery, embezzlement, unlawful giving or receiving of political funds and offences committed by way of misusing or abusing official positions.

  As the KNPA has a general investigation authority and the KPO also has a comprehensive first-hand investigation

authority over the six kinds of crimes, the investigation authorities of the three agencies will overlap. In this regard, Article 24, Subsection 1 of the Investigation Bureau Act provides that when the Head of the Investigation Bureau requests the other investigation agencies to hand over a case to the Investigation Bureau, the other investigation agencies should abide by the request.

Prosecution

The prosecution authority will be divided into two agencies: the KPO; and the Investigation Bureau. While the KPO retains the power of general prosecution for all crimes, the Investigation Bureau has a limited prosecution authority over crimes committed by the Chief Justice, Justices and judges of the Korean Judiciary, the Prosecutor General and prosecutors at the KPO, and police officers at the KNPA of superintendent rank or higher (Article 3, Subsection 1, Paragraph 2 of the Investigation Bureau Act). The Investigation Bureau's prosecution authority is narrower than that for investigation.

As shown above, the criminal investigation and prosecution systems in Korea are undergoing structural changes. It would be premature to predict the impact of the foregoing changes.

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?

Korea neither recognises any civil enforcements to regulate business crimes, nor allows any administrative agencies to combat against business crimes by means of criminal punishment. However, several administrative agencies may deal with unlawful business conducts that would constitute business crimes by imposing administrative measures or sanctions to the wrongdoers.

For example, the Korean National Tax Services may carry out tax investigations to detect tax offences, such as tax evasion, and may impose and collect a penalty tax. Similarly, the Korea Customs Service may undertake administrative investigations to seek out any offences in violation of the Customs Act. The Korean Fair Trade Commission may also invoke expansive administrative investigations to find any anti-competition conduct or unfair support. The scope of the investigations sometimes encompasses one entire business conglomerate, a so-called *Chaebol* in Korean, consisting of a number of affiliates or subordinate companies.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Probably the most famous business crime cases in Korea are the bribery cases relating to the political scandal of the impeached ex-president of Korea, Ms. Geun-hye Park. Many well-known people from various areas, including owners of major business groups in Korea, such as Mr. Jae-yong Lee of the Samsung Group and Mr. Dong-bin Shin of the Lotte Group were involved and punished. These cases were initiated in 2017, and some are still ongoing before the Korean courts.

2 Organisation of the Courts

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

Korea does not have a specialised court for criminal cases. Criminal cases are dealt with in a unitary court system consisting of three levels: district courts; high courts; and the Supreme Court of Korea. However, some courts including the Seoul Central District Court and Seoul High Court have specialised divisions that adjudicate corruption crimes.

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

A jury trial under the concept of Anglo-American law is not recognised under Korean law. Instead, a defendant of a criminal case may have citizens participate in his/her trial as stipulated in the Act on Citizen Participation in Criminal Trials (the "Participation Act"), which is called a participatory trial. The body of selected participants is called the "jury", but it is not the same concept of a jury as in Anglo-American law. Although the jury delivers a verdict on whether a defendant of a case is guilty and is entitled to present its opinion on finding of facts, application of law and sentencing, its verdict and opinions are not binding on the courts (Articles 12 and 46 of the Participation Act).

3 Particular Statutes and Crimes

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

• Securities fraud

Articles 178 and 443 of the Financial Investment Services and Capital Markets Act (the "Capital Markets Act") regulate securities fraud. This Act prohibits the following conduct: (i) utilising unfair means, schemes or tricks; (ii) attempting to obtain profits or benefits in property by using a document containing a misleading statement (i.e. a false description or representation or an omission of a material fact that is necessary to prevent misunderstanding of others); (iii) using a false market price for the purpose of inducing securities transactions; or (iv) spreading rumours or using fraudulent means, threats or assaults for the purpose of securities trading or market price change.

The offences require proof of intention for each prohibited conduct. A mere recklessness or criminal mistake is insufficient. Unless stated otherwise, the *mens rea* element of the crimes hereunder is the same.

• Accounting fraud

Accounting fraud is mainly governed by the External Audit of Stock Companies Act. According to this Act, when a company or a member of personnel in charge publishes false financial statements in violation of accounting standards prescribed in the Act, or a certified public accountant omits required statements or makes false statements in an audit report, those acts shall be subject to criminal liability.

• Insider trading

Articles 174 and 443 of the Capital Markets Act prohibit insider trading based on non-public information. "Insider" refers to those who come to know the non-public information in the course of exercising their rights or performing mandates, or in relation to their duties. For example, (i) the company and its officers, employees or their representatives or agents, (ii) major shareholders, (iii) persons having authorities to permit, approve, instruct, or supervise the company, (iv) contractual parties or parties under negotiation for contract, (v) agents, employees or servants of any of the foregoing persons, or (vi) information recipients from any of the foregoing persons. "Non-public information" means information undisclosed to the public that may have an impact on investment judgment.

• **Embezzlement**

Article 355 of the Korean Criminal Code (the "KCC") prohibits embezzlement, which occurs when a person having lawful possession of a property of another withholds or refuses to return it to a legitimate right holder. Furthermore, Article 356 of the KCC and Article 3 of the Act on the Aggravated Punishment of Specific Economic Crimes (the "Aggravated Economic Crimes Act") stipulate aggravated embezzlement. If embezzlement is committed in violation of the offender's occupational duties or the value of goods or profits obtained by the embezzlement amounts to KRW 500,000,000 or more, it constitutes aggravated embezzlement, resulting in more severe punishment.

• **Bribery of government officials**

Articles 129 to 135 of the KCC and Article 2 of the Act on the Aggravated Punishment of Specific Crimes (the "Aggravated Crimes Act") regulate bribery of government officials. These bribery statutes prohibit undue giving or receiving, demanding, offering or promising to give any form of profits or benefits in property, to public officials or arbitrators in connection with their duties. If the value of goods or profits obtained by the public officials or arbitrators amounts to KRW 30,000,000 or more, it constitutes aggravated bribery.

• **Criminal anti-competition**

Articles 23 and 23-2 of the Monopoly Regulation and Fair Trade Act (the "Fair Trade Act") prohibit the following acts that would likely undermine fair trade: (i) undue refusal to deal with or discrimination against counterparties in a transaction; (ii) undue exclusion of competitors; (iii) undue solicitation or coercion to customers of competitors to make a deal with the offender; (iv) abuse of a superior bargaining position; (v) imposition of unduly restrictive terms or interference with other business entities' activities; (vi) unfair support to specially related persons or other companies; (vii) provision of unjust benefits to specially related parties; or (viii) any other conduct that would likely undermine fair trades.

• **Cartels and other competition offences**

Article 19 of the Fair Trade Act prohibits cartels that would unduly undermine fair competitions. Prohibited conducts are market participants' collusions concerning: (i) price; (ii) terms and conditions for transactions, payments or payment conditions; (iii) production, delivery, transportation, or trade of goods or services; (iv) business areas or business partners; (v) establishing or extending facilities or equipment; (vi) kinds or standards of goods or services; (vii) joint operation or management of major business departments or establishing a company for the joint operation or management; (viii) a winner, a bidding or tender price, and other conducts prescribed by Presidential Decree in bidding or auction; or (ix) any other conduct that would substantially undermine competition by means of hindering or restricting business activities of market participants.

• **Tax crimes**

The Punishment of Tax Offences Act regulates various tax offences, including tax evasion. Article 3 of this Act provides that a person who evades a tax or obtains a tax refund or deduction by way of fraudulent or improper means shall be punished by a criminal fine and/or imprisonment. If the value of profits or benefits obtained by the offences amounts to KRW 500,000,000 or more, it constitutes aggravated tax evasion and shall be punished with up to life imprisonment (Article 8 of the Aggravated Crimes Act).

• **Government-contracting fraud**

There is no specific statute or regulation that particularly regulates fraud in government contracting. In such case, general fraud statutes are applicable, those being Article 347 of the KCC and Article 3 of the Aggravated Economic Crimes Act. When the value of profits or benefits obtained by fraudulent offences amounts to KRW 500,000,000 or more, it constitutes aggravated fraud.

• **Environmental crimes**

Korea has a set of environment statutes which consist of the Clean Air Conservation Act, the Water Environment Conservation Act, the Natural Environment Conservation Act, the Soil Environment Conservation Act, and the Marine Environment Management Act. In addition, to address serious air pollution in the metropolitan area, the Special Act on the Improvement of Air Quality in Seoul Metropolitan Area was enacted in 2017.

• **Campaign-finance/election law**

Two main statutes regulate offences concerning election or campaign fundraising. They are the Public Official Election Act (the "Election Act") and the Political Funds Act (the "Funds Act").

The Election Act makes various election offences illegal, such as bribing voters or other personnel related to elections (Articles 230–233 of the Election Act), interference with freedom of election (Article 237 of the Election Act), deceptive voting (Article 248 of the Election Act), unlawful spending of election expenses (Article 258 of the Election Act) and so on.

The Funds Act prohibits contributing or receiving political funds by means and processes not provided by the Funds Act. Also, it obligates fundraisers to spend the funds fairly, only for the purpose of political activities. Misappropriation of funds for private ends is strictly prohibited (Article 2 of the Funds Act).

• **Market manipulation in connection with the sale of derivatives**

The Capital Markets Act prohibits market price manipulation in securities trading, including the sale of derivatives. Article 176 of the Capital Markets Act describes in detail the unlawful conducts that would constitute market manipulations; for example, a colluded purchase or sale of securities at an agreed price, or making a false appearance of securities trading with no intent to transfer the interests or rights therein. If the value of profits or benefits obtained by the offence amounts to KRW 500,000,000 or more, it constitutes aggravated market price manipulation (Article 443 of the Capital Markets Act).

• **Money laundering or wire fraud**

The two statutes described below are considered to regulate money laundering.

- Article 3 of the Act on the Regulation and Punishment of Criminal Proceeds Concealment punishes a person when he/she: (a) makes a false appearance concerning an acquisition or disposition of criminal proceeds; (b) deceives the source of criminal proceeds; or (c) conceals criminal proceeds for the purpose of encouraging crimes or making an appearance that the criminal proceeds were legitimately acquired.
- Article 7 of the Act on Special Cases concerning the Prevention of Illegal Trafficking in Narcotics punishes a person when he/she conceals or makes a false appearance regarding the nature, location, origin, or ownership of illegal profits for the purpose of interrupting detections of narcotics crimes or investigations of the origin of illegal profits, or avoiding the confiscation of illegal profits. Attempt and preparation are also punishable.

• **Cybersecurity and data protection law**

Cybersecurity and data protection are governed by a number of statutes including Article 347-2 of the KCC, the Act on the Promotion of Information and Communication Network

Utilization and Information Protection (the "Network Utilization and Information Protection Act"), and the Personal Information Protection Act.

In particular, Articles 45–49 of the Network Utilization and Information Protection Act: (i) obligate network operators to take protective measures as required by relevant regulations or ordinances to defend their networks and users' information from cyber-attacks; and simultaneously (ii) prohibit unauthorised access or intrusion to any network and unauthorised collection, release or misappropriation of personal information. In violation of the above prohibitions, the offender shall be criminally punished pursuant to Articles 70–72 of the same Act.

• Trade sanctions and export control violations

The Foreign Trade Act, the Foreign Exchange Transactions Act and the Customs Act work together to regulate cross-border trades. These statutes prescribe various obligations or prohibitions to facilitate international commerce, to establish a fair trade system and to protect domestic industry. In violation of such obligations or prohibitions, criminal penalties or administrative measures shall be imposed pursuant to relevant provisions.

• Any other crime of particular interest in your jurisdiction

The Improper Solicitation and Graft Act was enacted in 2015 and makes it illegal to give and receive, demand, offer or promise to give gifts of more than KRW 30,000, KRW 50,000 or KRW 100,000 to public officials, journalists, private school teachers and their spouses. This law constitutes the anti-corruption law in a broad sense, but falls short of bribery statutes in that its application is not limited to public officials and the *quid pro quo* element in connection with the duties is not required.

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

Attempt, preparation or conspiracy of a crime may be punishable when a specific provision expressly states so (Articles 27 and 28 of the KCC). For example, attempted embezzlement is punishable by Article 359 of the KCC, and attempted customs evasion is punishable by Article 271 of the Customs Act.

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?

Generally speaking, a company or legal entity may be punishable by an act of its officer, representative, agent or employee if a specific provision expressly provides that the company or entity shall be punished together with the conductor. Such provision is commonly called a "joint penalty provision" (for example, Article 448 of the Capital Markets Act). However, the company or entity would be exempted from criminal liability, if it successfully establishes absence of negligence to prevent the violation at issue.

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

Unless a manager, officer or director is involved in the offence at issue, there is no general legal theory that imposes criminal liability upon the manager, officer or director just because the entity is liable for a crime.

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?

When there is a joint penalty provision, a conductor and a legal entity that he/she belongs to are jointly liable for their crime on the ground of the joint penalty provision. In such case, the authorities usually prosecute both.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

When a general succession occurs, the successor company may be criminally liable for the succeeded company's violation of law in the past.

5 Statutes of Limitations

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

Limitations periods are prescribed in Article 249 of the KCPA. They are determined by the maximum statutory sentence prescribed in the law, and run from the time a criminal conduct has ceased. For a crime with accomplices, it runs from when the final act of all accomplices has ceased or been completed (Article 252 of the KCPA).

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

Even a crime occurring outside the limitations period can be prosecuted if it is deemed to be included in a single crime within the limitations period. Where a statute provides punishment for a habitual crime and the criminal conduct outside the limitations period was committed by such habit, it may be punishable pursuant to the habitual crime provision (for example, Article 332 of the KCC stipulates habitual theft).

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

The limitations period shall cease to run when a criminal prosecution is initiated. Institution of criminal prosecution against one of the accomplices suspends the limitations period against the remaining accomplices. In addition, the limitations period is also suspended when an offender stays in a foreign territory for the purpose of avoiding criminal punishment (Article 253 of the KCC).

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Articles 3–6 of the KCC stipulate certain circumstances in which Korean criminal statutes are applicable in a foreign

territory, such as where an offender or a victim is a Korean national. However, it is difficult to find a case enforcing the above provisions in practice.

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

Investigation authorities initiate investigations when they have reason to believe that a crime has been committed. Besides, a victim's complaint, report or accusation of others, including witnesses, may also trigger criminal investigations.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Korea has entered into judicial mutual assistance and/or extradition treaties with numerous other countries. In this regard, the Act on International Judicial Mutual Assistance in Criminal Matters and the Extradition Act were enacted and are taking effect.

7 Procedures for Gathering Information from a Company

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

There are two ways that the investigation authorities can gather information. One is an informal request made in expectation of voluntary cooperation by an information holder. The other is a search and seizure warrant issued by a court authorising the agencies' gathering information on a specified person's premises for particular crimes.

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?

With a search and seizure warrant, the investigation authorities can seek documents from a company.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Attorney-client privilege is under discussion in the Korean legal society, but is not recognised under Korean law at present.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Korean labour and privacy laws do not provide protection for employees' personal data if the investigation authorities undertake information-gathering with a search and seizure warrant. If the investigation authorities request a voluntary production without a search and seizure warrant, the information holder's consent is required pursuant to the Personal Information Protection Act to abide by the request. There is no statute or domestic law that impedes cross-border disclosure.

7.5 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?

With a search and seizure warrant, if issued on the ground of necessity and relevance, the investigation authorities can demand that an employee produce documents, search the employee's premises and seize documents as stated in the warrant.

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

Please refer to the answer for question 7.5.

Questioning of Individuals:

7.7 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?

Unless an employee, officer, or director of a company under suspicion of crime voluntarily cooperates with the government, the investigation authorities may seek to compel their investigations by applying for an arrest or detention warrant to the court, where an employee, officer, or director of a company is found to be involved in the crime under investigation. The questioning will take place in a forum over which the investigation agency in charge has jurisdiction.

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

If deemed necessary, the investigation authorities may question a third person with his/her cooperation, there is no way to compel a third person absent an arrest or detention warrant relating to the third person's own crime.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The right to entertain the assistance of an attorney and privilege against self-incrimination are respectively recognised under Article 12, Subsection 4 and Article 23, Subsection 2 of the Korean Constitution. When a person asserts the privilege, an inference of guilt is prohibited.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

A criminal case is initiated by a prosecutor's filing of a written indictment document within a district court.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

There are no established rules or guidelines governing the prosecutor's decision to charge an entity or individual with a crime. The prosecutor has the discretionary power to initiate a prosecution considering the gravity of the offence, the offender's situation, the circumstances after the crime and the like (Article 247 of the KCPA).

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

Korea does not adopt the system or procedure in question.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Please refer to the answer to question 8.3.

8.5 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 may apply.

Civil liability is separate from criminal liability. Thus, if a victim of a crime files a tort claim against the offender in court, damages may be granted to the victim. Meanwhile, Korea does not adopt a civil penalty system.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The government has the burden to prove every element of any crime charged. When a defendant asserts affirmative defences, such as self-defence or the victim's consent, and reasonable doubt arises, then the government has the burden to prove non-existence of such defences.

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

The government must prove the charges beyond a reasonable doubt (Article 307 of the KCPA).

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 finds facts and determines whether the burden of proof is satisfied.

10 Conspiracy / Aiding and Abetting

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

According to the degree and form of involvement in a crime, accomplices may be punished as a co-principal or accessory.

Co-principal: If two or more persons jointly committed a crime, each of them shall be punished as a principal (Article 30 of the KCC). Furthermore, the Korean court recognises the theory of "co-principals by conspiracy". Under this theory, if two or more persons agreed to commit a crime in reliance of each other's action for the crime, and one of the conspirators took a criminal action, then the others, including those who did not actually perform criminal conduct, can be held liable as principals.

Accessory: A person who abets or aids another can be held liable as an accessory. The abettor will be punished to the same extent as a principal (Article 31 of the KCC), while the aider will be punished to a lesser degree (Article 32 of the KCC).

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?

As state of mind is an essential requisite of a crime, and intent is a principle in the *mens rea* element, a defendant will not be held liable if he/she lacked the required intent. While the government has the burden to prove it, proof by circumstantial evidence may be allowed.

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?

Generally, ignorance of law is not recognised as a defence. However, in an exceptional case where a defendant has a special and reasonable ground to believe that his/her conduct is particularly allowed by law, he/she may be exempted from criminal liability pursuant to Article 16 of the KCC.

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?

Ignorance of fact negating the requisite intent can be a defence. To be successful for this defence, the defendant needs to assert his/her ignorance to the degree that a reasonable doubt arises, then the government has the burden to prove the opposite.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no general obligation to report knowledge that a crime has been committed. However, a public official has the duty to report if he/she has a reason to believe that a crime has been committed (Article 234, Subsection 2 of the KCPA).

13 Cooperation Provisions / Leniency

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

Korea does not adopt the system or procedure in question.

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

This is not applicable in Korea.

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?

Korea has not adopted the system or procedure in question.

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?

This is not applicable in Korea.

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 a sentence on the defendant? Please describe the sentencing process.

The same court that determines a case on the merits also decides sentencing. There is no binding guideline for sentencing. However, the Supreme Court of Korea has published sentencing guidelines for a wide range of crimes, including murder, robbery, fraud, embezzlement and bribery, which judges generally comply with.

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.

There is no such element in sentencing a corporation.

16 Appeals

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

Appeals are allowed for both the defendant and the government as long as each party has a ground to appeal as stipulated in the KCPA (Articles 361-5 and 383 of the KCPA).

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

In Korea, the sentencing procedure is not separated from a guilty or non-guilty determination. The court renders its judgment on whether a defendant is guilty and sentences the defendant at the same time. A defendant or the government may appeal a sentence of the first instance court with no particular restriction (Article 361-5, Paragraph 15 of the KCPA). However, an appeal on sentencing to the Supreme Court of Korea is allowed only when the death penalty, life imprisonment or imprisonment of no less than 10 years has been sentenced (Article 383, Paragraph 4 of the KCPA).

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

Whereas a first instance court decision can be appealed in case of an error of fact or application of law, errors of fact do not constitute a legitimate ground for appeal to the Supreme Court of Korea.

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

When an appellate court upholds an appeal on the first instance court's judgment, it, in principle, shall vacate the lower court's judgment and render its own judgment, replacing the former (Article 364 of the KCPA). On the other hand, when the Supreme Court of Korea upholds an appeal, it vacates the lower court's judgment and remands the case to the lower court in principle. However, if the case record is sufficient to render a judgment, the Supreme Court of Korea may render its own judgment on the basis of the record (Article 396 of the KCPA).

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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?

The following authorities can prosecute business crimes:
- the Prosecutor's Office;
- the Police Department;
- the Financial Market Authority (FMA); and
- the Financial Intelligence Unit (FIU).

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The Prosecutor's Office is the main enforcement agency for pre-trial investigations as well as trials themselves. In this capacity, it is authorised to file petitions and indictments with the criminal courts as well as appeals against orders and judgments issued by the same.

The Office for Business Crimes at the Police Department serves to assist the Prosecutor's Office, as well as the criminal courts, during the pre-trial investigation.

The FMA is, among others, in charge of monitoring and supervising the different groups of financial intermediaries, which consist of banks, funds of different kinds, insurance companies, trustees, asset administrators, auditors and law firms. In case of irregularities, it is obliged to conduct investigations itself to a certain extent and to file a criminal complaint at the Prosecutor's Office.

The FIU is in charge of accepting notifications of financial intermediaries according to the Law on Due Diligence (anti-money laundering) and to forward the same to the Prosecutor's Office, if indicated.

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?

The civil enforcement of business crimes falls within the deliberate decision of the person or company harmed by the respective activities. They have to file the appropriate claims, for example, indemnification claims or those for undue enrichment, against the liable person or company at the civil court. Any criminal offence resulting in damage is likely to result in a civil claim too, while a civil claim does not need to be based on a convicting judgment at a trial.

The administrative enforcement falls within the authority of the FMA.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

There have been several major business crime cases in the past few years. Parts of these cases are closely entangled with major cases in foreign jurisdictions, as the funds gained by criminal activities there may have been hidden in Liechtenstein.

2 Organisation of the Courts

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

The criminal courts are structured in three instances:
- the Criminal Court;
- the Court of Appeal; and
- the Supreme Court.

The Criminal Court in major cases – these are cases which are punishable with imprisonment of up to more than three years – as well as the Court of Appeal, are composed of three judges. The Supreme Court is composed of five judges.

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

A jury system is not known to the Liechtenstein criminal courts.

3 Particular Statutes and Crimes

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

• **Securities fraud**

Any fraud committed in relation to securities is covered by the general rules on fraud. The same are as follows:

Fraud [§ 146 StGB (Criminal Code)]

Any person who by deceiving another person about facts causes such other person to do, acquiesce in, or omit an act that causes damage to the assets of such other person or of a third person and who has the intent to unjustly enrich himself or a third

party as a result of the conduct of the deceived person shall be punished with imprisonment of up to six months or with a monetary penalty of up to 360 daily rates.

Serious fraud (§ 147 StGB)

1) Any person who commits fraud by doing any of the following for deception purposes:
   1. using a forged or falsified document, falsified or alienated illiquid means of payment, uncovered data of an illiquid means of payment, forged or falsified data, any other such piece of evidence, or an incorrect measurement device;
   2. (cancelled); or
   3. falsely posing as an official,

   shall be punished with imprisonment of up to three years.

1a) Any person who commits fraud causing more than minor damage by using an illegal drug or an illegal method shall be punished likewise, according to the exhibit of the Agreement against Doping for the purpose of deceit by doping in sports.

2) Any person who commits fraud causing damage of an amount exceeding CHF 7,500 shall be punished likewise.

3) Any person who, as a result of the act, causes damage of an amount exceeding CHF 300,000 shall be punished with imprisonment between one and 10 years.

Fraud on a commercial basis (§ 148 StGB)

Any person who commits fraud on a commercial basis shall be punished with imprisonment of up to three years, but any person who commits serious fraud on a commercial basis shall be punished with imprisonment of six months to five years.

• Accounting fraud

Any fraud in connection with accounting is also covered by the general rules on fraud as set out above.

• Insider trading

A special rule on insider trading is set forth in the Law against Market Abuse while Trading in Financial Instruments (MG). The respective regulations read as follows:

Abuse of inside information (insider dealing) (Art. 23 MG)

1) The Court of Justice shall punish with imprisonment of up to three years – or in cases where the economic advantage obtained through the offence exceeds CHF 75,000, with imprisonment of six months to five years – an insider using inside information with the intent to obtain an economic advantage for himself or a third party by:
   a) purchasing or selling affected financial instruments or offering or recommending such financial instruments to a third party for purchase or sale; or
   b) making such information available to a third party without being obliged to do so.

2) Anyone who is not an insider using inside information that was disclosed to him or that he otherwise gained knowledge of with the intent to obtain an economic advantage for himself or a third party in a way described in para. 1, shall be punished with imprisonment of up to one year or a monetary penalty of up to 360 daily rates; however, in cases where the economic advantage obtained through the offence exceeds CHF 75,000, they shall face imprisonment of up to three years.

3) Anyone who otherwise is an insider or not an insider and who uses information which he knows, or with gross negligence does not know, to be inside information, in a way described in para. 1 but without the intent to obtain an economic advantage for himself or a third party, shall be punished with imprisonment of up to six months or a monetary penalty of up to 360 daily rates.

4) An insider refers to a person who by virtue of his membership of the administrative, management, or supervisory bodies of the issuer or otherwise due to his profession, occupation, responsibilities, or interest in the capital of the issuer has access to inside information. An insider further means a person who has obtained the information by committing offences. In case the person is a legal person, any natural person who takes part in the decision to execute the transaction for the account of the legal person shall be considered an insider.

5) Paras 1 to 3 do not apply to:
   a) transactions that are carried out to fulfil an obligation that has become due to purchase or sell financial instruments, if such obligation is pursuant to an agreement concluded before the person concerned received the inside information; and/or
   b) dealing in own shares (purchase and sale) in the context of buy-back programmes and price stabilisation measures for a financial instrument, if such transactions are conducted in compliance with Commission Regulation (EC) no. 2273/2003 of 22 December, 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council (EEA Compendium of Laws: Annex IX–29aa.01).

In addition to the insider trading itself, the criminal offence of market manipulation is of interest, as stated below:

Market manipulation (Art. 24 MG)

1) The Court of Justice shall punish with a fine of up to CHF 50,000, or in the event the fine cannot be collected with imprisonment of up to six months, anyone who:
   a) performs transactions, buys orders, or sells orders which:
      1. send or could send false or misleading signals regarding the supply of, demand of, or the price of financial instruments; or
      2. influence or have the capacity to influence the price of one or several financial instruments placed by one person or several persons acting in collaboration in the intent to drive up prices to an abnormal or artificial level;
   b) performs trades or places buy or sell orders under false pretences or by any other deceitful actions; or
   c) disseminates information via the media including the internet or through other channels that send or could send false or misleading signals with respect to the financial instruments, among other things, by disseminating rumours and false or misleading news, if the person who disseminated this information knew or should have known that the information was false or misleading. Journalists who disseminate such information in the line of duty shall be judged by the standards applicable to their profession unless these persons gain an advantage or a pecuniary benefit directly or indirectly from the dissemination of the respective information.

2) Para. a) shall not apply if the action conforms to accepted market practices in the supervised market concerned or with respect to the off-market trade concerned and the person has legitimate reasons for the action. Accepted market practices are only such practices that one may reasonably expect to find on one or more financial markets and are recognised by the FMA as such. A market practice, especially a new or emerging market practice, shall not be considered unacceptable on the grounds that it was not expressly accepted previously.

3) Para. 1 shall not apply to dealing in own shares (purchase and sale) in the context of buy-back programmes and price stabilisation measures for a financial instrument, if such transactions are conducted in compliance with Commission Regulation (EC) no. 2273/2003.
4) The Government shall provide further details by ordinance, especially concerning:
   a) the circumstances to be taken into account when judging transactions or buy and sell orders as market manipulation; and
   b) the consultation procedure and the announcement of the decision concerning acceptance of a market practice, and the factors to be taken into account when judging a market practice.

• Embezzlement

Embezzlement (§ 133 StGB)

1) Any person who, with the intent to unjustly enrich himself or a third party, appropriates for himself or for a third party any good that has been entrusted to him shall be punished with imprisonment of up to six months or with a monetary penalty of up to 360 daily rates.
2) Any person who embezzles a good, the value of which exceeds the amount of CHF 7,500, shall be punished with imprisonment of up to three years, and any person who embezzles a good, the value of which exceeds the amount of CHF 300,000, shall be punished with imprisonment between one and 10 years.

• Bribery of government officials

Active bribery (§ 307 StGB)

1) Any person who offers, promises, or provides to an office holder or arbitrator a benefit to be granted to such office holder or arbitrator or to a third party in return for any execution or omission of official duties, in violation of such duties, shall be punished with imprisonment of up to three years. Any person shall be punished likewise who offers, promises, or provides to an expert (§ 304 para. 1) a benefit for such expert or a third party in return for the provision of a false finding or a false opinion.
2) Any person who commits the act in relation to a benefit value exceeding CHF 5,000 shall be punished with imprisonment of six months to five years; any person who commits the act in relation to a benefit value exceeding CHF 75,000 shall be punished with imprisonment of between one and 10 years.

The complementary criminal offence of active bribery is the abuse of official powers:

Abuse of official powers (§ 302 StGB)

1) An official who, with the intent to injure another person with respect to such other person's rights, knowingly abuses his powers to carry out official duties in the name of the state, a municipal association, a municipality, or another person under public law as a body thereof in the execution of the laws shall be punished with imprisonment of six months to five years.
2) Any person who commits the act while carrying out official duties with a foreign power or a supranational or intergovernmental institution shall be punished with imprisonment of between one and 10 years.

• Criminal anti-competition

Criminal anti-competition is not regulated within the Criminal Code itself. It is part of the Law on Unfair Competition (UWG) which deals with civil, procedural, administrative and criminal aspects of the same.

Unfair competition (Art. 22 UWG)

The following acts committed by intention, namely:

- certain practices towards the consumers, as well as certain marketing and sales activities as enumerated by way of example;
- certain omissions in the advertisement for a price competition to promote sales;
- instigation to breach or dissolve contract;
- exploitation of the work products of others;
- infringement of production and business secrecies;
- creation of a possibility of confusion with other goods and services by wrong information as well as breach of obligations assumed within the framework of a code of conduct; and
- deceit by omission, as well as an aggressive mode of doing business,

are punishable with a fine up to CHF 100,000. This is due to a petition by a person authorised to file a civil claim. In case of negligence, the fine is limited to CHF 50,000.

Minor irregularities in relation to the obligation to inform consumers of the price can be charged with a fine up to CHF 20,000 and in case of negligence up to CHF 10,000 (Art. 23 UWG).

Art. 25 UWG establishes a specific kind of **entity liability** for the purpose of unfair competition as it expressly rules that the company is subject to joint and several liability.

• Cartels and other competition offences

Liechtenstein does not have an antitrust law with a specification of criminal offences to have its rules observed. The same is also true for the Criminal Code. However, it should be mentioned that Liechtenstein, as a Member State of the European Economic Area (EEA), is subject to Part 4 Chapter 1 of the EEA Agreement dealing under the headings 'Competition and other Common Rules' and 'Rules for Undertakings', with illegal concerted practices falling under the surveillance of the EU commission and the EFTA Surveillance Authority (Art. 53 to 60 EEAA).

• Tax crimes

Two main types of criminal offences in relation to taxes are known in Liechtenstein: tax evasion and tax fraud.

Tax evasion (Art. 137 SteG (Law on Taxes))

1) A fine will be imposed, for an infringement, on any person who:
   a) as a taxpayer, wilfully or through negligence, frustrates a demand for tax which he or she is liable to pay by making incorrect or incomplete statements on a tax return or on a voluntary disclosure or by providing incorrect or incomplete information or who otherwise culpably withholds the payment of taxes;
   b) as a person liable to deduct tax at source wilfully or through negligence, does not make a tax deduction or makes an incomplete deduction;
   c) wilfully or through negligence, withholds the formation tax or tax on insurance premiums for his own benefit or the benefit of another person; and/or
   d) as a taxpayer or as a person liable to deduct tax and source, wilfully or through negligence, obtains a full refund or an unjustified abatement.
2) The fine will be equivalent to the amount of the tax or charge evaded. It may be reduced by up to ⅔ in the event of a minor fault and increased up to the threefold in the case of a major one.

In relation to tax evasion, the attempt, as well as the assistance of a third party – be it by inducement or by contribution – results in a criminal offence also (Arts 138 and 139 SteG).

Tax fraud (Art. 140 SteG)
Any person who evades taxes by using false or falsified business accounts with untrue content or other documents shall be punished with imprisonment of up to six months or a financial penalty of up to 360 daily rates.

Misappropriation of tax to be deducted at source (Art. 141 SteG)
Any person liable to deduct tax at source who uses the same for his own benefit or the benefit of another shall be punished with imprisonment of up to six months or a financial penalty of up to 360 daily rates.

A specific regulation for **entity liability** is known for tax crimes (Art. 143 SteG). In case of tax evasion and assistance thereto the entity is supposed to be punished itself while the representatives acting for the same are only liable if the fine cannot be paid by the entity. In case of tax fraud and misappropriation of tax in relation to legal entities, the acting member of the governing body shall be punished.

• Government-contracting fraud

Any fraud in relation to government-contracting is covered by the general rules on fraud as set out above under the heading 'Securities fraud'.

• Environmental crimes

Intentional interference with the environment (§ 180 StGB)

1) Any person who, in violation of a legal provision or an official mandate, contaminates or otherwise interferes with a body of water, the soil or air in a manner capable of causing:
   1. a danger to the life of, or a risk of serious bodily harm (§ 84 par.1) to, another person or otherwise to the health or physical safety of a larger number of persons;
   2. a danger to animal or plant populations to a significant extent;
   3. a deterioration of the water, soil or air conditions for an extended period of time; or
   4. removal costs or other damage to an object belonging to another person or to a cultural property under protection as defined by the Cultural Property Act or to a natural monument in an amount exceeding CHF 75,000,

   shall be punished with imprisonment of up to three years.
2) If the act causes significant damage to the animal or plant populations, entails a deterioration of the water, soil or air conditions for an extended period of time, or causes removal costs or other damage to an object belonging to another person, to a cultural property under protection as defined by the Cultural Property Act, or to a natural monument in an amount exceeding CHF 75,000, the perpetrator shall be punished with imprisonment of six months to five years. If the act entails any of the consequences referred to in § 169 para. 3, the penalties provided for therein shall be imposed.

Intentional treatment and shipment of waste in a manner that represents a hazard to the environment (§ 181a StGB)

1) Any person who, in violation of a legal provision or an official mandate, collects, transports, recycles or removes waste, or who, within an enterprise, supervises or controls such activities in a manner capable of causing:
   1. a danger to the life of, or a risk of serious bodily harm (§ 84 para. 1) to, another person or otherwise to the health or physical safety of a larger number of persons;
   2. a danger to animal or plant populations to a significant extent;
   3. a deterioration of the water, soil or air conditions for an extended period of time; or
   4. removal costs exceeding the amount of CHF 75,000,

   shall be punished with imprisonment of up to two years.
2) If the act causes significant damage to the animal or plant populations, entails a deterioration of the water, soil or air conditions for an extended period of time, or causes removal costs in an amount exceeding CHF 75,000, the perpetrator shall be punished with imprisonment of up to three years. If the act entails any of the consequences referred to in § 169 para. 3, the penalties provided for therein shall be imposed.
3) Any person who, with the exception of the case set out in para. 2, ships waste in a significant quantity in violation of Art. 2 no. 35 of the Regulation (EC) no. 1013/2006 on shipment of waste shall be punished with imprisonment of up to one year or with a monetary penalty of up to 720 daily rates.

Intentional operation of plants in a manner that represents a hazard to the environment (§ 181c StGB)

1) Any person who, in violation of a legal provision or an official mandate, operates a plant in which a dangerous activity is carried out in a manner capable of causing:
   1. a danger to the life of, or a risk of serious bodily harm (§ 84 para. 1) to, another person or otherwise to the health or physical safety of a larger number of persons;
   2. a danger to animal or plant populations to a significant extent;
   3. a deterioration of the water, soil or air conditions for an extended period of time; or
   4. removal costs exceeding the amount of CHF 75,000,

   shall be punished with imprisonment of up to two years.
2) If the act causes significant damage to animal or plant populations, entails a deterioration of the water, soil or air conditions for an extended period of time, or causes removal costs in an amount exceeding CHF 75,000, the perpetrator shall be punished with imprisonment of up to three years. If the act entails any of the consequences referred to in § 169 para. 3, the penalties provided for therein shall be imposed.

Intentional damage to animal or plant populations (§ 181e StGB)

1) Any person who puts to death specimens of protected wild-living endangered animal species – in contradiction to legal regulations or an official instruction – possesses the same, destroys their evolutionary stages or separates the same from their natural habitat or destroys specimens of protected wild-living plant species, possesses the same or separates the same from their natural habitat shall be punished with imprisonment up to two years. This regulation does not apply if the act concerns only an insignificant number of specimens and has only an insignificant impact on the condition of this species.
2) Protected wild-living animal and plant specimens are those shown in exhibits I to III of the Agreement on the Protection of the European wild-living Plants and Animals and their natural Habitats, Law Gazette 1982 no. 72.

Intentional damage of habitats in protected areas (§ 181g StGB)

1) Any person who, in contradiction to legal regulations or an official instruction, damages a habitat within a protected area in a significant manner shall be punished with imprisonment of up to two years.

2) Habitats within a protected area are all habitats of a specimen for which an area had been declared to be a protected one by law or regulation or any natural habitat or habitat of any other kind for which an area had been declared by law or regulation to be a specially protected area.

Other types of endangerment of animal and plant populations (§ 182 StGB)

1) Any person who commits an act capable of creating:
   1. the danger of the spread of an epidemic among animals; or
   2. the danger of the spread of a pathogen or parasite dangerous to animal or plant populations,

   shall be punished with imprisonment of up to two years.
2) Any person shall be punished likewise who, in violation of a legal provision or an official mandate, causes significant danger to animal or plant populations in a manner other than the manner set out in § 180.

The criminal offences committed intentionally, as set forth above, have counterparts in cases where they are committed in negligence as more closely set forth in §§ 181, 181b, 181d, 181f, 181h and 183 StGB.

• Campaign-finance/election law

The regulations set forth in the Criminal Code in relation to offences at elections and votes do not deal with campaign-financing. However, activities in relation thereto might qualify as active bribery or abuse of official powers as discussed above under the heading 'Bribery of government officials'.

• Market manipulation in connection with the sale of derivatives

For market manipulation in connection with the sale of derivatives the same applies for what is said above under the heading 'Securities fraud'.

• Money laundering or wire fraud

Money laundering (§ 165 StGB)

1) Any person who hides asset components originating from an offence punishable by more than one year or a misdemeanour in accordance with § 223, § 229, § 289, § 293 or § 295, Arts 83 to 85 of the Foreigners Act, Art. 140 of the Tax Act, Arts 88 or 89 of the Value Added Tax Act or an infraction under Art. 24 of the Market Abuse Act, or conceals their origin, in particular by providing false information in legal transactions concerning the origin or the true nature of, the ownership or other rights pertaining to, the powers of disposal over, the transfer of or the location of such asset components, shall be punished with imprisonment of up to three years.
2) Any person who appropriates or takes into safekeeping asset components originating from an offence punishable by more than one year, a misdemeanour in accordance with § 223, § 229, § 289, § 293 or § 295, Arts 83 to 85 of the Foreigners Act, Arts 88 or 89 of the Value Added Tax Act or an infraction in accordance with Art. 24 of the Market Abuse Act, or knowingly originating from a misdemeanour in accordance with Art. 140 of the Tax Act, whether merely in order to hold such components in safekeeping, to invest them, or to manage them, or who converts, realises or transfers such asset components to a third party, shall be punished with imprisonment of up to two years.
3) Any person who appropriates or takes into safekeeping asset components of a criminal organisation (§ 278a) or a terrorist group (§ 278b) on behalf of or in the interest of such a criminal organisation or terrorist group, whether merely in order to hold such components in safekeeping, to invest them, or to manage them, or who converts, realises, or transfers such asset components to a third party, shall be punished with imprisonment of up to three years.
4) Any person who commits the offence in relation to a value exceeding CHF 75,000 or as a member of a criminal group that has joined together for the purpose of continued money laundering shall be punished with imprisonment of one to three years.
5) An asset component shall be deemed to arise from an offence if:
   - the perpetrator of the offence has obtained the asset component through the act or received it for the commission of the act or if the value of the originally obtained or received asset is embodied therein; or
   - the perpetrator saved the same by committing a misdemeanour in accordance with Art. 140 of the Tax Act or Arts 88 or 89 of the Value Added Tax Act.

A criminal offence called **wire fraud** is not known to Liechtenstein law. The relevant acts will normally qualify as fraud according to the general rules set forth above under the heading 'Securities fraud'.

• Cybersecurity and data protection law

Damage to data (§ 126a StGB)

1) Any person who causes damage to another by changing, deleting, or otherwise making unusable or suppressing data that is processed, transmitted, or supplied with the help of automation and that is not at his disposal or not at his sole disposal shall be punished with imprisonment of up to six months or with a monetary penalty of up to 360 daily rates.
2) Any person who, by committing the offence, causes a damage exceeding CHF 7,500 shall be punished with imprisonment up to two years.
3) Any person who by committing the offence imposes a negative effect on a multitude of computer systems by means of a computer program, a password, admission codes or comparable data allowing access to computer systems or parts thereof has to be punished with imprisonment of up to three years if these specific means had obviously been created or adapted to do so.
4) The following will be punished with imprisonment from six months to five years; those who:
   1. cause damage exceeding CHF 300,000;
   2. negatively affect a substantial part of the critical infrastructure (§ 74 para. 1 no. 10); or
   3. commit the act as a member of a criminal association.

Interference with the functioning of a computer system (§ 126b StGB)

1) Any person who seriously interferes with the functioning of a computer system that is not at his disposal or not at his sole disposal by entering or transmitting data shall be punished with imprisonment of up to six months or with a monetary penalty of up to 360 daily rates, if the act does not carry a penalty pursuant to § 126a.
2) Any person who by committing the offence causes a malfunction for a longer period of time shall be punished with imprisonment for up to two years.
3) Any person who by committing the offence causes a serious malfunction on a multitude of computer systems by means of a computer program, a password, admission codes or comparable data allowing access to computer systems or parts thereof has to be punished with imprisonment of up to three years if these specific means had obviously been created or adapted to do so.
4) Any person will be punished with imprisonment from six months to five years who:

1. causes a damage exceeding CHF 300,000;
2. negatively affects a substantial part of the critical infrastructure (§ 74 para. 1 no. 10); or
3. commits the act as a member of a criminal association.

Improper use of computer programs or access data (§ 126c StGB)

1) Any person who develops, launches, distributes, alienates, otherwise makes accessible, procures or possesses:
   1. a computer program which, given its particular nature, has been evidently developed or adapted to commit the act of obtaining illegal access to a computer system (§ 118a), to violate the secrecy of communication (§ 119), to commit the act of an improper interception of data (§ 119a), to cause damage to data (§ 126a), to cause interference with the functioning of a computer system (§ 126b), or to commit a fraudulent misuse of data processing (§ 148a), or any comparable device of this kind; or
   2. a computer password, an access code, or comparable data that enables total or partial access to a computer system, and does so with the intent to use them to commit any of the offences set out in sub-paragraph 1,

   shall be punished with imprisonment of up to six months or with a monetary penalty of up to 360 daily rates.
2) No person shall be punished in accordance with para. 1 if such person voluntarily prevents the computer program or comparable device referred to in para. 1 or the password, access code, or any data comparable thereto from being used in any of the manners set out in § 118a, § 119, § 119a, § 126a, § 126b or § 148a. If there is no danger of any such use or if such danger has been eliminated without any contribution by the perpetrator, the perpetrator shall not be punished if, not having any knowledge thereof, he voluntarily and earnestly endeavours to eliminate such danger.

• Trade sanctions and export control violations

The respective regulations are set forth in the International Sanctions Act (ISG). The penalty provisions read as follows:

Misdemeanours (Art. 10 ISG)

1) Anyone who wilfully violates any provision of an ordinance referred to in Art. 2 para. 2, provided such violation is declared to be punishable, shall be punished with imprisonment of up to three years or to a monetary penalty of up to 360 daily penalty units.
2) In the event that the violation is committed by negligence, the maximum penalty shall be reduced by half.

Contraventions (Art. 11 ISG)

1) Anyone who wilfully commits one of the following acts shall be convicted for contravention and sentenced to a fine of up to CHF 200,000, or to imprisonment of up to six months if the fine cannot be collected:
   a) refusing to provide information, to hand over documents, to permit access to business premises as referred to in Art. 2b para. 1 lit.a and Art. 4 para. 1 or making false or misleading statements in relation to this where the act is not considered a culpable conduct in accordance with any other criminal offence;
   b) violating any provision of an ordinance referred to in Art. 2 para. 2, provided such contravention is declared to be punishable, or violating any decree issued with reference to the liability to penalties under this article, where the act is not considered a culpable conduct in accordance with any other offence; and/or
   c) not complying with the obligation to notify the competent authority according to Art. 2b para. 1 lit.b.

1a) The competent authority, according to the Law on Due Diligence (FMA), will punish any person with a fine of up to CHF 200,000 who intentionally:
   a) refuses to give information to the FMA or third parties instructed by the same to execute controls or makes wrong statements or conceals substantial facts;
   b) does not, not completely or not in time comply with the request of the FMA to establish legally proper conditions or any other instructions passed in the course of its authority;
   c) does not properly or not in time carry out the verifications according to Art. 2c para. 1 lit.a; or
   d) does not establish the necessary organisational steps and secure appropriate internal measures of control and supervision according to Art. 2c para. 1 lit.p.
2) In the event that the violation is committed by negligence, the maximum penalty shall be reduced by half.
3) The period of limitation for the contraventions set out in para. 1 and 1a is five years.

Also in relation thereto, a kind of **entity liability** is known in cases where the offences are committed in the business operations of a legal person or partnership; the same are joint and severally liable for financial penalties, fines and costs (Art. 12 ISG).

• Any other crime of particular interest in your jurisdiction

Embezzlement, as discussed above, is a criminal offence against the misuse of assets entrusted. Closely related thereto is the breach of trust as follows:

Breach of trust (§ 153 StGB)

1) Any person who knowingly misuses his authorisation to dispose of assets belonging to another party or to bind another person and by doing so causes material damage shall be punished with imprisonment of up to six months or up to 360 daily rates.
2) Misuse of authority is given if rules serving the protection of the beneficial entitled person are violated in an unacceptable manner.
3) Any person who, by committing the offence, causes damage exceeding CHF 7,500 shall be punished with imprisonment of up to three years. Any person who causes damage exceeding the amount of CHF 300,000 shall be punished with imprisonment of between one and 10 years.

Furthermore, there are specific rules of criminal offences set forth among others in the Law on Due Diligence, the Bank Act, the Law on Investment Enterprises and the Law on Trustees. These specific rules serve to enforce the careful observation of the professional rules; for example, those including the respective necessity to have a licence. Parts of those regulations also refer to a specific kind of **entity liability**.

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

Yes, there is a liability for inchoate crimes in Liechtenstein. The relevant rule reads as follows:

Criminal liability of an attempt (§ 15 StGB)

1) The penalties provided for intentional acts will not only apply to a completed act, but also to an attempt and to any participation in an attempt.
2) The act will be deemed attempted as soon as the perpetrator puts his decision to carry out or direct another person (§ 12) to carry out the act into execution by way of an action immediately preceding the carrying out of the act.

3) An attempt and any participation in an attempt will not be punishable if completion of the act was not possible under any circumstances, for lack of personal qualities or circumstances that the law requires the person acting to fulfil or given the type of the action or the type of the object against which the act was perpetrated.

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?

Entity liability for criminal offences was introduced to the Liechtenstein Criminal Code by Law Gazette no. 2010/378 as set forth in § 74a to § 74g StGB:

Liability (§ 74a StGB)

1) To the extent that they are not acting in enforcement of the law, legal persons shall be liable for any misdemeanours and crimes committed by managers unlawfully and culpably in their capacity in the performance of business activities and within the framework of the purpose of the legal person (underlying acts).
2) Legal persons shall mean:
   1. legal persons entered in the commercial register as well as legal persons which neither have their domicile nor a place of operation or establishment in Liechtenstein, insofar as these would have to be entered in the commercial register under domestic law; and
   2. foundations and associations not entered in the commercial register as well as foundations and associations which neither have their domicile nor a place of operation or establishment in Liechtenstein.
3) Managing staff shall mean any person:
   1. authorised to represent the legal person in external relations;
   2. who performs control powers in a leading capacity; or
   3. who otherwise exerts significant influence over the business management of the legal person.
4) Where the underlying acts have been committed by employees of the legal person, even though not culpably, the legal person shall be liable only if the commission of the act was made possible or was significantly facilitated by the failure of managing staff, as defined by para. 3, to take the necessary and reasonable measures to prevent such underlying acts.
5) The liability of the legal person for the underlying act and the criminal liability of the managing staff or employees for the same act shall not be exclusive of each other.

Specific rules on entity liability are set forth in the Tax Act, the UWG and the ISG. The relevant rules have been discussed above under the heading 'Tax crimes', 'Criminal anti-competition' and 'Trade sanctions and export control violations'.

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

Regarding personal liability, managers, officers and directors cannot be oblivious if the entity becomes liable for a crime (see § 74a para. 5 StGB as stated above).

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?

As § 74a para. 5 StGB expressly states, the liability of the entity shall not be exclusive to the managing staff or the employees; a policy or preference as to when to pursue an entity, an individual or both is not indicated by the Criminal Code itself. Furthermore, attention should be paid to the different treaties ratified by Liechtenstein and, entailing the enactment of entity liability, expressly state that the same is of an original nature and complementary to the personal liability of the perpetrator (see the respective Report and Petition of the Government during legislation process no. 2010/52).

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The case of a merger seems to be covered by what is said in § 54d StGB, which reads as follows:

Legal succession (§ 74d StGB)

1) Where the rights and obligations of the legal person are transferred to another legal person by way of universal succession, the legal consequences provided for under this Act or the Code of Criminal Procedure shall apply to the legal successor. Legal consequences imposed on the legal predecessor shall also have effect for the legal successor.
2) Singular succession shall be deemed equivalent to universal succession if essentially the same ownership situation, with regard to the legal person, exists and the operation or activity is continued.
3) Where more than one legal successor exists, the corporate monetary penalty may be enforced against any legal successor. Other legal consequences may be attributed to individual legal successors to the extent that those legal consequences affect their area of activity.

In the case of an acquisition, the Criminal Code stays silent. However, there cannot be any doubt that the change in control has no impact on the entity liability as the identity of the same is not affected.

However, it seems legitimate to argue in such a situation of a merger or acquisition that the same will have a favourable impact on the future conduct of the legal person, especially if the consequences of the act had been or will be rectified, which is, according to § 74b StGB, supposed to be taken into account by the court when assessing the penalty.

5 Statutes of Limitations

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

The limitations period (other than those for a criminal offence punishable with life imprisonment or 10 to 20 years, as well as genocide, which is not the case for the one discussed in section 3 above) is calculated from the date when the activity carrying a penalty has been completed or the conduct carrying a penalty has ceased (§ 57 para. 2 StGB).

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

If the perpetrator commits a criminal offence of the same harmful inclination during the limitations period, the same shall not end until it had also expired for the new offence (see § 58 para. 2 StGB in question 5.3 below).

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

The limitations period can be tolled. The respective regulation dealing with this issue is set forth in § 58 StGB as follows:

Extension of the limitations period (§ 58 StGB)

1) If a result belonging to the elements of an offence occurs only after the activity carrying a penalty has been completed or if the conduct carrying a penalty has ceased, then the limitations period shall not come to an end either before it has also elapsed since the result came to pass, or one and a half times its duration, but at least three years must have passed since the point in time referred to in § 57 para. 2.
2) If, during the limitations period, the perpetrator commits an act carrying a penalty that arises from the same harmful inclination again, the limitations period shall not end until the limitations period has also expired for that act.
3) The limitations period does not include:
   1. the time during which, in accordance with a legal provision, prosecution cannot be initiated or continued, unless otherwise provided in para. 4;
   2. the time during which criminal proceedings for the act are pending in court against the perpetrator; or
   3. (of no interest for crimes under section 3 above).

3a) A discontinuation of the running limitation period, according to the aforementioned paragraphs, stays valid even if according to a later amendment of the law the offence had been time-barred at the date when the discontinuation took place.

4) If the act is prosecuted only upon demand, on application, or with the authorisation of a person entitled to grant authorisation, then the limitations period shall not be suspended because the prosecution is not demanded or applied for or the authorisation has not been given.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

If the conditions set out below are met, criminal offences – according to section 3 above – committed abroad are punishable in Liechtenstein, details of which are below.

Offences abroad that are punished only if they carry a penalty under the laws of the place where they are committed (§ 65 StGB):

1) For acts other than those referred to in § 63 and § 64 that have been committed abroad, the Liechtenstein criminal laws shall apply, provided that the acts also carry a penalty under the laws of the place where they are committed, if:
   1. the perpetrator was a Liechtenstein citizen at the time of the act or acquired Liechtenstein citizenship at a later point in time and still holds it at the time the criminal proceedings are initiated; or
   2. the perpetrator was a foreign national at the time of the act, is caught in Liechtenstein, and cannot be extradited abroad for reasons other than the type or nature of his act.
2) The penalty shall be determined in such a manner that the perpetrator is not treated less favourably in the overall effect than under the law of the place where the act is committed.
3) If there is no penal power at the place where the act is committed, it shall suffice if the act is punishable under Liechtenstein laws.
4) The act will not be punishable, however:
   1. if the act is no longer punishable under the laws of the place where it is committed;
   2. if the perpetrator has been acquitted by a final decision by a court of the state in which the act has been committed or the prosecution has otherwise been dropped;
   3. if the perpetrator has been convicted by a final judgment before a foreign court and the sentence has been enforced in its entirety or, to the extent it has not been enforced, it has been remitted or the period of limitation for enforceability under the law of the foreign state has expired; or
   4. for as long as the enforcement of the sentence imposed by the foreign court is stayed in whole or in part.
5) Preventive measures provided for under Liechtenstein laws shall, if the conditions therefor apply, be ordered against a Liechtenstein citizen even if he cannot be punished in Liechtenstein for any of the reasons set out in the preceding paragraph.

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

Investigations are initiated either due to the knowledge of the Prosecutor's Office and the Criminal Court themselves or a criminal complaint filed with the Prosecutor's Office, among others, by the FMA and the FIU.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The Liechtenstein criminal authorities cooperate with foreign enforcement authorities based on the following international treaties of interest here. These treaties are applicable in Liechtenstein from the dates shown in brackets:

- European Treaty on Mutual Assistance in Criminal Cases dated April 20, 1959 (January 26, 1970).
- Agreement on Money Laundering as well as Investigations, Seizure and Confiscation of Profits of Criminal Acts dated November 8, 1990 (March 1, 2001).
- Agreement of the United Nations against Border Crossing Organized Crimes dated November 15, 2000 (March 21, 2008).
- Agreement on Cybercrime dated November 23, 2001 (May 1, 2016).
- Treaty between Liechtenstein and the United States of America on the international assistance in criminal cases dated July 8, 2002 (August 1, 2003).

- Agreement on Criminal Law against Corruption dated January 27, 1999 plus the supplementary Protocol thereto dated May 15, 2003 (April 1, 2017).
- Treaty between Liechtenstein and the United States of America on a more thorough Cooperation for the Hindrance and Prosecution of Major Criminal Offences dated June 27, 2012 (March 9, 2018).

On tax-related issues:

- Agreement on Mutual Assistance in Tax Cases dated January 25, 1988 (December 1, 2016).
- Agreement between Liechtenstein and the United States of America on Foreign Account Tax Compliance Act (FATCA) dated May 16, 2014 (January 22, 2015).
- Mutual Agreement of the Exchange of Information concerning Financial Accounts dated October 29, 2014 (December 1, 2016).

7 Procedures for Gathering Information from a Company

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

On petition of the Prosecutor's Office or on its own the Criminal Court may gather information by:

- confiscating documents and things of any kind;
- searching locations of any type (offices and homes) as well as individuals;
- interrogating suspects and witnesses; or
- monitoring electronic communication.

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 government can demand that a company produce documents based on reasonable suspicions that documents relevant for the investigation may be seized due to a court order. Until the order has become legally valid, the documents seized are sealed on petition for later investigation.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Liechtenstein law knows the attorney-client privilege, whereas qualifying documents are exempt from seizure. The seizure may not be circumvented by having the attorney or his employees interrogated as a witness.

In-house attorneys as well as the corporate communication with them do not qualify as privileged.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

There are no specific rules granting any privileges to employees, whereas the same are subject to the ordinary rules dealing with the production of documents and interrogation.

7.5 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?

Company employees do not qualify as privileged, whereas they are under the obligation to produce documents in their possession which may be seized. Their homes and offices may be raided.

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

Here applies the same of what is said in relation to the company employees under question 7.5 above.

Questioning of Individuals:

7.7 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?

It falls within the authority of the Criminal Court to summon suspects and witnesses under subpoena for interrogation either by the court itself or on demand of the court by the Police Department. Employees, officers and directors of a company are either dealt with as suspects or witnesses.

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

In this regard, refer to question 7.7 above.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

A person questioned as a suspect has the privilege against self-incrimination. It is not supposed that the assertion is held against the suspect at trial as a tacit acknowledgment of guilt. However, the line is delicate and depends on the specific case at hand.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Pre-trial investigations are initiated by the court either on its own knowledge or due to a petition from the Prosecutor's Office regarding a criminal complaint filed. The trial itself is initiated due to an indictment normally brought by the Prosecutor's Office or in a supplementary manner by a person who has joined the criminal procedure as a civil claimant (§ 32 para. 4 StPO (Code of Criminal Procedure)).

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The rule of law as set forth under basic considerations in the Constitution and, in a more specified manner, in the Criminal Code and the Code of Criminal Procedure, form the guidelines to decide whether an entity or individual is charged with a crime. While rather vague suspicions are sufficient to start pre-trial investigations, only those sustained by evidence gathered shall lead to an indictment.

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

The possibility of a diversion is known in Liechtenstein law, as set forth in § 22a to § 22m StPO.

A diversion is dependent on whether the criminal offence, as far as discussed under section 3 above, qualifies as misdemeanour only – i.e. a criminal offence punishable with imprisonment of up to three years – and the culpability of the suspect may not be considered as grave.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Deferred prosecutions or non-prosecution agreements are not available in Liechtenstein.

A judicial approval for a diversion according to question 8.3 above is only necessary if the criminal procedure had been entered the stage of trial, i.e. once an indictment had been filed.

8.5 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 may apply.

Civil penalties in addition to or instead of criminal dispositions to an investigation are not known in Liechtenstein law.

The civil claims resulting from a criminal offence have to be pursued by the person or entity harmed, either by joining the criminal procedure itself or by filing the respective claims with the civil court. Normally, the criminal court will abstain from issuing a civil award (apart from very simple cases) and refer the claimant to the civil court.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The ordinary burden of proof is vested with the prosecutor. For an affirmative defence, the same has to be borne by the defendant.

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

The standard of proof is only met if all factual and intentional elements of the criminal offence have been proven beyond any reasonable doubt.

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

As trials in Liechtenstein are not by jury, the judges are the arbiters of fact.

10 Conspiracy / Aiding and Abetting

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

According to § 12 StGB, not only the immediate perpetrator shall be deemed to have committed the offence, but also every person who directs another person to carry out the offence or who otherwise contributes to it being carried out.

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?

The defence of not having committed a crime due to a lack of intent is available where the respective offence is only punishable if done on intent. Most of the offences discussed under section 3 above require intent of the perpetrator. The burden of proof has to be borne by the prosecutor as it is the case with all other elements of a criminal offence.

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?

If the defendant did not recognise the wrongfulness of the act due to a mistake of law, he shall not be deemed culpable if he cannot be

blamed for the mistake itself. The latter is the case if the mistake was easily recognisable or he did not acquaint himself with the relevant provisions; even so, he would have been obliged to do so due to his profession, occupation or other circumstances. The burden of proof for the mistake of law lies with the offender (§ 9 StGB).

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?

If the defendant was ignorant of the facts then he did not normally act with criminal intent, and so he is in principle not culpable if the offence can be committed on intent only. However, if the criminal offence can be committed by negligence also, this defence is not available. A person is negligent if he fails to exercise the care that is required of him under the circumstances, that he is capable of due to his condition, and that can be reasonably expected (§ 6 para. 1 StGB). Gross negligence is defined in § 6 para. 3 StGB as follows: someone acts with gross negligence if he acts in an unusual and noticeable manner against the diligence required, so that the occurrence of facts according to a criminal offence had been easily foreseeable.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no general public obligation to report crimes of which a person or entity has become aware.

However, specific obligations arise under Art. 17 para. 1 Law on Due Diligence (anti-money laundering), which applies to financial intermediaries of any kind (among others, banks, asset management companies, trustees), to notify the FIU of any suspicions concerning money laundering or a qualified offence preceding money laundering, organised crime or financing of terrorist activities.

13 Cooperation Provisions / Leniency

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

A person who wants to disclose criminal conduct and/or cooperates during the criminal investigation may under specific circumstances qualify for an extraordinary mitigation of penalty:

Extraordinary mitigation of penalty in case of cooperation with the law enforcement authorities (§ 41a StGB)

1) If the perpetrator of an act punishable under § 277, § 278, § 278a or § 278b or of a punishable act that is connected to such a conspiracy, group or organisation discloses to any law enforcement authority that he has knowledge of facts the disclosure of which significantly contributes to:
   1. the elimination or a significant reduction of the danger resulting from the conspiracy, group or organisation;
   2. helping to uncover such a punishable act beyond his own contribution to the act; or
   3. tracing a person who has been involved in such a conspiracy in a leading capacity or has been active in such a group or organisation in a leading capacity,

   a sentence below the legal minimum penalty may be imposed within the limits set by § 41, if this corresponds to the significance of the disclosed facts in proportion to the culpability of the perpetrator. § 41 para. 3 shall apply *mutatis mutandis*.
2) Para. 1 shall also apply to a perpetrator whose knowledge relates to punishable acts not governed by the criminal laws of Liechtenstein, provided that the provision of legal assistance would be permissible.

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

A defendant seeking leniency is well advised to cooperate with the court and Prosecutor's Office. Such cooperation might pave the way for a lenient judgment within the frame of the possible penalties.

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?

The Liechtenstein StPO does not contain any rules on plea bargaining. However, it can be discussed with the Prosecutor's Office and the Criminal Court in relation to what impact a decline to contest a criminal charge might have.

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?

As stated in question 14.1 above, there are no rules available.

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 a sentence on the defendant? Please describe the sentencing process.

The imposition of a sentence has to stay within the frame of penalties stated for the specific criminal offence. The penalty has to reflect the culpability of the perpetrator. In addition thereto, the court has to weigh the aggravating and mitigating causes to the extent they do not already determine the penalty itself. Furthermore, the facts of the offence have to be taken into account: to what extent the act is due to a negative or indifferent attitude of the perpetrator toward legally protected values; and to what extent it is due to external circumstances or motives that also prompt a person committed to legally protected values to commit a crime. Certain aggravating and mitigating causes are expressly stated in § 33 and § 34 StGB.

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.

A sentence on a corporation always results in the payment of a fine up to 180 daily rates between CHF 100 and 15,000 each (§ 74b para. 3 StGB). When calculating the daily rates, the earnings as well as the financial performance of the entity have to be taken into account (§ 74b para. 4 StGB).

The number of daily rates shall be determined in accordance with the seriousness and consequences of the underlying act and the seriousness of the lack of organisation. Additionally, the conduct of the corporation after the act shall be taken into account, especially whether it has rectified its consequences (§ 74b para. 5).

16 Appeals

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

A guilty or non-guilty verdict may be appealed, respectively, either by the defendant or the Prosecutor's Office. Verdicts of either kind may be appealed to the extent the appellant is aggrieved by the same.

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

The answer to question 16.1 above is also applicable to the criminal sentence itself.

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

The appellate court has to review the judgment within the petitions set forth in the appeal. An appeal may be based on the wrong finding of facts, procedural flaws and questions of law on which the guilty verdict is based. In addition thereto, the sentence itself may be challenged as inappropriate.

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

The Court of Appeal has two possibilities. First, to lift the judgment and refer it for re-adjudication to the Criminal Court of first instance. This will normally be done if supplementary evidence has to be taken. Second, to issue a new verdict and/or sentence on the facts established.

It is worthwhile mentioning that a judgment of the Court of Appeal may be appealed itself to the Supreme Court based on the wrong finding of facts, procedural flaws and questions of law. Also, the sentence may be challenged by doing so (§ 234 StPO). However, such an appeal is only possible if the sentence exceeds a term of imprisonment of one year (§ 235 StPO).

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Background:

Born in Vienna, Austria, on December 15, 1956; Austrian citizen.
Resident in Liechtenstein since 1986.

Professional positions:

January 2006: Principal of Lawfirm Holzhacker.
2004: Active as licensed trustee and principal of the trust company HOST Trust reg.
April 2004 to December 2005: Managing partner of Lawfirm Holzhacker & Struth.
July 1997: Managing partner of Lawfirm Meier & Holzhacker.
May 1996: Liechtenstein attorney.
January 1986 to May 1996: Foreign attorney associate of a law firm in Vaduz, Liechtenstein.
July 1981 to December 1985: Associate in different law firms in Vienna, Austria.
September 1980 to June 1981: Trainee at criminal and civil courts in Innsbruck and Vienna, Austria.

Main professional training (among others):

June 1999 to September 2000: Executive Master of European and International Business Law at the University of St. Gallen, Switzerland. Graduated with a Master's in European and International Law (M.B.L.-HSG) on November 25, 2000.
Admitted to the Liechtenstein Bar on May 21, 1996.
Supplementary Bar examination for lawyers of the EEA (European Economic Area) when first taken in Liechtenstein in May 1996.
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Lawfirm Holzhacker was established by Dr. Gerhard Holzhacker in January 2006 and is devoted to giving its clients excellent legal advice and assisting them in finding well-founded solutions for their legal concerns. Its clients are private and corporate and of domestic and mainly international origin, as well as foreign state agencies seeking legal advice on Liechtenstein law. While the intent is to assist clients on all legal issues, the firm's focus is on white-collar crime issues, including criminal and civil aspects, corporate law of any kind and law on financial markets. This has been the case for Dr. Holzhacker many years prior to the formation of Lawfirm Holzhacker. Alongside Lawfirm Holzhacker, the constitution and administration of companies and trusts are handled by HOST Trust reg., an entity separate to the law firm. This has become a major focus of activity, especially in relation to all the legal questions surrounding the same due to the ever-more closely knit network of regulations; among others, concerning due diligence (anti-money laundering), the AEOI and FATCA.

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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?

The Public Prosecutor is the only authority that has criminal prosecuting powers. The Public Prosecutor's Office has national and regional divisions. The national divisions are usually in charge of prosecuting crimes that require specific knowledge, whereas the regional divisions are in charge of prosecuting offences under general criminal law that have been committed within that region. Business crimes may be prosecuted by any Prosecutor, although the more serious corporate crimes are usually dealt with by the *Functioneel Parket*. This national department of the Public Prosecutor's Office is specialised in prosecuting crimes such as bribery, corruption, embezzlement, environmental violations, fraud, and tax violations.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As mentioned, the Public Prosecutor is the only authority with criminal prosecuting powers. Nevertheless, government agencies may impose administrative penalties for certain business crimes, too. If both the Public Prosecutor and a government agency have the power to investigate and sanction a certain violation, they usually liaise with each other before deciding who will investigate (and prosecute or sanction) a(n) (alleged) violation.

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?

There is no civil enforcement (other than, for instance, the possibility of a civil monetary compensation for damages occurred). There are various government agencies that enforce administrative law. Examples of such agencies include:

- the Human Environment and Transport Inspectorate ('IL&T');
- the Inspectorate of Social Affairs and Employment ('ISZW');
- the Netherlands Food and Consumer Product Safety Authority ('NVWA');
- the Dutch Authority for the Financial Markets ('AFM'); and
- the Fiscal Information and Investigation Service ('FIOD').

These government agencies have a wide range of powers and may, among other things, impose an administrative penalty ('*bestuurlijke boete*'), impose an order subject to a penalty for non-compliance ('*last onder dwangsom*'), and use administrative enforcement ('*bestuursdwang*').

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In September 2018, ING Bank entered into an out-of-court settlement with the Public Prosecutor with regard to a suspicion of violating the Money Laundering and Terrorist Financing (Prevention) Act and of negligent money laundering, by not properly investigating clients and monitoring bank accounts and not reporting unusual transactions (on time). On the basis of the settlement, ING Bank had to pay EUR 775 million, which is the largest out-of-court settlement in the Netherlands to date. In reaction to the Public Prosecutor's Office's decision not to prosecute any natural persons, three injured parties filed a formal complaint with the Court of Appeals in The Hague. On 2 October 2019, the Court of Appeals decided that the injured parties had standing, meaning that the Court of Appeals will have to decide whether or not the Public Prosecutor's Office should investigate and/or prosecute natural persons, too.

In September 2019, the Public Prosecutor's Office informed ABN AMRO Bank that it suspects ABN AMRO of having violated the Money Laundering and Terrorist Financing (Prevention) Act, too, by failing to report suspicious transactions over a longer period of time.

2 Organisation of the Courts

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

There are 11 District Courts, four Courts of Appeals, and one Supreme Court. All of these courts have jurisdiction over criminal cases, although some courts have exclusive competence to hear certain types of criminal cases. The District Courts and the Courts of Appeals all have a division specialised in economic crimes.

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

There are no jury trials in the Netherlands.

3 Particular Statutes and Crimes

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

• Securities fraud

There is no specific criminal offence covering securities fraud. Instead, the Prosecutor's Office generally prosecutes this type of conduct, invoking the following provisions of the Criminal Code ('CC'):

- Forgery of documents (Article 225 CC), which requires a person to have drafted false documents, falsified documents or used false or falsified documents. Criminal intent is required (for which '*dolus eventualis*' is sufficient). Further, it is required that the person had the intention for the document to be used as if it were genuine and unfalsified.
- Embezzlement (Article 321 CC), which requires a person to have unlawfully appropriated property that belongs to someone else but which he has in his possession other than as a result of an offence. Criminal intent is required (for which '*dolus eventualis*' is sufficient).
- Swindling (Article 326 CC), which requires a person to have assumed a false name or identity, used devious tricks, or used a tissue of lies in order to induce someone to surrender any property, to render a service, to make available data, to incur a debt or to cancel an outstanding debt, for the purpose of unlawful appropriation for himself or for somebody else. Swindling, too, requires criminal intent (for which '*dolus eventualis*' is sufficient).

Prosecution may further be based on the crime of price and market manipulation (Article 334 CC), which requires that a person, with the purpose to provide himself or another with unlawful benefits, increases or decreases the price of any merchandise, stocks, or other valuable papers by disseminating false information. Price and market manipulation require criminal intent, for which '*dolus eventualis*' is sufficient, too.

Prosecution of securities fraud may finally also be based on violation of the rules laid down in the Financial Supervision Act, as violation of some of those rules is made punishable under the Economic Offences Act ('WED'). The prohibited acts qualify as a crime when committed with criminal intent, but as a minor offence when committed unintentionally (although culpability is still required).

• Accounting fraud

It is a crime for a merchant, director, managing partner, or supervisory director of a legal entity or company to intentionally publish or intentionally allow to be published a false statement or balance sheet, a profit and loss account, a statement of income and expenditure or an explanatory note to such documents (Article 336 CC).

The prosecution of accounting fraud may further be based on the general criminal offences of forgery of documents (Article 225 CC) or swindling (Article 326 CC).

• Insider trading

It is prohibited to (attempt to) engage in insider dealing, to recommend that another person engages in insider dealing, to induce another person to engage in insider dealing, and to unlawfully disclose inside information (Article 14 Regulation (EU) no. 596/2014 on market abuse). Insider dealing arises, among other things, when a person possesses information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates (Article 8 Regulation (EU) no. 596/2014 on market abuse). The prohibited act qualifies as a crime when committed with criminal intent, but as a minor offence when committed unintentionally (but with culpability).

• Embezzlement

It is a crime for a person to unlawfully appropriate property that belongs to someone else but which he has in his possession other than as a result of an offence (Article 321 CC). Embezzlement is different from theft, as the embezzler was lawfully in possession of the property before appropriating it. Criminal intent is required, for which '*dolus eventualis*' suffices.

• Bribery of government officials

It is prohibited to make a promise, or to provide or offer a service or a gift to a public servant (i) with the object to induce that public servant to (refrain from an) act in connection with his duties (Article 177 sub 1 under 1° CC), or (ii) as a result or in response to such an act (Article 177 sub 1 under 2° CC). This prohibition also applies with regard to former and future public servants (Article 178a sub 2 CC resp. Article 177 sub 2 CC), foreign public servants (Article 178a CC) and (foreign) Judges (Articles 178 and 178a CC).

All of the above crimes require criminal intent, for which '*dolus eventualis*' is sufficient. The crime mentioned under (i) requires that a person had *the object* to induce the public servant to (refrain from an) act in connection with his duties, too.

Similarly, it is prohibited for a public servant to accept or request a gift, promise, or service in consideration for certain acts (to be) undertaken and acts (to be) refrained from being undertaken. (Articles 363–364a CC.)

• Criminal anti-competition

Any person who establishes, preserves, or increases his or another person's market position by committing a form of deception in order to mislead the public or a certain person is guilty of engaging in unfair competition, if such activity results in any disadvantage for the competitors (Article 328*bis* CC). It is required that a person has both criminal intent (at least '*dolus eventualis*') with regard to the act itself and to the misleading. Intent with regard to the disadvantage, however, is not required.

• Cartels and other competition offences

In the Netherlands, competition law is, other than the prohibition in Article 328*bis* CC, enforced through administrative law only.

• Tax crimes

There are several tax crimes, such as the failure to comply with certain obligations imposed by the State Taxes Act, the obligation to provide (correct) information to the Tax and Customs Administration and the obligation to keep proper records (Article 68 State Taxes Act). These crimes do not require criminal intent (culpability is sufficient).

The more serious tax crimes concern tax evasion. According to Article 69 State Taxes Act, any person who intentionally fails to submit a (correct and complete) tax return (on time), required by the State Taxes Act, or fails to comply with the obligations of Article 68 State Taxes Act resulting in the underpayment of taxes, is criminally liable. A person who intentionally does not (timely) pay taxes that have to be paid upon return, is criminally liable as well (Article 69a State Taxes Act). Both Article 69 and 69a State Taxes Act require criminal intent ('*dolus eventualis*').

Tax crimes are often also prosecuted through general criminal law provisions, such as the forgery of documents (Article 225 CC) and money laundering (Article 420*bis* CC).

• Government-contracting fraud

Government-contracting fraud is not prohibited as such. Nevertheless, government-contracting fraud by making a false statement, using a false document, telling multiple lies, or concealing a material fact may constitute a common type of fraud (Article 225 CC) or swindling (Article 326 CC). Criminal intent is required, for which '*dolus eventualis*' is sufficient.

Further, it is prohibited to unlawfully use funds that have been provided for a specific purpose by or on behalf of the government or an international organisation for purposes other than those for which these funds were provided (Article 323a CC). Criminal intent is required, for which '*dolus eventualis*' is sufficient.

• Environmental crimes

According to Articles 173a and 173b CC, it is a crime to unlawfully release a substance onto or into the soil, air or surface water, if this is likely to endanger public health or the life of another person. The act is punishable if it is carried out with criminal intent (for which '*dolus eventualis*' suffices) or gross negligence. That requirement does not relate to the consequence of the act. Further, Articles 161*quater* and 161*quinquies* CC prohibit the exposure and/or contamination of human beings, animals, plants, and property to ionising radiation and/or radioactive materials. The act falls under the scope of these Articles if it is likely to endanger public health or another person. Either criminal intent (at least '*dolus eventualis*') or gross negligence is required. As with Articles 173a and 173b CC, the consequence of the act is excluded from this requirement.

Finally, the WED penalises various violations of environmental law, such as the operation of a company without the required environmental permit or the violation of an environmental permit. Most offences constitute a crime when committed with criminal intent and a minor offence when committed without criminal intent (but with culpability).

• Campaign-finance/election law

Dutch criminal law criminalises various intrusions on the right to free elections (Articles 125–129 CC), such as:

- the use of violence or the threat of the use of violence in order to intentionally prevent someone from using his voting rights freely;
- bribing a person by means of a gift or promise in order to have that person not use his voting rights or use his voting rights in a certain way;
- employing a form of deception resulting in the invalidation of a vote cast or in the vote being cast for another person than intended;
- intentionally assuming an identity of another and participating in an election under this assumed identity; and
- intentionally invalidating a vote that was held or employing a form of deception which results in an outcome different from the results of the votes legally cast.

• Market manipulation in connection with the sale of derivatives

Article 15 of Regulation (EU) no. 596/2014 on market abuse prohibits (to attempt) to engage in market manipulation. Articles 12 and 13 define the activities that do and do not comprise market manipulation. The prohibition has been criminalised in the Netherlands by the WED. (Attempted) market manipulation qualifies as a crime when committed with criminal intent, but as a minor offence when committed without criminal intent.

Article 334 CC further prohibits that a person increases or decreases the price of any merchandise, stocks, or other valuable papers by disseminating false information with the purpose of enjoying or providing himself or another with unlawful benefits. Article 334 CC requires criminal intent, for which '*dolus eventualis*' is sufficient.

• Money laundering or wire fraud

A person is guilty of money laundering if he:

- hides or conceals the real nature, source, location, transfer, or moving of an object;
- hides or conceals the identity of a person entitled to an object or in possession of an object; or
- obtains, possesses, transfers, converts, or makes use of an object,
- if he either knows (Article 420*bis* CC) or has reasonable cause to suspect (Article 420*quater* CC) that the object derives – either directly or indirectly – from any crime.

Habitual money laundering is considered an aggravating factor (Article 420*ter* CC).

• Cybersecurity and data protection law

Dutch criminal law prohibits various computer-related crimes, such as:

- to intentionally and unlawfully intrude or hinder the access to or use of a computerised system (Articles 138ab and 138b CC);
- the intentional and negligent destruction, damaging, rendering unusable, and disabling of a computerised network or a telecommunication infrastructure facility, the causing of a defective functioning or operation of such facility, and the frustration of a safety measure taken in respect of such facility. The act is punishable if it may result in at least a danger to goods or the rendering of services (Articles 161*sexies* and 161*septies* CC);
- to intentionally and unlawfully alter, erase, render unusable, or disable data which is stored, processed, or transferred by means of a computerised device or a telephone infrastructure facility, or to add other data thereto (Article 350a CC); and
- to negligently cause data that is stored, processed, or transferred by means of a computerised device or a telephone infrastructure to be altered, erased, rendered unusable, or disabled, or causes other data to be added thereto, provided that this causes serious damage to that data (Article 350b CC).

Data protection law is mostly enforced through administrative law, although eavesdropping on (telephone) conversations, recording (telephone) conversations, recording data, and covertly making pictures constitutes a crime under certain circumstances.

• Trade sanctions and export control violations

The Dutch Sanctions Act prohibits the violation of trade sanctions and export control violations. The Sanctions Act functions as a framework act, permitting ministerial regulations to be issued in compliance with international treaties establishing trade sanctions and export control violations.

The intentional violation of trade sanctions and export control violations prohibited by or pursuant to the Sanctions Act constitutes a crime, whereas the non-intentional violation of such sanctions and violations constitutes a minor offence (for which culpability is still required).

• Any other crime of particular interest in your jurisdiction

- *Bribery of non-government officials*: it is prohibited for (future) employees and agents to accept or request a gift, promise, or service in consideration for certain acts (to be) undertaken and acts (to be) refrained from undertaking in violation of his duties as an employee or agent. Similarly, it is prohibited for persons to give gifts, make promises, or offer services to (future) employees and agents of such a nature or under such circumstances that that person

should reasonably assume that the (future) employee or agent is acting in violation of his duties (Article 328*ter* CC). A person may be acting in violation of his duties, too, if he does not disclose to his employer or principal that he has accepted or requested a gift, offer, or service in violation of good faith.

- *The Working Conditions Act*: the Working Conditions Act applies to all employers and employees and aims to maintain a safe and healthy workplace. It is a crime for employers to act or refrain from acting in violation with the (provisions based on the) Working Conditions Act, if the employer knows or reasonably should know that this is expected to endanger the life or health of one or more employees (Article 32 Working Conditions Act).
- *Facilitating large-scale or professional cultivation of cannabis*: it is prohibited to prepare, sell, deliver, manufacture, or possess objects of which a person knows or has serious reasons to suspect that those objects are meant to import, export, grow, prepare, process, sell, supply, provide, or transport certain types of psychotropic drugs (including cannabis) on either a large scale or by a professional party (Article 11a Opium Act).

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

Yes. A person may be criminally liable for attempting to commit a crime (though not a minor offence), provided that that person has criminal intent (at least '*dolus eventualis*') and that his intention has revealed itself by a first act in the commission of an offence (Article 45 CC). A person may further be criminally liable for the preparation of a crime with a maximum sentence of at least eight years (Article 46 CC). A person is not deemed to have attempted to commit a crime or to have prepared a crime, however, if that crime has not been completed due to circumstances that are dependent on the will of that person.

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, legal entities may be liable for criminal offences on the basis of Article 51 CC if the relevant behaviour can reasonably be attributed to that legal entity. Although it highly depends on the special circumstances of the case whether behaviour can be reasonably attributed to a legal entity, an important factor is whether the relevant behaviour occurred or was performed 'in the sphere of' the legal entity.

The relevant behaviour will be regarded as behaviour that has occurred or was performed in the sphere of the legal entity, if one or more of the following circumstances exist:

i. the omission or act was committed by a person who is employed by or works for the legal entity;
ii. the behaviour was part of the legal entity's normal course of business;
iii. the legal entity benefited from that behaviour; and
iv. the behaviour was at the disposal of the legal entity and it accepted or tended to accept such or similar behaviour, which acceptance includes the failure to take reasonable care to prevent the behaviour from occurring.

Should a criminal act require that a party had criminal intent or acted with gross negligence, it is further required that this mental state also existed on the part of the legal entity. In certain circumstances, the intent of an individual may be attributed to a legal entity. It is not necessary, however, that the individual itself acted with intent or gross negligence, as this state of mind may also be derived from (for example) the legal entity's policy or decisions.

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

Yes, although liability is not incurred automatically. Once it has been determined that a legal entity has committed a crime, superiors who have 'ordered' or 'directed' (exercised effective control) the prohibited conduct may be criminally liable, too. In order to be criminally liable for directing prohibited conduct, it is – generally – necessary that a person:

i. had the authority to intervene;
ii. had some sort of control over the fact whether or not the criminal behaviour would occur;
iii. omitted to take measures in order to prevent the criminal behaviour from occurring; and
iv. intended the criminal act and intended to give direction to that act. '*Dolus eventualis*' suffices, which means that the person in question must have knowingly accepted the considerable chance that the illicit behaviour would occur.

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?

The Public Prosecutor's Office does not have a general, official policy as to whether to prosecute a legal entity or an individual; this is left to the Prosecutor's discretion. Although the Prosecutor often prosecutes both the legal entity (in order to set an example and confiscate the proceeds of the crime) and the individual (in order to show that directors cannot hide behind their company), the Prosecutor is often more willing to conclude an out-of-court settlement with the legal entity.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

A successor entity may be criminally liable for the acts of the old entity, if the new entity is in fact (materially) a continuation of the old entity. Whether this is the case depends on several factors, such as the directors, location, activities, etc. (in case law, these are referred to as the 'social reality criteria').

5 Statutes of Limitations

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

In principle, the limitation period starts the day after which the crime has been committed (Article 71 CC). The Criminal Code sets out the following limitation periods:

i. three years for minor offences;
ii. six years for crimes that carry a fine, imprisonment, or a maximum prison sentence not exceeding three years;
iii. 12 years for crimes that carry a maximum prison sentence exceeding three years but not exceeding eight years; and
iv. 20 years for crimes that carry a maximum prison sentence exceeding eight years.

There is no limitation period for crimes that carry a maximum prison sentence exceeding 12 years and for a number of enumerated offences involving an underage victim.

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

This is usually not possible, although the limitation period for participation in a criminal organisation (Article 140 CC) is not dependent on the limitation period for acts that the criminal organisation committed or intended to commit. Further, the limitation period for ongoing acts does not start until after the act has ended.

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

Yes. The limitation period can be tolled by certain acts of the Public Prosecutor or the Judge (Article 72 CC). These acts include, among other things:

- the issuance of an indictment;
- the Public Prosecutor's request to the Supervisory Judge to undertake investigative activities; and
- the Public Prosecutor's request to the Supervisory Judge to be given leave to start a criminal financial investigation.

After the limitation period has been tolled, a new limitation period starts. Nevertheless, the right to prosecute a minor offence expires after 10 years. The right to prosecute a crime expires once the original limitation period has expired twice.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Dutch criminal law applies, insofar as relevant, to:

- any person who commits an offence in the Netherlands or on a Dutch vessel or aircraft (Articles 2 and 3 CC);
- any person who commits an enumerated offence, including the forgery of documents (Article 225 CC) if that criminal offence has been committed against a Dutch government institution (Article 4 CC);
- any person who commits a crime outside of the Netherlands against a Dutch person, a Dutch public servant, or a Dutch vehicle, vessel, or aircraft, provided that the crime carries a minimum prison sentence of at least eight years and that the act is also punishable in the country where that act was committed (Article 5 CC); and
- any Dutch national who commits an offence abroad which is deemed to be a crime in the Netherlands and is also punishable in the country where it was committed (Article 7 CC).

As a result of the implementation of Directive (EU) 2017/1371, the Netherlands now has jurisdiction over Dutch nationals and residents that commit certain fraud-related crimes (such as bribery of public servants, forgery of documents, swindling, and money laundering) abroad that (in short) affect the European Union's financial interests.

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

Dutch criminal law does not, in general, obligate the Public Prosecutor to investigate and/or prosecute every possible crime; Public Prosecutors have prosecutorial discretion in deciding whether to do so.

Investigations usually start on the basis of a criminal report, media reports, information from government agencies, or business self-reporting. If the Public Prosecutor's Office does not decide to (further) investigate and/or prosecute, an interested party (such as a victim) may request the Court of Appeals to order the Public Prosecutor's Office to do so.

The use of coercive measures is strictly regulated by criminal procedural law. Generally, coercive measures may only be used if there are 'reasonable grounds' or a 'serious suspicion' to believe that a criminal offence has been committed. This differs for the vast amount of 'business-related' criminal offences criminalised by the WED, however. For those crimes, certain coercive measures may be used as soon as it is 'reasonably necessary' to apply such measures for the (more abstract) investigation of criminal offences.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, the criminal authorities cooperate with foreign prosecutors on the basis of requests for mutual legal assistance. These requests are often based on international and European treaties. Incoming requests are handled on the basis of the relevant treaties and Articles 5.1.1–5.8.17 of the Code of Criminal Procedure ('CCP'). Outgoing requests are handled on the basis of the relevant treaties and the legislation of the receiving state.

On the basis of Articles 5.2.1–5.2.5 of the CCP, Prosecutors may also participate in a 'Joint Investigation Team' with other European prosecutors.

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 government has a wide range of powers to gather information when investigating business crimes. The government may (among other things) order companies to produce documents, seize documents and files on computers in company offices and the homes of directors and employees, and submit directors and employees to questioning. Further, the government may intercept telephone, fax, and e-mail communication.

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?

This depends on the suspicion. If a company is suspected of having committed a criminal offence criminalised under the Criminal Code, the Code of Criminal Procedure applies. The

CCP allows the government to order companies to produce documents that they are suspected of having in their possession, provided that there is a reasonable suspicion of a crime for which it is possible to impose provisional detention (Article 96a CCP). Further, the Supervisory Judge may, at the request of the Prosecutor, issue a warrant ordering a company to produce documents regardless of whether there is a suspicion of a crime for which provisional remand may be imposed (Article 105 CCP). These orders cannot be addressed to suspects in a criminal case, however.

The CCP further allows various officials to search certain premises and seize documents. Company offices may generally only be searched by a Supervisory Judge or a Public Prosecutor. The Public Prosecutor needs reasonable suspicion of a crime for which provisional remand may be imposed (Article 96c CCP), whereas the Supervisory Judge may – at the request of the Prosecutor – investigate a premise regardless of whether there is a suspicion of a crime for which provisional remand may be imposed (Article 110 CCP). Homes of directors and employees may only be searched by a Supervisory Judge (Article 110 CCP).

If a company is suspected of having committed a criminal offence criminalised under the WED, the government has much broader powers to demand a company to produce documents. The government may order companies to allow inspection of documents and data 'in the interest of the investigation', provided that this is 'reasonably necessary' for the fulfilment of their duties (Article 18 WED). The government is also allowed to make copies of the documents and data. The order may be directed to anyone, including the suspect.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

As mentioned under question 7.2, a warrant to produce documents under the CCP cannot be addressed to the suspect. Further, suspects do not have to produce documents or other information that does not exist independent of their will, as this would infringe their right not to incriminate themselves. Finally, Dutch criminal law recognises professional privilege to, for instance, attorneys (Article 218 CCP). Attorney-client privileged communication and attorney work products are therefore exempted from seizure, unless the communication or the documents themselves are the object of a crime or have been helpful in committing the crime.

Both in-house attorneys and external counsel may invoke privilege in criminal law cases. Privilege for in-house attorneys has been subject to debate, however, as a District Court decided that (in short) Shell's in-house attorneys could not invoke privilege as they had not signed a professional statute that guaranteed their independent position.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Since 25 May 2018, the GDPR has been in force. On the basis of the GDPR, processors of personal data may only process such data if (i) the data subject has given consent to the processing for one or more specific purposes, or (ii) processing is necessary for one of the enumerated reasons in Article 6 GDPR. On the basis of Article 6 GDPR, the sharing of employees' personal data with government authorities is only allowed if there is a legal obligation to do so. Therefore, it is argued, legal entities may only share employees' personal data if they receive an order (as opposed to merely a request) to do so from the Public Prosecutor or a (Supervisory) Judge.

7.5 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?

See question 7.2.

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

See question 7.2.

Questioning of Individuals:

7.7 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?

The government may request any suspect company, representative of a suspect company, or employee of a suspect company to submit to an interview by a law enforcement officer. There is no legal obligation to comply with such a request, however. The suspect company has the right to remain silent, which right can thus be invoked by the representative of the suspect company on behalf of that company. If the employee of the company is considered a suspect, too, he may also choose to remain silent. If the employee is considered a witness, he can only be compelled to answer questions by a (Supervisory) Judge. The employee may refrain from doing so, however, if his answers would incriminate himself or close relatives or if he can invoke professional privilege. It is the subject of discussion whether an employee may refrain from answering questions, too, by invoking the company's right to remain silent.

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

See question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Every law enforcement officer, Prosecutor and (Supervisory) Judge who is going to question a suspect has to inform that suspect of his right to remain silent, his right to consult with an attorney before questioning, and his right to be assisted

by an attorney during questioning. If a suspect has not been informed of these rights or has not been given the actual opportunity to employ these rights, his statement can be excluded from the evidence (unless he explicitly and informedly waived these rights). Although witnesses do not have a legal right to be assisted during questioning by an attorney, they may occasionally be allowed to do so.

The invocation of the right to remain silent can – in principle – not result in an inference of guilt at trial. However, if the evidence available begs the question why, the Judge may use the refusal of such an explanation as evidence.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The Public Prosecutor may initiate a criminal case by either issuing a punishment order or a summons with an indictment.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The Public Prosecutor has discretionary power in deciding whether to charge an entity or an individual with a crime and, if so, with which crime.

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

The defendant and the Public Prosecutor may agree to enter into an out-of-court settlement for crimes which do not carry a prison sentence exceeding six years and for minor offences. An out-of-court settlement usually involves the defendant paying a fine and – in the last few years – a press release with a statement of the facts. Out-of-court settlements in sensitive cases, and out-of-court settlements that require the defendant to pay a fine exceeding EUR 50,000, are subject to approval by the Minister of Justice.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

An out-of-court settlement does not have to be judicially approved.

8.5 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 may apply.

Victims of a crime may seek civil monetary compensation for damages occurred. A victim may do so in both criminal proceedings, provided that the claim does not unduly burden the criminal trial, and in a civil procedure.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The Public Prosecutor's Office always has the burden of proof and the risk of non-persuasion; it is not for the defendant to prove that he has *not* committed a crime or a minor offence. If the defence wants to present an affirmative defence, the defence has to be explicitly mentioned, substantiated with facts and circumstances, and sufficiently plausible. If not, the Judge is not obligated to respond to such a defence.

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

The Prosecutor has to prove every element of the crime. A Judge may only convict a suspect if he is *convinced* of his guilt on the basis of legal evidence.

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

The Judge is the arbiter of fact and determines whether the Prosecutor has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

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

Yes. A person may be criminally liable as a perpetrator if he:

- intentionally cooperated with another person to commit a crime, for which it is required that the intellectual and/or material contribution of that person is considerable;
- intentionally caused the act to be committed by another person; or
- intentionally instigated a crime by means of gifts, promises, abuse of authority, use of force, threats, or deception or by knowingly and willingly soliciting the commission of a crime (Article 47 CC).

A person may be criminally liable as an accomplice if he either intentionally aides and abets in the commitment of a crime or if he gives opportunity, means, or information to commit a crime (Article 48 CC).

A person may only be criminally liable for conspiracy with regard to certain enumerated crimes, such as overthrowing the government and terrorist offences.

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, provided that the crime charged requires '*mens rea*' (criminal intent or gross negligence). The burden of proof of the requisite

'*mens rea*' lies with the Prosecutor. If criminal intent is required, the Prosecutor has to prove at least conditional intent ('*dolus eventualis*'). In order to prove conditional intent, the Prosecutor must prove that the defendant knowingly and willingly accepted the considerable chance that a certain consequence would occur.

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?

In principle, this is not a (successful) defence, as everyone is presumed to know the law. However, should the defendant, for instance, have gathered trustworthy information on the status or the explanation of a certain law (e.g. through a regulatory authority), an 'excusable error of law' defence could (but will very rarely) succeed. The burden of proof with respect to the excusability of the error lies with the defendant.

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, this defence is part of the defence that there is absence of all guilt. Although the burden of proof of the defendant's knowledge lies with the Prosecutor, the defendant could try to convince the Judge that he was not aware of the facts that constituted the unlawfulness (and did not need to be aware of those facts) and that he is therefore not to be blamed.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

As a general rule, there is no obligation to report a crime to the government. Under Article 160 CCP, however, persons who have knowledge of certain enumerated crimes (which are not relevant in this context) are obligated to report that crime. Further, under Article 162 CCP, governmental bodies and civil servants that acquire knowledge of certain enumerated crimes in the performance of their duties, but are not responsible for investigating those crimes themselves, are obligated to report those crimes. The above reporting obligations do not exist if the reporting person would risk incriminating himself or close relatives by doing so or if that person can invoke a professional privilege.

In the Netherlands, there are no official policies with regard to leniency or credit for voluntary disclosure of crimes that have been committed by the person or legal entity reporting that crime. Nevertheless, voluntary disclosure may be taken into consideration by both the Public Prosecutor and the Judge.

13 Cooperation Provisions / Leniency

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

Although there are no formal guidelines or policies on voluntary disclosure or cooperation, a suspect may request leniency on the ground that he voluntary disclosed or cooperated. The Prosecutor may take the voluntary disclosure or cooperation into account when deciding whether or not to prosecute or to offer an out-of-court settlement. Voluntary disclosure and cooperation may be a mitigating factor for Judges, too.

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

See question 13.1.

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?

There is no plea bargaining as such in Dutch criminal procedures. Nevertheless, it is possible to enter into negotiations with the Public Prosecutor in order to try to achieve an out-of-court settlement (see question 13.1).

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?

See question 14.1.

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 a sentence on the defendant? Please describe the sentencing process.

The Criminal Code and the various special Acts only prescribe the types of penalties, maximum penalties, combination of penalties, and non-punitive orders that may be imposed. Within the prescribed boundaries, Judges are free to decide on an appropriate sentence.

In deciding on an appropriate sentence, Judges take all relevant circumstances into account, such as whether the defendant is a first offender, whether the defendant has paid damages to the victim, how much time has passed since the crime has been committed, and whether the defendant has ensured that no future crimes will occur. In an effort to ensure equality of all citizens, the Council for the Judiciary has drafted sentencing guidelines on certain crimes. Although these guidelines are not binding, Judges often take them into account when deciding on an appropriate sentence, too.

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.

Before imposing a sentence on a corporation, the court must determine whether that sentence is within the boundaries prescribed by law.

16 Appeals

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

A guilty verdict is appealable by both the Public Prosecutor's Office and the defendant. A guilty verdict for a minor offence is – in principle – appealable, unless no sentence or a sentence not exceeding EUR 50 was imposed. An acquittal is only appealable by the Public Prosecutor's Office.

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

There is no distinction made between a guilty verdict as such and a sentencing verdict. It is therefore not possible to only appeal the sentence.

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

The appellate court may overturn the District Court's judgment based on its own judgment of the case, since an appeal is a trial '*de novo*'.

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

The Court of Appeals can remedy any error on point of fact and/or law.

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The Business Crime Practice of Sjöcrona Van Stigt is an internationally recognised leader in representing corporations, boards of directors, management, and other individuals who face white-collar criminal investigation and litigation or internal (fraud) investigations. We are the largest specialist criminal defence firm in the Netherlands, with offices in The Hague and Rotterdam, and operate in an informal but highly effective network of similarly specialised firms worldwide. Thus we are well positioned to help clients in the Netherlands and abroad with problems that may arise in the course of their business operations.

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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?

All authorities that are statutorily empowered to do so, whether at the Federal (national) and or State (regional) level, can prosecute business crimes. Such authorities include: the Office of the Attorneys Generals of the Federation and the States ("**AG**"); the Nigeria Police Force ("**NPF**"); the Economic and Financial Crimes Commission ("**EFCC**"); the Federal Competition and Consumer Protection Commission ("**FCCPC**"); the Independent Corrupt Practices and Other Related Offences Commission ("**ICCPC**"); and the Department of State Security Services.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The body to investigate and/or prosecute a matter is often a function of the relevant law and offence as all such bodies have their investigative and prosecutorial powers statutorily set. There are, however, occasions of overlapping investigative and prosecutorial powers. In such cases, it is possible for more than one enforcement body to investigate the same matter. This is, however, not possible in the case of prosecutions, as there is a constitutional guarantee against double jeopardy. Accordingly, no one can be tried for the same offence twice. This ensures that where one enforcement agency decides to prosecute an offence, the others will likely refrain from prosecuting and may assist the prosecuting authority with the results of its investigation. There are also bodies, such as the Securities and Exchange Commission ("**SEC**"), that only have the power to investigate a matter without the power to prosecute. More often than not, such bodies are statutorily required to hand over such matter to a suitable agency or authority, like the AG, to prosecute.

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?

Yes, there are. Such agencies are typically regulators who administer penalties or other sanctions against acts or omissions of either a civil or quasi-criminal nature. Typically, enforcement is against particular elements of crimes rather than all the acts or omissions that constitute a prosecutable crime. So, for example, in the investigation or prosecution of the crime of securities fraud by the NPF, the SEC can impose civil or administrative penalties in line with its laws, regulations or rules, for the infractions that led to the commission of the securities fraud. Other such agencies that could impose such civil or administrative enforcements include the EFCC, ICCPC, FCCPC, Nigerian Communications Commission ("**NCC**"), National Agency for Food and Drug Administration and Control ("**NAFDAC**"), National Information Technology Development Agency ("**NITDA**"), Code of Conduct Bureau, Standard Organisation of Nigeria ("**SON**"), Budget Monitoring and Price Intelligent Unit ("**BMPIU**" also known as "**Due Process**"), the National Drug Law Enforcement Agency ("**NDLEA**"), the Central Bank of Nigeria ("**CBN**") and the Federal and States Tax Authorities.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The investigation of Oando PLC by SEC on alleged corporate governance abuses. SEC had engaged an independent auditor to conduct a forensic audit of the activities of Oando PLC pursuant to its receipt of two petitions against the company. The report revealed major infractions such as false disclosures, market abuses, misstatements in financial statements, internal control failures, and corporate governance lapses resulting from poor Board oversight, irregular approval of directors' remuneration, unjustified disbursements to directors and management of the company, related party transactions not conducted at arm's length, etc. SEC, further to the report, pronounced various directives to address the violations, including directing the resignation of the affected Board members of Oando PLC. A public notice for the referral of all infractions to the appropriate criminal prosecuting authority is currently pending.

2 Organisation of the Courts

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

Almost all superior courts of record have criminal jurisdictions and can accordingly try business crimes. There are no specialised courts for particular business crimes.

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

No, the right to a jury trial is not a feature of criminal justice administration in Nigeria.

3 Particular Statutes and Crimes

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

• Securities fraud

The Investment and Securities Act 2007 ("**ISA**"), the EFCC Act or the Criminal Code Act 1916 ("**Criminal Code**") may typically be used to prosecute securities fraud. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of securities fraud.

• Accounting fraud

The EFCC Act, the Companies and Allied Matters Act 1990 or the Criminal Code may typically be used to prosecute accounting fraud. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of accounting fraud.

• Insider trading

The ISA or EFCC Act may typically be used to prosecute insider trading. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of insider trading.

• Embezzlement

The EFCC Act or Criminal Code may typically be used to prosecute embezzlement or offences that are akin to it. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of embezzlement or offences that are akin to it.

• Bribery of government officials

The Criminal Code, the Corrupt Practices and Other Related Offences Act 2000 or the EFCC Act may typically be used to prosecute the bribery of government officials. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of the bribery of government officials.

• Criminal anti-competition

The Federal Competition and Consumer Protection Act 2019 ("**FCCPA**") may typically be used to prosecute criminal anti-competition. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of criminal competition.

• Cartels and other competition offences

The FCCPA may typically be used to prosecute criminal anti-competition. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of criminal competition.

• Tax crimes

The Federal Inland Revenue Service (Establishment) Act 2007 and States' tax legislations such as the Personal Income Tax Act 1993 may be used to prosecute tax crimes. The physical (act or omission) element, without the mental element, is sufficient for the successful prosecution of some tax crimes.

• Government-contracting fraud

The Public Procurement Act 2007, the EFCC Act and the Criminal Code may typically be used to prosecute government-contracting fraud. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of government-contracting fraud.

• Environmental crimes

The Harmful Waste (Special Criminal Provisions, etc.) Act 1988 may typically be used to prosecute environmental crimes. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of environmental crimes.

• Campaign-finance/election law

The Electoral Act 2010 may typically be used to prosecute the breach of campaign-finance/election laws. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of the breach of campaign-finance/election laws.

• Market manipulation in connection with the sale of derivatives

The ISA may typically be used to prosecute market manipulation in connection with the sale of derivatives. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of market manipulation in connection with the sale of derivatives.

• Money laundering or wire fraud

The Money Laundering (Prohibition) Act 2011 or the EFCC Act may typically be used to prosecute money laundering or wire fraud. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of money laundering or wire fraud.

• Cybersecurity and data protection law

The Cybercrime Act 2015 and the Nigeria Data Protection Regulations 2019 ("**NDPR**") may typically be used to prosecute breach of cybersecurity and data protection law. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of breach of cybersecurity and data protection law.

• Trade sanctions and export control violations

The Foreign Exchange (Miscellaneous Provisions) Act may typically be used to prosecute breach of trade and export control laws. The physical (act or omission) and mental (intent) elements are required for a successful prosecution of breach of trade and export control laws.

• Any other crime of particular interest in your jurisdiction

There are no other business crimes of particular interest in our jurisdiction.

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

Yes, there is in the circumstance that the relevant law recognises the attempt to commit the crime as a crime in itself.

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, there are for specified business crimes. In such instances, corporate criminal liability would typically arise, where the employee's act or omission is in furtherance of his authority in the entity or in advancement of the business of the entity.

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

Yes, there are for specified business crimes. While some laws would typically set out the circumstances under which the managers, officers and directors would become personally liable, others impute liability to the managers, officers and directors once the relevant entity is found culpable.

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?

There is no policy or preference of whom to prosecute in the event of the commission of a business crime. In some instances, the relevant statute prescribes a joint and separate liability for the entity and its managers, officers and directors.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Successor liability will typically apply in the event of corporate acquisition (shares sale and purchase). In contrast, assets acquisition (assets sale and purchase) typically are without legacy issues such as the business crimes of the previous owners of the asset.

5 Statutes of Limitations

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

The general rule is that there are no limitation periods against criminal conducts. Limitation periods may, however, be set by the relevant statute which creates the business crime or by each of the Federal Limitation Act or States' Limitation Laws. The limitation period is typically calculated from the date of or the nearest date to the commission of the business crime and the date of the commencement of the relevant court action.

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

Such circumstance may demand that the relevant acts or omission that occurred outside the limitation period, for example the conspiracy, where it is available, will not be prosecuted as a crime, in the circumstance that it falls outside the limitation period. Only offences that fall within the limitation period may be validly prosecuted.

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

The possibility of tolling the limitation period for a business crime will be subject to provisions of the relevant statute. We are unaware of any case where the limitation period for the prosecution of a business crime was tolled.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Subject to the relevant law that establishes the enforcement agency or defines the relevant business crime, the enforcement agency may investigate outside Nigeria the commission of a crime that is prosecutable in Nigeria. This may be due to the fact that the business crime was committed in respect of a Nigerian business or the acts or omissions outside Nigeria forms part of a series of acts or omissions that are ordinarily prosecutable in Nigeria. Subject to the relevant laws of the foreign jurisdiction, the relevant Nigerian enforcement agency may collaborate or cooperate with the law enforcement agency of the foreign jurisdiction to prosecute the business crime outside or inside Nigeria.

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

Typically, an investigation may commence when the relevant enforcement authority receives a petition from a complainant that a crime has been committed. The complainant may be another government agency whose relevant laws have been breached. An enforcement authority may also independently commence criminal investigations.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, there are formal mechanisms such as agreements and treaties with other countries which provide for cooperation in criminal investigations and prosecutions between Nigeria and the foreign jurisdiction's enforcement authorities.

7 Procedures for Gathering Information from a Company

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

Government agencies that are statutorily empowered to prosecute offences, or those that are established as regulators, generally have very wide powers to gather information when investigating business crimes. Some statutorily provided powers include the power to: generally request any information or document from the suspect or any other person; with or without warrants, conduct physical searches or raids including carting away any document considered relevant for the purpose of the investigation; and the power to, with or without warrants, undertake arrests in the event of the suspicion that a crime has been committed.

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?

Such circumstances must be statutorily provided for in either the law that establishes the relevant enforcement authority or in the law that creates the business crime.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Attorney-client communications (privileged communication) are generally recognised as privileged in Nigeria. A company may, when requested to produce privileged communication with its attorneys, rightfully assert its rights not to produce such privileged communication. Where, in the event of a seizure, privileged communication is carted away or sought to be used at a trial, the company can rightfully raise objections against the admissibility of such communication. This attorney-client privilege is extendable to in-house attorneys to the extent that they were acting within their capacities as lawyers.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The NDPR (see question 3.1) will impact the collection, processing or transfer of employees' personal data and may impede cross-border disclosures.

7.5 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?

Such circumstances, which will typically arise in the event of investigations, must be statutorily provided for in either the law that establishes the relevant enforcement authority or in the law that creates the business crime.

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

Such circumstances, which will typically arise in the event of investigations, must be statutorily provided for in either the law that establishes the relevant enforcement authority or in the law that creates the business crime.

Questioning of Individuals:

7.7 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?

Such circumstances must be statutorily provided for in either the law that establishes the relevant enforcement authority or in the law that creates the business crime. The forum for questioning may be at any of the enforcement authority's offices, the company's premises or any other forum or correspondence that the enforcement authority, subject to the relevant laws, finds suitable.

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

Such circumstances must be statutorily provided for in either the law that establishes the relevant enforcement authority or in the law that creates the business crime. The forum for questioning may be at any of the enforcement authority's offices, the company's premises, the third party's premises or any other forum or correspondence that the enforcement authority, subject to the relevant laws, finds suitable.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

There are constitutional guarantees against self-incrimination which allow a person under investigation for a crime to keep silent until his attorney is present. The arresting or questioning authority has an obligation to advise the person of this right. To the extent that the right is a constitutional one, no inference of guilt can be made as a result of the assertion of the right.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated by the prosecuting authority filing a charge, information or other originating process in court. The prosecuting authority may be the AG of the Federation (or a State), the NPF or any other authority or person given a fiat by the AG for such purpose.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

There are no publicly exposed rules or guidelines governing a government's decision to charge an entity or individual with a crime.

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

It is notionally possible that a defendant and the government agree to resolve a criminal investigation through pre-trial diversion or an agreement to defer prosecution. There are no publicly exposed rules or guidelines governing how pre-trial diversion or deferred prosecution agreements can dispose of criminal investigations.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

We are unaware of any rule which requires that deferred prosecution or non-prosecution agreements must be judicially approved.

8.5 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 may apply.

It is notionally possible that rather than proceeding with a criminal prosecution by the prosecuting authority, a regulator may administer penalties or other sanctions against acts or omissions of either a civil or quasi-criminal nature. Typically, enforcement is against particular elements of crimes rather than all the acts or omissions that constitute a prosecutable crime. So, for example, in the investigation or prosecution of the crime of securities fraud by the NPF, the SEC can impose civil or administrative penalties in line with its laws, regulations or rules, for the infractions that led to the commission of the securities fraud. Other agencies that could impose such civil or administrative enforcements include the EFCC, ICCPC, FCCPC, NCC, NAFDAC, NITDA, SON, BMPIU, Code of Conduct Bureau, NDLEA, CBN and the Tax Authorities.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Generally, the burden of proof rests with the prosecution to establish each element of a business crime. Some exceptions include that of certain instances under the FCCPA where the burden of proof is shifted to the defendant.

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

The party with the burden must establish each element of the offence beyond reasonable doubt, save that the standard of proof on a defendant in certain instances can be that of balance of probabilities.

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

The judge(s) is at all times the arbiter of facts and law.

10 Conspiracy / Aiding and Abetting

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

This will be subject to the law that establishes the offence, in which case conspiracy, aiding and abetting will be expressly stated as separate offences. Generally, however, a person who enables or aids another person to commit an offence is deemed to have taken part in committing the offence as a principal offender and may be charged with committing it. A common intention to commit or pursue an unlawful purpose is the element of liability for conspiracy. Where an offence is committed in the course of the coming together of two or more persons to achieve an unlawful purpose, each one of them is deemed to have committed the offence.

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?

The burden of proof, except in limited circumstances such as in strict liability offences, firmly rests on the prosecution to establish beyond reasonable doubt that the defendant committed the acts which constituted the crime, and that at the time of committing the acts, the defendant had the necessary intention to commit the acts.

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?

No. Generally, ignorance of the law is not a valid defence under Nigerian criminal law.

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?

No, ignorance of the facts is generally not a defence that will avail the defendant; however, such ignorance may be relevant to prove that at the time of committing the offence, the defendant lacked the requisite intent to commit the offence.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

The relevant statute may compel a third party to voluntarily report the commission of an offence, failing which the entity may be liable for the breach of that statute.

13 Cooperation Provisions / Leniency

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

Such situations are subject to express statutory or administrative rules or guidelines. For example, an enforcement agency may administratively decide to show leniency for cooperation in an investigation and prosecution. Statutorily, cooperation with the enforcement authority is a key factor in the consideration of plea bargain under the Administration of Criminal Justice Act 2015 ("**ACJA**").

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

There are no general rules in this regard; as such, the extent of cooperation, the required steps and the nature of favourable treatment granted will be on a case-by-case basis.

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?

Yes, a defendant can, under the ACJA, voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges or in exchange for an agreed-upon sentence.

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?

Under the ACJA, plea bargain must be with the consent of the victim of the crime and before the presentation of the evidence of the defence. The other conditions that must be present include:

a. the insufficiency of evidence to pass the standard of proof – beyond reasonable doubt;
b. the defendant must agree to return the proceeds of the crime or make restitution to the victim; and
c. in a case of conspiracy, the defendant must have cooperated by providing relevant information for the prosecution of other offenders.

Generally, the court may only enter the plea of guilty in respect of the plea bargain where it is satisfied that the defendant is guilty of the offence.

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 a sentence on the defendant? Please describe the sentencing process.

Sentencing is the final stage of a criminal trial. The court upon consideration of the case against the defendant determines the appropriate punishment to be imposed on the convict. The court shall consider the following factors when pronouncing a sentence:

a. the principles of reformation and deterrence;
b. the interest of the victim, the convict and the community;
c. appropriateness of non-custodial sentence or treatment *in lieu* of imprisonment (for the managers, officers or directors);
d. the previous conviction of the defendant; and
e. other aggravating or mitigating evidence or information in respect of the convict.

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.

This is the same as question 15.1 above.

16 Appeals

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

Yes, either party may appeal to have the judgment of the lower court reviewed or set aside entirely.

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

Yes, either party may appeal.

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

The appellate court would typically, relying on the records transmitted by the lower court, rule on points of law only. The appellate court would not call witnesses or re-hear the facts unless it is convinced that to do otherwise will occasion grave injustice to the appellant.

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

The appellate court may set aside the conviction of the defendant or vary the terms of the sentence imposed by the lower court.

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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?

The power to prosecute business crimes is enjoyed by Public Prosecutors' Offices, the Police, the Internal Security Agency, the Central Anticorruption Bureau, the Central Investigation Bureau, the Border Guard, the Military Police (in a very narrow scope), Tax Offices, the National Tax Administration, Tax Administration Chambers, and Tax and Customs Offices.

The National Tax Administration, the Internal Security Agency, the Central Anticorruption Bureau and the Central Investigation Bureau are organised at the national level.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As a rule, criminal investigations are carried out by public prosecutors. All other enforcement agencies support public prosecutors. The list of enforcement authorities and the scope of their competences are regulated in national statutes and regulations issued by the Minister of Justice.

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?

There are no civil enforcement agencies for business crimes. The injured party may also pursue its claims under separate civil proceedings. There is an administrative enforcement path against infringements of regulatory law (i.e. in case of a violation of antitrust law, infringements of consumer rights, or failure to observe certain regulatory obligations regarding compulsory agreements provided in telecommunications or energy law).

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The past year witnessed a first instance judgment in an extraordinary big fraud case related to a company called Amber Gold sp. z o.o. ("Amber Gold"). Amber Gold used to advertise itself as a company which invested in gold and other precious metals. In fact, it was operating between 2009 and 2012 as a financial pyramid scheme, where profit withdrawals for one customer were financed by the deposits from other customers. The criminal trial against two masterminds of Amber Gold began in March 2016. Pursuant to the public indictment, people acting on behalf of Amber Gold misled approx. 19,000 customers for approx. EUR 190 million. In October 2019, the first instance court found the perpetrators guilty of committing the criminal offences of fraud and money laundering. The court sentenced the defendants accordingly to 15 and 12.5 years of deprivation of liberty. The perpetrators were also obliged to redress the damage caused to the injured parties. The verdict is not yet legally binding.

Another major business crime case revealed in recent years is related to the company called GetBack S.A. ("GetBack"). GetBack used to conduct debt collection activities. In July 2017, GetBack debuted on the Warsaw Stock Exchange. The company decided to issue bonds to finance its operations. The bonds were offered to numerous individuals by intermediaries – banks and financial advisors. Moreover, the company was audited by reputable auditors (one of "Big Four"). People who are suspected of having committed a crime are accused of selling the bonds under the guise of concluding bank deposit agreements. They did not inform their clients about the related risk and investment safety. The suspects were to encourage clients to purchase the bonds by falsely informing them that the offer was exclusive and limited in time. As it turned out later, GetBack had financial problems and created a specific financial pyramid. The funds from the bonds were used by GetBack to redeem further, otherwise unrecoverable debts. The financial pyramid eventually collapsed and the losses were estimated at EUR 800 million.

2 Organisation of the Courts

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

There are District Courts, Regional Courts and Appeal Courts (common courts) in the Polish judiciary system. Criminal cases are conducted by Criminal Divisions of common courts. Such cases are handled by judges specialised in criminal law (excluding particular types of crimes).

The Supreme Court exists separately from the common courts of law system. The Supreme Court examines cassations (one of the extraordinary measures of appeal) and other matters specified in the law. The Criminal section of the Supreme Court examines criminal cases.

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

The institution of a jury does not exist in Polish criminal procedure; however, the panel at the main trial consists of a professional judge and lay judges in certain cases.

3 Particular Statutes and Crimes

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

• Securities fraud

Article 183 of the Trading in Financial Instruments Act ("TFIA") penalises so-called "manipulation". This provision refers to prohibition of market manipulation as provided under the Article 15 of the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse ("MAR"). This regulation results from the implementation of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse ("MAD") regime into Polish law and its adjustment to MAR. Under the current existing MAR/MAD regime, "manipulation" is explicitly equated with manipulating behaviour pursuant to Article 12 of the MAR.

There are two regimes of criminal liability for manipulation. Generally, the perpetrator shall be liable to a fine of up to PLN 5 million or imprisonment for a period of three months to five years. The second regime applies to those who enter into an agreement with another person aimed at manipulation. This person is liable to a fine of up to PLN 2 million.

• Accounting fraud

Under Article 78 of the Accounting Act, expert auditors issuing an untrue opinion on financial statements and their underlying account books, or the property and financial standing of an undertaking, are liable to a standard fine or imprisonment for a period up to two years, or both penalties jointly. In this case, non-deliberate violations of these standards are also penalised – although in a more lenient fashion.

• Insider trading

Pursuant to Article 181 TFIA, whoever engages in insider trading shall be liable to a fine of up to PLN 5 million or imprisonment for a period of three months to five years, or both penalties jointly.

The amendment mentioned in the answer referring to securities fraud altered Article 181 TFIA by introducing a uniform criminal liability regime for all aspects of use of insider information in violation of Article 14(a) of the MAR (insider trading and illegal disclosure of insider information). All kinds of perpetrators are subject to a fine of up to PLN 5 million or imprisonment for a period of three months to five years or both penalties jointly.

• Embezzlement

Pursuant to Article 296 of the Criminal Code ("CC"), anyone who, while under a legal obligation, a decision of an appropriate authority or a contract to manage the property or business of an individual, a company, or an organisational unit without legal personality, by abusing the authority vested in him, or by failing to perform his duties, inflicts substantial damage is liable to imprisonment for between three months and five years. If the offender referred to above, by abusing the authority vested in him, or by failing to perform his duties, creates an imminent danger of causing substantial damage to property, he is liable to imprisonment for up to three years. A stricter regime is provided for perpetrators acting in order to obtain a material benefit – the imprisonment period is six months to eight years. Non-deliberate violations are subject to imprisonment for up to three years.

Embezzlement may be also classified as an offence of misappropriation. According to Article 284 of the CC, anyone who misappropriates moveable properly entrusted to him is liable to imprisonment for between three months and five years.

• Bribery of government officials

The general definition of penalised behaviour is giving or promising to give a material or personal benefit to a person performing a public function in relation to activities related to that public function.

Additionally, in specific circumstances, bribery of government officials might be also construed as instigation to the offence defined in Article 231 of the CC, i.e. exceeding the authority of a government official or failing to perform the duties of a government official to the detriment of public or individual detriment, in order to gain a material benefit.

• Criminal anti-competition

The CC provides for criminal liability for corruption in business. It is stipulated that anyone who, while in a managerial position in an organisational unit performing business, or in an employment relationship, a service contract or a contract for a specific task, demands or accepts a financial or personal benefit or the promise thereof, in return for abusing the authority granted to him, or for failing an obligation, could inflict material damage on the unit, or constitute an act of unfair competition or an unacceptable act of preference for the buyer or recipient of goods, services or benefits, is liable to imprisonment for between three months and five years.

Additionally, Article 23 of the Combating of Unfair Competition Act ("CUCA") criminalises illegal use of business secrets. Anyone who causes serious damage to an entrepreneur by violating their obligation towards that entrepreneur by disclosing business secrets to another person or using such secrets in their own business, shall be liable to a standard fine, restriction of liberty, or imprisonment for a period of up to two years. The same penalty applies to anyone who illegally obtained access to business secrets and disclosed them to another person or used such secrets in their own business.

Article 24 of the CUCA criminalises causing serious damage to an entrepreneur by reproduction or copying of their products in a manner that might mislead the customers as to the identity of the manufacturer. The perpetrator is liable to a standard fine, restriction of liberty, or imprisonment for a period of up to two years. In case such reproduction or copying involves marking the products with counterfeit trademarks in order to introduce them to trading or trading in such counterfeit products, under Article 305 of the Industrial Property Law ("IPL"), the perpetrator is liable to a standard fine, restriction of liberty, or imprisonment for a period of up to two years. Note that under Article 305 of the IPL, no damage to another entrepreneur is required for the liability to arise. A stricter regime applies to perpetrators who deal with counterfeit goods of significant value or made such criminal activity a permanent source of their income. Such perpetrators are liable to imprisonment for a period of six months to five years.

• Cartels and other competition offences

Cartels and other competition deeds are defined and regulated on the basis of administrative law, in particular, the Protection of

Competition and Consumers Act, and they are subject to a fine.

Moreover, the CC provides for liability for hindering a public tender. The law states that anyone who, in order to achieve a material benefit, prevents or obstructs a public tender, or acts in concert with another entity to the detriment of the owner of property or an entity or institution for which the tender is to be held is liable to imprisonment for up to three years.

Additionally, spreading false information or withholding circumstances of significant importance to the conclusion of the agreement that is the subject of the tender, or acting in concert with another entity to the detriment of the owner of property or an entity or institution for which the tender is to be held, is subject to the same penalty.

• Tax crimes

Tax offences are described in a separate legal act – the Fiscal Penal Code ("FPC"). Criminal fiscal crimes are punishable by a fine, the penalty of restriction of liberty and imprisonment (up to five years). Tax crimes may be committed intentionally or unintentionally.

The most popular tax offence, VAT fraud, usually involves use of fake or otherwise unreliable invoices. Under the newly introduced articles 270a and 277a of the CC, forgery of or tampering with an invoice in relation to circumstances influencing the amount of a tax (or other public obligation) or its refund, in order to use such invoice as an authentic one, or using such a fake invoice, constitutes a separate offence. The perpetrator is liable to imprisonment for a period of six months to eight years. In case the perpetrator forged or used invoices documenting transactions whose value exceeded PLN 10 million or made forging or using fake invoices a source of their permanent income, the offence is considered to be a felony. Such perpetrator is liable to imprisonment for a period of five to 25 years.

• Government-contracting fraud

The CC states that anyone who, in order to obtain a subsidy or subvention order for himself or for another person, from an institution disposing of public funds, submits a forged or altered document or a document stating an untruth, an unreliable document, or an unreliable written statement regarding the circumstances that are significant for obtaining the financial support mentioned above or a payment instrument or order, is liable to imprisonment for between three months and five years.

• Environmental crimes

The CC provides for several environmental crimes. These crimes relate to causing significant destruction to plant or animal life, causing pollution of water, air and soil, and improper storage of waste. These offences can be committed intentionally and unintentionally (with less risk of punishment). Environmental crimes are punishable by up to eight years in prison. Some less serious offences are regulated under special law, e.g. the Act of 16 April 2004 on Nature Protection or the Act of 13 April 2007 on Prevention and Repair of Environmental Damage.

• Campaign-finance/election law

Offences against elections are defined in the Election Code and the CC. The CC provides for the crime of election corruption. It is punishable to accept financial or personal benefit or request such benefits for voting in a certain way.

• Market manipulation in connection with the sale of derivatives

Please see the answer referring to securities fraud.

• Money laundering or wire fraud

The CC provides that anyone who receives, transfers or transports abroad, or assists in the transfer of title or possession of legal tender, securities or other foreign currency values, property rights or real or moveable property obtained from the profits of offences committed by other people, or takes any other action that may prevent or significantly hinder the determination of their criminal origin or place of location, their detection or forfeiture, is liable to imprisonment for between six months and eight years.

The act on combating money laundering and the financing of terrorism provides for new obligations on banks, payment institutions and other obligated institutions (including lawyers). As a result, failure to fulfil particular obligations may constitute a criminal offence. For instance, whoever, acting in the name of or on behalf of an obliged institution, fails to comply with the obligation to provide the General Inspector with a notification of any circumstances that may indicate a suspicion that the criminal offence of money laundering or terrorist financing has been committed shall be subject to imprisonment for a period from three months to five years. The same penalty shall apply to whoever fails to provide the General Inspector with a notification of a reasonable suspicion that a given transaction or the assets being the object of that transaction may be linked to money laundering or terrorist financing. Moreover, the Act also penalises preventing or inhibiting the performance of the public control over the fulfilment of obligations related to counteracting money laundering.

• Cybersecurity and data protection law

Article 287 of the CC provides that anyone who commits so-called "computer fraud", i.e. without due authorisation (i) influences automatic processing, collection or transfer of electronic data, or (ii) alters (this covers, e.g., SQL-injection type attacks), deletes or creates electronic records, in order to obtain material benefit or to cause damage to another, is liable to imprisonment for a period of three months to five years.

Under Article 278 of the CC, whoever, without the permission of an authorised person, obtains someone else's computer software with the purpose of gaining a material benefit is subject to the penalty of deprivation of liberty for between three months and five years.

Pursuant to Article 269a of the CC, significantly interrupting the operations of a computer system or an IT network by means of: data transmission (e.g. DDOS attacks); deletion, corruption, or alteration of data; or restriction of access to data (this might cover, e.g., ransomware attacks), is subject to the same penalty.

Moreover, under Article 268a of the CC, unauthorised (i) deletion of electronic data, (ii) destruction of such data, (iii) restriction of access to such data (e.g. ransomware attacks), and (iv) prevention of access or automatic processing of such data is subject to a penalty of imprisonment for a period of up to three years. If the perpetrator causes significant damage, they are liable to imprisonment for a period of three months to five years.

Pursuant to Article 269 of the CC, corruption, alteration, or deletion of any data of particular significance for national defence, transport security, operation of government or local government or interruption or prevention of access to such data or their processing is subject to a penalty of imprisonment for a period of six months to eight years. Destruction or exchange of related hardware is subject to the same penalty.

Additionally, under Article 269b of the CC, anyone who prepares, obtains, transfers, or sells any software enabling the user to commit the above offences (this covers various backdoors, "Trojan horses", keyloggers, webcam hacks, botnet-related software, viruses, ransomware software, etc.) or to cause threat to life or health of multiple persons or assets whose value exceeds PLN 1 million is subject to imprisonment for a period of three months to five years. Note that it is not necessary to use said software in order for criminal liability to arise. The same penalty applies to preparing, obtaining, transferring or selling passwords, access codes or other data enabling access to data stored in a computer system or an IT network.

There is an exclusion of criminal liability of persons performing penetration tests at the request of the interested party – i.e. launching controlled attacks, preparing software intended to find and test so-called "exploits", sending so-called spoof mails to check the employees' cybersecurity awareness, etc.

Bug bounty programmes are also decriminalised. Hunting bug bounties will not constitute an offence if the person who identified a "bug" (malfunctioning software), security loophole, or other exploit caused no damage by their activity (either to the interested entity or to the public interest) and immediately informed the administrator of the relevant system or network of the "bug's" existence and the threat it could pose.

Cyber-crimes related to payment instruments (e.g. payment card systems) still remain a major challenge to Polish prosecutors. Apart from being classified as the earlier discussed "computer frauds", they are sometimes considered to be regular frauds (subject to a penalty of imprisonment) or even burglaries (subject to a penalty of imprisonment for a period of one to 10 years). Polish regulation of payment services does not contain any particular provisions criminalising such violations of cybersecurity.

Common violations of cybersecurity, i.e. various online scams, mostly related to unsolicited use of premium-SMS services, are classified as regular frauds.

• Trade sanctions and export control violations

Trade sanctions and export control violations are described in particular in the Fiscal Penal Code.

Pursuant to Article 64 of the FPC anyone who – without the notification of appropriate authorities – takes excise goods which are not marked by excise stamps out of the tax warehouse in order to export them shall be subject to the penalty.

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

An individual may be criminally liable for attempting to commit a crime. Assignment of the responsibility for the attempt to commit a crime takes place under the following factors: (i) a person acts with criminal intent; (ii) an accused has already started to carry out the crime; and (iii) an attempt failed or was ceased by the accused due to a force external to the accused.

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?

The quasi-criminal liability of collective entities such as companies and partnerships is provided in the Act on Criminal Liability of Collective Entities for Punishable Offences ("CLCE").

Pursuant to this Act, a collective entity may be held liable for an offence involving the conduct of an individual (employee):

(1) acting for, or on behalf of, the collective entity within the framework of his right or obligation to represent the entity, make decisions on behalf of the entity or perform internal audits, or violating that right or obligation;
(2) enabled to act because of violation by the person referred to in subparagraph 1 of his rights or obligations;
(3) acting for, or on behalf of, the collective entity with the consent or acquiescence of the person referred to in subparagraph 1; and
(3a) being an entrepreneur directly collaborating with the collective entity to achieve a legal purpose,

if the collective entity benefitted or could have benefitted from that conduct, even non-financially.

The collective entity may bear criminal liability under the CLCE if other detailed prerequisites are fulfilled, *inter alia*:

(1) the offence is confirmed by a final non-appealable convicting judgment, a judgment conditionally terminating the criminal proceedings or criminal fiscal proceedings, a ruling to grant the right to voluntary surrender, or a court ruling to terminate the proceedings due to circumstances preventing the perpetrator from being punished;
(2) the offence was committed as a result of (1) a lack of due diligence in selecting an individual who committed the offence or a lack of due supervision over that person on the part of a body or representative of the collective entity, or (2) the organisation of the operations of the collective entity in such a manner that it did not prevent an offence committed if it could have been prevented if the body or representative of the collective entity had applied that due diligence required in the circumstances in question; and
(3) the offence committed is one of the offences listed in the Act (*inter alia*, abuse of trust, corruption of managers, financial fraud, frustration of creditors).

In January 2019, the Polish Government published the last draft of the new CLCE. The key purpose of the new regulation was to enhance the effectiveness of preventing and fighting serious economic and tax crime, including corruption. The effective tools included, *inter alia*, more extensive liability, new obligations imposed on collective entities (such as the obligations regarding whistle-blowers, compliance and internal issues) and stricter sanctions. The most important changes included were: no closed list of criminal offences the liability for which may be incurred by collective entities; and the possibility to hold a collective entity liable without the natural person having been previously convicted by a valid court judgment.

This new law introduces severe penalties and other sanctions. The proposed penalties were a fine of PLN 30,000 to PLN 30 million (and in special cases PLN 60 million); and the dissolution or liquidation of the collective entity. The works on the new CLCE were stopped in November 2019 due to the end of the Parliament's previous term.

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

Under the Act of the CLCE, the criminal liability of the collective entity derives from the criminal liability of the individual, and not *vice versa*.

However, it should also be noted that under the regulation of the FPC, a person who, under a provision of law, a decision of the pertinent authority, an agreement, or as a result of actual performance, deals with business matters of a legal person or other entity, shall be liable for fiscal offences as an offender.

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?

To this day, the enforcement authorities have shown a determined preference to prosecute individuals as opposed to collective entities. To date, criminal proceedings against collective entities have been very rare in Poland, and fines have not been severe.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Liability arising under the CLCE is not subject to succession and the CLCE does not contain any provisions regulating this matter. Liability arising under the CLCE is considered to be quasi-criminal and therefore subject to similar constitutional guarantees and rules as ordinary criminal liability, which is always personal and not subject to succession. It should also be noted that, under Article 26a of the CLCE, the court might apply a precautionary measure consisting in prohibition of any transformations, divisions and/or mergers of the entity subject to liability arising under that act.

5 Statutes of Limitations

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

An offence ceases to be punishable after the lapse of a certain number of years (from five to 30 years) from the moment of its commission.

A private prosecution crime ceases to be punishable after the lapse of one year from the moment the injured party has learned the identity of the perpetrator of the crime, yet no later than after the lapse of three years from the moment of its commission.

If the commission of a crime is dependent on the occurrence of a consequence provided for in a statute, the running of the prescription period commences at the moment of the occurrence of the consequence.

If the criminal proceedings in any form (whether against a specified suspect or not) have been instituted within the period mentioned above, the prescription period of all offences covered by their scope is extended by 10 years. The only exception refers to private prosecution crimes, whose prescription period is extended by only five years in the above case.

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

In the case of "continuous crime", the limitations period starts running after the last act was completed. Continuous crime refers to a crime when two or more prohibited acts of conduct are undertaken at short intervals with premeditated intent.

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

The limitations period does not run if a provision of law does not permit the criminal proceedings to be instituted or to continue; this, however, does not apply to the lack of a motion or a private charge. Note that instigation of any proceedings covering a given offence (even if the suspect or exact circumstances of the offence are unknown) significantly extends the prescription period.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

In Polish criminal law, there is no special regulation regarding business crimes, and the "extraterritorial jurisdiction" to prosecute business crimes does not exist.

As for the general rule:

(1) a Polish criminal statute applies to a Polish citizen who has committed a crime abroad;

(2) a Polish criminal statute applies to a foreigner who has committed abroad a prohibited act against the interests of the Republic of Poland, a Polish citizen, a Polish juridical person or a Polish organisational entity without legal personality, and also to a foreigner who has committed a crime of a terrorist character abroad; and

(3) liability for an act committed abroad is applicable only if this act is also recognised as a crime by the statute being in force where the commission of the act was located.

In case the above-mentioned conditions are met, the Polish authorities are entitled to initiate and conduct criminal proceedings. However, the Polish authorities may conduct their activity only on Polish territory. Any action that should be carried out on foreign territory requires a motion for legal aid.

When it comes to business crimes, the Polish authorities mostly use legal aid in VAT fraud cases. However, they also use legal aid in minor issues such as witness hearings.

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

An investigation is initiated if there is a justified suspicion that an offence was committed. A decision to initiate the investigation is issued *ex officio* or as a result of a report by the competent authority.

In general, there exist no special rules or guidelines governing the initiation of an investigation. However, pursuant to the Prosecutor General's Guidelines of 6 July 2016, enforcement authorities shall act in a manner allowing the fastest possible collection of evidence indicating fraudsters engaged in widespread VAT fraud.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The authorities have many formal mechanisms for cooperating with foreign enforcement authorities. The mechanisms of cooperation between criminal authorities are stated in the Code of Criminal Procedure, many bilateral treaties and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000. It should be noted that Poland implemented the Council Framework Decision 2009/948/JHA of 30 November 2009 and the Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014. The provisions which implement the aforementioned are included in the Code of Criminal Procedure.

The authorities should not use any "informal mechanism" as it could affect the correctness and admissibility of the evidence.

The criminal authorities in Poland cooperate with foreign enforcement authorities on a daily basis.

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 enforcement agencies (as opposed to the government itself) have wide powers to gather any type of information. Under the provisions of the criminal procedure, any legal person/organisational unit/individual is obliged to assist the authorities conducting criminal proceedings (*inter alia*, render documentation, give information).

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 enforcement agencies conducting criminal proceedings (as opposed to the government itself) are entitled to demand that a company produce the documents if the lack of the documentation required would significantly hinder the conduct of the proceedings or make them impossible.

The documentation that may serve as evidence should be surrendered at the request of the court, the public prosecutor, and in urgent cases, of the Police or another authorised agency. In case the seizure is conducted by the Police or another authorised agency acting at its own behest, the person surrendering the documentation may immediately request that the decision approving the seizure be drawn up by the court or the public prosecutor and delivered. A person surrendering an object should be advised of that right. The decision should be served within 14 days of the seizure.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

In the Polish criminal procedure, there are several limitations and restrictions regarding the seizure of certain types of documentation:

(1) documentation containing information pertaining to the performance of the function of defence counsel;
(2) documentation containing confidential information or information constituting a professional or other legally protected secret, or documentation of a private nature; and/or
(3) a file of psychiatric treatment.

The labour law itself does not itself protect the personal documents of employees in the course of criminal proceedings.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Yes, in May 2018 General Data Protection Regulation entered into force.

7.5 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?

The government can demand that a company's employee produces documents under the same circumstances as in the case of the company (please refer to question 7.2 above).

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

The government can demand that a third person or entity produce documents under the same circumstances as in the case of the company (please refer to question 7.2 above).

Questioning of Individuals:

7.7 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?

The enforcement agencies (as opposed to the government itself) carrying on criminal proceedings are entitled to summon any person (*inter alia*, an employee, officer or director of the company) to testify. A person who has been formally summoned as a witness is obliged to appear at the place indicated by the authority and to testify.

The interrogations generally take place at the premises of the summoning authority; however, conducting the questioning in a different place is not excluded.

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

Please refer to question 7.7 above.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The accused has the right to give explanations. However, without giving any reasons, he may refuse to answer individual questions or to give explanations. He shall be instructed about this right.

The witness may decline to answer a question if it could expose him, or his next of kin, to the accountability for an offence or a fiscal offence. Moreover, the next of kin of the accused may refuse to testify. The witness must be advised of these rights before or during the interrogation, and advised of the criminal liability for giving false testimony.

The defendant and the injured party have the right to be accompanied by attorneys.

The witness may appoint an attorney, but the competent authority may refuse to admit such assistance.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

An investigation may be launched *ex officio* or at the initiative of the injured party, who must submit a formal (oral or written) notification. For the institution of proceedings with respect to certain crimes, the injured party must file a motion for prosecution. If such motion is not filed, then no proceedings will take place.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The public prosecutor shall issue a decision on the presentation of charges on an individual if the data existing at the moment the investigation is initiated, or those gathered in its course, justify sufficiently a suspicion that the offence was committed by a defined person.

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

In the cases referred to in Article 335 of the Code of Criminal Procedure, the prosecutor may bring an indictment requesting the sentencing of the accused without a hearing (§ 1) or a motion for conviction of the accused without a hearing (§ 2). This requires the following conditions: the confession of the accused to commit the crime; an explanation of all the circumstances of the case that does not contradict conclusions based on other gathered evidence; and attitude of the accused indicating that the purpose of proceedings will be achieved without a trial.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

All deferred prosecution or non-prosecution agreements shall be accepted by the court. The court shall verify whether the circumstances of the commission of the offence give rise to doubts and the attitude of the accused indicated that the purposes of the proceedings shall be obtained.

8.5 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 may apply.

In cases where, due to the defendant's action, a third party incurred damage, he has a right to seek compensation for such damage by filing the applicable motion to the criminal court. The court, when sentencing, will then be obliged to impose the obligation to redress the full damage inflicted by a crime, to redress part of it, or to compensate for the suffered harm, pursuant to the provisions of the civil law. The injured party does not need to specify the amount of requested redress in the motion. Even if the injured party does not file the motion, the court may still award the compensation *ex officio*.

Moreover, the imposition of redress or compensation or punitive damages does not impede the pursuance of the dissatisfied part of the claim in civil proceedings.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In the Polish legal system, as a general rule, the burden of proof "rests on who asserts, not on who denies". Under the criminal procedure, this means the burden of proving the defendant's guilt lies with the prosecution, and that fact must be established beyond reasonable doubt. The defendant is innocent until proven guilty.

The court might allow evidence and analyse it *ex officio*, but this does not shift the burden of proof.

There is an institution in Polish criminal law called extended confiscation. According to this regulation, in case of sentencing for: (i) an offence resulting in direct or indirect benefit of substantial value; (ii) an offence subject to a penalty of five or more than five years of imprisonment resulting in – even potential – direct or indirect benefit; or (iii) an offence committed in an organised crime group, all the assets acquired by the perpetrator within five years prior to commission of an offence would be considered a benefit thereof, unless the perpetrator or the other interested party submit evidence in rebuttal. So the burden of proof is reversed in this case.

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

It must be proven beyond reasonable doubt that all prerequisites of an offence have been fulfilled. All doubts which cannot be dispelled shall be resolved to the benefit of the accused.

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

Only the court is entitled to weigh the evidence, which is reflected in its obligation to indicate what facts have been found by the court to be proven or not proven and the evidence upon which the court has relied, as well as the reasons why the evidence to the contrary has been dismissed by the court.

The court would violate one of the core principles of Polish criminal procedure, should it fail to analyse the circumstances of the case on its own and, e.g., blindly accept the prosecution's assessment of the facts.

10 Conspiracy / Aiding and Abetting

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

As a general rule, not only the offender, but also anyone, who:

- induces or orders the offender to commit a crime;
- (intending another person to commit a crime) facilitates the commission of the act; and/or
- organises a prohibited act to be carried out,

is liable for his actions, and the penalty will be imposed within the limits of the penalty provided for the liability provided for the offence itself. Nonetheless, in the case of aiding, the court may apply extraordinary mitigation of the penalty.

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?

Polish criminal law provides that an offence may be committed intentionally or unintentionally, except for felonies, which might be committed only intentionally. In the case that criminal intent is required, this intent must be proven within the course of criminal proceedings, not unlike any other circumstance of the case.

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?

Error of law is an institution of Polish criminal law. Criminal liability (fault) is disabled if the error is justified. If the offender's mistake is not justified, the court may apply an extraordinary mitigation of the penalty. The prosecution and the court shall examine and explain whether the accused acted in justified error of the law or otherwise.

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?

A criminal deed is not committed if the accused acts in justified error as to any factors of the offence. The prosecution and the court shall examine and explain whether the accused acted in justified error of facts or otherwise.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Anyone who has learned of an offence being committed has a social (as opposed to legal) obligation to notify the public prosecutor or the Police thereof. In general, failure to report the crime does not lead to potential criminal liability.

However, specific regulations provide an obligation to report certain serious crimes, such as crimes against human life or crimes against the Republic of Poland. Another rule is provided under the banking law. If there is a reasonable suspicion that the bank's activities are used to conceal any criminal activity or are, for any purposes, connected with a fiscal offence, the bank is obliged to notify the enforcement authority entitled to conduct criminal proceedings.

In general, no special "credit" is granted for voluntary disclosure of any offence. Under specific circumstances, rewards might be offered by the Police or other enforcement agencies for assistance in ongoing criminal proceedings, especially those pertaining to crimes that cause widespread social outrage (e.g. violent murders or vandalism at historical sites). This practice is, however, not founded in the provisions regulating criminal procedure.

13 Cooperation Provisions / Leniency

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

The court will apply an extraordinary mitigation of the penalty, or may even grant a suspended sentence, with respect to an offender who acted in concert with others in committing an offence, and will subsequently reveal information to the prosecutors about other offenders involved in committing the offence, or the essential circumstances thereof.

Regardless of the above, the court may apply an extraordinary mitigation of the penalty, or even grant a conditional suspended sentence, with respect to an offender who, irrespective of any explanations given in his case, provides prosecutors with substantial assistance concerning an offence that they did not previously know about, and which is subject to imprisonment for more than five years.

As regards tax offences, the perpetrator who voluntarily disclosed the significant circumstances of the offence to the enforcement authorities (in particular by identifying other perpetrators) and paid the due amount of public obligation within the term specified by said authority, is not subject to liability for the relevant tax offence. This, however, does not exclude general criminal liability and such disclosure might (and often does) lead to the perpetrator being prosecuted and sentenced for criminal offences related to the tax offence he or she disclosed (e.g. using fake invoices or committing an accounting fraud).

No additional "credit" is offered for voluntary disclosure and cooperation. However, when deciding on the penalty, the court is obliged to assess the attitude of the accused and their behaviour after the offence has been committed. Such disclosure should be favourable to the perpetrator to that extent.

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

The institution of leniency applies only to individual natural persons.

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?

Polish criminal law provides for various separate regulations of plea bargaining.

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?

The application to an individual of provisions relating to plea bargaining depends on the stage of criminal proceedings.

First, the public prosecutor may place in the act of indictment (or in separate motion) a request for the accused to be sentenced to the penalties agreed upon therewith in the sentence together with the penal measure without a hearing if the circumstances of the commission of the offence give rise to no doubt and the attitude of the accused indicates that the purposes of the proceedings shall be achieved.

Second, until the closing of the first examination of all accused at the main trial, the accused may submit a motion to be sentenced to a penalty or a penal measure without the conduct of evidentiary proceedings, provided that the accused is not charged with an offence subject to a penalty of imprisonment for a period exceeding 15 years. The court may grant the motion of the accused to be sentenced when the circumstances of the offence do not raise doubts and the objectives of the trial will be achieved despite the fact that the trial is not conducted in its entirety. Such a motion may be granted only if the public prosecutor and the injured party do not object.

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 a sentence on the defendant? Please describe the sentencing process.

The Code of Criminal Procedure provides the following rules governing the court's imposition of a sentence on the defendant. After closing the judicial trial, the presiding judge shall give the floor to parties. After hearing the speeches, the court shall retire without delay for deliberation. The court shall draw up the judgment in writing without delay. The sentence shall be published in the open court.

Every judgment shall include the designation of the court which has rendered it, as well as: the names of the judges, lay persons, accusers and recording clerk; the date and place the case was heard and the judgment rendered; the name, surname and other particulars to identify the accused; the description and legal classification of the deed which has been imputed to the accused by the prosecutor; the adjudication of the court; and the indication of the Penal Law provision applied. The sentence shall also include: a detailed description of the deed alleged to the accused; and its legal classification, the penalty or penal sanction.

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.

The court is obliged to justify the sentence against a corporation. In such a judgment, it shall be determined whether the premises of corporate criminal liability (see question 4.1 above) were satisfied.

16 Appeals

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

Both guilty and non-guilty verdicts are appealable by the public prosecutor. The defendant may file an appeal against the guilty verdict as he has no legal interest to challenge a non-guilty verdict.

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

The guilty verdict is appealable by the public prosecutor, defendant and injured party acting in trial as an auxiliary prosecutor.

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

According to the provisions governing the proceedings before the court of second instance, after the appellate measures have been examined, the court shall decide whether the decision subject to appeal shall be upheld, changed or quashed in its entirety or part. A judgment shall be quashed or changed if it is found that: (i) a breach of the provisions of substantive law has occurred with regard to the legal classification of the act attributed to the accused; (ii) a breach of the provisions of substantive law has occurred in a case other than that indicated in subparagraph "(i)", unless despite the wrong legal basis, the ruling complies with law; (iii) procedural provisions were breached, if this may have affected the content of the judgment; (iv) the facts of the case on which the judgment was based were established erroneously, if this may have affected the content thereof; or (v) the penalty imposed is glaringly disproportionate to the offence, or the application, or the failure to apply a preventive measures, or any other measure, has been groundless.

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

Polish criminal procedure is, in principle, a two-instance system. Thus, the judgment of the court of second instance is final and legally binding.

As an extraordinary means of appeal, the party, Ombudsman and Attorney General may file a cassation against the judgment of force of law of the appellate court which ends the proceedings. A cassation may be filed only for reason of a glaring infringement of the law, if it could have had a crucial impact on the content of the judgment.

If the court of second instance quashed the challenged verdict and referred the case back to the court of first instance for adjudication, any party might file a complaint against such decision with the Supreme Court. The complaint might be based solely either on the circumstance that the premises of such referral were not satisfied or on invalidity of the proceedings (particularly gross violations of procedure).

In certain circumstances, the proceedings might also be re-opened. The motion to re-open the proceedings is justified if an offence was committed within the course or in relation with the proceedings and it could influence the sentence or new, previously unknown, facts favourable for the sentenced were discovered. Additionally, such motion is justified if the Constitutional Tribunal ruled that the sentence was based on a provision incompatible with the Constitution or a binding international treaty. In the latter case, the proceedings might be re-opened only in favour of the sentenced. The proceedings might also be re-opened *ex officio*, provided that one of the above premises is satisfied.

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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?

Criminal offences are enforced in the courts of law. Enforcement and prosecution of business crimes, as all crime, is undertaken by the Public Prosecutor's Office, which investigates any suspicion of a crime, aided by the criminal police bodies. There is no enforcement body or entity specialising in business crimes. The Public Prosecutor's Office has the powers granted to it by law to investigate any facts which may constitute a criminal offence in the Portuguese territory, without prejudice of the rules that govern extra-territorial jurisdiction of Portuguese law. Usually, the investigation of the most relevant cases is carried out by the Central Department of Investigation and Prosecution, which has nationwide jurisdiction to coordinate and direct the investigation and prevention of some specific criminal offences, namely of a violent nature, of particular complexity or those which are highly organised – the latter categories including corporate and business crimes.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The only competent body to investigate and prosecute criminal offences is the Public Prosecutor's Office. There are local offices, whose jurisdiction depends on the *locus delicti*, and a central department for criminal investigation and prosecution in Lisbon, which is a coordination and direction body for investigation and prevention of violent, highly organised and particularly complex criminality.

The Public Prosecutor's Office might be aided, among others, by the Judiciary Police, the Food Safety and Economic Authority or the Tax Authority, depending on the subject investigated and the expertise of each criminal police body.

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?

There is no civil or administrative enforcement specifically against business crimes. Business crimes are subject to criminal enforcement alone. Nevertheless, the Bank of Portugal, the Portuguese Securities and Exchange Commission and the Tax Authority, among others, are also responsible for investigating regulatory infractions and misdemeanours related to business crime.

In areas such as drug trafficking, money laundering and other serious crimes, such as corruption, embezzlement and influence peddling, Law 101/2001 allows, under certain circumstances, the existence of covert operations under the control of the Judiciary Police in order to prevent said crimes.

In the field of financial market crimes, the Portuguese Securities and Exchange Commission can perform preliminary enquiries, in line with its supervisory functions, whose findings it must deliver to the Public Prosecutor's Office if a crime is revealed.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In the recent years, there have been several high-profile cases of business crimes prosecuted and tried in Portuguese courts, all with a significant impact: "Face Oculta", a case involving an alleged corruption ring designed to favour a private business group linked to business waste and waste management, with relevant State firms also involved; the "Labirinto" operation, related to alleged unlawful concession of Golden Visas; and the "Marquês" operation, considered by many as the biggest corruption case in Portugal's modern history, in which a former Prime Minister and the former CEO of one the largest Portuguese private banks were formally charged with several counts of corruption, money laundering, document forgery and tax fraud, among other corporate elites, including former chief executives of Portugal Telecom.

2 Organisation of the Courts

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

Criminal courts are part of the common judicial courts, separated from the administrative and tax courts. The rules of

competence depend on the stage of the procedure, the gravity or the type of crime, the quality of the defendant and the *locus delicti*.

The structure of criminal courts is hierarchical, comprising district first instance courts, courts of appeal and the Supreme Court of Justice. The first instance courts can operate with a singular judge, a panel of judges or as a jury court, depending on the maximum abstract penalty for the offences at trial and the type of crime. Nevertheless, the courts of appeal and the Supreme Court of Justice act as first instance courts to try holders of high political positions and magistrates indicted for crimes undertaken during the performance of their duties.

There are no specialised courts in business crimes, nor could they exist due to the constitutional prohibition on establishing courts competent only to try certain categories of crimes.

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

If the trial relates to offences against cultural identity and personal integrity, national sovereignty and the accomplishment of the Rule of Law, electoral crimes and offences against international humanitarian law, or crimes – including business crimes – for which the maximum abstract penalty can exceed eight years of imprisonment, the defendant has the right to a jury trial.

However, there can be no jury trial in cases of terrorism, highly organised crimes and crimes committed by holders of political or high-ranking public positions.

In practical terms, however, jury trials are very rare in Portugal.

3 Particular Statutes and Crimes

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

• Securities fraud

Article 379 of the Portuguese Securities Code punishes, with up to eight years of imprisonment or a 600-day fine, the disclosure of false, deceptive or incomplete information or the undertaking of false operations suitable to artificially alter the normal functioning of the securities market or other financial instruments. Actions intended to alter the normal functioning of the securities markets include, namely, those which might modify the pricing conditions, the normal conditions of supply and demand of securities and financial instruments, the normal launch and acceptance conditions of public tender offers and other actions intended to alter or delay the negotiation phase.

Criminal liability for this specific offence requires criminal intent. Nevertheless, those holding a position in an administration body and those responsible for the direction and auditing of fields of activity of a financial intermediary, with knowledge of the facts described above, committed by persons subject to their direct directions and supervision and in the performance of their duties, who do not immediately terminate such, may also be held criminally liable.

• Accounting fraud

Article 379-E of the Securities Code provides for the crime of investment fraud, which encompasses the using of false or misleading information (of economic, finance or legal nature) in the context of operations intended to attract investment, financing or to issue securities. Information is considered false or misleading whenever it presents favourable situations without correspondence in reality or omits unfavourable facts that should be presented. This offence is compatible both with criminal intent, leading to a maximum penalty of eight years of imprisonment, and negligence, in which case the maximum penalty applicable will be halved.

Article 519 of the Companies Code provides for the crime of providing false information, applicable to the disclosure of false, incomplete or deceptive company information, and punishing it with up to one year of imprisonment or a 120-day fine. This offence also requires a criminal complaint.

Article 256 of the Criminal Code punishes production of false documents, alteration of legitimate documents, signature exploitation and use or concession of said documents, with a penalty of up to five years of imprisonment or a 600-day fine. This offence requires intention to cause losses to another person or the State, to obtain an unlawful benefit or to prepare, foster, execute or conceal another crime.

• Insider trading

Article 378 of the Securities Code punishes with up to five years of imprisonment or a 600-day fine whosoever is in possession of inside information and transmits it outside the normal course of its functions, negotiates, advises someone to negotiate in securities or other financial instruments or commands its trade, as well as whosoever cancels or modifies an order. Criminal intent is required.

Inside information is defined as unannounced information, which is precise and, directly or indirectly, connected with an issuer, securities or other financial instruments, or a related order, which could be used, if released, to appreciably influence market prices.

• Embezzlement

Embezzlement by public officials is foreseen as a specific crime under Article 375 of the Criminal Code. This offence, punishable with up to eight years of imprisonment, applies to public officials who unlawfully appropriate, for their own or for another person's benefit, money or any movable or immovable property or public or private property that has been subject to his possession or is accessible to him because of his functions. Article 20 of Law 34/87 foresees the same offence but applicable to political and high public officials. Both offences require criminal intent.

• Bribery of government officials

Passive corruption, punishable by Article 373 of the Criminal Code with up to eight years of imprisonment (without considering possible aggravating factors), can be defined as the request or acceptance of an undue advantage by a public official as repayment for having carried out or in order to perform an official act. In turn, active corruption, punishable by Article 374 of the Criminal Code with up to five years of imprisonment, can be defined as the offering or the promise to offer an undue advantage to a public official in return for having carried out or in order to perform an official act. Articles 17 and 18 of Law 34/87 are applicable to bribery offences related to holders of political positions and high-ranked officers, committed in performance of their duties.

The corruption provisions will apply regardless of whether the undue advantage is accepted by or offered to a public official/politician/private worker/sportsperson/military official or through an intermediary (if there is consent or ratification), and also regardless of whether the undue advantage is intended for the public official/politician/private worker/sportsperson/military official or for a third party, by his indication or with his knowledge.

Finally, Article 372 of the Criminal Code, Article 16 of the Law on corruption of political and high public officials and

Article 10-A of Law 50/2007 (regarding bribery in the context of sports competitions), holds criminally liable public officials/political or high-ranking public officials/sports agents that simply allow to be promised or accept an undue advantage for himself or for a third person or whosoever offers, promises or grants such advantage, even without the requirement of practising a specific action or omission in return.

A bribe ("undue advantage") can be defined as a monetary or non-monetary advantage which benefits its recipient in any way without any legal ground or justification. The relevant advantage may be given to a public official/politician/private worker, but it can also be given to a third party, if requested or consented by any of the abovementioned group of individuals. In all cases, the bribe can also be executed by means of an intermediary, and always requires criminal intent.

• Criminal anti-competition

There are no statutes to prosecute cartels or anti-competition conduct on a criminal level. Anti-competition and cartel offences are subject to administrative enforcement alone under the Portuguese Code of Industrial Property and Law 19/2012.

Nevertheless, under Article 8 of Law 20/2008, passive corruption is punishable where a private sector worker, by himself or through an intermediary, demands or accepts, for himself or for a third person, an undue advantage, or the promise thereof, to practice an action or omission which violates his professional duties. Under Article 9 of the same law, active corruption in the private sector is punishable where an individual, by himself or through an intermediary, grants or promises to grant an undue advantage to a private sector worker, or to a third party with his consent or ratification, to obtain an action or omission which violates the private worker's professional duties. Where the action or the omission practised by the private sector worker constituting the counterpart of the undue advantage is intended to distort competition or to cause economic losses for third parties, the maximum applicable penalty is increased.

• Cartels and other competition offences

See "Criminal anti-competition" above.

• Tax crimes

Tax crimes are established in Law 15/2001. Article 103 of said Law foresees tax evasion as a specific offence which punishes the failure to settle, present or pay taxes or other monetary advantages in order to reduce payable tax by concealment or modification of facts and values or by simulation of transactions, punishable with up to eight years of imprisonment or a 1,920-day fine.

Article 105 of Law 15/2001 foresees tax misappropriation, which applies to persons who simply fail to pay the value it was obliged to, punishing said conduct with up to five years of imprisonment or a 1,200-day fine.

Both offences require criminal intent.

• Government-contracting fraud

There is no specific offence relating to government-contracting fraud.

However, such behaviours will likely fall under the general range of fraud- and forgery-related offences provided under the Criminal Code, some of them described above.

For example, the crime of fraud, punishable under Articles 217 and 218 of said Code with up to eight years of imprisonment, and applicable to whosoever, with the intent of obtaining for himself or a third person an unlawful material benefit, damages the property of another by causing an error or a mistake. Another example: the crime of false declarations, punishable under Article 348-A of the Criminal Code with up to one year of imprisonment, and applicable to whosoever falsely declares or attests to a public authority or official in the exercise of his or her identity, a state or other capacity with legal effects, whether own or regarding third parties.

Other specific offences may apply, such as the following.

Article 377 of the Criminal Code punishes, with up to five years of imprisonment, the crime of taking an economic advantage in public office, applicable to any public official who, in the course of a legal transaction, and intending to obtain an economic unlawful participation for himself or a third party, damages in whole or in part the public interest that he has the duty to manage, supervise, defend or carry out. Article 23 of Law 34/87 foresees the same offence applicable to political and high-ranking public officials.

Influence-peddling is also a criminal offence under Article 335 of the Criminal Code, which punishes with up to five years of imprisonment whosoever requests or accepts, for himself or for third parties, a monetary or non-patrimonial advantage, or its promise, to abuse his influence, real or supposed, before any public entity, in order to obtain a favourable decision.

All these offences require criminal intent.

• Environmental crimes

Article 279 of the Criminal Code punishes sound, air, water, soil, fauna and flora pollution in violation of legal or regulatory acts or of any obligations imposed by the competent authority in accordance to said acts, with up to five years of imprisonment or a 600-day fine.

Article 270-A of the Criminal Code punishes environmental hazardous substances handling with up to three years of imprisonment or a 600-day fine.

Article 280 punishes the creation of risks to human life or physical integrity, to property or to cultural and historic monuments through pollution with up to eight years of imprisonment.

All these offences foresee punishment through negligence, apart from criminal intent.

• Campaign-finance/election law

There is a wide variety of electoral offences established in the electoral laws of the President of the Republic (Decree-Law 319-A/76), Parliament (Decree-Law 14/79), Regional Parliaments (Decree-Law 267/80 and Organic Law 1/2006), Local Authorities (Organic Law 1/2001) and European Parliament (Law 14/87), as well as in Articles 336 to 342 of the Criminal Code (*e.g.* electoral fraud or bribery of voters), all of which require criminal intent.

Under Article 28 of Law 19/2003, personal participation in the allocation or obtainment of unlawful campaign funding is punishable with up to three years of imprisonment. Criminal liability requires criminal intent.

• Market manipulation in connection with the sale of derivatives

See "Securities fraud" above.

• Money laundering or wire fraud

Article 368-A of the Criminal Code punishes with up to 16 years of imprisonment anyone who converts or transfers funds – or intervenes or aids in such operations – to conceal their unlawful origin, from predicate offences, such as tax evasion, bribery and corruption, influence-peddling, trafficking, and any other crime. Criminal liability requires criminal intent.

Law 83/2017 brought forth a heavy framework of obligations to prevent money laundering offences, granting powers to several institutions, such as the Bank of Portugal, the Portuguese Securities and Exchange Commission, the Portuguese Insurance and Pension Funds Supervisory Authority and even the General Inspectorate for Finance, to supervise compliance. Failure to comply with Law 83/2017 and the orders of the competent authorities is enforced with administrative sanctions of up to €5,000,000, depending on the nature of the entity, which may be

aggravated to double the economic benefit of the infraction or up to 10% of the annual revenue of the business in certain cases.

Besides the crime of money laundering itself, crimes related to violations of anti-money laundering obligations include (*i*) illegitimate disclosure of information, (*ii*) disclosure and improper favouring of identity discovery, and (*iii*) disobedience of lawful orders or instructions from the competent authorities.

• Cybersecurity and data protection law

Cybercrime statutes are established in Law 109/2009, which foresee a punishment of imprisonment for computer falsehood, software or informatic data damage, computer sabotage, unlawful access, unlawful interception of data and unlawful reproduction of protected software, all of which require criminal intent.

Data protection offences are established in Law 58/2019 and comprehend the crimes of failure to comply with data protection obligations, unlawful access, deviation of personal data, vitiation or destruction of personal data, false data insertion, aggravated disobedience, and violation of professional secrecy. These offences require criminal intent, except for the offences of vitiation or destruction of personal data and violation of professional secrecy, which enable punishment for negligent actions.

The General Data Protection Regulation (GDPR), which is currently applicable in Portugal, foresees several obligations enforceable by administrative law. Law 58/2019, of 8 August, intended to ensure the execution of the GDPR in Portugal, also foresees several criminal offences, such as the use of data in terms incompatible with the purpose of its collection, the unlawful access to data, data deviation, the forgery or destruction of data, the insertion of false data, the breach of secrecy or the disobedience to specific orders issued by the Portuguese Data Protection Authority.

• Trade sanctions and export control violations

Whosoever, in violation of a restrictive measure to which Portugal is bound, makes available, directly or indirectly, to designated persons or entities, any funds or economic resources that they may use or from which they may benefit from, or perform a prohibited transfer of funds, shall be punished with up to five years of imprisonment. The same penalty applies to whosoever establishes or maintains a legal relationship with persons or entities included in trade sanctions lists.

Apart from criminal intent, this offence foresees punishment through negligence, in which case the penalty will correspond to a fine of up to 600 days.

Also, a wide variety of trade sanctions are foreseen in Decree Law 28/84, including punishment of up to two years of imprisonment or a 100-day fine for the unlawful and unlicensed exportation of goods. Negligent conduct is punishable.

• Any other crime of particular interest in your jurisdiction

The Criminal Code punishes fraud, insurance fraud, food, beverage and services fraud, computer fraud and employment fraud. Law 15/2001 punishes tax fraud and social security fraud. Decree-Law 28/84 punishes subsidy or grant fraud, credit fraud and merchandise fraud.

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

There is liability for inchoate crimes in Portugal. As a general rule, whenever the maximum penalty applicable is greater to three years of imprisonment, or when explicitly foreseen, the attempt to commit a crime is punishable.

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?

For a limited number of crimes, listed in Article 11(2) of the Criminal Code and in special legislation, essentially legal person may be held liable if the relevant offence is committed: (*i*) in its name and in the collective interest by individuals who occupy a position of leadership; or (*ii*) by an individual who acts under the authority of someone occupying a position of leadership due to a violation of the monitoring and control duties pertaining to the latter.

A position of leadership is comprised by the bodies and representatives of the legal entity and by whoever has the authority to exercise control over its activity.

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

Corporate liability may coexist with individual liability, considering the same exact set of facts, if the manager, officer or director fulfils the elements of the crime and the requisite mental state.

Criminal liability may not be transmitted to another entity, due to the constitutional principle that states that punitive liability is personal and non-transferable. However, the directors of the relevant company may alternatively be asked to pay the fine to which the company was sentenced, if the entity lacks the required financial capacity for crimes committed (*i*) at the time of the exercise of their directive functions, without their express opposition, (*ii*) before the beginning of their functions, when it was their fault that the asset of the legal entity became insufficient to pay the fine, or (*iii*) before the beginning of their functions, when the definitive decision of the sanction was communicated during their mandate and they are responsible for defaulting on the payment due by the company.

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?

Legally and constitutionally, and due to the legality principle, in its procedural perspective, authorities are not allowed to choose who to pursue; they are obliged to pursue both the corporate entity and the individuals when they receive news of the crime.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Irrespective of its former or current owners or shareholders, corporate liability remains contained in the same legal person within which (and regarding whose activity) the relevant offence was committed.

5 Statutes of Limitations

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

Statute of limitations periods depended on the abstract maximum penalty applicable for the crime: 15 years for crimes

punishable with a maximum penalty greater than 10 years of imprisonment or specific offences, such as influence-peddling, bribery and corruption, embezzlement and taking economic advantage in public office; 10 years for crimes punishable with a maximum penalty of at least five years of imprisonment but less than 10; five years for crimes punishable with a maximum penalty of at least one year of imprisonment but less than five; and two years for the remaining cases.

Limitations periods start to run from the day the crime is committed.

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

Generally, the limitations period hinders prosecution. Nevertheless, the limitations period only begin running (*i*) for permanent crimes, on the day the criminal act as a whole ends, (*ii*) for continuous crimes, on the day of the last criminal action, and (*iii*) for inchoate crimes, on the day of the last criminal action.

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

The limitations period can be tolled (*i*) during the period in which the criminal process cannot proceed due to lack of legal authorisation, delivery of sentencing or of resolution of a prejudicial question by a non-criminal court, (*ii*) during the period in which the criminal procedure is pending after the communication of the charge or judicial indictment, (*iii*) during the period in which there is a declaration of judgment by default, (*iv*) during the period in which the sentence cannot be communicated to an absent defendant, (*v*) during the period in which the sentence, communicated to the defendant, is not *res judicata*, and (*vi*) during the period in which the defendant is serving a sentence in a foreign country.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

As a general rule, Portuguese criminal law is applicable to all acts committed in the Portuguese territory, regardless of the offender's nationality. Portuguese law shall equally apply, notably, when the relevant crime: (*i*) is perpetrated by Portuguese citizens against other Portuguese citizens that live in Portugal; (*ii*) is perpetrated by Portuguese citizens or by foreigners against Portuguese citizens, if the perpetrator is to be found in Portugal and if the facts are punishable in the territory where they took place (unless the punitive power is not carried out in that place) and extradition cannot be performed or if it is decided not to surrender the offender as result of a European arrest warrant or another international agreement binding on Portugal; or (*iii*) is perpetrated by or against a legal person with its headquarters in the Portuguese territory. Portuguese criminal law is also applicable to acts committed abroad when it so results from international conventions to which Portugal is bound.

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

Investigations are initiated whenever the Public Prosecutor's Office receives news of a crime. As stated above, the opening of an investigation is mandatory in such cases, although there is a general system of objectives and priorities foreseen in Law 96/2017 for some crimes to be primarily prevented and investigated.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Law 144/99 establishes the rules for international cooperation in criminal matters from the Portuguese authorities. There are also international conventions regarding international cooperation to which Portugal is bound. However, the most commonly used cooperation mechanism is the European arrest warrant, nationally regulated by Law 65/2003, which is a judiciary decision that requires another Member State to arrest and transfer a criminal suspect or sentenced person to the issuing state so that the person can be put on trial or complete a detention period.

In addition, other mechanisms of international cooperation are foreseen in Articles 229–233 of the Portuguese Criminal Procedural Code: Law 158/2015 regarding the transmission and execution of criminal sentences of imprisonment and other measures involving deprivation of liberty; Law 36/2015 on the surrender of a person between Member States of the EU in case of default of a preventive measure; Law 88/2009 regarding the emission and execution of orders of confiscation of the instruments, products and advantages of the crime; and Law 74/2009 on the interchange of criminal data and information in the EU.

7 Procedures for Gathering Information from a Company

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

Besides the powers generally endowed to the Public Prosecutor's Office in any criminal investigation – searches, seizures, examinations and telephone tapping – there are special provisions (such as those provided under Law 5/2002) regarding the breach of secrecy of financial institutions, allowing a more effective collection of evidence by means of requesting documentation and information.

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?

Under Law 5/2002, the Public Prosecutor's Office may demand the documents relevant to the investigation. If that request is not fulfilled on time, or if there are substantiated suspicions that documents or information were hidden, the judiciary authority may seize the documents, in some cases only if previously authorised by the judge.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The privilege against self-incrimination is recognised in Portugal and may be used as a defence to refuse the production and presentation of information by the defendant.

The refusal of the production or seizure can also be grounded on the professional secrecy privilege of a lawyer. However, a judge can determine the breach of secrecy, considering the indispensability of the document, the severity of the crime and the necessity of protection of the legal interests at stake.

Under Law 5/2002, breach of banking and professional secrecy must be ordered by the judicial authority conducting the proceedings, which includes the Public Prosecutor's Office, during the investigation stage. The order must identify the envisaged individuals and specify the information and documents to be presented, even if generically. The request may also be made by reference to the accounts or transactions in relation to which the information needs to be obtained.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The free movement of personal data within the European Union is the main applicable principle. However, Law 74/2009 on the interchange of criminal data and information in the EU, which transposes EU Council Framework Decision 2006/960/JAI, establishes as limits to the cooperation duty (*i*) the gathering and conservation of data and information with the intention of disclosure to the law enforcement of other Member States, (*ii*) the provision of data and information to be used as evidence before a judicial authority, and (*iii*) the obtainment of data and information through means of taking evidence, as defined by Portuguese law. Portuguese legislative bodies are also working on the transposition of Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (Draft Law 125/XIII).

In addition to the General Data Protection Regulation, Article 28 of Law 58/2019, of 8 August, which ensures the execution of the GDPR, and articles 17 to 22 of the Portuguese Labour Code, foresee limitations regarding employees' personal data.

According to the GDPR and said Law 58/2019, any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions established therein, some specific conditions laid down are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.

7.5 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?

Despite the privilege against self-incrimination, the Public Prosecutor's Office may demand the production of documents as stated in question 7.2 above.

If there is a strong suspicion that the documents are being hidden in a house or an office, these can be searched, and the documents seized.

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

See the answer to question 7.5 above.

Questioning of Individuals:

7.7 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?

The Public Prosecutor's Office, by itself or aided by the criminal police bodies, can question whoever has direct knowledge of facts relevant to the subject of the inquiry. However, a witness can refuse to answer if the relevant reply may contribute to its own criminal liability. If the employee, officer or director of the company acts as a representative of the indicted company, they can also refuse to answer, based on the company's privilege against self-incrimination.

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

See the answer to question 7.7 above.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The defendant has the right to be assisted by an attorney in every procedural act in which he participates. Nevertheless, there are circumstances in which there is a legal obligation of assistance by an attorney, including questioning of an arrested or imprisoned defendant, questioning by a judicial authority, in the examining debate and in the trial hearing. A witness, whenever questioned, even in an act restricted to the public, may also be accompanied by an attorney which informs him or her of the rights she holds, though he or she must not intervene. Both the defendant and the witness may exercise the privilege against self-incrimination. The exercise of that right can never signify an inference of guilt at trial.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

See the answer to question 6.2 above.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

See the answer to question 6.2 above.

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

Portuguese law provides a mechanism for provisional suspension of proceedings, under Articles 281 and 282 of the Criminal Procedural Code and Article 9 of Law 36/94 (Measures applicable to the Fight against Corruption and Financial and Economic Criminality).

This outcome, materially similar to some plea-bargaining systems, is agreed during the investigation stage between the Public Prosecutor and the defendant, with the consent of a pre-trial judge, leading to the suspension of the proceedings upon the defendant adhering to an injunction and/or certain rules of conduct. The conditions for such an agreement to be offered are the following: (*i*) the crime must be punishable with imprisonment not greater than five years or with a penalty other than imprisonment; (*ii*) agreement of both the defendant and the offended party (when the offended party is part of the proceedings); (*iii*) absence of previous convictions for a crime of the same nature; (*iv*) absence of previous provisional suspensions for crimes of the same nature; (*v*) absence of institutionalisation as a safety measure; (*vi*) absence of a high level of guilt; and (*vii*) prediction that compliance with the injunction and the rules of conduct is deterrent enough to fulfil the prevention demands claimed by the case.

In the event of an active corruption crime within the public sector, Article 9 of Law 36/94 establishes that the provisional suspension of the proceedings may be offered to a defendant when he has reported the crime, or the Public Prosecutor considers him to have decisively contributed to the unveiling of the truth. Suspension in such cases requires fewer conditions: apart from the defendant's contribution, it is only necessary that he agrees with the suspension and that it is foreseeable that compliance with the injunction and the rules of conduct will be deterrent enough to fulfil the prevention demands claimed by the case.

The suspension of the proceedings can last up to two years, during which the limitation period is also suspended. If the defendant complies with the set of injunctions and rules of conduct prescribed, the Public Prosecutor dismisses the proceedings. In contrast, failure to comply with the terms agreed or recidivism causes the process to resume its course, ultimately leading to formal indictment.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

As stated in question 8.3 above, the provisional suspension of the proceedings must be approved by a pre-trial judge who attests to the absence of a high level of guilt and the prediction that compliance with the injunction and the rules of conduct is deterrent enough to fulfil the prevention demands claimed by the case.

8.5 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 may apply.

A defendant in a criminal procedure can be subject to civil compensation for the emerging losses and damages of the crime. That indemnification can be claimed by the victim of the crime or by any other person or legal entity who suffered losses or damages caused by the criminal conduct.

In principle, the civil claim is submitted in the criminal procedure, only exceptionally being filed in a separate civil procedure. The compensation might be attributed without any civil claim being demanded by the interested party whenever specific victim protection needs are deemed to be present.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof in Portuguese criminal procedural law rests on the Public Prosecutor's Office side. The defendant solely has the burden of proof regarding circumstances which might exclude or diminish his liability. These circumstances do not exclude the power of the judge to actively request new evidence in the name of the truth and the well-founded verdict of the case.

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

The evidence must convince the trial judge beyond reasonable doubt that the defendant committed the crime. Except when the law provides otherwise, the evidence is evaluated according to the standards of experience and the unhindered conviction of the judge.

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

It is the judge who determines whether the burden of proof was adequately satisfied. As stated in questions 2.1 and 2.2 above, the court can function with a singular judge, a panel of judges or as a jury court, depending on the maximum abstract penalty for the crime at trial and the severity of said crime.

10 Conspiracy / Aiding and Abetting

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

If a person assists another to commit a crime, he or she might be liable as if he or she was the main perpetrator provided that such assistance was directly involved in the execution of the crime, by agreement or in joint action with the perpetrator. If an individual exclusively provides material or moral aid to the perpetrator, he or she may be held criminally liable as an accomplice, with a particularly tempered sentence.

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?

It is a perfectly valid and common defence to argue that the defendant did not have the requisite criminal intent to commit the crime. As stated in section 3 above, several statutes regarding business crimes foresee the requirement of intentional misconduct, meaning that if said defence proceeds, there can be no criminal liability for the defendant. However, if the crime is punishable for mere negligent behaviour as well, the defendant may still be held criminally liable.

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?

In general terms, knowledge of the law is legally presumed and does not exempt the defendant from criminal liability, except if the crime is of very low ethical-social value, in which case ignorance of the criminal prohibition leads to the exclusion of intent, under Article 16(1) of the Criminal Code.

In addition, ignorance of the unlawful nature of the conduct of the defendant is a valid defence which excludes guilt. However, under Article 17 of the Criminal Code, if said ignorance is found to be reprehensible, the defendant remains liable and may only benefit from a penalty decrease.

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?

It is a defence arguing that the defendant did not know that he had engaged in a conduct which he knew was unlawful. If the defendant, knowing the applicable law, thought that the relevant factual framework was one which did not make it possible for him or her to be committing a crime, even though he or she was mistaken regarding the reality of the facts, Article 16 of the Criminal Code forbids him or her to be charged with a penalty as if he or she acted with criminal intent. Nevertheless, the defendant may be punished due to negligent behaviour; safeguarding the relevant criminal offence allows such possibility.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Portuguese law does not provide a general duty of report or denunciation *vis-à-vis* private entities or individuals. However, police, public officials and servants are obliged to report any crimes they become aware of during the performance of their duties to the Public Prosecutor's Office.

The failure to report imminent business crime practices by those who assume a leading position within an organisation, and who are therefore bound by law to prevent unlawful and harmful outputs arising from the company's activity, may result in the liability of the company itself (and the relevant omitting agents).

Regarding potential benefits from voluntary disclosure, besides being considered in the sentencing, Article 8 of Law 36/94 establishes a mitigation of the penalty for corruption cases where the defendant aids the investigation in the gathering of evidence or in the identification and capture of other criminally liable persons.

13 Cooperation Provisions / Leniency

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

Although there is no specific regime affording special protection to whistleblowers, several provisions grant a waiver or mitigate the penalty for perpetrators who, under certain conditions, report the crime (within limited timeframes) or who decisively contributed to the gathering of evidence which allows the identification and capture of other criminally liable persons.

In general terms, Law 93/99 establishes special measures for the protection of witnesses in criminal proceedings. In addition, Article 4 of Law 19/2008 establishes that government, state-owned company and private sector workers, who report offences that they become aware of during their work or because of the exercise of their duties cannot, in any form, including non-voluntary transfer or dismissal, be jeopardised. These workers also have the right to remain anonymous, until a charge is brought. After the charge, they also have the right to request a transfer to a different position, which cannot be refused.

In the event of an active corruption crime within the public sector, Article 9 of Law 36/94 establishes that the provisional suspension of the proceedings may be offered to a defendant where he or she has reported the crime, or the Public Prosecutor considers him or her to have decisively contributed to the unveiling of the truth.

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

Article 374-B of the Criminal Code is applicable to crimes of corruption in the public sector and undue receipt of an advantage

and, under certain conditions, establishes that penalties can be mitigated or waived altogether.

Waiving of the penalty under this article requires: (*i*) the perpetrator of the crime to report the crime within 30 days of its occurrence, assuming criminal proceedings have not already been initiated, and as long as the perpetrator voluntarily returns the undue advantage or its value; (*ii*) before the practice of the act or omission, the perpetrator to voluntarily repudiate the undue advantage previously accepted or return it; and (*iii*) before the act or omission is practised, the perpetrator to withdraw the promise or refuse its offering or request its return.

On the other hand, the penalty may be mitigated if the perpetrator: (*i*) specifically aids the investigation in acquiring and gathering decisive evidence or capturing other responsible persons; or (*ii*) practised the criminal facts by request from the public official, either directly or by means of an intermediary.

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?

The Portuguese Supreme Court of Justice has already declined the possibility of an agreed-upon sentence, mainly because of the lack of a specific legal regulation for it.

The defendant can keep silent because of the privilege against self-incrimination but not in exchange for reduced charges. The defendant can also confess the facts for which he or she is indicted, renouncing the giving of any further evidence with the facts being considered as proved, meaning the determination of the penalty is made immediately, reducing the judicial fee by half. However, the confession can only have said effects if it was free, complete and unreserved and if the maximum penalty for the crime is equal to or fewer than five years of imprisonment.

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?

There are no specific applicable guidelines.

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 a sentence on the defendant? Please describe the sentencing process.

After the court determines that a defendant is guilty of a crime, it will decree the sentence. The applicable punishment is established by the criminal statutes with a minimum and a maximum penalty. These limits can be extended or diminished in case there are mitigating (such as whether the commission of the crime was by abetting or was solely attempted) or aggravating circumstances (for instance, the defendant is a recidivist).

Within the legal boundaries of the penalty, the court decides the sentence by means of an analysis of the defendant's level of guilt and the deterrence requirements. Between the maximum limit given by the defendant's guilt and the minimum limit corresponding to the protection needs of the legal interest endangered by the commission of the crime, the specific value of the penalty will be set based on ensuring that the defendant will no longer commit crimes in the future due to said sentence.

In that calculation, the court considers (*i*) the degree of unlawfulness of the behaviour, the execution of the crime and the severity of its consequences, as well as the nature of the duties infringed by the defendant, (*ii*) the intensity of the criminal intent or negligence, (*iii*) the emotions displayed in the commission of the crime and the objectives and motives of the defendant, (*iv*) the personal conditions of the defendant and its economic situation, (*v*) the defendant's behaviour previous to the crime, especially when the defendant should reverse the consequences of the crime, and (*vi*) the condition of maintaining lawful behaviour if he or she is sentenced to a penalty.

Under certain circumstances, the court can replace the penalty with other sanctions, including suspension of imprisonment, a fine or even the prohibition to exercise a profession, function or activity.

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.

Similar to the process of sentencing a singular person, a sentence on a corporation must be primarily decided by the deterrence factor and consider (*i*) the degree of unlawfulness of the behaviour, the execution of the crime and the severity of its consequences, as well as the nature of the duties infringed by the defendant, (*ii*) the intensity of the criminal intent or negligence, (*iii*) the emotions displayed in the commission of the crime and the objectives and the motives of the defendant, (*iv*) the personal conditions of the defendant and its economic situation, (*v*) the defendant's behaviour previous to the crime, especially when the defendant is meant to reverse the consequences of the crime, and (*vi*) the condition of maintaining lawful behaviour if it is sentenced to a penalty.

The main applicable penalties are a fine, which might be replaced by an admonition, good conduct monitoring, and the dissolution of the legal entity. The court may also decide to require the corporation to exhibit certain behaviour needed to cease the unlawful activity, order a prohibition to enter into agreements, restriction of access to subsidies or grants or the exercise of an activity, the closure of an establishment and the publication of the sentence.

16 Appeals

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

A guilty verdict is appealable by the defendant. Both convictions and acquittals are appealable by the Public Prosecutor's Office, according to the legality and objectivity principles that guide its procedural conduct and depending on the position assumed by the Public Prosecutor's Office at trial, that – at least, in theory – may be entirely favourable to the defendant.

If the people whose interests have been frustrated by the commission of the crime, and for who the law especially intended to protect, demand to be recognised with the formal status of victims , they are also granted legal standing to appeal the acquittal of the defendant.

Parties who claim civil compensation from the defendant can also appeal against the parts of the decision not favourable to them.

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

The Portuguese Criminal Procedural Law does not separate a guilty verdict and the sentence itself. The internal reasoning,

voting and deciding process of the judges or jury is not appealable, only the sentence (which also communicates the guilty verdict of the court) itself and as a whole.

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

As stated in question 2.1 above, the appellate court's structure includes courts of appeal and the Supreme Court of Justice.

The courts of appeal have jurisdiction concerning factual and legal matters, whereas the Supreme Court of Justice only has jurisdiction regarding legal issues, not matters of fact. However, even when the law restricts the jurisdiction of the court to legal aspects, the appeal can be founded, if the invalidity results from the wording of the sentence, on insufficiency of proof for the decision, an irreconcilable contradiction of rationale or a mix of rationale and decision and manifest error in the assessment of evidence.

There are also extraordinary appeals in Portuguese jurisdiction, namely for the standardisation of jurisprudence, the revision of *res judicata* decisions under particular circumstances and the appeal of the enforcement of an unconstitutional rule to the Constitutional Court.

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

Excluding the rulings from the Constitutional Court, that are restricted to a purely normative analysis (although with practical implications within the proceedings, to be duly implemented by the appeal court) and what was said above regarding limitations of jurisdiction, the appellate court can fully alter the sentence of the lower court or it can remand the process for new trial regarding the whole case or on only the specific questions underlined in the appeal, whenever the superior court cannot decide on the case (for example, if a new critical assessment of proof is required).

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Morais Leitão is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, Morais Leitão is a reference in several branches and sectors of the law on the national and international level.
The firm's reputation amongst both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by a unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices. With a team comprising over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados) and Mozambique (HRA Advogados).

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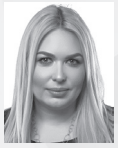

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1 General Criminal Law Enforcement

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

The enforcement authorities for business crimes are the regular Prosecutors' Offices ("PO"), supported by the Judicial Police; both have specialised professionals for economic crimes. They are divided by county and city/district (attached to courts of law), with a central structure in Bucharest. Furthermore, there are three specialised structures within the PO with the High Court of Cassation and Justice ("HCCJ") – the National Anticorruption Directorate ("NAD"), the Directorate for Investigating Organised Crime and Terrorism ("DIOCT"), both having central and territorial offices, and the central Department for Investigating Crimes of the Judiciary ("DICJ").

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Throughout the regular POs, the competence to investigate and prosecute a case results from the type of crime committed (less or more dangerous) or on the status of a person (e.g. senator, judge, general).

Moreover, Government Emergency Order ("GEO") no. 43/2002 for NAD, GEO 78/2016 for DIOCT and Law no. 304/2004 (as completed by Law no. 207/2018) for DICJ determine the criteria by which their special competence incurs and prevails (special categories of crimes for NAD and DIOCT, judiciary system personnel – judges and prosecutors – for DICJ).

Territorially, the competent authority is (generally) that of the place where the crime was perpetrated.

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?

The National Agency of Fiscal Administration ("NAFA") can conduct preliminary investigations regarding tax evasions, having the obligation to inform the POs when it suspects that a crime has been committed. However, any prosecution can be conducted only by a prosecutor. Similarly, the National Office for Prevention and Control of Money Laundering ("NOPCML") and the Fight Against Fraud Department ("DLAF") can also conduct preliminary inquiries regarding their areas of competence.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Business crime investigations and trials are less mediated than those of public servants, the reason being the spotlight is rarely occupied by such cases, especially since both companies and public authorities tend to be careful about the public image side effects of making such files public.

However, after the last echoes of the Microsoft case (involving not the company but high-level politicians and businessmen) have dissipated, other corporate names appeared in the media: Oracle, in relation to a criminal investigation involving charges of private corruption of its general manager; BRD – Societe Generale, for a corruption self-intimation of several HR employees; and the investigation by the National Bank of 16–17 banks for involvement in suspicious money laundering transactions.

2 Organisation of the Courts

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

The Romanian courts are structured territorially: Ordinary Courts (several in each county); Tribunals (one in each county); Courts of Appeal (15, regional); and the HCCJ. There are no specialised criminal courts in Romania. Most business crimes are judged by Tribunals or superior courts.

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

Romania has a continental judicial system, based on courts constituted only of judges.

3 Particular Statutes and Crimes

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

- **Securities fraud**

There are several incriminations for misrepresentation of facts about an entity's financial situation by its representatives, such as art. 134 of Law no. 24/2017, art. 279 of Law no. 297/2004 and art. 271 of Law no. 31/1990. Criminal intent is required.

• Accounting fraud

Any form of false statements/recordings in the accountancy will be criminally prosecuted, usually under art. 321 CC (and in conjunction with tax evasion). Other relevant and related crimes might be fraudulent management (art. 242 CC) or bankruptcy (simple or fraudulent, arts 240–241 CC). All require criminal intent.

• Insider trading

The incrimination is art. 134 of Law no. 24/2017, which also sanctions the abusive usage/disclosure of privileged information and market manipulation. Criminal intent is required.

• Embezzlement

Art. 295 CC incriminates the appropriation, use or disposal of money, values or any other assets managed or administrated by a person, for their benefit or for another. Intent is needed.

• Bribery of government officials

Bribery has a very broad spectre of incrimination, for both active and passive corruption: taking/receiving bribe (arts 289–290 CC), traffic peddling (art. 291 CC) and buying influence (art. 292). Law no. 78/2000 further criminalises other specific conducts by officials. Criminal intent must be proven.

• Criminal anti-competition

Art. 5 of Law no. 11/1991 regulates many such crimes: the use of a business, emblem or packaging that may cause confusion with those legitimately used by another trader or manufacturer; import, export, storage, sale of goods/services, etc. bearing false patents/trademarks/other types of intellectual property rights to mislead others; disclosure, acquisition; or use of commercial secrets by third parties as a result of commercial/industrial espionage. All require criminal intent.

• Cartels and other competition offences

Art. 65 of Law no. 21/1996 sanctions cartel-type agreements performed with the purpose of hindering, restricting or distorting competition.

• Tax crimes

Tax fraud crimes are incriminated by Law no. 241/2005 (arts 3–9) in a variety of forms, all of which can be committed only with intent: e.g. registering false incomes/expenditures, not registering real commercial operations, hiding goods and assets, not complying with reporting duties, or forged books.

The penalties are some of the most severe in Europe – if the prejudice exceeds EUR 500,000, the prison sentence can be up to 15 years.

• Government-contracting fraud

Several crimes (committed with intent) should be observed: alteration of public tenders (art. 246 CC); illegally obtaining funds (art. 306 CC); and diversion of funds (art. 307 CC).

One of the most controversial crimes in Romania is that of abuse of office (art. 297 CC), which can consist of any deed of a public servant who fails to perform an act or does it faultily (breaching a legal duty provided by a Law or Government Ordinance), causing damage or violating the rights or legitimate interests of a person or entity. Through the soon-to-be-implemented legislative changes, this crime will suffer important limitations, including a threshold for the damage.

• Environmental crimes

Art. 98 of GEO 195/2005 incriminates certain actions of pollution, destruction, transport of dangerous goods, etc., if they are susceptible to endanger public health or the life of humans, animals or plants. Intent and negligence could be incurrent.

• Campaign-finance/election law

Arts 385–392 CC sanction different intentional misconducts: forgery of votes; corruption of voters; improper voting procedures; etc. Additionally, art. 13 of Law no. 78/2000 incriminates the action of the leader of a party/syndicate/patronage/NGO to use his influence or authority for obtaining, for himself or another, money or other undeserved goods.

• Market manipulation in connection with the sale of derivatives

This is criminalised in art. 120 of Law no. 24/2017 and sanctioned by art. 134 of Law no. 24/2017, the same as insider trading.

• Money laundering or wire fraud

Money laundering is defined in Law no. 129/2019 (art. 49). Wire frauds are provided by art. 249 CC (computer fraud) and arts 250–251 CC (fraudulent financial operations). All require criminal intent.

• Cybersecurity and data protection law

Cybercrimes are incriminated in arts 360–365 CC: illegal access to an e-system; illegal interception of e-data; alteration of e-data; unauthorised transfer of e-data; and illegal operations with devices or software.

There are no direct data protection crimes in Romanian law (just contraventions).

• Trade sanctions and export control violations

Law no. 86/2006 (the Customs Code) incriminates certain specific conducts, such as smuggling, using fake or forged customs documents, tampering in any form (collecting, holding, producing, transporting, receiving, depositing, offering, unpacking, selling) with assets that have a special customs regime, if the person knows that the assets have been/are destined to be smuggled, etc.

• Any other crime of particular interest in your jurisdiction

One of the most recurring crimes in Romania (usually a "complement" of business crimes – tax evasion, money laundering, corruption, etc.) is of "organised criminal group" (art. 305 CC), namely initiating, creating, joining or supporting an organised criminal group, which is defined as a structured group, made up of three or more persons, which exists for a certain period and acts in a coordinated manner for the purpose of committing one or more crimes.

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

Yes, there are crimes which are sanctioned in attempted form (usually with lesser penalties), whereas for other crimes any preparative acts or beginning of execution are assimilated to the crime in completed form.

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?

Corporate criminal liability can incur when the crimes are committed by the representatives or the employees in the performance of the object of activity of the legal entities or in their interest or on their behalf.

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

Criminal liability is personal for corporate and natural persons alike and can also coexist; the latter when the managers/officers/directors/employees of the company have perpetrated a crime themselves (with intent or by negligence). One's criminal liability does not automatically determines the other's.

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?

In most cases, individuals are the main targets of the investigations, yet corporate criminal liability has increased in occurrence following an increased accent placed on asset recovery.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Yes, the corporate criminal liability and other consequences will be transferred to the resulting legal entity.

5 Statutes of Limitations

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

The general statute of limitations (of three, five, eight, 10 or 15 years, depending on the penalty limits) starts at the date of the perpetration of the crime and until the date of the first investigative act communicated to the defendant (which interrupts the course of the statute of limitations).

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

Once the statute of limitations has been reached, the crimes cannot be prosecuted unless they are part of a continuous or continuing crime (actions or inactions that are part of the same crime, extended in time but with the same criminal resolution and against the same person), when the statute of limitations starts from the date of the last action/inaction.

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

The special statute of limitations is met when, no matter the number of interruptions of the general statute term, the general term plus an extra term is reached until there is a definitive conviction.

The extra term is half the general term for crimes committed before April 22nd, 2012 and equal to the term for crimes after this date. The recent modifications of the CC (not yet entered into force) provide for a return to an extra term of half the general one.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

The enforcement agencies can enforce their authority outside Romania if the author of the business crime is a Romanian citizen/entity and if the sanction stipulated by the Romanian law is imprisonment exceeding 10 years, or if the business crime is also incriminated in the country where it was committed. In all situations, authorisation must be granted by the Chief Prosecutor of the PO with the HCCJ/competent Court of Appeal. In terms of frequency of international cooperation, in 2019 there were over 13,000 criminal investigations in which Romanian and foreign authorities cooperated, at least 100 of them (those in the competence of NAD) being in business crime cases.

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

Investigations can be initiated by criminal complaint from the victim, through denunciation or intimation from a third party (public authorities included), or *ex officio*.

The complaint, denunciation and the intimation must follow specific rules (author, form, content, term of submission), whereas the *ex officio* is a self-intimation ordinance drafted by the prosecutor himself.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

International criminal cooperation is one of Romania's strong points in criminal enforcement, considering that, individually or as a Member State of the EU, Romania is part of multiple international and European conventions or bilateral treaties that establish legal mechanisms for cooperation between enforcement authorities. At a national level, Law no. 302/2004 regulates the international judicial cooperation in criminal matters. INTERPOL, EUROPOL and the FBI have offices/representatives in Romania. Also, Romania is one of the EU members which participates in the operationalisation of the European Public Prosecutors' Office, the office being led by a Romanian national, Mrs. Laura Codruta Kovesi, former Chief Prosecutor of NAD.

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 government, through its criminal investigation authorities, has the power to gather any information or documents/material evidence from any person that might know something about the crime, either by testimonies or requests to provide information/documents/material evidence. Failure to comply can constitute a crime (art. 271 CC – obstruction of justice). Furthermore, the prosecutor can request and use surveillance, wiretappings or other special investigation methods to collect information.

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?

If the criminal investigation authorities have reasonable suspicion that a person (companies included) is in possession of documents that might be necessary during a criminal investigation, they can demand those documents are provided, in exchange for a proof of surrender. However, they can also raid the headquarters if they believe the search could lead to discovery and collection of evidence related to a crime, to the preservation of evidence or to capturing a suspect/defendant. During the raid, the documents can be seized if the authorities have reasonable suspicion that they are related to the crime. Raids can also be ordered in cases where requests for documents are ignored.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The client-attorney relationship is strictly privileged and confidential and derived documents or communications cannot be requested nor used (if obtained otherwise) as evidence by the authorities unless the attorney himself is suspected of having committed a crime. Technical supervision is also excluded.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

As Romania is part of the European Union, GDPR is fully applicable, including exceptions. Thus, upon request of courts of law or prosecutors (national and foreign alike), producing information or documents is mandatory for all persons, under criminal sanction (obstruction of justice).

7.5 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?

The rules for raids, search warrants and seizure of evidence are the same for individuals and companies.

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

Please see the answers to questions 7.2 and 7.5 above.

Questioning of Individuals:

7.7 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?

Any person can be questioned as a witness, whereas refusal to comply can lead to criminal prosecution for perjury (art. 273 CC). Suspects and defendants have the right to remain silent (invoking the privilege against self-incrimination) throughout the entire criminal process (investigation and trial alike), as granted by arts 78/83 Criminal Procedure Code ("CPC").

The questioning usually takes place in the office of the prosecutor/police officer, except in special cases (e.g. hospital, jail, etc.). An oath must be taken by witnesses (perjury rules applicable). The questioning can be recorded (audio/video) and the testimony itself is mentioned in writing (computer-typed) and signed by the witness.

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

As mentioned above, any person who has information about a crime can be summoned as a witness, typically at the PO/Police headquarters. This person has an obligation to be present at the date and place mentioned in the subpoena and to tell the truth.

Failure to be present can result in the issuance of an Enforced Presentation Order, when a police officer identifies and escorts a person to give testimony.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The right to be assisted (not represented!) by an attorney during questioning is expressly offered to the suspect, defendant, victim, civil party or civil liable party. The CPC can be interpreted to justify such possibility also in relation to witnesses (arts 31 and 34), however many criminal investigation authorities consider the respective CPC articles as a flaw of corroboration with art. 88 CPC and, thus, prohibit legal assistance to witnesses during testimonies. The imminent legislative modifications will clear the issue and expressly grant attorney assistance privileges to witnesses.

Refusal to testify/to answer questions as a witness or the failure to tell the truth can constitute perjury (art. 273 CC) or the crime of accessory after the fact (art. 269 CC), but these two cannot both be incident for the same action. However, a witness cannot be coerced into testifying regarding aspects of which he has no recollection or is uncertain.

A witness can only refuse to testify (usually this happens during questioning) if he/she invokes the privilege against self-incrimination or is related to a suspect/defendant – spouse (or previous spouse), sibling or their direct ancestors or descendants, or attorney.

If a person first testifies as witness in an investigation and, afterwards, is accused/charged regarding the respective deeds, the witness testimony cannot be used against him (or even

removed from the file, along with all derived evidence obtained – debates exist in practice and doctrine on this aspect).

Invoking the privilege of self-incrimination cannot be used against the suspect/defendant (even if, more than once, in practice this is considered as a negative personal circumstance).

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Once the criminal authority is informed of a crime through complaint, denunciation or self-denunciation (and these comply with certain formal procedural requirements), the prosecutor initiates criminal investigation *in rem* (regarding the deed) if none of the cases that prevent the initiation and exercise of a criminal action exist (art. 16 CPC) and no matter if a person is named as a possible perpetrator. If reasonable suspicions arise/are confirmed against a certain person, then the criminal investigation is continued against that person, again through prosecutorial ordinance.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The main principles of the criminal investigation are "the pursuit of truth" (reason for which a prosecutor must obtain evidence both against and in favour of the suspect/defendant), "the presumption of innocence" (innocent until proven guilty – after a definitive appellate court decision) and "the mandatory performance of the criminal investigation" (the authorities are obligated to clarify the facts and circumstances of the case, based on evidence, and to start and exercise the criminal action when such evidence demonstrate that a crime has been committed by a certain person and no legal impediments exist).

As exceptions, the prosecutor can waive the exercise of the criminal action (drop the charges) if, considering the concrete elements of the case, there is no public interest in pursuing it further and must stop an investigation if the crime requires a preliminary complaint from the injured person and this is not formulated in the legal term of 90 days or is withdrawn.

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

Starting from February 1st, 2014, Deferred Prosecution Agreements ("DPA") were introduced in CC (arts 478–488), along with a couple of procedural solutions better adapted to European and international requirements: in the criminal investigation phase – waiving the exercise of the criminal action (dropping criminal charges, art. 318 CPC) and, in the trial phase – waiving criminal punishment (arts 80–82 CC) and postponing the application of a punishment (arts 83–90 CPC).

In all situations, there are several conditions which must be met: a maximum punishment for the crime (five or seven years); certain circumstances of the deed/person; and the proportionality with the deed. Furthermore, the suspect/defendant can be obligated to comply with some supervision obligations (if the obligations are not complied with in bad faith, the prosecutor/judge can overturn the decision).

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Yes, a Court must verify the legality and thoroughness of the Ordinance of the prosecutor to drop charges or to conclude a DPA and can dismiss it if it considers the solution to be too lenient or does not meet all legal (mainly formal) conditions.

8.5 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 may apply.

The civil action of the damaged person against the defendant can be exercised either in the criminal investigation and trial, or through a separate civil action (tort liability). During any criminal procedure (investigation or trial) the suspect/defendant and the victim can draft a settlement or mediation agreement concerning the civil action.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The prosecutor has the burden of proof with regard to the criminal action. In a civil action, the damaged/civil party (who formulates demands) bears the burden of proof.

Should a defendant request administration of evidence, the prosecutor/court of law decides on its relevance and utility. Then, they proceed in obtaining it, allow the defendant to submit documents directly, obtain testimonies or documents from other persons/authorities, etc.

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

A person can be only convicted if the court is convinced that the charge was proven beyond any reasonable doubt.

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

The arbiter of facts is the Court of Law (one or more judges), which determines whether the burden of proof was satisfied or not and, consequently, can convict or should acquit the defendant.

10 Conspiracy / Aiding and Abetting

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

Yes, a person who facilitates or helps the author in any way before or during the perpetration of the crime, as well as the person who promises, before or during the crime, that they will buy the assets originating from the crime or that they will help the author in any way is an accomplice to that crime (art. 48 CC). A person who, with direct intent, determines another to commit a crime is considered an instigator (art. 47 CC). Both are criminally liable within the same punishment limits as the author of the crime (even if the author commits the act without intent).

An accessory after the fact (art. 269 CC) is the person who helps the perpetrator, after the crime, for the purposes of preventing or hindering the investigation, criminal liability, serving the sentence or a custodial measure. A fence (art. 270) is a person who receives and sells stolen goods, knowing or foreseeing, based on concrete circumstances, that the assets originate from criminal activities. Both are punishable with imprisonment (yet this cannot exceed the sentence of the author).

Moreover, a person can be liable for the crime of initiating, creating, adhering or supporting an organised criminal group, in which case a crime itself is committed even before the originally intended crime.

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?

Guilt is one of the key elements of a crime (art. 15 CC), the reason for which either intent or negligence must exist and consequently be proven (by the accusation) for each crime (art. 16 CC), as each incrimination requires.

It is possible to defend against criminal charges by showing that there was either no criminal intent or there was just negligence (in cases in which the crime can either be a lesser one, or the deed may not be incriminated at all).

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?

CC regulates (art. 30) the error as an exonerating circumstance, which incurs when the perpetrator did not know of the existence of a status, situation or fact which determines the criminal nature of a deed. Furthermore, ignorance of a legal stipulation (other than part of the criminal law) can also be claimed. The burden of proof belongs to the defendant.

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?

As above, the defendant must prove lack or impossibility of knowledge.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Failure to report (art. 266 CC and other special norms) applies to any person who does not inform the criminal investigation authorities about the perpetration of a crime of a certain gravity (e.g. crimes against the life of others, crimes resulting in the death of a person, crimes against national security). Family members of the author(s) are exempted. Public servants and persons/officials having controlling duties also have reporting obligations if they become aware of the commission of a crime during their service or, respectively, regarding persons or controlled activities.

Furthermore, a person can, for some crimes (e.g. giving a bribe, buying influence), not be criminally charged if he reports the crime before the authorities become informed of it, whereas, in all other cases, acknowledgment of guilt can result in a reduction of the sanctioning limits by ⅓.

Additionally, the participant (instigator or accomplice) of any crime can avoid sanction if, before the deed is discovered, he denounces it, so that the consummation of the crime can be prevented, or if he prevents himself from the consummation of the crime.

Lastly, voluntary disclosure of other crimes (not known to the authorities and committed by other persons) could also be rewarded (art. 19 of Law no. 682/2002) with a reduction of the punishment limits by half. Imminent criminal laws intend to reduce this possibility to crimes perpetrated more recently than one year before the denunciation.

13 Cooperation Provisions / Leniency

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

As mentioned above, voluntary disclosure or cooperation may lead to total or partial immunity from criminal investigation/sanction.

Furthermore, cooperation in any investigation (even in one where the defendant does not acknowledge guilt) can also be considered as mitigating circumstances (possible, not mandatory), with the effect of a reduction of the sanctioning limits by a third. Cooperation can also be considered the settlement of the

prejudice, with the important exception of tax evasion, where payment in full results in a reduction by a half of sanctioning limits (or up to full immunity for tax evasions lower than EUR 100,000 committed before March 2013).

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

Cooperation can range from providing the authorities with requested information/documents and up to full admission of guilt, with the consequences mentioned previously.

In all cases of admission of guilt, a DPA could be concluded with the prosecutor (as per the request of the defendant) or a simplified "admission of guilt" court procedure could be requested (to the court of law), which usually results in lesser punishments since sanction limits are automatically reduced by ⅓ and punishments tend to be oriented towards a minimum, or near to it, plus the highly likely benefit (if final sanction is below three years' imprisonment) of not actually doing jail time.

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?

As mentioned in section 8 above, DPAs are a possibility in the Romanian criminal system after February 1st, 2014 (no matter what the perpetration date of the crime). However, DPAs can only refer to an agreed-upon sentence (which still has to be confirmed by a judge, for legality) and cannot reduce the charges (from more to less severe crimes or disproving lesser crimes altogether, like in other jurisdictions). Furthermore, a simplified court procedure can also be applicable in such cases (of admission of guilt), as mentioned above.

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?

Please see section 8 above.

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 a sentence on the defendant? Please describe the sentencing process.

There are several particularities to the criminal condemnation of a moral person (art. 135 CC): the punishment itself can only consist of a fine (the "fine-days" system), though there are specific ancillary punishments (disclosure of condemnation in the media, closure of operation locations for certain periods of time, forbiddance to participate in public tenders, suspension of activity and dissolution of the company).

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.

To be held criminally liable (as mentioned in section 4 above), a corporation must not be part of the public domain (public institution). Insolvent/bankrupt companies, until judicial dissolution, can be held criminally liable.

16 Appeals

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

Yes, any verdict is appealable by the parties of the file (defendant, prosecutor, injured person/civil party or civilly liable party.

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

See the answer to question 16.1 above.

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

The appeal phase is characterised by the following principles: the suspensive effect (appealing a sentence suspends in full its effects); the speciality principle (the court is bound to examine the case only with respect to the person who appealed it and the person referred to in the appeal, but under all relevant aspects related to the facts and the law); the *non reformatio in pejus* principle (the court cannot create a more difficult situation for the appellant); and the extensive effect (the court shall extensively examine the case also regarding parties which did not file for appeal or to whom it does not refer, if it thus improves their procedural situation).

The appellate court must examine all relevant evidence obtained in the criminal investigation phase and first court procedure but can also request new evidence (within the limits of the appeal).

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

The appellate courts can reverse the ruling of the first court and issue a new ruling regarding both the criminal and civil action, with full powers (within the limits of the appeal). The only exception is that, if a defendant was acquitted in first court, a condemnation can only be ordered if new evidence is provided in support of his guilt (condemnation cannot be ordered just on sheer re-interpretation of evidence obtained before).

Moreover, the appellate courts can order a retrial by the first court in case of summoning/subpoena incidents regarding the defendant; oversight of solutioning charges or claims; or absolute nullity cases.

Simona Pirtea is a highly appreciated business criminal law practitioner, with more than a decade of intensive professional activity in the legal (mainly Criminal Law) and security fields, having proven her strong technical knowledge and consistent business-oriented approach throughout a wide array of cases involving corporate and private clients alike.
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Mădălin Enache has, over the last 15 years, practised extensively and exclusively in high-level white-collar criminal cases, acquiring first-class professional expertise in some of the most difficult and media-scrutinised criminal investigations and trials, being known in the field as one of the highest skilled practitioners, building a solid reputation as a leading criminal law attorney, acknowledged and recognised by clients and global legal publications (*Chambers Europe*, *The Legal 500*, etc.).
Mădălin counselled, assisted and represented renowned international and Romanian corporate clients, key figure businessmen and executives and high-profile politicians involved in a wide range of cases in front of the criminal investigation authorities or courts of law, at the highest level of jurisdictions, having as object mainly corruption cases, financial and fiscal frauds, embezzlements of public/EU funds, money laundering, abuse of office, etc.
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EPA was set up in 2018, after the merger of the specialised law boutique offices of two highly reputed "new wave" Business Criminal Law attorneys, Ms. Simona Pirtea and Mr. Mădălin Enache, both with extensive experience over the last 15 years, mainly in White-Collar Criminality cases, but also in Business Crime matters of relevant importance.
The firm's focal area of activity is Criminal Law – White-Collar & Business Crimes, in its two main components: criminal investigation & litigation, as well as business crime consultancy & counselling (business ethics and integrity). Be it corruption crimes or money laundering, economic criminality or abuse of office, embezzlement of EU funds or cybercrimes, copyright or environmental criminal breaches, we have across-the-board knowledge and experience, as recognised by some of the most prestigious publications and publishers (such as *The Legal 500* and *Chambers Europe*).
EPA mainly works for foreign corporate clients, as well as for their executives and officers, but also acts on behalf of local companies, businessmen, public figures, politicians and officials, fighting criminal law battles from all procedural stances.

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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?

The Attorney-General, as the Public Prosecutor ("**PP**"), controls and directs all criminal prosecutions and proceedings, including prosecutions of business crimes. The Attorney-General has the power to institute, conduct or discontinue any proceedings for any offence. This power may also be exercised by officers of the Attorney-General's Chambers ("**AGC**"), who are appointed to carry out the PP's duties.

Several enforcement authorities including the Commercial Affairs Department ("**CAD**") within the Singapore Police Force, the Corrupt Practices Investigation Bureau ("**CPIB**"), and the Monetary Authority of Singapore ("**MAS**") investigate and refer matters to the AGC for criminal prosecution. These enforcement authorities are organised at the national level.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The enforcement agency that will investigate a matter depends on the nature of the offence. For example, CAD is the main white-collar crime investigation agency, and CPIB is the only agency authorised to investigate corruption offences under the Prevention of Corruption Act (Cap. 241) ("**PCA**").

Although enforcement agencies may provide recommendations on the appropriate charges to be brought, the final decision to prosecute lies with the AGC.

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?

A person, including a company, may face civil penalties for committing business crimes. This will be provided in the specific legislation governing the offence.

For example, section 232 of the Securities and Futures Act (Cap. 289) ("**SFA**") states that the MAS may, with the PP's consent, bring a court action to seek a civil penalty for a breach of relevant SFA provisions. The court may order a civil penalty of a sum not exceeding the greater of S$2 million, or three times the amount of profit gained or loss avoided as a result of the contravention.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In July 2019, three individuals were convicted of multiple insider trading offences and sentenced to imprisonment terms ranging from 20 to 36 months. They had engaged in a "front-running" arrangement (using advance information of pending share orders to illegally benefit from trading shares) for over seven years, resulting in S$8.07 million in profits. This was the first case of front-running prosecuted as an insider trading offence in Singapore, which carries a heavier penalty.

In November 2019, a Singaporean company director was sentenced to 34 months' imprisonment after pleading guilty to multiple counts of cheating and illegally supplying luxury goods to North Korea in breach of United Nations sanctions. He had created a financing scheme based on false invoices to deceive five banks of about S$130 million.

In November 2019, the MAS imposed a civil penalty of S$11.2 million on UBS AG as its client advisors had engaged in acts that deceived or were likely to deceive clients. The client advisors, among other things, did not adhere to the spread or inter-bank price of a trade as agreed with or understood by the client.

2 Organisation of the Courts

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

The Singapore court system has two tiers: the Supreme Court (comprising the High Court and Court of Appeal); and the State Courts (comprising, among other things, the Magistrates' Courts and District Courts). Criminal cases are heard at first instance in the State Courts or High Court. The Magistrates' Courts and District Courts may try any offence for which the maximum term of imprisonment provided by law does not exceed five years and 10 years, respectively, or which is a fine-only offence (sections 7(1)(a) and 8(1), Criminal Procedure Code (Cap. 68) ("**CPC**")). The High Court tries all other offences at first instance.

Appeals from the State Courts are heard by the High Court, and appeals from the High Court are heard by the Court of Appeal.

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

Singapore does not have jury trials. Trials are typically heard before a judge.

3 Particular Statutes and Crimes

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

• Securities fraud

Prohibited market conduct relating to capital markets products such as securities is set out in sections 196 to 204, SFA.

For example, it is an offence to create a false or misleading appearance of active trading in any securities, or with respect to the market for, or the price of, such securities (section 197, SFA). Further, a person must not carry out two or more transactions in securities of a corporation (including derivatives), which will have the effect of manipulating the price of the securities, with the intent to induce other persons to subscribe for, purchase or sell securities of the corporation or a related corporation (section 198, SFA).

• Accounting fraud

Under section 477A, Penal Code (Cap. 224) ("**PC**"), it is an offence for a clerk, officer or servant to intentionally and with intent to defraud, destroy, alter, conceal, mutilate or falsify any account that is in his employer's possession, or make or abet the making of any false entry in such account.

• Insider trading

Insider trading is governed by sections 213 to 231, SFA. In general, it is an offence to trade or procure another person to trade in the securities of a corporation while in possession of materially price-sensitive information concerning the corporation that is not generally available. Notably, the Prosecution does not need to prove that the accused intended to use the said information (section 220(1), SFA).

• Embezzlement

Criminal breach of trust ("**CBT**") is covered under sections 405 to 409, PC. A person commits CBT if he is entrusted with or has dominion over property, which he dishonestly misappropriates or converts to his own use. If convicted of simple CBT, the accused faces up to seven years' imprisonment and/or a fine. Public servants, bankers, merchants, or agents could be charged for aggravated CBT, which carries a maximum punishment of 20 years' imprisonment, and shall also be liable to a fine.

• Bribery of government officials

Section 5, PCA makes it an offence for a person to corruptly give or corruptly receive any gratification as an inducement to or reward for any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed, in which such public body is concerned.

Notably, where the giver or receiver is a person in the employment of the Singapore government or any public body, a rebuttable presumption of corruption arises (section 8, PCA).

• Criminal anti-competition

Anti-competitive practices are regulated by the Competition Act (Cap. 50B). Notably, there is no criminal liability for contravening competition law *per se*. However, the Competition and Consumer Commission of Singapore ("**CCCS**") may impose financial penalties for infringements (section 69, Competition Act).

• Cartels and other competition offences

Section 34, Competition Act prohibits cartel activities, specifically agreements between undertakings, decisions by associations of undertakings or concerted practices which have the object or effect of preventing, restricting or distorting competition within Singapore.

• Tax crimes

Tax evasion is punishable under the Income Tax Act (Cap. 134) ("**ITA**"). Any person who wilfully, with intent to evade or assist any other person to evade tax, omits any income that should be included in a tax return, makes any false statement in a tax return, or gives a false answer to any question or request for information from the Inland Revenue Authority of Singapore, shall be guilty of an offence (section 96(1), ITA).

• Government-contracting fraud

There is no specific legislation dealing with government-contracting fraud. Fraudulent acts such as cheating may be punished under the PC.

• Environmental crimes

The Environmental Protection and Management Act (Cap. 94A) governs environmental crimes concerning air, water, land and noise pollution, as well as hazardous substances.

• Campaign-finance/election law

The Parliamentary Elections Act (Cap. 218) and Presidential Elections Act (Cap. 240A) prohibit certain corrupt and illegal practices relating to parliamentary and presidential elections, respectively.

• Market manipulation in connection with the sale of derivatives

See the answer to "Securities fraud".

• Money laundering or wire fraud

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) ("**CDSA**") criminalises the laundering of benefits of drug dealing/criminal conduct. These include:

(i) assisting another to retain the benefits of drug dealing/criminal conduct (section 43/44, CDSA); and

(ii) acquiring, possessing, using, concealing or transferring the benefits of drug dealing/criminal conduct (section 46/47, CDSA).

• Cybersecurity and data protection law

The Computer Misuse Act (Cap. 50A) ("**CMA**") sets out penalties for various offences, including unauthorised access to computer material, use or interception of computer service, and disclosure of access code (sections 3, 6, and 8, CMA).

• Trade sanctions and export control violations

Singapore, as a member of the United Nations, implements trade sanctions imposed by the United Nations Security Council through the United Nations Act (Cap. 339). The regulation and control of exports is also governed by the Regulation of Imports and Exports Act (Cap. 272A), Strategic Goods (Control) Act (Cap. 300), and Customs Act (Cap. 70).

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

A person who attempts to commit an offence punishable by the PC or any other written law, shall be guilty of an offence (section 512, PC). This is even if the attempted crime is not completed.

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?

An entity can be liable for criminal offences. Generally, in every written law of Singapore, the word "person" includes any company (section 2(1), Interpretation Act (Cap. 1)).

An entity can be liable for an employee's conduct if the employee effectively controls what the entity does and can be said to be its "directing mind and will".

Sometimes, entity liability is specifically provided for in statute. For example, for insider trading, section 226(1), the SFA states that a corporation is taken to possess any information that its officer possesses and that came into his possession in the course of the performance of his duties.

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

The managers, officers and directors of an entity may be personally liable for a crime if the specific legislation governing the offence provides for such liability, and the requirements therein are satisfied. For example, section 141(1) of the Customs Act states that where an offence has been committed by a company, any person who at the time of the offence was a director, manager, secretary or other similar officer shall be deemed guilty of that offence unless he proves that: (a) the offence was committed without his consent or connivance; and (b) he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and all the circumstances.

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?

Although no official policy has been published, the Attorney-General stated in a newspaper op-ed in November 2015 that in the context of business crimes, the decision to take action against an entity requires careful consideration to ensure that disproportionate collateral damage is not inflicted on innocent parties such as the entity's employees and shareholders.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Generally, a company, as a separate legal entity, will remain liable for any offence even after a merger/acquisition.

5 Statutes of Limitations

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

There is no limitation period for enforcing or prosecuting criminal offences.

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

See question 5.1.

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

See question 5.1.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Enforcement agencies do not have the jurisdiction to carry out investigations outside Singapore. However, they may request assistance from foreign authorities (see question 6.3).

Certain statutes have extra-territorial reach. For example, section 37, PCA provides that a Singapore citizen may be prosecuted for an offence under the PCA that is committed outside Singapore as if it had been committed in Singapore.

It is not uncommon for the AGC to rely on extra-territorial jurisdiction to prosecute business crimes.

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

Investigations are initiated when a complaint or report is lodged and the relevant authority has reason to suspect that an offence has been committed. In the case of the police, their powers of investigation are set out in Part IV, CPC.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The Mutual Assistance in Criminal Matters Act (Cap. 190A) sets out the mechanisms that Singapore uses for cooperation with foreign countries in relation to criminal matters. Singapore is also a party to multiple international treaties that facilitate the provision and obtainment of international assistance in criminal matters. Such assistance includes the taking of evidence, locating or identifying persons, and enforcing foreign confiscation orders.

7 Procedures for Gathering Information from a Company

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

Under the CPC, the police have the power to, among other things, compel the production of documents, examine witnesses, conduct searches for documents and other things, seize property, access computers, and arrest suspects (sections 20, 22, 34, 35, 39 and 64, CPC).

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?

Where the police consider that any document or thing is necessary or desirable for any investigation, inquiry, trial or other proceeding under the CPC, the police may issue a written order to require the company to produce or give the police access to that document or thing (section 20, CPC).

Additionally, the court may issue a search warrant if, among other things, it considers that a general or specific search or inspection will serve the purposes of justice or of any investigation, inquiry, trial or other proceeding under the CPC (section 24, CPC). In this regard, the police are empowered to search, without a warrant, for any property alleged to have been stolen, if there is reasonable cause for suspecting that such stolen property is concealed or lodged in any place and the police have good grounds for believing that the property will likely be removed due to the delay in obtaining a search warrant (section 32, CPC).

The police may seize any property: (a) in respect of which an offence is suspected to have been committed; (b) which is suspected to have been used or intended to be used to commit an offence; or (c) which is suspected to constitute evidence of an offence (section 35, CPC).

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The company under investigation may invoke legal advice privilege and litigation privilege at common law to resist the disclosure of certain types of communications and documents. Legal advice privilege may be claimed over communications between the company and their lawyers made confidentially for the purpose of obtaining or giving legal advice. Litigation privilege may be maintained over documents that were created for the dominant purpose of litigation or contemplated litigation.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Section 13 of the Personal Data Protection Act 2012 (No. 26 of 2012) ("**PDPA**") provides that an individual's consent is required before an organisation may collect, use or disclose his personal data, unless the collection, use or disclosure without the individual's consent is required or authorised under the PDPA or any other written law. Specifically, the organisation may collect an individual's personal data without his consent, or from a source other than the individual, if the collection is necessary for any investigation or proceedings, and if it is reasonable to expect that seeking the individual's consent would compromise the availability or accuracy of the personal data (paragraph 1(e), Second Schedule, PDPA).

An organisation transferring personal data to a country outside Singapore must ensure that it protects the personal data to a standard that is comparable to the protection under the PDPA (section 26(1), PDPA).

7.5 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?

See question 7.2.

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

The investigative powers under the CPC are also applicable to third parties. See question 7.2.

Questioning of Individuals:

7.7 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?

In the course of investigations, the police may issue a written order requiring anyone within the limits of Singapore, who appears to be acquainted with any of the facts and circumstances of the case, to attend before the police (section 21, CPC). The police are empowered to examine such person orally (section 22(1), CPC). It is an offence for a person to refuse to answer a public servant authorised to question him (section 179, PC).

The police may record a statement from the person in writing. This statement must be read over to the person, interpreted for him (if he does not understand English), and be signed by him (sections 22(3) and 22(4), CPC).

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

The investigative powers under sections 21 and 22 of the CPC are also applicable to third parties. See question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

An arrested person shall be allowed to consult and be defended by a legal practitioner of his choice (article 9(3), Constitution). However, this right only arises within a reasonable time after arrest, which depends on the circumstances of each case. There is no right to be represented by a lawyer during questioning.

In police investigations, a person examined must state truly what he knows of the facts and circumstances of the case, but need not say anything that might expose him to a criminal charge, penalty or forfeiture (section 22(2), CPC).

However, a person questioned under section 27 of the PCA has no privilege against self-incrimination as CPIB officers are empowered to require a person to give information in relation to corruption offences and the person is legally bound to give that information.

The court may draw an adverse inference from an accused's silence, where: (a) he was charged or informed by the police that he may be prosecuted for an offence; and (b) he failed to mention any fact which he subsequently relies on in his defence, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so questioned, charged or informed (section 261, CPC).

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal proceedings against any person may be initiated pursuant to an arrest, a summon, an arrest warrant, a notice to attend court or any other mode for compelling the attendance of a person in court as provided in the CPC or any other written law (section 150, CPC).

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Guidelines on prosecutorial decisions are not published in Singapore. Generally, after investigations, the AGC will assess whether there is a reasonable prospect of conviction and whether it is in the public interest to prosecute. Ultimately, it is a matter of prosecutorial discretion (see questions 1.1 and 1.2).

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

Criminal investigations into certain specified offences may be resolved through deferred prosecution agreements ("**DPAs**"). These are available to companies but not individuals. The decision to enter into a DPA is a matter of prosecutorial discretion.

The subject of an investigation may also write letters of representation to urge the PP to not initiate criminal proceedings, or if charges have already been brought, to withdraw, amend, or reduce the charge(s). The PP has the discretion to decide whether to accede to these requests.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

A DPA comes into force only when the High Court approves it by making a declaration that the DPA is in the interests of justice, and that its terms are fair, reasonable, and proportionate.

8.5 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 may apply.

As stated in question 1.3, the MAS may, with the PP's consent, bring a court action to seek a civil penalty for a breach of relevant SFA provisions (section 232(1), SFA).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Generally, the Prosecution bears the burden of proving the elements of the offence, and the accused bears the burden of proving any affirmative defences.

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

The Prosecution must prove the elements of the offence beyond a reasonable doubt, while the accused must prove any defence on a balance of probabilities.

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

The trial judge is the arbiter of fact and determines whether the party has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

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

A person abets an offence if he: (a) instigates any person to commit the offence; (b) engages with one or more other person(s) in any conspiracy for the commission of the offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to commit the offence; or (c) intentionally aids the commission of the offence (section 107, PC). Notably, to constitute the offence of abetment, it is not necessary that the act abetted should be committed.

Whoever abets an offence shall, if the act abetted is committed in consequence of the abetment, and there is no express provision for its punishment, be punished with the punishment provided for the offence (section 109, PC).

Further, when a person agrees with another person to commit an offence or cause an offence to be committed, they may be liable for criminal conspiracy (section 120A, PC). A party to a criminal conspiracy shall, where there is no express provision for its punishment, be punished in the same manner as if he had abetted the offence that is the subject of the conspiracy (section 120B, PC).

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?

Generally, the Prosecution bears the burden of proving the elements of the offence, including intent, beyond a reasonable doubt (see question 9.1). Therefore, the accused needs only to cast reasonable doubt as to whether he had the requisite intent to commit the crime.

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?

Ignorance of the law is not a defence to a criminal charge.

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?

A person who, by reason of a mistake of fact or in ignorance of a fact in good faith, believes himself to be bound by law or justified by law to do an act would not have committed an offence (section 79, PC). The burden of proof lies on the accused (section 107, Evidence Act (Cap. 97)).

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Section 424 of the CPC requires every person, including every company (see question 4.1), who is aware of the commission of or the intention of any other person or company to commit certain specified offences, to, in the absence of reasonable excuse, immediately give information to the police.

The punishment for intentionally omitting to give any information of an offence that a person is legally bound to give is an imprisonment term which may extend to six months, or a fine, or both (section 202, PC).

Under section 39(1) of the CDSA, a person must also file a Suspicious Transaction Report as soon as reasonably practicable where he knows or has reasonable grounds to suspect that any property represents the proceeds of criminal conduct, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment.

Any person who contravenes section 39(1), CDSA shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$250,000 or to imprisonment for a term not exceeding three years or to both (if the person is an individual), or to a fine not exceeding S$500,000 (if the person is not an individual) (section 39(2), CDSA).

A person or entity may receive leniency for voluntary disclosure, subject to the PP's discretion.

13 Cooperation Provisions / Leniency

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

Generally, voluntary disclosure and cooperation with investigations are viewed favourably by enforcement agencies, and may amount to a mitigating factor.

Under CCCS's leniency programme, the first cartel member to notify CCCS of cartel activity will be entitled to immunity from financial penalties (if CCCS has not started investigations), or a reduction of up to 100% of the financial penalties (if CCCS has started investigations).

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

See question 13.1.

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 practice, it is not uncommon for the Prosecution to make a plead guilty ("**PG**") offer, such as offering to proceed on certain charges and for the remaining charges to be taken into consideration for the purpose of sentencing, or to withdraw or reduce certain charges, in exchange for the accused pleading guilty.

However, there can be no agreement as to sentence as this is within the court's jurisdiction.

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?

See questions 8.3, 8.4 and 14.1. The PG offer does not have to be approved by the court.

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 a sentence on the defendant? Please describe the sentencing process.

In determining an appropriate sentence, the court will consider, among other things, the minimum (if any) and maximum punishments prescribed in the relevant legislation, the circumstances of the offence, the relevant sentencing benchmarks and sentencing principle(s) (i.e. deterrence, retribution, prevention and/or rehabilitation), and any aggravating and/or mitigating factors present.

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.

Penalties for corporate offences generally include fines and confiscation orders in respect of the proceeds derived from the offence.

In determining the quantum of fine to be imposed on a corporate offender, the court may consider, among other things: (a) the intention or motivation of the company; (b) the steps taken by the company upon discovery of the breach or the degree of remorse shown by the company; (c) whether the company was merely an alter ego of its directors, who had already been punished for the same offences; and (d) where appropriate, the community of interests (e.g. shareholders, employees and creditors of the company) that may be affected if a prohibitive fine is imposed on the company.

16 Appeals

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

An accused convicted by a trial court may appeal against the conviction, the sentence imposed or an order of the trial court (section 374(4), CPC). However, an accused who pleaded guilty may appeal only against the extent or legality of the sentence (section 375, CPC).

The Prosecution may appeal against the acquittal of an accused, the sentence imposed or an order of the trial court (section 374(3), CPC).

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

Both the accused and Prosecution may appeal against the sentence imposed. See question 16.1.

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

Any judgment, sentence or order of a trial court may be reversed or set aside if the appellate court is satisfied that it was wrong in law, against the weight of the evidence or, in the case of a sentence, manifestly excessive or manifestly inadequate (section 394, CPC).

Generally, the appellate court is slow to overturn a trial judge's findings of fact, as the trial judge is better placed to assess the witnesses' credibility. However, it may intervene when the inferences of fact drawn by the trial court are not supported by the primary or objective evidence on record.

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

In an appeal against a conviction, the appellate court may reverse the finding and sentence and acquit or discharge the accused, order him to be re-tried, alter the finding, or reduce or enhance the sentence (section 390(1)(b), CPC).

In an appeal against the sentence, the appellate court may reduce, enhance or alter the nature of the sentence (section 390(1)(c), CPC).

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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 usually prosecuted by the state prosecutor's office, but in some cases, the victim of a business crime can also initiate and lead the prosecution of a crime.

The role of the prosecutor is usually performed by the district state prosecutor's office in the courts of first and second instance, as well as in the pre-trial procedure, each district state prosecutor's office covering an area of one district court. The Supreme State Prosecutor's Office is responsible for procedures before the Supreme Court of Slovenia.

A Specialised State Prosecutor's Office of the Republic of Slovenia was established to prosecute more complex criminal acts, which includes criminal offences against the economy, punishable by a term of imprisonment of five years or more.

Some acts, which are incriminated as offences and not as criminal acts, are prosecuted by other authorities, such as the Slovenian Competition Protection Agency, etc.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The State Prosecution Service Act (*Zakon o državnem tožilstvu* or *ZDT-1*) defines the rules regarding which state prosecutor's office is competent to prosecute a certain matter. As explained in question 1.1, usually the local district state prosecutor's office is competent to investigate and prosecute a matter.

For matters that fall into the category of more complex criminal acts as defined by the ZDT-1, only the Specialised State Prosecutor's Office is competent to investigate and prosecute. It will also investigate and prosecute any related criminal acts if the charges are based on the same evidence.

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?

Crimes *stricto sensu* are only prosecuted in criminal courts. Any illegal assets obtained in connection with the crime will be confiscated as part of the procedure. Furthermore, a claim for damages by the victims of the crime can be made either within the criminal procedure or in a separate civil procedure.

A separate procedure for the non-conviction-based confiscation of illegal assets can also be conducted on the basis of the Confiscation of Property of Illegal Origin Act (*Zakon o odvzemu premoženja nezakonitega izvora* or *ZOPNI*), which could be classified as a type of civil enforcement that addresses increasingly acquisitive criminality. So-called civil forfeiture is an action *in rem* and does not imply that a criminal act has been committed.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Business crime is increasingly becoming a priority for Slovene public prosecutors, which has resulted in quite a few new notable investigations, several ongoing investigations as well as criminal trials being concluded in the past year. In the past 10 years, after the global economic crisis, special focus has been put on the banking sector and corporate crimes.

2 Organisation of the Courts

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

The criminal courts in Slovenia are organised into three instances; additionally, a case can be brought before the Constitutional Court of the Republic of Slovenia when constitutionality of law or certain judicial decisions are in question. There are no specialised criminal courts for particular crimes in the Republic of Slovenia.

Criminal proceedings are under the jurisdiction of either local (*Okrajno sodišče*) or district (*Okrožno sodišče*) courts at the first instance, depending on the seriousness of the criminal offence. Local courts have competence to judge cases in which the allegedly committed criminal offence is punishable either by financial penalties or by imprisonment of up to three years. Other cases are tried before the district court.

There are four higher courts of second instance and the Supreme Court of the Republic of Slovenia is the court of third instance.

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

The Slovene legal system does not recognise a right to a jury trial; however, the Slovenian constitution does provide for direct participation of citizens in the exercise of judicial power in its Article 128, stating that the circumstances and form of such participation are to be regulated by law.

The Criminal Procedure Act (*Zakon o kazenskem postopku* or *ZKP*) provides for the participation of citizens in tribunals in some courts. In principle, the defendant always has the right to a trial by tribunal in the Slovene legal system, except before the local courts. While the tribunals of higher courts and the Supreme Court consist only of professional judges, laypersons are part of the tribunal in procedures before the district court.

Criminal cases in district courts are tried before a tribunal of two professional and three lay judges if the offence is punishable by a prison sentence of at least 15 years, or if the offence is a crime against honour and reputation, committed via the public media. Other cases in the district court are tried by a tribunal of one professional and two lay judges. In should be noted, however, that the defendant can freely choose to have his case tried in the district court only by a professional judge and that there are no lay judges in other courts.

3 Particular Statutes and Crimes

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

• Securities fraud

Securities fraud is prohibited by Article 231 of the Criminal Code of the Republic of Slovenia (*Kazenski zakonik* or *KZ-1*). This crime can be committed only by someone who trades in financial instruments. They are criminally liable for falsely representing data in a way which has a considerable effect on the value of the financial instruments if they had thereby influenced another person to buy or sell the financial instruments. Securities fraud has to be committed intentionally.

• Accounting fraud

The perpetrator is criminally liable for forgery or destruction of business documents under Article 235 KZ-1. Forgery covers intentionally entering false information, the failure to enter relevant information and signing any business documents that contain false information.

• Insider trading

Under Article 238 KZ-1, it is prohibited to use inside information that could materially affect the price of a financial instrument to directly or indirectly make a trade with the financial instrument in question. A perpetrator of this criminal act can be a person who acquires this information based on their position or place of employment if they use the so-called inside information or disclose it to an unauthorised third person. The use of the inside information by a third person is also incriminated. All forms of insider trading can only be committed with intent.

• Embezzlement

Embezzlement or misappropriation is incriminated in Article 208 KZ-1. The article states that unlawful appropriation of another person's movable property that is entrusted to him is a criminal act.

If the property was entrusted to the perpetrator because of their employment, performance of economic, financial or business activity of guardianship, or the embezzlement of such property, their actions would amount to an aggravated offence under Article 209 KZ-1. Embezzlement is only punishable if committed with intent.

Embezzlement in the context of corporate governance is addressed by the abuse of a position of trust in business activity, a criminal act prescribed by Article 240 KZ-1. According to the incrimination, whoever, in the governing or supervising of an economic activity, abuses his position or the trust placed in him for disposing of another's property, managing a company, or conducting a business activity, acts beyond the limits of the rights inherent in his position or fails to perform any of his duties with a view to procuring an unlawful property benefit for himself or for a third person or to causing damage to the property of another, shall be sentenced to imprisonment for not more than five years.

• Bribery of government officials

Both the person offering the bribe and the public official accepting the offer can be criminally prosecuted under Articles 261 and 262 KZ-1. There are several different ways of committing bribery. Firstly, is not necessary that the bribe is actually given, it suffices that it was offered, accepted or demanded. Secondly, the bribe has to be offered with the view to achieve a specific action or inaction on the part of the government official, but it is irrelevant if the bribe achieved its purpose or not. Thirdly, a bribe can be given both to induce behaviour of the public official that is against the rules and regulations and a behaviour that is in line with applicable rules. Lastly, the perpetrator has to act with intent, otherwise his behaviour is not punishable as a criminal offence.

• Criminal anti-competition

Anti-competition offences are regulated as minor offences and not as criminal acts.

• Cartels and other competition offences

A breach of antitrust regulation can constitute a criminal offence under Article 225 KZ-1 if one violates the prohibition of restrictive agreements, abuses a dominant position or creates a prohibited concentration of companies and thereby prevents, significantly impedes or distorts competition in the Republic of Slovenia or the European Union, or a significant part thereof. For a criminal offence to occur, the described behaviour has to result in significant acquisition of assets or damages to company or companies.

• Tax crimes

Under Article 249 KZ-1, tax evasion is a punishable criminal offence. It is defined as providing false information about circumstances relevant to taxation with the intention of evading taxes or in order to enable another person to do so, if the amount of public tax evaded has amounted to a major material benefit within a period of 12 months.

• Government-contracting fraud

A public official who knowingly causes or enables an illegal or ineligible use of public funds is criminally liable under Article 257.a KZ-1. The additional elements are that the public official foresees or could foresee that there will be material damage to public funds and that this damage then actually occurs.

Other criminal acts that are relevant to government-contracting fraud are fraud, etc.

• Environmental crimes

There are several environmental crimes, for example, burdening and the destruction of the environment (Article 332 KZ-1), pollution of the sea or fresh water bodies (Article 333 KZ-1), illegal handling of nuclear or other radioactive waste (Article 334 KZ-1), pollution of drinking water (Article 336), destruction of plantations (Article 339 KZ-1), destruction of forests (Article 340 KZ-1), etc.

• Campaign-finance/election law

There is no specific criminal act prescribed.

• Market manipulation in connection with the sale of derivatives

There is a general crime prescribed for various abuses of the financial instruments market. According to Article 239 KZ-1, whomever with the intention of procuring an unlawful property benefit for himself or for a third person, abuses the market in financial instruments by means of a prohibited conduct, by: (1) concluding a business or issuing a trade contract, having provided market participants with an incorrect or misleading idea of the offer, demand, or price of the financial instrument, or providing one or more connected persons to assure the price of one or more financial instruments at an abnormal or artificial level, using fictitious means or any other form of fraudulent conduct when concluding business or issuing a trade contract; or (2) spreading incorrect or misleading information on financial instruments, following the same objective when spreading rumours, incorrect and misleading information via media, online, or in any other similar way, shall be sentenced to imprisonment for not more than three years.

• Money laundering or wire fraud

Money laundering includes all forms of handling, exchange, keeping or disposal of money or other assets according to Article 245 KZ-1, if the perpetrator is aware or should and could have been aware that the assets were acquired by a criminal act.

• Cybersecurity and data protection law

Violation of secrecy of means of communication is a punishable crime under Article 139 KZ-1, abuse of personal data is a punishable crime under Article 143 KZ-1 and breaking into business information systems is a crime under Article 237 KZ-1.

• Trade sanctions and export control violations

These types of offences are covered by tax crimes and specific crimes prohibiting export of certain goods (e.g. export of radioactive goods).

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

An attempt to commit a criminal act is prosecuted under the Slovenian Criminal Code, but only if an intentional criminal act that is punishable by a prison sentence of at least three years is attempted or if expressly provided by the Criminal Code.

For a person to be found liable for an attempt of a criminal act, they have to have already begun the criminal act itself, which distinguishes an attempted criminal act (which is punishable by law) from mere preparatory acts (which are not punishable by law).

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?

A legal person can be held liable for a criminal offence under the provisions of the Liability of Legal Persons for Criminal Offences Act (*ZOPOKD*).

Pursuant to Article 4 ZOPOKD, a legal person can be held liable for a criminal offence that the perpetrator committed in its name, on its behalf or for the benefit of that legal person, if (1) the criminal offence committed entails carrying out an illegal resolution, order or endorsement of its management or supervisory bodies, (2) if its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence, (3) if the legal person obtained illegal proceeds from the criminal offence or items that are a result of the criminal offence, or (4) if the management or supervisory bodies of the legal person have omitted obligatory supervision of the legality of the actions of employees subordinate thereto.

As long as one of the alternative conditions described above is fulfilled, the legal person can be held liable for the criminal offence, irrespective of the legal relationship between the perpetrator and the legal person. In other words, liability of legal persons is not limited to the conduct of its employees and can extend to conduct of its managers, contractors and third persons.

Liability of legal persons for criminal offences is partially accessory, meaning the legal person is liable for the conduct of a perpetrator whose actions objectively fulfil the elements of the description of criminal offence, even if the perpetrator is not found guilty because of insanity or mistake of fact, etc.

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

As explained in question 4.1, liability of the legal person is partially accessory to the criminal liability of natural persons. Therefore, the liability of the legal person stems from the liability of the natural person and not the other way around.

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?

While it is not necessary to prosecute both the natural and the legal person (please see question 4.1 above), it is the usual practice to do so.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Pursuant to Article 6 ZOPOKD, a legal person can be found liable for a criminal offence even if it ceases to exist before the criminal procedure is concluded with the force of *res judicata*.

The successor entity cannot be found liable for the criminal offence. However, according to the same article, the successor entity can be sanctioned if its management or supervisory bodies were aware of the committed criminal offence before the predecessor ceased to exit; otherwise only the proceeds of the crime can be confiscated from the successor and the safety measure of the confiscation of items may be imposed on the successor entity.

5 Statutes of Limitations

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

Prosecution is barred from taking place after the statute of limitations expires. The period of the limitation of criminal prosecution begins when the criminal act is committed, which is at the time the perpetrator acted or failed to act.

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

Once the statute of limitations expires, the criminal offence cannot be prosecuted.

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

The period of limitation of criminal prosecution is suspended during the period that the prosecution cannot be initiated or continued, or when the perpetrator is unreachable by the state authorities.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

As a principle, enforcement agencies have no jurisdiction and no authority to act outside of the territory of Slovenia. Should they be required to investigate abroad, they can only do so by requesting assistance from foreign authorities through appropriate channels.

However, the issue of jurisdiction should be strictly distinguished from the issue of the territorial validity of KZ-1. In other words, under certain conditions, even crimes that were committed outside the territory of the Republic of Slovenia can be prosecuted in Slovene courts on the basis of KZ-1.

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

Pre-trial procedures in Slovenia usually consist of a preliminary investigation, led by a prosecutor and a judicial inquiry. Both are assisted by the police.

The first inquiry phase begins when there are grounds for suspecting that the crime has been committed. It can formally begin on the basis of direct perception by the prosecutor, criminal complaint or a notification of criminal act.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

As a member of the EU, Slovenia cooperates with Europol and Eurojust, which coordinate the criminal authorities of various Member States. This cooperation is regulated by the Cooperation in Criminal Matters with the Member States of the European Union Act. Slovenia also cooperates with Interpol and is a party to several bilateral agreements in the area of criminal law.

7 Procedures for Gathering Information from a Company

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

In principle, authorities can gather information in several different ways, including by conducting interviews, house raids, investigation of electronic devices, using undercover investigative measures, summoning bank records, etc. Depending on the invasiveness of the method, the authorities might need authorisation by either the state prosecutor or by a judge to be able to legally use some of the methods listed.

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 authorities can demand that a company under investigation produce documents; however, while third persons can be fined for not producing documents on request of the police, state prosecutor or court, defendants cannot be fined due to their right not to incriminate themselves.

A raid of a company can be conducted based on a court order, which will be issued if there are reasonable grounds for suspecting that a specific person has committed a criminal offence and there is likelihood of apprehending the accused during the search or of discovering traces of the crime or objects of importance for the criminal procedure.

A raid can sometimes be conducted without a court order on the basis of consent of the owner, as well in some other specific instances.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The legal privilege which grants protection from seizure by authorities only applies to the relationship between a client and an attorney.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The strict regulation based on the General Data Protection Regulation in the European Union (*GDPR*) applies to companies in Slovenia. However, the GDPR as well as the Slovenian Personal Data Protection Act provide for an exception that allows disclosure of personal data in cases where this is necessary for the purposes of a criminal investigation.

7.5 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?

The seizure of documents is possible if they are required as evidence in criminal proceedings. The seizure and a raid of the home and office is permitted under the conditions described under question 7.2.

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

See question 7.2.

Questioning of Individuals:

7.7 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?

The authorities can call any individual for questioning at different stages of the proceedings. The rights and obligations of the individual depend on whether they are treated as a witness or as an accused person. If a person is treated as an accused, they have the right to an attorney and the right to remain silent before the authorities as well as before the court. If a person is called as a witness, they have a general duty to answer the questions truthfully. The questioning may take place before the police, before the investigative judge in pre-trial proceedings or before the court during the trial.

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

Third persons can be called to questioning as a witness, provided they are not accused of the crime. As a witness they have a general duty to give testimony. Witnesses have a limited right to refuse to answer certain questions if they were to incriminate themselves by the statement. Certain persons may not be called as witnesses, for example close family members of the accused.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Please see question 7.7. The accused has the right to have an attorney present during questioning and the right to remain silent before the authorities as well as the courts. If the accused asserts his right to remain silent, the result of the trial will depend on other evidence produced during the proceedings.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Theoretically, the criminal procedure begins when the criminal investigation is initiated as described in question 6.2. After the preliminary investigation is completed, a prosecutor can either request a judicial inquiry or under certain conditions file a direct indictment, therefore skipping a judicial inquiry.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The prosecutor will charge an individual with a crime once the material circumstances are sufficiently clarified either by the prosecutorial or judicial investigation and given that the conditions for prosecution are still met.

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

Criminal procedures can be ended through the process of mediation if the prescribed sentence for the alleged criminal offence is a fine or a prison sentence of up to three years. Once the agreement concluded in mediation is fulfilled, the prosecutor dismisses the charges.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Under Article 162 ZKP, the prosecutor may suspend prosecution of a criminal act that is punishable by a fine or a prison sentence of no more than three years if the defendant is willing to behave in accordance with instructions of the prosecutor in order to reduce or eliminate adverse effects of the criminal act and on the condition that the victim of the crime gives consent. If the defendant fulfils his obligations under the agreement, the criminal complaint is dismissed.

8.5 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 may apply.

The defendant can be subject to a civil liability claim for any damage they might have caused. The claim can be made in the criminal procedure or in a separate civil procedure before the competent civil court.

In certain conditions (mainly due to the fact that conditions for criminal liability are not met), a civil procedure for confiscation of illegal assets on the basis of ZOPNI can be instituted. Please see question 1.3.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The prosecutor has the burden of proof for all the elements of the description of the crime as described in detail for each criminal act in section 3. They also have to prove that the perpetrator is culpable for the crime, meaning that they have to prove the required state of mind (either guilt or negligence).

If the prosecutor proves all the elements that fulfil a description of a criminal offence, the burden of proof shifts to the defendant, who can argue that his actions were not unlawful; one example of this defence is self-defence.

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

The required standard of proof for a guilty verdict is that the court is convinced of the perpetrator's guilt.

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

The judge or the tribunal of judges decide on the facts as well as the law of the case.

10 Conspiracy / Aiding and Abetting

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

KZ-1 incriminates participation in a criminal offence that takes the form of solicitation or aid to the perpetrator if the solicitation or aid was intentional (Articles 37 and 38 KZ-1).

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?

Requisite form of guilt (intent or negligence) is prerequisite to a guilty verdict and has to be proven by the prosecutor.

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?

Mistake of law can be used as a defence if the perpetrator was not aware that his actions were unlawful due to justifiable reasons. However, had the perpetrator had the same opportunity to acquaint themselves with the legal norms as other people in their environment or if he should have been aware of the legal norm due to the nature of his work, role or position, he cannot successfully claim mistake of law in his defence.

The burden of proof is on the defendant.

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?

If the defendant committed a criminal act because he was ignorant of the facts, he is not guilty of the crime. Mistake of fact can be successfully claimed if the perpetrator was, at the time of the criminal act, not aware of the circumstances which constitute the elements of the criminal act or they mistakenly thought that the circumstances were such as to make the their actions lawful. The burden of proof for this defence is on the defendant.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

All state authorities are legally obliged to report a criminal offence that is prosecuted *ex officio* if they become aware of it.

Private legal and natural persons are generally not obliged to report a criminal offence, but have the right to do so. The exception to this rule is especially serious crimes, for which a sentence of at least 15 years is prescribed, which have to be reported by anyone who knows of the crime or of the perpetrator. If the question of timely uncovering of such a crime is dependent on the report, the person can even be criminally liable under Article 281 KZ-1 for the failure to report information about the crime or the perpetrator.

The perpetrator is not under any obligation to report the crime he committed (since that would be contrary to the privilege against self-incrimination) but if he confesses to the crime, that can represent a mitigating circumstance taken into account at sentencing.

13 Cooperation Provisions / Leniency

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

The reporting of a crime does not necessarily lead to any benefits for the person disclosing the criminal behaviour. However, whistleblowing may be taken into account by the authorities and may result in a lower penalty.

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

See question 13.1.

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?

Under the provisions of ZKP, the defendant and the state prosecutor can conclude an agreement under which the defendant pleads guilty. Part of the agreement can cover the sentence as well as the costs of the criminal procedure, stopping a criminal procedure that is not covered by the agreed-upon confession and the performance of other tasks. Legal classification of facts cannot be subject to the agreement and the agreed-upon sentence cannot be below the limits set by the law. There are also other procedural requirements for the agreement to be valid.

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?

The agreement concluded between the defendant and the state prosecutor has to be decided on by court. The court can only approve the agreement if it finds that it was concluded in accordance with the rules described above in question 14.1. The court also has to decide if the defendant understood the nature and the consequences of the given confession, if the confession was voluntary and if it was clear, complete and supported by the evidence in the criminal file. If any of the listed conditions are not met, the court cannot approve the agreement.

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 a sentence on the defendant? Please describe the sentencing process.

The court is bound by the minimum and maximum sentence set by the statute, except in exceptional circumstances. Within the statutory limits, the court sets the sentence based on the gravity of the offence and the culpability of the perpetrator, taking into account all possible mitigating and aggravating circumstances, such as the perpetrator's motives, past behaviour, conduct after committing the offence, 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.

A corporation is sentenced using the same principles and guidelines as prescribed for natural persons (see question 15.1). Additionally, the court takes into account the economic power of the legal person.

16 Appeals

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

The judgment can be appealed by either the prosecutor or the defendant.

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

The criminal sentence will be given as part of the judgment, which can be appealed only on the grounds of the sentence.

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

The judgment can be appealed on four grounds:
(1) on the grounds of a material breach of the provisions of ZKP;
(2) on the grounds of violation of KZ-1;
(3) due to an erroneous or incomplete finding of facts; and
(4) due to the decision on the sanctions, confiscation of pecuniary gains, costs of the criminal procedure, etc.

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

It is in the appellate court's power to either change the verdict of the court of first instance or annul the verdict and return the case to the court of first instance for a repeated trial.

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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?

Examining magistrates (*Juzgados de Instrucción*) institute criminal proceedings and conduct criminal investigations. They also decide whether there are reasonable grounds to bring the defendant to trial. Then, the prosecution can be brought by the Prosecutor's Office, or a private or public prosecutor.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Government agencies are only empowered to impose fines for administrative offences. Once they establish that a crime has been committed, the case is referred to the competent examining magistrate in accordance with the Spanish Organic Act on the Judiciary (**LOPJ**) and the Spanish Criminal Procedure Code (**CPC**).

In addition, there are two specialised prosecutors: the Special Public Prosecutor for Corruption and Organised Crime; and an Anti-Drug Special Public Prosecutor.

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?

Some agencies have the authority to investigate and conduct administrative proceedings whereby they can impose administrative fines. For instance, the following agencies have administrative authority concerning business crimes:

(1) The National Securities Market Commission deals with infractions against the security market such as securities fraud.
(2) The National Competition Authority deals with infractions of competition law and cartels.
(3) The National Tax Authority deals with infractions such as tax fraud.
(4) The Bank of Spain deals with infractions against the financial system.
(5) The Commission for the Prevention of Money Laundering and Money Offences deals with money laundering.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

A number of major business crimes are currently ongoing. The latest include: alleged tax evasion and bribery against a person close to the Spanish royal family; tax evasion through complex corporate schemes of famous actors (*Caso Nummaria*); and a case against a major construction company for money laundering, bribery and organised crime.

2 Organisation of the Courts

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

Spanish Criminal Courts have jurisdiction over crimes committed within the Spanish territory, notwithstanding when it is provided by international treaties to which Spain is a party. Under the LOPJ, jurisdiction is also recognised, under certain circumstances, over crimes committed abroad by Spanish citizens (active personality principle). Likewise, Spanish Criminal Courts have jurisdiction over specific crimes (including corruption between individuals or in international transactions and counterfeit medicines) committed by Spanish citizens or foreigners, under specific circumstances.

Competence is attributed to courts under territorial (*forum delicti commissi*) and material (*ratione materiare*) criteria. In addition, investigations are conducted by investigation magistrates (*jueces de instrucción*), whereby trials are conducted by a different court from that which conducted the investigation (*juzgados de los penal*). Criminal Courts are organised as follows:

The ordinary courts with national jurisdiction in criminal matters are:

(1) The Second Chamber of the Supreme Court (*Sala 2ª del Tribunal Supremo*) – apart from hearing cassation appeals, the Supreme Court is competent to investigate and prosecute the high-ranking officials specified in the LOPJ (Arts 57.2 and 3).
(2) The Criminal Matters Chamber of the National Court (*Sala de lo Penal de la Audiencia Nacional*) – tries serious crimes specified in Art. 65 LOPJ, crimes committed abroad and hears appeals against judgments issued by Central Criminal Courts, Central Examining Magistrates Court and Central Minors Courts.
(3) Central Criminal Courts (*Juzgados Centrales de lo Penal*) – hear cases for offences with a penalty of imprisonment for less than five years.

(4) The Central Courts of Instruction (*Juzgados Centrales de instrucción*) – investigate cases to be heard in either the National Court or the Central Criminal Courts.

The ordinary courts with limited territorial jurisdiction in criminal matters are:

(1) High Courts of Justice (*Tribunal Superiores de Justicia*) – are the highest courts in the autonomous communities (*comunidades autonomas*) and have jurisdiction to investigate and prosecute cases against certain high-ranking officials and appeals against judgments issued by Provincial Courts.
(2) Provincial Courts (*Audiencias Provinciales*) – adjudicate cases for offences with a penalty of imprisonment for more than five years.
(3) Criminal Courts (*Juzgados de lo Penal*) – adjudicate cases for offences punished with less than five years of imprisonment.
(4) Examining magistrates (*Juzgados de Instrucción*) – investigate crimes that should be adjudicated by Provincial Courts and Criminal Courts and adjudicate misdemeanour cases.

In addition, there are specialised criminal courts:

(1) Courts with special duties in the matter of criminal sentencing (*Juzgados de Vigilancia Penintenciaria*) – deal with all matters relating to prison inmates.
(2) Juvenile courts (*Juzgados de Menores*) – have jurisdiction over crimes committed by persons aged between 14 and 18.
(3) Courts dealing with violence against women (*Juzgados de Violancia sobre la Mujer*) – have jurisdiction over crimes committed against a woman in particular family situations.

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

Art. 1.2 of Organic Act 5/1995 of the Jury Court establishes that a jury is competent to adjudicate the following crimes committed by civil servants not attributed to the National High Court: (1) disloyalty in custody of documents; (2) corruption; (3) influence peddling; (4) embezzlement; (5) fraud and illegal taxation; (6) negotiations prohibited to civil servants; and (7) disloyalty in the custody of prisoners.

3 Particular Statutes and Crimes

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

• Securities fraud

Securities fraud administrative infractions are provided by the Security Market Law.

Concerning the criminal aspect, Art. 282 *bis* of the Spanish Criminal Code (**SCC**) provides the criminalisation of "fake investments in the stock market". A penalty of imprisonment is provided for *de facto* or *de jure* managers of a company issuing securities and listed on the stock market who falsify financial information used in the stock market in order to: (1) attract investors; (2) place any kind of financial asset; or (3) obtain any form of financing.

• Accounting fraud

Accounting fraud is punishable by imprisonment under Art. 290 SCC. It punishes *de facto* or *de jure* directors of a company incorporated or under formation who falsify the annual accounts or other documents recording the legal or financial status of the company causing financial damage to the company, any shareholders, partners or third parties.

• Insider trading

Insider trading is regulated under the Security Markets Law (administrative law) and criminalised under Art. 285 SCC. The offence requires: (1) the use of privileged information for one's own benefit; or (2) the provision of insider information for use by a third party.

Moreover, one of the following circumstances must be presented:

(1) the benefit obtained by the insider or the third party or the damage caused must exceed €500;
(2) the value of the financial instruments used was more than €2 million; or
(3) serious damage was caused to the market's integrity.

Insider trading applies to any of the following persons who possess privileged information: (1) members of the managerial or supervisory boards of the issuer; (2) individuals with participation in the capital of the issuer; (3) individuals who obtain information through the exercise of her/his profession or duties; and (4) individuals who obtain information via a criminal activity.

• Embezzlement

Art. 252 SCC provides for the penalty of imprisonment for the person who, with power to administer the assets of others, exceeds her/his powers, causing damaged to the assets administered. Moreover, Arts 432 to 435 punish the acts of embezzlement committed by a public official concerning public funds.

• Bribery of government officials

Bribery of government officials occurs in cases where a public official accepts or offers an undue advantage to carry out or omit to carry out an act in breach of her/his duties or in relation of her/his duties. Thus, both passive and active corruption are criminalised in Spain.

• Criminal anti-competition

Anti-competition infractions are, in Spain, administrative infractions and not criminal. They are sanctioned under the Spanish Competition Law and Arts 101 and 102 of the Treaty on the Functioning of the European Union.

• Cartels and other competition offences

In Spain, cartels are sanctioned under Art. 1 of the Spanish Competition Law and Art. 101 of the Treaty on the Functioning of the European Union. These infractions are of an administrative nature.

The SCC, however, provides some offences that could be committed through a cartel and hence punishable criminally (very rarely applied). Thus, the following acts are punishable by imprisonment: (1) manipulation of raw materials or essential goods in order to limit supplies or distort prices (Art. 281 SCC); (2) price tampering (Art. 284 SCC); and (3) bid rigging in auctions and public tenders (Art. 262 SCC).

• Tax crimes

Tax fraud is punished under Art. 305 SCC. The offence consists of avoiding the payment of taxes, by deed or omission, to any public treasury (national, autonomous, or local authorities) when the defrauded amount exceeds €120,000.

• Government-contracting fraud

Government-contracting fraud mainly concerns influence peddling criminalised under Arts 428, 429 and 430 SCC. The SCC covers both the influence by a public officer over another public officer and the influence from a private individual over a public officer for the purpose of one's own or a third party's financial benefit.

• Environmental crimes

Environmental crimes are covered in Arts 325 to 331 SCC. The SCC covers various conducts that cause or may cause significant damage to the quality of the air, soil, water or to animals or plants.

• Campaign-finance/election law

Illegal funding for political parties is provided under Art. 304 SCC. It is illegal to receive or deliver donations or contributions to political parties that are (1) anonymous, finalist or revocable, (2) exceed €50,000 per year from the same person, or (3) made by entities without legal personality.

• Market manipulation in connection with the sale of derivatives

As stated above, price tampering is provided under Art. 284 SCC.

• Money laundering or wire fraud

Money laundering is punished by imprisonment, provided under Arts 301 to 202 SCC. It constitutes the following acts being knowingly committed: (1) acquisition, possession, use, conversion or transmission of illegally obtained assets; (2) acts aimed to hide or conceal the illegal origin of the asset; or (3) aid provided to the individual who participated in the prior criminal offence.

• Cybersecurity and data protection law

The SCC provides several cybersecurity offences, among others:

(1) Hacking (Art. 197 *bis* SCC): punishes individuals who, without being authorised, breach security measures and access or facilitate access to an information system.

(2) Phishing (Art. 284.2 SCC): punishes individuals who, without authorisation and using informatic manipulation, obtain informatic data.

(3) Denial-of-service attacks (Art. 264 *bis* SCC): punishes individuals who cause unauthorised hinderance or interruptions to an informatic system.

• Any other crime of particular interest in your jurisdiction

Spanish legislation also criminalises, among others: (1) corruption in business (Art. 286 *bis* and *ter* SCC) dealings with bribes between individuals; (2) administrative corruption (Art. 404 SCC); (3) corruption in sport (Art. 286 *bis* SCC); and (4) swindling (Arts 248, 250 and 251 SCC).

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

The SCC punishes completed crimes and attempted crimes (Art. 16 SCC). Criminal liability for attempted crimes is exempted when the completion of the crime has been voluntarily desisted or hampered. Likewise, conspiracy, proposition (Art. 17 SCC), and provocation (Art. 18 SCC) also entail criminal liability when the law expressly so provides.

Perpetrators and accessories of crimes are criminally liable. The SCC defines perpetrators (Art. 28 SCC) as: (1) those who perpetrate the act themselves, alone, jointly, or by means of another used to aid and abet; (2) whoever directly induces another or others to commit a crime; and (3) whoever cooperates in the commission of the crime by an act without which the crime could not have been committed. Accessories are defined (Art. 29 SCC) as those that are not consider perpetrators but cooperate in carrying out the offence with prior or simultaneous acts.

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?

Spain introduced corporate criminal liability into the SCC in 2010. Under Art. 31 *bis* 1) SCC, a legal entity – with some exceptions such as the State – may be found criminally responsible for crimes committed in their name or on their behalf, and for their benefit, directly or indirectly. Legal entities are criminally responsible for acts committed by their legal representatives or by those who, acting individually or as members of a body of the legal entity, are authorised to take decisions in the name of the legal entity or hold organisational and managerial authority.

Legal entities shall also be criminally liable for offences committed by those under the authority of the aforementioned persons. Acts have to be committed in the course of the corporate activities, on their behalf and for their benefit, directly or indirectly, provided that the legal representatives or those with managerial authority have seriously failed to observe their supervision, oversight and control duties.

Exemption of criminal liability of legal entities is provided in certain circumstances; for instance, if the corporation shows that it adopted and effectively implemented a compliance programme to prevent the crime in question. Even if all the conditions exempting the corporation are not met, compliance programmes may be used to mitigate the penalty.

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

Administrators *de facto* or *de jure* of a legal entity are personally responsible for crimes committed by the legal entity or the person they represent, even if there are not enough elements to consider him or her the perpetrator.

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?

There is no official policy or preference on pursuing criminal cases against an entity or an individual. That being said, it should be noted that the first judgment (STS154/2016) of the Spain Supreme Court convicting a legal entity is relatively new (2016). Thus, nowadays the number of criminal proceedings against individuals is still higher than the number of criminal prosecutions against legal entities.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

According to Art. 130.2 SCC, the "transformation, merger, absorption or demerger" of a legal entity does not extinguish criminal liability, which is attributed to the successor entity or entities. However, the judge may moderate the transfer of the penalty to the legal entity according to the proportion that the original responsible legal entity retains.

In addition, the concealed or apparent dissolution of a legal entity does not extinguish criminal liability.

5 Statutes of Limitations

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

Art. 131 SCC provides for the limitation period, which depends on the penalty set for the crime, determined as follows:

(1) 20 years when the maximum penalty for the crime is a prison sentence of 15 years or more;
(2) 15 years when the maximum penalty for the crime is disqualification for more than 10 years or a prison sentence of more than 10 years and less than 15 years;
(3) 10 years when the maximum penalty is a prison sentence or disqualification for more than five years and less than 10 years; and
(4) five years for all other criminal offences, except minor criminal offences, slander, and defamation, which have a limitation period of one year.

Moreover, when the penalty imposed is a composition of several penalties, the limitation period applicable shall be the longest term. Likewise, in case of a combination of offences or similar offences, the limitation period applicable shall be that corresponding to the most serious crime.

The limitations period starts running on the date on which the offence is committed (Art. 132.1 SCC).

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

Art. 132.1 SCC provides that in case of continuous offences, permanent offences or offences that are part of a practice, the limitations period begins running only once the last offence has been committed or the last criminal act was undertaken.

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

The limitations period may be interrupted according to Art. 132.2 SCC. The limitations period start anew following the interruption. Art. 132.2 SCC provides for the circumstances when the limitations period may be tolled. For instance, this will happen when proceedings are brought against a person deemed to be responsible.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Art. 23 LOPJ establishes the rules for Spanish extraterritorial prosecution, including the principle of universal jurisdiction.

Spanish courts can investigate acts abroad if: (1) committed by Spanish citizens or foreigners who have acquired Spanish nationality after the crime was committed; (2) the act is publishable at the place of execution or there is a treaty providing the contrary; (3) a criminal complaint has been filed by the Public Prosecutor or the aggrieved party; and (4) the defendant has not been sentenced abroad.

In addition, Art. 23.4.n LOPJ allows extraterritorial prosecution for corruption in business and in economic international transactions committed by Spanish individuals or foreigners outside the national territory if:

(1) criminal proceedings have been brought against a Spanish individual;
(2) criminal proceedings have been brought against a foreigner who resides in Spain;
(3) the crime has been committed by the executive, administrator, employee or collaborator of a corporation, company, association, foundation or organisation that has its headquarters or registered address in Spain; or
(4) the crime was committed by a legal person, company, organisation, groups or any other kind of entity or groups of people that have their headquarters or registered address in Spain.

However, Art. 23.5 LOPJ states that the crimes will not be prosecuted in Spain in some circumstances, such as when an international court has initiated a proceeding for the investigation and prosecution.

Finally, Art. 23.3.h LOPJ establishes extraterritorial jurisdiction for crimes against the public administration committed by Spanish or foreign nationals outside the national territory.

Spain has mostly used the extraterritorial jurisdiction to prosecute crimes against humanity, genocide, torture or terrorism. However, increasingly, Spain is relying on this jurisdiction to prosecute corruption and money laundering (for instance, *see* Supreme Court Resolution n° 974/2016 on extraterritorial jurisdiction for the crime of money laundering).

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

The CPC provides that the Prosecutor's Office, with the Judicial Police, shall initiate an investigation as soon as they are aware of a possible commission of a crime, except in case of criminal proceedings that can only be initiated at the request of an interested party. Following its investigation, the Prosecutor's Office decides whether to:

(1) dismiss the case because there is not adequate evidence of a criminal offence; or
(2) refer the case to the competent examining magistrate to carry out the relevant preliminary proceedings.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Cooperation with foreign enforcement authorities is frequently used by Spanish authorities in, *inter alia*, tax evasion, fraud, corruption and money laundering. This cooperation takes the form of joint investigations or exchange of information via international judicial cooperation.

According to Spanish rules, authorities are not allowed to exchange information directly with a foreign agency unless:

(1) established by law, i.e., set forth in bilateral or multilateral treaties and conventions on mutual assistance; or
(2) with the prior approval of the competent court.

Formal cooperation is frequent but the processes take significant time. Cooperation not established by law or without a court's permission are not permitted and the evidence could be excluded from the trial.

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 and the judicial police have limited investigating power, whereas the examining magistrate possesses full power of investigation. The Office of the Prosecutor can open its own investigation and order to produce evidence (Art. 773.2 CPC). However, it cannot adopt precautionary measures or limit fundamental rights, except from the detention of the suspect (Art. 5 EOMF).

The examining magistrate has a broad range of tools to investigate, such as witness interviews, questioning of defendants, arrest and search warrants, seizure of documents, wire tapping and dawn raids.

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?

Under the CPC, the examining magistrate can order the production of documents relevant to an investigation, dawn raids, issue search warrants on a company under investigation and seize documents, including electronic devices and information therein when there are serious indications that important facts can be discovered or evidenced (Art. 573 CPC). This can also be done upon the demand of any party to the criminal proceedings. The examining magistrate, however, has to verify that the measure is justified and proportional. The Prosecutor's Office has no authority to issue search warrants.

Other government agencies, such as the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (Sepblac) or tax authorities, have limited authority to gather information. However, they can conduct inspections and request relevant information.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

In application of the right of defence, attorney-client communications are confidential and covered by the attorney-client privilege. However, the privilege does exist when there are objective indications that the lawyer has committed a crime along with the defendant (Art. 118.4 CPC). Confidentiality of communications does not extend to in-house lawyers unless the communication in made in preparation of a defence.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

No, labour or privacy laws do not impact the collection, processing or transfer of employees' personal data ordered in criminal investigations. The use of documents, submitted by the parties or required by the court, in criminal proceedings are exempt from the requirement of consent (Art. 236 *quater* LOPJ). Concerning privacy laws, the General Data Protection Regulation (EU Regulation 679/2016) is in force in Spain; however, Spain has failed to implement the Data Protection Law Enforcement Directive (EU Directive 2016/680).

7.5 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?

See question 7.2.

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

Examining magistrates can order such measures on any third party or entity if it is necessary for the investigation (Art. 575 CPC). The examining magistrate must comply with the proportionality principle. All parties to a criminal proceeding can also request the examining magistrate to take such measures.

Questioning of Individuals:

7.7 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?

Examining magistrates can order anybody, including employees, officers or directors of a company under investigation to submit to questioning as a witness (Art. 410 CPC) or a suspect or defendant as many times as considered appropriate to elucidate the case. Suspects and defendants have the right to remain silent and not to answer questions (Art. 118 CPC). A witness that fails to comply with a summons or to answer questions may be imposed with a fine.

The questioning can also be done by the police.

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

Any person must submit to questioning at the request of the police or the examining magistrate as a witness.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Art. 17.3 of the Spanish Constitution enshrines the right of suspects to remain silent and the assistance of a lawyer during police and judicial investigations. The CPC reaffirms those rights and also recognises the right against self-incrimination (Arts 118 and 520.2 CPC) as part of the right of defence.

Pursuant to the right to presumption of evidence, the assertion of the privilege against self-incrimination cannot be considered as a guilty statement at trial.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases can be initiated through a criminal complaint (*denuncia o querella*) by the victim, the prosecutor or the police after a preliminary investigation (*atestado*). It can also be initiated *ex officio* by the examining magistrate. Finally, any individual can exercise what is called the popular criminal action.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

As explained, the criminal investigation is conducted by an examining magistrate. Once the magistrate considers there are reasonable grounds that the crime has been committed by a defendant and no more evidence is needed, he or she shall issue a decision closing the investigation, formally charging the defendant and inviting the prosecution to request trial and issue an indictment.

The Prosecutor Office is obligated to prosecute when he or she considers it appropriate (Art. 105 CPC). Prosecutors are governed by the legality and impartiality principles. They are obligated to prosecute regardless of any political considerations and the personal circumstances of the person being investigated. However, in the case of juvenile criminal proceedings and proceedings for misdemeanours, prosecutors may not prosecute if they consider there is no public interest, the victim and perpetrator have reached a conciliation agreement or the crimes committed are not sufficiently serious.

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

Spanish legislation does not recognise pretrial diversion or deferred prosecution agreements.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

This is not applicable.

8.5 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 may apply.

Victims of crimes may choose to claim damages caused by the commission of the crime within the criminal proceedings or after the final judgment has been issued therein (Art. 111 CPC). Civil remedies include restitution, reparation and compensation (Art. 100 CPC).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Under the presumption of innocence principle, the prosecution, either public, private or popular, has the burden of proof of the crime's elements, whereas the defendant has the burden of proof with respect to affirmative defences.

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

As a result of the application of the principle of presumption of innocence and *in dubio pro reo*, the commission of crimes must be proved beyond reasonable doubt. Art. 741 CPC provides that the judge appreciates the evidence on the basis of his conscience.

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

Judges and magistrates are the arbiters of fact and determine whether the party has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

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

Conspiracy exists when two or more persons agree on committing a crime (Art. 17.1 SCC). Conspiracy is only punishable when it is expressly provided in the Criminal Code.

Art. 28 SCC attributes the same criminal liability of those who aid and abet to that of the principals of the crime; hence the same penalty shall be imposed. Accomplices are defined as those who: (1) directly instigate another to perform the act; or (2) cooperate in the execution of an act without which it would not have been carried out.

Accessories are defined as those who, not being considered as aiding and abetting, cooperate in the execution of the act with previous or simultaneous acts (Art. 29 SCC). An accessory will be subject to a lower penalty (Art. 63 SCC).

Instigation must meet several requirements: (1) be prior to the event; (2) be direct (on a specific person and aimed at the commission of a specific act); (3) be effective (sufficient to move the will of the induced person); (4) the instigator must have the intention to instigate and the intention of the perpetrator to commit the act (*dolus eventualis* is sufficient); and finally (5) it is necessary that the one induced to commit the crime begin to execute the act (attempt) or that he or she completes the crime.

To be considered aider and abettor (*cooperador necesario*), two elements must be met: an agreement of wills; and a contribution, an act or omission, but always effective and transcendent to reach the objective of committing the crime.

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?

Sentences can only be imposed if the defendant committed the crime intentionally (*dolus*) or through negligence (Arts 5 and 10 SCC). A defendant cannot be found guilty if the intent is not proved. Crimes committed unintentionally (by negligence) are only punished if it is specifically provided in the Criminal Code. It is usually determined based on circumstantial evidence.

The prosecution has the burden of proof with respect to intent.

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?

The ignorance of the law defence is governed by Art. 14.3 SCC, which provides that an essential error of the unlawfulness of the fact constituting a crime is a defence. If it could be avoided, it excludes criminal liability and the crime shall be punished as being committed through negligence. If it could not be avoided, the crime shall not be punished. The defendant has the burden of proof.

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?

Ignorance of the facts can also constitute a defence (Art. 14.2 SCC). If the crime could be avoided, it excludes criminal liability and the crime shall be punished as being committed through negligence. The defendant has the burden of proof.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Those who witness a crime (Art. 259 CPC) or those who become aware of the commission of a public criminal offence (Art. 262 CPC) because of their position, profession or job, have the obligation to report the crime. A fine may be imposed if they fail to do so.

Voluntary disclosure of the commission of a crime is established as a mitigating circumstance, either as a person (Art. 21.4 SCC) or an entity (Art. 31 *quater* a) SCC).

13 Cooperation Provisions / Leniency

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

Disclosing criminal conduct or cooperation with the investigation may be consider by the court as a mitigating circumstance in accordance with Art. 31 *quater* SCC.

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

The following steps are recognised as mitigating circumstances (Art. 31 *quater* SCC):

(a) confessing the crime to the authorities;
(b) if the legal entity cooperates in the investigation, bringing new and decisive evidence to elucidate the persons criminally responsible;
(c) reparation or reduction of the damage caused by the crime; and
(d) establishing effective measures to prevent and discover the crimes that might be committed in the future.

If one mitigating circumstance is recognised, the lower half of the punishment provided by law will be applied (Art. 66.1.1 SCC). If two or more mitigating circumstances are recognised, or one or more is deemed qualified, the sentence shall be reduced by one or two degrees as provided by law (Art. 66.1.2 SCC).

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 practice, the prosecutor may offer a more lenient crime and sentence in exchange for the defendant to plead guilty, usually in court at the beginning of the trial. If the defendant pleads guilty and it is accepted by the court, the trial would not take place

and the judge would issue the judgment, imposing the accepted sentence (Arts 781 and 655 CPC). Defendants can only plead guilty if the sentence does not exceed six years of imprisonment.

Legal entities can only plead guilty through a specially designated representative with a special power of attorney.

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?

No rules are provided concerning the government's ability to plea bargain. The court may order the trial to continue if the sentence should be higher for the crime, in the case of minor sentences (Art. 655 CPC), or to correct the qualification of the crime and impose an appropriate sentence in accordance with the law prior to acceptance of the pleading (Art. 787.3 CPC) in cases of prison sentences.

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 a sentence on the defendant? Please describe the sentencing process.

Sentences are imposed by criminal courts at the time they issue the judgment. Rules to determine the appropriate sentence are provided by the SCC (book I, Title III, Chapter II). The SCC establishes the rules to impose a sentence to perpetrators of a completed offence, perpetrators of an attempted offence, accomplices, aggravating and mitigating circumstances for crimes committed with intent and how to determine the sentence in case the circumstances concur. The SCC also distinguishes cases where the defendant has committed more than one crime, where the same act amounts to different crimes or when one crime has been committed as a means to commit another one. In case of crimes against patrimony, the sentence will be imposed taking into account the total damage caused.

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.

Art. 66 *bis* SCC refers to the same rules provided for crimes with intent, taking into account aggravating or mitigating circumstances. It also establishes the following criteria: (a) the need to prevent a continuing criminal activity or its effects; (b) the economic and social consequences, particularly for employees; and (c) the position of the person that failed to fulfil her/his overseeing duties. In case of penalties of a limited duration, they cannot exceed the duration of imprisonment that would be imposed on a natural person. Sentences of more than two years can only be imposed should the corporation be: (a) a repeat offender; or (b) used as an instrument for the commission of crimes. Permanent sentences or sentences of more than five years can only be imposed if the corporation is: (1) a repeat offender convicted for at least three crimes of the same nature provided in the same Title of the Criminal Code; or (2) used as an instrument to commit crimes.

16 Appeals

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

Judgments can be appealed either by any of the parties to the proceeding, the prosecutor or the person condemned (Arts 790 and 846 *bis* b) CPC).

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

The last section of judgments (*fallo*) include both the verdict and the sentence imposed. Both can be appealed at the same time either by the prosecutor, the person condemned or any other party to the proceeding. Likewise, the judgment can be appealed by the person exempted of criminal liability if he or she has been sentenced to a security measure or declared civilly responsible.

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

Appellate courts examine whether there have been (Art. 790 CPC): (1) a breach of procedural rules and guarantees leaving the party defenceless; (2) an error in weighing evidence; and (3) a breach of rules. The CPC also establishes that judgments issued by the Jury Tribunal can be appealed on grounds of: constitutional or legal provisions in the qualification of the facts and determination of the sentence, security measures or civil responsibility; violation of the right to presumption of innocence; and other issues concerning the jury (Art. 846 *bis* c CPC).

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

Appellate courts can acquit, condemn or increase the sentence. It cannot condemn or increase the sentence on grounds of error in weighing evidence. The judgment can also be nullified. Should that be the case, it will be returned to the court that issued the judgment either to issue a new one or to celebrate a new trial. In case of grave breach of procedural rules, the court will order a return to the state when the violation occurred for the breach to be corrected.

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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 police and the public prosecutor (Art. 12 of the Swiss Code of Criminal Procedure (**SCCP**)). The criminal courts are the responsible adjudicating bodies for cases brought forth by the public prosecutor (Art. 13 SCCP). The Confederation and the cantons may delegate the prosecution and adjudication of contraventions to administrative authorities (Arts 17, 357 SCCP). In administrative criminal cases, the competence for prosecution may lie with an administrative authority. For instance, the authority responsible for prosecution and judgment of violations of the criminal provisions of the Financial Market Supervision Act (**FINMASA**) or the financial market acts is the Federal Department of Finance (Art. 50(1) FINMASA).

The cantons are in principle free to determine and regulate the composition and organisation of their criminal justice authorities, including the police and public prosecutor (Art. 14 SCCP). This is the reason why there are quite considerable differences between the cantons with respect to the organisation of the enforcement authorities at the regional level. Some of the larger cantons, such as Bern and Zurich, have implemented specialised public prosecutor's offices responsible for the prosecution of business crimes.

On the federal level, criminal cases are in principle prosecuted by the Office of the Attorney General (**OAG**). The OAG is responsible for the prosecution of all offences in the Swiss Criminal Code (**SCC**), which are subject to federal jurisdiction (Arts 23, 24 SCCP). These offences may include criminal organisation, felonies associated with a criminal organisation, money laundering and corruption.

The responsibility for the execution of mutual legal assistance requests from foreign prosecution authorities lies with the cantonal or federal authorities, as the case may be.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Whether an offence is prosecuted by cantonal or federal authorities is determined by the SCCP. The general principle is that the cantons have jurisdiction unless the law specifically stipulates that the offence in question falls under federal jurisdiction. Offences pursuant to the SCC falling under federal jurisdiction are in principle prosecuted by the OAG. However, under certain conditions the OAG can transfer a criminal case that falls under its jurisdiction in accordance with Art. 23 SCCP to the cantonal prosecutor's offices for investigation (Art. 25 SCCP). In cases of multiple jurisdiction, the OAG decides which canton investigates the case (Art. 26(1) SCCP). In the event of conflicts between the OAG and cantonal criminal justice authorities, the Federal Criminal Court shall decide (Art. 28 SCCP).

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?

There is currently no civil enforcement against business crimes in Switzerland.

As mentioned above in question 1.1, in administrative criminal cases, the competence for prosecution may lie with an administrative authority. A frequent example is prosecution by the Federal Department of Finance in cases of violations of the criminal provisions of the financial market acts. Another example is the Embargo Act, which refers to the Federal Act on Administrative Criminal Law (**FAACL**). According to the latter, the relevant administrative authority is responsible for prosecution (Art. 20(1) FAACL).

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

Swiss authorities are still dealing with large international business crime cases, such as 1MDB, Petrobras-Odebrecht, FIFA, Volkswagen and Gunvor.

At national level, the investigation into state-owned PostAuto involving accounting practices, which allegedly did not comply with subsidy law and, as a result, led to excessive subsidies for public transport services, attracted considerable attention in the press.

2 Organisation of the Courts

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

Pursuant to federal law, the Confederation and the cantons shall determine their own criminal justice authorities and regulate the composition, organisation and powers of the criminal justice authorities and the appointment of their members, unless the SCCP or other federal acts regulate the same in full (Art. 14 SCCP). An example of such federal regulation is the provision according to which two court instances must exist in each canton. Due to the freedom of the cantons, the cantonal differences with respect to the structure of criminal courts are quite substantial. While larger cantons have specialised criminal courts of first instance for white-collar crimes, criminal cases in smaller cantons are tried by the general district courts.

On the federal level, the Federal Criminal Court decides on cases involving federal jurisdiction unless the OAG has delegated the proceedings to the cantonal authorities. Furthermore, the Federal Criminal Court judges administrative criminal cases that the Federal Council has referred to it (Art. 35 of the Organisation of the Criminal Authorities Act (**OCAA**)).

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

There are no jury trials in Switzerland. However, certain cantonal courts of first instance may be constituted of lay judges.

3 Particular Statutes and Crimes

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

• Securities fraud

Under Swiss law, there is no specific statutory provision regarding fraud and misrepresentation in connection with the sale of securities. Rather, the general provision of Art. 146 SCC is applicable.

Pursuant to Art. 146 SCC, any person who with a view to securing an unlawful gain for himself or another wilfully induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests, is criminally liable. Thus, the objective elements of fraud consist of (i) wilful deception by means of false pretences, concealment of the truth, or wilful reinforcement of an erroneous belief, (ii) error, (iii) act of the deceived person to the prejudice of his or another's financial interest, and (iv) damage. The offender acts wilfully, in particular, if he uses forged documents, constructs an entire scheme of lies, prevents the defrauded party from verifying the presented information or knows that the defrauded party will not verify the information due to the relationship of trust between the parties.

Subjectively, fraud requires that the offender acts with intent, i.e. the offender must carry out the act in the knowledge of what he or she is doing and in accordance with his or her will. Conditional intent (*dolus eventualis*) is sufficient. Thus, if the offender regards the realisation of the act as being possible and accepts this, he or she acts with conditional intent. Furthermore, the offender must act with the intent to secure an unlawful gain for himself or another person.

Fraud is punishable with a custodial sentence not exceeding five years or a monetary penalty. If the offender acts for commercial gain, he or she is liable to a custodial sentence not exceeding 10 years or to a monetary penalty of not less than 90 daily penalty units.

In case the offender uses forged documents, the preparation and/or use of such documents may constitute forgery of a document pursuant to Art. 251 SCC. According to Art. 251 SCC, any person who with a view to causing financial loss or damage to the rights of another or in order to obtain an unlawful advantage for himself or another, produces a false document, falsifies a genuine document, uses the genuine signature or mark of another to produce a false document, falsely certifies or causes to be falsely certified a fact of legal significance or makes use of a false or falsified document in order to deceive, is liable to a custodial sentence not exceeding five years or to a monetary penalty.

With respect to fraud in connection with the sale of securities, forgery of a document may in particular fall into consideration in form of false certification. False certification requires a qualified written lie. Such qualified written lie is accepted by the courts if the document has an increased credibility and the addressee therefore has a special trust in it. This is the case when generally applicable objective guarantees warrant the truth of the statement towards third parties, which precisely define the content of certain documents in more detail.

The Collective Investment Schemes Act (**CISA**) also contains criminal provisions in relation to securities fraud. For instance, any person who, in the annual or semi-annual report, wilfully provides false information, withholds material facts or does not produce all the mandatory information, is liable to a custodial sentence not exceeding three years or to a monetary penalty. Where the offender acts through negligence, the penalty is a fine not exceeding CHF 250,000 (Art. 148 CISA).

Furthermore, misrepresentations in securities trading may fall under the Financial Market Infrastructure Act (**FMIA**), which contains several criminal provisions (Art. 147 *et seqq.* FMIA).

• Accounting fraud

In general, accounting fraud is subsumed under the general statute of fraud (Art. 146 SCC) (see above). In case the accounting fraud is accompanied by preparation and/or use of forged documents, forgery of a document pursuant to Art. 251 SCC falls into consideration (see above).

• Insider trading

The exploitation of insider information trading is punishable under Art. 154 of the FMIA. Art. 154 FMIA distinguishes between three different categories of insiders: (i) the primary insider (Art. 154(1-2) FMIA); (ii) the secondary insider (Art. 154(3) FMIA); and (iii) the tertiary insider (Art. 154(4) FMIA).

The objective elements of the provision in Art. 154(1) FMIA consist of the following: the offender must: (i) be a body or a member of a managing or supervisory body of an issuer or of a company controlling the issuer or controlled by the issuer, or a person who due to his or her shareholding or activity has legitimate access to insider information; (ii) gain a pecuniary advantage for himself or for another with insider information; by (iii) a. exploiting it to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities; b. disclosing it to another; or c. exploiting it to recommend to another to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities.

The sanction for a primary insider is a custodial sentence not exceeding three years or a monetary penalty. If he or she gains a pecuniary advantage exceeding CHF 1 million, he or she shall be liable to a custodial sentence not exceeding five years or a monetary penalty.

A person is a secondary insider if he or she gains a pecuniary advantage for himself or herself or for another by exploiting insider information or a recommendation based on insider information disclosed or given to him or her by a person referred to in Art. 154(1) FMIA or acquired through a felony or misdemeanour in order to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities.

The secondary insider shall be liable to a custodial sentence not exceeding one year or a monetary penalty.

A tertiary insider is a person not falling under the other two categories and who gains a pecuniary advantage for himself or herself or for another by exploiting insider information or a recommendation based on insider information. He or she shall be liable to a fine of up to CHF 10,000.

• Embezzlement

The main statutory provision pertaining to embezzlement is Art. 138 SCC ("Misappropriation"). The provision requires the offender to appropriate moveable property belonging to another but entrusted to him or alternatively to make unlawful use of financial assets entrusted to him, for his own or another's benefit. Subjectively, misappropriation requires that the offender acts with intent. Conditional intent (*dolus eventualis*) is sufficient. Furthermore, the offender must act with the intent to secure an unlawful gain for himself or another person. The offender is liable to a custodial sentence not exceeding five years or a monetary penalty.

If the offender acts in his capacity as a member of a public authority, or as a public official, guardian, adviser, professional asset manager, or in the practice of a profession or a trade or the execution of a commercial transaction for which he has been authorised by a public authority, he or she is liable to a custodial sentence not exceeding 10 years or to a monetary penalty.

It is worth mentioning in relation to this the related criminal provision of Art. 158 SCC ("Mismanagement"). Pursuant to Art. 158(1) SCC, any person who by law, an official order, a legal transaction or authorisation granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss, is criminally liable.

The sanction is a custodial sentence not exceeding three years or a monetary penalty. If the offender acts with a view to securing an unlawful financial gain for himself or another, a custodial sentence of up to five years may be imposed.

Alternatively, any person who, with a view to securing an unlawful gain for himself or another, abuses the authority granted to him by statute, an official order or a legal transaction to act on behalf of another and as a result causes that other person to sustain financial loss is liable to a custodial sentence not exceeding five years or to a monetary penalty (Art. 158(2) SCC).

• Bribery of government officials

The SCC differentiates between the following categories of bribery:

- Bribery of Swiss public officials.
- Bribery of foreign public officials.
- Bribery of private individuals.

The provisions governing the bribery of Swiss public officials includes the granting to and the acceptance by Swiss public officials of an undue advantage.

Bribery of public officials and private individuals

The objective elements of Arts 322ter, 322^{quater}, 322^{septies}, 322^{octies} and 322^{novies} consist of the following: (i) a bribing person; (ii) a bribed person; (iii) an undue advantage; (iv) the offering, promising or giving of an undue advantage (active bribery) or the demanding, the securing of the promise of or the accepting of an undue advantage (passive bribery); and (v) a purpose, i.e. the bribing person offers, promises or gives to the bribed person a bribe to cause the latter to carry out or to fail to carry out an act in connection with his or her official activity that is contrary to his or her duty or dependent on his or her discretion (principle of equivalence).

Subjectively, all types of bribery require that the offender act with intent. *Dolus eventualis* is sufficient.

The offender of the criminal provisions pursuant to 322ter, 322^{quater} and 322^{septies} is liable to a custodial sentence not exceeding five years or a monetary penalty. Bribery of private individuals is punishable with a custodial sentence not exceeding three years or a monetary penalty.

It is noteworthy that in minor cases, active and passive bribery of private individuals is only prosecuted upon complaint. Minor cases could be held to be established, in particular, in the following circumstances: the sum in tort is not extensive or the security and health of third parties are not affected by the offence.

Granting and acceptance of an advantage

Pursuant to Arts 322^{quinquies} and 322^{sexies} SCC, the undue advantage is offered, promised or given in order that the Swiss public official carries out his or her official duties. Hence, in contrast to active and passive bribery, the offering, promising or giving of an undue advantage is not linked to a concrete or at least determinable consideration of the Swiss public official (principle of equivalence). However, the granting of the undue advantage needs to be suitable for influencing the carrying out of the Swiss public official's official duties.

The granting and acceptance of an undue advantage are sanctioned with a custodial sentence not exceeding three years or a monetary penalty.

• Criminal anti-competition

Criminal unfair competition practices are sanctioned according to the Unfair Competition Act (**UCA**). Pursuant to Art. 23(1) UCA, anyone who wilfully commits unfair competition in accordance with Arts 3 (Unfair advertising and sales methods and other unlawful conduct), 4 (Incitement to breach or termination of contract), 5 (Exploitation of another's work product) or 6 (Breach of manufacturing or trade secrecy) shall be punished upon request with a custodial sentence not exceeding three years or a monetary penalty. The criminal unfair competition offences range from making incorrect, misleading or unnecessarily offensive statements about others, their products, prices or businesses, to impairing the customer's freedom of choice through particularly aggressive sales methods, to failing to observe the notice in the telephone directory that a customer does not wish to receive advertising messages from third parties and that his data may not be passed on for direct marketing purposes. Furthermore, the offender is punishable according to the above-mentioned provision if he, *inter alia*, incites customers to breach of contract in order to conclude a contract with themselves, exploits a work result entrusted to him such as offers, calculations or plans without authorisation or exploits or communicates to others manufacturing or trade secrets which he has sought to obtain or otherwise unlawfully obtained.

Additionally, the failure to comply with certain pricing disclosure obligations *vis-à-vis* consumers is punishable with a fine of

up to CHF 20,000 in case the offender acts with intent (Art. 24(1) UCA). *Dolus eventualis* is sufficient. If the offender acts negligently, he is punishable with a fine of up to CHF 10,000.

• Cartels and other competition offences

While administrative sanctions against companies participating in certain anti-competitive behaviour are regulated in Art. 49a *et seqq.* of the Cartel Act (**CA**), criminal sanctions are provided for in Art. 54–55 CA. Pursuant to Art. 49(1) CA, which according to the Swiss Federal Supreme Court is akin to criminal law in its nature, any undertaking that participates in an unlawful agreement pursuant to Arts 5(3) and (4) (elimination of effective competition through certain agreements between actual or potential competitors) or that behaves unlawfully pursuant to Art. 7 (by abusing position in the market, hindering other undertakings from starting or continuing to compete or disadvantaging trading partners) shall be charged up to 10% of the turnover that it achieved in Switzerland in the preceding three financial years. The amount is dependent on the duration and severity of the unlawful behaviour. Due account shall be taken of the likely profit that resulted from the unlawful behaviour.

Furthermore, any undertaking that to its advantage breaches an amicable settlement, a final and non-appealable ruling of the competition authorities, or a decision of an appellate body shall be charged up to 10% of the turnover it achieved in Switzerland in the preceding three financial years (Art. 50 CA). The involved individual acting with intent is liable to a fine not exceeding CHF 100,000 (Art. 54 CA).

Additionally, an undertaking that implements a concentration that should have been notified without filing a notification, fails to observe the suspension obligation, fails to comply with a condition attached to the authorisation, implements a prohibited concentration, or fails to implement a measure intended to restore effective competition shall be charged up to CHF 1 million (Art. 51(1) CA).

Finally, any undertaking that does not, or does not fully fulfil its obligation to provide information or produce documents shall be charged up to CHF 100,000 (Art. 52 CA). The involved individual acting with intent is liable to a fine not exceeding CHF 20,000. The same sanction is imposed on a person who wilfully implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings (Art. 55 CA).

• Tax crimes

Intentional or negligent tax evasion is punishable with a fine, which is usually the simple amount of the evaded tax. It can be reduced to one third in the case of slight culpability, and increased up to three times in the case of serious culpability (see Art. 175 *et seqq.* of the Direct Federal Tax Act (**DFTA**) and Art. 56 *et seqq.* of the Tax Harmonisation Act (**THA**)).

Tax fraud is punishable with a custodial sentence not exceeding three years or a monetary penalty. The punishment for tax evasion is reserved (Art. 186 DFTA and Art. 59 THA). Tax fraud requires that the offender, for the purpose of tax evasion, uses forged, falsified or untrue documents such as business records, balance sheets, income statements or wage statements and other certificates issued by third parties for the purpose of deception.

As of 2016, an aggravated tax misdemeanour as set out in Art. 186 DFTA and Art. 59(1)(1st clause) THA, if the tax evaded in any tax period exceeds CHF 300,000, is a predicate offence to money laundering according to Art. 305bis of the SCC.

The assistance of foreign tax evasion is not punishable under Swiss law unless the assisting act itself, such as fraud or forgery of a document, constitutes an offence.

• Government-contracting fraud

There is no specific statutory provision regarding government-contracting fraud. However, the above-mentioned provisions regarding fraud (Art. 146 SCC), bribery (Art. 322ter *et seqq.* SCC) and/or anti-competitive behaviour may be applicable.

• Environmental crimes

The Environmental Protection Act (**EPA**) contains criminal provisions addressing environmental offences. These offences range from failing to take the safety measures prescribed for the prevention of disasters or failing to comply with the prohibition of certain production methods or the keeping of certain stocks, to putting organisms into circulation without providing recipients with the required information and instructions, to infringing regulations on the movement of special waste. If the offender acts wilfully, he or she is liable to a custodial sentence not exceeding three years or a monetary penalty (Art. 60(1) EPA). If he acts negligently, he or she is liable to a monetary penalty not exceeding CHF 540,000 (Art. 60(2) EPA).

Furthermore, the EPA contains contraventions which are punishable with a fine not exceeding CHF 20,000 if the offender acts wilfully, or respectively with a fine not exceeding CHF 10,000 if the offender acts negligently (Art. 61 EPA).

Finally, offences against the regulations on incentive taxes and on biogenic motor and thermal fuels are also punishable (Art. 61a EPA).

• Campaign-finance/election law

Under Swiss law, disruption and obstruction of elections and votes (Art. 279 SCC), attacks on the right to vote (Art. 280 SCC), corrupt electoral practices (Art. 281 SCC), electoral fraud (Art. 282 SCC), vote catching (Art. 282bis SCC) and the breach of voting secrecy (Art. 283 SCC) are punishable. With the exception of vote catching (fine of up to CHF 10,000), these offences are punishable with a custodial sentence not exceeding three years or a monetary penalty.

There are no federal criminal provisions with respect to campaign financing.

• Market manipulation in connection with the sale of derivatives

Pursuant to Art. 155(1) FMIA, any person who (a) disseminates false or misleading information against his or her better knowledge, or (b) effects acquisitions and sales of securities admitted to trading on a trading venue in Switzerland directly or indirectly for the benefit of the same person or persons connected for this purpose is liable to a custodial sentence not exceeding three years or a monetary penalty. The offender must act with the intent to substantially influence the price of such securities and to gain a pecuniary advantage for him- or herself or for another. If the offender gains a pecuniary advantage of more than CHF 1 million, he or she shall be liable to a custodial sentence not exceeding five years or a monetary penalty (Art. 155(2) FMIA).

• Money laundering or wire fraud

Under Swiss law, any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony, i.e. an offence that carries a custodial sentence of more than three years, or from a qualified tax offence, shall be punishable with a custodial sentence not exceeding three years or a monetary penalty (Art. 305bis(1) SCC).

The criminal offences under Art. 186 DFTA and Art. 59(1)(1st clause) THA shall be deemed to be qualified tax offences if the evaded taxes exceed CHF 300,000 per tax period (Art. 305bis(1bis) SCC).

According to the Swiss Federal Supreme Court, and regardless of the clear wording of Art. 305bis(1) SCC, the actions described

as "frustrating the identification of the origin and the tracing of assets" shall not have any independent significance in comparison to "frustrating the forfeiture".

In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.

The Anti-Money Laundering Act (**AMLA**), which is currently under revision, contains due diligence obligations for financial intermediaries, including the obligation to file a report with the Money Laundering Reporting Office if they have reasonable grounds to suspect that assets involved in the business relationship are, *inter alia*, connected to an offence in terms of Art. 305bis SCC or are the proceeds of a felony or an aggravated tax misdemeanour under Art. 305bis(1bis) SCC (Art. 9(1) AMLA). Any person who fails to comply with the duty to report in terms of Art. 9 AMLA shall be liable to a fine not exceeding CHF 500,000. If the offender acts through negligence, he or she shall be liable to a fine not exceeding CHF 150,000 (Art. 37 AMLA).

Swiss law does not know a specific provision for wire fraud. However, Art. 146 SCC may be applicable.

• Cybersecurity and data protection law

There are multiple statutory criminal provisions pertaining to data protection. The main statute is the offence of unauthorised obtaining of data (Art. 143 SCC). Pursuant to Art. 143(1) SCC, any person who obtains for himself or another data that is stored or transmitted electronically or in some similar manner and which is not intended for him and has been specially secured to prevent his access is liable to a custodial sentence not exceeding five years or to a monetary penalty. The offender must act with the intent to obtain an unlawful gain for himself or for another.

Furthermore, any person who obtains unauthorised access by means of data transmission equipment to a data processing system that has been specially secured to prevent his access is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty (Art. 143bis(1) SCC). In addition, any person who markets or makes accessible passwords, programs or other data that he knows or must assume are intended to be used to commit an offence under Art. 143bis(1) SCC is liable to the same sanction (Art. 143bis(2) SCC).

Finally, any person who without authority alters, deletes or renders unusable data that is stored or transmitted electronically or in some other similar way is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty (Art. 144bis(1) SCC). If the offender has caused major damage, a custodial sentence of one to five years may be imposed. The offence is prosecuted *ex officio*. Any person who manufactures, imports, markets, advertises, offers or otherwise makes accessible programs that he knows or must assume will be used for the purposes described in Art. 144bis(1) SCC, or provides instructions on the manufacture of such programs, is liable to a custodial sentence not exceeding three years or to a monetary penalty (Art. 144bis(2) SCC). If the offender acts for commercial gain, a custodial sentence of one to five years may be imposed.

• Trade sanctions and export control violations

The Goods Control Act (**GCA**) and the Embargo Act (**EmbA**) contain different criminal provisions regarding export restrictions (Art. 14 *et seqq.* GCA) and breaches of embargoes (Art. 9 *et seqq.* EmbA). The EmbA is supplemented by ordinances issued by the federal government.

A breach of the GCA, e.g. producing, storing, passing on, using, importing, exporting, transporting or brokering goods without the required licence, or failing to comply with the conditions and requirements of a related licence, is sanctioned with a custodial sentence not exceeding three years or a fine not exceeding CHF 1 million if the offender acts wilfully. In serious cases, the penalty is a custodial sentence not exceeding 10 years, which may be combined with a fine not exceeding CHF 5 million. If the offender acts negligently, the penalty is a custodial sentence not exceeding six months or a fine not exceeding CHF 100,000 (Art. 14 GCA). Certain contraventions and administrative offences are also punishable (Arts 15 and 15a GCA). For instance, anyone who wilfully refuses to provide information, documents or access to business premises in accordance with Arts 9 and 10(1) GCA or provides false information in this connection is liable to a fine not exceeding CHF 100,000 (Art. 15(1)(a) GCA).

With respect to breaches of embargoes, anyone who wilfully violates any provision of an ordinance regarding compulsory measures (Art. 2(3) EmbA), provided such violation is declared to be subject to prosecution, is liable to a custodial sentence of up to one year or a fine of a maximum of CHF 500,000 (Art. 9(1) EmbA). In serious cases, the penalty is a custodial sentence of up to five years. The custodial sentence may be combined with a fine of a maximum of CHF 1 million. If the offender acts negligently, the penalty is a monetary penalty of up to CHF 270,000 or a fine of a maximum of CHF 100,000. Certain contraventions are also punishable (Art. 10 EmbA). For instance, anyone who wilfully refuses to provide information, to hand over documents, or to permit access to business premises in terms of Arts 3 and 4(1) EmbA, or who provides false or misleading information in this connection, is liable to a fine not exceeding CHF 100,000 (Art. 10(1)(a) EmbA).

• Any other crime of particular interest in your jurisdiction

Statutes which are of particular interest are the offences of unlawful activities on behalf of a foreign state (Art. 271 SCC) and industrial espionage (Art. 273 SCC).

Pursuant to Art. 271(1) SCC, any person who carries out or facilitates activities on behalf of a foreign state, a foreign party or organisation on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, is liable to a custodial sentence not exceeding three years or to a monetary penalty. In serious cases, the offender is liable to a custodial sentence of not less than one year.

According to Art. 273 SCC, any person who (i) seeks to obtain a manufacturing or trade secret in order to make it available to a foreign official agency, a foreign organisation, a private enterprise, or the agents of any of these, or (ii) makes a manufacturing or trade secret available to the above-mentioned addressees, is liable to a custodial sentence not exceeding three years or to a monetary penalty. In serious cases, the offender is liable to a custodial sentence of not less than one year. Any custodial sentence may be combined with a monetary penalty.

Both offences require intent. *Dolus eventualis* is sufficient. In case of Art. 273(1) SCC, the intent to make available the secret to the above-mentioned addressees is additionally required.

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

Under Swiss law, there is criminal liability for attempted felonies and misdemeanours. If the offender does not complete the criminal act or if the result required to complete the act is not or cannot be achieved, the court may reduce the penalty (Art. 22(1) SCC). If he of his own accord does not complete the criminal act or if he assists in preventing the completion of the act, the court may reduce the sentence or waive any penalty

(Art. 23(1) SCC). No penalty is imposed in case the offender fails to recognise through a serious lack of judgment that the act cannot under any circumstances be completed due to the nature of the objective or the means used to achieve it (Art. 22(2) SCC).

Attempted contraventions (acts punishable by fine) are offences only in the cases expressly mentioned in the SCC (Art. 105(2) SCC).

If the threshold required for an attempt pursuant to Art. 22 SCC has not been reached, the act is, in principle, not punishable. However, preparatory acts for certain offences of particularly serious nature are subject to punishment themselves (Art. 260bis SCC). Likewise, the participation in and the support of a criminal organisation is a separate criminal provision (Art. 260ter SCC).

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?

Since 2003, corporate criminal liability exists for (a) any legal entity under private law, (b) any legal entity under public law with the exception of local authorities, (c) companies, and (d) sole proprietorships (Art. 102(4) SCC).

Currently, two different statutory norms exist for corporate criminal liability:

The first circumstance in which an entity can be held criminally liable is regulated in Art. 102(1) SCC. Pursuant thereto a corporation may be held liable if a felony or misdemeanour is committed in an entity, in the exercise of the duties of the entity and it is not possible to attribute the criminal act to any specific natural person, due to the inadequate organisation of the entity, then the felony or misdemeanour shall be attributed to the entity.

The second circumstance in which an entity can be held criminally liable is regulated in Art. 102(2) SCC. If the offence committed falls under the catalogue of offences, e.g. money laundering or bribery, then the entity is held liable regardless of whether an individual can be identified as responsible and punished. The punishment does not pertain to the inability to attribute the crime to an individual but rather for failing to prevent the circumstances of the commission of the crime.

In both circumstances, the entity is liable to a fine not exceeding CHF 5 million.

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

Criminal liability of an entity does not *per se* lead to the personal liability of managers, officers, and directors of the entity but rather their criminal liability is dependent on their own conduct and whether criminal acts can be attributed to them.

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?

Where both entity and personal liability is given, the authorities have a general duty to pursue and prosecute both (Art. 7 SCCP). While in the past, the Swiss authorities have almost always focused their prosecution on individuals, there is a trend where increasing numbers of corporate entities face prosecution.

In case of Art. 102(1) SCC, it is required that the act cannot be attributed to an individual in order for the entity to be criminally liable. In practice, this generally implies that the authorities were unsuccessful in pursuing and attributing the act to a responsible individual.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

There is no specific regulation regarding successor liability within Swiss criminal law; however, the general civil law legal principles regarding successions of entities is applicable within criminal law. Criminal liability therefore may exist where companies acquire targets that have been engaged in conduct that violates criminal law, such as anti-corruption laws or economic sanctions law. This reinforces the need to understand a target's potential criminal liability and taking steps to minimise the risk, such as pre-acquisition due diligence and timely post-acquisition review.

5 Statutes of Limitations

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

The statute of limitation period begins on the day on which the offender committed the offence, in the case of a series of acts, on the day on which the final act was carried out. If the criminal conduct continues over a period of time, the statute of limitations begins on the day on which the criminal conduct ceases (Art. 98 SCC).

The right to prosecute is subject to a time limit of 30 years if the offence carries a custodial sentence of life. For offences carrying a custodial sentence of up to three years, the offence becomes time barred after 10 years, and for offences carrying a sentence of more than three years, the offence is time barred after 15 years. Offences carrying different penalties are time barred after seven years (Art. 97 SCC). Administrative criminal law may also carry other limitation periods.

According to recent case law, in cases of corporate criminal liability based on Art. 102 SCC, the limitation period for the criminal liability of the company is the same as the limitation period of the offence that was presumably committed within the entity.

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

The possibility has in principle been rejected by the Swiss Federal Supreme Court.

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

Statutes of limitations under the SCC cannot be tolled; however, the Administrative Criminal Law Act (**ACLA**) does allow for it (Art. 11 ACLA). In administrative criminal proceedings, the statute of limitations is tolled during certain court or appeal proceedings, or as long as the perpetrator is carrying out a prison sentence abroad.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Swiss authorities' jurisdiction is generally limited to crimes committed within Swiss territory. This includes acts perpetrated within Switzerland, or when the effects of the crime unfolded in Switzerland (Arts 3 and 8 SCC). In cross-border white-collar offences, the place of commission is rather broadly interpreted. This results in a relatively broad interpretation of Swiss jurisdiction. For example, bribery offences are considered to be committed in Switzerland as long as the bank account of a Swiss bank has been used to pay or receive the bribe. Finally, crimes against Switzerland that were committed abroad also fall under the jurisdiction of the SCC (Art. 4 SCC).

Jurisdiction to prosecute crimes committed abroad is also given in cases of adherence to an international convention mandating the prosecution of the offence, requiring, however, that the act committed is also punishable at the place of its commission (Art. 6 SCC).

Whilst there is a certain amount of jurisdiction given to the authorities to prosecute offences committed abroad, there are often negating factors, such as drawn out judicial assistance proceedings for the acquisition of evidence, which lead to stronger selectivity when pursuing crimes committed abroad. Often the courts will instead try to indict the offenders for offences in Switzerland related to those committed abroad.

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

The police or public prosecutor generally initiate investigations and proceedings on their own initiative or upon the filing of a complaint by a victim or a third party. While any person is entitled to report an offence to a criminal justice authority in writing or orally (Art. 301 SCCP), criminal justice authorities have a duty to report all offences that they become aware of within their official capacity (Art. 302 SCCP).

The Money Laundering Reporting Office Switzerland (**MROS**) is the most frequent source of information leading to criminal proceedings for white-collar crime matters, in particular international corruption, followed by international mutual legal assistance. Swiss anti-money laundering legislation contributes to the detection of these offences in so far as all Swiss financial intermediaries are required to inform MROS immediately when they are aware or have "reasonable grounds" to suspect that assets involved in a business relationship fall under at least one of the criteria set out in the AMLA, including if they originate in a predicate offence to money laundering (Art. 9 AMLA). The MROS communicates these reports to the public prosecutor for follow-up action upon conclusion that there are reasonable grounds to suspect that an offence has been committed.

Proceedings are initiated by investigatory activity by the police or the opening of an investigation by the public prosecutor (Art. 300 SCCP). If the offence is only prosecuted upon complaint, an investigation is only opened once such a complaint is filed (Art. 303 SCCP).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The International Legal Assistance in Criminal Matters Act (**ILACMA**) regulates international cooperation in criminal matters. Switzerland is also a member state of the European Convention on Mutual Assistance in Criminal Matters, the European Extradition Treaty and other treaties regulating legal assistance in criminal matters.

According to the annual activity report on international legal assistance, in 2019 Switzerland dealt with more than 44,000 legal assistance cases. This included 1,270 requests to Switzerland for criminal evidence, and 935 from Switzerland to foreign countries for criminal evidence.

The investigative authorities may also, under certain circumstances, provide foreign authorities with information outside of a formal legal assistance request proceeding (Art. 67a ILACMA). This was done 127 times by Switzerland in 2019.

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 Swiss authorities possess a varied range of legal measures to establish the truth. The use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence (Art. 140 SCCP). The catalogue of available measures includes the right to question the accused (Art. 157 *et seqq.* SCCP), potential witnesses (Art 162 *et seqq.* SCCP), and informants (Art.178 *et seqq.* SCCP). Experts may be consulted (Art. 182 *et seqq.* SCCP), inspections may be conducted and authorities may obtain access to objective evidence, including documents, and electronic data (Art. 192 *et seqq.* SCCP).

When necessary, the authorities may also obtain access to objective evidence through the coercive measures permitted by law. Such coercive measures must be necessary and proportionate, and there must be a reasonable suspicion that an offence has been committed. These include, amongst others: the power to summon a person for a deposition, if necessary under the threat of sanctions or with the help of the police (Art. 201 *et seqq.* SCCP); the right to detain a suspect in pre-trial custody as long as the relevant requirements are met (Art. 212 *et seqq.* SCCP); the power to conduct searches of premises (Art. 244 *et seqq.* SCCP), to undertake searches of records and recordings, including all information recorded on paper, audio and video as well as electronic recordings (Art. 246 *et seqq.* SCCP) or to seizure objects or assets (Art. 263 *et seqq.* SCCP); and the power to conduct covert surveillance measures, including the surveillance of post and telecommunication (Art. 269 *et seqq.* SCCP) and surveillance using technical surveillance devices (Art. 280 *et seqq.* SCCP).

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 authorities have a general right to seize objects and assets of the accused or a third party which are of relevance, including

documents (Art. 263 SCCP). Those in possession of such documents may be obliged to release them. The accused, any other persons who have the right to remain silent or refuse testimony to the extent the right applies to them, and entities who could by handing over the documents incriminate themselves, may refuse to hand over documents and assets (Art. 264 SCCP). Those who are not exempt may be forced to hand over objects and assets under the threat of a fine (Art. 265 SCCP).

The authorities may raid a company (Art. 244 SCCP) and are authorised to search a company with a written warrant for evidence (Art. 241 SCCP). Documents and records which according to the proprietor may not be searched and are protected under the right to remain silent or refusal of testimony or other relevant reasons are to be sealed and cannot be used or inspected by the authorities. Sealing must be requested immediately, or, at the latest, at the end of the raid. The authorities may request for the removal of the seal of the documents within 20 days; if not, the sealed documents will be returned to the owner. The removal of the seal will be decided upon by the court (Art. 248 SCCP).

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The accused's right to remain silent (Art. 158 SCCP), the catalogue of persons who have a right to remain silent (Art. 168 SCCP) as well as a corporation's right against criminal self-incrimination and (limited) civil incrimination (Art. 265 SCCP) extend to the right to refuse the provision of documents.

The owner or proprietors of the company have a right to comment before the documents and records are searched and indicate which documents are protected (Art. 247 SCCP). This is in particular the case for the following documents and records, which cannot be seized (Art. 264 SCCP): documents and records covered by legal privilege (which includes communications between the company and its external lawyers); purely private documents and records which do not contain information for the investigation; documents and records outside of the authorities' legitimation; and, to some extent, documents and records containing business secrets. The contesting of the seizure of such documents follows the above-mentioned procedure for the sealing of evidence; see question 7.2.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The collection, processing, and transfer of employee's personal data is regulated under the Swiss Federal Act on Data Protection (FADP) and within the Swiss Code of Obligations (CO). The restrictions on data processing and other acts pertaining to employee data is dependent upon the type of data, the purpose for which the data is gathered, as well as the recipient's jurisdiction.

The assertion of foreign jurisdiction within Swiss sovereign territories is penalised under the SCC. To prevent foreign authorities or private individuals who act for the benefit of such authorities from performing on Swiss soil procedural acts without Swiss governmental authorisation, Swiss law provides that whoever, without being authorised, carries out activities on behalf of a foreign state or a foreign party or organisation on Swiss territory, where such activities are the responsibility of a public authority or public official and whoever encourages, or aids or abets such activities shall be liable to imprisonment or to a monetary penalty (Art. 271 SCC). Thus, Art. 271 SCC prevents an "official act" from being performed on behalf of a foreign authority on Swiss soil and can have the effect of blocking the collection of evidence located in Switzerland, if it is intended for the use in a foreign proceedings. In addition, espionage, both political (Art. 272 SCC) as well as industrial (Art. 273 SCC), are penalised within the SCC as well. Banking customer secrecy and restrictions are to be found within the Swiss Banking Act (**BA**).

7.5 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?

There are no regulations specifically pertaining to company employees. The document procurement and seizure regulations set out above (see question 7.3) are applicable. The role of certain employees within criminal proceeding and their questioning is set out below in questions 7.7 and 7.9.

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

See the answers to questions 7.3 and 7.5 above.

Questioning of Individuals:

7.7 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?

In principle, anyone can be questioned that is considered to have knowledge of facts that may assist in establishing the truth. The rights and obligations of these persons depend on their status. Employees or any other persons suspected to have committed the crime are questioned as accused and they have accompanying rights, in particular the right against self-incrimination and the right to refuse to collaborate in the criminal proceedings. Employees or any other persons who are not accused but who cannot be excluded as having committed or participated in the crime are heard as informants. Informants, in principle, do not have an obligation to testify and may refuse to collaborate in the criminal proceedings (Art. 178 *et seqq.* SCCP). Other employees or any other persons who can make a statement that may assist in the investigation are heard as witnesses. They are bound by the duty to testify truthfully (Art. 162 *et seqq.* SCCP).

There are no specific regulations regarding the forum; the standard procedure is the office of the authorities.

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

See above, question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The accused has a right to be informed that an investigation is being conducted against them, the offences that are under investigation, their right to remain silent, and to legal representation (Art. 158 SCCP). Evidence obtained at an examination hearing conducted without the foregoing caution is inadmissible.

Whilst witnesses, and in certain cases informants, are required to testify, they also may have the right to refuse testimony, which may be asserted if the specific grounds therefore are given (Art. 168 *et seqq.* SCCP). Any person involved in criminal proceedings has the right to legal representation to safeguard their interests. The defence of the accused is reserved to lawyers licensed to represent parties in court (Art. 127 SCCP).

In criminal proceedings against a corporate undertaking, the undertaking shall be represented by a single person who has unlimited authority to represent the undertaking in private law matters (Art. 112 SCCP). Said person is treated as an informant and retains the right to remain silent (see above). The enterprise itself as an entity possesses the rights granted to an accused natural person. Employees who have been or could be designated as the representative of the company in the criminal proceedings against it, as well as their close employees, are heard as informants with the rights attached to this status (Art. 178 letter g SCCP).

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

See question 6.2 above.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

If it is deemed by prosecuting authorities that sufficient evidence is present, they then have a duty to charge the respective entities or persons (Art. 324 SCCP). Legally, the authorities' prosecutorial discretion is limited to the assessment of the evidence at hand. There are limited exceptions to this duty, which are elaborated on below.

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

Criminal authorities have a duty to investigate and prosecute if they become aware of a crime (Art. 7 SCCP). The *dubio pro reo* principle is not applicable at this stage, but rather it is for the trial judge to decide on the accused's culpability, if the factual situation is not clear. In practice, however, there is often a case overload which can lead to a somewhat more selective method in deciding which cases to pursue.

The authorities may, however, renounce to open an investigation and issue a no-proceeding order if the offence's elements are clearly not fulfilled, if there are procedural impediments or if: the level of culpability and consequences of the offence are negligible (Art. 52 SCC); the offender has repaired the loss, damage or injury, or made all reasonable efforts to compensate for the damage caused by him, provided that a limited penalty is suitable, the interest in prosecution of the general public and of the persons harmed are negligible and the offender has admitted the offence (Art. 53 SCC); or the offender is so seriously affected by the immediate consequences of his act that a penalty would be inappropriate (Art. 54 SCC). This allows for a potential resolution of a criminal investigation without it going to trial.

In addition, at any time prior to bringing charges, the accused may request the public prosecutor to conduct accelerated proceedings provided the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims (Art. 358 *et seqq.* SCCP). Accelerated proceedings are not an option in cases where the public prosecutor requests a custodial sentence of more than five years. If the public prosecutor accepts accelerated proceedings, the prosecutor will prepare an indictment to which the accused has to consent. Subsequently, the court will only conduct a hearing to establish whether the accused admits the matters and whether the conditions of the accelerated proceedings are met. The court does not conduct any investigations (Art. 361 SCCP). It either confirms the indictment or sends it back to the public prosecutor to start an ordinary procedure (Art. 362 SCCP).

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Neither deferred nor non-prosecution agreements currently exist under Swiss law. The AG has, however, discussed the introduction of a deferred prosecution mechanism in Switzerland.

8.5 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 may apply.

Matters regarding economic loss to the state caused by an enterprise are matters of civil law in Switzerland.

Civil claims may be filed by the injured party within criminal proceedings. These will be adjudicated upon, if the offender is convicted or if the offender is acquitted of the criminal charges and the court is in a position to pass judgment on the civil matter (Art. 122 *et seqq.* SCCP).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Under Swiss law, any person or enterprise is presumed to be innocent until they have been convicted in a judgment that is final and legally binding. The criminal court is free to assess

the evidence in accordance with the views that it forms over the entire proceedings. Where there is insurmountable doubt as to whether the factual requirements of an alleged offence are established, the court shall proceed on the assumption that the circumstances more favourable to the accused occurred (presumption of innocence, Art. 10 SCCP).

During the investigative phase, it is thus for the criminal authorities to investigate *ex officio* all facts respectively constituting elements of the crime at stake. Incriminating and exculpating circumstances must be investigated with the same level care (Art. 6 SCCP).

In the trial phase, the burden of proof lies with the public prosecution office, which has to prove the relevant facts beyond reasonable doubt. Once this degree of certainty is met, the accused person, in order to avoid conviction, must submit counter-evidence casting doubt on the public prosecution office's case. The accused person thus has the right to make motions during the investigation but also at court level to have further evidence taken (Arts 318, 331(2) and 345 SCCP).

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

See above.

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

In Switzerland, the courts are the arbiters of fact. In particular, they decide if the facts alleged by the prosecution have been proven beyond reasonable doubt.

Depending on the offence, the court will be composed of a single judge or a panel of judges (Art. 19 SCCP).

10 Conspiracy / Aiding and Abetting

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

Any person who commits a crime in collaboration with other offenders is criminally liable as the offender, provided the criminal act was committed based on a joint plan and jointly executed.

Furthermore, a person may be charged as the instigator of a crime if he or she wilfully incites another person to commit an offence. The punishment applying to the perpetrator is applicable also to the instigator. The same applies to the attempt to incite (Art. 24 SCC).

Finally, aiding and abetting is also punishable under Swiss law. Any person who wilfully assists another to commit a felony or a misdemeanour is liable to a reduced penalty (Complicity, Art. 25 SCC). The act of aiding or abetting requires that the perpetrator intentionally and causally advances the main offence. Both physical as well as psychological assistance may be qualified as aiding and abetting.

Aiding and abetting a contravention, i.e. acts punishable by a mere fine (Art. 103 SCC), is only punishable where expressly mentioned in the law (Art. 105(2) SCC). For example, in administrative criminal law, aiding and abetting a contravention is always punishable (Art. 5 ACLA).

Finally, it should be noted that certain forms of assisting a perpetrator are punishable as separate crimes. For example, assisting a perpetrator to avoid the confiscation of criminal proceeds may be punishable as money laundering (Art 305bis SCC). Furthermore, participating in or supporting a criminal organisation is punishable in itself (Art. 260ter SCC).

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?

A perpetrator must act with intent, unless the law expressly states that the offence may be committed through negligence, which, as a rule and with the exception of administrative criminal law, is not the case with business crimes. A person acts with intention if he wilfully carries out the act in the knowledge of what he is doing and in accordance with his will. A person acts wilfully as soon as he regards the realisation of the act as being possible and accepts this (*dolus eventualis*, Art. 12(2) SCC).

Where the objective elements of the offence are proven, a perpetrator will often deny that he subjectively acted with intent. The prosecuting authorities bear the burden of proof regarding all elements of the crime, including subjective elements such as the intent to commit the crime. The state of mind of the perpetrator is more difficult to prove than objective facts. However, where no other evidence is available, the courts frequently infer from the objective circumstances that the perpetrator must have acted with intent.

As for corporate criminal liability, the existence of an effective compliance programme may be an efficient defence. It will prove a certain degree of organisation within the company's structure and may thus support the company's assertion that it did take all the reasonable organisational measures required to prevent such an offence; in other words, that one of the constituent elements of Art. 102 SCC – the lack of an adequate organisation – is lacking.

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?

Art. 21 SCC provides that a person who is not and cannot be aware that, by carrying out an act he is acting unlawfully, does not commit an offence. If the error was avoidable, the courts will reduce the sentence (error of law).

Whilst this defence exists, it is rarely successful as the courts set a very high standard of what should be known. As a general rule, not knowing the law is not a defence. Also, there is no error of law if the perpetrator had a vague feeling that the intended act might be contrary to what is right.

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?

According to Art. 13 SCC, if the perpetrator acts under an erroneous belief as to the circumstances, the court shall judge the act according to the circumstances as the perpetrator believed them to be (error of facts).

If the error had been avoidable under the exercise of due care, the perpetrator is liable for negligently committing the act, provided the negligent commission of the act is punishable. The standard rules regarding the burden of proof apply.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

As a general rule, a person or entity is not obliged to report crimes in Switzerland. Only the criminal authorities, or other authorities pursuant to specific legal provisions, have an obligation to report crimes they have become aware of (Art. 302 SCCP). In these cases, the wilful failure to report may in itself constitute a crime (Art. 305 SCC).

In the realm of business crimes, duties to report are often contained in specific acts, such as in particular the AMLA which stipulates reporting duties for financial intermediaries in case of suspected money laundering (Art. 9 AMLA). Failure to report is a criminal offence in itself and fined with CHF 500,000 in case of intent respectively CHF 150,000 in case of negligence (Art. 37 AMLA).

Leniency will be discussed below.

13 Cooperation Provisions / Leniency

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

A confession may lead to a reduced penalty provided it proves genuine remorse, facilitates the criminal prosecution and was not made only on the basis of overwhelming evidence (Art. 48 lit. d SCC).

Furthermore, a perpetrator can apply for accelerated proceedings if he is prepared to admit the relevant facts (see below question 14.1). In this case, it is not relevant whether the admission is made at a relatively late stage of the proceedings and under the pressure of the existing evidence. Typically, the penalty negotiated and imposed in accelerated proceeding will be of a lesser severity.

In particular in case of criminal organisations, the court has the discretion to mitigate the penalty imposed if the perpetrator makes an effort to foil the criminal activities of the organisation by cooperating with the criminal authorities (Art. 260ter (2) SCC).

Furthermore, Swiss antitrust law contains detailed provisions regulating to what extent voluntary cooperation mitigates or even excludes punishment.

Finally, Swiss tax law also allows to mitigate or even exclude punishment in cases of voluntary disclosure, the extent of leniency depending on the specific circumstances of the case.

Apart from this, Swiss law does not contain specific provisions to reward spontaneous reports of irregularities or cooperation by natural persons or corporations. However, in practice self-reporting or cooperation during proceedings is generally taken into account by the criminal authorities when determining a sentence.

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

Except for antitrust law and tax law, there are no strict guidelines regarding the extent of the cooperation required. In practice, it can generally be said that full cooperation in all aspects during the entire investigation process and the voluntary disclosure or confession of any relevant offences, including disclosure of documents, will contribute towards leniency.

The courts may, however, only exercise discretion in determining the extent of the sanction and may not waive the sanction in its entirety. Exceptions and deviating circumstances can be seen above.

See questions 8.1 and 13.1.

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?

Whilst the concept of plea bargaining as known in other jurisdictions does not *de facto* exist, Swiss law provides for three procedures which allow a certain level of negotiations between the prosecution authorities, the civil claimant and the accused:

First, according to Art. 53 SCC, if the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if:

- a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine are suitable as a penalty;
- the interest in prosecution of the general public and of the persons harmed are negligible; and
- the offender has admitted the facts essential to the legal appraisal of the relevant offence.

Typically, the exemption from punishment based on Art 53 SCC is preceded by settlement discussions for which the accused can apply (Art. 316 (2) SCCP). Such discussion will in particular relate to the facts to be admitted by the accused and the form and amount of reparation required.

Second, the public prosecutor might issue a Summary Penalty Order, provided:

- the accused accepts his responsibility for the offence or if his responsibility has otherwise been satisfactorily established; and
- the sanction decided on by the public prosecutor is limited (a fine, a monetary penalty of up to CHF 540,000 or a custodial sentence of no more than six months) (Art. 352 SCC).

Unless it is challenged by a party within 10 days, the Summary Penalty Order becomes a final judgment and the case does not reach the trial phase. Although not specifically mentioned in the law, the issuance of a Summary Penalty Order is often preceded by discussions between the public prosecutor and the accused. And even where this is not the case, the accused person is free to challenge or accept the Summary Punishment order which becomes thus, so to speak, a plea agreement offer by the prosecution authorities.

Third, the accused may request the public prosecutor to conduct so-called Accelerated Proceedings (Art. 358 *et seqq.* SCCP) if the following conditions are met:

- the accused admits the facts essential to the legal appraisal of the relevant offence;
- the accused recognises, if only in principle, the civil claims (if any); and
- the prosecutor requests a custodial sentence below five years.

If the request is accepted by the prosecutor, he will discuss with the parties the charges, the sentence and the civil compensation. If an agreement is reached, the prosecutor will submit an indictment containing the requested punishment or measures amongst other elements. All involved parties are given 10 days to oppose the indictment. If any party opposes the accelerated proceedings, ordinary proceedings must be conducted. Otherwise, a court hearing will take place in which the court freely decides whether (i) the conduct of accelerated proceedings is lawful and reasonable, (ii) the charge corresponds to the result of the main hearing and the files, and (iii) the requested sanctions are equitable. The court does not conduct any investigations (Art. 361 SCCP). It either confirms the indictment or sends it back to the public prosecutor to start an ordinary procedure (Art. 362 SCCP).

The sole grounds for appeal against a judgment in accelerated proceeding are that a party did not agree to indictment or that the judgment passed does not correspond to the indictment submitted.

All three options discussed above are available not only in criminal proceedings against natural persons but also in proceedings against corporate entities.

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?

See question 14.1 above.

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 a sentence on the defendant? Please describe the sentencing process.

The sentence is to be determined within the usually wide range determined by statutory law for the offence.

The court determines the sentence based on the offender's degree of guilt. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life (Art. 47 (1f) SCC).

The degree of guilt is to be assessed upon the seriousness or danger to the legal interest concerned, the reprehensibility of the offender's conduct, their motives and aims in committing the crime, and the extent to which, given their personal and external circumstances, the offender could have avoided the unlawful behaviour (Art. 47 (2) SCC).

The court has the power to mitigate the sentence under certain circumstances; for example, if the accused acted for honourable motives, while in serious distress, under serious threat, on order of a person whom he had to obey or on whom he was dependent, under provocation by the victim, in a state of extreme emotion excusable under the circumstances, or if the offender has shown genuine remorse and, in particular has made reparation for the damage caused or if the need for punishment is substantially reduced due to the time lapsed since the offence, provided the offender has shown good conduct thereafter (Art. 48 SCC).

If the court chooses to mitigate a sentence, it is not bound by the minimum penalty an offence carries (Art. 48a SCC).

In the case of multiple offences, the court will impose the sentence for the most serious offence at an appropriately increased level (so-called aspiration principle). It may not, however, increase the maximum level of the sentence by more than half, and it is bound by the statutory maximum of the relevant form of penalty (Art. 49 SCC).

In addition to the penalty, the court will order the forfeiture of assets acquired by the perpetrator or a third party through the commission of the offence. A third party will be protected if it acquired the assets in good faith *and* provided adequate compensation. Where the original assets are no longer available, the court will issue an equivalent compensatory claim (Art. 70 *et seq.* SCC).

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.

Enterprises are fined based upon the gravity of the offence, the gravity of the organisational deficit which enabled it, the extent of damages caused, and the economic strength of the enterprise. The courts have ample discretion in determining the sanction imposed as there are no binding sentencing rules.

The maximum fine for corporate liability is CHF 5 million. In addition to the fine, the corporate entity faces the confiscation of the proceeds acquired through the commission of the offence (Art. 70 *et seq.* SCC).

16 Appeals

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

Swiss criminal procedural law does not distinguish between a trial and sentencing phase. A bifurcation may exceptionally be granted upon request. However, an appeal is only possible against the final verdict deciding on guilt and sanctions (Art. 342 SCCP).

Any partial or final judgment of a cantonal court of first instance may be appealed to the corresponding cantonal court of appeals (Art. 398 *et seq.* SCCP). At the federal level, since 1 January 2019, judgments of Federal Criminal Tribunal may be appealed to the Higher Appeals Chamber of the Federal Criminal Tribunal. In either case, the appellate courts can fully review the appealed judgment, including errors of law, incorrect or inappropriate determination of facts, and inappropriate exercise of discretion (Arts 393 and 398 SCCP).

Furthermore, any participant of the appeal proceedings mentioned before may lodge a further appeal to the Federal Supreme Court, provided he or she can show a legally relevant interest for the submission of an appeal, such interest being assumed in the case of the accused, prosecution and under certain circumstance, the injured party (Art.78 *et seq.* FSCA). The Federal Supreme Court's review is limited to legal errors and manifestly incorrect findings of fact (Art. 95 *et seq.* FSCA).

Procedural orders and measures of the criminal authorities, as well as decisions on compulsory measures may be appealed to a cantonal court or, in case of federal jurisdiction, to the board of appeal of the Federal Criminal Tribunal (Art. 37 OCAA).

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

See above question 16.1.

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

See above question 16.1.

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

Appellate courts have the power to either remedy the ruling by deciding on the merits *in lieu* of the lower court or they may remit the case back with instructions to the lower court for a new ruling (Arts 397, 408 and 409 SCCP; 107 FSCA).

In practice, the Federal Supreme Court regularly remits the case back to the lower court for a new decision on the merits, in particular where additional facts need to be established. The lower appellate courts very often decide themselves on the merits.

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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?

(1) Public Prosecutors Offices

In Taiwan, there are 22 District Prosecutor's Offices and the public prosecutors of these District Prosecutor's Offices are responsible for leading the investigation of crimes and have the sole power to make the decisions on whether or not to indict the suspects under investigation. All other investigative authorities as listed below must report their investigation to and take instructions from the public prosecutors.

(2) Other investigative authorities

(a) The Police

The police are responsible and have the authority to investigate all kinds of crimes. However, in practice, the police rarely investigate crimes which are in the scope of the Investigation Bureau's and the Agency against Corruption's purview, for example violation of the Securities and Exchange Act and the Anti-Corruption Act.

(b) The Investigation Bureau of the Ministry of Justice ("MJIB")

The MJIB is in charge of investigation into crimes involving foreign aggression, disclosure of classified national information, corruption, vote-buying, drug abuse, money laundering, computer crimes, organised crimes, disturbance of domestic security, and major economic crimes. In practice, most investigations of white-collar crimes, for example violation of the Banking Act, the Securities and Exchange Act, and the Anti-Corruption Act, are conducted by the MJIB and then referred to the Public Prosecutor's Offices.

(c) The Agency against Corruption of the Ministry of Justice ("MJAC")

The MJAC is in charge of formulating corruption control policy and fulfilling the functions of anti-corruption education, corruption prevention and corruption investigation. They also conduct investigations on crimes concerning the Anti-Corruption Act and report their investigations to the Public Prosecutor's Office.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Any one of the above said authorities has the power to initiate criminal investigations into crimes within the scope of its duties, either on its own initiative or in response to a criminal complaint from a victim or a criminal report from a third party. If the Public Prosecutor's Office takes the initiative or receives a criminal complaint or a criminal report and considers it necessary to have other authorities assist in the investigation, it has full discretion to decide which authority the case should be assigned to.

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?

(1) Civil Enforcement

There is no civil law enforcement by public authorities. However, during the criminal investigation, the public prosecutor could apply to the criminal court for a ruling to seize assets or to freeze bank accounts of the perpetrator of a business crime. The person who is injured by the business crime could also file an application to the civil court for a provisional attachment order to attach assets or freeze bank accounts of the perpetrator. In addition, it is very common in Taiwan for a victim of a crime to file an auxiliary civil lawsuit against the perpetrator after the latter has been indicted by the public prosecutor.

(2) Administrative Enforcement

Certain violations of administrative laws, for example the Securities and Exchange Act and the Fair Trade Act, would incur a criminal as well as an administrative penalty. Examples of the authorities that regularly conduct administrative investigation and impose fines or other administrative penalties on perpetrators who are also suspects of criminal investigation violations include the Environmental Protection Administration (for environmental matters), the Financial Supervisory Commission (for matters involving securities fraud, insider trading), and the National Taxation Bureau (for tax evasion).

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

One example of a high-profile business crime involved former Secretary-General of the Legislative Yuan (Taiwan's legislature), Mr. L., who was suspected of taking bribes and exploiting his authority when making decisions on the Legislative Yuan's procurement of computer hardware and software to pocket kickbacks on several occasions, totalling NT$30 million, from the supplier. Hence, the prosecutor indicted Mr. L and the computer supplier for taking kickbacks, taking bribes in performing public duties, and holding assets of unknown sources under the Anti-Corruption Act. After the case was heard by the court of first

instance, the court rendered a judgment, sentencing Mr. L to 16 years in prison for taking kickbacks and holding assets from unknown sources.

Another high-profile business crime involved kickbacks taken by a senior officer of a petrochemical company. When handling a construction project in China in his capacity as the head of the engineering department, the senior engineer demanded NT$10 million in kickbacks from a supplier. The prosecutor indicted him on breach of trust under the Criminal Code. After his case had been heard by the court of first instance, the court rendered a judgment and sentenced him to two years and eight months in prison, and the proceeds of the crime, NT$7,500,000 (approximately US$246,910), was confiscated by the court.

2 Organisation of the Courts

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

The courts hearing criminal cases are structured in three instances. Criminal courts of the 22 District Courts have first-instance jurisdiction over nearly all criminal cases. The criminal courts of the Taiwan High Court and its four branches hear appeals against judgments given by district courts. At the district court and high court levels, matters of both facts and law are considered and decided. Except for minor crimes, the judgments given by a high court can be appealed to the Supreme Court, which may only consider and decide on whether there exist errors of law in the high court judgments.

Except for minor crimes which could be decided by only one judge, criminal courts at the district court level are composed of three judges. The criminal courts of the high courts and those of the Supreme Court are composed of three and five judges, respectively.

At both district court and high court levels, there are divisions specialising in certain kinds of crimes. For example, divisions of financial crimes are dedicated to cases involving criminal offences under the Banking Act and the Securities and Exchange Act, etc. There are also divisions of corruption who are in charge of trials of crimes concerning the Anti-Corruption Act. The Supreme Court, however, has not set up any specialised division.

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

Taiwan does not have a jury system and Taiwan law does not provide for jury decisions. However, the legislature is currently contemplating introducing citizen participation (lay judges) into the judicial system.

3 Particular Statutes and Crimes

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

• Securities fraud

Article 20 paragraph 1 of the Securities and Exchange Act provides that, during public offering, issuing, private placement, or trading of securities, there shall be no misrepresentations, frauds, or any other acts which are sufficient to mislead other persons.

Article 171 paragraph 1 of the Securities and Exchange Act imposes three to 10 years' imprisonment, and, in addition thereto, a fine of NT$10 to 200 million on persons in violation of article 20 paragraph 1.

• Accounting fraud

According to article 71 of the Business Entity Accounting Act, if a person responsible for company decisions or entrusted with accounting affairs knowingly uses untrue information to prepare accounting documents or enters false information into accounting books, he/she may face imprisonment for up to five years and, *in lieu* thereof or in addition to, a fine of no more than NT$600,000.

Article 20 paragraph 2 of the Securities and Exchange Act requires that the financial reports or any other relevant financial or business documents filed or publicly disclosed by an issuer in accordance with the Act shall contain no misrepresentations or nondisclosures. Article 171 paragraph 1 of the same Act imposes three to 10 years' imprisonment, and, in addition thereto, a fine of NT$10 to 200 million on persons involved in such misrepresentation and nondisclosure.

• Insider trading

As article 157-1 paragraph 1 of the Securities and Exchange Act stipulates, "upon actually knowing of any information that will have a material impact on the price of the securities of the issuing company, after the information is precise, and prior to the public disclosure of such information or within 18 hours after its public disclosure, the following persons shall not purchase or sell, in the person's own name or in the name of another, shares of the company that are listed on an exchange or an over-the-counter market, or any other equity-type security of the company:

1. a director, supervisor, and/or managerial officer of the company, and/or a natural person designated to exercise powers as representative pursuant to article 27, paragraph 1 of the Company Act;
2. shareholders holding more than 10 per cent of the shares of the company;
3. any person who has learned the information by reason of occupational or controlling relationship;
4. a person who, though no longer among those listed in [one of] the preceding three subparagraphs, has only lost such status within the last six months; and
5. any person who has learned the information from any of the persons named in the preceding four subparagraphs".

Article 171 paragraph 1 of the same Act imposes three to 10 years' imprisonment, and, in addition thereto, a fine of NT$10 to 200 million on persons involved in such insider trading.

• Embezzlement

According to article 335 of the Criminal Code, a person who has lawful possession of property belonging to another and who embezzles it with the intention to illegally obtain the property for his own or a third person's benefits shall be sentenced to imprisonment for up to five years or detention; *in lieu* of or in addition thereto, a fine of up to NT$30,000 shall be imposed.

For persons who commit embezzlement (article 335) with respect to property of which they have lawful possession resulting from their occupational fiduciary relationship, article 336 paragraph 2 of the Criminal Code raises the penalty to imprisonment of six months to five years, which may be accompanied by a fine of up to NT$90,000.

According to article 171 paragraph 1 subparagraph 3 of the Securities and Exchange Act, a director, supervisor, or managerial officer of an issuer as defined in the Act who, with intent to procure a benefit for himself/herself or for a third person, acts contrary to his/her duties or misappropriates company assets,

thus causing damage of NT$5 million or more to the company, shall be punished with three to 10 years' imprisonment and, in addition thereto, a fine of NT$10 to 200 million.

• Bribery of government officials

In Taiwan law, the Criminal Code and the Anti-Corruption Act overlap in their proscription of corruption in public life. Since the Anti-Corruption Act was tailor-made for fighting bribery, it takes precedence over that of the Criminal Code in cases involving public servants. The Anti-Corruption Act penalises both persons offering and taking bribes.

Article 4 of the Anti-Corruption Act imposes imprisonment for life or a term of no less than 10 years and may also be punished by a fine not exceeding NT$100,000,000 on public servants having "demanded, taken or promised to take bribes or other unlawful profits in exchange for violation of their official duties".

On the other hand, article 11 paragraph 1 of the Anti-Corruption Act imposes the penalty of imprisonment for a term of no more than seven years and no less than one year, possibly accompanied by a fine not exceeding NT$3,000,000, on "any person who tenders bribe or other unjust valuables, promises to give anything of value or actually gives anything of value to a person subject to the Act [i.e. public servants] in return for the latter's action or inaction in performing his or her official duties".

Taiwan law prohibits civil servants from receiving facilitation or "grease" payments. Article 16 of the Civil Servant Work Act prohibits civil servants from receiving any kind of gifts in relation to the matters they handle. On top of that, according to article 5 of the Anti-Corruption Act, civil servants who receive grease payments are punishable with imprisonment for a term of no less than seven years with a possible fine of up to NT$60 million.

The Anti-Corruption Act also punishes those who offer grease payments or other improper benefits to civil servants even when there is no breach of official duties by the civil servants. According to article 11 paragraph 2 of the Anti-Corruption Act, such payments are liable to imprisonment for a term of up to three years, detention, and/or a fine of no more than NT$500,000.

• Criminal anti-competition

The Fair Trade Act imposes penalties on acts that are likely to restrain competition, which include causing another enterprise to discontinue its supply of, purchase from, or other business transactions with a particular enterprise for the purpose of injuring such enterprise; giving another enterprise differential treatment without justification; preventing competitors from participating or engaging in competition by inducement with low price or other improper means; causing another enterprise to refrain from competing in price, or to take part in a merger, concerted action, or vertical restriction by coercion, inducement with interest, or other improper means; imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement.

• Cartels and other competition offences

Under the Fair Trade Act, the Fair Trade Commission may order enterprises engaging in concerted action to desist from such action, rectify its conduct, or take any necessary corrective measure. If the enterprise relapses into another concerted action, the actor (natural person) involved in the action will be punished with imprisonment for up to three years, or a fine of up to NT$100 million, or both.

Nevertheless, enterprises may, with the approval of the Fair Trade Commission, legally engage in concerted actions for the following purposes:

1. unifying the specifications or models of goods or services for the purpose of reducing costs, improving quality, or increasing efficiency;
2. joint research and development on goods, services, or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency;
3. each developing a separate and specialised area for the purpose of rationalising operations;
4. entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports;
5. joint acts in regard to the importation of foreign goods, or services for the purpose of strengthening trade;
6. joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand orderly, because of economic downturn, that the enterprises in the same industry have difficulty to maintain their business or encounter a situation of overproduction;
7. joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small-and-medium-sized enterprises; or
8. joint acts required for the purposes of improving industrial development, technological innovation, or operational efficiency.

• Tax crimes

(1) Tax evasion

A taxpayer who evades tax payment by fraud or other unrighteous means may be sentenced to detention or imprisonment for up to five years; *in lieu* thereof or in addition thereto, a fine of no more than NT$60,000 may be imposed. A person who instigates or assists another person to commit tax evasion may be sentenced to detention, imprisonment for up to three years, and a fine of no more than NT$60,000 may be imposed on him. Where the person instigating or assisting tax evasion is a tax official, an attorney, a certified public accountant, or any other agent legally representing an evader of tax, the penalty to be imposed will be increased by up to one-half.

(2) Refusing, obstructing or avoiding an inspection by tax collectors

On profit-seeking enterprises that refuse to be investigated by the agents appointed by the Taxation Administration or other tax collection authorities, or refuse to submit relevant information and documents required for making tax assessment, a fine of NT$3,000 to NT$30,000 may be imposed.

• Government-contracting fraud

Article 87 paragraph 3 of the Government Procurement Act provides a penalty of five years' imprisonment and a fine up to NT$1 million for persons who, by fraud or any other illegal means, block other suppliers of government procurement from tendering, or rig the results of an opening of tenders.

A penalty of five years' imprisonment and a fine up to NT$1 million is imposed by article 87 paragraph 4 of the Government Procurement Act on persons who, seeking to affect adversely the price of award or to gain illegal benefits, discourage a supplier from tendering or engaging in price competition.

Article 87 paragraph 5 of the Government Procurement Act also imposes a penalty of three years' imprisonment, possibly accompanied with a fine up to NT$1 million, on persons who, seeking to affect the result of procurement or to gain illegal benefits, borrow or usurp the name or certificate of others in tendering. The same rule also applies to persons who allow others to borrow or usurp his name or certificate in tendering.

• Environmental crimes

The Criminal Code imposes detention, five years' imprisonment and/or an NT$1 million fine on persons who discard, discharge, drain or emit hazardous substances into the air, soil, or rivers or other waterbodies, and thereby cause harm to the environment.

If the above offence is committed by a proprietor, supervisor, agent, employee or other staff member during the performance of his duty, the penalty to be paid will rise to seven years' imprisonment and may be with accompanied with a fine of up to NT$15 million.

Should the offence result in casualties, or serious physical injury to persons, penalties may be elevated to seven to 10 years' imprisonment. An attempt to commit such environmental offenve is also punishable (article 190-1 of the Criminal Code). Some other major environmental legislation, such as the Air Pollution Control Act, the Tobacco Hazards Prevention Act and the Soil and Groundwater Pollution Remediation Act, also carry criminal liability for violation of environmental regulations.

• Market manipulation in connection with the sale of derivatives

Article 106 of the Futures Trading Act forbids price manipulation of futures in the following ways:

1. continuously inflating, maintaining, or deflating the prices of a certain futures contract or its related spot commodities;
2. increasing, maintaining, or decreasing the open positions of a certain futures contract or the supply or demand of its related spot commodities;
3. disseminating or spreading false information;
4. directly or indirectly engaging in manipulative acts to influence the prices of a certain futures contract or its related spot commodities.

Article 107 of the Futures Trading Act forbids certain persons who have direct or indirect access to information that may materially affect the prices of a certain futures contract from purchasing or selling futures or its related spot commodities which are related to such information prior to the public disclosure of the information or within 18 hours after its public disclosure; such persons include:

1. directors, supervisors, managers, employees, or mandataries of a futures exchange, futures clearing house, futures enterprise, futures association, Stock Exchange, over-the-counter securities exchange, or a securities dealers association;
2. public officials, employees or mandataries of the Competent Authority or the competent authorities of other related businesses;
3. any person who has learned the information by reason of occupational or controlling relationship;
4. directors, supervisors, managers, employees, or major shareholders with shareholding of 10 per cent or more, of the issuer of the underlying securities of single stock futures contracts or equity option contracts;
5. directors, supervisors, managers or employees of the mandataries referred to in subparagraphs 1, 2, and 4;
6. a person who, though no longer among those listed in the preceding five subparagraphs, has only lost such status within the last six months; or
7. any person who has been informed of the information by the persons referred to in the preceding six subparagraphs.

Article 108 paragraph 1 of the Futures Trading Act proscribes bucketing, misrepresentation, fraud, deceit, or other conducts misleading futures traders or other third parties; the term "bucketing" refers to off market offsetting, cross-trading, taking the other side of a customer's order and accommodation trading.

Article 112 of the Futures Trading Act imposes penalties on persons acting in defiance of the above provisions: imprisonment for three to 10 years, with an additional fine of NT$10 to 200 million.

• Money laundering or wire fraud

1. Article 14 of the Money Laundering Control Act imposes imprisonment of up to seven years and a fine amounting to NT$5 million on anyone involved in money laundering activities. These activities are described in article 2 of the same Act: knowingly disguising or concealing the origin of the proceeds resulting from unlawful activities, or transfer or conversion of such proceeds with the effect of facilitating others to avoid criminal prosecution;
2. disguising or concealing information relating to proceeds, such as its true nature, source, movement, location, ownership or other rights; and
3. acceptance, obtention, possession or use of the proceeds resulting in unlawful activity committed by others.

Wire fraud is punishable under article 339 of the Criminal Code by detention, five years' imprisonment and/or a fine of up to NT$500,000.

• Cybersecurity and data protection law

The Taiwan Criminal Code has incorporated several offences against cybersecurity: usurpation of another person's account; breaking through a computer's protection or taking advantage of a system loophole; and deleting or altering magnetic records on a computer are now punishable by imprisonment for up to five years and a NT$600,000 fine.

Recent developments in Taiwan law have resulted in more attention being paid to the ways personal data are collected, accessed, used and abused. The Personal Data Protection Act ("PDPA") is the legislation governing the collection, processing and use of personal data and defining the proper use of personal information. PDPA applies to government agencies as well as private entities and individuals.

Article 6 of the PDPA proscribes, with a few exceptions, the collection and use of such personal information as medical records, medical treatment, genetic information, sexual life, health examination and criminal records.

Articles 19 and 20 of the PDPA forbids non-government entities from collecting or processing personal information unless for specific and legitimate purposes and in compliance with the conditions set out in the PDPA.

A penalty of imprisonment for up to five years and/or a fine of up to NT$1 million is imposed by article 41 of the PDPA on any person who, with the intention to acquire illicit profits or to prejudice another person, acts in defiance of the relevant regulations under the PDPA.

• Trade sanctions and export control violations

Exportation and importation of strategic high-tech commodities in the following circumstances is prohibited by article 27 of the Foreign Trade Act, under the penalty of five years' imprisonment and/or a fine of up to NT$3 million:

1. where such commodities are transported to restricted regions without authorisation;
2. where, after import permits are granted, such commodities are transferred to restricted regions without authorisation prior to being imported; and
3. where, after being imported, the use or end user of such imported commodities are substituted without authorisation from the original declaration to the production or development of military weapons, such as nuclear or biochemical weapons, or ballistic missiles.

• Any other crime of particular interest in your jurisdiction

Taiwan Criminal Code prohibits activities of loan sharks, defined as taking advantage of an urgent need, carelessness, inexperience or lack of other resort of another person and giving such person a loan at usurious interest that is obviously unjust, under the penalty of imprisonment for up to three years and/or a fine of NT$300,000.

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

Yes, there is liability for attempted crimes under the Criminal Code. Generally, establishing liability require proof of: (i) intent to commit a specific crime; and (ii) an action in furtherance of the attempt, which need not constitute criminal conduct on its own. The attempt of an offence is only punishable, if expressly provided for by the law.

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?

As a general rule, only a natural person can be criminally liable under Taiwan law. An entity may be held criminally liable only when there are specific provisions imposing penalties on entities in the form of "dual liability provision". A dual liability provision makes entities, including companies, punishable along with the natural person who actually commits the offence. However, in certain laws applying dual liability, the entities could be released from criminal liability if it could prove that it has not failed in its duty of care to prevent the crime.

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

The rule is that the criminal liability only applies to a natural person if he/she by himself/herself commits or takes part in the criminal violation and to a juristic person if the managers, officers, directors, or employees of the juristic person commit a crime of dual liability. Therefore, the managers, officers, directors, or employees of a company which bears criminal liability on account of a provision with dual liability would not automatically be criminally liable unless he/she actually commits or takes part in the criminal violation.

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?

As explained in question 4.1, entities are punishable only together with the natural person who actually commits the offence under a dual punishment provision. Hence, in Taiwan, the public prosecutor prioritises investigation and prosecution against natural persons.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

According to article 24 of the Business Merger and Acquisition Act, all rights and obligations of any company dissolved due to the merger/consolidation shall be generally assumed by the surviving company or the newly incorporated company after the merger/consolidation. In addition, the status as a concerned party of the dissolved company in any ongoing litigation, non-litigation, arbitration and any other proceedings shall be taken over by the surviving company or the newly incorporated company. Hence, if a company bears criminal liability due to its manager's or officer's offences of a dual punishment provision and later merged or consolidated with another company, the surviving company shall inherit the criminal liability (usually in the form of a fine).

5 Statutes of Limitations

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

The enforcement-limitations period starts from the time when the criminal act has ceased. In a case involving complicity, the period with respect to all accomplices starts from the time the final act of all accomplices has ceased. The limitations periods for different offences are stipulated depending on the amount of the statutory penalty. For example, the statutory offence that carries the maximum principal punishment of imprisonment for life or for not less than 10 years, the limitations period is 30 years and if such offences cause the death of a victim, there is no enforcement limitation.

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

Yes, the statute of limitations commences from the day on which the offence is completed. Provided that the offence is of a continuing nature, the statute of limitations shall not commence until the last act of offence is completed.

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

The limitations period can be tolled by the public prosecutor's indictment of the suspect to the criminal court.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

According to article 5 of the Criminal Code, the Criminal Code shall apply to any of the following offences outside the territories of the Republic of China:

1. The offence of sedition specified in article 100.
2. The offence of treason specified in article 103.
3. The offence of obstructing governmental operation specified in articles 135, 136 or 138.
4. The offences against public safety specified in articles 185-1 or 185-2.
5. The offences of counterfeiting currency specified in articles 195 to 199.
6. The offences of counterfeiting securities specified in articles 201 to 202.
7. The offences of forgery specified in articles 211, 214, 218 or 216, which only include using forged official documents as specified in articles 211, 213 and 214.

8. The drug offences specified in Chapter 20, except for the offences of drug abuse or possession of drugs, seeds or application tools or drug.
9. The offences against personal freedom specified in articles 296 and 296-1.
10. The offences of piracy specified in articles 333 and 334.
11. The offences of aggravated fraud specified in articles 339-4.

According to article 6 of the Criminal Code, the Criminal Code shall also apply to any of the following offences committed by a public official of the Republic of China outside the territory of the Republic of China:

1. The offences of malfeasance specified in articles 121 to 123, 125, 126, 129, 131, 132, or 134.
2. The offence of facilitating escape specified in article 163.
3. The offences of forgery specified in article 213.
4. The offences of embezzlement specified in article 336, paragraph 1.

According to article 7 of the Criminal Code, the Criminal Code shall apply where any national of Republic of China commits an offence which is not specified in one of the two preceding articles but is punishable by not less than three years of imprisonment outside the territory of the Republic of China, unless the offence is not punishable by the law of the place where the offence is committed.

According to article 8 of the Criminal Code, article 7 of the Criminal Code shall apply *mutatis mutandis* to an alien who commits an offence outside the territory of the Republic of China against a national of the Republic of China.

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

According to the Code of Criminal Procedure, if a public prosecutor learns of a potential or actual criminal activity due to complaint, report, voluntary surrender, or otherwise, he/she shall immediately launch an investigation on the matter. There are not any laws or rules on how the public prosecutor should commence the criminal investigation. The public prosecutor enjoys discretion on how to proceed with the investigation.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

According to the Mutual Assistance in Criminal Matters Act, Taiwan's competent authorities could assist foreign competent authorities and, under the principle of reciprocity, request assistance from foreign competent authorities to take the following measures in foreign jurisdictions:

1. Obtaining evidence.
2. Service of documents.
3. Search.
4. Seizure.
5. Immobilisation of assets.
6. Implementation of final and irrevocable judgment or order for confiscation of assets or collection of proceeds value relating to a criminal offence.
7. Restitution of proceeds of crime.

In addition to the Mutual Assistance in Criminal Matters Act mentioned in question 6.1, for jurisdictions with which Taiwan has established agreement of mutual legal assistance, assistance may be rendered between competent authorities of Taiwan and foreign jurisdictions in accordance with the terms of the relevant agreements.

In principle, Taiwan's enforcement agencies are very willing to cooperate with foreign enforcement authorities under the principle of reciprocity.

7 Procedures for Gathering Information from a Company

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

Compulsory investigations include search, seizure, inspection, arrest and detention upon a warrant issued by a judge. Criminal authorities are entitled to various investigational measures such as dawn raids, seizure of documents, searches, scanning of bank accounts, summoning witnesses or more specific measures such as wiretapping, electronic searches. Every particular measure comes with specific requirements and most of them require a warrant to be issued by the local criminal court. This is especially true for dawn raids and seizure orders. However, in urgent circumstances, the prosecutor can also order such measures and obtain the court's approval later.

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 public prosecutor is entitled to ask a company to produce documents as long as he considers such documents relevant to the matter under investigation.

As long as it is necessary, the court would authorise a search against the defendant's or the suspect's body and the domiciles and other places owned or occupied by the defendant or the suspect in accordance with the Code of Criminal Procedure. However, if the premises are owned or occupied by a third party, the court would not allow the search unless there exists sufficient reasons showing that the defendants or the suspects are in such premises, or there are objects to be seized in such places. The objects ought to be seized include articles or documents which could be used as evidence or which should be confiscated in the future criminal trials.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

According to the Code of Criminal Procedure, a witness who is or was a medical doctor, pharmacist, obstetrician, clergy, lawyer, defence attorney, notary public, accountant, or one who is or was an assistant of one of such persons and who because of his occupation has learned confidential matters relating to another may refuse to testify when he is questioned unless the permission of such other person is obtained.

However, there is no similar rule in the Code of Criminal Procedure that allows a professional to refuse to provide documents to the competent authorities based on the principle of attorney-client privilege. In accordance with the common consensus among local legal community, while the competent

authorities would respect an external attorney's duty of confidentiality to his/her client, they nevertheless consider an in-house attorney as a part of the company and the attorney-client privilege may not be raised in this latter case.

Hence, in their general practice, Taiwan authorities rarely ask an external counsel to produce the documents he/she prepares for his/her client. On the other hand, when the Taiwanese competent authorities ask a Taiwanese company to produce certain documents in its possession, the Taiwanese company could never refuse to produce documents on the ground that they are prepared by its in-house counsel.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

As mentioned above, the PDPA governs the collection, processing and use of personal data in Taiwan. It sets out strict regulations on how companies may process personal data of their employees or customers. In general, the disclosure of personal data is not permitted. One of the few exceptions allows companies to disclose personal data to law enforcement authorities if the disclosure is necessary for prosecuting criminal offences and if the interests of the person concerned do not conflict with the disclosure.

Cross-border transfer of personal data constitutes an "international transmission", regulated by the PDPA, and the competent authority may prohibit a business entity's international transmission of personal data if (A) it will prejudice any material national interest, (B) it is prohibited or restricted under an international treaty or agreement, (C) the country to which the personal data is to be transmitted does not afford sound legal protection of personal data, thereby affecting the rights or interest of the data subject(s), or (D) the purpose of transmitting personal data is to evade restrictions prescribed under PDPA (article 21).

7.5 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?

The public prosecutors as well as other competent authorities are vested with the power to require a company employee to produce documents as long as they consider the requested documents relevant to the crime under investigation.

However, if the competent authorities are to conduct a raid to obtain documents located at the domicile or offices owned by an employee who is not himself/herself the defendant or suspect of the crime under investigation, the competent authorities must apply to the criminal court for a warrant and the criminal court would not issue one unless there are sufficient facts and evidence pointing to the existence of articles or documents ought to be seized, i.e. documents which could be used as evidence in the criminal trial, in the employee's home or offices.

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

See the responses to questions 7.2 and 7.5.

Questioning of Individuals:

7.7 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?

The status of the person to be interrogated (as an accused person or as a witness) is decisive as to the right such person may enjoy with regard to the questioning.

Unlike a witness, an accused, i.e. a suspect or a defendant, has the right to remain silent before the authorities or in the criminal court.

A witness, however, must testify in front of the authorities and can only remain silent in certain scenarios, for example if he/she would incriminate himself/herself by his/her own statement.

The police, the MJIB, the MJAC, and the public prosecutor's office have the power to notify any person to pay a visit to their respective offices and undergo interrogation. If the notice is issued by the public prosecutor's office and the witness fails to attend the hearing, the public prosecutor has the power to have the witness arrested by the police and brought to his office to give his/her testimony.

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

The answer is the same as the response to question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Only the defendant has the right to be accompanied and represented by an attorney during questioning. The witness is not entitled to be accompanied or represented by an attorney when he/she is questioned by the competent authorities.

A witness may refuse to testify if his/her testimony may incriminate him/herself or the person having the relationship to him specified in certain scenarios in the Code of Criminal Procedure. Legally speaking, neither the silence of the accused nor the refusal of giving testimony should be considered an inference of guilt at trial. However, in practice, it is not common for a defendant or a witness to assert such right in the criminal investigation proceedings in Taiwan.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Most criminal investigations are kindled by criminal complaints from the victims or criminal reports from third parties. Sometimes the competent authorities find or learn suspected crimes from the media. For less complicated cases, the competent authorities would initiate a criminal investigation by summoning the suspects to come to their offices and respond to their questioning. For more complicated cases, the competent

authorities might collect relevant information and document in secret, or even conduct a raid or interview some witnesses before they proceed to inquire the suspects.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

According to article 251 of the Code of Criminal Procedure, if the evidence obtained by the public prosecutor in the course of investigation is sufficient to show that the accused is suspected of having committed a criminal offence, the public prosecutor shall indict the accused.

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

If the offence committed is not one punishable by death, life imprisonment, or with a minimum punishment of imprisonment for not less than three years, the public prosecutor, in consideration of factors enumerated in article 57 of the Criminal Code and the maintenance and protection of public interest, may deem that a deferred prosecution is appropriate, and may make a decision of deferred prosecution for a period of one to three years.

The accused may be required by the prosecutor, as a condition for deferred prosecution, to comply with or perform some acts within a certain period of time, such as apologise to the victim, write a penitence letter, or pay the victim an appropriate sum as compensation.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Unless the complainant agrees in advance to the public prosecutor's decision of deferred prosecution, he/she is entitled to file an opposition against the decision of deferred prosecution and in such circumstances, the chief prosecutor of the High Prosecutor's Office will conduct a review on the public prosecutor's decision of deferred prosecution.

If the public prosecutor makes a decision of deferred prosecution on a case without any victim or complaint, the public prosecutor shall, on his/her own initiative, move the decision to the High Prosecutor's Office for the chief prosecutor's review.

If the decision of deferred prosecution is sustained by the chief prosecutor of the High Prosecutor's Office, the decision will be final. The criminal court never participate in the process of reviewing the decision of deferred prosecution.

The factors the chief prosecutor of the High Prosecutor's Office consider when reviewing the decision of deferred prosecution include whether the maximum statutory punishment of the offences are indeed less than three years and whether the conditions for the decision are fair and adequate.

8.5 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 may apply.

The constituting factors of a tortious act are almost the same as those of a criminal act under the Taiwan Civil Code and the Criminal Code. In principle, complaints claiming for damages in tort are filed with a civil court and dealt with separately from the criminal case. However, the victim of a crime could also file an auxiliary civil lawsuit to the criminal court after the perpetrator is indicted and the criminal court has the power to render a civil judgment ordering the defendant to pay damages to the victim once it finds the defendant guilty.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

According to the Code of Criminal Procedure, the public prosecutor bears the burden to prove all the facts necessary to meet the elements of the charged crimes against the defendant. The law is silent on whether the defendant has the burden of proof with respect to his/her affirmative defences. In practice, the criminal court would request the defendant to suggest how he/she could or would prove his/her affirmative defences and would authorise the defendant's request for investigation of evidence in order to prove his/her affirmative defences. Whether the defendant could point out methods to prove his/her affirmative defences and the result of the court's investigation on evidence requested by the defendant for that purpose would influence the court's finding on whether the defendant's affirmative defences are true.

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

In a criminal trial, the criminal court must find the defendant not guilty unless the public prosecutor produces sufficient evidence to prove the crime "beyond a reasonable doubt".

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

This duty lies with the criminal court, i.e. the three judges of the tribunal. The judges of the tribunal are the arbiters of facts and they determine whether or not the public prosecutor has satisfied his/her burden of proof.

10 Conspiracy / Aiding and Abetting

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

The Criminal Code has provisions that hold a person criminally liable for the acts of others.

(1) Co-principals

Two or more persons who jointly commit a crime are all principal offenders of such crime.

The Taiwan criminal court has developed through judicial precedents a "doctrine of joint principal conspiracy": if two or more persons conspire with each other to commit a specific crime and at least one of these persons takes some action based on the conspiracy to commit the crime, all of the conspirators, including those who do not actually take part in actions, would be considered the principals of the crime.

(2) Solicitation
A person who solicits another to commit a crime is criminally liable at the same extent with the principal who takes action to commit the crime.

(3) Accessory
A person who aids a principal in committing a crime is an accessory to such crime and is criminally liable at a lesser extent than the principal.

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?

Criminal liability requires intent (except for offences which can expressly be committed negligently). However, intent does not require that the offender specifically wishes for the accomplishment of the crime. It is sufficient if he/she accepts the possibility of the offence and approves of it. Some offences require a special form of intent. For example, with regard to fraud, the perpetrator must not only act intentionally but also with the intention to benefit him/herself or a third party. The public prosecutor bears the burden of proof in respect to whether a defendant has the requisite intent at the time of the offence.

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?

Ignorance of the law is never an acceptable defence in the criminal trial in Taiwan.

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?

Ignorance of the facts is an acceptable defence in Taiwanese criminal trial. For example, if the defendant has participated in seemingly lawful conduct and was not aware that such conduct was a part of unlawful activities committed by other members, then he/she is not criminally liable, as he/she lacks the intent to commit a crime. The public prosecutor bears the burden of proof in respect to whether a defendant has the knowledge of the facts at the time of the offence.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

In Taiwan, government officials are legally obligated to file a report with the competent authorities if they find suspected crimes during performance of their duties. Other persons or entities have no legal obligation to file a report with the competent authorities even they have knowledge of suspected crimes and they would not be liable for failing to do so. According to the Criminal Code, if the person who commits a crime or the entity whose employees or manager commits a crime with dual liability surrenders to the competent authorities before the crime and the perpetrator is identified by the competent authorities, the punishment against the surrenders would be reduced.

13 Cooperation Provisions / Leniency

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

A report of criminal activities does not mandatorily lead to impunity; however, as previously mentioned, according to the Criminal Code, the sentence would be reduced if the person who commits a crime surrenders him/herself before being identified as the suspect by the competent authorities.

In addition, in order to facilitate investigation of certain crimes and reduce the potential damages of these crimes, there is legislation providing certain leniencies to perpetrators who voluntarily surrender themselves and/or even provide information to assist the investigation against other accomplices.

For example, the Anti-Corruption Act offers reduced penalty provisions for self-reporting, which are applicable as follows:

- If a public official who takes a bribe voluntarily turns him/herself in for an offence not yet discovered, the penalty is reduced or exempted if he/she surrenders all the unlawful gains. If this has led to the uncovering of other principal offenders or accomplices, the penalty is exempted.
- If a public official who takes a bribe confesses to the crime during the investigation thereof, the penalty is reduced if he/she surrendered all the unlawful gains. If this has led to the uncovering of other principal offenders or accomplices, the penalty is reduced or exempted.
- If a person offers a bribe, the penalty shall be exempted if he/she voluntarily turns him/herself in for an offence not yet discovered.
- If a person offers a bribe, the penalty may be reduced or exempted if he/she confesses his/her guilt during the investigation or trial.

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

As explained above, the extent of cooperation required and the favourable treatments provided would depend on the applicable acts or laws of the suspected crimes.

Generally speaking, such cooperation might include the suspect's confession, providing information, restituting illegal gains, testifying in the court, etc. In return, the favourable treatment might come in the form of reduction of criminal punishment, waiver of criminal punishment, and probation, etc.

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?

According to the Code of Criminal Procedure, except for cases that involve crimes punishable by death, life imprisonment, or a three-year minimum imprisonment, or for first-instance cases that are under the jurisdiction of the high court, the prosecutor may, after consulting with the victim, or acting upon the prosecutor's own discretion, or upon the request of the defendant or of the defence attorney, and with the court's consent, conduct negotiations with the defendant outside of the trial proceedings.

According to local practice, the defendant could thus negotiate with the public prosecutor on the terms of sentences, compensation amount to the victims, etc., but the charges of the indicted crimes are generally not negotiable.

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?

According to the Code of Criminal Procedure, if the defendant and the public prosecutor of a criminal trial reach agreement on the sentence and the public prosecutor reports the agreement to the criminal court, the criminal court shall render a judgment of which the sentence is within the scope of the agreement, unless one of the following circumstances applies:

1. where the defendant's offence is not one that according to the law, the defendant could receive a probation or imprisonment that is convertible to a fine;
2. where facts found by the criminal court are obviously inconsistent with the facts based on which the agreement of sentence is reached;
3. where the criminal considers that the defendant should be found not guilty or the indictment should be dismissed due to procedural defects;
4. where the request by the public prosecutor is obviously improper or unfair;
5. where the bargain was not made out of the defendant's free will; and
6. where the agreement is withdrawn or where the requests for bargaining is revoked.

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 a sentence on the defendant? Please describe the sentencing process.

There are no fixed guidelines or standards governing the court's sentencing. The court decides the appropriate sentence within the range of penalty stipulated in statutes by exercising its discretion. However, the court seeks uniformity of sentence to some extent by referring to precedents, and this practice is said to have created informal, *de facto* standards for sentencing. The court also refers to the recommendation for sentencing by the public prosecutor, which is based on the internal database of precedents and the internal standards of the Public Prosecutor's Office. Judicial Yuan has released to the public a set of standards for sentencing in certain offences such as offences of homicide and offences against public safety. However, these standards are only references for the court rather than a binding rule for the court's decision on the sentences.

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.

According to article 57 of the Criminal Court, sentencing shall be based on the liability of the offender and take into account all the circumstances, and special attention shall be given to the following items:

1. The motive and purpose of the offence.
2. The stimulation perceived at the moment of committing the offence.
3. The means used for the commission of the offence.
4. The offender's living condition.
5. The disposition of the offender.
6. The education and intelligence of the offender.
7. The relationship between the offender and the victim.
8. The seriousness of the offender's obligation violation.
9. The danger or damage caused by the offence.
10. The offender's attitude after committing the offence.

16 Appeals

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

Appeals are allowed for both the defendant and the prosecutor. Any guilty judgment is appealable by the defendant, and any non-guilty judgment is also appealable by the prosecutor.

The government is allowed to appeal against a guilty judgment only if they can find a ground of appeal. Judgments rendered by the district courts are appealable to the high court. An appeal to the high court is allowed on the grounds of non-compliance with procedural law, errors in fact-finding, errors in application of law, or inappropriate sentencing. Judgments rendered by the high court are appealable to the Supreme Court, which is the highest and final court.

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

Taiwan does not have a sentencing procedure independent from a fact-finding procedure. Even when the defendant pleads not guilty, the prosecutor is allowed to present aggravating factors at

the trial. After the trial, if the court finds the defendant guilty, the court renders a judgment stating the amount of the penalty without conducting a sentence hearing. The defendant and the government are both allowed to appeal on the ground of inappropriate sentencing.

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

At the high court level, the tribunal repeat the same procedure as proceeded at the district court level. The tribunal at the high court level would find the facts and apply the laws on its own and would vacate the district court's decision and render a new decision if the facts found or the laws applied by the district court are incorrect.

On the other hand, the Supreme Court only reviews the laws applied by the high court. The standard for the Supreme Court's review on laws is that whether there is contravention of laws in the high court's written decision. Contravention of laws means the failure to apply laws or applies laws improperly. It would also be considered a contravention of the law if the high court fails to give reasons on its finding of important facts or gives contradicting reasons in its written decision.

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

If the high court upholds an appeal, it would set aside the district court's decision and make a new decision on the case.

If the Supreme Court upholds an appeal, it would set aside the high court's decision and remand the case to the high court, where the case will be tried by another division of the high court. The Supreme Court has the power to give its own decision, too, although it rarely does so.

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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?

Under Turkish law, as a general rule all crimes including business crimes can only be prosecuted by public prosecutors. However, for certain specific crimes, which are stipulated under specific legislation such as Execution and Bankruptcy Law no. 2004, complainants are allowed to directly file criminal lawsuits by simply submitting petitions to criminal enforcement courts. Given that all sanctions stipulated under Execution and Bankruptcy Law no. 2004 are either preventive imprisonment orders or disciplinary imprisonment orders, these crimes can merely constitute an exception to the general rule, which stipulates that public prosecutors conduct criminal investigations and send their indictment to the relevant criminal court should there be sufficient evidence indicating the criminal behaviour. The Turkish judicial system does not provide prosecution services at the regional or national level. Prosecution offices operate on a territorial basis and are established in courthouses across the country, within the jurisdiction of which they investigate criminal matters.

On the other hand, there are several administrative authorities in Turkey that can carry out administrative investigations within the auspices of their industry or specialism. The Capital Market Board, the Financial Crimes Investigation Board ("**MASAK**") and the Competition Authority could be given as examples in this respect. These authorities can issue fines following their investigation should they find an incompliance, but they cannot prosecute their subjects. In case they come across any criminal conduct within the meaning of Turkish Criminal Code no. 5237 ("**TCC**") or any other Turkish laws, they are obliged to inform the prosecution office which has jurisdiction on the matter. As a matter of fact, in certain conditions, the prosecution cannot be initiated unless the relevant administrative authority submits a criminal complaint. For instance, according to article 115 of the Capital Market Law no. 6362 ("**CML**"), the crimes set forth under this code can only be prosecuted if the Capital Market Board duly submits a criminal complaint to the Prosecution Office.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

There is only one agency which conducts criminal investigations: public prosecutors. The prosecution office where the crime is committed will have jurisdiction over the criminal matter in principle.

On the other hand, several administrative authorities have power to carry out administrative investigations related to business crimes. In case they come across a business crime, they must report their finding to the prosecution office.

Specific examples of such organs and the relevant pieces of legislations are as follows:

- Capital Market Board: supervises the entities falling under the CML and can investigate financial crimes occurred pursuant to the CML such as insider trading and securities fraud.
- Financial Crimes Investigation Board (makes investigations regarding financial crimes occurring within the scope of the Law on the Prevention of Laundering of Crime Revenues and the Law on the Prevention of Terrorism Financing.
- Tax Offices: make enquiries, investigations regarding loss of tax, irregularities regarding tax payments, tax evasions and violations of secrecy of taxes.
- Banking Regulatory and Supervisory Agency ("**BDDK**"): has authority to monitor banking institutions and provide compliance with banking legislation and impose fines for banking crimes.
- Competition Authority: initiates investigations *ex officio* or upon any complaint as to prevention of free competition and has authority to impose administrative fines.

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?

Certain administrative authorities can take action in case of incompliance which qualifies as a business crime at the same time. Penalties for such can vary from debarment to monetary fines and sanctions. They cannot, however, prosecute or issue criminal penalties on individuals.

From a civil enforcement perspective, in case of damages arising from individual or corporate behaviour which could be regarded as a business crime, compensation can be requested before the civil courts in Turkey. A common example is where a compensation case is filed against fraudsters on the basis of their tortious liability according to the Turkish Code of Obligations ("**TCO**").

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

A criminal proceeding was initiated in 2019 against the founders and executives of a firm called "Çiftlik Bank" with the charges

of aggravated fraud and money laundering. Çiftlik Bank operated an online platform, an alleged Ponzi scheme, inspired by the social-media game "Farmville". The platform promised users to invest their money in livestock raised in real farms across the country and that they can benefit from the production of the livestock. The platform collected approximately USD 400 million from approximately 1,000 investors.

2 Organisation of the Courts

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

The Turkish criminal court system has a three-tiered judicial system, which comprises of the Criminal Courts of First Instance, the Regional Appeal Courts and the Turkish Court of Cassation.

In the first tier, there are three types of courts: criminal peace judgeships; the criminal courts of general jurisdiction; and serious crimes courts.

The criminal peace judgeships deal with objections to apprehension and custody. They also decide on arrest warrants as well as search and seizure orders.

In respect of business crimes, the common venue is the criminal court of general jurisdiction, which has the power to judge all cases that are outside the serious crimes courts' competence. If an aggravated form of business crime is committed, the serious crimes court would hear the case, as it has the power to judge crimes punishable with a prison term of more than 10 years (e.g. aggravated fraud).

There are also specialised criminal courts such as juvenile criminal courts, criminal courts for intellectual and industrial property and criminal enforcement courts.

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

There is no right to a jury in crime trials in the Turkish judicial system.

3 Particular Statutes and Crimes

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

• Fraud

Fraud is defined under article 157 of TCC as *creating a benefit personally or for other people by means of deceiving persons with fraudulent acts at the detriment of the said or other persons.* The sanction of this crime is one to five years of imprisonment and a judicial monetary fine. An offender of aggravated fraud is, on the other hand, sanctioned with imprisonment from three to 10 years in addition to a judicial monetary fine.

• Securities fraud

Securities fraud is defined in article 107 of the CML under two paragraphs. According to the first paragraph of the article, the acts of buying and selling, giving, cancelling or changing orders or making account activities in order to create wrong or misleading impressions on market instruments' prices, price changes, supply and demands will be sanctioned with imprisonment from three to five years and a judicial monetary fine. According to the second paragraph of the article, the persons who profit from spreading false, misleading or fictitious information, rumouring, providing information, commenting, preparing or spreading reports in order to influence market instruments' prices, values or investors' decisions will be sentenced to three to five years of imprisonment as well as a judicial monetary fine.

• Accounting fraud

Accounting fraud is stipulated in the Tax Procedural Law no. 213. False accounting in commercial books, improper and inaccurate identification of transactions in commercial books, creating repetitive records and incorrect valuations are examples of accounting fraud. Those who commit this crime are sanctioned with imprisonment of between one and three years as well as a judicial monetary fine.

• Insider trading

The CML stipulates that it is forbidden to obtain personal gain by means of using "insider information" by purchasing or selling capital market instruments. The sanction of this crime is either three to five years of imprisonment or judicial monetary fine not less than double the profit gained by the insider trading.

• Embezzlement

According to the TCC, such crime can only be committed by a public official by means of transferring the possession of property that is delivered to the official in respect of his/her duty as he/she is obliged to protect it. Those committing embezzlement are sentenced to five to 12 years of imprisonment. In case the crime is committed by deceitful acts aiming to conceal the embezzlement, the sentence will be raised by 50%.

• Bribery of government officials

Under the TCC, this crime can only be committed mutually, involving at least one public official and one civilian. Any benefit, advantage, money or gift that is offered and/or rendered to a public official for a favour to be done in relation to the duty of the public official constitutes bribery. Those committing bribery are sentenced to four to 12 years' imprisonment, excluding the reducing/increasing penalty provisions.

Engaging in bribery with persons who are representatives of the below listed legal entities is also criminalised:

- Companies with a public entity status.
- Companies established with a partnership with public entities or professional organisations having a public entity status.
- Foundations operating within public entities or professional organisations having a public entity status.
- Public benefit associations.
- Cooperatives.
- Publicly traded joint-stock companies.

Turkey has ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention contains general advisory articles and leaves the details of penal regulations to member states. Within this context, engaging in bribery with the below listed persons is also criminalised under the TCC.

- Public officials elected or appointed in a foreign country.
- Judges, jury members or other officials acting in international or transnational or foreign state courts.
- Members of international or transnational parliaments.
- Persons performing public activities for a foreign country, including public institutions or public corporations.
- Citizens or foreign arbitrators appointed within the framework of arbitration procedures applied for the solution of legal disputes.
- Officials or representatives of international or supranational organisations established based on an international agreement.

• Criminal anti-competition

Acts that are contrary to fair competition are only evaluated within the framework of the Law on Competition, under which various administrative fines are foreseen. Further, intentionally committing the acts stated as unfair competition in the Turkish Commercial Code no. 6102 ("**TCOC**") is also considered as a punishable crime under article 62 of the TCOC. According to the said article, those committing this crime will be sentenced to up to two years of imprisonment or a judicial monetary fine.

• Cartels and other competition offences

Any behaviour that is seen as a cartel or competition offence is evaluated within the framework of the Law on Competition, under which various administrative fines are foreseen. However, such activities would not give rise to incarceration.

• Tax crimes

The Tax Procedural Law sets forth both criminal charges and administrative fines. Accordingly, loss of tax and irregularity crimes fall under the scope of administrative fines; tax evasion and secrecy of taxes, on the other hand, are specified as criminal offences and can be punished by imprisonment.

• Government-contracting fraud

Bid-rigging and manipulation of tender contracts is forbidden. There are various penalties, including fines and imprisonment, depending on the way in which this type of fraud is committed.

• Environmental crimes

Offences against the environment are regulated in the TCC in Articles 181 to 184. Anyone who commits any of the crimes of intentional pollution of the environment, pollution of the environment by negligence, causing noise and pollution caused by constructions might be sentenced to imprisonment or receive a judicial fine.

• Campaign-finance/election law

Donations to be made to political parties are strictly regulated in Turkey under the Political Parties Law. As per Article 116, those who violate these rules are sentenced to imprisonment from months to one year. A political party official or candidate who accepts a donation from foreign states, international organisations or foreign real or legal persons is sentenced to imprisonment for between one and three years.

• Market manipulation in connection with the sale of derivatives

Please kindly refer to the explanation above on securities fraud.

• Money laundering or wire fraud

Processing assets acquired as a result of an offence which attracts imprisonment of six months or more in various ways, or transferring the assets to a foreign country to hide the illegal source, or to give the impression that they are acquired in a lawful manner is criminalised under Article 282 of the TCC. Those who commit this crime are sentenced to imprisonment from three to seven years and a judicial fine of up to 20,000 days. Those who intentionally purchase, accept, keep or use assets that are the subject matter of a crime are also subject to imprisonment for between two and five years. Sanctions are doubled if this crime is committed by an organised criminal group.

• Cybersecurity and data protection law

Illegal recording or unlawfully giving out, publishing or obtaining personal data is forbidden as well as failure to destroy personal data. Article 135 to 140 of the TCC apply in case of violation of these criminal provisions. Those who commit crimes regarding data protection law are sentenced to imprisonment.

• Trade sanctions and export control violations

Turkey has no specific trade sanction or export control legislation. These issues are regulated under the Customs Law and Smuggling Law. As per the Smuggling Law, those who export goods that are subject to export restrictions by law, are sentenced to one to three years in prison and a judicial fine of up to 5,000 days.

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

Inchoate crimes are regulated under article 35 of the TCC, which states that a person who acts with the intention of committing a crime but fails to perform the acts necessary to commit the crime due to a cause beyond his control, is considered to have attempted to commit the crime. Offenders shall be liable even if the attempted crime is not completed, and the offender is sentenced to imprisonment from 13 to 20 years instead of an aggravated life imprisonment sentence, imprisonment from nine to 15 years instead of a life imprisonment sentence, and, in other cases, ¼ to ¾ less imprisonment time than the actual time foreseen for the attempted crime.

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?

Criminal liability is personal, meaning that, as a matter of principle, nobody can be held criminally liable for the actions of another person (article 38 of the Turkish Constitution; article 20 of the TCC). Only real persons can commit crimes and receive criminal sanctions. Unlike some other jurisdictions, legal entities in Turkey cannot be held criminally liable. Under Turkish law, if a real person commits a crime on behalf or in favour of a legal entity, the real person will be held personally liable.

However, legal entities are still subject to certain safety measures. Safety measures imposed on legal entities include seizure or cancellation of the proceeds of crime.

Further, according to article 43/A of the Turkish Misdemeanour Law no. 5326, in case a person who is an organ or representative or acts within the operation of the legal entity commits one of the following crimes:

- fraud as defined in articles 157 and 158 of the TCC;
- manipulating tenders as defined in article 235 of the TCC;
- bribery as defined in article 252 of the TCC;
- money laundering as defined in article 282 of the TCC;
- embezzlement as defined in article 160 of the Law on Banking;
- smuggling as defined in the Anti-Smuggling Law;
- financing terrorism as defined in article 8 of the Anti-Terrorism Law; and
- crimes determined in article annex 5 of the Petroleum Market Law,

for the benefit of the legal entity, an administrative monetary fine of up to TRY 2,000,000 will be imposed on the legal entity for each crime by the court with jurisdiction to hear the criminal case of the individual who committed the crimes above.

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

Personal liability of the individual who has committed, solicited or participated in the crime is a rule regardless of whether the individual in question committed the crime for the benefit of the entity. Monetary fines and measures on the entity follow the guilty verdict of the individual.

Two types of share capital companies in Turkey are widespread: joint stock companies; and limited liability companies.

In joint stock companies, management of the company is carried out by the board of directors, who are not required to be shareholders. If appropriate delegation of powers is not made horizontally between the board members, each and every one of them could be held criminally liable in any matter that the company finds itself in. Therefore, delegating responsibilities amongst the board members is crucial to narrowing down the number of board members in respect of criminal liability for a specific matter. Equally, vertical delegation within the company on a specific issue with a top-down approach is important to avoid criminal responsibility on board members.

Management of the limited liability companies are carried out by the board of managers. If there is no delegation of powers between the managers, they will all be criminally responsible for any criminal conduct committed by the company.

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?

As stated above, legal entities cannot be held criminally liable in Turkey, but they can still be subjected to security measures. The exercise of security measures is quite rare and dependent on the personal liability. The practice of using security measures is evolving.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

This has not been tested yet, as the use of security measures is a new concept. However, even though the criminal liability of the individual(s) does not apply to the successor's equivalents, security measures would follow, since in a merger/acquisition context, the successor takes over the entity with all the benefits generated in the past, which includes criminal proceeds and benefits. Particularly in the context of article 43/A of the Turkish Misdemeanour Law, the successor's entity liability would arise.

5 Statutes of Limitations

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

There are two kinds of enforcement time limitations; one for limitation of action and one for limitation of punishment. In fact, enforcement limitations can be set forth by each specific law that regulates a crime. When there is not any specific regulation for a crime, time limitations are calculated by the TCC. Pursuant to article 66 of the TCC, unless otherwise is provided in the law, public action is dismissed upon the lapse of:

a) 30 years for offences requiring the punishment of heavy life imprisonment;
b) 25 years for offences requiring the punishment of life imprisonment;
c) 20 years for offences requiring the punishment of imprisonment for not less than 20 years;
d) 15 years for offences requiring the punishment of imprisonment for more than five years and less than 20 years; and
e) eight years for offences requiring the punishment of imprisonment or a punitive fine for not more than five years.

Article 68 of the TCC specifies the limitations for punishment.

The punishments listed in this article may not be executed upon the lapse of the following periods:

a) 40 years for the punishment of heavy life imprisonment;
b) 30 years for the punishment of life imprisonment;
c) 24 years for the punishment of imprisonment for 20 years or more;
d) 20 years for the punishment of imprisonment for more than five years; and
e) 10 years for the punishment of imprisonment and punitive fines imposed for up to five years.

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

Even if they are part of a pattern or practice, crimes occurring outside the limitations cannot be prosecuted according to the TCC, which is heavily criticised by several academic circles.

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

In cases where the proceeding of investigation and prosecution is bound to a permission or decision, and is the result of a matter to be solved by another authority, the statute of limitations is suspended until such permission or decision is obtained or the matter is resolved, or the court decision declaring the offender a fugitive is abated pursuant to the law.

Also, it is possible for time limitations to be invalidated on the following conditions:

a) If any one of the suspects or offenders is brought before the court to take his statement or for interrogation purposes.
b) If a decision is taken for arrest of any one of the suspects or offenders.
c) If an indictment is prepared relating to the committed offence.
d) If a decision for conviction is given even though related to some of the offenders.

After suspension of the running of the statute of limitations, an entirely new statute of limitations starts to run. Where there is more than one reason leading to the suspension of the statute of limitations, the statute of limitations starts to run again as of the date of the occurrence of the last event of disruption. In the case of suspension, the statute of limitations is extended at most up to one half of the period stipulated in the law for the committed offence.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Turkey has extra-territorial jurisdiction as per the TCC for

criminal offences, which are subject to a minimum sentence of one year of imprisonment, committed abroad by:

- Turkish citizens (on the condition that no decision has been rendered in a foreign state).
- Foreign persons to the detriment of Turkey.
- Foreign persons to the detriment of a Turkish citizen or private legal person incorporated in accordance with Turkish law (on the condition that no decision has been rendered in a foreign state).

Moreover, certain criminal offences, such as war crimes or crimes against humanity, which are explicitly listed in the TCC, fall within the scope of Turkey's extra-territorial jurisdiction.

Foreign bribery is the only business crime with extraterritorial reach, specifically regulated as per Turkish criminal law. Pursuant to article 252 of the TCC, if foreign bribery is committed for the performance or non-performance of an activity or with respect to a dispute involving Turkey, a public authority in Turkey, a private legal person incorporated as per Turkish laws or a Turkish citizen, an *ex officio* investigation and prosecution is conducted for the offender(s), as long as the offender(s) is/are present in Turkey.

Exercise of these criminal provisions is quite rare.

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

As a general principle, public prosecutors are obliged to initiate investigation as soon as he/she is aware of the criminal conduct. The lowest threshold for the prosecutor to initiate the criminal investigation is the existence of sufficient doubt. In the case of public crimes, the prosecutor does not need a complainant to start the investigation; regardless of the way in which he/she finds out the criminal conduct, the investigation starts. In respect of certain crimes, the investigation of which requires a formal complaint, the prosecutor cannot conduct a criminal investigation *ex officio*.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Turkey has ratified several bilateral and international conventions for assistance on criminal matters. The various international conventions are as follows:

- The OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.
- The European Convention on Mutual Assistance in Criminal Matters.
- The Convention on the Transfer of Sentenced Persons.
- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.
- The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.
- The Criminal Law Convention on Corruption; the European Convention on the International Validity of Criminal Judgments.
- The European Convention on the Suppression of Terrorism.
- The European Convention on the Transfer of Proceedings in Criminal Matters.
- The European Agreement on the Transmission of Applications for Legal Aid.

In addition to the above, Turkey has bilateral agreements with the following countries on criminal assistance: Albania; Algeria; Belarus; Bosnia and Herzegovina; Brazil; China; Egypt; Georgia; India; Iran; Iraq; Italy; Jordan; Kazakhstan; Kosovo; Kuwait; Kyrgyzstan; Macedonia; Moldova; Mongolia; Morocco; Oman; Pakistan; Poland; Romania; Serbia; Syria; Tajikistan; Tunisia; Turkish Republic of Northern Cyprus; Turkey; Turkmenistan; USA; and Uzbekistan.

7 Procedures for Gathering Information from a Company

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

During the investigation, the prosecutor can carry out all kinds of necessary searches directly or through police officers, request information, documentation or recordings from all public officials, request criminal peace judgeships for search warrants to conduct on-site searches in the suspect's personal property or on the suspect's body or place of business, and summon and interrogate the relevant parties, witnesses and anyone related to the suspected crime.

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?

Within the framework of the investigation, the prosecutor can demand any document from real or legal persons for the sake of investigation and revealing the material truth. According to article 332 of the Criminal Procedural Law no. 5271, those who have been asked by prosecutor, judge or court to provide any information must respond to such demand within 10 days at the latest; otherwise an investigation can be initiated against them with the accusation of misconduct that is specified in article 257 of the TCC. Even though the Criminal Procedural Law does not make any distinction between public officials and legal entities, legal entities are imposed with an administrative fine in case they do not respond to such demand according to article 32 of the Turkish Misdemeanour Law and Turkish Court of Cassation's precedents. Equally, individuals within the entities can be subject to criminal sentences in case of incompliance.

Also, the public prosecutor can order the police force to search the premises of a company and seize documents that may constitute evidence after obtaining a search warrant from criminal peace judgeship provided that there is reasonable doubt that a crime was committed. In non-delayable cases, the public prosecutor can *ex officio* produce a search warrant to search the premises of a company.

Likewise, a criminal peace judgeship's order or for non-delayable cases a public prosecutor's order is needed to seize documents during a search. If the police force cannot reach the public prosecutor, the seizure can be made by the police commander's written order. In cases where the seizure is conducted without obtaining the criminal judgeship's order, the seizure order must be submitted for the criminal peace judgeship's approval in 24 hours and the criminal peace judgeship must approve the said order within 48 hours starting from the execution of seizure or when the seizure order becomes inadmissible.

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

There are certain legal and procedural protections for companies to assert for documents to be used as evidence.

The Criminal Procedure Law sets forth significant procedural protections against seizure of documents. As a general rule, decisions of seizure must be given in written form by a judge. For particular occasions only, like if there is peril in delay, upon the written order of the public prosecutor; or in cases where it is not possible to reach the public prosecutor, upon the written order of the superior of the security forces, such seizure decision can be made without the judge's decision. However, the seizure order must be submitted for the criminal peace judgeship's approval in 24 hours and the criminal peace judgeship must approve the said order within 48 hours starting from the execution of seizure or when the seizure order becomes inadmissible.

Turkish Attorneyship Law no. 1136 provides a certain degree of attorney-client privilege. Equally, as per article 130 of the Criminal Procedure Law, the attorneys' offices shall only be searched upon a court decision and in connection with the conduct that is indicated in the decision and under the supervision of the public prosecutor. The President of the Bar or an attorney representing the President of the Bar shall be present at the time of search. In case the attorney objects to the seizure of any documents on the grounds that the said document pertains to attorney-client privilege, the documents are sealed and submitted to the criminal peace judgeship to decide. However, this protection covers only external lawyers and does not extend to in-house lawyers.

In a criminal investigation, there would be no restriction for the prosecution office to have access to the personal documents of employees that are kept at the workplace if a search order is granted for the workplace.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

As of April 2016, Turkey has a specific data protection law, based on EU Data Protection Directive (Directive 95/46/EC): the Law on Protection of Personal Data no. 6698 ("DP Law"). Obligations and rights introduced by the DP Law are quite similar to the GDPR.

Collection of all kinds of personal data of employees and the transfer thereof needs to be compliant with the DP Law.

Personal data can be transferred to third parties on one of the legal bases stipulated under the DP Law, which are as follows:

- if the data subject has given his explicit consent;
- it is explicitly permitted by the law;
- it is mandatory for the protection of life or to prevent the physical injury of a person, where that person is physically or legally incapable of providing his/her consent;
- processing of personal data belonging to the parties of a contract is necessary provided that it is directly related to the execution or performance of that contract;
- it is mandatory for the data controller to fulfil its legal obligations;
- the personal data is publicised by the data subjects themselves;
- it is mandatory for the establishment, exercise or protection of certain rights; and
- it is mandatory for the legitimate interests of the data controller, provided that the fundamental rights and freedoms of the data subject are not compromised.

For official requests by governmental bodies, data controllers can base the transfer on compliance with statutory or legal obligations and transfer personal data without the explicit consent of the data subject.

Cross-border data transfers are subject to further requirements under the DP Law. In brief, cross-border data transfers shall be based upon the following legal grounds:

- the data subject gives his/her explicit consent;
- the cross-border transfer is based on one of legal bases stipulated under the DP Law (apart from explicit consent), provided that:
  - the receiving country is accepted as safe with an adequate level of data protection by the Turkish Data Protection Board; and
  - if the level of data security is not adequate, then the data transferor in Turkey and data receiver abroad (data controller or processor) must execute a written undertaking letter (of which the minimum content is already determined by the Turkish Data Protection Board) and seek the approval of the Board for the data transfer.

The list of countries with an adequate level of protection has yet to be published by the Turkish Data Protection Board, which leads to all countries being considered unsafe in terms of data transfers. Therefore, at this stage, there are two statutory ways for a data controller to transfer personal data abroad: (i) by obtaining explicit consent of the data subject; or (ii) a written undertaking is executed between the data transferor and data receiver, and the approval of the Turkish Data Protection Board is obtained for the data transfer.

The above-mentioned rules are applicable for all kinds of transfers of personal data to public and private establishments.

As a result, as long as the DP Law is complied with, Turkish legislation does not impact collection, processing or transfer of employees' personal data.

7.5 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?

To the extent that the prosecution office deems it relevant to the subject of criminal investigation, it can request any corporate information from a company and their employees. The company is obliged to provide this information for which it does not need to take its employees' consent. In case the prosecution office thinks that the evidence might disappear or be destroyed, search and seizure warrants can be granted for the office or home of the employee.

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

Please refer to questions 7.3 and 7.4.

Questioning of Individuals:

7.7 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?

In case an employee, officer or director of the company is considered the offender of the crime in question, they will be questioned according to articles 145 to 148 of the Turkish Criminal Procedure Law. The suspect or accused's statement given in his/her questioning appears as one of the most important pieces of evidence to reveal the material truth. Therefore, and with consideration of the right to a fair trial, the questioning procedure has been set forth in the law in order to avoid any illegal acts during the questioning process.

An individual to be questioned or interrogated shall be summoned and the reason for the invitation should be declared to him/her, with the consequences of their incompliance to be set out in writing.

In the event that an employee, officer or director of the company are not offenders but are witnesses instead, then they can be summoned to obtain their statements as witnesses. Please refer to question 7.7 and 7.8 for detailed information on such procedure.

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

Third parties can be questioned as witnesses if and when it is deemed necessary for the case by the judges or prosecutors.

Witnesses shall be invited to the prosecution office or the court by summons. The summons shall contain an explanation about the consequences of failing to appear. In cases where the suspect is under arrest, a subpoena order may be issued for the witnesses. The subpoena order shall contain an explanation of reasons for the direct application of the subpoena and such witnesses shall be subject to the equal interactions applicable to the witnesses, who appear upon summoning.

Witnesses, who fail to appear after having been summoned according to the regular procedural rules without notifying the reason of their absence, shall be subpoenaed by the use of force and shall be subject to a restitution covering the losses of failing to appear, and this amount shall be paid by him under the rules of public debts.

If a witness is:

a) the fiancée/fiancé of the suspect or the accused;
b) the husband or wife of the suspect or the accused, even if the link of marriage does not exist at that time;
c) a person related to the suspect or the accused in the ascending or descending direct line, either by blood or affinity;
d) a person lineally related to the accused within three degrees, or a person collaterally related to the accused within two degrees; or
e) a person having a relationship to the accused,

they may exercise the privilege to not testify as a witness.

Questioning may take place in the courthouse, public prosecution office or police stations.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Before starting the questioning, the person (suspect or accused) shall be notified of his right to appoint a defence counsel, and that he/she may utilise his/her legal help, and that the defence counsel shall be permitted to be present during the interview or interrogation. If he/she is not able to retain a defence counsel and requests a defence counsel, a defence counsel shall be appointed on his/her behalf by the Bar Association. Also, he/she shall be reminded of his/her right to remain silent.

In Turkish criminal legislation, the freedom from self-incrimination is protected under the Constitution and under the Criminal Procedure Law. Article 38 of the Constitution states that no one can be forced to make statements or provide evidence incriminating themselves. Additionally, article 148 of the Criminal Procedure Law states that submissions obtained by the police, without the defence counsel being present, cannot be used as a basis for the judgment, unless this submission had been verified by the suspect or the accused in front of the judge or the court. Even if a suspect or accused self-incriminated himself/herself, self-incrimination cannot be the ground on which a guilty verdict can be given. The prosecutor and the criminal judge must reveal the truth with concrete evidence, as an inquisitorial system is adopted in criminal trials.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Under the Criminal Procedure Law, prosecutors prepare and send their indictment to the criminal court having jurisdiction over the case. In the event that the evidence gathered during the investigation generates sufficient suspicion, the prosecutor issues the indictment. In cases where sufficient suspicion has not occurred, the prosecutor does not issue the indictment and issues a non-prosecution decision.

Upon submission of the indictment, the relevant court examines the indictment and decides whether the indictment shall be accepted or returned to the prosecutor's office. If the indictment is accepted by the court, proceedings and the trial commence.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Under the Criminal Procedure Law, it is at the discretion of the public prosecutor to accuse an entity or individual with a crime, based on the evidence gathered during the investigation which helps determine sufficient suspicion as to whether the crime was committed. Sufficient suspicion at this level is the lowest threshold according to which it is determined whether or not an indictment will be issued. At the criminal trial level, however, there should not be any doubt about the criminal conduct for the court to give a guilty verdict.

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

Mediation is applicable for certain crimes as per the Turkish Criminal Procedure Law. Judicial police officers, the prosecutor or the judge should encourage the suspect/accused and the victim or real or legal person affected by the crime for the following crimes:

a) Crimes that are investigated and prosecuted upon complaint.
b) The following crimes that are mentioned in the TCC with no regard as to whether or not they require a complaint:
   1) Intentional wounding (except for subparagraph 3, articles 86 and 88).
   2) Negligent wounding (article 89).
   3) Threat (article 106, subparagraph 1).
   4) Violation of tranquillity of domicile (article 116).
   5) Violation of freedom of work and labour (article 117, subparagraph 1; article 119, subparagraph 1-c).
   6) Theft (article 141).
   7) Misconduct (article 155).
   8) Fraud (article 157).
   9) Purchase or acceptance of an asset acquired as a result of criminal offence (article 165).
   10) Kidnapping a child and keeping him/her (article 234).
   11) Revealing information or documents that have the nature of commercial secrets, banking secrets or secrets of customers (article 239, except for subparagraph 4).

The mediation process shall be carried out as follows: the appointed mediator shall be given a copy of each document included in the case file that is considered appropriate by the public prosecutor. The public prosecutor shall caution the mediator about the requirement of complying with principles of confidentiality in the investigation. The mediator shall conclude the mediation interactions within 30 days at the latest after he has received the copies of the documents included in the file of investigation. The public prosecutor may extend this period for a maximum of 20 days.

At the end of the mediation conferences, the mediator shall produce a report and submit it to the public prosecutor, together with the copies of the documents that have been handed over to him. If the mediation occurs, the details of the kind of mediation agreement shall be clearly explained in the report, which must be furnished with the signatures of the parties.

If, at the end of the mediation, the suspect fulfils the object of the contract at once, a decision on no grounds for prosecution shall be rendered. In cases where mediation is achieved, no tort claim may be filed before civil courts for the crime under prosecution; if there is a pending case before civil courts, this case shall be considered as withdrawn.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Deferred prosecution or non-prosecution agreements are not available under Turkish criminal law.

8.5 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 may apply.

Criminal investigations are carried out pursuant to the TCC and Criminal Procedure Law and there is no provision specifying civil penalties or remedies in such laws. Therefore, a defendant cannot be subject to any civil penalty or remedy by the criminal courts. Having said that, the complainant can initiate damages action before civil courts in parallel to the criminal proceedings with regard to the same actions.

With that being said, those who are punished with imprisonment due to consciously committing a crime cannot be a parliament member or public officer, director or auditor of an association, foundation, company or political party. Further, they are incapable of exercising the right to vote or stand for election during imprisonment.

Similarly, goods used during/for commitment of a crime are confiscated, unless they belong to a *bona fide* third party.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In the Criminal Procedure Law, the public prosecutor represents the claim. The prosecutor prepares the claim, determines the legal basis of the crime and files the criminal case before criminal courts. Therefore, the public prosecutor bears the burden of proof for all the charged facts. In case the public prosecutor cannot prove the criminal case, the accused shall be acquitted due to presumption of innocence.

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

Contrary to civil procedure law, the principle of circumstantial evidence is dominant in criminal procedural law. In order for gathered/obtained evidence to qualify as legal and to be used based on the decision, it should be gathered/obtained in accordance with law. Legal evidence does not fall under the evidence restrictions. The restrictions can regard the subject matter of the evidence and the method used for obtaining the evidence.

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

Since all criminal proceeding are carried out *ex officio*, the criminal court is the arbiter of fact. The court determines whether or not the public prosecutor has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

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

A person who conspires with or assists another to commit a business crime is liable according to the TCC and will be punished with the same penalty as that applicable to those who actually committed the crime.

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?

In principle, intent is the moral element of criminal offences according to the TCC. The TCC therefore explicitly provides exceptions where negligence is considered to be sufficient for criminal conduct. Business crimes cannot be committed without criminal intent. In fact, some types of business crimes require specific intent. The prosecution office bears the burden of proof. Prosecutors, however, exercise wide discretion assuming the existence of criminal intent considering the factual scenario.

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?

According to article 4 of the TCC, ignorance of criminal law is not an excuse. The exception is legal mistake, which is regulated by article 30(4) of the TCC. If the defendant was unable to avoid the mistake in respect of illegality of his/her actions, his/her guilt will be suspended.

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?

If there is an inescapable mistake about the illegality and consequences of his/her actions, an individual can rely on this defence, but it should be borne in mind that this is a narrow exception in the established principle that ignorance of criminal law is not an excuse.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

According to article 278 of the TCC, an individual who witnesses an existing and continuing crime should report it to the authorities, failure of which would give rise to imprisonment for up to one year. There is no leniency or credit for voluntary disclosure.

13 Cooperation Provisions / Leniency

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

The TCC provides leniency for those who committed bribery. If an individual who has accepted or offered a bribe reports the act of bribery before it comes to the attention of authorities, this individual will not be punished. However, these are not applicable with regard to foreign bribery.

Leniency is possible in the case of embezzlement too. In cases where the embezzled goods are returned or the damages of the crime are compensated entirely before the initiation of the criminal investigation, leniency can be resorted to.

An offender of securities fraud might also receive leniency if they display remorse and pay to the Treasury an amount which is twice the benefit they obtained or caused to be obtained through the securities fraud, on the condition that this amount is not lower than TRY 500,000.

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

There is no established leniency or cooperation system in respect of business crimes.

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?

The concept of plea bargaining exists under Turkish criminal law for certain criminal offences. However, the business crimes indicated in this chapter do not fall under the scope of plea bargaining.

This procedure is called the fast-track procedure, a special trial procedure applied instead of a normal procedure, even when there is sufficient suspicion. A fast-track procedure might only be applied if the suspect accepts the proposal of the public prosecutor. The suspect can withdraw his/her consent at any stage until the fast-track procedure is approved by the court. The suspect's legal attorney must be present while the suspect accepts the public prosecution proposal in this regard. If a fast-track procedure is applied, the penalty deemed appropriate for the suspect's actions by the public prosecutor will be halved.

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?

The fast-track procedure is subject to the criminal court's review and approval.

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 a sentence on the defendant? Please describe the sentencing process.

The procedure is set out by Law no. 5275 on the Execution of Punishments and Security Measures. Once the decision is final and binding, the detailed process is exercised by the prosecution office.

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.

The judge looks into whether the individuals of a corporation that has benefited from the criminal conduct must be sentenced too.

16 Appeals

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

There is no restriction regarding appeals on a party basis. Either the defendant or the prosecution can appeal the verdict on the condition that the verdict meets the requirements for appeal. There are two sorts of appellate court in Turkish legislation, as mentioned above. In principle, any criminal verdict can be appealed so long as it is not an annulment of the decision of the regional court.

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

Yes, either the perpetrator or the prosecution can appeal a guilty verdict. Also, sentences of 15 years and more are reviewed *ex officio* by Regional Appeal Courts, whether or not they have been appealed by any of the parties.

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

Regional Appeal Courts conduct a legal and factual review, whereas the Turkish Court of Cassation only conducts legal reviews, even if the appellants do not require such a review. In that regard, Regional Appeal Courts can gather any evidence that had not been gathered by the domestic court i.e. hearing witnesses as well as legally review the domestic court's decision. However, the Court of Cassation cannot gather any further evidence and can only conduct a legal review of the Regional Court of Appeals' decision.

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

The Regional Court of Appeals can rectify the illegality of a decision if the first instance court has failed to identify, among others, that:

- the accused should have been acquitted;
- the minimum sentence should have been imposed;
- the sentence should have been reduced; and
- the term of the penalty.

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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?

The United States has a federal system of government. Both the federal government and the state governments promulgate and prosecute violations of their own laws.

At the federal level, there are 93 United States Attorneys, appointed by the president, who are principally responsible for investigating and prosecuting federal crimes that occur within their judicial districts. By statute, each has the authority to prosecute all crimes against the United States occurring in his or her district.

The U.S. Attorneys and their assistants are part of the Department of Justice (DOJ), the federal agency responsible for representing the United States in courts of law. The DOJ's Criminal Division is headquartered in Washington, D.C., and has several sections that specialise in prosecuting particular types of crimes, including the Fraud Section and Money Laundering and Asset Recovery Section. A separate Antitrust Division prosecutes anti-competition crimes.

At the state level, the powers of particular enforcement authorities vary. Generally, each state has an attorney general who is the chief legal officer of the state. In addition, criminal prosecutions generally are the responsibility of county-level public prosecutors within each state ("state's attorneys" or "district attorneys"). The jurisdiction of the state attorneys general, state's attorneys, and district attorneys extends to violations of state and local criminal law that occur within the borders of the respective state or county.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As a general matter, federal prosecutors are responsible for prosecuting violations of U.S. (national) law, which includes specific federal crimes, such as bribery of foreign officials, and more general crimes, such as embezzlement or fraud, that occur in multiple states or in federal territories such as federal government buildings and national waterways. State-level prosecutors prosecute violations of state law.

When criminal conduct potentially violates both U.S. and state criminal laws, the authorities may negotiate which agency will lead an investigation and prosecute. The U.S. Constitutional prohibition against being tried twice for the same offence (double jeopardy) generally does not prohibit dual prosecutions by state and federal authorities, because they are considered separate sovereigns.

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?

Yes. In addition to prosecution of violations of criminal law by the DOJ, various federal agencies are authorised to investigate and bring civil enforcement proceedings. In civil proceedings, agencies can seek civil monetary penalties, disgorgement (forfeiture), and injunctive (non-monetary) relief. Generally, criminal statutes apply to knowing and wilful criminal conduct, while the standard of intent for civil violations is lower.

Examples of agencies that regularly conduct civil enforcement matters are:

- the Commodity Futures Trading Commission, for cases involving derivatives, including futures, swaps, options and related transactions in commodities;
- the Environmental Protection Agency, for environmental cases;
- the Federal Trade Commission, for antitrust cases;
- the Federal Reserve Bank, for enforcement of banking regulations;
- the Internal Revenue Service, for tax cases;
- the Office of Foreign Assets Control (OFAC), for economic and trade sanctions; and
- the Securities and Exchange Commission (SEC), for securities fraud, insider trading, accounting and foreign bribery cases.

Certain U.S. federal agencies also may conduct administrative proceedings involving persons subject to regulation by those agencies. These proceedings involve adjudication by agency officials rather than a federal court. If the agency determines that a person has violated a rule or statute, it can order the person to cease and desist from committing such violations in the future, and also can impose injunctions, such as prohibiting or conditioning the person's continued engagement in particular commerce.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

There continue to be major settlements in the Foreign Corrupt Practices Act (FCPA) area. For example, in March 2020, Airbus concluded a four-year investigation and agreed to pay nearly $4 billion to authorities in the U.S., France and the UK, the largest global foreign bribery resolution to date. Airbus paid approximately $592 million to the DOJ and entered into a deferred prosecution agreement (DPA) in order to resolve criminal charges of conspiracy to violate the FCPA and conspiracy to violate the Arms Export Control Act. In December 2019, Ericsson paid over $1 billion to the DOJ and the Securities Exchange Commission (SEC) and entered into a DPA with the DOJ to resolve criminal charges of conspiracy to violate the anti-bribery provisions of the FCPA and conspiracy to violate the books-and-records provisions of the FCPA. The total settlement amount is one of the largest in the history of FCPA enforcement, but the amount of the bribes Ericsson allegedly paid – $62 million – is smaller than comparable settlements (which have involved between $300 million to $2 billion in bribes). This proportion is attributable, at least in part, to the amount of profits that the DOJ said resulted from Ericsson's misconduct – in this case, over $382 million.

The DOJ's ongoing investigation into corruption at Petróleos de Venezuela SA, Venezuela's state-owned and state-controlled energy company, has resulted in numerous FCPA cases against individuals.

2 Organisation of the Courts

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

Both federal and state courts generally are divided into three types: (i) trial courts of general jurisdiction; (ii) first-level appellate courts that hear all appeals from the trial courts; and (iii) second-level appellate courts that hear selected appeals from the first-level appellate courts. Defendants who have lost at the trial-level court may appeal as of right to the first-level appellate court. Appeal to the highest court is frequently by discretion of the court rather than by right.

At the federal trial court and appellate court level, courts hear both civil and criminal cases; there are no specialised criminal courts. At the state level, the existence of specialised criminal courts varies by state.

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

Yes. In both federal and state courts, except in cases of certain petty offences, criminal defendants have a Constitutional right to a trial by jury.

3 Particular Statutes and Crimes

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

• Securities fraud

It is a criminal offence for any person to wilfully employ any device, scheme or artifice to defraud, or to make any untrue statement of a material fact or to omit a material fact necessary in order to make the statements made not misleading, or to do anything else that would constitute a fraud or deceit upon any person in connection with the purchase or sale of any security.

• Accounting fraud

Under the FCPA's internal controls provisions, every company that has its securities registered with the SEC must make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company. There is no materiality element to this statute – any inaccuracy may constitute a violation.

However, in other cases of accounting fraud, materiality does come into the picture. The SEC Staff Accounting Bulletin No. 99, Section M, titled "Materiality", provides guidance in applying materiality thresholds to the preparation of financial statements filed with the commission and the performance of audits of those financial statements. The bulletin offers examples of how misstatements of relatively small amounts that come to the auditor's attention could have a material effect on the financial statements. These include misstatements that change a loss into income or vice versa, or misstatements that hide a failure to meet analysts' consensus expectations.

• Insider trading

Insider trading can be a form of securities fraud. Illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, non-public information about the security. Insider trading violations also may include "tipping" such information, securities trading by the person "tipped" and securities trading by those who misappropriate such information.

• Embezzlement

Embezzlement is the fraudulent conversion of property to a person's own use by a person who has been entrusted with it. It is different from theft in that the embezzler has a relationship of trust with the victim under which the embezzler was lawfully in possession of the property until he or she appropriated it.

• Bribery of government officials

It is a crime to provide, promise or offer, in a corrupt manner, to any government official of the United States or to a person who has been selected to become an official, directly or indirectly, anything of value in order to induce the official to act in any way. In addition, the FCPA prohibits offering to pay, paying, promising to pay or authorising the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.

• Criminal anti-competition

Under the Sherman Act (one of the U.S. antitrust statutes), a person commits an offence when he or she enters into an agreement that unreasonably restrains competition and that affects interstate commerce. The DOJ Antitrust Division subjects "hardcore" cartel agreements, such as bid rigging, price fixing and market allocation, to a *per se* prosecution standard. Agreements not challenged as *per se* illegal are analysed under the rule of reason to determine their overall competitive effect, and in the past few years, some evidence has indicated that the DOJ has been pursuing other antitrust matters, such as no-poach agreements, equally aggressively.

• Cartels and other competition offences

Please see the answer to "Criminal anti-competition" above.

• Tax crimes

The most frequently charged criminal tax violation is the preparation of false tax returns, which generally involves a person who either wilfully submits any return or document under the internal revenue laws that he does not believe is true and correct, or wilfully assists in the preparation of any document under such laws. Another commonly prosecuted crime under the internal revenue laws is tax evasion, which involves wilfully attempting in any manner to evade or defeat any tax imposed by such laws. To be liable for tax evasion, a person must wilfully take at least one affirmative act constituting an evasion or attempted evasion of the tax, and it must be shown that a tax deficiency exists with respect to that person. Other tax crimes include wilfully failing to collect and pay over-tax that is due (such as employment taxes), wilfully failing to file a tax return, and wilfully delivering to the Internal Revenue Service any tax return or other document known by the person to be fraudulent or false.

• Government-contracting fraud

It is unlawful for any person to falsify, conceal or cover up any material fact, to make any materially false statement, to submit a false claim for payment, or to use any false document in dealing with the United States. A person who knowingly and wilfully does any of these things may be subject to criminal liability. The primary law guiding the DOJ's enforcement of government-contracting fraud is the False Claims Act (FCA), which includes mandatory treble damages for violations, reduced to mandatory double damages in the case of voluntary self-disclosure, and additional civil penalties. Over 30 states and municipalities also have enacted FCAs.

• Environmental crimes

The major federal environmental laws, including the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act, criminalise knowing, wilful or, often, negligent violations of the laws' requirements. Examples of specific criminal conduct under environmental laws include: discharging pollutants into water bodies without a permit; improper removal and disposal of asbestos-containing materials; disposal of hazardous waste in unpermitted areas; tampering with emission- or discharge-monitoring equipment; exporting hazardous waste without the permission of the receiving country; and submitting false statements or reports to the federal government. Individual states also have their own environmental laws that are usually similar to – but can be stricter than – the federal laws. As with the federal laws, under most state environmental laws, criminal liability can attach for conduct that knowingly, wilfully or, in some instances, negligently violates the statute.

• Campaign finance/election law

The Public Integrity Section within the DOJ's Criminal Division oversees federal prosecution of campaign finance and other election crimes. These attorneys in this agency prosecute selected cases against federal, state and local officials, and also help oversee and supply advice and expertise to local U.S. Attorney offices bringing campaign finance prosecutions. Under DOJ policy, U.S. Attorneys must consult with the Public Integrity Section before initiating any criminal investigation involving alleged violations of the Federal Election Campaign Act. Under the Federal Election Campaign Act, knowingly and wilfully making corporate contributions is criminal, as is involvement in contribution reimbursement, contribution coercion and fraudulent misrepresentation of campaign authority. Individual states and numerous localities have their own campaign finance statutes, many of which include provisions for criminal prosecution of excessive contributions and other violations.

• Market manipulation in connection with the sale of derivatives

Under the Commodity Exchange Act, manipulating or attempting to manipulate the price of any commodity in interstate commerce, of any futures contract or of any swap contract is unlawful. Examples of price-manipulation practices include "cornering" the market (where a person acquires a sufficiently dominant supply of a commodity to allow that person to control price, typically requiring other traders needing to buy the commodity to pay an artificially high price for it) and "squeezing" the market (where a person acquires a dominant futures or swap position entitling him or her to delivery of a commodity and, in the event of shortages in the commodity, demands an artificially high price from those owing the delivery).

• Money laundering or wire fraud

Money laundering under U.S. law is broadly defined under two statutes, one that targets the transfer or transportation of proceeds of unlawful activity, and the other that criminalises fund transfers to further other illegal conduct or to conceal the proceeds from such conduct.

• Cybersecurity and data protection law

Cybersecurity and data protection are governed by a number of statutes, including the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act, the Bank Secrecy Act, the USA PATRIOT Act and the Sarbanes-Oxley Act at the federal level. Generally speaking, these statutes oblige companies to maintain cybersecurity and data protection safeguards to defend systems and information from cyberattacks or unauthorised access. Many legal requirements focus on obliging banks and other financial institutions in particular to adopt risk analysis and oversight programmes, and require frequent testing, with some regulators such as the SEC requiring periodic submission of data relating to cybersecurity. The Federal Trade Commission frequently enforces minimum security requirements with respect to entities collecting, maintaining or storing consumer's personal information. State governments (most notably California) also have passed laws to protect consumers and personal information, and federal and state bank regulators may institute proceedings for engaging in "unsafe and unsound" conduct related to cybersecurity and data privacy on similar theories.

• Trade sanctions and export control violations

The OFAC administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals. OFAC acts under presidential national emergency powers, as well as authority granted to it by specific legislation, to impose controls on transactions and freeze assets under U.S. jurisdiction. The primary law under which sanctions are carried out is the International Emergency Economic Powers Act (IEEPA). IEEPA authorises the president to regulate commerce after declaring a national emergency in response to any unusual and extraordinary threat to the United States of a foreign source. Under IEEPA, it is a crime to wilfully violate or attempt to violate any regulation issued under the act. Institutions that violate or attempt to violate those regulations may face criminal enforcement actions by the DOJ. In addition to the DOJ, federal and state authorities and regulators may also initiate enforcement actions against financial institutions that violate sanctions laws. OFAC also may take actions under the Trading with the Enemy Act, which restricts trade with certain countries hostile to the United States.

In August 2017, Congress passed the Countering America's Adversaries Through Sanctions Act (CAATSA), which, among other items, codified various Russia-related sanctions previously promulgated by executive order into law. CAATSA

also subjected the president's ability to waive or terminate the application of sanctions imposed on targeted persons under CAATSA to congressional review.

The U.S. government also regulates the export, re-export and transfer of equipment, software, technology, technical data and certain services. Specifically, the Arms Export Control Act is the primary law guiding U.S. export control law regarding munitions. The Department of State implements this statute by the International Traffic in Arms Regulations (ITAR). All persons or entities that engage in the manufacture, export or brokering of defence articles and services as defined by the U.S. Munitions List must register with the U.S. government. ITAR sets out the requirements for licences or other authorisations for specific exports of defence articles and services. The export, re-export or transfer of certain significant defence articles or services also requires congressional notification. The Export Administration Regulations (EAR) originally were enacted under the now expired Export Administration Act and currently are maintained under IEEPA. Enforcement for violations of ITAR and EAR may include both criminal and civil penalties.

• Any other crime of particular interest in your jurisdiction

Under the Commodity Exchange Act, "spoofing" means placing bids or offers with the intent to cancel those bids or offers before a trade is executed. Spoofing violates the Commodity Exchange Act and knowingly spoofing is a criminal offence. Recently, U.S. prosecutors and regulators have pursued spoofing cases, particularly cases involving traders using high-speed algorithms that placed and quickly cancelled orders in order to give the impression that intense buying or selling interest existed in the market.

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

Yes, there is liability for attempted crimes in the United States, both at the federal and state levels. Generally, attempt statutes require proof of: (i) intent to commit a specific crime; and (ii) an action in furtherance of the attempt, which need not constitute criminal conduct on its own.

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, under both federal and state law, a legal entity can be convicted of a crime.

An entity may be responsible for the conduct of an employee when the employee is acting: (i) within the scope of his or her employment; and (ii) for the benefit of the entity. The employee need not intend to benefit the entity to the exclusion of his or her own benefit – if an employee's action will benefit the entity at least in part, this element of the test is satisfied.

When the entity's state of mind is an element of the offence, the knowledge of its employees, officers and directors may be imputed to the entity to the same extent – knowledge is imputed to the entity when an employee obtains the knowledge while acting: (i) in the course of his or her employment; and (ii) for the benefit (at least in part) of the entity. In addition, under the collective knowledge doctrine, the knowledge of the entity is the aggregate of the imputed knowledge of every employee acting within the scope of his or her authority, even if no one employee has sufficient knowledge to form criminal intent.

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

No automatic criminal liability for managers, officers and directors exists when their entity is convicted of a crime. Rather, a criminal case must be made separately against the individuals. Under most statutes (with some exceptions), managers, officers and directors are not strictly liable for the transgressions of a corporate 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?

Federal prosecutors follow policy guidelines concerning when it is appropriate to bring criminal charges against an entity, called the Principles of Federal Prosecution of Business Organizations. Pursuant to these guidelines, whether or not it is appropriate to charge an organisation criminally depends on several factors as discussed in section 8 below, including the nature and seriousness of the offence, the pervasiveness of wrongdoing at the organisation, the organisation's history of similar conduct, the nature of the compliance programme at the organisation and remedial measures taken in response to the misconduct, whether or not the corporation voluntarily disclosed the conduct to authorities and cooperated in the investigation of the conduct, collateral consequences of a prosecution (including harm to shareholders), and the adequacy of other remedies including prosecution of individuals or civil outcomes. In considering whether or not to prosecute individuals in addition to an organisation, prosecutors consider several factors that include the seriousness of the conduct and the potential deterrent effect of a prosecution.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

In general, when a company merges with or acquires another company, the successor company assumes the predecessor company's liabilities. Successor liability applies to all kinds of civil and criminal liabilities and also can apply if a transaction constitutes a "*de facto* merger" under state law, if the transfer was fraudulent or intended to be so, or if the successor entity is a continuation of the seller or continues substantially the same operations as the seller.

As an example, successor liability applies to liabilities related to violations of the FCPA. Where a target company was subject to the FCPA prior to a transaction, the DOJ and the SEC may pursue an enforcement action against either the predecessor company under a theory of direct liability, or the acquiring company under a theory of successor liability. The risk for acquiring companies can be minimised, however, by conducting thorough and appropriate due diligence and by promptly implementing sufficient internal controls and compliance measures at the acquired entity following the change in control.

5 Statutes of Limitations

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

At the federal level, the enforcement-limitations period, when applicable, begins running on the date on which the offence is

committed. Capital offences and certain other serious crimes are not subject to any limitations period. Generally, unless otherwise specified, federal crimes are subject to a five-year limitations period, and a number of banking-related crimes are subject to a 10-year period. The limitations period generally begins when the last act in furtherance of the crime is committed.

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

Yes. Crimes that are part of a "continuing offence", such as a conspiracy, may be prosecuted even if the limitations period for some of the crimes within the continuing offence has lapsed, so long as the last crime constituting an "overt act" in furtherance of the continuing offense occurred within the limitations period. A continuing offence is an offence committed over a span of time.

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

The limitations period may be tolled for a number of reasons, most significantly, if the government can show active concealment of the crime. In addition, if the DOJ requires the assistance of overseas authorities to obtain evidence, it may apply to the court for a temporary stay of the limitations period.

The government and the potential defendant may enter into an agreement to toll the limitations period, which a potential defendant may do if it is cooperating with the government and hopes to enter into a settlement agreement.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Prosecutors may enforce U.S. criminal statutes outside the United States where: (i) the "due process" clause of the U.S. Constitution permits extraterritorial application of the relevant statute; and (ii) Congress intended the relevant statute to have extraterritorial effect.

The due process clause permits the extraterritorial application of criminal law where a "sufficient nexus" exists between the United States and the defendant such that application of the law would not be arbitrary or unfair. Generally, this means that U.S. criminal law may apply where the defendant is a U.S. national or entity organised under the laws of a state or the United States, where some element of the offence occurred on U.S. territory or using the means of interstate commerce, or where the effects of the offence will impact the United States or U.S. nationals.

Assuming the due process clause permits the extraterritorial application of U.S. law, the next question is whether Congress intended the relevant law to apply extraterritorially. Generally, except in cases of crimes against the United States, U.S. courts presume that criminal statutes do not have extraterritorial application unless Congress clearly intended otherwise.

The U.S. foreign bribery statute (the FCPA, discussed in the answer to question 3.1), is an example of a statute prosecutors frequently enforce extraterritorially. Prosecutors also frequently prosecute securities fraud laws extraterritorially, although U.S. courts have called into question whether these laws should apply outside the United States.

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

Prosecutors generally are free to initiate investigations when they have reason to believe that a crime falling within their jurisdiction has been committed. U.S. law generally does not require the government to initiate investigations under particular circumstances.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The United States has entered into mutual legal assistance treaties with numerous other countries, and formal cooperation between the DOJ and foreign prosecutors occurs pursuant to these treaties. Federal prosecutors and regulators also cooperate with foreign regulators on an informal basis. Cooperation between U.S. and non-U.S. regulators has become increasingly common.

In March 2018, Congress passed the Clarifying Lawful Overseas Use of Data Act (the CLOUD Act), clarifying the scope of data subject to warrants under the Store Communications Act and providing a framework for cross-border data access for law enforcement purposes. The CLOUD Act's immediate effect was to explicitly allow American law enforcement authorities to issue warrants for electronic data that is stored outside the U.S., an issue that was being litigated before the Supreme Court. The act also recognises the potential conflict between such warrants and foreign privacy regimes and sets up a framework for the U.S. to enter into agreements with foreign countries to facilitate access to each other's data without a mutual legal assistance treaty.

7 Procedures for Gathering Information from a Company

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

Generally, the government has three types of procedural tools at its disposal to gather information in criminal investigations: (i) an informal request, which is a request by the government to voluntarily produce documents or provide information; (ii) a subpoena, which is a demand issued by a court to produce documents or appear for questioning; and (iii) a search warrant, which is a warrant issued by a court authorising the government to search a person's premises for particular items.

The government may use a subpoena to compel a person to provide formal testimony.

In civil investigations, the government may issue a civil investigative demand (CID), which is a formal demand by an investigative agency for documents or information.

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?

Prosecutors and law enforcement officers may demand documents via a subpoena. A subpoena is issued by the grand jury at the request of a prosecutor. A grand jury is a group of residents of a judicial district (at the federal level) or county (at the state level) who are summoned by the court to hear evidence presented by the government and to determine whether the government has sufficient evidence to proceed to prosecute a defendant.

A law enforcement officer also may seek authority to raid a company to seize documents via a search warrant. Only a United States District Court (at the federal level) or a state court of general jurisdiction may authorise a law enforcement agency to execute a search warrant. The warrant must be based on an affidavit that sets forth the facts known to the officer that provide "probable cause" to search for and seize property. Probable cause is a low quantum of proof: it means that facts exist that would lead a reasonably prudent person to believe that evidence of a crime will be discovered in the place to be searched. The locations to be searched and the types of evidence that may be seized must be defined in the search warrant.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The United States recognises two protections against production or seizure: the attorney-client privilege and the attorney work product doctrine. Some states recognise additional protections against disclosure, but they are more rarely invoked.

Generally, the attorney-client privilege protects from disclosure confidential communications between an attorney and a client regarding legal advice. It applies whether the client is an individual or a company, and, if the client is a company, the privilege applies whether the attorney is in-house or outside counsel. The federal courts generally hold that if any employee of a company communicates with an attorney about the subject matter of the employee's employment, that communication may be privileged. Some state courts, however, hold that only the communications of senior personnel who "control" the company are made on the company's behalf and thus subject to privilege.

The attorney-client privilege does not apply when the client communicates with the attorney in order to obtain assistance in committing or planning a crime or a fraud (the "crime-fraud exception" to the attorney-client privilege).

The attorney work product doctrine generally protects from disclosure documents or tangible things made by or for an attorney in preparation for litigation. The purpose of the doctrine is to protect from disclosure the attorney's opinions and impressions of facts learned by the attorney.

When the government requests documents from a company or causes a subpoena to be issued to it, the company generally will review any documents relevant to the request or subpoena to determine whether or not they are protected from disclosure. The company may withhold those documents and usually must provide a list of any documents so withheld. If the government believes that any assertion is improper, it may ask a court to compel the company to produce improperly withheld documents.

When the government seizes documents under a warrant, it may decide to follow special procedures to segregate privileged documents so that it is not later barred from using seized materials in its prosecution.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

State and federal labour laws do not usually protect employee documents from disclosure of employees' personal data to government or regulatory authorities. In certain contexts, such as information regarding health care records, financial records and tax records, privacy restrictions dictate the manner in which documents may be disclosed.

7.5 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?

The government may seek documents from an employee to the same extent, and using the same procedures, that it may seek documents from the defendant company.

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

The government may seek documents from a third person or entity to the same extent, and using the same procedures, that it may seek documents from the defendant company.

Questioning of Individuals:

7.7 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?

The circumstances and manner in which the government can question an individual are strictly circumscribed.

Law enforcement officers may seek a voluntary interview with employees, officers and directors to answer questions, but these individuals may refuse to participate.

Law enforcement officers also may detain a person for questioning if the officers have "probable cause" to believe that the person has been involved in the commission of a crime.

In addition, the grand jury may issue a subpoena to an employee, officer or director, commanding the individual to appear before the grand jury to answer questions.

The U.S. Constitution protects individuals from being compelled to provide testimony that would tend to incriminate themselves, and thus an individual may refuse to testify before a grand jury on this basis.

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

The government may seek to question third persons to the same extent, and using the same procedures, that it seeks to question employees, officers, or directors of a company.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Persons being questioned by the government have an absolute Constitutional right to remain silent and not to provide answers that would tend to incriminate themselves. Persons being questioned by the government also have the right to consult with an attorney.

When the questioning is being conducted on a voluntary basis by a law enforcement officer, the person being questioned may refuse to answer any questions at any time and may insist that his or her attorney be present during the questioning.

When the person is testifying before the grand jury, he or she may consult with his or her attorney before answering any particular question, but the attorney is not permitted to attend the testimony in the grand jury room. The person does have the right to refuse to answer any questions that could produce answers that would tend to incriminate that person.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

For serious crimes punishable by more than one year in prison, if the grand jury has probable cause to believe that a crime has been committed by a person, it will return an "indictment" against that person. The indictment is drafted by the prosecutor and sets forth allegations against the accused.

For minor crimes, the prosecutor may commence a criminal case without a grand jury proceeding by filing an "information" document with the court, setting forth the allegations against the accused.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

At the federal level, the Principles of Federal Prosecution, a DOJ policy, governs federal prosecutors' decision to charge an entity or an individual with a crime.

When a federal prosecutor has probable cause to believe that an individual has committed a crime and that the prosecutor has sufficient admissible evidence to convict the individual in court, the prosecutor should commence a criminal case against the person unless the prosecutor believes: (i) no substantial federal interest would be served by prosecution; (ii) the person is subject to effective prosecution in another jurisdiction; or (iii) an adequate non-criminal alternative to prosecution exists.

Federal guidelines also set forth the following additional factors in assessing whether an entity should be charged criminally:

- the nature and seriousness of the offence, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the company;
- the company's history of similar misconduct;
- the company's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
- the existence and effectiveness of any pre-existing compliance programme at the company;
- the company's remedial actions;
- collateral consequences, including disproportionate harm to shareholders, pension holders and employees;
- the adequacy of the prosecution of individuals responsible for the company's malfeasance; and
- the adequacy of remedies such as civil enforcement actions.

These factors encourage companies involved in a DOJ investigation to cooperate with the prosecutors in order to maximise the likelihood that they will receive leniency, as described below in section 13.

In June 2020, the DOJ's Criminal Division released updates to its Evaluation of Corporate Compliance Programs guidance. Where the guidance previously required prosecutors to determine if a corporate compliance programme had been "implemented effectively", it now requires a determination as to whether the programme has been "adequately resourced and empowered to function effectively". Prosecutors will assess whether the company dedicated resources commensurate with the risks confronting the entity, and whether management gave its compliance function sufficient authority and information to implement the programme.

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

In the case of corporate defendants, the prosecutor may agree with the defendant to defer prosecuting the defendant (a DPA) or not to prosecute the defendant at all (a non-prosecution agreement or NPA) using the standards set out above in the answer to question 8.2. A DPA is an agreement that involves the government filing criminal charges against a defendant, but not prosecuting the defendant on them (deferral of the charges). An NPA is a type of settlement under which the government agrees not to file any criminal charges against the defendant. Under both types of agreements, the defendant admits to a statement of facts concerning the offence and to undertake compliance and remediation steps.

DPAs and NPAs are rare in anti-competition cases, because the DOJ Antitrust Division has a specialised leniency programme for such matters.

If a prosecutor believes that an individual would benefit and be less likely to commit a future crime if he or she were diverted from the traditional penal process into community supervision and services, the prosecutor may place that individual in pretrial diversion. Only defendants who are not repeat offenders and who meet certain other criteria are eligible for pretrial diversion.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Prosecutors have discretion to decline or defer prosecution and, accordingly, DPAs and NPAs are not subject to court approval. A small number of courts in recent years have rejected DPAs, but these actions have usually been overturned on appeal.

8.5 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 may apply.

Yes. Where the defendant's criminal conduct also constitutes a violation of U.S. civil law (such as, for example, securities law), the defendant may be subject to civil penalties or remedies as part of a civil enforcement or administrative proceeding, as described above in the answer to question 1.3. Often, a civil enforcement proceeding will run parallel with a criminal proceeding.

Additionally, if a defendant is a government contractor, it may lose its ability to sell goods or services to the government if it is convicted of a crime involving embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax violations or receiving stolen property. The lead government agency with which the defendant contracts will determine whether the government may continue to contract with the defendant.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The government bears the burden to prove every element of any crime charged. The defendant bears the burden to prove every element of any affirmative defence asserted.

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

In a criminal prosecution, the government must prove every element of the crime "beyond a reasonable doubt". Reasonable doubt is doubt that a reasonable person could have based on the evidence presented at trial, or lack of evidence. It is the highest standard of proof possible in U.S. jurisprudence.

Defendants generally have the burden of proving any affirmative defences by "clear and convincing evidence" or a "preponderance of the evidence", which are lower standards of proof. The preponderance-of-evidence standard means that all of the evidence, taken together, makes a particular fact more likely than not. The clear-and-convincing standard ranks between the preponderance and beyond-a-reasonable-doubt standards in difficulty.

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

The trial jury – known as a petit jury – is the arbiter of fact in a criminal trial, unless the defendant waives his or her right to be tried by jury. Thus, the jury determines whether each party has satisfied any burden of proof.

At any time after the government completes putting on its evidence, however, the defendant may ask the judge to enter a judgment of acquittal of any offence for which the government's evidence was insufficient to sustain a conviction as a matter of law. This can include a motion to set aside a jury verdict finding the defendant guilty if the verdict is against the weight of the evidence.

10 Conspiracy / Aiding and Abetting

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

Yes. Anyone who conspires with or aids or abets another person to commit a crime can be held liable as a principal to the same extent as that other person.

The elements of criminal conspiracy are satisfied when two or more persons agree to commit a crime and at least one of those persons takes at least one overt act toward the commission of the crime.

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. Where the law defines an offence as requiring a particular state of mind by the defendant, the state of mind is an essential element of the offence. In such cases, the prosecutor must prove that the defendant had the requisite state of mind to commit the offence beyond a reasonable doubt.

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?

Generally, defendants are presumed to know the law. Thus, when a defendant commits a crime, he or she is presumed not only to have performed the acts constituting the crime, but also to have intended to violate the law that prohibited those acts. For this reason, a "mistake-of-law" defence is generally not available.

The mistake-of-law defence is available in certain instances where the government is required to prove specific intent on the part of the defendant to violate the law. In these circumstances, the mistake-of-law defence is available where the defendant has a genuine, good-faith belief that he or she is not violating the law based on a misunderstanding caused by the law's complexity. Because specific intent is an element of the crime, the government has the burden of proving the defendant's intent beyond a reasonable doubt.

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?

The "mistake-of-fact" defence is available when the defendant's honest mistake negates the requisite state of mind for the offence.

For example, if it were a crime to intentionally give a gift to a government official, and the defendant honestly believed that the person to whom he gave the gift was a private citizen and not a government official, then the defendant should be found not guilty because his mistake prevented him from forming the requisite intent to commit the crime. The government has the burden to prove the defendant's state of mind beyond a reasonable doubt.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no affirmative obligation to report knowledge that a crime has been committed. However, if a person knows of the commission of a felony (a serious crime) by another, and conceals it, the person is guilty of a crime called "misprision of felony". To be guilty of misprision of felony, the defendant must have taken an affirmative step to conceal the crime.

Federal prosecutors can take voluntary disclosure into account in the resolution of criminal cases. For example, with respect to the FCPA, the DOJ Fraud Section's FCPA Corporate Enforcement Policy (made permanent in November 2017) provides a presumption of declination for companies that voluntarily self-disclose, cooperate and remediate. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offence, such as where the offender is a criminal recidivist. If a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, the DOJ will accord, or recommend to a sentencing court, a 50% reduction off the low end of the fine range determined by the U.S. Sentencing Guidelines and will not require appointment of a monitor if the company has implemented an effective compliance programme. By contrast, if a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates and timely and appropriately remediates – but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing (a maximum of 25% off the low end of the fine suggested by the Sentencing Guidelines). On March 1, 2018, the DOJ informally extended the FCPA declination policy to non-bribery cases as non-binding guidance.

13 Cooperation Provisions / Leniency

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

Yes. Under the Principles of Federal Prosecution, discussed above, DOJ prosecutors take into account a company's voluntary disclosure of wrongdoing and cooperation with the government's investigation in making their charging decisions and sentencing recommendations. Where a company discloses its own wrongdoing or voluntarily shares company information with the government in connection with its investigation, the prosecutor may agree to charge the company with a lesser offence, or may enter into a DPA or NPA with the company.

In addition to the Principles of Federal Prosecution, the U.S. Sentencing Guidelines (see question 15.1 below) also provide leniency for companies that cooperate with government investigations.

In anti-competition matters, if a company is the first company in an industry to voluntarily disclose a violation, the DOJ Antitrust Division may grant complete leniency under its specific leniency programme. This programme can extend to non-anti-competition crimes committed in connection with the anti-competition activity that is being reported. Historically, credit was not available for subsequent self-reporting participants in the violation. However, in July 2019, the DOJ Antitrust Division announced that later self-reporting participants in a violation could receive credit for corporate compliance efforts, and that the DOJ would take the effectiveness of the company's anti-competition programme into consideration when making charging decisions.

As discussed above at question 12.1, there is a more recently developed FCPA Corporate Enforcement Policy, which is aimed at entities that self-disclose FCPA violations, timely and appropriately remediate their misconduct, and cooperate with the DOJ's investigation. In March 2018, the DOJ informally extended the cooperation principles of this policy to non-bribery cases as non-binding guidance.

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

Generally, the government will consider leniency when the company's disclosures and cooperation materially assist it in uncovering and investigating criminal acts it could not have uncovered and investigated without the company's assistance, or could not have uncovered and investigated without expending significant resources.

Typically, leniency requires that a company fully investigate – on its own – any criminal activity that is or may become the subject of a government investigation by conducting an "internal investigation". The company generally would be expected to share the results of this internal investigation with the government, and thus assist the government in focusing and resolving its own inquiry. The government also would expect a voluntary agreement to produce relevant documents to the government and to make relevant employees available to be interviewed by law enforcement officers.

In addition to merely assisting the government in its own inquiry, prosecutors also will give credit to companies that use the results of their own internal investigations to alter their business practices, for example, by disciplining employees who engaged in misconduct and strengthening their compliance functions and internal controls.

The DOJ Antitrust Division has a specific leniency programme that may provide leniency to the first company in an industry to voluntarily disclose a violation. Subsequent self-reporting participants can receive credit for their corporate compliance efforts.

In March 2019, the leadership of the DOJ Criminal Division clarified that cooperation with the DOJ pursuant to the FCPA Corporate Enforcement Policy (discussed above at questions 12.1 and 13.1) requires the disclosure of all relevant facts about individuals who were substantially involved in the misconduct.

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?

Yes. A defendant may enter into a "plea agreement" with the government, under which the government will charge the defendant with agreed-upon offences and will agree to recommend a particular (usually reduced) sentence to the court.

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?

There are two categories of benefit a defendant may hope to achieve from a plea agreement: reduced charges and a reduced sentence.

Charges: The government has discretion to charge (or not to charge) defendants with particular offences. Nevertheless, under DOJ policy, federal plea agreements should reflect honestly the totality and seriousness of the defendant's conduct; any departure from this standard must be disclosed in the agreement. The court does not approve the government's charging decisions, but the court does have the power to approve or reject an entire plea agreement, of which any reduced charges are part.

Sentence: While the prosecutor decides what charges to bring, the court has ultimate discretion on what sentence to impose. A plea agreement may include a recommendation to the court to impose a particular sentence, but the court is not bound by that recommendation. There is a narrow category of federal plea agreements under which both the charges and sentence are agreed between the government and defendant, and the court is asked either to reject or accept the entire package. Such agreements are disfavoured both by courts and the authorities.

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 a sentence on the defendant? Please describe the sentencing process.

Both federal and state laws provide the minimum and maximum sentences (*i.e.*, the amount of fine, term of imprisonment or both) to which a defendant can be sentenced for a particular offence. The minimum and maximum sentences may be set forth in the specific statute defining the particular offence, or they may be set forth in a separate general statute that sets forth permissible sentences for different classes of crimes. In addition, at the federal level, the "alternative fines" statute provides that a defendant may be sentenced to pay a fine of up to twice the amount of the pecuniary gain realised by the defendant, or the pecuniary loss to others caused by the defendant, from the criminal conduct.

At the federal level, once the court determines that a defendant is guilty and determines the maximum sentence for the offence of conviction, the court conducts a calculation using the U.S. Sentencing Guidelines. The Sentencing Guidelines comprise a series of steps that convert an offence of conviction and certain other relevant conduct into a numeric score, which the court then can use to determine the potential range of fines or terms of imprisonment with which to sentence the defendant. The court, however, may use its discretion in issuing a sentence.

With regard to business crimes, the penalty may not be limited to fines and/or imprisonment. For certain offences, the DOJ may seek criminal or civil forfeiture, or both, of property that constitutes or is derived from proceeds traceable to the offence. The DOJ and the SEC also may seek an injunction against the business where this is deemed necessary to advance public interests or enforce governmental functions. Injunction actions specifically may be provided for by statute, or they may be permitted to enforce statutes that do not specifically provide such a remedy.

Generally, the Sentencing Guidelines account for the severity of the defendant's crime and the defendant's criminal history. They provide for reduced sentences for defendants who disclose wrongdoing to the authorities and actively assist the authorities in their investigation of any criminal conduct. They also provide for reduced sentences for companies that implement compliance programmes designed to detect and prevent wrongdoing by employees.

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.

In considering the imposition of a sentence on a corporation, the court must consider the nature and circumstances of the offence and the history and characteristics of the defendant. In addition, the sentence should reflect the seriousness of the offence, promote respect for the law, provide just punishment for the offence and be serious enough to deter future criminal conduct and to protect the public from further crimes of the defendant.

In making these determinations, the court will consider whether the company has implemented any compliance functions and internal controls or disciplined the employees who were responsible for the misconduct.

16 Appeals

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

If a defendant is found guilty at trial, the defendant may appeal the verdict on any available grounds, but, if the defendant is found not guilty, the government may not appeal.

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

A defendant who has been convicted of a crime, whether after trial or as part of a plea agreement, may appeal a sentence if the sentence: (i) was imposed in violation of law; (ii) was imposed as a result of an incorrect application of the Sentencing Guidelines or is greater than the maximum sentence provided for in the

Sentencing Guidelines; or (iii) was imposed for an offence for which there is no Sentencing Guideline and is plainly unreasonable. If the defendant pleaded guilty under an agreement specifying the fine to which the court must sentence the defendant, the defendant may only appeal if the sentence violated the law or misapplied the Sentencing Guidelines.

The government may appeal a sentence if the sentence: (i) was imposed in violation of law; (ii) was imposed as a result of an incorrect application of the Sentencing Guidelines or is less than the minimum sentence provided for in the Sentencing Guidelines; or (iii) was imposed for an offence for which there is no Sentencing Guideline and is plainly unreasonable. The attorney general, solicitor general, or deputy solicitor general of the United States must approve any appeal by the government.

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

An appellate court only may overturn a trial court's finding of fact if the finding was "clearly erroneous". This means that the appellate court only may overturn a factual finding when the finding is unsupported by substantial evidence or contrary to the clear weight of the evidence.

An appellate court owes no deference to the trial court; however, respecting its conclusions of law, it may review those conclusions *de novo*, meaning afresh.

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

The appellate court's remedial power depends upon the basis for the appeal.

In an appeal from the trial court's sentence, the appellate court may vacate the sentence and remand the case to the trial court for resentencing consistent with any instructions of the appellate court.

In an appeal from the defendant's conviction, the appellate court may vacate the trial court's judgment of conviction and remand the case to the trial court for a new trial. In exceptional circumstances, if the appellate court finds that the trial court erred in not entering a directed verdict of not guilty, the appellate court may remand the case to the trial court with instructions to do so and to release the defendant.

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