Bribery & Corruption 2020

Seventh Edition

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Jonathan Pickworth & Jo Dimmock

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PREFACE

We are pleased to present the seventh edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 28 countries and one region worldwide.

This edition sees the addition of new chapters relating to Belgium, Poland, Hong Kong and the Czech Republic, as well as an Asia-Pacific overview. In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

Jonathan Pickworth & Jo Dimmock
White & Case LLP
November 2019

Asia Pacific Overview

Phillip Gibson, Dennis Miralis & Rachel Le Bransky
Nyman Gibson Miralis

Introduction

The Asia-Pacific (APAC) region is made up of a number of jurisdictions, including Australia, New Zealand, Vietnam, Thailand, Malaysia, Singapore, Indonesia, India and Pakistan, People's Republic of China (PRC), Hong Kong and Japan, as well as a number of Pacific Island nations.

Across the APAC, there is an increased flurry of activity in relation to adopting more robust anti-corruption related policy, legislation and enforcement measures.

However, as a result, the anti-corruption landscape is also becoming more complex. Companies must be aware of risks imposed by legislation that exerts itself extra-territorially, rigorous local regulatory regimes that may conflict with cross-jurisdictional laws, and increasingly onerous restrictions on the movement of data as well as diversity in approach to information-sharing across jurisdictions.

Governments are increasingly involved in cross-border investigations in response to borderless financial crime, encouraging ethical corporate practices, addressing challenges in detecting corporate crime by implementing self-reporting schemes, and scrambling to respond to rapid technological advancement.

This article will provide a brief overview to bribery and corruption in the APAC region, addressing the following:

- increasingly robust regulatory and enforcement measures, including the introduction of vicarious liability offences for corporations, reporting obligations for financial institutions, and the development of structural integrity through 'E-government';
- challenges of cross-jurisdictional coordination, particularly information sharing;
- rise of the ethical business, including self-reporting schemes;
- era of the whistleblower; and
- the impact of grassroots activism.

Strengthened anti-corruption and bribery regulatory and enforcement measures

Vicarious liability

APAC jurisdictions are implementing more robust measures to hold legal persons liable for criminal conduct by individuals. One reason behind this is that the economic interest behind bribery and corruption often lies with the legal person, and therefore criminal prosecution solely against the natural person will not suffice.

There is, of course, the additional effect of companies ensuring they implement effective procedures and practices to avoid liability.

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The Australian Government has proposed reforms to Australian foreign bribery laws, including the introduction of an offence for corporations that fail to prevent foreign bribery. Companies will be strictly liable for bribery committed by employees, contractors and representatives, both foreign and domestic, unless the company can demonstrate that adequate procedures to prevent such conduct were in place. The reforms propose that policy and practice guidelines will be published to assist Australian companies in establishing the requisite procedures to avoid liability. The maximum penalty is AUD $18 million, and more if the individual's conduct was intentional.

Singapore case law provides that companies can be liable where a crime is committed by an individual who is "the embodiment of the company" (primary liability) or who acts "within the scope of a function of management properly delegated" (vicarious liability).[1]

Whether prosecutors will pursue the individual and/or the company is a matter of prosecutorial discretion. However, in 2015, the then Attorney-General of Singapore, VK Rajah, stated in an opinion-editorial that "[s]ignificant attention is also given to the culpability of corporations… especially if the offending conduct is institutionalised and developed into an established practice in an entity over time".[2]

In the PRC, the Amended Anti-Unfair Competition Law (AUCL) 2018 similarly provides at Article 7 that "bribery committed by a staff member of a business operator shall be deemed the conduct of the business operator, unless the business operator has evidence to prove that such acts of the staff member are unrelated to seeking business opportunities or competitive advantage for the business operator". The onus shifts to the operator to persuade prosecutors that they should not be held vicariously liable for employees' conduct.

It is suggested that this signals a 'paradigm shift' in Chinese corporate crime jurisprudence,[3] and as a result, high-profile companies are outing their own executives with claims of bribery, precipitating criminal investigations.

This is not a new method to incentivise companies to develop robust anti-bribery and corruption policies and procedures. Developments are in line with US and UK laws, and further implement the OECD Anti-Bribery Convention.[4]

The International Organisation for Standardisation (the ISO) recently published an anti-bribery management system (ISO 37001) providing a global 'good practice' framework to assist companies in developing adequate compliance programs, or in reviewing anti-corruption and bribery measures. Unfortunately, it is not an automatic legal defence to bribery charges.

Apart from significant monetary penalties, in some jurisdictions, legal persons also face other punishments, including disqualification from public tender processes on findings of bribery and corruption.

Role of financial institutions

Financial institutions such as banks and companies such as securities, insurance and financial asset management companies, are often abused as intermediaries in corruption schemes.[5] APAC jurisdictions have realised the importance of appropriate regulation and supervision of financial institutions, and associated reporting obligations, to prevent high-level corruption that would normally go undetected.

Ideally, international standards are adopted by APAC regions. The Asia/Pacific Group on Money Laundering, established by the FATF Asia Secretariat, works to ensure the adoption, implementation and enforcement of internationally accepted AML/CTF financing standards as set out in the FATF Forty Recommendations.[6]

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Further, most APAC jurisdictions have adhered to the International Organisation of Securities Commissions (IOSCO) standards, 38 principles of securities regulation, based on objectives of protecting investors, ensuring a fair, efficient and transparent market, and reducing systemic risk.[7]

As a result, across an increasing number of APAC jurisdictions, financial institutions are required to report suspicious or threshold transactions.

As of 1 July 2017, financial institutions in the PRC including banks, securities and insurance companies, and other entities determined and announced by the People's Bank of China, are required to report large-sum and suspicious transactions to the China Anti-Money Laundering Monitoring and Analysis Centre (CAMLMAC). The large sum transaction threshold is a cash transaction reaching RMB 50,000 or, if the client is a natural person, a cross-border transfer between bank accounts reaching RMB 200,000.

Similar obligations are enforced across the APAC region. In Australia, AUSTRAC, the Australian financial intelligence body, issued a AUD $252,000 infringement notice to a money transfer business for failing to report international fund transfers between 2018 and 2019. AUSTRAC Chief Executive Officer, Nicole Rose PSM, reiterated that the reporting of money flowing in and out of Australia is critical to detecting criminal activity.[8]

In Australia, 'cash dealers', including solicitors, also have distinct obligations to report threshold cash transactions reaching AUD $10,000.[9]

There is also an increased focus on financial institutions implementing 'know-your-customer' (KYC) policies and practices in an effort to combat financial crime.

Laos recently enacted the Law on Anti-Money Laundering and Counter-Financing Terrorism which requires reporting units (both financial sector and non-financial sector institutions) to comply with KYC and customer due diligence processes as prescribed. Reporting units must, amongst other things: request identification papers; ensure that customer business operations accord with business operation records (e.g. accurate sources of funds and properties); and keep detailed and accurate records. In 2016, the Lao government then passed the Agreement on KYC and Customer Due Diligence, expanding on the AML/CTF law, "in order to strictly implement the work of AMLCTF at the reporting unit level".[10]

As a point of difference, Hong Kong aims to open virtual banks by the end of 2019. Although operational costs are reduced, KYC policies and procedures will need to be drastically revised given that, for example, original identity documents will no longer be confirmed in person. Yet, virtual banks are subject to the same AML/CTF requirements as their bricks-and-mortar counterparts.

Structural change – E-government

Corruption and bribery are caused by systemic weakness.[11] Therefore, efforts to strengthen regulatory and enforcement provisions are also aimed at enhancing the structural integrity and transparency of various administrations.

In the public sphere, the use of information and communication technologies (ICT), also known as 'E-government', has been found to reduce opportunities for bribery and corruption in a significant way. One study indicates that a country's 1% increase in the UN E-government Index may contribute to a 1.17% decrease in corruption.[12]

E-government ensures that transactions are depersonalised, and the provision of services is standardised, thereby limiting opportunities for individuals to interfere, and reducing the risk of discretionary decision-making. Automating certain procedures also means that alterations or bypasses can be tracked.[13]

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In Korea, citizens can monitor in real time the progress of applications for licences online. In addition, Pakistan recently restricted its tax department and introduced ICT in order to reduce contact between tax collectors and payers.[14]

Extended jurisdictions

Jurisdictions must also be aware of foreign corruption statutes and their extraterritorial impact.

Of course, in this respect, no corruption overview would be complete without mentioning the omnipotent FCPA, the provisions of which apply to companies listed on the US Securities Exchange Commission, legal or natural persons who have their principal place of business in the United States, and any foreign legal or natural persons suspected of involvement in criminal activity while in US territory, to name only a few. Notably, under the FCPA, the conduct of one individual is enough to bring US jurisdiction over non-US subsidiaries, resulting in an unprecedented extraterritorial extension of legal jurisdiction.

The effect is significant. In 2016, 30 companies from around the world paid over US $2.4 billion to resolve cases brought under the FCPA.[15]

APAC is quickly becoming a primary target of the FCPA. In 2015, there were over 100 FCPA investigations in Asia, more than double the number of investigations in any other region.[16] There are indications that this may be due to longstanding business practices in parts of the APAC that are in contravention of the FCPA, and that until recently were not sanctioned in APAC jurisdictions, or are still not sanctioned.

For example, in some APAC jurisdictions, companies are still expected to make informal payments to government officials to ensure contracts are secured, or that the company has access to land and/or other resources etc. US foreign investors in Vietnam rely on local managers, agents, consultants and vendors to liaise with government officials. The local staff will often use bribes to attract business or sell product. However, the FCPA covers payments that have the intention of influencing foreign officials to obtain advantages. So, what may be 'normal practice in Vietnam'[17] is an FCPA violation for which foreign investors are liable.

As a point of distinction, 'facilitating' payments which are made to foreign officials to further, or expedite, the performance of their duties are exempt under the FCPA, although these payments remain controversial and there is no clarity regarding how such payments would be interpreted by US authorities.

Cross-jurisdictional coordination and collaboration

Established networks

The APAC region demonstrates its commitment to cooperation in fighting corruption and bribery through a number of longstanding law enforcement and financial intelligence agencies, examples of multi-agency collaboration in the APAC, tasked with combatting transnational crime, particularly financial crime, and promoting international standards of regulation and enforcement. To name a few:

- The Pacific Transnational Crime Network (PTCN) was developed in 2002 and is a police-led criminal intelligence and investigation entity. Its members include: Australia (Australian Federal Police); New Zealand (New Zealand Police); Samoa (Samoa Police Service; and Solomon Islands (Royal Solomon Islands Police Force).
- The Egmont Group is a global network committed to collaboration and information exchange. APAC members include Australia (Australian Transaction Reports and Analysis Centre), Hong Kong and PRC (Hong Kong Special Administrative Region

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and China Joint Financial Intelligent Unit (JFIU)), Indonesia (Indonesian Financial Transaction Reports and Analysis Centre (PPATK), and Thailand (Anti-Money Laundering Office (AMLO).

- The Asia-Pacific Group on Money Laundering (APG) consists of 41 member jurisdictions, 11 of which are permanent members of the associate Financial Action Task Force (FATF) dedicated to examining and developing measures to combat money laundering.
- In 2001, 23 countries of the APAC jointly developed an Anti-Corruption Action Plan within the framework of the Asian Development Bank (ADB) and the Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative for Asia and the Pacific. The plan sees governments resolve to cooperate and curb cooperation within the APAC. Membership now stands at 31 countries.

Information sharing

Yet despite these networks, coordination and collaboration is complex and at times restricted. This is best exemplified in the area of information and data sharing.

- *Mutual Legal Assistance Treaties*

Formal requests for information are by way of Mutual Legal Assistance (MLA) requests pursuant to bilateral and/or multilateral treaties to which countries are signatories, and which have been incorporated into domestic law.

Multilateral treaties to which APAC jurisdictions are signatories include the United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime. In addition, Cambodia, Indonesia, Malaysia, Brunei, Laos, Myanmar, Philippines, Singapore, Thailand and Vietnam are also signatories to the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty.

Individual jurisdictions have also entered into bilateral MLA treaties such as Hong Kong and the PRC. Australia is party to over 25 bilateral MLA treaties.[18] The advantage of bilateral agreements is that information can be kept confidential between parties to that agreement.

Any country can make a MLA request to another for assistance, including a request for the provision of information. Assistance is provided on the understanding of reciprocity – that the providing country will receive assistance should the need arise.

However, there are a number of issues with MLA requests. Processes suffer from lengthy delays, and a lack of resources, and coordination between agencies.[19] A UN study revealed that responses to formal MLA requests were reported to be in the order of months, not days, by which time, ephemeral electronic evidence could be lost.[20]

The APAC jurisdictions also rely on informal assistance requests to foreign governments or other providers. However, these requests may not be legally enforceable, and turn on the willingness of countries to assist voluntarily.[21]

In 2014, 13% of foreign bribery cases were brought to the attention of law enforcement authorities through the use of formal and informal MLA requests.[22]

- *Other methods of request*

As an alternative to MLA requests, different sectors are developing their own information-sharing channels, including regulators and enforcement authorities in the financial sector.[23] Typically, these channels are developed under 'soft law' including action plans, resolutions and bilateral or multilateral Memoranda of Understanding (MOU).

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For example, the Hong Kong Monetary Authority (HKMA), the central banking institution responsible for Hong Kong's financial stability, integrity and international status, has entered into multiple MOUs and other formal cooperation agreements with APAC banking supervisory authorities including the National Bank of Cambodia, Australian Prudential Regulation Authority, and China Banking and Insurance Regulatory Commission. These arrangements enable the HKMA and other authorities to share and exchange supervisory information (to the extent they are permitted under law), consult each other regarding cross-border issues, and keep shared information confidential.

APAC jurisdictions are also signatories to the multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMOU). Under the MMOU, securities regulators can provide information and assistance, including information identifying persons who beneficially own or control companies, or accounts, and in relation to transactions, the amount purchased or sold, the time and price of the transaction, and the entity that handled the transaction. International ordinary or associate members of the International Organisation of Securities Commissions (IOSCO) are eligible to apply to sign the MMOU. Out of 149 eligible members, 118 are MMOU signatories as of August 2018.[24]

In addition, in 2018, the US passed the Clarifying Lawful Overseas Use of Data (CLOUD) Act to expedite access to electronic information held by US-based global service providers. The Act permits foreign governments to enter into bilateral agreements with the US whereby foreign law enforcement authorities can then make requests directly to providers, as an alternative to MLA requests. CLOUD requests are conditional on reciprocity; the foreign jurisdiction must allow the US to request electronic data from their own service providers.[25]

- *Data protection and transfers*

APAC jurisdictions also face rapid technological advancement and the explosive use of social media in a professional context, which has dramatically transformed the way business is conducted. This inevitably impacts on access to information, including data protection and cross-border transfers.

For example, in the PRC, a vast amount of information which may be sensitive is communicated using the app, WeChat, a transient messaging platform. The laws on the retention of business records for the purposes of investigations and prosecutions must now be reviewed. Indeed, in March 2019, the US Department of Justice (DOJ) announced revisions to its FCPA Corporate Enforcement Policy requiring companies to implement 'appropriate guidance and controls' over these types of communications in the event of a US investigation into a Chinese company, or Chinese subsidiary of a multinational company.[26]

However, jurisdictions are clashing in their approach to data transfer. The PRC has enacted the International Criminal Judicial Assistance Law (ICJA), whereby individuals based or working in China cannot provide assistance in foreign criminal proceedings without first obtaining approval from the Chinese government to disclose evidence located in China to overseas law enforcement authorities. As a result, multinational companies can only comply with, for example, foreign production orders after government approval. If consent is not forthcoming, the company would be forced to choose between being held in contempt by a foreign court, and liable for potential obstruction of justice offences, and breaching Chinese law.

For example, a US appeals court recently upheld a decision to hold three Chinese banks in contempt for refusing to comply with subpoenas in a US investigation into the violation of international sanctions on North Korea, specifically the movement of tens of millions

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of dollars.[27] According to the court file, the three banks said that the Chinese government ordered them not to provide the requested records.

The first instance Judge, District Columbia Chief Judge Beryl Howell, dismissed the banks' argument that the Chinese government requires a mutual legal assistance request for records in US criminal investigations, citing China's abysmal compliance record with such requests.[28]

The PRC also relies on State Secrets Law which prohibits the transfer of state secrets outside China. Violators are subject to criminal penalties. 'State secrets' are generally held to include any data or information that is related to China's economic and social development, information related to science and technology, or any information that, if released, could pose a threat to Chinese national security.[29]

The rise of the ethical business

In 2015, the then Attorney-General of Singapore, VK Rajah, opined that: "[T]he enforcement of laws and regulation alone, however, is insufficient. The fight against financial crime in Singapore also requires a spirit of compliance that guides behaviour. Without the prevalence of this spirit of compliance, no enforcement regime, no matter how competent, can avoid being inundated and overwhelmed – even, perhaps, to the point of becoming dysfunctional."[30]

This is not an idea singular to Singapore. Increasingly, both public and private sectors across the APAC region must be (at the very least) perceived to take steps towards strong anti-corruption enforcement laws, improved mechanisms of investigation, and importantly, proactive steps to minimise potential liabilities.

According to a 2017 survey from Transparency International, 50% of people in the APAC said that their government was doing "a bad job" in the fight against corruption. This is perhaps unsurprising when, at the time of the survey, one in four people in the APAC had paid a bribe to access public services in the previous 12 months.[31]

The importance of addressing corruption cannot be understated. According to the United Nations (UN) Secretary-General, Antonio Guterres, the annual cost of international corruption amounts to $3.6 trillion, made up of bribes and stolen money.[32] It is also, according to the UN, one of the biggest impediments to eliminating poverty and hunger, improved education, infrastructure and health.

It is therefore imperative that APAC jurisdictions harness the "spirit of compliance". For example, Japanese regulators are putting company compliance programs at the forefront of the private sector agenda. In 2016, the Japan Exchange Regulation published 'Principles for Preventing Corporate Scandals' as a result of a number of corporate scandals emerging in listed companies. The Principles are not legally binding, and a failure to abide by these Principles will not lead to any adverse consequences for the company. However, listed companies are expected to implement the Principles as a means of self-discipline, and management is expected to demonstrate integrity and leadership in respect of compliance issues.[33]

Further, developments in anti-bribery and anti-corruption laws are rapid in China due to trade tensions, although arguably they also represent expected reforms, given China's global market domination.[34] Nevertheless, multinational companies operating out of China are, as a result, more proactive in implementing compliance programmes, internal audits and risk assessments to identify potential liabilities and develop strategies to mitigate them.

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In addition to instilling a culture of compliance, companies are subject to new reporting regimes aimed at facilitating cooperation and collaboration with law enforcement bodies, and offering a reprieve from increasingly severe penalties.

General reporting obligations are used widely across the APAC. For example, a "recognised market operator" in Singapore must, after becoming aware of a financial irregularity or other matter which might affect its ability to discharge its financial obligations, notify the relevant authority as soon as practicable.[35] The operator must also submit periodic reports and provide such assistance (such as furnishing business records) as the authority requires for the performance of the authority's functions and duties. Should the operator not abide by these requirements, they are guilty of an offence and liable on conviction to significant monetary penalties.

Other regions go further and incentivise reporting, granting immunity from prosecution or offering cash rewards. For example, Nepal authorises the provision of an appropriate reward by the investigating authority to a person assisting with inquiries, investigations, or collection of evidence relating to corruption.[36]

In some APAC jurisdictions, entities and individuals may be absolved from criminal responsibility for participation in corruption and/or bribery if they disclose the act and persons involved.

These schemes have been piloted in the US and the United Kingdom. In 2016, the UK Serious Fraud Office entered into its second Deferred Prosecution Agreement (DPA) in relation to bribery and corruption offences. In 2017, the DOJ under the, then new, Trump administration issued a declination letter requiring the "disgorgement of associated gains" to CDM Smith Inc., a Massachusetts-based construction firm which allegedly paid nearly $2 million in bribes to Indian government officials between 2011 and 2015 in exchange for infrastructure projects.

DPA schemes are slowly being introduced in Singapore and Australia. For Singapore, the scheme represents a departure from enforcement against individuals.[37] Under the Criminal Justice Reform Act (not yet in force), the DPA would see companies encouraged to cooperate with the public prosecution office by satisfying certain conditions and requirements in exchange of amnesty. Requirements may include paying an agreed financial penalty, compensating victims, implementing or reworking compliance programs, and assisting with investigations.

In Australia, the Attorney-General's Department has introduced the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017,* which is not yet enacted. The Bill borrows from its UK counterpart and encourages voluntary negotiation between companies and relevant prosecutorial bodies, where the company is required to comply with a range of specific conditions, which may include admission of criminal liability, payment of a monetary penalty, cooperation with ongoing investigations, and consent to publicising the DPA.

The era of the whistleblower

Where public bodies or companies engage in criminal behaviour, usually those in the organisation are best placed to suspect or know the nature and extent of the criminal activity.

However, fear of retaliation remains a major deterrent for whistleblowers. Therefore, it is imperative that legal and physical protections for whistleblowers are implemented such that individuals have confidence that their report will be acted on, that the entity or individual

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they report to is serious about addressing corruption or mismanagement, that their complaint will be treated confidentiality, and that they will not face reprisal, whether it be prosecution, dismissal from employment or even physical harm.

There is a significant positive cultural shift toward whistleblowers and the need for their protection. It is internationally accepted that whistleblower policy and practice must be two-pronged: proactive in changing culture, and providing a series of protections and incentives.[38]

Yet, protections vary across the APAC jurisdictions. In some countries, whistleblowing is at the forefront of the legal and political agenda (Japan, China), whereas in others express protections are limited (Hong Kong). Certain regulated industries may face additional whistleblower protections.

In Hong Kong, what whistleblower protection regime is in place offers little or no protection.[39] To gain protection, a whistleblower must rely on piecemeal employment, anti-corruption and/or criminal laws which offer a limited scope of protection. So, although a person is, for example, liable to criminal prosecution if they disclose a whistleblower's identity or information that could lead to the whistleblower's identification, there are no express whistleblowing laws to this effect. For this reason, Hong Kong lags behind other major business jurisdictions.

A legal framework that supports whistleblower confidentiality is imperative.

In India, the Whistleblowers Protection Act (WBPA) is enacted to safeguard against victimisation of the whistleblower. Under the Act, the Central Vigilance Commission (CVC) is designated by government and empowered to receive confidential complaints, although the CVC maintains discretion as to whether the identity of the whistleblower remains confidential.

Where confidentiality cannot be assured, protection of the whistleblower's rights and security and adequate incentives must follow.

For example, in Malaysia and Singapore, whistleblowers are exempted from both civil and criminal charges where information is provided in good faith. Japan and China outlaw detrimental treatment of whistleblowers in the workplace.

Whistleblowers may also be entered into witness protection programmes when their wellbeing or safety is at risk.

Jurisdictions are also moving to ensure comprehensive protection regimes exist across public and private sectors. In Australia, a comprehensive protection regime already existed for the public sector under the Public Interest Disclosure Act 2013. As of 1 July 2019, a new whistleblower protection regime will cover the corporate, financial and tax sectors. For example, by 2020, certain companies (public, large proprietary, registrable superannuation entities) will be required to implement clear and accessible whistleblower policies.

Grass roots activism

The rapid development of whistleblower protections does not occur without the attention of and pressure from the public. High-profile cases such as the Edward Snowden revelations, WikiLeaks scandal, Commonwealth Bank of Australia financial planning advice investigations, and Chinese pharmaceutical company bribery cases (GlaxoSmithKline) have all fostered public discussion, and garnered public support for legislative reforms.

The clandestine and systemic nature of bribery and corruption means that enforcement authorities must rely on its citizens as a source of information, and a means by which

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misconduct can be detected and prevented. APAC jurisdictions are thus increasingly harnessing the efforts of its public, the media, trade unions and other non-governmental players. Whistleblowers are only one part of a whole.

For example, in Bangladesh, Transparency International, a grass-roots organisation, has established local voluntary watchdog committees across some 36 locations in Bangladesh that work on local corruption issues by providing citizens with information and advice, undertaking monitoring activities, and publicly reporting on corruption.[40]

In India, the Children's Movement for Civil Awareness (CMCA) established school-based 'Civic Clubs' that run socially conscious programs for students on civic values, active citizenship, urban local government, and rights and responsibilities,[41] educating young people about the widespread impact of corruption.

Conclusion

Jurisdictions across the APAC region have taken steps to increase awareness of corruption and strengthen legal and regulatory frameworks. It is telling that the aforementioned are only a few of the developments and challenges facing the APAC region in fighting corruption. Others include integrity and transparency in public procurement, facilitating confiscation and asset recovery across jurisdictions, and addressing freedom-of-information issues.

There are also many varied definitions of corruptions, and standards in approaching bribery and corruption, across the different jurisdictions. It is imperative for any entity seeking to work or invest in the APAC region to be well abreast of the local regulatory regime, and the rapid developments in corruption laws, both regional and foreign.

* * *

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Australia

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The law and enforcement regime

Legal regime

Australia is a federation comprising six States and two self-governing Territories. The Australian Constitution specifies those areas in which the Commonwealth has power to legislate and leaves the residue to the States. Corruption and bribery are largely State matters.

Each of the States and Territories criminalise both public sector and private sector bribery.[1] However, many of these offences are technical in nature and therefore difficult to enforce.

The Australian federal government (the Commonwealth) has laws which prohibit bribery of federal public officials,[2] as well as laws which prohibit the bribery of foreign public officials.

Foreign public sector bribery

Australia ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in 1999. Australia is also a party to the United Nations Convention against Corruption (UNCAC) of 2003. Both treaties require State Parties to criminalise bribery of foreign public officials in the course of international business.

Australia has given effect to its treaty obligations in Division 70 of the *Criminal Code Act 1995* (Cth) (Criminal Code). Section 70.2(1) makes it an offence to provide, offer or promise to provide a benefit not legitimately due to another person, with the intention of influencing the exercise of a foreign public official's duties in order to obtain business or a business advantage.

"Foreign public official" is broadly defined to include:

- an employee or official of a foreign government body;
- a member of the executive, judiciary or magistracy of a foreign country;
- a member or officer of the legislature of a foreign country;
- a person who performs official duties under the law of a foreign country; and
- an employee or official of a public international organisation, such as the United Nations.

"Benefit" is also broadly defined to mean "any advantage" and is expressly not limited to property.

The offence created by section 70.2(1) captures bribes made to foreign public officials either directly or indirectly via an agent, relative or business partner. While a key element of the offence is that the defendant must have *intended* to influence the foreign public official, it

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is not necessary to show that such an intention was expressed.[3] Section 70.2(1A) makes it clear that liability under section 70.2(1) will arise whether or not the bribe achieved its desired purpose of obtaining or retaining business or a business advantage. In determining whether a benefit was legitimately due, a court must disregard whether the benefit in question was customary, necessary or required in the particular circumstances. The value of the benefit is also to be disregarded.

Section 70.2 has extra-territorial reach. Liability arises if the bribery occurred in Australia, and also where it occurred outside Australia, so long as the person who engaged in it was an Australian citizen or resident, or a body corporate incorporated in Australia.[4]

The maximum penalty for an individual who is convicted under section 70.2(1) is 10 years' imprisonment, a fine of AU$2.1m, or both. A corporation can be fined the greatest of: AU$21m; three times the value of any benefit obtained directly or indirectly that can be reasonably attributed to the bribe; or, where the value of the benefit cannot be determined, 10% of the corporation's annual turnover for the 12 months up to the end of the month in which the conduct constituting the offence occurred. Bribery may also give rise to money-laundering charges under Division 400 of the *Criminal Code.*

In addition to criminal penalties, any benefits obtained by foreign bribery can be forfeited to the Australian government under the *Proceeds of Crime Act 2002* (Cth). That Act establishes a regime that allows proceeds of Commonwealth-indictable offences to be traced, restrained and confiscated by a court. It also confers power on a court to order that a person appear before it to demonstrate that unexplained wealth was acquired by lawful means.

In December 2017, the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) (Crimes Bill) was introduced to Parliament.

If passed, the Crimes Bill will:

- extend the definition of foreign public official to include candidates for office;
- remove the concept of a benefit being "not legitimately due" as an element of foreign bribery offences and replacing it with a concept of "improperly influencing". The Crimes Bill also proposes introducing a provision which specifies matters which may and must not be taken into account in determining whether influence is improper;
- extend the definition of bribery to include conduct directed at obtaining or retaining personal advantage. The current definition is limited to conduct directed at business advantage;
- create a new corporate offence of failing to prevent bribery. This offence would be very similar to the failing-to-prevent-bribery offence in the UK *Bribery Act* 2010;
- remove the requirement of influencing a foreign official in their official capacity;
- make certain clarifying amendments to remove supposed uncertainties in the existing provisions; and
- introduce a Deferred Prosecution Agreement scheme in respect of certain serious corporate offences (see further below).

On 20 April 2018, the Senate Legal and Constitutional Affairs Legislation Committee recommended that the Crimes Bill be passed.[5] However, the Crimes Bill's passage through Parliament subsequently stalled, and ultimately lapsed. The Government has not provided a clear indication as to when the Crimes Bill will be re-introduced, but it seems likely this will occur within the next 12 months.

Defences to foreign public sector bribery

The Criminal Code provides two defences to the offence of foreign bribery under section

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70.2(1). The first defence is engaged where the provision of the benefit is permitted or required by a written law of the place where the conduct occurred.[6]

The second defence is in respect of facilitation payments. If the value of the benefit in question was of a minor nature, provided in return for expediting or securing the performance of a minor 'routine government action', and a record of the details of the conduct was created as soon as practicable, a defendant will have a good defence against liability.[7]

For the purposes of the defence, routine government action is an action of a foreign public official that is commonly performed by that person, including things like granting permits or licences, processing government papers and providing access to utilities. Routine government action does not involve a decision whether to award new business, or to continue existing business with a person. Setting the terms of new or existing business is also excluded. While sections 26–52 and 26–53 of the *Income Tax Assessment Act 1997* (Cth) provide that domestic or foreign bribes cannot be deducted under the Act, facilitation payments are not considered bribes, so are tax-deductible as losses or outgoings. A defendant bears the onus of proving a defence.

Domestic bribery offences

The Criminal Code also criminalises bribery of Commonwealth public officials. Section 141.1(1) provides that it is an offence for a person to dishonestly provide or offer a benefit to another person, or cause a benefit to be so provided or offered, if done with the intention of influencing an Australian Commonwealth public official in the exercise of his or her official duties. A Commonwealth public official will be guilty of a criminal offence under section 141.1(3) if he or she dishonestly requests, receives or agrees to receive a benefit with the intention either of having his or her duties influenced, or of fostering a belief that such influence will be wielded. The maximum penalties for individuals and corporations convicted of these offences are the same as those for offences under section 70.2 of the Criminal Code.

Section 141.1 has extra-territorial reach. A person will be liable whether or not the conduct constituting domestic public sector bribery occurred in Australia, and whether or not the result of the bribery was obtained in Australia, so long as it involved an Australian Commonwealth public official.

There are also State and Territory provisions which prohibit bribery of public officials, although those provisions are often the same as those which prohibit private sector bribery.[8]

Domestic private sector bribery

The Criminal Code does not criminalise bribery in the private sector; the States and Territories are left to legislate in this area. Indirect Commonwealth regulation is provided to some extent by the prescription of directors' duties in the *Corporations Act 2001* (Cth) (Corporations Act) and by the market-sharing and price-fixing provisions in Part IV of the *Competition and Consumer Act 2010* (Cth).

At the State and Territory level generally, it is illegal to corruptly give or offer inducements or secret commissions to, or receive them from, employees or agents of corporations and individuals.[9] Conduct will be 'corrupt' only if engaged in with the intention of influencing the recipient to show favour.

An example of the State and Territory provisions are those in the *Crimes Act 1900* (NSW), the relevant statute for the State of New South Wales (NSW). In that statute:

- Section 249B(1) prohibits an agent from corruptly receiving or soliciting (or corruptly agreeing to receive or solicit) any benefit from another person as an inducement, a

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reward, or on account of doing or not doing something, or showing or not showing favour to any person in relation to the affairs or business of the agent's principal. It also prohibits the receipt of any expectation which would tend to influence the agent to show or not show favour to any person in relation to the affairs or business of the agent's principal. Section 249B(2) imposes mirror offences on persons who give or offer an agent any such benefit.

- Section 249D(1) prohibits a person from corruptly giving a benefit to another person for giving secret advice to a third party where the person giving the benefit intends the advice to influence the third party to enter into a contract with the person giving the benefit, or appointing the person who gives the benefit to any office. Section 249D(2) makes it an offence to corruptly receive such a benefit.
- Section 249E makes it an offence for a person who offers or gives a benefit to a person entrusted with property (or any person entrusted with property who receives or solicits a benefit for anyone) without the consent of each person beneficially entitled to the property or the Supreme Court of NSW as an inducement or reward for the appointment of any person to be a person entrusted with the property.
- Section 249J provides that it is not a defence that the receiving, soliciting, giving or offering of any benefit is customary in any trade, business, profession or calling.
- The definition of "agent" is a wide one and includes employees: section 249A.

The legislation in the States and Territories varies as to the penalties that may be imposed for private sector bribery. Generally, individuals are liable for between three and 21 years' imprisonment.[10] Under the NSW Crimes Act, an individual can be imprisoned for up to seven years, and may also be ordered to repay all or part of the value of any benefit received or given by that person. He or she may also be disqualified from holding civic office for up to seven years. Where bribery is perpetrated by a corporation, some jurisdictions provide for fines instead of imprisonment.

False accounting

On 1 March 2016, new false accounting provisions came into effect. The provisions, found in Part 10.9 of the Criminal Code, criminalise intentional or reckless concealment of bribery by dealing with accounting documents.

Specifically, the provisions make it an offence to make, alter, destroy or conceal an accounting document, or to fail to make or alter an accounting document that the person is under a legal duty to make or alter, if that conduct is done:

- with intent to "facilitate, conceal or disguise"; or
- reckless as to whether the conduct "facilitates, conceals or disguises",

certain types of conduct which relate to the giving or receiving of a benefit which is not legitimately due.[11] This concept of a "benefit not legitimately due" echoes the language of the foreign bribery offences described above.

The offence only arises if "certain circumstances apply". The certain circumstances are intended to ensure that the offences are within the constitutional power of Federal Parliament. However, they make it clear that the offence may apply to conduct committed outside of Australia. The maximum penalties for these offences are identical to the penalties for the foreign bribery offences in the Criminal Code, described above.

These provisions were introduced as a direct response to criticism in the OECD Phase 3 report (discussed further below) about the inadequacy of Australia's books and records offences.

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Whistleblower protection

Sweeping reforms of Australia's whistleblower protection framework came into force on 1 July 2019 as a result of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). The new regime, which sits in Part 9.4AAA of the Corporations Act, has significantly expanded and strengthened private sector whistleblower protections, increased applicable penalties and introduced a requirement for public companies and large proprietary companies to have a whistleblower policy which addresses certain matters.

Importantly, protected disclosures are no longer limited to potential contraventions of the Corporations legislation, but now extend to disclosures where the whistleblower has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to the relevant company or a related body corporate. This specifically includes conduct by the entity, or one of its employees or officers, that constitutes an offence against a law of the Commonwealth punishable by imprisonment for a period of 12 months or more (e.g., the foreign bribery offence).

Where certain criteria are met, a whistleblower will receive protections in relation to the confidentiality of their identity and victimisation. The penalties for breach of these protections have been significantly increased. The maximum civil penalty for companies, for example, is now the greater of AU$10.5 million, three times the benefit derived from the contravention or 10% of annual turnover (up to a maximum of AU$525 million). It is also now easier for victimised whistleblowers to claim compensation and other remedies.

The Federal Government considered the use of financial rewards to incentivise whistleblowing, as occurs in the United States, but decided not to implement this.

Public officials are protected under the *Public Interest Disclosure Act 2013* (Cth) (PID Act). The PID Act seeks to encourage public officials to report suspected wrongdoing in the Australian public sector, while protecting those who make public interest disclosures from reprisals. There is equivalent legislation covering public servants in each State and Territory.

There are also specific protections for reprisals for union whistleblowers. These were introduced by the *Fair Work (Registered Organisations) Amendment Act* 2016 (Cth), which contained a range of measures intended to fight union corruption.

Investigation and enforcement agencies

Australia has adopted a multi-agency approach to combating corruption. Australia's main criminal law enforcement agencies in bribery cases are the Australian Federal Police (AFP) and the Office of the Commonwealth Director of Public Prosecutions (DPP). State-based investigations are generally conducted by the fraud squad of the particular State police department, with prosecutions being undertaken by State Directors of Public Prosecution.

The AFP is active in detecting and investigating corruption as part of its statutory obligations to investigate serious crimes against federal laws and against Commonwealth property, revenue and expenditure.

While allegations of corruption will generally be referred to the AFP, other agencies that may become involved in investigation processes include: the Australian Securities and Investments Commission (ASIC); the Australian Commission for Law Enforcement Integrity; the Australian Criminal Intelligence Commission; the Inspector-General of Intelligence and Security; and the Office of the Commonwealth Ombudsman. The DPP is largely responsible for prosecuting offenders under the anti-bribery provisions of the Criminal Code.

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Corruption involving or affecting the public sector (including State government agencies, local government authorities, members of Parliament and the judiciary) is also dealt with at State level through independent bodies such as the NSW Independent Commission Against Corruption (ICAC).[12] While it cannot charge individuals or corporations with offences, the ICAC has wide-ranging power to investigate "corrupt conduct" involving NSW public officials or public bodies/authorities. Reports following an investigation can be given to parliament, the police or released publicly.

Despite repeated calls over recent years, there is still no federal anti-corruption commission in Australia. The present Federal Government has finally agreed to establish a federal integrity commission to address the issue of corruption within the administration of the government in both its law enforcement and public sector agencies. However, the model proposed by the government has been heavily criticised by the opposition and cross-bench parties as lacking teeth.

Overview of enforcement activity and policy during the past two years

Cases prosecuted

The first case prosecuted under Australia's foreign anti-bribery laws centred upon Securency International Pty Limited (Securency), a subsidiary of the Reserve Bank of Australia. It arose from allegations by a company insider that Securency had paid nearly AU$50m to international sales agents to bribe central banking officials in Malaysia, Indonesia and Vietnam in order to secure banknote supply contracts. Investigations were jointly conducted by the AFP, the United Kingdom's Serious Fraud Office and Malaysia's Anti-Corruption Commission, leading to raids and searches in all three countries.

In 2011, following the AFP's investigation, the AFP charged Securency and another Reserve Bank subsidiary, Note Printing Australia Limited (NPA), and several of the companies' former senior managers with conspiracy to bribe foreign public officials contrary to section 70.2(1) of the Criminal Code.

Over the ensuing years, the prosecutions were mired in lengthy committal hearings and interlocutory arguments. Unfortunately for the AFP, public awareness of the outcomes of the prosecutions was hampered by a suite of non-publication orders made by the Supreme Court of Victoria. Those orders were only vacated in November 2018, following the last accused pleading guilty to conspiracy to bribe a foreign public official in Malaysia.

Amongst the information suppressed, were the early guilty pleas by both Securency and NPA in 2011. Each pleaded guilty to three charges of conspiracy to commit foreign bribery, and were fined AU$480,000 and AU$450,000, respectively. Each company also co-operated in an application brought under the *Proceeds of Crime Act 2002* (Cth) as a result of the successful prosecutions, and paid a total of about AU$22m in pecuniary penalty orders.

The DPP ultimately secured a series of convictions against various individuals, following guilty pleas, on charges of conspiracy to bribe foreign public officials and/or false accounting. The individuals convicted included the former CEO of Securency, the former CFO of Securency, the Indonesian sales agent for Securency, a former senior business development manager of Securency, and a former banknote specialist of Securency,

However, in a significant blow for the AFP and CDPP, in 2018, the prosecutions of a further four individuals were permanently stayed by the High Court (the highest court in the Australian judicial system). The stay was granted on the basis that the continued prosecution of these individuals would bring the administration of justice into disrepute

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following unlawful compulsory examinations conducted during the course of the AFP's investigation by what is now the Australian Criminal Intelligence Commission: see *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53.

The second charges under Australian foreign anti-bribery laws were laid by the AFP in February 2015 against two directors of an Australian construction company, Lifese. The directors were charged with conspiracy to bribe a foreign public official in connection with building contracts in Iraq. A third man was also charged. Much of the evidence relied upon by the prosecution was from intercepted telephone conversations. The three men pleaded guilty and were sentenced in September 2017 (*R v Jousif; R v I Elomar; R v M Elomar* [2017] NSWSC 1299). The directors were each sentenced to four years' imprisonment and fined $250,000. The third man was sentenced to four years' imprisonment. The gaol sentences of the directors were reduced on appeal to three-years and four-months (with a non-parole period of one-year and eight-months) (*Elomar v R* [2018] NSWCCA 224).

In May 2018, the AFP charged engineering consultancy Sinclair Knight Merz, now known as Jacobs Group Australia, and its former chief executive, with conspiring to bribe foreign officials in the Philippines and Vietnam to secure various infrastructure projects.

In September 2018, the AFP charged Mr Mozammil Bhojani with conspiracy to bribe a foreign public official. It is alleged that between January 2015 and 2018, Mr Bhojani conspired to bribe two Nauru government officials with more than AU$100,000 in kickbacks in exchange for favourable phosphate shipments for his company, Radiance International Pty Ltd.

In March and April 2015, NSW police charged two former executives of Commonwealth Bank of Australia with receiving bribes in return for the grant of IT contracts to a US company, ServiceMesh. The charges resulted from the bank reporting anomalies it had uncovered to the police. These charges were brought under domestic anti-bribery laws. One of the former executives, who pleaded guilty, was sentenced in late 2016 to 3½ years' gaol. The other has pleaded not-guilty, and will stand trial in 2019.

In March 2019, the former chief of staff at NAB, Ms Rosemary Rogers, was charged in NSW with one count of dishonestly obtaining advantage by deception and 56 counts of an agent corruptly receiving benefits under domestic anti-bribery laws. The charges relate to a scheme by which the executive allegedly approved inflated invoices issued by an events company to the bank, in return for personal travel, cash and other benefits totalling AU$5.4 million. The head of the events company, Ms Helen Rosamond, has also been charged. The bank has commenced civil proceedings against Ms Rosamond and her events company in an attempt to recover its losses.

Disgraced former NSW government minister, Mr Eddie Obeid, who was found guilty of misconduct in public office in 2016 in relation to his family's business interests in café leases in Sydney's Circular Quay, has been charged, along with his son and another former minister, Mr Ian McDonald, with conspiracy to commit misconduct in public office over their alleged involvement in the issue of a coal mining exploration licence. Each has entered a not-guilty plea and the matter is expected to go to trial in 2020.

In December 2018, Mr Peter Gregg, the former CFO of Leighton Holdings, was found guilty of two counts of contravening s 1307 of the Corporations Act by engaging in conduct that resulted in the falsification of Leighton Holdings' books. The case centred on two payments totalling US$15 million made in 2011 to UAE's Asian Global Projects and Trading FZE, and a backdated agreement to buy and sell steel, executed by Mr Gregg on behalf of Leighton Holdings. The Crown alleged that the agreement was not genuine, and was only signed in order to legitimise the payments in question. Mr Gregg was sentenced

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to a total effective sentence of two years' imprisonment, to be served by way of an intensive correction order.

Current investigations

It is difficult to obtain reliable data in relation to the number of bribery and corruption investigations currently under way in Australia. However, in December 2017, the OECD's Phase 4 Report on Australia (discussed further below) recorded that the AFP had 19 foreign bribery investigations under way (an increase on 17 as at April 2015). The AFP does not generally publish details of its ongoing investigations.

In August 2019, the NSW ICAC commenced a public inquiry into whether, from January 2015, NSW Labor party officials, members of Chinese Friends of Labor, political donors and others entered into a scheme to circumvent prohibitions or requirements under Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) relating to political donations. This includes investigating allegations that a billionaire property developer, Mr Huang Xiangmo, made a AU$100,000 cash donation to the NSW Labor Party and that party officials sought to mask the origins of the money using 'straw donors'. It is illegal in NSW for property developers to make donations to political parties.

Current trends of enforcement action

Despite a growing number of successful prosecutions, Australia is still in the early stages of enforcing anti-bribery laws in relation to foreign public officials. However, significant progress has been made in the level of enforcement action in recent years. The catalyst for that progress was the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia, issued by the OECD Working Group on Bribery in late 2012 (OECD Phase 3 Report). The OECD Phase 3 Report noted that a substantial proportion of Australia's international economic activity is exposed to foreign bribery risks, particularly in the mining and resources sector and the agriculture sector. It criticised Australian enforcement efforts and was particularly scathing about the failure of the AFP to resource, prioritise and pursue foreign bribery investigations.

The AFP and the Australian government responded to the OECD Phase 3 Report with a number of initiatives. These included: entry by AFP into a Memorandum of Understanding with ASIC in respect of collaborative working arrangements and the sharing of information; the establishment by the AFP of dedicated Fraud and Anti-Corruption teams in five capital cities; and the establishment of a Fraud and Anti-Corruption Centre to improve coordination amongst agencies, to develop standards and procedures for fraud and anti-corruption investigation and to provide training to investigators.

The OECD Working Group published its Phase 4 Report for Australia in December 2017.[13] That report found that Australia's enforcement of laws on foreign bribery had increased markedly since the Phase 3 Report. It noted that seven offenders had been convicted of foreign bribery offences, and that Australia had taken substantial steps to improve its framework for detecting and investigating foreign bribery cases, including the creation of the FAC. It provided recommendations designed to further help Australia strengthen foreign bribery enforcement, including:

- enhancing whistleblower protections in the private sector (which as discussed above, has since occurred);
- proactively pursuing criminal charges against companies for foreign bribery and related offences; and
- encouraging companies to develop and adopt adequate internal controls and compliance programmes.

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Australia's Phase 4 Follow Up report is due to be submitted to OECD in December 2019.[14]

The enforcement environment in Australia has also intensified in the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission). The final report of Commissioner Hayne was provided to the Governor-General on 1 February 2019.

The Royal Commission highlighted multiple instances of serious malpractice by Australian banks and other financial services providers, and the Commissioner's report included 76 recommendations for reform. The Commissioner was, amongst other things, very critical of ASIC for failing to take tougher action against companies and individuals. In the aftermath of the Royal Commission, ASIC announced a new enforcement approach, by which ASIC will actively ask itself "*Why not litigate?*". This new strategic approach, coupled with a significant boost in government funding and increased penalties and powers, is expected to lead to an uplift in the number of civil and criminal enforcement actions by ASIC over the next 12 months.

In the foreign bribery space, we have seen a trend, in the last few years, of ASIC taking a more active interest in potential Corporations Act contraventions by directors or officers. We expect that trend to continue.

Law and policy relating to facilitation payments and hospitality

Facilitation payments

The Criminal Code excludes criminal liability for facilitation payments. However, individuals and corporates alike need to be aware that they will only be able to rely upon the defence if the value of the benefit is of a minor nature, made for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature, and specified details of the payment are properly recorded as soon as is reasonably practicable. Determining whether a particular payment satisfies these strict requirements can often be difficult.

Although the OECD Convention does not require countries to criminalise the use of facilitation payments, there has been a gradual shift in mood, and such payments are no longer widely considered acceptable. A growing number of Australian companies with international operations now prohibit, as a matter of company policy, facilitation payments.

Somewhat controversially, the Crimes Bill does not propose the abolition of the 'facilitation payments' defence, even though the Senate Economic References Committee report on Foreign Bribery (2018) recommended, by majority, that the defence be abolished over a transition period.

Hospitality

Australian legislation does not expressly explain the circumstances under which providing gifts and hospitality may amount to bribery. As the law currently stands, the giving of such benefits will only be unlawful if done with the intention of influencing a public official. There is little in the way of guidance on this area from Australian regulators. The principal guidance for Commonwealth public officials is under the *Public Service Act 1999* (Cth), which has a series of relevant standards set out in the Australian Public Service Code of Conduct, and the Australian Public Service Values, under the umbrella of the Australian Public Service Commission Guide to its Integrated Leadership System. The Department of Foreign Affairs and Trade has its own Code of Conduct for Overseas Service. State and Territory Governments also have their own public services with their own codes of

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conduct, which may be supplemented by agency-specific codes.

In certain business transactions, providing a level of hospitality to prospective clients may be required. Vigilance is recommended in this area to ensure compliance with anti-bribery laws, particularly when engaging with public officials. Some issues to consider in determining whether hospitality is appropriate are: whether the company providing it has a clear policy on gifts and hospitality and whether that policy is being complied with; whether the expenditure is reasonable and is accurately recorded; and whether the hospitality might reasonably be suspected of influencing the recipient's decision-making processes.

The BHP Billiton case is a timely reminder of the particular risks associated with the provision of hospitality to public officials. In 2015, BHP Billiton agreed to pay to the SEC a US$25 million penalty to settle SEC charges that it violated the FCPA by failing to devise and maintain sufficient internal controls over its global hospitality programme connected to the company's sponsorship of the 2008 Summer Olympic Games in Beijing.

Key issues relating to investigation, decision-making and enforcement procedures

Self-reporting

In Australia, self-reporting of foreign bribery to the AFP is encouraged but is not mandated by any legislative or formal framework. At the time the OECD Phase 4 Report was published, at least eight companies had self-reported evidence of bribery committed by persons related to them. In each case, the AFP proceeded to investigate.

The AFP has indicated that it expects to see more self-reporting by companies; however this has not been matched by legislative amendments or clear prosecution guidelines. While there are few, if any, formal incentives from a criminal law perspective, a potential benefit to self-reporting is that the AFP may be more inclined to work with the corporation in question, and keep it better informed during the investigation process. There may also be leniency at the prosecution stage, although a number of other factors would also be considered in accordance with the Prosecution Policy of the Commonwealth. While the AFP has attempted to address some of this uncertainty through the publication of Best Practice Guideline for self-reporting of foreign bribery and related offending by corporations,[15] it is the proposed introduction of a deferred prosecution agreement scheme (see below) that will likely be the 'game-changer' in terms of encouraging self-reporting.

Plea bargaining

A plea bargain can take two forms, the first being an agreement between the prosecution and the defence that the defendant agree to plead guilty to a particular charge in return for more serious charges being dropped. This type of plea bargain is allowed in Australia and, in certain circumstances, the DPP may be able to provide a defendant with testimonial or prosecutorial immunity. In addition to agreeing to drop certain charges in return for a guilty plea, the DPP may agree to proceed with a charge summarily rather than on indictment, or agree not to oppose a defence.

The Prosecution Policy of the Commonwealth provides guidance on negotiations between the prosecution and the defence about charges to be prosecuted. Charge negotiations are specifically encouraged and can occur at any stage of a prosecution, and at the DPP's initiation. This practice will meet the requirements of justice as long as the charges to be continued bear a reasonable relationship to the nature of the defendant's criminal conduct, provide an adequate basis for the imposition of an appropriate sentence, and are supported by evidence.

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The second form involves a defendant pleading guilty to a charge in return for a lesser sentence being imposed by a court. This form of plea bargaining has been precluded by the High Court in *Barbaro v the Queen* (2014) 253 CLR 58 for criminal proceedings, which holds that prosecutors are not required and should not be permitted to proffer even a sentencing regime to a judge. In *Commonwealth v Director, Fair Work Building Industry Inspectorate and Others* (2015) 258 CLR 482, the High Court held that this principle did not apply in civil penalty proceedings (which will include many proceedings brought under the Corporations Act – see above, but not proceedings under the Criminal Code).

The Crimes Bill will, if passed, introduce a deferred prosecution scheme in Australia. It will have the following features:

- Deferred Prosecution Agreements (DPAs) would be available only to companies (and not individuals) for certain specified crimes which are regarded as 'serious corporate crime'. These would include foreign bribery, false accounting and insider trading;
- there would be certain mandatory terms of a DPA, including a statement of facts relating to each offence specified in the DPA, the requirements to be fulfilled by the person under the DPA, the amount of financial penalty to be paid by the person, and the circumstances which constitute a material contravention of the DPA; and
- after the proposed terms of any DPA are agreed between the person and the Director, it will need to be referred to an "approving officer" – who must be a retired judicial officer with sufficient knowledge and experience – who would determine whether the terms are in the interests of justice and are fair, reasonable and proportionate (in which case, the DPA must be approved). In referring the DPA for approval, the Director must provide a written statement to the effect that he or she is satisfied that there are reasonable grounds to believe that an offence specified in the DPA has been committed, and that entering into the DPA is in the public interest.

Civil versus criminal prosecution

Foreign and domestic public sector bribery offences at the Commonwealth level are prosecuted in Australia under provisions of the Criminal Code. At the State and Territory level, public and private sector bribery is also prosecuted criminally. There are only some circumstances in which acts of bribery may also give rise to civil claims. Civil penalty proceedings under the Corporations Act (which are brought by ASIC) for breaching directors' duties are an example.

Examples of cases in which ASIC has pursued directors or officers for breach of section 180 of the Corporations Act (for failing to exercise due care, skill and diligence) include *ASIC v Ingleby* [2013] VSCA 49, *ASIC v Lindberg* [2012] VSC 332 and *ASIC v Flugge* [2016] VSC 779. Those cases all arose out of the rorting by AWB Ltd, an Australian wheat exporter, of the UN's Oil-for-Food Program in Iraq. These cases highlight the need for directors and officers to ensure that proper systems are in place to combat bribery and corruption within their organisations, the importance of not ignoring 'red flags', and the need to ensure that the Board is appropriately informed of relevant matters.

Overview of cross-border issues

Parallel investigations

As the drive to enforce the anti-bribery regime gathers momentum and the regime itself becomes more sophisticated, Australian agencies are increasingly using parallel investigations and collaborating with overseas agencies, both generally and in relation to specific cross-border investigations.

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An International Foreign Bribery Taskforce (IFBT) was established in May 2013 as a platform for specialist investigators from Australia, the United States, Canada and the United Kingdom to work together to combat foreign bribery. The IFBT facilitates collaboration and cooperation between experts from the AFP, the Federal Bureau of Investigation, the Royal Canadian Mounted Police and the City of London Police Overseas Anti-Corruption Unit. The IFBT aims to enhance the response of these like-minded countries to foreign bribery by encouraging experts to share knowledge, skills and methodologies.

Australia is also an active member of the G20 Anti-Corruption Working Group, which aims to enhance the prevention of corruption-related activities. In 2018, the G20 published its Anti-Corruption Action Plan for 2019–2021, which included a strengthened commitment to work together to prevent, investigate and take enforcement action against corruption.

Another multilateral anti-corruption forum to which Australia contributes is the Asia-Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Experts Taskforce. Australia was a key participant in developing the APEC Code of Conduct for Business and has since worked with Chile, Thailand and Vietnam to implement it. For the purpose of disturbing the financing of corrupt activities, Australia has also collaborated with other APEC members to promote the use of anti-money laundering systems, and hosted several international conferences on this topic.

Overseas impacts

Australia's geographic location and footprint in certain high-risk economic activities expose it to impacts from overseas laws concerning bribery and corruption, as set out above. In addition to the mining and resources and agriculture sectors, another area of risk is the construction sector, particularly in Asian markets (and in particular, China) where Australian companies are increasingly turning, given investment opportunities.

Overseas impacts are also felt in Australia, due to the increasingly international nature of business. An example is provided by the differences in anti-bribery laws in Australia and the United Kingdom. While in Australia, facilitation payments are allowed and there is (for the moment at least) no strict liability bribery offence for corporations, the opposite is true in the United Kingdom. Australian-based companies doing business in the United Kingdom must be aware of the need to comply with the strict anti-bribery regime in place there, and may be required to implement company-wide procedures and policies to ensure compliance.

Corporate liability may arise under foreign laws even where there is no obvious jurisdictional nexus. It is increasingly common for international business partners to demand that their Australian counterparts comply with foreign laws. International business contracts may require that Australian companies warrant their compliance with foreign anti-corruption laws or provide annual certificates of compliance with them.

Corporate liability for bribery and corruption offences

Section 70.2(1) of the Criminal Code creates the offence of providing, offering or promising to provide a benefit not legitimately due to another person, with the intention of influencing the exercise of a foreign public official's duties to obtain business or a business advantage. This offence captures the conduct of individuals and corporations alike; however, to establish the criminal liability of a corporation, the Criminal Code requires that both the physical and mental (or 'fault') elements can be attributed to the corporation.

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The physical element of the offence under section 70.2(1) is attributed to a corporation if the conduct was committed by an employee, agent or officer of the body corporate acting within the actual or apparent scope of that person's employment or authority.[16] The key fault element, being the requirement of intention under section 70.2(1), is satisfied if the corporation "expressly, tacitly or impliedly authorised or permitted the commission of the offence".[17] Authorisation or permission can be established in several ways, including by proving that:

- the corporation's board of directors or a 'high managerial agent' (a senior officer) carried out the conduct, or authorised or permitted the commission of the offence;
- the corporation had a corporate culture that directed, encouraged, tolerated or led to non-compliance with the legislative provisions; or
- the corporation failed to create and maintain a corporate culture requiring compliance with the relevant anti-bribery laws.

A similar analysis applies in respect of the false accounting provisions in the Criminal Code.

The scope of corporate liability provisions in the Criminal Code is potentially broad, although the provisions are often complex to apply in practice. The provisions relating to corporate culture direct attention to the adequacy of a corporation's anti-bribery compliance programme. As is discussed above, the proposed amendments to the Criminal Code would see the introduction into Australia of an even broader corporate offence of failure to prevent bribery closely modelled on section 7 of the UK *Bribery Act* 2010.

Such an offence would have the effect that a body corporate would be liable for the offence of failing to prevent bribery of a foreign public official if an associate (including employees, contractors, agents and subsidiaries) commits an offence against section 70.2 (or engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2), and the associate does so for the profit or gain of the body corporate. The offence will be an offence of strict liability; however, it will be a defence if the body corporate can prove that it had in place adequate procedures, designed to prevent the commission of an offence against section 70.2.

The Crimes Bill includes a provision which would require the minister to publish guidance on the steps that a body corporate could take to prevent an associate from bribing foreign public officials, However, the legislation will not prescribe what constitutes 'adequate procedures' – that task will be left to the courts to determine on a case-by-case basis.

Finally, the Australian Law Reform Commission (an independent Federal Government agency that provides recommendations for law reform to Government) is currently conducting a "*comprehensive review of the corporate criminal responsibility regime, with a particular focus on the need for effective laws to hold corporations to account for criminal misconduc*t". The ALRC is planning to release a Discussion Paper in November 2019, and a final report in April 2020.

Proposed reforms / The year ahead

If passed, the Crimes Bill will see three significant reforms relevant to bribery and corruption, namely:

- reforms to the foreign bribery provisions in the Criminal Code aimed at making enforcement of those offences easier;
- the introduction of the corporate offence of failure to prevent bribery; and
- the introduction of a deferred prosecution scheme.

We may also finally see the establishment of a federal anti-corruption body.

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Collectively, these reform proposals represent a recognition and continuation of the government's response to the criticisms of Australia's anti-corruption efforts.

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* * *

Endnotes

1. Crimes Act 1900 (NSW), s 249B; Crimes Act 1958 (Vic), s 176; Criminal Law Consolidation Act 1935 (SA), s 150; Criminal Code Act 1899 (Qld), ss 442B–442BA; The Criminal Code (WA), ss 529–530; Criminal Code Act 1924 (Tas), s 266; Criminal Code 2002 (ACT), ss 356–357; Criminal Code Act 1983 (NT), s 236.
2. Part 7.6 of the Criminal Code Act 1995 (Cth).
3. Proving an offence under s 70.2(1) of the Criminal Code requires proof of the physical elements and the fault elements of the offence. In the case of the key fault element, intention to influence may be proved by showing that the person in question "means to bring [the result] about or is aware that it will occur in the ordinary course of events": Criminal Code, s 5.2.
4. Criminal Code, s 70.5.
5. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombattingCrime/Report. See also the report of the Senate Economics References Committee on "Foreign bribery" dated March 2018 (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report). The majority of the recommendations made in the latter report supported the reforms proposed in the Crimes Bill.
6. Criminal Code, s 70.3.
7. Criminal Code, s 70.4.
8. Various State and Territory legislation criminalises public sector bribery: Crimes Act 1900 (NSW), s 249B; Crimes Act 1958 (Vic), s 176; Criminal Law Consolidation Act 1935 (SA), s 150; Criminal Code Act 1899 (Qld), ss 442B–442BA; The Criminal Code (WA), ss 529–530; Criminal Code Act 1924 (Tas), s 266; Criminal Code 2002 (ACT), ss 356–357; Criminal Code Act 1983 (NT), s 236.
9. Crimes Act 1900 (NSW), Part 4A; Crimes Act 1958 (Vic), s 176; Criminal Code 1899 (Qld), section 60 and 98C; Criminal Law Consolidation Act 1935 (SA), ss 149–150; Criminal Code Act 1942 (Tas), s 72; Criminal Code Compilation Act 1913 (WA), s 61; Criminal Code 2002 (ACT), s 356; Criminal Code Act 1983 (NT), ss 59–60 and 77–88.
10. Maximum periods of imprisonment provided for by the various State and Territory legislation are: seven years under the Crimes Act 1900 (NSW), s 249B; 10 years under the Crimes Act 1958 (Vic), s 176; seven years under the Criminal Law Consolidation Act 1935 (SA), s 150; seven years under the Criminal Code Act 1899 (Qld), s 442I; seven years under The Criminal Code (WA), s 538; 21 years under the Criminal Code

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Act 1924 (Tas), s 389(3); 10 years under the Criminal Code 2002 (ACT), s 356; and three years under the Criminal Code Act 1983 (NT), s 236.

11. Criminal Code, s 490.1 and 490.2.
12. Other bodies include: the Independent Broad-based Anti-Corruption Commission in Victoria, the Crime and Corruption Commission in Queensland, and the Corruption and Crime Commission in Western Australia.
13. https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf.
14. http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm.
15. https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf.
16. Criminal Code Act 1995 (Cth), s 12.2.
17. Criminal Code Act 1995 (Cth), s 12.3.

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Tobin's experience is recognised in *Who's Who Legal Australia: Business Crime, Investigations & Asset Recovery 2019*. He is also listed in *Chambers Asia Pacific 2018* for Anti-Bribery & Corruption and in the 2019 Edition of *Australia's Best Lawyers* for his expertise in Litigation.

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Belgium

Hans Van Bavel
Stibbe

Brief overview of the law and enforcement regime

The major provisions on combating bribery and corruption are laid down in Articles 246 to 252 (bribery of public officials) and in Articles 504*bis* and 504*ter* (bribery of private persons) of the Belgian Criminal Code. These Articles prohibit the solicitation, acceptance or receipt of an offer, a promise or an advantage, of whatever nature, in order to adopt a certain behaviour in relation to one's profession (passive bribery), as well as the making of any offer, promise or advantage of whatever nature (active bribery).

Moreover, Article 16*bis* of the Act of 4 July 1989 prohibits companies and other legal entities from making gifts to political parties, candidates and representatives. Only physical persons are allowed to make gifts to political parties and candidates. A legal entity that makes a gift to a political party, to a candidate or a political representative, or the person who accepts such a gift in name of the political party or at the expense of the party, will be punishable by a fine.

Belgian law makes a distinction between bribing a public official and bribing private persons.

Bribery of a public official

A public official is a person who holds a public office. This term covers not only a public officer or a public servant but also any person who is responsible for a public service. The Criminal Code can be interpreted in such a way that even the employees of state-owned or state-controlled enterprises can be considered government officials if the emphasis is placed on the type of work they do rather than on the status of the employees. This way, if they perform a public service, employees of government-owned or government-controlled companies can fall under the scope of the abovementioned Criminal Code provisions on bribery of public officials. These provisions also cover persons who hold a public office in a foreign country and persons who hold a public office within an international public organisation.

Bribery of private persons

A private person can be a director or a manager of a legal entity, an agent of a legal entity or a natural person, or a commissioner of a legal entity or a natural person. The terms "director" and "manager" can be read according to the autonomous interpretation under criminal law, which gives a broader meaning to these terms than under corporate or employment law.

The Criminal Code is aimed at persons who have certain decision-making powers within a company. The act of bribery must be committed within the scope of the individual's professional relationship with the company. If a private person acts entirely in his own

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name and for himself, he would not fall under the scope of Article 504*bis* and 504*ter* of the Belgian Criminal Code. However, to be criminally liable, the private person must have offered or accepted the advantage without knowledge and without authorisation of the company's board, the general assembly, the agent, or the principal.

Sanctions

Most violations of criminal law provisions on corruption are punishable by imprisonment or fine, or both, and – depending on the circumstances of the case – additional sanctions such as professional bans, injunction orders, and/or public announcements may be imposed. Terms of imprisonment vary between six months and 15 years, depending on the gravity of the act. The applicable fines range between €800 and €1,600,000, depending on the seriousness of the illicit act.

As legal entities cannot be imprisoned, they can be fined according to a conversion mechanism. An additional sanction that, depending on the circumstances, will or can be imposed, is confiscation of the proceeds of the offence.

An aggravating circumstance can include the existence of a "corruption pact", where the offer of an advantage (by the active corrupter) has been accepted (by the passive corrupter), or where the seeking of an advantage (by the passive corrupter) is followed by a proposal of an offer of the advantage being sought (by the active corrupter).

There are specific, additional sanctions that only apply to legal entities, such as a judicial wind-up order, temporary or permanent disqualification from performing its activities, temporary or permanent closure of the enterprise, and publication or dissemination of the judgment.

Investigation and enforcement bodies

These offences are enforced by the Public Prosecutor, which is the main body responsible for investigating and prosecuting criminal offences. The Prosecutor leads the preliminary inquiry. In case of corruption, he is assisted by specialist police services (the Central Office for the Repression of Corruption, the Central Service for the Fight Against Organised Economic and Financial Crime, and the Financial Crime Units at the Belgian Federal Police).

When intrusive methods of investigation are needed, the prosecutor can ask for an Investigating Judge to be involved, and request a judicial inquiry. A judicial inquiry is carried out by the police and supervised by the Investigating Judge, who determines the investigative measures that will be carried out by the police. After the judicial inquiry, the case is sent to the Council Chamber, which decides whether the person or company charged with a criminal offence by the investigating judge should be committed for a full-fledged criminal trial.

Associated criminal offences

As bribery offences rarely come alone, money laundering and fraud are the most frequent related criminal offences.

Overview of enforcement activity and policy during the last year

Case overview

- *Football fraud scandal*

  Last year, a judicial inquiry was launched in a fraud, money laundering and corruption case involving a number of football players and teams of the Belgian Jupiler League.

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Several searches were held in football club headquarters and suspect's residences. In all, 23 people (amongst them player agents, referees, club executives, players, journalists and managers) were accused of one or multiple crimes.

Apart from this judicial inquiry, the Royal Belgian Football Association also started an investigation into match-fixing. The disciplinary procedure focused on the team KV Mechelen, which has been accused of allegedly bribing another team (Waasland-Beveren) in order to secure a spot in the Belgian top league (the "Jupiler Pro League") for the 2018-2019 season. KV Mechelen and a few executives were already found guilty both by the Higher Appeal Dispute Committee of the KBVB, and – in appeal – before the Belgian Arbitration Authority.

- *DEME*

  Belgian authorities are investigating whether senior executives at Deme, the Brussels-based dredging giant, paid bribes to secure a contract at a port on Russia's Arctic coastline. According to US court filings that were obtained by the Belgian authorities through a legal assistance request, a Deme consultant and former employee sat on the evaluation board that decided on the awarding of the subcontract. Deme also allegedly paid €4.2m in bribe money each to the consultant and a USK Most employee who chaired the evaluation board. The inquiry is still ongoing.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

The law does not provide for any exceptions such as facilitation or 'grease' payments. The size of the offer, promise or advantage, of whatever nature, is not relevant. The legislator introduced a very broad scope to the term "advantages" by using the phrase "advantages of whatever nature".

Hospitality

Moderate hospitability and gifts are tolerated. There is no absolute prohibition of promotional gifts given to persons who exercise a public function or hold a professional function or who work under an assignment within or with regard to a legal entity or a natural person (such as a director or manager).

Promotional gifts are interpreted quite broadly: gifts; invitations to events; invitations to lunches, dinners and receptions; as well as invitations to trips abroad. However, they should be moderate and are acceptable as long as the giver has no intention of persuading the public official to commit an act relating to his official job duties. As a rule of thumb, one can say that anything that one can eat or drink on one occasion, does not lead to corruption.

Key issues relating to investigation, decision-making and enforcement procedures

The general rules, located in the Belgian Criminal Proceedings Code, apply regarding the investigation and enforcement procedures in cases of bribery and corruption in Belgium.

Self-reporting and whistleblowing

Belgian law does not provide a process for self-reporting of bribery and corruption cases. There is also no general statutory protection under Belgian criminal law for whistleblowers. However, for some financial crimes, such as insider dealing and market abuse, the law protects whistleblowers who report in good faith any violation of financial laws. There is no specific regulation that protects whistleblowers in bribery and corruption cases.

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Guilty plea and avoiding prosecution or conviction

The Criminal Proceedings Code provides the possibility of guilty plea procedures (Article 216 of the Belgian Criminal Proceedings Code). This procedure allows the Public Prosecutor to negotiate a penalty in exchange for an admission of guilt. The Public Prosecutor has discretion in regard to the guilty plea procedure. However, a guilty plea is only possible when the prosecutor is of the opinion that the facts at hand do not have to be punished by a sentence exceeding five years of imprisonment.

Belgium also offers the possibility of an "amicable settlement" (Article 216*bis* of the Belgian Criminal Proceedings Code), which is an alternative out-of-court settlement procedure, available when the prosecutor is of the opinion that the facts at hand do not have to be punished by a sentence exceeding two years of imprisonment and to the extent it does not concern a criminal offence which constitutes a serious violation of one's physical integrity.

The accused negotiates with the Public Prosecutor over the payment of a lump sum of money in exchange for dropping the charges. Contrary to the guilty plea procedure, the "amicable settlement" does not include an admission of guilt. In most cases, the legality of the amicable settlement and the proportionality of the "sanction" has to be reviewed subsequently by the Council Chamber or the trial court judge.

Civil route

In Belgium, a victim of bribery may bring his case before the criminal court to claim damages and/or restitution. Alternatively, he can also take his case to the civil court. No specific civil law measures have been introduced concerning bribery. Of course, general civil law principles apply, such as tort law, to seek damages before the criminal or civil trial court.

Overview of cross-border issues

(Extra)territoriality

Generally, an offence committed outside Belgium cannot be prosecuted in Belgium. However, exceptions exist.

If a Belgian resident or person with permanent residence in Belgium commits a private corruption offence abroad, he can be held liable in Belgium if this offence is also punishable in the state where the offence has been committed. Prosecution can only take place if the victim files a complaint or upon official notice issued by the authorities of the state where the offence was committed. Any person who bribes a person abroad, who holds a public function in Belgium, or who holds a public function abroad but is a Belgian national or serves an international public organisation with Belgian headquarters, can be punished by a Belgian court for committing a bribery offence outside of Belgium.

If the person who committed a bribery offence outside Belgian territory involving a person holding a public function in another state or within an international organisation is a Belgian national or a resident, he can be prosecuted in Belgium if the bribery offence is also punishable in the state where the offence has been committed. An important limitation to Belgian jurisdiction over the criminal prosecution is that the suspect must be "found in Belgium", which means he/she should be present in Belgium at a certain time. This makes it difficult to prosecute foreign legal entities with no business activities or branches in Belgium.

Cross-border enforcement

Several bilateral and multilateral treaties are in place for increasing cross-border co-operation

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and enforcement. The Council of Europe has enacted several legal instruments that are implemented in Belgian law, such as the Act on Mutual International Legal Assistance 2004 to facilitate, *inter alia*, sharing information between countries.

With regard to obtaining evidence, the European Investigation Order offers the possibility to request investigation orders from other EU member states. For requests from states outside the EU, Belgium is part of a number of multilateral and bilateral treaties that provide that the contracting state must provide mutual assistance to each other in criminal matters. If no treaty has been made, any request for assistance can be granted based on international comity.

Corporate liability for bribery and corruption offences

Both natural persons and legal entities (i.e., companies and other legal entities) can be held liable under Belgian criminal law. All legal entities can incur criminal liability irrespective of their particular nature or form. A number of associations and companies which have no legal personality according to Belgian company law rules are seen as equal to fully-incorporated legal entities for criminal law purposes. As a result, a company can be held responsible for offences committed by a natural person (who committed them on behalf of the company). It is unimportant who within the company actually committed the offence (employee, director, etc.). However, such criminal liability will only be inferred if the facts can be materially and morally imputed to the company.

The company is criminally responsible for offences that have an intrinsic relation to either: (i) the realisation of its purposes; (ii) the fulfilment of its interests; or (iii) that which is, deriving from the concrete circumstances, being performed "in its name". Attributing the objective elements to the company will not pose considerable problems, due to the broad scope of the third criterion.

With regard to the "so-called" moral imputation, criminal intent is required at the level of the corporate entity. The intent must be present "within the managing bodies" of the legal entity. Reference is also made to the notion of "guilty ignorance", which is present when a person consciously did not question whether certain acts were a criminal offence, and whereby that person's conscious avoidance of gathering the necessary knowledge is equated with actual intent. As a result, a company cannot commit passive private bribery in most cases, as this requires that the legal entity is not aware of the act performed pursuant to the received advantage. However, a company can commit public corruption. As a general rule, the company will be held liable if its directors or chief officers were aware of the corruption.

Proposed reforms / The year ahead

A legislative proposal to renew the Criminal Code is pending in parliament.

This proposal has the ambition to modernise the Criminal Code by updating the principles of criminal law, the offences and the sanctions. One of the novelties is the introduction of levels of sanctions depending on the gravity of the offence.

Both public and private bribery would be punishable by a sanction of level 2, namely imprisonment from one year up to three years. For companies, this sanction is converted to a fine of between €160,000 and €2,880,000.

An aggravated offence will be introduced to sanction the bribery of international public officials more severely, as recommended by the OESO. The offence will be committed if

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the public official (a police officer, a judge or part of an adjudicating college or a person with a public function in a different State, or of an international public organisation) effectively used his influence and has committed the unlawful act. It will be punishable by a sanction of level 3: imprisonment of three to five years. An additional fine of €1,600 to €80,000 can be imposed as well.

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With over 25 years' experience, Hans has a deep knowledge of the criminal justice system and its impact on businesses. His extensive practical experience enables him to secure the best possible outcome for his clients.

Hans' practice covers all aspects of company-related criminal law. He has assisted clients in many different sectors such as diamonds, banking, transport, petrochemical, insurance and telecommunications. He represents companies and their directors before Belgian courts, including the Supreme Court on criminal matters, and before the European Court of Human Rights. In addition, he has significant experience in cases relating to internal fraud.

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Brazil

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Brief overview of the law and enforcement regime

Once again, it is important to start this chapter by emphasising that the Brazilian enforcement regime has seen some remarkably active years in the present decade, with unprecedented results in many aspects. While it is true that new laws came into force in the anti-corruption space, most of the legal rules and tools that have been used in the massive investigations ongoing in the country already existed but had never been applied as effectively as they have been recently.

Prosecutors and judges have become tougher than ever before, in part as a positive result of the increasing empowerment and assertion of independence which has benefited the Judiciary branch and the Prosecutors' offices (especially at the federal level) during the last three decades, but also in part due to a lack of control over their potential excesses. Finally, as the front pages of major newspapers can testify, society seems less tolerant of corruption-related culture and practices than ever before.

The Brazilian Penal Code sets forth the crimes of active and passive corruption within its chapter dedicated to crimes against the government; this states that, as a rule, those crimes must affect public interest and involve someone vested with public authority. Active corruption (Art. 333) incriminates whomever offers or promises an undue advantage to a public servant for him to omit or delay an official act.

The penalty for active corruption ranges from two to 12 years of imprisonment and a fine – which will be increased by a third if the illegal favour is actually carried out by the public servant (Art. 333, sole paragraph). Passive corruption (Art. 317) incriminates whomever solicits, receives or accepts any offer of an undue advantage made by virtue of the public function that he/she exercises. The penalty for passive corruption ranges from two to twelve years of imprisonment and a fine – which will be increased by a third if the person actually carries out an act or omission related to the public function in exchange for the advantage solicited, received or accepted (Art. 317, first paragraph).

The violation of a functional duty by a public servant, which is not aimed at a personal benefit but is being influenced by or seeking to meet a request from a third party, is also corruption in Brazil. Such crime has a penalty that ranges from three months to one year of detention or a fine (Art. 317, second paragraph). The Penal Code also incriminates the practice of influence-peddling (Art. 332), imposing penalties that range from two to five years of imprisonment to whomever solicits, charges or obtains an advantage, or promises an advantage for influencing an act to be carried out by a government official in the exercise of his/her duties.

In the wake of and under the direct influence of Brazilian adhesion to the OECD Convention

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on Combating Bribery of Foreign Public Officials in International Business Transactions, Brazil's Penal Code was amended in June 2002 to set forth the crimes of active corruption of a foreign public official (Art. 337-B) and influence-peddling in the context of an international business transaction (Art. 337-C). The penalty for active corruption of a foreign public official is imprisonment from one to eight years and a fine, whereas for the crime of influence-peddling in the context of an international business transaction, the penalty is imprisonment from two up to five years and a fine.

In line with the main provisions relating to general corruption, the law also sets forth that the penalties for the crime of active corruption of a foreign public official shall be increased by a third if the latter actually carries out an act or omission violating his or her duties in exchange for the advantage solicited, accepted or promised (Art. 337-B, sole paragraph).

In addition to the provisions set forth in the Penal Code, the Brazilian legal system establishes other important legal provisions relating to bribery and corruption. The so-called Law of Crimes Against the Tax System, the Economic Order and the Consumer Relations sets forth specific cases of passive corruption by officers of the Brazilian Revenue Services, which penalties are three to eight years of imprisonment and a fine (Law No. 8,137/90, Art. 3). In turn, the Public Bid Law contains a chapter listing a number of criminal provisions which aim at ensuring fairness of public bids and to punish undue favours to private interests (Law No. 8,666/93, Arts. 89-98). The Anti-Money Laundering Act (Law No. 9,613/98) has often been used by prosecutors as a means to bring more serious legal consequences – both in terms of punishment and of facilitating precautionary measures, such as freezing of assets – in relation to possible acts of bribery and corruption, more notably in high-profile cases.

Unlike many other jurisdictions, Brazil does not incriminate commercial bribery in general. The two exceptions to this rule are found within the scope of the so-called Law of Unfair Competition, which sets forth a specific crime in this regard for which it establishes a penalty ranging from three months to one year of detention or a fine (Law No. 9,279/96, Art. 195, items IX and X), and in the Law No. 10,671/03, which sets forth penalties ranging from two to six years of imprisonment and a fine to whoever requests or accepts (Art. 41-C) or gives or promises to give (Art. 41-D) an undue advantage aimed at changing the outcome of a sports competition.

Other than the criminal provisions mentioned above, the Brazilian anti-bribery legislation also includes two very important laws that are worth mentioning due to the central role they play within the nation's anti-corruption legal system and the seriousness of its sanctions:

- The Anti-Corruption Law, also known as the Clean Company Act (Law No. 12.846/13), establishes an entire system of civil and administrative liabilities for companies, and a controversial mechanism of strict liability for companies involved in bribery. Under clear inspiration from the successful leniency policies in the antitrust space (originally introduced in Brazil in 2000 in the wake of the American and European legal reforms of the previous years and currently regulated by Law No. 12,529/11), the Anti-Corruption Law introduced in its Art. 16 the leniency agreement mechanism to Brazilian anti-bribery enforcement, although its lax regulation, alongside the self-referential and sometimes dysfunctional practices of Brazilian regulators and prosecutors, still give much room for legal uncertainty in the field.
- In turn, the Improbity Law (Law No. 8,429/92) was originally drafted to hold public servants liable for violating their duties and to prevent them from causing civil damages and/or illicit enrichment, but it has also been used to impute civil damages to private entities and government officials which are found guilty of misconduct.

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From the investigative and procedural perspectives, there are two other laws that are utterly important to understand the current anti-bribery and anti-corruption landscape in Brazil. One is the already cited Anti-Money Laundering Act (Law No. 9,613/98), which not only facilitates the prosecution of corruption-related crimes and their subsequent acts but – as abovementioned – also facilitates the use of precautionary measures aimed at following the flow of money, and at freezing and recovering assets. The other is the Law on Organised Crime (Law No. 12,850/13), which incriminates the act of taking part in a criminal organisation and, more importantly, introduces the mechanism of plea bargaining within Brazilian procedural law, which quickly became the most powerful tool used by prosecutors to expand the reach and effects of the biggest anti-corruption investigations the country has ever seen in its history. With regard to the agencies in charge of the Brazilian enforcement, it is broadly known that the Federal Public Prosecutor's Office (MPF) has led anti-corruption enforcement efforts throughout the country, with more distinct successes in some specific regions and cases which the Chief Prosecutor's Office (PGR) designates special task forces to handle. Back in 1988, the Brazilian Constitution established a Public Prosecutor's Office that was autonomous and independent from the three branches of government (Executive, Legislative and Judiciary), even if formally being part of the first.

In the last 15 years, the Public Prosecutor's Office has consolidated its autonomy and independence, and presently includes federal prosecutors to investigate and prosecute some of the most senior and powerful businessmen and politicians in the country. Seeking the same political independence, but some way behind their federal peers, are the state prosecutors, who do not always have the same resources to investigate and prosecute similar high-profile cases and people within their jurisdictions.

Criminal investigations in Brazil are mostly led by police departments. The Federal Police Department was reformed in the past decade and has been consistently increasing its level of action in anti-bribery and anti-corruption investigations. This is not true, however, in relation to State Police Departments, which are generally poorly equipped and present an undesirable level of financial dependence and political interference from state governments, with a corresponding notable lack of efficiency.

Other administrative agencies linked in some way to anti-corruption enforcement are:

1. the Comptroller-General of the Union (CGU), which oversees the use of federal public funds, leads programmes to prevent and identify corruption amongst federal public bodies, cooperates with criminal investigators and prosecutors, and is the central authority to apply the Anti-Corruption Law within the federal government;
2. the Solicitor-General of the Union (AGU), whose scope is to represent and defend federal interests and assets before Courts;
3. the Federal Audit Court (TCU), which scope is to oversee federal public spending;
4. the former Council for Control of Financial Activities (COAF) of the Ministry of Finance, renamed to simply Federal Intelligence Unit (UIF, in Portuguese) and reallocated under the administrative umbrella of the Central Bank as of August, 2019 (see Provisional Measure No. 893/19), which is a powerful agency that cross-references financial information and coordinates initiatives in fighting money laundering, by virtue of which its reports have played a crucial role in many anti-corruption investigations; and
5. the Department of Asset Recovery and International Legal Cooperation (DRCI) of the Ministry of Justice, which centralises and coordinates Brazilian efforts for international cooperation on criminal matters and has been increasingly active and effective in the present decade – it is typically the central authority of the Brazilian government for the execution of mutual legal assistance agreements.

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With respect to jurisdiction, acts related to bribery and corruption may be subject to federal or state jurisdictions, depending on whether federal or state funds or assets may be involved. Federal courts are usually better equipped, but not always, and there can be high-profile and lower cases under either federal or state judicial oversight. Our sense and experience suggest that the more remarkable high-profile cases in the country have been prosecuted in federal courts for a range of reasons, ranging from the fact that federal investigators and prosecutors are generally better equipped and more independent, to the fact that typically – and naturally – federal contracts tend to involve bigger amounts than state contracts, in accordance with the variable proportion of federal and state budgets.

Overview of enforcement activity and policy during the last year

It is not news that over the last six years, Brazil has faced what is by far the biggest corruption-related scandal, and the largest and most complex criminal investigation in its entire history, namely the '*Lava Jato*' (Car Wash) Operation. The country has also faced a major political crisis, precipitated in many ways by economic instability and the high pressure that investigators from both the Federal Police and the Federal Prosecutor's Office have managed to put on senior government officials, prominent businesspeople and mainstream politicians nationwide – not to mention a considerable amount of judicial activism.

Beginning in early 2014 as an investigation targeting a group of money dealers in the southern State of Paraná, the *Lava Jato* investigation soon moved on to target a significant graft scheme involving senior officials of the Brazilian state-owned oil company, Petrobras. It became a huge and impressive investigation when, approximately two years later, its reach expanded so far that it seemed to unearth major corruption schemes relating to every major public bid and contract in different areas of the government, with special focus on infrastructure.

As a result, what previously had only involved mainly the political party that ran the federal government at that time (the PT, or Workers Party) and the parties that were part of its congressional coalition, eventually involved every major political party of the country, as well as many of their most prominent leaderships (including those of the party that succeeded PT in the federal government, the MDB – Brazilian Democratic Movement, whose term ended in January 2019), as the investigations spread across federal and state contracts related to areas such as construction, energy, transportation, sanitation and others. Moreover, *Lava Jato* evolved in a way that made its investigations sprout links with and reciprocally reinforce other high-profile investigations that were being conducted by other federal police officers and prosecutors throughout the country.

In terms of Brazilian anti-bribery enforcement activities, while 2017 and the first half of 2018 were characterised by the expansion of the investigations arising from *Lava Jato*, and the more striking sets of plea deals – namely the Odebrecht/Braskem and the J&F/JBS matters – the second half of 2018 and the year of 2019 have presented different features.

The investigative work of special task forces has been maintained ever since, but in general has became less noisy. While some speculate that the prosecutors' appetite may no longer be the same (after defeating, among others, two of the most powerful Brazilian corporate groups and the most popular political leader of the country), it is important to note that investigations can move forward without relying on spectacular acts – and many of them have done so. Economic sectors more affected over the last year and a half include public concessions (especially of federal and state highways) and health care, respectively targeted by the *Lava Jato* task forces based in Curitiba and in Rio de Janeiro.

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Yet those massive settlements and plea deals have made investigations much more complex, and their effects keep challenging prosecutors, judges and defence lawyers. On one hand, their scope became much broader than in the past and touched the authority of many other prosecutorial agencies and different jurisdictions; on the other, the insufficiency of legal regulation and case law, combined with the persistent lack of coordination among different prosecutorial and administrative agencies, have contributed to a scenario of legal uncertainty which negatively affects the rights of defendants as well as the anti-corruption policies themselves.

As stated in the previous edition of this guide, the multi-agency system to fight corruption designed by the Brazilian Constitution proved, in fact, its importance to prevent powerful political or economic actors from capturing the agencies of control. However, in the wake of some very large-scale settlements and plea deals, whose extent and complexity had probably never been foreseen by legislators, it also proved to be a hard test for those agencies to coordinate and cooperate with each other, and there is still a lot to be done in this regard. It is clear, in any event, that enforcement policies relying on settlements and plea deals are here to stay in Brazil, irrespective of the need of clearer rules and more transparent prosecutorial practices for the future.

Political efforts to hinder prosecutions continued to be felt in late 2018 and in 2019, and appear to have become more effective in the latter. Although the new federal government was elected in late 2018 with a tough anti-corruption platform in its speeches, the first year of the new presidential term was marked by a chaotic management in agencies of enforcement, while some political interference in the Federal Police Department, the Federal Revenue Service and the Financial Intelligence Unit raised public concern.

It is worth mentioning that, in late 2018, the elected president invited the federal judge Sergio Moro, then still overseeing important *Lava Jato*-related cases, to be the new Minister of Justice as from 2019. He promptly accepted the invitation and left his judicial career, raising criticism over his closeness to a politician who – voluntarily or not – had been indirectly favoured by some of the judge's decisions in *Lava Jato* cases.

In February 2019, the new Minister of Justice sent to Congress a bill proposal which was called the "anti-crime package", and aimed at reforming several provisions set forth by the Brazilian Penal Code, the Code of Criminal Procedure and other laws like the Heinous Crimes Act and the Improbity Act. Its clear scope was to make Criminal Justice tougher and to accelerate punishment; nevertheless, the domestic legal community argued that most of the package was focused on obsolete formulas of repression, the effectiveness of which in preventing crimes has never been proved, though they can certainly bring negative collateral effects – like restricting due process rights and aggravating mass incarceration, already a huge problem in Brazil. Congress refused to vote the bill as fast as the Ministry of Justice wanted, and by mid-2019 congressional commissions had already rejected part of the proposals – though it is still hard to predict when the Houses are going to appraise the proposal and what the final outcome of the relevant debates will be.

In turn, and unlike in previous years, in 2019 the Superior Court of Justice and the Supreme Court appeared to become more rigorous in assessing what were seen as prosecutorial excesses committed by special anti-corruption task forces. Both courts turned out to be less tolerant to pre-trial arrest orders issued by lower judges upon those task forces' requests – which had been seen as a prosecutorial strategy to put pressure on individuals and obtain their collaboration – and the latter issued some symbolic rulings contrary to the prosecutors' view, including, in late August and early October, the first two annulments of sentences

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deriving from *Lava Jato* investigations, grounding such rulings in violations of defence rights related to due process and suggesting that other sentences could also be annulled on that basis.[1]

In addition, after a series of information leaked as of June by a media organisation, demonstrating an undue – and in certain situations unlawful – level of proximity between prosecutors and former judge Moro when he was still overseeing *Lava Jato* cases, concerns about judicial impartiality and other due process rights raised expectations that the superior courts would no longer be as lenient with some prosecutorial practices as they were in the past, but this is yet to be seen.

As the new federal government still searches for its identity in the midst of some internal disputes among different political groups, there have been no important developments in relation to anti-corruption policies in a broader and more politically centralised perspective. In any case, and especially before federal courts, many prosecutors continue to put pressure on corporates and businesspeople by means of the enforcement of anti-corruption laws.

Law and policy relating to issues such as facilitation payments and hospitality

According to Brazilian law, facilitation payments – defined as payments made to a government official to secure or expedite a routine or a necessary act – are deemed illegal and subject to the penalties of the aforesaid Art. 317 and Art. 333 of the Penal Code, which respectively incriminate acts of passive and active corruption. The possible differentiation between the purpose of the payment to a government official to carry out a regular act or to violate his/her duty will occur in the application of the relevant penalties, which shall be aggravated in case of violation of one's legal duties.

In relation to business expenditure, the relevant regulations are found in the administrative law, both at federal and state levels, and vary to a limited extent. At the federal level of government, the main provisions in this regard are established by Decree No. 4,081/02, Decree No. 6,029/07 and Resolution No. 3/00 of the Public Ethics Commission of the Presidency of the Republic.

Despite it being true that in many contexts there can still be seen a customary practice of providing corporate hospitality and gifts to public officials, the applicable legal regulations tend to be very strict, though not always effectively enforced. The acceptance of gifts, personal loans or any other advantage is usually forbidden, and may be considered a bribe if connected to any intention of facilitating the counterpart's access to the government structure.

There are specific situations in which public servants and government officials may accept payments by a private entity for transportation, lodging and expenses for events such as congresses and seminars, especially if provided by academic, scientific or cultural institutions. Such expenses may be accepted if the government official is not in a situation in which he may benefit the entity by a decision that he/she might take part. On some occasions, he/she will be obliged to publicise the relevant terms and conditions and values, fees charged, *etc*. Gifts can be distributed only under specific circumstances (courtesy, propaganda or by occasion of special events or commemorative dates) and as long as their unit value does not exceed the amount of R$ 100,00.

Key issues relating to investigation, decision-making and enforcement procedures

Effectiveness and legal certainty are still the biggest challenges posed for Brazilian

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enforcement as a whole, especially if taking into account that the vast majority of acts relating to bribery and corruption are not subject to federal but to state jurisdictions, and, therefore, they often tend to be poorly investigated by state police departments. Despite the undeniable efforts made by many investigators and their remarkable achievements, it is important to note that such success has been particularly limited to the scope of special task forces and normally in the federal enforcement level. In turn, there have been a number of cases whose apparent success and effectiveness may hide lack of compliance with due process rights.

The two better prepared and better equipped enforcement agencies in charge of corruption-related investigations are the Federal Police Department and the Federal Prosecutors' Office ("MPF"), whose activities are focused on offences that may have caused harm to the federal government or whatever entity which is part, either directly or indirectly, of the federal government. Federal courts tend to be better equipped than state courts on average, but their presence does not cover the nation's entire territory.

Having said that, it is important to understand that the possible outcome of a specific case still depends greatly on who are the investigators in charge of it and how the situation is prosecuted and assessed by the relevant courts. The time to carry out criminal investigations and prosecutions in Brazil may also vary significantly and sometimes pre-trial investigations take several years to be concluded, which may be followed by several more years of court proceedings until their final appeals are decided.

As stated above, the most important legal mechanisms in Brazil's new high-enforcement landscape of the last five years are the plea agreement and anti-corruption leniency agreement. Plea deals apply to individuals subject to criminal investigations, since criminal liability in Brazil is still almost exclusively for individuals (the sole exception in which corporate criminal liability is accepted refers to environmental crimes), whereas leniency agreements are available to legal entities and in relation to reducing and settling civil and administrative liabilities.

In a legal culture utterly reliant on the legality principle, the lack of more detailed legal rules, towards both plea deals and leniency agreements, has given room for an reprehensible level of personal activism by some enforcers. This has been felt particularly with regard to federal and state prosecutors, facilitated by the high level of autonomy and independence each Brazilian prosecutor may have from their peers and even from their relevant prosecutorial offices' policies. That said, the guidelines on leniency agreements issued by the MPF in late 2017,[2] and the joint guidelines on plea agreements published by the 2nd and 5th Chambers of Coordination and Review of the MPF in early 2018,[3] indicate important efforts in the search for clearer prosecutorial standards, and more legal certainty to what has proved to be a powerful tool for anti-bribery and anti-corruption enforcement in Brazil.

There are no legal tools such as deferred prosecution agreements or non-prosecution agreements in Brazil, though a plea deal may grant immunity for the relevant individual, subject to exceptional conditions (Law No. 12,850/13, Art. 4, § 4th). Nor are there regulations concerning self-reporting, in spite of how much the Brazilian enforcement practices have been influenced by U.S. practices in the anti-bribery space. This means that there remains a high level of uncertainty for a company that, upon implementation of efficient internal controls, identifies a misconduct and is considering how to deliver the relevant information to the enforcement authorities – a situation in which the best legal advice may depend on knowing the identities of the prosecutors of the potential matter, and how they are expected to work.

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Recent years in Brazil have also been characterised by the fact that some prosecutorial and judicial practices have toughened legal interpretation to obtain more effective enforcement. In this regard, three symbolic examples are worth mentioning:

1. the excessive use of preventive detention, which has always been a flaw in the nation's judicial system, has lately been applied to corruption-related cases in a way that has raised the question whether enforcement has distorted its legal aims towards facilitating requests for cooperation and plea deals;
2. the *quid pro quo* legal requirement needed to characterise the crime of corruption has become more undefined, evolving from a specific and clear act benefiting a third party to a vague possibility of giving a third party better access to a government structure; and
3. the admissibility of execution of penalty right after having the case ruled by the Court of Appeals but still pending special appeals to the Superior Court of Justice or to the Supreme Court, based on an unstable precedent of the latter court issued in 2016, in contrast to a clear Constitutional clause (Art. 5, item LVII) and several other precedents affirming that the execution of a sentence may only commence after a final and unappealable decision has been issued.

Overview of cross-border issues

The emergence of a new enforcement culture in the midst of the developments of *Lava Jato* and other massive anti-bribery investigations in Brazil has had another ground-breaking effect: Brazilian regulators and enforcers have been more active than ever before in the field of international cooperation since 2015.

The related figures are as impressive as this: until mid-2019, the *Lava Jato* Task Force in Curitiba, Paraná State (where the *Lava Jato* probe started) had engaged in more than 750 requests for active and passive international cooperation with more than 50 different countries throughout the globe,[4] whereas the last three-and-a-half years put Brazil on the global map of multi-jurisdictional resolutions by virtue of the very symbolic matters of Odebrecht-Braskem (late 2016), Rolls-Royce (early 2017),[5] Keppel Offshore (late 2017),[6] Petrobras (late 2018)[7] and, more recently, Technip (early 2019).[8]

There have also been a lot of talks and cooperation among Brazilian enforcement authorities and their Latin American peers, the most significant example of which is still the Brasilia Declaration, signed in February 2017 among Public Prosecutors of Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Panama, Peru, Dominican Republic, Venezuela and Portugal, adding a European element to the effort. It was based on art. 49 of U. N. Merida Convention and creates joint teams for bilateral or multilateral investigations, seeking to allow enforcers to coordinate investigations related to acts of bribery, corruption and money laundering among the relevant countries.

A number of bilateral efforts joining Brazilian and foreign prosecutors from different Latin American jurisdictions have also been put in place. Two meaningful examples of them are the cooperation agreement signed with the Argentinian *Ministerio Publico Fiscal* in late 2018,[9] and the closer cooperation with Peru, which allowed pre-trial hearings of the Peruvian *Lava Jato*-related investigations to happen in Brazil at the MPF's offices in Curitiba in late 2018 and early 2019, and facilitated the settlement signed by the Peruvian government, Odebrecht and its former executives in early 2019.[10]

It is certain that, in light of the above and in the face of a multi-jurisdictional government investigation in Latin America, companies considering an internal investigation should bear

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in mind, at each step of the way, the specific requirements of local legislation with respect to key issues such as data preservation and collection, employee interviews, fact analysis and reporting, disclosure and settlements.

Corporate liability for bribery and corruption offences

As a rule, criminal liability in Brazil is personal and subjective as well as essentially directed to individuals. The sole exception in which corporate criminal liability is accepted is for environmental crimes (Law No. 9,605/98).

Companies may, however, be held liable for bribery and corruption offences under the regime of civil and administrative sanctions of the Anti-Corruption Law (Law No. 12,846/13), some of which can be very serious and similar in nature and seriousness to the criminal sanctions set forth for entities in the Law of Environmental Crimes.

The list of conducts considered a violation under the Anti-Corruption Law is very broad. It not only includes to offer or give, directly or indirectly, an undue advantage to a government official or to a related third party, but also covers financing, funding, sponsoring or in any way subsidising the practice of harmful acts pursuant to the law, and the use of third parties to hide or disguise the real interests or the identity of the beneficiaries of the conduct.

The practice of any conduct considered harmful under the law could lead to administrative or civil liability for the company involved. In the administrative and judicial spheres, the company may be subject to individual or cumulative penalties, such as fines (of up to 20% of the company's revenues), confiscation of assets, rights, or values gained from the illegal act, partial suspension or prohibition from carrying out business activities, and the prohibition from receiving benefits, subsidies or credit from government entities.

The Anti-Corruption Law sanctions bribery offences committed against either Brazilian or foreign governments and establishes a strict liability regime for companies involved in bribery offences, but its applicability and effectiveness have not been sufficiently tested to date.

Proposed reforms / The year ahead

The Brazilian Congress has been intermittently discussing different bill proposals that could change the enforcement landscape towards bribery and corruption, including new procedural rules relating to plea deals and anti-corruption leniency agreements.

As mentioned above, in early 2019 the Ministry of Justice sent to Congress the so-called "anti-crime package", aimed at making criminal justice tougher and at making punishment easier and faster, but soon a lot of criticism against the bill, grounded on due process rights, was raised, and the outcome of its passage through Congress is uncertain. In any event, once again, one should not expect many legislative changes for the year ahead, as the present Congressional agenda has been much more focused on establishing the Houses' relationship with the new federal government and on economic reforms.

Therefore, with regard to anti-corruption enforcement in Brazil – and consistent with what has been stated in the previous edition of this guide – the years ahead point to a period of consolidation of the policies already in force. Certainly, *Lava Jato* and other present and future investigations will continue to evolve, and may bring some additional tension to the political environment – but probably not on the same scale of the years 2015-2018. In any event, it is possible to foresee developments relating to the level of cooperation and coordination among the different agencies of administrative corruption control and

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prosecutorial offices, which suggests some good news on the horizon for corporations and individuals.

Lastly, in a longer perspective, it remains likely in our opinion that Brazil will also adhere to the corporate criminal liability regime in the anti-corruption space, and will possibly incriminate commercial bribery in a few years' time as well.

* * *

Endnotes

1. See <https://globalinvestigationsreview.com/article/1202959/operation-car-wash-faces-another-supreme-court-setback>, accessed Sep 30, 2019.
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5. See <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>, accessed Sep 15, 2019.
6. See <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>, accessed Sep 15, 2019.
7. See <https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>, accessed Sep 15, 2019.
8. See <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>, accessed Sep 15, 2019.
9. See <http://www.mpf.mp.br/pgr/noticias-pgr/argentina-faz-acordo-com-o-mpf-e-podera-utilizar-delacoes-feitas-no-brasil-no-ambito-da-operacao-lava-jato> (in Portuguese), accessed Sep 15, 2019.
10. See <https://elcomercio.pe/politica/rafael-vela-jose-domingo-perez-odebrecht-fiscales-peruanos-firman-acuerdo-colaboracion-eficaz-brasil-noticia-nndc-608181> (in Spanish), accessed Sep 15, 2019.

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Rogério has experience in matters relating to crimes committed within the corporate environment. He is a counsellor of the Commission on Professional Prerogatives for the State of São Paulo Bar Association (OAB-SP), a former researcher in the Department of Criminal Law and Criminology at Universidade de São Paulo and a former director of the Brazilian Institute for Criminal Sciences (IBCCRIM). He is also a lecturer and guest professor for undergraduate and graduate courses nationwide, editorial advisor for the *Revista Brasileira de Ciências Criminais* [Brazilian Review of Criminal Sciences] and has authored several specialised and journalistic publications dedicated to criminal law and criminal procedure with a focus on business crimes.

As a white collar practitioner, Rogério has been one of the most active lawyers handling complex matters and dealing with new legal tools in *Lava Jato* (Car Wash) and other massive investigations ongoing in Brazil in the present decade. He was one of the first lawyers involved in *Lava Jato* plea deals, and has handled many multi-jurisdictional cases that have arisen as a result of recent high anti-corruption enforcement in Brazil and in Latin America.

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China

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Brief overview of the law and enforcement regime

China has had strong anti-corruption laws for many years. On 1 January 1980, the *Criminal Law of the People's Republic of China* (the "**PRC Criminal Law**"), containing the criminal offences of bribery and corruption, came into effect. The *PRC Criminal Law* later underwent a sea change to modernise and rejuvenate the laws in 1997, with enhanced provisions on bribery and corruption offences.

The laws have now become even more vigorous, with sustained enforcement following the coming to power of President Xi Jinping in 2013. President Xi has made the curbing and elimination of corruption one of his main goals. This has kick-started the beginning of a new era, which has brought a new focus on and appreciation of the strength and breadth of the Chinese anti-corruption laws.

The actions taken by President Xi have been felt even at the highest echelons of power. According to the statistics provided in a report[1] by the Procurator-General of the Supreme People's Procuratorate (the "**SPP**"), Zhang Jun, to the National People's Congress in March 2019, there were 9,802 persons charged for corruption or dereliction of duty. Indicative of the seriousness of the anti-corruption campaign, 32 state functionaries at the provincial/ministerial level were investigated. In total, 16,092 state functionaries were transferred by the State Supervisory Committee of the People's Republic of China to the SPP and investigated for corruption or dereliction of duty.[2]

As another example, banquets for representatives of the National People's Congress have given way to self-serve and alcohol-free buffets. This focus is also evidenced by the issuance of the Administrative Measures on Conferences of Central and State Departments (the "**Measures**") and the Provisions on Administration of Domestic Official Reception by Party and Government Organs (the "**Provisions**") in September and December 2013, respectively. The Measures aim at cutting expenditure on official meetings by central government departments. The Provisions contain strict and more detailed requirements and standards on where a business meal may take place and what must be excluded from a business meal. These developments are part of President Xi's overall efforts to eliminate opportunities for corruption and extravagance in connection with official meetings and receptions.

It is also noteworthy that the Chinese government invited the State Parties under the United Nations Convention Against Corruption to inspect China's compliance with the treaty for the first review period from 2010 to 2015.[3] This was indicative of the seriousness of the Chinese government's efforts in its anti-corruption campaign.

As further evidence of China's focus on and commitment to anti-corruption enforcement, in March 2018, the National People's Congress of the People's Republic of China passed an

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amendment to the Constitution Law of the People's Republic of China, which established a new supervisory agency, the State Supervisory Committee of the People's Republic of China (the "**State Supervisory Committee**"). The State Supervisory Committee combined the Central Commission for Disciplinary Inspection, the State Bureau of Corruption Prevention, the General Administration of Anti-Corruption of the Supreme People's Procuratorate, and the Ministry of Supervision of the People's Republic of China.[4] The Chinese government believes this will facilitate an even stronger and more coordinated focus on anti-corruption enforcement.

Currently, the primary pieces of anti-bribery and anti-corruption legislation in China are: (i) the *PRC Criminal Law*; and (ii) the *PRC Anti-unfair Competition Law* (the "**AUCL**"). The *PRC Criminal Law* applies to both "official bribery" (where government officials and state functionaries are involved) and "commercial bribery" (where private enterprises and/or their staff are involved), whereas the AUCL prohibits "commercial bribery".

In addition to this primary legislation, various government departments' administrative rules (such as the *Interim Regulations on Prohibiting Commercial Bribery*) and judicial interpretations issued by the Supreme People's Court (the "**SPC**") and the SPP (such as the *Opinion on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery* (the "**2008 Commercial Bribery Opinion**") and, most recently, *Interpretations of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery* (the "**2016 Judicial Interpretation**")) also contain anti-bribery provisions.

The Communist Party of China ("**CPC**") and the State Council have also issued internal disciplinary rules governing corruption or bribery of Communist Party members and Chinese government officials.

The PRC Criminal Law

The *PRC Criminal Law* prohibits: (a) "official bribery", which applies to a "state functionary" or an "entity"; and (b) "commercial bribery", which applies to a "non-state functionary".

The term "state functionary" is broadly defined, and includes civil servants who hold office in state organs, persons who perform public duties in state-owned entities or semi-government bodies, persons who are assigned to non-state-owned entities by state organs or state-owned entities to perform public duties, and persons who otherwise perform public duties according to the law.[5] The term "entity" includes state organs, state-owned companies, enterprises, institutions, and people's organisations.[6]

The term "non-state functionary" means any person or entity that is not a "state functionary" or an "entity" as defined in the *PRC Criminal Law.* Generally speaking, the criminal sanctions for bribery offences involving state functionaries are more severe than those involving non-state functionaries.

Under the *PRC Criminal Law*, both the offering and receiving of bribes constitute serious criminal offences in China. The offences are usually categorised as "bribe-giving" or "bribe-accepting" offences. The statutory offences are:

(i) offering of a bribe to a state functionary;[7]

(ii) offering of a bribe to a non-state functionary;[8]

(iii) offering of a bribe to a foreign official or an officer of a public international organisation;[9]

(iv) offering of a bribe to an entity;[10]

(v) offering of a bribe by an entity;[11]

(vi) offering of a bribe to a close relative of, or any person close to, a current or former state functionary;[12]

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(vii) introduction to a state functionary of an opportunity to receive a bribe;[13]

(viii) acceptance of a bribe by a state functionary;[14]

(ix) acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary;[15]

(x) acceptance of a bribe by a non-state functionary;[16] and

(xi) acceptance of a bribe by an entity.[17]

The Ninth Amendment to the *PRC Criminal Law* (the "**Ninth Amendment**"), which was promulgated by the National People's Congress on 29 August 2015 and came into effect on 1 November 2015, focuses on empowering judicial organs to more effectively combat corruption. In addition to introducing a new offence of "offering a bribe to a close relative of, or any person close to, a current or former state functionary", these amendments:

(i) expand the scope of monetary penalties as punishment for bribery offences (see the table setting out the penalties for various offences under the heading *Penalties under the PRC Criminal Law* below);

(ii) add monetary fines to almost all corruption/bribe-related offences;

(iii) replace specific monetary thresholds for sentencing considerations with more general standards, such as "relatively large", "huge" and "especially huge"; and

(iv) raise the bar for mitigating circumstances to apply for reduced sentencing.

On 18 April 2016, the SPC and the SPP jointly issued the 2016 Judicial Interpretation on bribery, corruption, and misappropriation of official funds. It became effective immediately. The 2016 Judicial Interpretation provides further clarification to the Ninth Amendment regarding corruption and bribery crimes. In principle, the 2016 Judicial Interpretation:

(i) expands the definition of bribes to include certain intangible benefits;

(ii) adjusts monetary thresholds for bribery prosecutions and sentencing, including raising the thresholds for bribes involving government officials and non-government officials;

(iii) clarifies that a thank-you gift after improper benefits are sought still constitutes bribery; and

(iv) clarifies when leniency may be given and provides additional details on the requirements and benefits of voluntary disclosure.

Jurisdiction of the PRC courts

Foreigners or foreign entities are subject to the same legislation when doing business in China.[18] Chinese criminal laws apply to crimes that take place within the territory of China, whether committed by Chinese nationals or foreigners.

Accordingly, the PRC courts would have jurisdiction over:

(i) bribery and other crimes that are committed by PRC or foreign individuals or entities within China;

(ii) bribery and other crimes that are committed by PRC or foreign individuals or entities on board PRC ships or PRC aircraft;

(iii) bribery and other crimes that are committed outside China with the intention of obtaining improper benefits within China;

(iv) bribery by PRC individuals of foreign officials or officers of a public international organisation outside China;

(v) bribery and other crimes committed by PRC nationals outside China which are punishable under the *PRC Criminal Law* by a fixed term imprisonment of three years or longer; and

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(vi) bribery and other crimes committed outside China by PRC state functionaries or military personnel.

"Bribe-giving" offences

The *PRC Criminal Law* generally prohibits an individual or entity from giving "money or property" to a state functionary, a close relative of, or any person close to, a current or former state functionary, a non-state functionary or an entity for the purpose of obtaining "improper benefits".

Previously, "money or property" included cash, in-kind objects as well as various "proprietary interests that can be measured by money", such as the provision of: home decoration; club membership; stored value cards; travel expenses; shares in, or dividends or profits from, a company without corresponding investments in the company; payment through gambling; and payment for services that have not been provided, etc.[19]

The 2016 Judicial Interpretation reconfirms the definition of bribes to include certain intangible benefits. It defines "money and property" to include money, in-kind objects, and proprietary interests for the crime of bribery and "proprietary interests" include material benefits that can be converted into money, such as home renovation, debt relief, etc., and other benefits that need to be paid using money, such as membership service, travel, etc.[20] Previously, the 2008 Commercial Bribery Opinion provided that the amount of such intangible benefits should be calculated on the amount actually paid, whereas the 2016 Judicial Interpretation states that the amount concerned can also be calculated on the amount payable. This is to address situations in which services, travel or other intangible benefits may have been deliberately undervalued by bribe-givers.

In "bribe-giving" cases, a violation occurs when a party makes a bribe with the intent to seek "improper benefits", which include: (a) seeking benefits from a state functionary, non-state functionary or entity which would be a breach of law, regulations, administrative rules, or policies for that state functionary, non-state functionary or entity to provide; or (b) requesting a state functionary, non-state functionary or entity to breach the law, regulations, administrative rules or policies to provide assistance or facilitating conditions. For commercial activities related to bidding and government procurement, giving money or property to a relevant state functionary in violation of the principle of fairness to secure a competitive advantage is considered as giving money or property for the purpose of obtaining an "improper benefit".[21] Further, where "money or property" has been offered with an intent to seek "improper benefits", but the offence of giving a bribe is not consummated because of factors independent of the said intent, such action may nevertheless constitute a criminal attempt offence under PRC law.[22]

However, a person who gives money or property to a state functionary due to pressure or solicitation from that state functionary but who receives no improper benefit shall not be regarded as having committed the crime of offering a bribe.[23]

As interpreted by the SPP and the SPC, bribery may be distinguished from a gift by reference to the following factors:[24]

(i) the circumstances giving rise to the transaction, such as the relationship between the parties, the history of their relationship, and the degree of their interaction;

(ii) the value of the property involved in the transaction;

(iii) the reasons, timing and method of the transaction and whether the party giving money or property has made any specific request for favour; and

(iv) whether the party receiving money or property has taken advantage of his/her/its position to obtain any benefit for the party giving money or property.

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In other words, a person who gives money or property to a state functionary, non-state functionary or entity without requesting any specific favour may not be regarded as offering a bribe.

Effective from 1 May 2011, China extended the scope of commercial bribery to include illicit payments to foreign officials. The *PRC Criminal Law* now also criminalises the "giving of money or property to any foreign official or officer of a public international organisation", for the purpose of seeking "improper commercial benefits".[25] The inclusion of foreign officials in the definition extends the reach of China's anti-corruption laws beyond the country's borders, although the distinction between "improper commercial benefits" and "improper benefits" means that the scope of punishable actions involving foreign officials is slightly narrower than those where personnel of Chinese entities, as defined in the *PRC Criminal Law*, are the recipients of bribes.

"Bribe-accepting" offences

State functionaries, close relatives of, or any persons close to state functionaries, non-state functionaries and entities are all prohibited from accepting money or property or making use of their position to provide improper benefits to a person seeking such improper benefits.

In general, "improper benefits" is a key to a "bribe-accepting" offence, and it must be shown that the party accepting the bribe has used its power or position to seek a benefit for the party giving the bribe, except in the following circumstances:

(i) any person (whether a state functionary or non-state functionary) who takes advantage of his/her position to accept and keep for themselves a "kickback" or "handling fee" under any circumstances shall also be regarded as having committed the crime of accepting a bribe;[26]

(ii) any state functionary who received bribes with an amount exceeding RMB 30,000 from his/her subordinate and may affect the performance of his/her duty;[27] or

(iii) a promise to seek benefits for others should be regarded as "seeking benefits" for others. If an official clearly knows that a person offering a bribe has in mind a specific request seeking the official's help, the official will be considered to be "seeking benefits" for others.[28] This is intended to address situations in which officials accept money or property from bribers who do not request help explicitly but have some unspoken understanding with the officials regarding benefits sought.

In addition, the provision of money or property does not have to occur sequentially prior to "seeking benefits" for others.[29] The 2016 Judicial Interpretation clarifies that bribes include payments given after benefits are received, i.e. a thank-you gift received after benefits are sought or received still constitutes bribery. Hence, if nothing has been requested from an official in the performance of his duties but that official later accepts money or property from others based on such performance, that official will be considered to be "seeking benefits for others".

Monetary thresholds for enforcement

As mentioned above, the Ninth Amendment replaced the then-existing monetary thresholds for commencing an investigation into offences with more general standards such as "relatively large", "huge", and "especially huge".[30] The 2016 Judicial Interpretation re-establishes the monetary thresholds and standards for bribery-related prosecution and sentencing.[31] In essence, the minimum bar for most prosecutions of offering bribes to state functionaries has been raised from RMB 5,000 to RMB 30,000, and that of offering bribes to non-state functionaries has been raised from RMB 5,000 to RMB 60,000.[32] A summary comparing the previous monetary thresholds and the new ones is set out as follows:

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Offence	Previous Thresholds	New Threshold
"Bribe-giving" cases		
Offering of a bribe to a state functionary	RMB 10,000	RMB 30,000, or RMB 10,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Offering of a bribe to a non-state functionary	RMB 100,000 where the person offering the bribe is an individual, and RMB 200,000 where the person offering the bribe is an entity	RMB 60,000 where the person offering the bribe is an individual, or RMB 20,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Offering of a bribe to an entity	If an individual offers bribes to an entity, the threshold is RMB 100,000, or less than RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Opinions on Prosecution Thresholds of Bribe-giving Offences (the "**SPP 2000 Prosecution Standards**"). If an entity offers bribes to an entity, the threshold is RMB 200,000, or RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Prosecution Standards	N/A
Offering of a bribe by an entity	RMB 200,000, or RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Prosecution Standards	RMB 200,000 if the offer is made to an individual who can wield influence over others
Offering of a bribe to a foreign official or an officer of a public international organisation	N/A	RMB 60,000 where the person offering the bribe is an individual, or RMB 20,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Offering of a bribe to a close relative of, or any person close to, a current or former state functionary	N/A	RMB 30,000, or RMB 10,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Introduction to a state functionary of the opportunity to receive a bribe	RMB 20,000 where the introducer is an individual or RMB 200,000 where the introducer is an entity	N/A
Acceptance of a bribe by a state functionary	RMB 5,000	RMB 30,000, or RMB 10,000, if it also has an aggregate factor specified in Art. 1 of the 2016 Judicial Interpretation

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Offence	Previous Thresholds	New Threshold
Acceptance of a bribe by a non-state functionary	RMB 5,000	RMB 60,000, or RMB 20,000 if it also has an aggregate factor specified in Art. 1 of the 2016 Judicial Interpretation
Acceptance of a bribe by an entity	RMB 100,000, or less than RMB 100,000 when it also has an aggregate factor specified in the SPC 1999 Interpretation on Prosecution Thresholds for Cases Directly Handled and Initiated by the Procuratorate	N/A
Acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary	N/A	RMB 30,000, or RMB 10,000 if it also has an aggregate factor specified in Art. 1 of the 2016 Judicial Interpretation

Penalties under the *PRC Criminal Law*

Criminal penalties vary depending on whether the party offering or accepting a bribe is an individual or an entity and, if the party is an individual, whether he is a state functionary or non-state functionary. As explained above, the criminal sanctions for bribery offences involving state functionaries are generally more severe than those involving non-state functionaries.

Where the individual has received more than one bribe, the amount of each bribe will be aggregated for the purpose of determining the appropriate penalty. The table below sets out the factors taken into consideration and the corresponding penalties for the relevant offences under the legislation.

Offence	Relevant Factors	Penalty
"Bribe-giving" cases		
Natural person offering a bribe to a state functionary	Where the total bribes exceed RMB 30,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Criminal detention, or up to five years' imprisonment, and monetary penalties
	Where the total bribes range between RMB 1,000,000 to RMB 5,000,000, or the total bribes range between RMB 500,000 and RMB 1,000,000 if it also has an aggravating factor	Five to 10 years' imprisonment and monetary penalties
	Where the total bribes exceed RMB 5,000,000, or the total bribes range between RMB 2,500,000 and RMB 5,000,000 if it also has an aggravating factor	10 years' to life imprisonment, in combination with monetary penalties, or confiscation of property
	Where the offender volunteers information on the bribery before prosecution	A punishment may be waived, or lessened from the stipulated range, or a lighter punishment within the stipulated range may be imposed

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Offence	Relevant Factors	Penalty
Natural person offering a bribe to a close relative of, or any person close to, a current or former state functionary	Where the total bribes exceed RMB 60,000, or the total bribes range between RMB 20,000 and RMB 60,000 if it also has an aggravating factor	Criminal detention, or up to three years' imprisonment, and monetary penalties
	Where the total bribes range between RMB 1,000,000 and RMB 5,000,000, or the total bribes range between RMB 500,000 and RMB 1,000,000 if it also has an aggravating factor	Three to seven years' imprisonment, and monetary penalties
	Where the total bribes exceed RMB 30,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Seven to 10 years' imprisonment, and monetary penalties
Natural person offering a bribe to a non-state functionary or to a foreign functionary or to an official of an international public organisation	Where the total bribes exceed RMB 60,000, or the total bribes range between RMB 20,000 and RMB 60,000 if it also has an aggravating factor	Criminal detention, or up to three years' imprisonment, and monetary penalties
	Where the total bribe ranges between RMB 2,000,000 to RMB 10,000,000, or the total bribes range between RMB 1,000,000 and RMB 2,000,000 if it also has an aggravating factor	Three to 10 years' imprisonment and monetary penalties
Natural person offering a bribe to an entity	N/A	Criminal detention or up to three years' imprisonment, plus monetary penalties
Entity offering a bribe to a state functionary	In respect of such entity	Imposition of a fine
	In respect of the employees of such entity who are directly in charge of the matter in question and the employees who are directly responsible for the crime (collectively, "**Responsible Personnel**")	Criminal detention or up to five years' imprisonment, plus monetary penalties
Entity offering a bribe to a non-state functionary	In respect of such entity	Imposition of a fine
	In respect of its Responsible Personnel	Refer to the sentence guidance regarding the offence of a "natural person offering a bribe to a non-state functionary or to a foreign functionary or to an official of an international public organisation"
Entity offering a bribe to another entity	In respect of such entity	Imposition of a fine
	In respect of its Responsible Personnel	Refer to the sentence guidance regarding the offence of a "natural person offering a bribe to an entity"
Introducing an opportunity to a state functionary to receive a bribe	Where the offender volunteers information on the bribery before prosecution	Criminal detention, or up to three years' imprisonment, and monetary penalties
		A punishment may be waived, or reduced from the stipulated range

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Offence	Relevant Factors	Penalty
State functionary accepting a bribe	Where the total bribes range between RMB 30,000 and RMB 200,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Criminal detention or up to three years' imprisonment and monetary penalties
	Where the total bribes range between RMB 200,000 and RMB 3,000,000, or the total bribes range between RMB 100,000 and RMB 200,000 if it also has an aggravating factor	Imprisonment for between three and 10 years, monetary penalties or confiscation of property
	Where the total bribes exceed RMB 3,000,000, or the total bribes range between RMB 1,500,000 and RMB 3,000,000 if it also has an aggravating factor	10 years' to life imprisonment or the death penalty, and monetary penalties or confiscation of property
	A bribe involving an extremely large monetary amount and serious damage to the interests of the state and the people	Life imprisonment or the death penalty and confiscation of property
Non-state functionary accepting a bribe	Where the total bribes range between RMB 60,000 to RMB 400,000, or the total bribes range between RMB 20,000 and RMB 60,000 if it also has an aggravating factor	Criminal detention, or a fixed-term imprisonment of up to five years depending on the amount involved
	Where the total bribes range between RMB 400,000 to RMB 6,000,000, or the total bribes range between RMB 100,000 and RMB 200,000 if it also has an aggravating factor	Fixed-term imprisonment of more than five years, and/or confiscation of property
Entity accepting a bribe	In respect of such entity	Imposition of a fine
	In respect of its Responsible Personnel	Criminal detention, or up to five years of fixed-term imprisonment
A close relative of, or any person close to, a current or former state functionary accepting a bribe	Where the total bribes range between RMB 30,000 to RMB 200,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Criminal detention or up to three years' imprisonment and monetary penalties
	Where the total bribes range between RMB 200,000 and RMB 3,000,000, or the total bribes range between RMB 100,000 and RMB 200,000 if it also has an aggravating factor	Imprisonment for between three and seven years, and monetary penalties
	Where the total bribes exceed RMB 3,000,000, or the total bribes range between RMB 1,500,000 and RMB 3,000,000 if it also has an aggravating factor	Imprisonment for between seven and 10 years, monetary penalties or confiscation of property

"Aggravating factors" affecting prosecution and sentence

In the last decade, the SPC and the SPP, either jointly or individually, published several judicial interpretations to give further clarification and more concrete guidance for lower courts and procurators to follow when they prosecute and adjudicate on bribery and corruption-related crimes. The 2016 Judicial Interpretation, which is the latest judicial interpretation from the SPC and the SPP, enumerates the "aggregating factors" that shall be taken into account in connection with the prosecution and sentencing of individuals offering or accepting bribes.

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The "aggregating factors" specified in Art. 7 of the 2016 Judicial Interpretation apply to individuals who committed the offences of offering bribes by:

(i) offering bribes to three or more persons;

(ii) using illegal gains to offer bribes;

(iii) seeking promotion or adjustment of positions through offering bribes;

(iv) offering bribes to any state functionary who has supervisory and administrative responsibilities in terms of food, drug, safe production, environment protection, etc. to conduct illegal activities;

(v) offering bribes to any judicial functionary to influence judicial justice; and/or

(vi) causing economic losses in the amount of no less than RMB 500,000 and less than RMB 1,000,000.

Whereas the "aggregating factors" specified in Art. 1 of the 2016 Judicial Interpretation apply to individuals who committed the offences of accepting bribes by:

(i) having received party or administrative disciplinary sections due to graft, taking bribes, or misappropriating public funds;

(ii) having been subject to criminal prosecution for international crimes;

(iii) using grafted (i.e., embezzled) funds and goods for illegal activities;

(iv) refusing to explain the whereabouts of grafted (i.e., embezzled) funds and goods or to cooperate with recovery work, resulting in the funds and goods being unable to be recovered;

(v) causing adverse effects or other serious consequences;

(vi) asking for bribes multiple times;

(vii) seeking illegitimate benefits for others, resulting in loss to public property, the interests of the state and the people; and/or

(viii) seeking promotion or adjustment of positions for others.

With respect to bribes accepted or offered, the SPP in 2000 issued its opinion which specifies the prosecution thresholds. The threshold of prosecuting entities for accepting or offering bribes would be lowered from RMB 200,000 to RMB 100,000, if there is one of the following enumerated "aggregative factors":[33]

(i) to gain unlawful benefits through bribery;

(ii) bribery of more than three persons;

(iii) bribery of Party or government leaders, judicial officers, and administrative enforcement officers; or

(iv) to cause significant damage to the state or the people.

Mitigating factors

Pursuant to the Ninth Amendment and the 2016 Judicial Interpretation, a person who offers or pays a bribe who voluntarily confesses to his or her crime(s) before being prosecuted may receive a mitigated sentence or a lighter sentence within the stipulated range. Further, a person who offers or pays a bribe may be exempted from prosecution or receive a mitigated sentence if he/she plays a key role in resolving a significant case, or performs meritorious deeds.[34]

Statute of limitations

The limitation periods for the prosecution of a crime are:[35]

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(i) five years if the maximum penalty for that crime is a term of imprisonment of less than five years;

(ii) 10 years if the maximum penalty for that crime is a term of imprisonment of between five and 10 years;

(iii) 15 years if the maximum penalty for that crime is a term of imprisonment of no less than 10 years; and

(iv) 20 years (and may be extended on approval by the SPP) if the maximum penalty for that crime is life imprisonment or death.

The PRC Anti-unfair Competition Law

The AUCL was just updated in 2017 and is discussed in the next Section.

Overview of enforcement activity and policy during the last year

The major legislation change last year lies in the revision of the AUCL. The previous version of the AUCL was released in 1993. Over the course of the past 24 years, it has played an essential role in encouraging and protecting fair commercial competition in China. However, economic development has necessitated revisions to the AUCL.

On 4 November 2017, the 30th Session of the Standing Committee of the Twelfth National People's Congress passed important amendments to the AUCL, and the new AUCL took effect on 1 January 2018.

The definition of commercial bribery under the current AUCL

The AUCL is intended to regulate business activities which may lead to unfair competition. It prohibits, *inter alia*, "commercial bribery", which is defined as follows:[36]

(i) the use by a business operator;

(ii) of the means of giving money, property or other benefits;

(iii) to four categories of recipients;

(iv) in order to obtain business transaction opportunities or other competitive advantages.

Compared with the previous version of the AUCL, the current AUCL clarifies the definition of commercial bribery by listing three categories of entities or individuals who could be the recipients of bribes; these categories include:

(1) an employee of the other party to a transaction; (2) the entity or individual authorised by the other party to a transaction to handle relevant affairs; and (3) an entity or an individual that uses power or influence to affect a transaction.[37]

A significant change in the current AUCL, compared to the previous version of the AUCL, is that the transaction counterparty itself has been excluded from the categories of potential bribe recipients, which effectively narrows the scope of commercial bribery. It is particularly notable that while individual employees of transaction counterparties are included in the categories of potential bribe recipients, transaction counterparties themselves are excluded. On this basis, one of the potential interpretations could be that beneficial payments made between the two transactional parties, such as transactional rebates, may be excluded from the scope of commercial bribery.

The broad scope of prohibition

The term "business operators" is broadly defined as legal persons, or other economic organisations or individuals, who deal with commercial businesses or profitable services.

Pursuant to the Interim Provisions on Prohibition of Commercial Bribery issued by the State

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Administration for Industry and Commerce (the "**Anti-Commercial Bribery Provisions**"), "property" means cash and tangible assets, and includes promotional fees, advertising fees, sponsorship, research and development fees, consultancy fees, commissions and expense reimbursements paid in order to see or buy goods.[38] The term "other benefits" can include things such as the provision of tours and travel within China or abroad.[39]

Special provision for commercial bribery conducted by employees under the current AUCL

The previous version of the AUCL did not specifically address whether unauthorised conduct of commercial bribery by an employee is attributable to the business operator. In practice, however, the authorities typically regarded any commercial bribery carried out by an employee as an instance of commercial bribery carried out by the individual's employer.

The current AUCL makes it clear that that bribery committed by an employee of a business is deemed to have been committed by the business.[40] However, the current AUCL provides an exception that if the business has evidence that the act of the employee is irrelevant to seeking a transaction opportunity or competitive edge for the business, the business will not be liable.[41] The burden is on the employer to provide such evidence.

Safe harbour provisions for the provision of rebates and commissions

The current AUCL retains the safe harbour provisions which allow a business to explicitly pay a discount to the other party to the transaction, or pay a commission to an intermediary, as long as both parties faithfully make a record in their accountancy book.

It is important to note that under the Law of the PRC on Donations for Public Welfare (the "**Donation Law**"), donations are to be made voluntarily and *gratis*. Any monetary or goods contributions that are made as donations but with the commercial purpose of seeking economic benefits or transaction opportunities will be seen as commercial bribes.[42] The Anti-Commercial Bribery Provisions also provide that business operators shall not provide gifts in the form of cash or articles to counterparties, except for small-amount advertising gifts in accordance with business practices.[43]

Penalties under the current AUCL

There are three levels of penalties provided by the current AUCL. Where an administrative offence of commercial bribery is found to have taken place but which does not constitute a criminal offence, the authorities will confiscate illegal gains resulting from the offensive conduct, and, depending on the severity of the conduct, impose a fine of between RMB 100,000 and RMB 3,000,000. Further, the authorities are empowered to revoke the business licence of the business operator in question if the situation is sufficiently serious.[44] Whether an act of commercial bribery is considered sufficiently serious will be determined on a case-by-case basis.

Furthermore, according to Art. 26 of the current AUCL, where a business receives an administrative penalty for engaging in commercial bribery, the supervision and inspection authority will record the penalty in the business operator's credit record as a matter of public record.

Where the violation in question is minor, the business operator will not face administrative penalties if it corrects such misconduct in a prompt and timely fashion. This change, introduced in the current AUCL, appears to address concerns from the business community that the previous version of the AUCL does not credit business operators for maintaining effective compliance programmes and/or taking steps to discover and rectify misconduct.

The current AUCL additionally provides that business operators which carry out commercial bribery and cause damage to third parties are liable to pay compensation. Art. 17 of the

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current AUCL clarifies that the amount of compensation payable is determined *as per* the actual loss of the business incurred for the infringement or if it is difficult to calculate the actual loss, *as per* the benefits acquired by the tortfeasor from the infringement. Moreover, the amount of compensation shall also include reasonable disbursements made by the business to prevent the infringement.

Law and policy relating to issues such as facilitation payments and hospitality

There is no similar exception under the China laws for facilitation payments or hospitality, like the one under the US Foreign Corrupt Practices Act of 1977 (the "**FCPA**"). Therefore, to determine whether facilitation payments and hospitality constitute a violation or offence in China, it is essential to determine the "money or property" for the purpose of obtaining "improper benefits" under the *PRC Criminal Law* and "commercial bribery" under the AUCL, which have been discussed above.

Key issues relating to investigation, decision-making and enforcement procedures

The risks discussed above are global, and companies operating in China and in the global environment should implement policies and procedures to help prevent violations and remediate them as soon as any potential issue surfaces. Such policies and procedures should include elements of prevention, investigation and remediation.

Prevention − effective compliance programme

An effective compliance programme, which incorporates tough anti-bribery policies and comprehensive internal control measures reflecting a strong stance against corruption from the board of directors and senior management, can lead to early identification of corruption risks. Such a programme should focus on the company's policies and procedures with respect to gifts, entertainment and other hospitality, and on dealings with third-party representatives and business partners, who should undergo due diligence to ensure compliance, sign anti-corruption representations and be subject to anti-corruption training as appropriate.

A compliance or audit function that periodically reviews company practices for corruption risk, and a group that oversees the implementation and maintenance of the anti-corruption programme, are both critical to early detection and prevention. Confidential reporting channels – for example, a private hotline, through which employees can feel safe to report issues – has also proven effective in detecting risks. Such reporting avenues need to be accompanied with assurances that no retaliation will result from reporting corruption. Appropriate training for all levels of the organisation, as well as positive incentives that promote compliance with company policy and the law, should be prescribed. It is vital that the programme be updated periodically to ensure it keeps pace with continuing developments in anti-bribery laws and regulations in China.

Investigation − quick and adequate response to corruption allegations

Corporations must be prepared to conduct internal investigations of corruption allegations, whether raised as a result of the compliance programme or raised by enforcement agencies, the media or whistleblowers.

It is important and prudent to carefully choose the body responsible for conducting any internal investigation. There may be instances where an independent investigation is required. Allegations involving senior management, or investigations requiring specialist skills, should ideally be handled by independent, external counsel.

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The designated investigative body should be properly resourced and the scope of the investigation should be proportionate to the scope of the allegations. Any investigation in China should be conducted in accordance with Chinese privacy, labour and other local laws. Attorney-client privilege should also be maintained to provide confidentiality and protect against retaliation.

Remediation – appropriate corrective measures

Should an internal investigation corroborate corruption allegations, corporations must implement appropriate and adequate remedial measures with appropriate oversight by the board of directors.

Corporations should examine and correct gaps identified in the existing corporate policies and compliance programmes. It is also advisable for corporations to assess whether the identified issues affect its internal controls over financial reporting, and take appropriate remedial steps accordingly.

Consideration should also be given to whether the identified issues should be disclosed to authorities, having regard to the improper conduct and practices identified, the company's legal obligations, and disclosure obligations under local and/or foreign laws.

Conclusion

Anti-corruption enforcement is increasingly global in scope. As summarised above, China has been aggressively enforcing its own anti-corruption laws on a sustained basis. This has and will continue to mean vigorous multinational anti-corruption enforcement, targeting domestic and foreign companies and individuals.

With adequate preparation and resources, companies can effectively avoid costly risks. Corporations with business in China should have appropriate preventative measures, well-functioning investigation procedures and, if necessary, remediation measures so as to mitigate any potential financial and reputational risks. Those measures will help to minimise, if not eliminate, the risks that employees fall foul of as a result of China's anti-corruption measures, as well as anti-corruption laws of other jurisdictions. These risks will not go away without the right corporate attitude, resources and attention, and vigilance is key to protecting companies and individuals in this increasing-enforcement environment.

Overview of cross-border issues

Foreign entities operating in China face the potential of being investigated and charged in connection with this aforementioned sustained anti-corruption campaign. In the summer of 2013, GlaxoSmithKline ("**GSK**"), a British pharmaceutical company listed on both the London and New York stock exchanges, became the focus of the biggest corruption scandal in China involving a foreign company. The GSK chain of events was set in motion by two chains of e-mails accusing GSK of bribing doctors in order to promote GSK's medical products.[45] In September 2014, GSK was found by the Changsha Intermediate People's Court in Hunan Province, China to have offered money or property to non-government personnel in order to obtain improper commercial gains, and was found guilty of bribing non-government personnel. As a result of the Court's verdict, GSK was ordered to pay a fine of RMB 3bn (£297m) to the Chinese government.[46] Five former GSK senior executives were sentenced to suspended imprisonment of two to three years.[47]

Following the GSK bribery investigation, the State Administration of Industry and Commerce stated that local Administrations of Industry and Commerce should pay

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more attention to industries affecting the public interest (including the pharmaceutical industry), strengthen their supervision over the bidding activities carried out by industry players, and conduct thorough investigations against any commercial bribery arising from the bidding process.[48] A number of foreign drug manufacturers – UCB, Novartis, AstraZeneca PLC, Pfizer, Bayer AG, and Roche Holding AG − were subsequently visited by the Chinese authorities.[49] There were also news articles reporting that Sanofi SA and Eli Lilly were visited by the Chinese authorities as well.[50]

Recently we have seen more FCPA enforcements announced by the DOJ and the SEC in the technology and manufacturing industries, in addition to the traditional FCPA focus areas such as pharmaceutical and medical devices. It is likely that technology and manufacturing industries (especially automobile electronics manufacturing) will also be areas of anti-corruption focus for China.

Another major problem regarding cross-border bribery & corruption issues lies in the jurisdiction of the PRC courts. As discussed above, foreigners or foreign entities are subject to the same legislation when doing business in China.[51]

Corporate liability for bribery and corruption offences

The *PRC Criminal Law*

Offence	Thresholds	New Threshold
"Bribe-giving" cases		
Entity offering a bribe to a state functionary	RMB 200,000 if the offer is made to an individual who can wield influence over others	Imposition of a fine on the entity Criminal detention or up to five years' imprisonment, plus monetary penalties, for the employees of such entity who are directly in charge of the matter in question and the employees who are directly responsible for the crime (collectively, "**Responsible Personnel**")
Entity offering a bribe to a non-state functionary	RMB 200,000	Imposition of a fine on the entity For Responsible Personnel, refer to the sentence guidance regarding the offence of a "natural person offering a bribe to a non-state functionary or to a foreign functionary or to an official of an international public organisation"
Entity offering a bribe to another entity	RMB 200,000, or RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Prosecution Standards	Imposition of a fine on the entity For Responsible Personnel, refer to the sentence guidance regarding the offence of a "natural person offering a bribe to an entity"
Acceptance of a bribe by an entity	RMB 100,000, or less than RMB 100,000 when it also has an aggregate factor specified in the SPC 1999 Interpretation on Prosecution Thresholds for Cases Directly Handled and Initiated by the Procuratorate	Imposition of a fine on the entity For Responsible Personnel, criminal detention or up to three years' imprisonment and monetary penalties

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Proposed reforms / The year ahead

In March 2018, the National People's Congress of the People's Republic of China passed a State Council restructuring plan that merges: the State Administration for Industry and Commerce; the State Administration of Quality Supervision, Inspection and Quarantine; the State Food and Drug Administration; the Price Supervision and Anti-Monopoly Bureau under the National Development and Reform Commission; the anti-monopoly bureau under the Ministry of Commerce; and the Anti-monopoly Commission of the State Council into a new government agency called the "State Administration for Market Regulation", which is under the supervision of the State Council.[52] On 10 April 2018, the State Administration of Market Regulation was officially established.[53]

The functions of the State Administration of Market Regulation include: overall administration of the market; supervision of market participants' registration and the establishment of a public sharing system for such information; enforcement of regulations for market supervision; enforcement of antitrust regulations; maintenance of the market system; implementation of national quality strategy; administration of industrial product quality and safety, food safety, and special equipment safety; and unification of measurement standards, inspection, testing, certification, and accreditation. The State Food and Drug Administration will work under the State Administration of Market Regulation and be responsible for the registration and supervision of pharmaceuticals, cosmetics and medical devices, and implement supervision and management.[54]

* * *

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Czech Republic

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Brief overview of the law and enforcement regime

Combating bribery and corruption, both in the commercial and government/state-related spheres in the Czech Republic, is regulated mainly under criminal law. However, the civil law regime related to combating bribery also applies in the commercial sphere, mainly in the form of rules on the prohibition of unfair competition.

Criminal law regime

Both bribery and corruption are criminal offences under Czech law. Under Czech law, soliciting and/or accepting a bribe, as well as offering, providing and/or promising a bribe, are considered as criminal offences, no matter whether committed directly or through a third person, or whether committed in the commercial or government/state-related sphere. In addition, there are the following specific criminal offences related to corruption and bribery in some specific sectors: (i) discrimination in public procurement, public tender and public auction; and (ii) intrigues related to public procurement, public tender, public auction and insolvency proceedings.

In this respect, the offence of discrimination generally consists in favouring, to the detriment of others, certain contractor/s in a public procurement proceeding, public tender or public auction, while soliciting, accepting, offering, providing or promising a bribe. The offence of intrigues generally consists in soliciting, accepting, offering, providing or promising a bribe in order to affect the results of a public procurement, public tender, public auction or insolvency proceedings.

Under Czech criminal law, a bribe is understood not only as monetary remuneration but in broader terms as any unjustified advantage consisting of direct enrichment or other advantage to which there is no entitlement, and which may be given to the bribed person or any other person appointed by the person bribed. Bribery/corruption-related criminal offences are not limited solely to state matters or the civil service sector as such. In practice, they apply to any matter related to administering matters in the public interest, and also in relation to one's own business or third person's business. Public interest in this sense is understood in a wider scope than just issues related to state power. Public interest is understood as the interest of the whole society, or at least a certain group of people. Therefore, this category also covers affairs such as football corruption, bribery related to university admission, or bribery related to issuing driving licences to applicants who failed driving tests, etc.

Bribery and corruption is considered as a criminal offence also in cases when no state matters or public interest are involved. However, in such cases, bribery and corruption are considered as a criminal offence only if committed either in relation to business activities, or in relation to insolvency proceedings.

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In addition, certain activities which are not specifically classified as bribery or corruption under the Czech Criminal Code, but which significantly enable bribery or corruption to happen or to remain unpunished, are considered to be criminal offences. These criminal offences include: (i) patronisation, which consists in helping a perpetrator of a bribery/corruption-related crime to escape criminal prosecution or serve a sentence; (ii) failing to prevent a crime, which consists of failure to prevent the preparation or commission of a bribery/corruption-related crime of which one has reliable knowledge; (iii) failing to report a crime, which consists of failure to report to the police or state prosecutor a bribery/corruption-related crime that was committed by another person; (iv) public incitement of a bribery/corruption-related crime; and (v) public connivance in a bribery/corruption-related crime.

Criminal liability of individuals and legal entities

Both natural persons (individuals) and legal entities (with a few exceptions) can be held criminally liable for bribery/corruption-related offences. Criminal liability of individuals and legal entities is based on parallel and independent principles, which means that not only both an individual and a legal entity can be found guilty for a crime, but also that a legal entity can be found guilty for a crime even if there is no evidence indicating which particular individual committed the crime.

Criminal law sanctions

The main sanctions that may be imposed for bribery/corruption-related crimes upon natural persons (individuals) include:

- imprisonment of up to 12 years;
- forfeiture of the property of the convicted;
- forfeiture of things used or intended for committing the crime or things gained by the crime or as remuneration for it;
- pecuniary penalty ranging from €4 to €2,000 per day for a minimum of 20 and maximum of 730 days; and
- a ban on certain activities related to the crime committed, from 1 to 10 years.

Regarding the sanction of banning certain activities, in cases of business corruption, courts often impose a ban on holding corporate functions in companies (including membership of boards of directors, etc.) or on carrying on relevant business as an individual entrepreneur. In cases of corruption in public services, courts usually impose a ban on further employment in the public services sector.

Other sanctions which can be imposed over natural persons (individuals) for bribery/corruption-related crimes, but which are not commonly imposed in practice, include house arrest, community service and, in cases of foreign nationals, banishment.

The main sanctions which may be imposed for bribery/corruption-related crimes on legal entities include:

- forced dissolution of the legal entity;
- forfeiture of property of the legal entity;
- pecuniary penalty ranging from €40 to €80,000 per day for a minimum of 20 and maximum of 730 days;
- forfeiture of things used or intended for committing the crime or things gained by the crime or as remuneration for it;
- ban on certain activities related to the crime committed from 1 to 20 years;

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- ban on participation in public procurement, public tenders and other similar proceedings from 1 to 20 years;
- ban on receiving grants and subsidies from public sources from 1 to 20 years; and
- publishing in the mass media, at the perpetrator's cost, information about the crime committed and the sentence imposed.

Other consequences of bribery/corruption-related crimes

Conviction for a bribery/corruption-related offence may have a number of consequences for the convicted in the civil law sphere. These consequences arise automatically by law, and do not have to be imposed expressly by court.

Any person who has been sentenced for a bribery/corruption-related criminal offence related to business activities is disqualified both from serving as a corporate representative (a member of a board of directors, supervisory board, etc.) of a company, and running a business as an individual entrepreneur. Such disqualification lasts until the criminal offence is expunged from the perpetrator's Criminal Register by court. Expunging the sentence from the perpetrator's Criminal Register is not subject to any specific deadlines; a court expunges the perpetrator's Criminal Record based on the perpetrator's application and after the court recognises that the perpetrator has managed to live an orderly life for a sufficient period after his/her sentence.

Apart from the ban on participation in public procurement, public tenders and other similar proceedings, legal entities sentenced for a bribery/corruption-related crime are automatically disqualified from any public procurement proceedings for limited period of time from five up to 30 years based on the seriousness of the crime.

Investigation of crimes

The main state bodies involved in criminal prosecution are police, state prosecutors and courts. Any criminal investigation is commenced by the police. The police act upon their own findings and suspicions, and also upon a report which can be filed by anyone to the police or to the prosecutors. If such report or the police's own investigation turns out to be based on facts and shows that a crime may have been committed, the police officially transfer the investigation to the public prosecutor and continue the investigation under the prosecutor's supervision. Once the prosecutor is convinced (based on the evidence) that there are enough facts and evidence to support the case, the charges are officially pressed and the case goes before court.

Apart from police, state prosecutors and courts, there is also a specialised unit within the Ministry of Finance which plays an important part in combating bribery and corruption. This specialised unit is called the Financial Intelligence Office and, under the Czech Anti Money-Laundering Act, its primary task is to investigate money laundering cases. However, in practice, its findings often lead also to cases involving bribery and corruption.

Civil law regime

Bribery in the private sphere is also covered by provisions on prohibition of unfair competition under the Czech Civil Code. According to these provisions, bribery (both in the form of offering a bribe and accepting a bribe) which may cause harm either to other competitors or to customers, is forbidden among competitors. Persons whose rights might be breached or jeopardised by such act of bribery can require the offender to refrain from such conduct and to remedy the existing situation; in addition, they can also claim an appropriate satisfaction (typically in the form of monetary compensation), for damage caused and surrender of unjustified enrichment.

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Overview of enforcement activity and policy during the last year

High-profile bribery and corruption cases

In the last year, the following major high-profile final court judgment regarding bribery and corruption was passed:

A former health minister and regional president was found guilty after being caught red-handed carrying an alleged bribe in the amount of €270,000. The bribe consisted of money originating from EU funds which were being allocated to numerous public procurement projects. These projects were regularly overpriced and the surplus was then distributed between several top regional politicians and related construction companies. The proceedings lasted for seven years.

The following are the main ongoing high-profile bribery/corruption-related cases and investigations involving governmental and parliamentary politicians:

- Several individuals and companies (including a former councillor of Prague) are accused of manipulation in public procurements regarding two hospitals in Prague. Allegedly, an entrepreneur offered bribes in order to secure who (which company) won public procurement tenders.
- A former director of a hospital in Prague charged with bribe accusations was found guilty by a first instance court. He was given an 8½ year prison sentence for accepting bribes for manipulations in public procurement and securing that a specific company won public tenders. The judgment is not final and it will be decided by a competent regional court in the appeal procedure.
- A former director of a hospital in Liberec, his wife and a representative of a health company, were acquitted of alleged acceptance of a bribe in the amount of CZK 23,000,000 (approximately €902,000) for manipulations in public procurement resulting in favouring several companies in deals with the hospital. Judgment is not final, as the public prosecutor appealed.

Sectors with a reputation for increased levels of bribery and corruption

Based on a report of the Ministry of Interior for the year 2018, corruption and bribery occur mostly in the area of public procurement, sport and the health industry. According to the report, this should be viewed as a failure of individuals rather than a systemic problem. In the Governmental Policy for Fight against Corruption for years 2018 to 2022, the health industry is indicated as very risky in respect of corruption potential. Additionally, the government plans to focus on the fight against bribery and corruption in the following areas: enforcement of overdue obligations (executions) by executors; the energy industry; telecommunications; and road traffic.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

Czech law does not specifically regulate or forbid facilitation payments or hospitality to business partners. However, in practice, the legality of facilitation payments to state officials (being understood as a payment to an official to expedite performance of his/her official duties) would be assessed under general rules on combating bribery and corruption. It can be assumed that in this respect, in many cases facilitation payments would be likely to be classified as illegal bribery or corruption under Czech criminal law. Under the Act on Civil Service, the public servant may not accept gifts or other benefits in connection with their service, the value of which exceeds CZK 300 (approximately €12).

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Hospitality

Hospitality to business partners and government officers (being understood as small gifts, invitations to lunch, tickets to concerts or museums, etc., provided not to influence a specific matter, but in order to keep a good relationship with the business partners and government officers in general), is relatively widespread in the Czech Republic. On 14 December 2015, the Czech government adopted the general Ethical Code on Conduct of Officials and Employees of the Public Service, which is binding on all public servants. In addition, in the private sector, in the past few years many large companies (usually branches of international corporations) have adopted similar codes of conduct which either forbid or significantly limit any acceptance of or provision of gifts from/to state officials, and sometimes also from/to business partners.

Key issues relating to investigation, decision making and enforcement procedures

Criminal law proceedings

Court trial in criminal proceedings under Czech law is strictly in the public law regime. The state is represented by the state prosecutor, who seeks to prove the guilt of the accused in front of the court as an independent body. The role of a legal representative within a court trial is mainly to represent and defend the accused. The position of the injured/damaged party is slightly weaker within a criminal case trial. S/he is entitled to claim damages within the criminal proceedings, but if the court does not have enough evidence to decide this claim within the criminal proceeding, the court refers the injured/damaged party to separate civil proceedings. If there is a reasonable concern that the claim of the injured/damaged party may be jeopardised or complicated, the court can secure the claim by imposing a ban on the accused, disposing of the relevant part of his/her property.

Police investigation can be commenced upon a report by any member of the public or any legal entity. In recent years, it has often happened that a publicly known entity, such as an NGO or a fund, has filed such a report, especially in bribery or corruption cases. Upon such report or its own findings, the police are obliged to start a pre-investigation. During this pre-investigation, the police may require clarification and procure relevant documents and materials from anybody.

If the findings obtained at this stage of investigation show that a crime has been committed and indicate the most probable suspect, the police officially press charges against the suspect and begin the prosecution. The prosecution involves a more thorough investigation and is administered by the state prosecutor. Although the investigation must (according to applicable laws) be terminated within two, three or six months depending on the seriousness of the offence, in practice the investigation usually lasts significantly longer.

The prosecution proceedings may be terminated (besides several other less common reasons) mainly upon findings that the offence has not been committed, or not by the prosecuted person. Otherwise, the prosecutor formally charges the prosecuted before court. All evidence, including the witness interrogation, is executed again before court. The convicted and the state prosecutor have a right to appeal against the court decision within the period of eight days to a court of higher instance.

Possibilities to mitigate potential criminal law sanction

In case of serious criminal offences, including bribery and corruption, committed by an organised group, an accused who is an individual (not a legal entity) may decide to act as a so-called “cooperating prosecuted”. To be recognised as a cooperating prosecuted by

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the court, the accused must: (i) plead guilty, and (ii) provide substantial information which may help to investigate the criminal offence or to hinder its committal. The cooperating prosecuted status in practice results in mitigation, in some cases not even the imposition, of a criminal law penalty over the relevant accused, depending on the level to which information provided by the cooperating prosecuted contributed to investigation of the crime. However, the cooperating prosecuted status may not be obtained automatically upon pleading guilty; it must be expressly approved by the prosecutor and recognised by the court.

Self-reporting of a bribery/corruption-related crime by the perpetrator is considered as a mitigating element in criminal law cases, and can lead to significant mitigation of criminal law penalty. However, this applies only to perpetrators who are individuals (not to legal entities).

There is no deferred plea agreement in Czech criminal law; however, a similar result may be reached as the prosecutor can in his/her sole discretion conditionally terminate the criminal proceedings, if appropriate. The prosecutor takes into account especially the seriousness of the alleged crime and cooperation of the perpetrator in the criminal proceedings. Conditional termination of the criminal proceedings against legal entities has not been used very often in the past (only very few cases since 2011); however, the Czech Bar Association and the Prosecutor General's Office concluded a memorandum at the end of 2018 that supports use of the conditional termination of criminal proceedings.

Although the memorandum is not aimed at criminal proceedings against legal entities specifically, it should apply to all criminal proceedings including criminal proceedings against legal entities. It must be noted that one of the requirements for a conditional termination of the criminal proceedings is that the accused confesses that he/she/it committed the act for which they are being prosecuted.

Under Czech criminal law, any person who finds out that another person committed the crime of bribery or corruption is obliged to notify the police or a prosecutor about such crime. If he/she fails to do so, he/she may be sentenced to up to three years. However, this obligation does not apply to related persons.

Overview of cross-border issues

The Czech police and state prosecutors cooperate with international bodies such as EUROPOL and INTERPOL. The High Public Prosecutor's Office is also represented in the European Unit for Judicial Cooperation between EU member states – Eurojust, and is a member of the European Judicial Network.

Obtaining evidence from other EU Member States for the purposes of combating bribery and corruption is further enabled by the European Evidence Warrant (EEW) which is also applicable in the Czech Republic. The EEW is a judicial decision which may be issued by a court, public prosecutor or other judicial authority to request objects, documents and data. The EEW is then recognised by the executing authority without further formalities.

Under the Czech Criminal Code, Czech citizens cannot be extradited for prosecution or to serve a sentence in other countries. However, this applies with the exception of extradition to another EU country based on the European Arrest Warrant. The European Arrest Warrant was established by Council Framework Decision 2002/584/JHA, and it applies where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months for an offence punishable by imprisonment, or a detention order for a maximum period of at least one year.

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Corporate liability for bribery and corruption offences

Under Czech law, there is no specific criminal offence that would be comparable to the strict liability corporate offence of "failing to prevent bribery" (established by the UK, the Bribery Act 2010, and where the only defence for a company is to show that its corporate body had adequate procedures in place).

However, to a certain extent, a company could be held criminally liable for failing to establish internal procedures to prevent corruption and bribery anyway. In general, in the Czech Republic a company can be held criminally liable for bribery/corruption related offences if the act of bribery/corruption is in practice done by the company's officer, director or employee. Specifically in relation to employees, the company will also be held criminally liable for its employees' acts of bribery which resulted from insufficient procedures within the company and/or insufficient supervision by the company over its employees. However, unlike the corporate offence of "failing to prevent bribery" under the UK Bribery Act 2010, criminal liability of a company for acts of bribery committed by its employees is not considered as a strict liability.

On the other hand, a company can discharge itself from criminal liability if it makes every effort that can be justifiably required to prevent a crime being committed by its officers, directors or employees. Many companies adopt compliance programs with the purpose of fulfilling this condition. Nonetheless, such compliance program must not only be written but must also be effectively performed. If not, discharge from criminal liability is not to be declared, and the company may bear all negative consequences.

Only a few companies have been found guilty for bribery/corruption crimes; pecuniary penalty has always been imposed as a sentence (from CZK 300,000 up to CZK 5,000,000).

Proposed reforms / The year ahead

Whistleblower's Act

A proposal of law on the protection of whistleblowers (as implementing law of the EU Directive on the protection of persons who report breaches of Union law) has been submitted by the Czech government into the inter-ministerial comment procedure. If passed successfully through the inter-ministerial comment procedure, the proposal will be submitted to the Parliament.

Lobbying Act

A proposal of a framework law for lobbying regulation has been submitted by the Czech government to the Parliament. The proposal aims to make the legislative procedure more transparent and give the public access to information regarding contacts between politician and high-level state officials and lobbyists. The regulation of lobbying has been recommended by the Group of States against Corruption (GRECO).

Amendment to Act on Public Prosecution

Currently, there are four bills before Parliament aimed at amending the Act on Public Prosecution in the area of appointing leading public prosecutors (including the Prosecutor General) and removing them from office. The amendments also contain regulation of public prosecutors' term of office. Nevertheless, all the four bills are in a very early stage of the legislative process, and there is no political agreement on their reading so far.

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France

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Brief overview of the law and enforcement regime

France has seen major changes in bribery and corruption law since the landmark 9 December 2016 Law on transparency, corruption and modernisation of the economy (the "*Sapin II*" law), France's version of the FCPA.

Today, two key bodies of law make up France's anticorruption framework: criminal statutes on corruption (mostly in the French Penal Code); and the uncodified part of the above-mentioned "*Sapin II*" law that imposes anticorruption compliance obligations on corporations.

French criminal law: A complex web of bribery and corruption offences

French criminal bribery and corruption statutes are notoriously complex (an author counts as many as 34 separate criminal offences for bribery and influence peddling alone), and explicitly cover a wide range of situations and possible perpetrators.

While it would take too long to list all the applicable offences, current provisions of the French Penal Code on bribery distinguish between bribery and influence peddling. Bribery implies the improper use of authority associated with one's function, while influence peddling ("*traffic d'influence*"), implies the improper use of one's actual or alleged influence (e.g. to get another official to do or not to do something). They are different offences but usually carry the same maximum sentences.

These provisions punish both the briber and the bribed party. For each type of bribery or influence peddling, each party in the *quid pro quo* is covered symmetrically by a different offence. Depending on the individual's actions (i.e. giving or receiving the bribe), the charge will be of "active" or "passive" bribery (this also applies for influence peddling), and two parties to the "transaction" may even get different judicial outcomes.

In this respect, it is worth noting that a wide range of bribed officials or individuals, including private agents, can be sentenced. Separate provisions and lines of case law cover the bribery of public officials (defined broadly), of officials of international public organisations (like the EU), of judicial officials, of private officials (e.g. officers of a company in charge of procurement), and of foreign government officials.

Fines and prison sentences vary for each specific offence (e.g. 10 years' imprisonment and a €1m fine for active bribery of a foreign public agent). Following the general rule of art. 131-38 of the French Penal Code, fines are quintupled for legal persons. Additionally, under art. L.2141 of the French Public Tenders Code ("*Code des marchés publics*"), corporations convicted of bribery or certain other offences may be excluded from public tenders for a set time period.

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Anticorruption compliance requirements under Sapin II

The 9 December 2016 Law on transparency, corruption and modernisation of the economy, nicknamed "*Sapin II*" after the minister in charge at the time, is France's comprehensive anti-corruption reform and a response to laws such as the FCPA and the UK Bribery Act. Building on existing criminal procedure statutes, the law toughened corruption sanctions and introduced new transactional tools (see below).

Most importantly, the law imposed stringent compliance obligations on large corporations and created the French Anti-Corruption Agency ("*Agence Française Anticorruption*", "AFA").

Since June 2017, companies incorporated in France and exceeding certain size and turnover thresholds are required to have an anti-corruption compliance programme that meets certain specifications.

Compliance programmes under *Sapin II* must be tailored to prevent acts of bribery and influence peddling, and must include the following measures:

- a code of conduct;
- an internal whistleblowing mechanism;
- a corruption risk-mapping system;
- a risk assessment process for clients, suppliers and intermediaries;
- internal or external accounting controls;
- training programmes for employees exposed to higher risks of corruption and influence peddling;
- a disciplinary procedure for ethics violations; and
- an audit mechanism to assess the effectiveness of the compliance programme.

The AFA provided guidance on these aspects with its 2017 recommendations and its "Guide on the corporate anti-corruption function" in January 2019. It may also answer some more specific anti-bribery compliance questions through its office in charge of supporting economic actors.

One of the AFA's missions is to audit companies to make sure such programmes are implemented.

Accordingly, presidents, directors and managers of companies subject to *Sapin II*, as well as the companies themselves as legal entities, may be held administratively liable for failure to implement a compliance programme. Notably, presidents, directors and managers of companies subject to *Sapin II* may not delegate their powers in this field. In other words, it means that although the AFA highly recommends to appoint a chief compliance officer (whose position within the company must guarantee his/her independence and direct access to the Board of Directors), the latter may not be held liable should the AFA consider that the company failed to implement its anti-bribery compliance programme.

Pecuniary sanctions can go up to €200,000 for presidents, directors and managers, and up to €1 million for companies. In addition, the AFA's Sanctions Committee (the AFA's independent body in charge of adjudicating claims of noncompliance after audits) may order the publication of the sanction in the press.

By 2018, the AFA had already conducted around 50 audits, and this figure is increasing in 2019. Consequently, companies must anticipate AFA's audits and strengthen their anti-bribery compliance programmes. To do so, companies should rely on the questionnaire

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released by the AFA on its website and which AFA's agents use in the frame of on-site audits. Companies should also conduct interview training so as to be prepared for offsite audits.

To make sure that all aspects of their anti-bribery compliance programme are covered, companies should ask law firms and audit firms to assist them in this "exercise". Obtaining anti-bribery certification delivered by a recognized organisation is also recommended, because it shows the robustness of the anti-bribery compliance programme in place.

Beyond anti-bribery compliance

Sapin II must not be reduced to its anti-bribery compliance provisions. Indeed, this law also tackles bribery through other provisions that: (i) enable whistleblowing within companies and protect whistleblowers from any type of retaliation; and (ii) regulate lobbying practices.

- *Whistleblowing*

Pursuant to Sapin II, any company having at least 50 employees must determine the appropriate legal instrument for the implementation of procedures enabling whistleblowing.

Sapin II defines a whistleblower as "*a physical person who reports, selflessly and in good faith, a crime or an offence, a serious and obvious breach of an international commitment duly ratified or approved by France, of a unilateral act from an international organization issued on the basis of such commitment, of law or regulation, or a serious threat or harm to the public interest, of which he has personal knowledge*".

Whistleblowers must not be subject to discriminatory measures, and any retaliation by an employer following an alert will be considered null and void under French labour law.

Preventing someone from raising an alert is a crime punishable by up to one year of imprisonment and a criminal fine of up to €15,000 (the legal entity itself may face a criminal fine of up to five times this amount, i.e. €75,000).

According to *Sapin II*, the whistleblower should raise the alert with his/her hierarchical manager, employer or the person designated by the employer for that purpose (the referent).

If the alert is not addressed within a reasonable time period, the alert can be raised to the relevant administrative or judicial authority, or to the professional authorities and if the alert is still not addressed within three months, the whistleblower may disclose it to the public through the press or social media.

Where there is a serious and imminent threat or risk of irreversible damage, the whistleblower may bring the alert directly to the attention of the administrative or judicial authority, or to the professional authorities. The whistleblower may also alert the public directly.

During the entire whistleblowing process, the identity of the whistleblower, the information provided and the person(s) involved in the reported alert must remain confidential. Revealing information that could lead to the identification of a whistleblower is punishable by up to two years' imprisonment and a criminal fine of up to €30,000 (the legal entity itself may face a criminal fine of up to five times this amount, i.e. €150,000).

- *Regulation of lobbying practices*

Under French law, lobbyists basically include any legal entities where a director, employee or member:

- has devoted more than half of his or her time within the last six months to an activity which consists in communicating on his own initiative with public decision-makers and whose purpose is "to influence one or several public decisions"; or

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- has entered into communication at least 10 times within the last 12 months (on an ongoing basis) with public decision-makers, on his own initiative, in order "to influence one or several public decisions".

These criteria apply to all companies worldwide as long as one of their directors, members or employees – working in France or abroad – meets one of the above-mentioned conditions. Lobbyists are also individuals who engage in professional activities in an individual capacity under the same conditions.

The public decision-makers with whom lobbyists may communicate "to influence one or several public decisions" include, *inter alia*: members of Government and of ministers' offices; MPs, Senators and parliamentary assistants; assistants/advisors to the President of the French Republic; directors of independent administrative authorities, etc.

Lobbyists must register with the High Authority for Transparency in the Public Life ("HATVP") and annually provide a set of information regarding their lobbying activities and the resources they allocate to such activities. This information is publicly available on the HATVP's online register.

In their relations with public decision-makers, lobbyists must declare their identity, the company they work for, and the interests they represent. Lobbyists must also follow ethical rules that notably prevent them from, *inter alia*:

- offering or giving to public decision-makers any gifts, donations or benefits whatsoever having a significant value;
- undertaking any action with such persons with a view to fraudulently obtaining information or decisions;
- obtaining or attempting to obtain information by intentionally providing such persons with false information or by using misleading tactics;
- organising conferences, events or meetings where the public speaking arrangements by such persons are tied to the payment of any form of compensation;
- using, for commercial or publicity purposes, the information obtained from such persons; or
- selling copies of documents originating from the Government or from an authority or using the official stationary or the logo of such authorities.

The HATVP ensures that lobbyists comply with these rules. In this view, the HATVP may obtain any document without business secrecy being invoked against it. The authority may also carry out on-site inspections, after having obtained authorisation from the custodial judge (JLD) of the Paris Tribunal.

Failure to comply with the above-mentioned ethical rules, and failure to provide the information required by the HATVP regarding lobbying activities, constitute criminal offences punishable by one year in prison and a fine up to €15,000 for individuals and up to €75,000 for legal entities.

Enforcement climate and tools

The enforcement climate for white-collar offences, including corruption offences, has been getting tougher over the last few years.

The 2016 *Sapin II* law and earlier changes, such as the creation of a national financial prosecutor ("*Parquet National Financier*", "PNF") in 2014, initiated a tougher enforcement culture, with French prosecutors now willing to take the lead in major cross-border cases and use newly-created transactional tools.

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Sapin II introduced that change by creating an equivalent to the US deferred prosecution agreement (DPA) called the "judicial public interest agreement" ("*Convention judiciaire d'intérêt public*", "CJIP"). The agreement does not require admission of guilt (hence maintaining access to government tenders), and has been extended to white-collar offences other than bribery following its success. It cannot be entered into by physical persons (but they have access to another transactional procedure that mandates a guilty plea). French prosecutors took advantage of the tool immediately: to date, seven CJIPs have been entered into since 2017, for total penalties and disgorgements exceeding €1,084bn.

Overview of enforcement activity and policy during the last year

France's bribery and corruption law landscape is at a turning point in 2019. After a long-awaited alignment of its anti-corruption arsenal on international standards with the 2016 *Sapin II* law, the priorities of French legislators and regulators are now twofold: completing the implementation of the 2016 reform, and bringing change to other areas to continue building a French compliance law that meets or exceeds international expectations.

For bribery and corruption law, this translates in practice as a thorough effort by the AFA to provide entities with "soft law" guidance on practical compliance issues such as: how to structure the corporate compliance function; how to deal with issues that may arise in M&A; or gifts and invitations policies (see below).

Interestingly, the AFA initiated in the summer of 2019 administrative sanctions proceedings against French corporation Sonepar, following an on-site audit. The agency argued in front of its Sanctions Commission that the corporation's anticorruption programme did not comply with the law. Alleged breaches included improper cross-border implementation of the risk-mapping system, and accounting controls not adequately addressing corruption risks. In its 4 July 2019 decision, the Sanctions Commission acquitted the corporation on all charges.

Faced with criticism for both its lack of directions to companies and its lack of resources to conduct thorough audits, the AFA will be reinforced by the expertise of law firms and audit firms (notably firms from the so-called "Big 4") which will assist the Agency in its audits.

On the judicial front strictly speaking, prosecutorial "Americanisation" is on the rise, with increased use of transactional tools and fines (in deals or in court decisions) never seen before in the French system. This follows a long rise, over the last decades, of prosecutor-led proceedings ("accusatory") in a legal culture that has historically favoured "inquisitorial" proceedings.

The UBS criminal tax fraud case, which ended in February 2019 in a €3.7bn fine for provision of banking services to help tax evasion, is a good example of that new trend. The bank refused transactional solutions after long negotiations (a guilty plea, and then CJIP, were on the table), and got the largest fine ever ordered by a French criminal court. Although the outcome may eventually be different on appeal, authorities are sending the message that French justice can have significant deterrence, and that corporations should seriously consider transactional outcomes where there is clear evidence of serious wrongdoing.

Law and policy relating to issues such as facilitation payments and hospitality

French criminal law does not have a specific exception for either "facilitation payments" or gifts/hospitality offered to government officials. This means that all improper gifts or advantages may be construed as bribery (or a similar offence).

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Facilitation payments

Under French Law, the fact that a bribery payment is made for the sole purpose of getting an official (such as a customs official or law enforcement officer) to do his or her job consisting of "routine governmental action" is not a valid excuse to avoid liability. This is true regardless of the party initiating the facilitation payment.

Neither the French Penal Code nor other sources allow facilitation payments, which means that individuals or corporations taking part in these payments may be charged with public domestic or international bribery offences. While it is not a prosecution or investigation agency *per se*, the AFA has a documented position of assimilating facilitation payments to bribery offences.

Corporations should therefore note the differences between French Criminal Law and the FCPA on that aspect when drafting their anti-corruption policies.

Gifts and hospitality

Similarly, the French Penal Code does not provide for any exception for gifts and hospitality offered to public officials. Until very recently, there was no official guidance, and corporations often modelled their policies on standards applicable in other countries such as the United States.

The AFA will, however, be issuing shortly a "*Guide on gifts and invitations policies for corporations, associations and foundations*" to help entities draft their anticorruption policies on that matter. The agency published a draft version for comments in July 2019 and the definitive version, while nonbinding, will serve as a useful reference tool. In its draft, the AFA offers step-by-step guidance on the items to consider when drafting a policy (e.g. whether to set fixed maximum amounts, transparency and accounting considerations…) alongside examples of problematic conduct a policy should prevent.

Finally, it is worth keeping in mind that French bribery statutes, unlike some of their foreign counterparts, also cover private bribery (see overview of the law above). This means that a well-drafted policy should address gift-giving practices to non-public-sector individuals as well (e.g. gifts to a purchasing manager of a client or prospective client).

Key issues relating to investigation, decision-making and enforcement procedures

Cooperation, a staple of US-style enforcement once seen as incompatible with French legal culture, was recently heavily encouraged by joint AFA-PNF guidelines on CJIPs published last July. In the guidelines, the agencies cite the implementation of an effective compliance programme, and cooperation of the targeted entity, as key factors to reach a CJIP agreement with prosecutors.

The agencies explicitly say that cooperation can reduce penalties, designating self-reporting and cooperation through internal investigations turned over to the government as essential factors for the prosecutors not only to decide whether to allow a transactional outcome, but also to determine the sentence/fine.

In practice when negotiating a CJIP, a lack of cooperation can result in harsher fines and/or disgorgements. In the first ever signed CJIP in the HSBC case (2017), the agreement noted to justify the heavy fine that "*[the defendant], which neither voluntarily disclosed the facts to the French criminal authorities, nor acknowledged its criminal liability during the course of the investigation, only offered minimal cooperation in the investigation*."

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Overview of cross-border issues

Heavy fines on French corporations in sanctions matters (such as the US$8.9bn fine for French Bank BNP Paribas in 2014) or anti-bribery (like Alstom's 2014 US$772bn fine) have made cross-border bribery enforcement a very sensitive issue in the French political space. Many of these cases are perceived as improperly extraterritorial, and several congressional investigations were initiated on that matter since 2014.

Cross-border evidence collection and the French blocking statute

There is today a recognition, across party lines, of the need for more protection of French companies' data and documents that has incited the government to act upon the issue.

France has long been wary of certain proceedings seen as extraterritorial application of foreign jurisdiction. Consequently, since 1968 France has had a "blocking statute" (amended in 1980) designed to prevent the abuses of entering discovery requests or subpoenas (commonly considered as "fishing expeditions") on French entities or individuals. It criminalises the transmission of information to foreign courts outside the channels set forth by treaties (such as the 1970 Hague Convention for civil matters or mutual legal assistance treaties for criminal issues).

While the law is widely considered not to be strictly enforced (only one case to date sanctioned a violation), things may change soon as a consensus emerges around the need for a more credible enforcement of the statute (see reform projects below).

Local and European prosecutors take the lead in cross-border cases

Some major cases show that French prosecutors may be evolving, from not participating in major cross-border bribery cases to joining the DoJ in existing cases, and finally to now taking the lead in cross-border cases.

- For example, shortly after its creation in 2014, the PNF tacked on the DoJ case mid-investigation in *Société Générale*, which resulted in parallel US DPA and French CJIP with AFA monitoring in June 2018.
- The PNF and SFO (UK Serious Fraud Office) are currently conducting a joint investigation in the *Airbus* case following self-reporting by the corporation in 2016, with the DoJ reportedly opening its investigation later on and separately.

In the longer term, it will be interesting to see if increased anticorruption enforcement by French and European prosecutors on domestic targets means a decreased focus of US agencies on European entities. One of the rationales of stronger bribery laws and enforcement practices in France was to show that the country is "doing its part" in fighting corruption, but only time will tell if the strategy is effective.

Corporate liability for bribery and corruption offences

Criminal liability for corruption offences

Art. 121-2 of the French Penal Code sets out the liability of legal entities as a general principle for all offences committed on their account by their organs or representatives. The same article notes that "*the criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act*", meaning that both individuals and corporations can be found guilty of criminal offences like bribery, without needing different legal bases.

Anticorruption compliance as a mitigating or aggravating factor

Involvement – or lack thereof – of the top management in corruption prevention is already

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a major theme in case law since, under French law, criminal liability attaches to the corporation as a result of the acts of its "organs or representatives" (i.e. its directors, officers or governing bodies).

Now that anticorruption compliance programmes are mandated for large companies and audited by the AFA, the quality of these programmes (and audit results, if the corporation was audited by the AFA) can be an important factor in a legal case.

The AFA has publicly declared that it is willing to share with French or foreign judicial authorities the results of certain audits, and corporations themselves may want to use favourable AFA audit reports as evidence of their good faith efforts to fight corruption.

Proposed reforms / The year ahead

A new emphasis on cooperation and self-reporting

Cross-border cooperation will undoubtedly be a marquee theme of next year's investigations landscape, with cases such as Airbus being pursued simultaneously, with varying degrees of cooperation, by the PNF, the SFO, and the DoJ.

Self-reporting will also be a topic to follow, as France has long had its reservations on that practice. After adopting it for tax, competition and other areas of the law, the new guidelines from the AFA and the PNF may shift French anticorruption culture on this point.

A proposed reform of the blocking statute and a reaction to the US CLOUD Act

After several failed reform attempts by previous legislatures, French MP Raphaël Gauvain was tasked with writing a report on economic intelligence issues related to cross-border proceedings, and worked closely with the Ministry of the Economy on a reform proposal that would create a clearer evidence transmission regime, in conjunction with certain recent changes introduced by the GDPR.

On 26 June 2019, a report to the Prime Minister proposed among others:

- A stricter enforcement of the statute, with heightened sanctions in case of transmission of evidence in civil or criminal proceedings (up to two years' imprisonment and a €2m fine for physical persons, €10m for legal entities).
- Mandatory registration with the Ministry of the Economy's economic intelligence office ("SISSE") of corporations targeted by foreign investigations. The executive may directly conduct the dialogue itself in certain important cases where strategic issues are at stake.
- Administrative sanctions of up to €20m for physical persons, and 4% of the global turnover for legal entities for technology companies (e.g. cloud services providers) that unlawfully transfer data abroad in anticipation of litigation. This provision aims at limiting the extraterritorial effects of the US CLOUD act and its coercive power on French or European companies.
- Finally, Mr. Gauvain suggests extending the legal privilege to in-house counsel, as only attorneys currently enjoy that protection. This would allow France to align itself with other jurisdictions on the issue, giving corporations the opportunity to assess frankly the legal implications of a situation (i.e. without creating incriminating evidence with their work product).

The Prime Minister reacted favourably to some of Gauvain's propositions. To date, the government has not yet released a timeframe for the implementation of such a reform.

The general idea of the reform is not to block cooperation but to limit extensive information-gathering operations that may have unwanted effects when target entities are deemed strategic.

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The reform will be sensitive as it will have to balance fundamental national economic interests with the necessary leeway companies need to defend themselves.

* * *

Endnotes

1. Essentially having 500 employees or more in France – or globally for groups headquartered in France – and having an annual turnover of €100m or more. See art. 17 of the law and AFA's website for precise scope information and examples.
2. AFA Sanctions Commission decision 19-01 "*Société S SAS et Mme C*" dated 4 July 2019 (https://www.agence-francaise-anticorruption.gouv.fr/fr/document/premiere-decision-commission-des-sanctions-lagence-francaise-anticorruption).
3. AFA, "*Point sur la problématique des paiements de facilitation*", presentation dated September 2018 published on AFA's website (https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/2018-09_-_Paiement_de_facilitation_-_D2AE_-.pdf).
4. AFA, "*Guide Pratique: Politique cadeaux et invitations dans les entreprises, les associations et les fondations*", draft project for comments published in July 2019 (https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-ouvre-consultation-publique-sur-projet-guide-jusquau-30-septembre-2019).
5. AFA, "*Lignes directrices sur la convention judiciaire d'intérêt public*" (Guidelines on the Judicial Public interest Convention), 26 June 2019 (https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf).
6. GAUVAIN, R., "*Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale*" (Re-establishing French and European sovereignty and protecting our companies from extraterritorial laws and measures), Report to the Prime Minister dated 26 June 2019.

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Germany

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Brief overview of the law and enforcement regime

In 2018, Germany took the 11th rank in Transparency International's *Corruption Perception Index* (CPI). Although the rank was better than in the previous year, Germany's overall rating on the scale of 100 points decreased to 80 points from 81 points in the previous year. The CPI set out as the reason, that in the German economic sector corruption is increasingly perceived as a threat, especially with regard to the activities of construction and public procurement.

The German law features a strong institutional and legal anti-corruption framework. Offering, giving and taking bribes constitutes a criminal offence; facilitation payments are also prohibited. Even small-value gifts and hospitality for public officials may constitute a criminal offence depending on the benefit, its value and the intention of the provider.

Enforcement of bribery abroad has increased significantly in recent years, and a large number of prominent German companies and individuals from businesses have been successfully prosecuted. Companies can be held liable for corruption offences committed by their representatives under the German Act on Administrative Offences (*Ordnungswidrigkeitengesetz* – OwiG), with fines of up to €10 million and seizure of all economic advantages obtained through bribery.

Most of the relevant provisions regarding bribery are included in the German Criminal Code (*Strafgesetzbuch* – StGB). The key provisions are taking and giving bribes in commercial practice (Sec. 299 StGB), taking and giving bribes in the public health sector (Sec. 299a ff. StGB), and taking and giving bribes in the public service sector (Sec. 331 ff. StGB). Next to them, there are further provisions forbidding bribery, *e.g.*, bribing delegates (Sec. 108e StGB) or interfering with an election of the works council (Sec. 119 of the German Works Constitution Act; *Betriebsverfassungsgesetz*).

The German anti-bribery laws provide for a criminal liability of both the giving and the receiving party of bribes. In connection with bribery, other criminal offences are often also being committed, such as embezzlement and tax evasion.

The German Criminal Code is applicable with regard to criminal offences committed in Germany. However, criminal offences committed abroad can also fall within its reach, in particular, if individuals with German nationality are involved and/or parts of the criminal act have been committed in Germany.

Taking and giving bribes in commercial practice

Section 299 StGB prohibits taking and giving bribes in commercial practice.

It is forbidden to grant an advantage to an employee and/or to an agent of a business as consideration for an unfair preference with regard to the purchase of goods or services in

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Germany or abroad. The same applies if the advantage is granted in exchange for actions in connection with the purchase of goods and services, which constitute a violation of the employee's or agent's duties towards the business. Inversely, an employee or an agent of a business commits a criminal offence if he/she requests or accepts an advantage in exchange for an unfair preference with regard to the purchase of goods or services in Germany or abroad, or if the benefit is accepted in exchange for actions in connection with the purchase of goods and services, which constitute a violation of the employee's or agent's duties towards the business.

The scope of the advantage is very broad and includes any direct or indirect benefit which the receiving party is not entitled to or by which they gain a better position than they were in before. Advantages can be invitations for dinner or to a concert, gifts or concluding a contract which is in favour of the receiving party.

The advantage must be granted to an employee or an agent of the business. An agent is any person who can act on behalf of the business and who can influence business decisions.

The advantage must be given as consideration for an unfair preference with regard to the purchase of goods or services. Whether the advantage granted amounts to unfair influence on the receiving party when making their business decision depends on the circumstances of the specific case. Advantages that are considered socially adequate could be granted. This includes, for example, small tips, a small present for a birthday or anniversary, and invitations for lunch in a normal restaurant. German law does not provide for a specific threshold, however, amounts of €40–60 are usually considered socially adequate.

Taking and giving bribes in the public health sector

Taking and giving bribes in the public health sector is prohibited according to Sections 299a and 299b StGB.

These provisions are applicable to health care professionals including, *inter alia*, doctors, veterinarians, psychotherapists, pharmacists and physiotherapists. Similar to taking and giving bribes in commercial practice, it is forbidden to grant an advantage to healthcare professionals as consideration for an unfair preference when prescribing or purchasing drugs or medical devices, or when referring patients or diagnostic material both in Germany and abroad. In addition to the person granting the advantage, the health care professional taking it is also subject to a criminal liability.

Sections 299a and 299b StGB are particularly relevant with regard to health care professionals working in medical centres. Medical centres are places where several health care professionals are working in close proximity, *e.g.*, an orthopaedist, an apothecary, a physiotherapist and a manufacturer of orthopaedic devices are sharing the same premises. This constellation, whilst generally admissible, poses a high risk that advantages are being granted to the orthopaedist for the referral of patients to the other healthcare professionals working in the same medical centre. In addition to risks arising from Sections 299a and 299b StGB, the respective professional laws concerning healthcare professionals set out rigid conditions to be respected when running a medical centre.

Taking and giving bribes in the public service sector

With regard to bribery in the public services sector, two types of criminal offences can be differentiated.

First, it is forbidden to grant an advantage to a German or European public official or to a person entrusted with special public service functions *for the performance of an official act* (Sec. 331 StGB). Public officials are, *inter alia*, civil servants, judges, persons who

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otherwise carry out public official functions and persons who have otherwise been appointed to serve with the public authority in Germany or in the European Union.

However, the criterion "for the performance of a lawful official act" is subject to a very broad interpretation and shall also include donations made to them with the intention to create a positive climate. Advantages that are considered socially adequate may be granted. This includes, for example, small tips, a small present for a birthday or anniversary, and invitations for lunch in a normal restaurant. German law does not provide for a specific threshold, however, amounts of €20–30 are usually considered socially adequate.

The offence shall not be punishable if the competent public authority authorises the acceptance of the benefit by the recipient either in advance or upon prompt report by the recipient.

Second, it is forbidden to grant the advantage for the public official currently or in the future *performing an official act and thereby violating his/her official duties* (Sec. 332 StGB). The duty that the public official is violating can result from laws and regulations. Further, the violation of internal rules of procedure or instructions of the public official's superior can be sufficient. With regard to the granting of advantages to public officials abroad, criminal liability is limited to the future performance of an official act (Sec. 335a StGB).

The advantage must be given in order for the public official to conduct their official act with or without a breach of their official duties. Whether the advantage granted is suitable for this depends on the circumstances of the specific case. Next to the person granting the advantage, the public official and/or the other person entrusted with special public service functions taking the advantage are criminal liable (see Sec. 333 StGB and Sec. 334 StGB respectively).

Bribing delegates

According to Section 108e StGB, a member of a federal parliament or a state parliament can be held criminally liable if he/she takes an unlawful advantage as consideration for performing their duties resulting from her mandate. The same applies, *inter alia*, with regard to members of the parliament of the European Union and members of a parliamentary assembly of an international organisation. Next to the respective delegate, the person giving the unlawful advantage is criminally liable.

The advantage is not unlawful if it has been given in compliance with the rules applicable to the person taking it. Relevant provisions are stipulated, *inter alia*, in the German Act of the Members of the *Bundestag* (*Abgeordnetengesetz*) or in the German Law on Political Parties (*Parteiengesetz*). Further, the advantage must be given for a specific act of the delegate conducted within the execution of their parliamentary duties. Therefore, advantages given by political interest groups to delegates for them representing certain political ideas in a general way do not fall within the reach of Section 108e StGB.

Sanctions

Both taking and giving bribes in commercial practice (Sec. 299 StGB), and taking and giving bribes in the public health sector (Sec. 299a, 299b StGB) shall be punished with a fine or imprisonment not exceeding three years. In especially severe cases, the punishment can be imprisonment of up to five years, *e.g.,* if the offence is related to an advantage of high value or if the offender is acting commercially or as a member of a gang (Sec. 300 StGB). Whether or not the advantage is considered as being of high value depends on the specific case, and the amounts mentioned by legal scholars vary from €10,000 to €50,000.

Taking and giving bribes in the public service sector with regard to the discharge of an

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official duty (Sec. 331, 332 StGB) shall be punished with a fine or imprisonment not exceeding three years.

Taking and giving bribes in the public service sector with regard to the violation of official duties (Sec. 332, 334) shall be punished with a fine or imprisonment not exceeding five years. In especially severe cases, the punishment can be imprisonment of up to 10 years, *e.g.*, if the offence is related to an advantage of high value or if the offender is acting commercially or as a member of a gang (Sec. 335 StGB). Whether or not the advantage is considered as being of high value depends on the specific case, and the amounts mentioned by legal scholars vary from €10,000 to €50,000.

Convictions for bribery that are related to companies or their representatives shall be registered in the competition register and may cause that company to be excluded from public procurement tenders. The register is not open to the public and entries in the register shall be regularly deleted after five years (Sec. 2, 6 and 7 Competition Register Act).

Investigation and proceedings

In Germany, there is no central federal investigation authority dealing with bribery matters. Rather, there are about 120 public prosecutors' offices spread regionally over the whole country. These are competent to investigate criminal offences (including bribery) that have been committed in their area of responsibility.

There are a few bigger public prosecutors' offices that have established specialised departments dealing with bribery matters and/or handling complex white-collar investigations. This is the case, for example, at the public prosecutors' offices in Berlin, Munich, Hamburg, Cologne and Frankfurt. Further, there are some public prosecutors' offices that have a special competence to investigate bribery and/or white-collar related offences committed within the area of other (mostly smaller) public prosecutors' offices in their region.

In many bribery cases, there is also the suspicion of tax evasion; consequently, the tax authorities are involved in the investigation alongside the public prosecutors' office. The period of limitation for bribery is three or five years depending on the relevant offence. The period of limitation for tax evasion is five years. However, if – *inter alia* – a large amount of taxes has been evaded, the period of limitation is extended to 10 years. According to decisions of the German Federal Criminal Court, a large amount of taxes is considered to be evaded if it exceeds €50,000.

Therefore, in some cases the investigation authority focuses more on the tax evasion caused by bribes, unlawfully deducted as expenses from the income, than on the bribery offence itself. This is of particular relevance if the bribery has become time-barred but the tax evasion is still enforceable.

Overview of enforcement activity and policy during the last year

Cases

In Germany, criminal investigations usually are not published, and only bigger or special cases attract the interest of the media. The following cases have been discussed in the media:

In 2018, the Bremen public prosecutors' office conducted criminal investigations against the director of the German Federal Office of Migration with regard to the suspicion that up to 2,000 residence permits had been unlawfully granted to refugees in exchange for payments or other benefits. The criminal investigation is ongoing and a decision of the criminal district court is expected for 2020.

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According to media reports, an employee of a big German company was allegedly paying bribes to the Russian ruling party in connection with the sale of medical devices to Russian customers. After seven years of investigation, the Augsburg public prosecutors' office dismissed the case against the payment of a six-digit EUR amount in 2019.

Focus

When investigating bribery cases, investigation authorities regularly investigate not just the individuals making potential bribery payments, but also the legal person involved in the illegal conduct. The fines levied on them are increasing.

Often the focus is also on tax evasion committed in connection with bribery payments, due to the longer period of limitation of tax evasion if the relevant threshold is reached.

The number of bribery investigations running against public officials with regard to invitations to dinners or on holidays by companies is also increasing.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

Facilitation payments are payments of small amounts that are made to public officials in order to induce the public official to perform an official act to which the payer is generally entitled (*e.g.*, customs or visa matters) in a faster way.

Facilitation payments made to German or European public officials are forbidden and would constitute a criminal offence for both the one taking and the one giving the payment (Sects. 331 and 333 StGB, respectively).

Facilitation payments made to foreign public officials (outside of Germany and outside of the EU) are not punishable according to German law as long as they are not made in order to obtain a future official act by which the foreign public official is breaching their official duties. However, it depends on the circumstances of the specific case whether or not accelerating the processing of an official act by the foreign public official constitutes a breach of the public official's official duties. Further, making the payment can be punishable according to local or foreign laws.

Hospitality

Hospitality is giving and taking gifts or invitations in order to maintain a "good relationship". This constitutes an advantage for the person receiving the hospitality and bears the risk of being considered bribery by investigation authorities. There are no specific provisions in Germany covering the topic of hospitality, so the general rules as set out above apply.

Whether or not hospitality is considered bribery depends on the circumstances of the specific case and, in particular, whether or not the hospitality can be considered socially adequate. If the hospitality has a direct or indirect link to a past, ongoing or future business decision, this could bear a risk of potential bribery. Further, the higher the value of the hospitality, the higher the risk that it is considered socially inadequate – with the result that a suspicion of bribery may arise.

In the private sector, hospitality is treated less restrictively than in the public sector. Standard invitations to business lunches and other kinds of hospitality are admissible if they relate to business purposes, *e.g.*, a meeting regarding the project's progress or the introduction of a new product. If public officials are involved, a specific diligence is required to avoid any indication of potential bribery, *e.g.*, by offering only hospitality of low value.

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Key issues relating to investigation, decision-making and enforcement procedures

Self reporting

German law does not provide for an obligation of individuals or corporations to (self)report possible bribery offences to the investigation authorities.

However, if bribery payments have been included as expenses in tax declarations, a correction may be necessary, and a respective notification to the competent tax authority must be filed (Sec. 153 of the German Tax Code). Not filing the correction notification (if required) could cause criminal liability for tax evasion. Filing the correction notification, however, bears a significant risk that criminal proceedings will be initiated because the tax office is obliged to report to the public prosecutors' office if they have any suspicion of bribery and, usually, when filing correction declarations, it is in some way obvious to the tax authority if potential bribery payments are the reason for making the correction.

Termination for opportunity reasons, and settlements

There are several options the prosecutor and/or the criminal court can use to terminate criminal proceedings due to opportunity reasons.

According to Sec. 153 StPO, criminal proceedings can be terminated if there is only a minor guilt of the offender. With regard to bribery cases, this is rarely the outcome of the investigation. However, criminal proceedings can be dismissed against the payment of a certain amount by the defendant (Sec. 153a StPO), too. The decision on whether or not to do so, and on the size of the amount, is at the discretion of the public prosecutor. However, the dismissal against payment requires that there is only a minor guilt of the offender.

With regard to a settlement with the public prosecutor's office, there are no specific rules. It depends on the circumstances of the specific case whether or not a settlement can be reached. The settlement can be seen more or less as an informal "agreement" between the defendant and the investigation authority on the amount to be paid as a fine and not to file an appeal against the fine order. If a settlement can be reached, and to what extent, also depends on the prosecutor handling the case. As there is no centralised agency competent for investigating bribery cases (see above), the results can vary significantly.

Whistleblowing

In April 2019, the EU adopted the Whistleblowing Directive, which applies to the public and private sector and aims to protect whistleblowers reporting infringements of EU law. The directive has until May 2021 to be transferred into German law.

The directive was created to strengthen the protection of whistleblowers, allowing them to report fraud, corruption, tax evasion or environmental destruction more safely. In particular, whistleblowers shall be protected against retaliatory measures for such whistleblowing activities, such as dismissals, downgrades or other reprisals.

Cross-border investigations

Within the European Union, investigation authorities of member states closely cooperate with regard to cross-border investigations. The willingness of national investigation authorities to cooperate with foreign investigation authorities is also increasing. For example, during witness interviews conducted by the Munich public prosecutors' office with regard to the diesel matter, members of the US Department of Justice were attending. However, no formal rules have been established yet with regard to such forms of cooperation.

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Corporate liability for bribery and corruption offences

There is no criminal liability for legal persons, but criminal and administrative offences committed by managers or other responsible persons on behalf of the management can be attributed to the legal person, with the result that an administrative fine can be imposed on the legal person (Sec. 30 OWiG). In addition, any profits generated by the offence can be seized.

In case the offence is committed by staff, the investigation authorities usually also investigate the managers or other persons responsible on behalf of the management, with the suspicion of lack of supervision (Sec. 130 OWiG). Failure to prevent, or to make it much more difficult for staff to commit business-related offences (such as bribery), constitutes an own administrative offence of management or other persons responsible on behalf of the management, which can also be attributed to the legal person according to Sec. 30 OWiG.

The fines to be levied on the legal person in case of an intentional criminal offence can be up to €10 million; in case of a negligent criminal offence, up to €5 million. In addition to the sanctions, any profits generated by the offence, such as the value of a contract concluded through bribery, can be seized by the court.

Proposed reforms / The year ahead

Currently, there are ongoing discussions by politicians to introduce a criminal law for legal persons. A first draft of the so-called Company Sanctions Act (*Verbandssanktionengesetz*) has been released to selected interest groups and associations for annotation.

The main purpose of the draft new law is to ensure that investigation against legal persons becomes mandatory and is no longer subject to the discretion of the public prosecutors' offices. Further, a significant increase of the possible fines is being discussed, reaching up to 10% of the average annual turnover of the corporate group in the past three years.

It is expected that the government will publish a formal draft of the envisaged new law very soon.

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He defends clients against criminal and regulatory proceedings in connection with a wide variety of offences including tax evasion, bribery, bankruptcy, market manipulation, insider trading and other investment fraud schemes. Dr. Thomas Helck also supports clients in connection with internal investigations, and with establishing and reviewing compliance management systems. Further, he assists clients during and in the aftermath of dawn raids, and provides compliance and anti-bribery training to managers and employees.

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Greece

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Brief review of the law and enforcement regime

Introduction

During the last year, Greece has adopted a new Penal Code and Penal Procedure Code. This has caused significant changes to Greek anti-corruption legislation. However, there is no clear legal definition of "corruption" in the Greek Criminal Law; corruption is not only a legal term but also a social phenomenon. A criminal approach to the term, according to the Greek legal theory, includes all improper or unlawful transactions or trading relations, characterised by lack of transparency, and aiming at improper economic interest.

Corruption is therefore terminologically connected with criminal law and specifically with **bribery crimes**, which incorporate all the aforementioned characteristics. Bribery crimes are described mainly in the **Greek Penal Code** (GPC) and, in some cases, in **special criminal laws**.

A procedural aspect of the term is indirectly described in the new Arts. 35 and 36 of the Greek Penal Procedure Code (GPPC), which define the scope of the anti- corruption prosecutors. Unlike the British SFO, these are not a special prosecuting authority; they are prosecutors of the first and second instance with the competence to investigate and prosecute felonies, perpetrated by public servants or political persons, aiming at improper economic interest against the Greek State. Therefore, this procedural definition of "corruption" refers to bribery in the public sector; it is narrow. and serves mainly investigation and prosecution purposes.

The anti-corruption legislation covers an extensive scope of passive and active bribery in the public and private sector such as: passive and active bribery of public servants (Arts. 235, 236 GPC) and judges (Art. 237 GPC); trading in influence (Art. 237A GPC); active and passive bribery in the private sector (Art. 396 GPC); several aspects of active and passive bribery of voters and political officials in national and communal elections (Arts. 159, 159A, 165 GPC); active and passive bribery of foreign officials according to the OECD anti- bribery convention; active and passive bribery in sport (Art. 132 Law No 2725/1999); and active and passive bribery of national or EU officials against the financial interest of the European Union (Law 2803/2000).

However, according to the new GPPC, "corruption"-related crimes in the private sector are not investigated by anti-corruption prosecutors; but they may be investigated and prosecuted by the prosecutors of financial crimes (Art. 33, 34 GPPC). The prosecutors of financial crimes and the anti-corruption prosecutors are commonly supervised by a specially designated prosecutor of the Supreme Court (Art. 33 par. 2, 35 par. 2 GPPC).

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Bribery in the public sector (Art. 235, 236 GPC)

Art. 235 GPC describes the passive, and Art. 236 GPC the active, forms of bribery in the public sector. Both criminal provisions have been changed during the latest reform of the GPC. The new law is in both cases more lenient than the older provisions and thus applicable, as "*lex mitiori*", in all pending cases.

According to Art. 235 GPC, a public servant who requests or receives for himself or another person any kind of undue advantage or a promise of such an advantage, in exchange for an action or omission in the future or in the past, within the exercise of his duties, is punished with imprisonment of between 10 days and five years and pecuniary punishment. Pecuniary punishments are imposed by the judge according to Art. 57 GPC; in this case, they can vary between €1 and €36,000. If the act is committed by the public servant professionally (i.e. as a profession), the foreseen sentence is imprisonment of between three and five years, and pecuniary punishment as aforementioned. If the public servant's actions are contrary to his/her duties, he/she shall be punished with incarceration of 5–10 years and pecuniary punishment as aforementioned, and if the act is committed by him/her professionally (i.e. as a profession), with incarceration of 5–15 years and pecuniary punishment of between €1 and €100,000.

The aforementioned punishments refer to public servants. Bribers, who are not necessarily public servants, are punished according to Art. 236 GPC (active bribery) with imprisonment of between 10 days and three years, or with pecuniary punishment of between €1 and €18,000, when the public servant's action or omission lies within the exercise of his/her duties. If the public servant's actions are contrary to his/her duties, the briber shall be punished with imprisonment of between 3–5 years and pecuniary punishment of between €1 and €36,000. Art. 236 GPC has been changed and is more lenient than the previous law. Active bribery is no longer a felony but only a misdemeanor. This results in a shorter period of time limitation in active bribery (max. eight years) than in passive bribery (max. 20 years).

Furthermore, persons with decision-making or supervision powers within an enterprise, who fail through negligence and by breaching a specific service duty to prevent a person under their command accepting bribes as a public servant or offering bribes to a public servant in favour of the enterprise, are punished with imprisonment of between 10 days and two years, or with pecuniary punishment from €1 to €18,000. This can be challenging for an enterprise's compliance and legal department and may trigger further civil liability of the enterprise. Stricter punishments (imprisonment of between 10 days and three years, or pecuniary punishment from €1 to €18,000) are imposed on persons with decision-making or supervision powers within a public enterprise or in the public sector, when they fail through negligence to prevent the bribery in their enterprise or sector department.

Changes to provisions that extend the boundaries of the public sector (former Art. 263A GPC)

In bribery crimes, the public sector was previously defined through the legal term "employee", which was broader than the one for "public servant", and was described in the former Art. 263A GPC. An employee for the purposes of Arts. 235, 236 GPC (among others) was, next to the public servants, any person who served in a legal person of private law owned by the Greek State, in organs or organisations of the EU, or in legal entities of private law which were subsidised by the Greek state or by legal persons of public law.

Art. 263A GPC was changed during the recent reform of the GPC. The definition of "public employee" for the purposes of Arts. 235, 236 GPC is now described only in Art. 13

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GPC, according to which, "an employee is a person who has been legally entrusted, even temporarily, with the exercise of public, municipal or community service, or service within another legal person of public law". This change has significantly narrowed the scope of Arts. 235 and 236, which previously included, among others, bribery in the banking system and in private enterprises subsidised by the Greek state. Pending cases of bribery in the public sector may, under conditions, be handled the same as bribery in the private sector.

Passive and active bribery in the private sector (Art. 396 GPC)

Passive bribery is punishable when taking place in the private sector, during the employee's exercise of a business activity in breach of his duties as defined by law, employment contract or internal regulation, according to Art. 396 GPC. The foreseen punishment is imprisonment of one-to-five years and pecuniary punishment of between €1 and €36,000 where the employee requests or receives the undue advantage for himself or a third person in exchange for an action or omission against his duties. The same punishment applies to whomsoever, during the exercise of a business activity, provides or promises an undue advantage to an employee in the private sector in exchange for an action or omission in breach of the employee's duties as defined by law, contract or internal regulation (active bribery).

In the Greek legal theory, bribery in the private sector has been mainly considered as a competition law crime. This is clearly stated in the new GPC by placing this criminal provision (Art. 396 GPC) in the chapter dealing with offences against assets. In the previous law, bribery in the private sector was classified among service-related criminal offences (in former Art. 237B GPC). The scope of Art. 396 GPC underlines the importance of internal business regulation of an enterprise in identifying and prosecuting an employee's breach of trust. Art. 396 GPC is expected to apply to pending cases of bribery in the public sector, due to the aforementioned narrowing of the definition of "public employee".

Further forms of bribery

The passive and active forms of political bribery are described and punished in Arts. 159 and 159A GPC, respectively. These cover the Prime Minister's, Ministers', Heads of Regions' and other officials' requesting or receiving of an undue advantage in exchange for a future or already completed action related to the exercise of their duties (passive bribery). The foreseen punishment imposed on these officials is incarceration of between five and 20 years and pecuniary punishment of between €1 and €100,000 (Art. 159 par. 1 GPC). The same punishment applies to whomsoever promises or gives an undue advantage to these political persons in exchange for an action or omission related to their duties (active bribery, Art. 159 A par. 1 GPC).

Not taking part in an election or poll, supporting a specific resolution, or voting in a particular manner in exchange for an undue advantage are further explicitly punished as forms of **political bribery** in active and passive form, as aforementioned (Art. 159 par. 2 and Art. 159A par. 2 GPC, respectively). Persons with decision-making or supervision powers within an enterprise, who fail through negligence and by breaching a specific service duty to prevent active political bribery. are punished with imprisonment of between 10 days and five years and pecuniary penalty of between €1 and €36,000 (Art. 159A par. 3 GPC).

Passive and active bribery of **judicial officials** are described in Art. 237 GPC. Passive bribery covers the officials' future or already completed actions or omissions, related to the exercise of their duties, in exchange for receiving an undue advantage or promise of this

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advantage (passive judicial bribery). The foreseen punishment is incarceration of between five and 20 years and pecuniary punishment of between €1 and €100,000 (Art. 237 par. 1 GPC). A more lenient punishment of incarceration of between five and 10 years and pecuniary punishment of between €1 and €100,000 applies to any person who offers or promises this undue advantage to a judicial official for the aforementioned purpose (active bribery – Art. 237 par. 2 GPC). Once again, persons with decision-making or supervision powers within an enterprise, who fail through negligence and by breaching a specific service duty to prevent judicial bribery in favour of the enterprise, are punished with imprisonment of between 10 days and five years and pecuniary punishment of between €1 and €36,000 (Art. 237 par. 3 GPC).

Trading in influence is punishable according to Art. 237A GPC as following: Whoever requests or receives directly or via third party any kind of advantage for himself or for another person or accepts a promise of such an advantage in exchange for undue influence, that he asserts or confirms falsely or truly, that he is able to exert over political or judicial officials or public employees, so that they commit an act or an omission in the exercise of their duties, is punished with imprisonment of between 10 days and five years (passive trading in influence) and pecuniary punishment of between €1 and €36,000. Furthermore, whoever promises, offers or gives directly or indirectly an undue advantage to a person asserting or confirming, falsely or truly, that he has the aforementioned ability, with the aforementioned purpose (active trading in influence), is punished with imprisonment of between 10 days and three years, or pecuniary punishment from €1 to €18,000.

Finally **bribery in sport** is punishable under Art. 132 par. 2 of the Law 2725/1999. It is forbidden to request or receive an advantage in order to influence the result of a sport (passive brivery in sport), as well as to provide or give such an advantage to players, coaches or referees in order to influence the result of a sport (active bribery). The foreseen punishment is imprisonment of between two and five years and pecuniary punishment from €200,000 to €2 million. If the match was indeed influenced, this is an aggravating factor and the act becomes a felony. This was punishable with incarceration from between five and 10 years. According to the new Art. 463 GPC a more lenient punishment applies (incarceration from one to six years), but the crime remains a felony.

Causing damage to the Greek State

According to the previous law, if the damage caused to the Greek State exceeded €150,000 as a result of the bribery, this aggravated the punishability of the act (previous Law 1608/1950). The foreseen sentence was lifetime incarceration. This severe legislation used to apply in most bribery cases in the public sector due to the low threshold of €150,000 and the inflexibility of the Greek prosecuting authorities when calculating this damage.

This law was abolished during the latest reform of the penal and penal procedure law. As a result of this, a shorter period of time limitation now applies to such cases (15 instead of 20 years). Only in felony cases of fraud and breach of trust, which result in damage caused to the Greek state, does the longer period of time limitation remain (20 years). This can affect several bribery cases, which may be prosecuted under the scope of breach of trust.

Special rules applying in servicing sentences

Crimes which are punished with **imprisonment** are considered as **misdemeanours;** and crimes which are punished with **incarceration**, **felonies**. According to the former Art. 99 -104 GPC, the punishment for misdemeanours (imprisonment) was, in most cases, either **suspended** or converted to a pecuniary penalty. According to the new law, in misdemeanours,

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imprisonment punishments of up to three years can be suspended. Imprisonment punishments of between three and five years are either converted to community service, or (most times partially) served in prison. A conversion to pecuniary penalty is no longer possible, except for pending cases.

In felonies, according to the previous law, an incarceration punishment could also be transformed into imprisonment upon acceptance of mitigating factors, and therefore further suspended or (more likely) converted to a pecuniary penalty. These mitigating factors remain under the new law, as well. However, incarceration punishments converted to imprisonments can no longer be further converted to pecuniary penalties. An imprisonment can be either suspended, or converted to community service, or (most times partially) served. Once again, this abolition of conversion of imprisonment to pecuniary penalty only refers to future, and not to pending cases.

Incarceration sentences, which are not transformed to imprisonment, must be served in prison, but a conditional release of the convict is possible after having served ⅖ or ⅗ of the imposed sentence.

Investigating bodies

In Greece, there is no special agency for combating corruption crimes like the British SFO. There are, however, special departments in the Public Prosecution Offices seated in the **second** ("*Efeteio*") and **first instance courts** ("*Protodikeio*") in Athens and Thessaloniki with the competence to investigate and prosecute corruption crimes, primarily in the public sector, according to the provisions of Arts. 35, 36 GPPC, which incorporate the provisions of the former Law 4022/2011.

The "Anti-Corruption Prosecutors" of the second instance supervise those of the first instance. They are all supervised and coordinated by a specially designated prosecutor of the Supreme Court in Athens ("*Areios Pagos*"), who further supervises the "prosecutors of financial crime". Next to the "Anti-Corruption Prosecutors", the "financial crime prosecutors" are competent to investigate and prosecute mainly tax and custom crimes, as well as crimes which are "important for the public interest".

It is important to note that in Greece, the Prosecution Office is part of the judicial authority and prosecutors enjoy judicial status. According to the Greek Penal Procedure Code (GPPC), primary investigation in the pre-trial stage is generally conducted by an **investigating judge**. Law 4022/2011 and Art. 587 GPPC further regulate that primary investigation in corruption crimes, as defined in Art. 35 GPPC, must be conducted by a specially designated, experienced judge ("investigating judge of Law 4022/2011").

Other legal consequences

Bribery crimes are, by definition, basic to money laundering. This triggers further liability for legal entities that gain an illicit advantage due to the bribery, according to Art. 45 of the Law 4557/2018 (which implemented Arts. 58, 59 of the AML-EU Directive 2015/849 into Greek law). Although legal entities cannot be subjects of criminal liability according to the Greek Criminal Law, the administrative liability described in this provision includes the imposition of an administrative penalty of between €50,000 and €10 million. Further administrative sanctions that can be imposed separately or jointly on the legal entity are: the closing of the enterprise or some sectors of the enterprise, for between one month and two years; the prohibition of capital-raising in the enterprise for the same period; the prohibition on opening affiliate stores for the same period; and the exclusion of the enterprise from

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public competitions and contracts with the Greek State or other legal entities of the public sector for the same period.

Overview of enforcement activity and policy during the last year

In the last year, Greece has implemented the new Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. The Law 4557/2018 repeats the provisions of the Directive.

Greece further implemented the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union in the Greek Law 4478/2017. According to Art. 5 of the Law (equivalent to Art. 10 of the Directive), the Greek State had stated its willingness to establish national institutions allowing confiscated property to be used for the public interest or social purposes.

A special Secretariat for Financial and Economic Crime Unit ("SDOE") was established in 2018: with the ministerial decision No 242/2018; its mission is to ensure the adequate management of property frozen with a view to possible subsequent confiscation.

Last year, Greece ratified a new Penal Code and Penal Procedure Code. The impact of this change was described in the introduction.

Facilitation payments and hospitality

According to Greek Law, a facilitation payment is considered to be a bribe and it is not permitted. Greek law and policy regarding "hospitality" is not clear. According to the Greek anti-corruption legislation, there is no specific boundary to distinguish "permitted" from non- permitted, illicit advantages. In that sense, any kind of advantage to which the recipient is not legally entitled can theoretically be a bribe. An exception can be made however, when the advantage is socially adequate and justified according to special characteristics of each occasion. For example, it is acceptable for pharmaceutical companies to provide short accommodation to doctors, but not to the doctors' families, when sponsoring a medical conference. The aforementioned point of view has not been changed during the recent reforms in the Greek penal and penal procedure law.

Investigation, decision-making and enforcement procedures

Prosecution in Greece used to operate under a very strict **principle of legality**. This meant that prosecutors did not have the ability to choose whether to prosecute or not, when they had adequate evidence regarding the guilt of the defendant. According to the new GPPC, the prosecutors may operate under the principle of opportunity in less severe misdemeanours (Art. 48 GPPC) and, instead of proceeding with the prosecution, impose a community service measure on the defendant.

There was **no plea bargaining** in Greece and once the prosecution had been initiated, a judicial decision had to take place, either in the pre-trial stage or in a court hearing. This rather inflexible system led to a great number of prosecutions and, respectively, a great number of court hearings. On the other hand. it was not unusual for a court hearing to end with an acquittal decision. This was changed during the latest GPPC reform.

Alongside the aforementioned Art. 48 GPPC, the prosecutor and the defendant may bargain the punishment in several felonies, as described in Art. 303 GPPC. However, the defendant must confess and plead guilty as accused. The "deal" refers only to a sentence which is milder. In less severe felonies (up to 10 years' incarceration), an incarceration penalty

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can be reduced to an imprisonment and thus eventually be suspended or converted to a community service. This plea bargaining is designed for the pre-trial procedure. However, it can also take place at the trial stage, in the first stage of the hearing, before the witness examination, according to Art. 303 par. 7 GPPC. Another procedure that may divert the trial stage, is described in Arts. 301–302 GPPC, in crimes with victims, and has a restorative character. As a result of this penal procedure reform in Greece, prosecution will be, for the first time, operating under the principle of opportunity. The results of this change are to be evaluated in the judicial practice.

There are some special provisions regarding **crown witnesses** and **whistleblowers** in bribery crimes in the Greek Penal Procedure Code and the Greek Penal Code. Specifically, Art. 263A GPC provides some leniency measures for **crown witnesses** as follows: Active bribery in the public and private sector remains unpunished, if the person of his own volition and before being examined in any way regarding his act, reports it to the prosecutor. Furthermore, if the person responsible for a bribery act contributes substantially to the disclosure of the participation of an employee, he will receive a mitigated punishment and, in some cases, the prosecution may be suspended. The main purpose of these provisions is to punish the employees, who are in most cases public servants, and combat bribery efficiently.

Art. 47 GPPC concerns **whistleblowers** with respect to bribery crimes. This new institution in Greek Law, which was created in 2014, refers to persons who, contrary to crown witnesses, have not participated in the illicit bribery act and wish to report it. Art. 47 GPPC provides them the necessary protection, both legal and actual, from the actions of the persons accused for bribery crimes. The whistleblower status is granted by the prosecutor of the first instance and confirmed by the specially designated "anti-corruption" prosecutor of the Supreme Court in Athens.

In order to achieve efficiency in anti- corruption policy, the **Greek Law 4312/2014 offered a mitigated sentenc**e, among others, in cases of bribery against the Greek State, if the defendant **fully compensated** the Greek State for the loss it suffered due to his actions. This Law was very important in practice because, if the damage caused to the Greek State exceeded €150,000 (which was the case in most cases), the foreseen sentence was lifetime incarceration (Law 1608/1950). A mitigating sentence could therefore ensure the suspension of the sentence until the end of the procedure before the appeal court and in the end, the release of the convict after a shorter period of jail time. After the recent abolition of Law 1608/1950, this mitigated sentence, as described in Law 4312/2014, refers to the current, more lenient, frame of punishment.

Overview of cross-border issues

In recent years, Greek justice has dealt with some serious cross-border bribery cases, among others in the pharmaceutical and arms industry. As Greek prosecution and investigating officials have had to cooperate with other prosecution officials in the EU and the United States, several cross-border issues arose within the procedure of mutual assistance in criminal matters.

Greek prosecution and investigating officials are not familiar with the **principle of specialty** in mutual assistance in criminal matters. They therefore tend to use the material received by the foreign prosecution office as they wish and sometimes against the volition of the foreign prosecution office. This judicial malpractice (due to the lack of understanding of the Greek authorities) has been confirmed both in cases of **direct interstate mutual assistance** between Greek prosecution and investigating offices and foreign prosecution officials

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(specifically between the Greek investigating Judge and the Prosecution Office of Bremen, in a bribery case in the arms industry), as well as in **Eurojust-governed mutual assistance** between several prosecution officials (specifically in a bribery case in the pharmaceutical sector). In both cases, the Greek authorities used the mutual assistance material in order to prosecute several persons, **without prior consent** of the foreign authorities.

In one case, this resulted in the prosecution of a British citizen in Greece for bribery, fraud and money laundering, who had been already convicted in the UK after having pled guilty and provided crucial material to the SFO, which were then sent to the Greek prosecution authorities for further investigation. The Greek prosecutor and investigating judge used this very material in order to prosecute the British citizen in Greece, against the expressed volition of the SFO! However the aforementioned malpractice was recently spotted by the Chief Prosecutor of the Supreme Court, who recently circulated a note to all investigating judges and prosecutors, instructing them to respect the principle of specialty (Circular Note 6/2019).

Defence lawyers and foreign prosecution officials should therefore explicitly provide detailed instructions to the Greek prosecution and investigating authorities, about the extent of usage of the material with a view to specific defendants.

Bribery by a corporate body

According to Greek criminal law, legal entities cannot be held criminally liable. Although so-called "administrative liability" does have a punitive nature, it is governed by administrative- and administrative procedure law. This means that administrative penalties and sanctions imposed can only be challenged before administrative, and not criminal courts.

On the other hand, legal entities can be held as "victims" of a crime, according to Greek criminal law. This is very important because in the Greek Criminal Procedure Code, every "victim" of a criminal action (anyone "directly damaged by the crime") has the right to actively participate in the criminal proceedings and be represented by a lawyer as a **civil plaintiff**, "to support the prosecution" (not the prosecutor). According to the previous GPPC, the "civil plaintiff" had to present to the court an active civil claim against the defendant, in order for him to participate in the criminal proceeding. This was decided according to the rules of civil (not criminal) law, but was changed in the latest GPPC reform. Anyone who is "directly damaged by the crime" may now participate in the criminal proceeding and "support the prosecution".

Recently, in several bribery cases in the public sector and the pharmaceutical Industry, the Greek State raised such claims as a "victim of the crime". These claims were accepted by the courts and the Greek state participated in the criminal procedure as "victim" next to the prosecutor through the lawyers of the Greek State.

In a recent bribery case against Greek and German officials in the arms industry, who had been employees of two German companies, the Greek State (participating in the procedure as "victim"), invited the German companies to participate in the trial as "civilly liable parts" for the actions of the defendants. This meant that corporate entities could be named as quasi-"defendants" in the criminal procedure but **within a civil action, raised before the criminal court.** A "civilly liable part" was therefore not a criminal defendant *stricto sensu*, but he had all the rights of a participant in the criminal procedure, aiming to prove the innocence of the defendant, in order to avoid further corporate civil liability resulting from the actions of the defendant. However, the institution of the "civilly liable part", deriving from the civil law, was abolished in the latest GPPC reform. As a result, all these "civilly liable persons" will be/have been expelled from pending trials.

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Proposed reforms / The year ahead

In the weeks coming, several amendments or changes are about to occur to the GPC and the GPPC. As far as corruption crimes are concerned, it seems that active bribery (Art. 236 GPC) will be a felony once again, in severe cases. Such an anticipated stricter regulation will be effective only for future prosecutions.

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Hong Kong

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Brief overview of the law and enforcement regime

Introduction

Hong Kong continues to have a reputation for strong anti-corruption laws and an effective enforcement regime, being currently ranked second in Asia, behind only Singapore. Over the past three years, Hong Kong has improved its ranking in the *Transparency International Corruption Perception Index* (CPI), rising from 18th out of 167 countries in 2015 to 14th out of 180 countries and territories in 2018.[1]

Corruption reports lodged with Hong Kong's main government body responsible for the investigation and prevention of corruption, the Independent Commission Against Corruption (ICAC), have been declining steadily from the early 2010s. In the last few years, there have also been new developments on a number of high-profile enforcement actions, which clearly demonstrate the ICAC's determination to continue fighting corruption at the highest echelons of Hong Kong's government as well as the business community. The ICAC's success in these high-profile enforcement actions will continue to be the key for Hong Kong to further advance in the CPI ranking and to maintain its strong anti-corruption reputation.

The enforcement bodies

The ICAC was established in 1974 with the purpose to investigate and prosecute corruption offences, and also to educate the public about corruption, and work with relevant government departments to improve processes. For that purpose, the ICAC has three separate departments:

- the Operations Department;
- the Corruption Prevention Department; and
- the Community Relations Department.

The Operations Department is responsible for investigating corrupt practices under the Prevention of Bribery Ordinance, Cap. 201 (POBO), the Elections (Corrupt and Illegal Conduct) Ordinance, Cap. 554 (E(CIC)O), and the Independent Commission Against Corruption Ordinance, Cap. 204 (ICACO). The Corruption Prevention Department exists to reduce opportunities for corruption occurring within the Hong Kong government and other public bodies (by, for example, examining the practices and procedures of the government), and the Community Relations Department for educating the public on issues of corruption and obtaining public support for the work of the ICAC.

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The ICAC is an independent body accountable and subject only to the Chief Executive of Hong Kong's orders and control. It is led by a Commissioner who is directly appointed by the Chief Executive (the "Commissioner").[2]

The ICAC is assisted by other government departments, such as the Hong Kong Police and the Department of Justice, as well as regulatory bodies such as the Securities and Futures Commission (SFC). Several departments of the Hong Kong Police, including the Commercial Crime Bureau, regularly assist the ICAC in its investigations, while the Department of Justice provides legal advice from time to time, or as requested by the ICAC. The SFC assists the ICAC in the investigations of listed companies and listed company personnel, and also refers its cases to the ICAC for further investigation, and provides expert evidence to the ICAC as required.

The legal regime

Hong Kong's main law governing relevant bribery and corruption offences is the POBO. It regulates both the public and private sectors. The public sector covers government departments, public bodies, prescribed officers[3] and public servants.[4] Prescribed officers include the civil service, while public servants extend beyond employees of the government. The private sector covers anyone in a principal and agent relationship.

The POBO does not define the term "bribery". Rather, it creates offences that proscribe the soliciting, accepting or offering of an advantage.

The offences

There are seven specific offences under the POBO that relate to bribery in the public sector and one which has general application to both the public and private sectors.

Official bribery

The seven specific public sector offences are set out in Part II of the POBO in sections 3 to 8 and 10.

Sections 3 and 10 solely target prescribed officers. Section 3 makes it an offence for prescribed officers to accept or solicit an advantage without the general or special permission of the Chief Executive. Currently, section 3 does not apply to the Chief Executive. Section 10 makes it an offence for prescribed officers and the (current or former) Chief Executive to maintain a standard of living or be in control of wealth or property which is beyond their present or past emoluments, which they cannot satisfactorily explain.

Section 4 applies to public servants generally and the Chief Executive and makes it an offence to, without lawful authority or reasonable excuse, offer an advantage to a public servant or the Chief Executive for the performance of an act in the capacity of that public servant or the Chief Executive, or to influence the transaction of any business with a public body. This section applies to the solicitation or acceptance of such advantage by a public servant or the Chief Executive in a similar manner. It is worth noting that section 4 is the only provision in the POBO that expressly applies extra-territorially and makes it an offence to offer, solicit or accept an advantage "whether in Hong Kong or elsewhere".

Section 5, 6 and 7 cover public sector contracts, tenders and auctions, respectively. Section 5 makes it an offence to, without lawful authority or reasonable excuse, offer an advantage to a public servant or the Chief Executive for assistance in influencing the promotion, execution, or procuring of any contract with a public body or the payment of monies provided in such contract. This section of the POBO also applies to the solicitation or acceptance of an advantage by a public servant or the Chief Executive in a similar manner. Sections 6 and 7 respectively make it an offence for any person to, without lawful authority

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or reasonable excuse, offer, solicit or accept an advantage for the withdrawal of a tender or a bid at an auction of a public body.

Section 8 makes it an offence for any person – while having dealings with the government or public bodies – to, without lawful authority or reasonable excuse, offer an advantage to any prescribed officer of the government or public servant employed by such public body. Currently, section 8 does not apply to the Chief Executive.

Apart from the seven specific public sector bribery offences created by sections 3 to 8 and 10 of the POBO, section 9 covers both the public and private sectors (please see the section below on 'Commercial bribery' for the application of section 9 in the private sector) and makes it an offence for an agent to accept an advantage for doing (or forbearing to do) any act or showing favour or disfavour to any person in relation to the business of that agent's principal.[5] It supplements the specific public sector offences, for example, by making it an offence for a public servant to use falsified documents to deceive his principal (i.e. the relevant public body), which is not covered by the other specific public sector offences.

Section 9 has also been used by the Hong Kong courts to target bribery of foreign officials, who are not covered by the specific public sector offences. Relying on the broad definition of the term "agent" in section 2 (1) of the POBO, i.e. "including a public servant or any person employed by or acting for another", the courts have applied the section 9 offence to bribery of foreign officials where the *actus reus*, i.e. the offer, solicitation or acceptance of an advantage, is carried out in Hong Kong[6] (see also the section on 'Extraterritorial application of the POBO' for a discussion on the relevant cases, and the section below on 'Commercial bribery' for further discussion of this offence).

It is noteworthy that sections 3 and 8 of the POBO differ from sections 4 to 7 and 9 in that they do not require the advantage to be paid for a corrupt purpose. Additionally, sections 4 and 9 of the POBO also differ from sections 3, 5 to 8 and 10 in that they expressly provide that no offence is committed if the solicitation or acceptance of the advantage is made with the permission of the public servant and/or agent's employer and/or principal (see also the section below on 'Statutory defences').

Hong Kong also maintains the common law offence of misconduct in public office. The elements of this offence include when a public official culpably misconducts himself in the course of or in relation to that public official's public office. The relevant misconduct has to be wilful and intentional. Hong Kong courts have used this offence to complement the provisions of the POBO and deal with situations not proscribed by the POBO.

Commercial bribery

Section 9 of the POBO, which targets "corrupt transactions with agents", covers commercial bribery as well as official bribery (see the section above on 'Official bribery').

Under section 9, it is an offence for an agent to accept an advantage without lawful authority or reasonable excuse for doing (or forbearing to do) any act or showing favour or disfavour to any person in relation to the business of that agent's principal.[7] In the same manner, it is an offence for any person to offer an advantage to an agent to undertake the relevant conduct set out above.[8] *Chan Chi Wan, Stephen v Secretary for Justice* [2017][9] clarified that an offence under section 9 comprises only three elements:

1. the acceptance or offer of an advantage;
2. as a reward for certain conduct; and
3. such conduct was related to the principal's affairs or business.

The reference to "without reasonable excuse" is not an element of the offence but rather is

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one of the applicable defences for accepting or offering an advantage.[10]

While the POBO does not include provisions imposing requirements on companies to make and keep accurate books and records,[11] section 9 makes it an offence for any agent to use falsified receipts, accounts or other documents for the purpose of misleading his or her principal.[12] It is worth noting that the offences under section 9 do not apply in cases where the agent has the principal's permission for the acceptance of the advantage (see the section below on 'Statutory defences'). This means that section 9 mainly targets commission earned by an agent in relation to the principal's business without the knowledge of his or her principal.

Conspiracy

Many of the recent bribery cases involve several defendants who have been charged with conspiracy to commit the bribery offences set out in Part II of the POBO. The offence of conspiracy is set out in section 159A of the Crimes Ordinance, Cap. 200, and requires that a person agrees with any other person on a course of conduct which, if the conduct is carried out, will necessarily amount to the commission of an offence (by one or more parties of the agreement).

It follows that a conspiracy under section 159A of the Crimes Ordinance is not an independent offence but requires the commission of a separate offence (even though this separate offence does not have to be carried out). Section 159A of the Crimes Ordinance also explicitly states that the separate offence that is the subject of the conspiracy has to be an offence triable in Hong Kong. This means that for cases involving the bribery of a foreign official, it is not enough when the agreement to bribe such foreign official is reached in Hong Kong (i.e. the conspiracy occurs in Hong Kong). For there to be a triable offence in Hong Kong, the relevant *actus reus* of the offence has to occur in Hong Kong, i.e. the offer of the bribe has to be made in Hong Kong.

If the offer is made abroad, there is no triable offence under the POBO and, therefore, not all required elements for the conspiracy are present (see the discussion in the section below on 'Extraterritorial application of the POBO').

Definition of bribery

The relevant corruption offences in the POBO do not use the term "bribe". Rather, they use the term "advantage", and cover a very wide scope of benefits. According to the definition of "advantage" found in section 2 of the POBO, the "advantage" covers the following benefits:

- property (defined in section 2 as "any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description");
- employment;
- discharge of a debt;
- any other service or favour (other than entertainment);
- the exercise or forbearance from the exercise of any right, power or duty; and
- any offer or promise of any of the above benefits.

While the POBO specifically excludes "entertainment" from the services or favours that could constitute an advantage, "entertainment" is narrowly defined as "the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time".[13] As such, the exemption of entertainment is limited to meals/drinks and other forms of entertainment that occur

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with such meals/drinks (e.g. music that is provided alongside a meal). Any entertainment provided outside of this narrow scope could be viewed as a service or favour and could therefore constitute an advantage under the POBO.

In addition, according to guidelines on conduct and discipline of civil servants, a civil servant must avoid "lavish, or unreasonably generous or frequent entertainment, or any entertainment that is likely to give rise to any potential or real conflict of interest, put the officers in an obligatory position in the discharge of their duties, compromise their impartiality or judgement, or bring them or the public service into disrepute bearing in mind public perception".[14] There are also specific guidelines for officials appointed under the political appointment system that deal, *inter alia*, with entertainment, and set out that politically appointed officials should not accept entertainment if the entertainment (for example, due to its excessive nature) may lead to embarrassment in the discharge of the official's function or bring the public service into disrepute.[15]

Statutory defences

The bribery offences in sections 4 to 9 of the POBO provide a statutory defence if there is "lawful authority or reasonable excuse" for the offer, solicitation or acceptance of the advantage. According to section 24 of the POBO, the burden of proof (that there was such lawful authority or reasonable excuse) lies with the accused. The standard of proof is the balance of probabilities. The POBO itself provides such lawful authority in sections 4 and 9, which allow a public servant (other than a prescribed officer) and/or agent to solicit and accept advantages with the permission of their employer and/or principal). *HKSAR v Chan Chi Wan Stephen* [2016][16] confirms that, consistent with section 4 (4) of the POBO, an agent can only legitimise the act of accepting an advantage by relying on the permission given by his principal if the principal's permission was applied for and obtained before the advantage was accepted, or as soon as possible thereafter.

For prescribed officers, the Acceptance of Advantages (Chief Executive's Permission) Notice 2010 (the "Notice") was put in place to, *inter alia,* limit the very broad application of section 3 of the POBO, which prohibits the acceptance of any advantages. The Notice gives general permission for prescribed officers to accept advantages that fall outside four restricted categories (namely gift, discount, loan of money, and passage). For the restricted categories, the Notice sets out some narrowly defined limits within which advantages can be accepted by prescribed officers, including, for example, low-value gifts on specific occasions such as weddings (up to HK$1,500 (US$195/€172) and on any other occasion up to HK$250 (US$32/€29)) provided that the person making the gift has no official dealings with the prescribed officer or his or her department.[17] Any advantages that do not fall within the exceptions provided by the Notice require the special permission of the relevant approving authority for such prescribed officer.[18]

It is worth noting that criminal liability under the POBO does not require a "*quid pro quo*" – it is no defence that the conduct for which the advantage was provided was not carried out. According to section 11 of the POBO, it is irrelevant whether the agent who received the advantage did not actually have the power to carry out the relevant conduct, never intended to carry out the relevant conduct, or never in fact carried out the relevant conduct in relation to the principal's affairs or business.

Threshold for enforcement

The POBO does not include a *de minimis* exemption. As such, even advantages of a very minor amount or value could potentially lead to exposure under the applicable provisions. In a recent case, a suspect was convicted for having given "red envelopes" to supermarket

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managers on three occasions in exchange for information on the supermarket's sales performance and stock of milk powder. The red envelopes contained cash gifts that ranged from HK$100 (US$13/€12) to HK$800 (US$100/€92). The Magistrates' Court had sentenced the suspect to a six-month prison term for a violation of section 9 of the POBO (corrupt transactions with agents). On appeal, the Court of First Instance (the "CFI") confirmed the sentence of the Magistrates' Court.

Other relevant anti-corruption laws

The E(CIC)O, which is also enforced by the ICAC, sets out offences related to corruption occurring during elections; including, for example, cases where an advantage is paid to influence a person to stand or not stand as a candidate in elections,[19] or where an advantage is paid to influence votes.[20]

The Banking Ordinance, Cap. 155, prohibits the receipt of commission by staff of relevant financial institutions for the procurement of any advance, loan, financial guarantee, credit facility, etc. from that financial institution.[21]

The Organized and Serious Crimes Ordinance, Cap. 455 (OSCO), which is Hong Kong's primary anti-money laundering legislation, addresses the downstream offence of dealing with proceeds of corrupt conduct. Under section 25 of the OSCO, a person commits an offence if, "*knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property*". An indictable offence includes offences under the POBO.[22] A person who is convicted on indictment of an offence under section 25 of the OSCO is liable for a fine of up to HK$5 million (US$645,000/€576,000) and imprisonment for up to 14 years.[23]

It is important to note that the offence under section 25 of the OSCO is established so long as the prosecution proves that the accused dealt with the property having "reasonable grounds to believe" that it represents proceeds from an indictable offence. The prosecution does not have to also prove that the relevant property was in fact proceeds of an indictable offence. This was confirmed by the Court of Final Appeal (the "CFA") in the case against Carson Yeung Ka-sing, a Hong Kong businessman and former chairman of the Birmingham City Football Club, who was found guilty of five counts of dealing with property believed to be proceeds of an indictable offence in the amount of HK$721 million (US$93 million/€83 million).[24]

Penalties and legal consequences

Apart from the section 3 bribery offence which is a summary offence and carries a maximum prison term of one year,[25] the other bribery offences under Part II of the POBO are indictable offences and on indictment can lead to imprisonment of up to 10 years for offences under sections 5, 6 and 10 and imprisonment of up to seven years for all other offences.[26] On indictment, section 10 carries a maximum fine level of HK$1 million (US$130,000/€115,000), while all other offences carry a maximum fine of HK$500,000 (US$64,500/€57,600) (with the exception again being section 3, with a maximum fine of HK$100,000 (US$13,000/€11,500)). In addition, an offender may be ordered to disgorge the advantage received (or for section 10, a sum not exceeding the unexplained property).[27]

Under section 12A of the POBO, an offender who is convicted of conspiracy to commit a bribery offence under Part II of the POBO shall be sentenced as if he or she is convicted of the bribery offence itself.

The offences under the E(CIC)O described above are indictable offences and carry a maximum prison term of seven years and a maximum fine level of HK$500,000 (US$64,500/€57,600). The offence of receiving commission under the Banking Ordinance is also an indictable

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offence and carries a maximum prison term of five years and a maximum fine level of HK$200,000 (US$26,000/€23,000).

Overview of enforcement activity and policy during the last year

The source of the ICAC's investigations are mostly complaints/reports ("Corruption Reports") received through its whistle-blowing hotline and the ICAC offices. Once a Corruption Report is received, the ICAC assesses internally whether the Corruption Report is "pursuable" or "non-pursuable". If the Corruption Report is pursuable, the investigations section of the ICAC will commence an investigation. After a steep decline of approximately 41% in the number of Corruption Reports during 2011–2014 from 4,010 to 2,363, the annual number of Corruption Reports increased for the first time in 2015 to 2,803.[28] The number of Corruption Reports received by the ICAC remained rather stable for 2016, 2017 and 2018 at 2,891, 2,835 and 2,665 respectively. Compared to the peak number in 2011, the ICAC has successfully reduced the number of Corruption Reports by approximately 33% in 2018, and the number remains at a relatively low level.

Important cases

In the past seven years, the ICAC has investigated a number of high-profile corruption cases that attracted a lot of public attention and involved the highest echelons of Hong Kong's government and business community.

Cases against high-ranking government officials

Some of the ICAC's enforcement efforts have been focused on investigations involving high-ranking government officials and their purported involvement in corrupt acts.

- **Former Chief Executive – Donald Tsang Yam-kuen**

  In October 2015, the former Chief Executive of Hong Kong, Donald Tsang Yam-kuen, was charged with one count of accepting an advantage as Chief Executive and two counts of misconduct in public office. The ICAC commenced its investigations into allegations against Tsang in February 2012 when Tsang was still in office as the Chief Executive. Charges against Tsang relate to the following:

  1. The prosecution alleged that the renovation, refurbishment and redesign of Tsang's luxury resident unit in Shenzhen, China (the "Residential Unit") had been a bribe for Tsang's handling of the Applications (as defined below) ("Count 1").
  2. The prosecution also alleged that Tsang had deliberately concealed his negotiations with the majority shareholder of a radio station to lease the Residential Unit and a related payment, when the Executive Council was considering and approving the radio station's various licences or related applications (the "Applications") ("Count 2").
  3. The prosecution further alleged Tsang had failed to declare or disclose to the then Permanent Secretary for the Chief Executive's Office, the Development Bureau and the Honours and Non-Official Justices of the Peace Selection Committee, of his interest in the Residential Unit and his engagement of an interior designer for interior design work for the Residential Unit, when he proposed that the designer be referred for consideration for nomination under Hong Kong's honours and awards system ("Count 3").

  In a hearing in December 2015, Tsang pleaded not guilty. At the trial in February 2017, the jury was unable to reach a verdict on Count 1 and acquitted Tsang of Count 3. Tsang was nevertheless convicted of Count 2 and was sentenced to imprisonment for a term of

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20 months (reduced from 30 months for his good character and contributions to Hong Kong).[29] Despite a retrial on Count 1 in November 2017, the second jury could not agree on a verdict and the charge was ordered to be left on the court file. Tsang subsequently appealed in July 2018 on the Count 2 conviction by the Court of Appeal. His appeal against the sentence was allowed and his imprisonment term was reduced to 12 months.[30]

In December 2018, Tsang obtained leave to further appeal to the CFA and his Count 2 conviction and sentence were ultimately quashed in June 2019. The CFA held that there was inadequate direction given by the trial judge in relation to the wilfulness and seriousness of the non-disclosures by Tsang, which were the key elements of Count 2. In essence, the CFA explained that "wilfully" meant "deliberately" rather than by accident, inadvertence or oversight, and "seriousness" should be determined by considering the responsibilities of Tsang and his office as well as the nature and extent of his departure from those responsibilities.[31]

This issue became prominent, because some members of the jury did not find the dealings under Count 1 to be corrupt and under such circumstances, the two key elements of Count 2 warranted further directions. Finally, since the jury had proven that it was impossible to reach a definitive conclusion on the bribery charge (i.e. Count 1), the CFA held that it was unproductive to further speculate the prosecution's case on Count 2, and concluded that it would not be in the interests of justice to further examine both Counts 1 and 2.[32]

- **Former Chief Executive – Leung Chun Ying**

  The ICAC also investigated another former Chief Executive of Hong Kong, Leung Chun Ying, following complaints received in 2014.[33] The allegations against Leung, who was a director of DTZ Holdings plc ("DTZ") at the relevant time, included an allegation that he acted contrary to section 9 of the POBO when he signed an agreement with UGL Limited ("UGL") to act as a referee and advisor in relation to UGL's acquisition of several subsidiaries of DTZ ("UGL Agreement"), and receive payments totalling £4 million (US$5.1 million/€4.6 million) thereunder, during the time when he was the Chief Executive. It should also be noted that Leung's resignation from DTZ took effect two days after he signed the UGL Agreement.[34]

  On 12 December 2018, the Department of Justice ("DoJ") issued a press release stating that they had decided not to prosecute Leung,[35] as: DTZ knew that Leung had entered into the UGL Agreement; there was insufficient evidence to show that DTZ did not consent to Leung's acceptance of the monies; and there was "*no reasonable prospect of conviction of a corruption charge against [Leung]*". On the same day, the ICAC also issued a statement stating that they would discontinue their four-year investigation into Leung on similar grounds.

  Subsequently, two applications for judicial review to challenge the DoJ's decision not to prosecute Leung were heard by the CFI in August 2019,[36] and refused on the grounds that the applicants failed to establish that the decisions not to prosecute Leung were beyond the constitutional power given to the Secretary for Justice.[37]

Corruption cases in the financial services industry

Recently, a number of cases involving bribery schemes in the financial services industry have come to the fore, demonstrating that in line with international enforcement efforts, the ICAC has set its sights on corruption in that industry, and further enforcement may be expected in coming years.

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In November 2018, a former associate director of a bank was convicted of offences under section 9 (1) (a) of the POBO and section 159A of the OSCO[38] for falsely representing to his client that it was a trade practice to pay him 20% of the realised profits from his investments as "handling and intelligence fees", and subsequently depositing the payments received into his brother's account, and sentenced to imprisonment for 3.5 years. Following the sentencing, a confiscation order was made in August 2019 confiscating the bribes of about HK$1.46 million (US$186,000/€168,000), and the offender ordered to make payment within six months, failing which an additional 30 months of imprisonment would be imposed on him.

In June 2019, a former chief financial analysis manager of a financial intermediary was sentenced to imprisonment for 10 months by the District Court for conspiring with a former sales representative of a bank to deceive the bank in granting a loan referred by the financial intermediary.[39] The bank representative was also sentenced to imprisonment for defrauding the bank by coaching the loan applicants not to disclose the fact that they were referred by the financial intermediary (which was prohibited by the bank's policy).[40] However, the sentence of the former bank representative was reduced from a starting point of two years to 14 months after the court considered his guilty plea and willingness to return the ill-gotten commissions to the bank. The ICAC commenced investigation upon receipt of a corruption complaint by the bank.

Seminal case on the meaning of agent-principal relationship under section 9 of the POBO

In 2016, a private string instrument tutor (the "Tutor") was prosecuted for accepting commissions in referring the parent of her student to a particular music store to purchase an Italian-made violin, allegedly in breach of section 9 (1) of the POBO. The Tutor was acquitted at the first trial, and the subsequent appeal by the Hong Kong government was unsuccessful.

In dismissing the appeal, the CFI held that section 9 of the POBO did not apply for two main reasons. First, the Tutor was only hired to teach music lessons, and the so-called referral services were outside the scope of the contract for services between her and the parent. Therefore, the Tutor did not "act for" the parent in referring her to the music shop, and thus no agent-principal existed between them. Second, the Court considered the use of commission by stores to encourage referrals from music tutors to be a normal sales strategy, and that the Tutor was merely providing some gratuitous advice in a social capacity on how the parent could obtain the desired violin at a discounted price, and did not deviate from her duty as there was no evidence to indicate the parent suffered any loss. It is expected that the case will be appealed to the CFA on the question of whether it is "*correct that when someone, purportedly in a private or friendly capacity, provides gratuitous advice, which is based on the special knowledge of that person in a particular field, to another no fiduciary obligation on the former could arise which would give rise to an agent-principal relation for the purpose of section 9 of the [POBO]?*".[41]

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

Some jurisdictions such as the USA provide for narrow exceptions in their anti-bribery laws for "facilitating payments". In the U.S. Foreign Corrupt Practices Act (FCPA), this exception applies only for cases where a payment is made to further "routine governmental action" involving non-discretionary acts.[42] The POBO does not include any similar exception for facilitation payments. Instead, the text of the relevant bribery offence explicitly includes advantages offered for "expediting" the performance of an act by a public servant.[43] As set out above, there is also no *de minimis* threshold under the POBO that excludes small

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payments from prosecution. As such, any payment intended to facilitate or expedite a routine government act would *prima facie* constitute an offence under the POBO (unless any of the statutory defences set out above apply).

Hospitality

The POBO excludes entertainment from the relevant definition of an "advantage". This exemption is, however, narrowly defined, and only applies to "the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time".[44] As such, any entertainment provided outside of a meal or drinks would potentially fall within the relevant definition of 'advantage' under the POBO. For public servants, it is worth noting that specific guidelines apply that prohibit lavish entertainment (see also the above section on 'Definition of bribery').

Key issues relating to investigation, decision-making and enforcement procedures

Investigation powers

The ICAC has far-reaching investigative powers that it exercises independently of any other government body. According to section 12 of the ICACO, the Commissioner has the duty to investigate:

- complaints alleging corrupt practices as he considers practicable;
- alleged or suspected offences under the POBO/E(CIC)O, or conspiracies to commit such offences;
- alleged or suspected offences of blackmail or conspiracy to blackmail, by or through the misuse of the office of a prescribed officer; and
- any conduct of a government officer that is connected with or conducive to corrupt practices.

To assist ICAC officers in their investigations, the ICACO provides a right in section 10 for ICAC officers to arrest without a warrant any person the officers reasonably suspect to be guilty of an offence under the POBO, E(CIC)O and ICACO, or of an offence of blackmail committed by or through the misuse of office (if the relevant suspect is a prescribed officer). This section also gives the ICAC officers a right to arrest a suspect without warrant, whom the officers reasonably suspect to be guilty of other offences that are revealed during their corruption investigations.

Part III of the POBO also sets out various measures aimed at assisting the ICAC in its investigations of suspected corrupt practices. It provides ICAC officers with the power to:

- inspect and take copies of accounts, books, documents or other articles which may be required for the purpose of investigations (it is worth noting that no court order is required before this power can be exercised);[45]
- make an *ex parte* application to the CFI for production or access to particular material held by the Inland Revenue Department;[46]
- make an *ex parte* application to the CFI for the provision of information by any suspect in relation to, for example, property, expenditures, etc. of such suspect or any other person believed to be acquainted with relevant facts,[47] including attending an interview with ICAC officers;[48]
- make an application to the CFI[49] for a restraining order to be imposed on relevant property in the control of a suspect;[50]
- make an *ex parte* application to the CFI for a search warrant;[51] and

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- make an *ex parte* application to a magistrate for the surrender of travel documents held by a suspect.[52]

An ICAC officer may also apply to any public servant for assistance with ongoing investigations into an alleged or suspected offence.

It is an indictable offence for persons to refuse to comply with what the ICAC requires them to do or produce, or to make a false statement. The relevant offences carry a maximum prison term of one year and a maximum fine of HK$20,000 (US$2,600/€2,300).[53]

Safeguards

While the ICAC operates independently when exercising its broad investigation powers, there are a number of safeguards that ensure a suspect's rights are not prejudiced.

As set out above, most of the ICAC's investigative powers (apart from section 13 of the POBO) require an application to the court and are therefore subject to judicial oversight.

Additionally, section 14 (1) (d) of the POBO provides that statements compelled by the ICAC in the exercise of its investigative powers are not admissible in prosecutions against the person making such statement.

Section 15 of the POBO and section 18 of the ICACO also expressly safeguard legal professional privilege. In order to avoid a waiver of privilege, it is important for legal advisers to claim privilege on behalf of their clients over any privileged information that is seized by the ICAC officers. If the ICAC disputes the claim of privilege, they will seal the information. The owner of the information will then have to establish privilege by way of an application to the CFI. On such an application, the judge can examine the documents seized by the ICAC to determine whether the documents are privileged. In some cases, the warrants authorising the seizure of the relevant information prescribe a timeframe for bringing the application. The ICAC will have recourse to the information seized if no application is made within the timeframe specified in the warrant, or if the CFI rules that the information is not legally privileged.

Whistle-blowers

In detecting possible corruption offences, the ICAC relies heavily on information provided by the general public. For that purpose, the ICAC maintains a whistle-blower hotline as well as a Report Centre, both of which are staffed with duty officers and are active around the clock. To protect the identity of whistle-blowers and the information provided, section 30A of the POBO provides, *inter alia*, that the name and address of any informer are kept confidential and any documents that may lead to a disclosure of such informer's identity will have to be redacted prior to any disclosure of the same in civil or criminal proceedings. The ICAC also offers witness protection programmes, established and maintained in accordance with the Witness Protection Ordinance, Cap. 564, which provide protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses for the ICAC.

Despite the ICAC's heavy reliance on information provided by the public, there is no positive duty under the POBO to report corruption to the ICAC. Such a duty exists, however, under the OSCO: Section 25A (1) of the OSCO imposes a duty to report on any person who knows or suspects that any property was used in connection with or represents the proceeds of an indictable offence (including bribery and corruption). Failure to make a disclosure under section 25A (1) is an offence, and is punishable by imprisonment for three months and a fine of level 5 (currently equivalent to HK$50,000 (US$6,450/€5,760), according to Criminal Procedure Ordinance, Cap. 221, Schedule 8).

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Confidentiality of investigations

All investigations are confidential. The POBO makes it an offence to tip off a possible subject of an ICAC investigation, and offenders could be liable for a prison term of up to one year and a fine of HK$20,000 (US$2,600/€2,300).[54] Similarly, the OSCO also makes it an offence to tip off. Any person who discloses to any other person any matter which is likely to prejudice any investigation which might be conducted following a disclosure under section 25A of the OSCO could be liable upon conviction on indictment for a fine of up to HK$500,000 (US$64,500/€57,600) and imprisonment for up to three years.[55]

Enforcement

Once the ICAC concludes its investigation of a specific case, it will have to prepare the relevant evidence and submit the same to the Secretary for Justice (i.e. the head of the Department of Justice) for consideration. This is because, under section 31 (1) of the POBO, prosecutions for offences under Part II of the POBO shall be instituted only with the consent of the Secretary for Justice. This consent requirement reflects the separation of investigation and prosecution within the common law criminal justice system and provides for an independent assessment through the Secretary for Justice on whether a prosecution is in the best interests of the public.

If the Secretary for Justice is of the opinion that the evidence submitted by the ICAC is sufficient to warrant a prosecution, but in the particular case such prosecution may not be in the best interests of the public, the Secretary for Justice can decide to "caution" the subject, provided that the subject has admitted his or her guilt. The caution, if administered, will be kept on record and can be taken into consideration for future cases for the decision of whether to prosecute or on sentencing. Factors that the Secretary for Justice may take into account in arriving at the decision include the seriousness of the offence, the likely penalty upon conviction, the effect on the accused, etc.

Overview of cross-border issues

Extraterritorial application of the POBO

As set out above, the only bribery offence under the POBO that expressly applies extraterritorially is section 4, which regulates the bribery of public servants (which is limited by its definition to Hong Kong public servants). The extraterritorial application of section 4 stems from the words in the legislation: "whether in Hong Kong or elsewhere", which qualify the relevant conduct, i.e. the offer, solicitation or acceptance of the advantage found in the offences set out in section 4, making offers of advantages to public servants and/or solicitations and/or acceptances of advantages by public servants offences whether they take place in Hong Kong or outside Hong Kong. As such, offenders cannot escape the scope of section 4 by offering the bribe and/or soliciting or accepting the bribe in a place outside Hong Kong.

Relevant cases decided in the last decade confirm that all the other bribery offences under the POBO require the relevant conduct, i.e. the offer, solicitation or acceptance of the advantage to occur in Hong Kong, otherwise the relevant conduct does not constitute a triable offence in Hong Kong. In a landmark decision, the Court of Appeal (CACC 99/2012, 18 December 2013)[56] held that section 9 of the POBO does not apply extraterritorially to an offer of a bribe made outside of Hong Kong aimed at inducing acts of a foreign official, and any agreement made in Hong Kong to make such an offer is not triable in Hong Kong as a conspiracy under section 159A of the Crimes Ordinance, Cap. 200. The decision was confirmed by the CFA on 1 August 2014 (FAMC 1/2014).

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In the case concerned, two executives of a Macau waste management company (majority owned by a Hong Kong-based company) devised a plan in Hong Kong to bribe a Macau public official to obtain a renewal and award of government contracts for the waste management company. However, the actual offer to the public official was only made at a later stage and outside of Hong Kong. The two defendants were convicted of conspiracy to offer advantages to an agent, contrary to section 9 (2) (a) of the POBO and section 159A of the Crimes Ordinance, and sentenced to three years and three months' imprisonment.

The Court of Appeal then reversed the convictions and held that an offence under section 9 of the POBO is only complete when the offer of the bribe is communicated to the recipient. As the offer was communicated in Macau and not Hong Kong, the relevant conduct was not completed in Hong Kong and therefore not triable as an offence under section 9 of the POBO. Additionally, as a conspiracy under section 159A of the Crimes Ordinance is not a separate offence, but requires the commission of an offence that is triable in Hong Kong, the acts of planning that were made in Hong Kong were also not triable in Hong Kong.

Foreign public officials

The POBO applies to the bribery of foreign public officials, albeit to a very limited extent: in a case (FACC 6/2009, 19 January 2010)[57] where a foreign official was offered a bribe in Hong Kong, the CFA found that the definition of "agent" under the POBO was broad enough to include a public official of a place outside Hong Kong, and that section 9 of the POBO applies where an advantage is offered in Hong Kong, even if the offeree is a public official of a place outside Hong Kong and the act or forbearance concerned is in relation to his public duties in that place outside Hong Kong.

Since there was a triable offence, the CFA also found the agreement made in Hong Kong for the purpose of committing the relevant offence to be a conspiracy under section 159A of the Crimes Ordinance. It is worth noting, as set out above, that section 9 of the POBO does not have an extraterritorial effect and would not cover bribery of a foreign official if the relevant conduct of offering, soliciting or accepting of an advantage occurs outside of Hong Kong.

International cooperation

Hong Kong provides mutual legal assistance to other jurisdictions under the United Nations Convention against Corruption (UNCAC) and via a number of bilateral treaties.

Hong Kong, as a special administrative region of China (which is a signatory of the UNCAC), is required to provide mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the UNCAC.[58] The Secretary for Justice of the DoJ is China's designated authority in Hong Kong for receiving requests for mutual legal assistance and cooperation on surrender of fugitive offenders under the UNCAC. The ICAC is designated as the relevant authority in Hong Kong responsible for assisting other signatories of the UNCAC in developing and implementing specific measures for the prevention of corruption. Since the UNCAC came into force in Hong Kong on 12 February 2006, the ICAC has received more than 66 requests for assistance under the UNCAC and bilateral agreements of mutual legal assistance.[59] For its support with extradition and mutual legal assistance under the UNCAC, the ICAC relies on the Fugitive Offenders Ordinance, Cap. 503, and the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 which, as a result of legislative amendments in 2007, apply as between Hong Kong and the States Parties of the UNCAC.

Hong Kong has also signed bilateral agreements for mutual legal assistance with 30 jurisdictions.[60] The statutory framework for implementing these bilateral agreements (as

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in the case of the UNCAC) is the Mutual Legal Assistance in Criminal Matters Ordinance. Similar to the designation under the UNCAC, the Department of Justice is responsible for coordinating requests for international extraditions and mutual legal assistance, and does so through its Mutual Legal Assistance Unit. In addition, the INTERPOL Division of the Hong Kong Police's Liaison Bureau works closely with the Mutual Legal Assistance Unit in executing international extraditions and mutual legal assistance requests. In 2018, the ICAC handled 69 requests from overseas jurisdictions for investigative assistance and received assistance for six requests it placed with its overseas counterparts, including in Japan, Thailand, Switzerland and the USA.[61]

Corporate liability for bribery and corruption offences

Prosecutions of corporates are extremely rare under Hong Kong's applicable corruption laws. In general, the ICAC's investigations and prosecutions target individuals (see case examples set out in the section on enforcement activity that primarily deal with individuals).

The POBO does not include strict liability offences for corporates. Corporates can, however, be prosecuted under the POBO for bribery offences because they apply to any "person", which is defined under Hong Kong laws to include both natural persons as well as any public body and any body of persons, corporate or unincorporated.[62] In determining if a corporate is liable, the courts apply the common law, and in particular the "identification principle", which holds a corporate liable for the acts of its officers who are in control of the corporate and who commit the offences in question.

Proposed reforms / The year ahead

Hong Kong still ranks as one of the least corrupt places in the world and has consistently remained within the band of the top 20 economies with very low levels of corruption in the Corruption Perceptions Index.[63] According to ICAC's annual survey, which aims at having a more in-depth understanding of the public perception for people's concerns over corruption, in 2018: the vast majority (98.4%) of respondents indicated that they themselves had not come across corruption in the past year; 67.3% of respondents considered that the overall situation of corruption in Hong Kong would be about the same next year; and the majority of respondents (79.0%) considered ICAC's anti-corruption work to be effective, which was similar to the ratings recorded in the past three years. For respondents who considered ICAC's anti-corruption work to be effective, the key reasons mentioned included the existence of media reports on the ICAC's work, successful arrests and prosecutions, and the ICAC's effective publicity and education work.[64]

Nonetheless, it is important for Hong Kong and for the ICAC to continue to improve the public's perception of corruption in Hong Kong. As a starting point, legal reforms that are needed should be implemented. For example, presently, sections 3 and 8 of the POBO apply to officials under the political appointment system and civil servants, but not the Chief Executive. The Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests set up on 26 February 2012 identified this loophole in its report issued in May 2012.[65] So far, however, no steps have been undertaken to close this apparent loophole, and it remains unclear when the relevant amendments to the POBO will be implemented.

Secondly, the ICAC needs to continue to investigate and take enforcement actions where appropriate, including against high-ranking former and current government officials, with a view to maintaining Hong Kong's strong anti-corruption reputation.

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Endnotes

1. Transparency International, CPI Results 2018 and 2015: http://www.transparency.org/cpi2018/results and http://www.transparency.org/cpi2015/results.
2. See Article 57 of the Basic Law of the Hong Kong Special Administrative Region.
3. A prescribed officer includes mainly persons holding an office of emolument under the government, officials of the Monetary Authority, members of the ICAC, judicial officers and the Chairman of the Public Service Commission (section 2 (1) POBO).
4. A public servant includes prescribed officers and employees of public bodies (section 2 (1) POBO).
5. Section 9 (1) POBO.
6. *Hong Kong Court of Final Appeal, B v Commissioner of the Independent Commission Against Corruption* [2010] HKEC 122.
7. Section 9 (1) POBO.
8. Section 9 (2) POBO.
9. *Chan Chi Wan, Stephen v Secretary for Justice* [2017] 20 HKCFAR 98 (see further discussion of this case in the section below on 'Important cases').
10. *Chan Chi Wan Stephen v Secretary for Justice* [2016] 3 HKLRD 186 applying *HKSAR v Yan Pak Cheung* [2009] 2 HKLRD 82 and *HKSAR v Chan Tat Chung Danny* [2010] 2 HKC 268).
11. Other laws in Hong Kong include such requirement; for example, the Companies Ordinance, Cap. 622, which provides in section 380 that a company has to maintain annual financial statements for a financial year that give a true and fair view of the financial position of the company and the financial performance of the company for that financial year.
12. Section 9 (3) POBO.
13. Section 2 (1) POBO.
14. See publication of the Administration of the Civil Service, Summary of the Regulatory Regime on Acceptance of Advantages and Entertainment by Civil Servants (para. 18): http://www.csb.gov.hk/english/admin/conduct/files/aae_e.pdf.
15. Chief Executive's Office, Code for Officials under the Political Appointment System, Chapter 5.10, http://www.cmab.gov.hk/doc/issues/code_en.pdf.
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18. The relevant approving authorities are set out in section 1 of the Acceptance of Advantages (Chief Executive's Permission) Notice 2010.
19. Section 7 E(CIC)O.
20. Section 11 E(CIC)O.
21. Section 124 Banking Ordinance.
22. Section 25 (5) OSCO; Section 12 POBO.
23. Section 25 (3) OSCO.
24. *HKSAR v Yeung Ka Sing Carson* [2016] HKEC 1506.
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26. Section 12 (1) POBO.
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30. *HKSAR v TSANG Yam-kuen, Donald* [2018] HKCA 425.
31. *HKSAR v TSANG Yam-kuen, Donald* [2019] HKCFA 24 at § 74.
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35. Department of Justice statement in relation to ICAC investigation (available at: https://www.info.gov.hk/gia/general/201812/12/P2018121200761.htm).
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43. Section 4 (1) (b) POBO.
44. Section 2 (1) POBO.
45. Section 13 POBO.
46. Section 13A POBO.
47. Section 14 POBO.
48. Section 14 (1) (d) POBO.
49. Section 14C (7) POBO.
50. Section 14C POBO.
51. Section 17 POBO.
52. Section 17A POBO.
53. Sections 13 (3) (4) and 14 (4) (5).
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India

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Introduction

The Indian economy is characterised by the presence of a 'big' government – the Indian political structure encompasses central and state governments, as well as various local self-governance structures. This means that a single business entity may be subject to a number of central, state and local regulations, requiring registration, compliance, periodic reporting and inspections, and the exercise of individual discretion by government officials at various levels.

Apart from performing such functions, the government also operates large commercial enterprises in several sectors, including education, defence, aviation, railways (a near monopoly), infrastructure, banking, telecom and healthcare – accordingly, interactions with the government (in its various forms) and government-owned enterprises are unavoidable for entities looking to do business in India. It is also important to bear in mind that Indian laws and regulations often provide for considerable discretion in the hands of government agencies and personnel, and this can make interacting with the government a subjective and time-consuming exercise.

While Indian anti-corruption laws are fairly stringent, corruption is not uncommon in India. As per Transparency International, India ranked 78th out of 180 countries in the *Corruption Perceptions Index*, 2018. However, recent years have been marked with a growing public dissatisfaction over corruption and its cost to the Indian economy. Over the past five to six years, there has been a strong public sentiment against corruption, and high-profile instances of corruption have become key political and election issues.

The incumbent Indian government has also taken a hard line stance on corruption issues and has prompted the introduction of several legislative measures aimed at tackling corruption in India, including the creation of an independent ombudsman (the '*Lokpal*') to investigate and prosecute cases of corruption by public officials (including ministers), strengthening laws relating to prosecution of bribe-givers, facilitators and influence peddlers, expansion of existing laws governing money laundering and '*benami*' (i.e., proxy) transactions, and new laws to target undisclosed income and assets (whether in India or abroad) and accused persons absconding from prosecution. Most importantly, the past few years have seen a change in attitude of enforcement agencies, which have started enforcing anti-corruption laws aggressively in India, and have been supported in their efforts by the judiciary (which has taken up an active role in monitoring corruption cases) and civil society.

Brief overview of the law and enforcement regime

Prevention of Corruption Act, 1988

The primary anti-corruption statute in India, the Prevention of Corruption Act, 1988

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('**PCA**'), criminalises receipt of any 'undue advantage' by 'public servants' and providing such undue advantage by other persons. The PCA states that an 'undue advantage' is any gratification (not limited to being pecuniary in nature or estimable in money) other than the legal remuneration which a public servant is permitted to receive either from the government or any other organisation served by such public servant. Further, the term 'public servant' has a wide definition under the PCA, and includes any person in the service or pay of any government, local authority, statutory corporation, government company, or other body owned or controlled or aided by the government, as well as judges, arbitrators, and employees of institutions receiving state financial aid. The Supreme Court of India has also held that employees of banks, public or private are also considered 'public servants' under the PCA.[1]

The offences under the PCA include: (1) public servants obtaining any undue advantage with the intention, or as a reward, to improperly or dishonestly perform or cause performance of public duty; (2) public servants obtaining any undue advantage without (or for inadequate) consideration from a person concerned in proceedings or business transacted either by the public servant or any other public servant to whom such public servant is a subordinate; and (3) criminal misconduct by a public servant (which includes possession of disproportionate assets) and a habitual offender.

The PCA also targets the conduct of 'middlemen', influence peddlers or intermediaries who facilitate bribery, by criminalising the act of taking any undue advantage to cause the improper or dishonest performance of public duty. Until recently, bribe-givers were brought within the ambit of the PCA through the offence of 'abetment' of the offences mentioned above – however, recent legislative changes to the PCA in 2018 have expressly targeted bribe-givers by criminalising the act of providing or promising to provide a bribe to any person (irrespective of whether such person is a public servant or not) to induce or reward a public servant to improperly or dishonestly perform a public duty. The bribe-giver may also be charged with 'criminal conspiracy' to commit offences under the PCA. The penalties for various offences under the PCA include imprisonment ranging from six months to 10 years, and a fine (for which no maximum amount is prescribed). Further, recent legislative changes to the PCA have also introduced provisions pertaining to attachment and confiscation of property procured by way of an offence under the PCA. It is not inconceivable for investigating authorities to allege that any advantage received by a bribe-giver pursuant to the bribery (which is an offence under PCA) could also be subject to attachment and confiscation, and not just the property of the public servant(s) in question.

Under the PCA, if there is an agreement or attempt to give or receive a bribe, this in itself is sufficient to constitute an offence (and attract prosecution), and the actual payment of a bribe is not necessary. Further, it is immaterial whether the bribe has been obtained for a public servant's own benefit or the benefit of any other person, either directly or through any other person. The 2018 amendment states that the obtaining, accepting, or attempting to obtain an undue advantage in itself is an offence under the PCA, even though the ultimate performance of a public duty by a public servant is not improper. Offences under the PCA are generally investigated by a special enforcement unit called the Central Bureau of Investigation ('**CBI**') or the state anti-corruption departments of the police.

It may be noted that the prior sanction of the government is required for the initiation of prosecution under the PCA against public servants. However, this safe harbour applies only to proceedings against serving and retired public servants and not persons accused of giving bribes. Trials for offences under the PCA are conducted before special courts set up

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for this purpose. The 2018 amendment states that there shall be an endeavour to conclude the trial within a period of two years since the date of initiation of proceedings, subject to a maximum time period of four years.

Service rules for government officials

Government officials in India are also bound to conduct themselves in accordance with the 'service rules' applicable to different classes of officials, including the Central Civil Services (Conduct) Rules 1964 and the All India Services (Conduct) Rules 1968 ('**Service Rules**'). Service Rules prohibit government officials from receiving gifts, hospitality, transport, or any other pecuniary advantage that exceeds certain specified thresholds from individuals other than near relatives or personal friends (with whom such official has no business dealings) without the sanction of the government – however, a casual meal, a casual lift, or other social hospitality is permitted. The Service Rules also provide that government servants are not permitted to accept lavish or frequent hospitality from persons with whom they have official dealings, and prohibit government servants from engaging in any trade, business, or other employment, canvassing in support of any business and participating, except in the discharge of official duties, in the registration, promotion or management of any company for commercial purposes. A contravention of the Service Rules can lead to initiation of disciplinary proceedings against the official concerned, the consequences of which can include termination of service.

Foreign Contribution Regulation Act, 2010

The Foreign Contribution Regulation Act, 2010 ('**FCRA**') prohibits the acceptance of hospitality or contributions from 'foreign sources' by persons including legislators, judges, political parties or their office-bearers, government servants and employees of bodies owned or controlled by the government, except with the permission of the central government. The FCRA defines the term 'foreign source' to include any foreign citizen, company, entity, multinational corporation, trust or foundation. Further, non-governmental organisations (including charities) receiving contributions from a 'foreign source' are required to be registered under the FCRA, and report such contributions. The FCRA provides for an exception for personal gifts valued up to INR 25,000 (approximately US$ 375), and such gifts are not prohibited. A contravention of the FCRA is punishable with imprisonment of up to five years, or a fine, or both. Where the offender is a company, persons such as directors and other managerial personnel may be held liable for the offence.

Right to Information Act, 2005

The Right to Information Act, 2005 ('**RTI Act**') allows Indian citizens to obtain information held by any public authority, subject to specified exceptions for national interest, legislative privilege and right to privacy. Further, the RTI Act requires public authorities to publicly disclose certain types of information relating to their functions (for example, they must publish relevant facts while formulating important policies or announcing decisions that affect the public and provide reasons for their decisions). The information requested by a citizen is required to be provided in a timely manner (within a period ranging from 48 hours (if the life and liberty of any person are involved) to 30 days). An authority has been set up at the central and state levels to monitor complaints from citizens under the RTI Act (including a refusal of access or a failure to respond).

In recent years, the RTI Act has proved to be a key tool in the fight against corruption – requests for information by activists and citizens have been successful in bringing to light instances of corruption in government tenders and public procurement programmes. The RTI Act promotes transparency in the government and bureaucracy's decision-making, and

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by facilitating publication of official records, which ensures that any lapses are brought into the public eye.

Central Vigilance Commission Act, 2003

The central government has constituted the Central Vigilance Commission ('**CVC**') pursuant to the Central Vigilance Commission Act, 2003. The CVC is the government watchdog that is tasked with inquiring into (or commissioning an inquiry into) offences alleged to have been committed under the PCA. It is also responsible for advising, planning, executing, reviewing and reforming vigilance operations in central government organisations. The CVC is required to operate impartially and free of executive control, and can refer investigations to the CBI.

Lokpal and Lokayuktas Act, 2013

The Lokpal and Lokayuktas Act, 2013 is a recent legislation which provides for the establishment of corruption ombudsmen (called '*Lokpal*' at the central level, and the '*Lok Ayuktas*' at the state level), which act independently from the executive branch of the government. These bodies have been empowered to investigate allegations of corruption against public functionaries, including offences under the PCA (including allegations against the prime minister and other central ministers, members of parliament and other public servants). Further, public servants are required to declare the assets held by them (together with their spouse and dependent children) on an annual basis. In March 2019, a former Supreme Court judge, Justice Pinaki Chandra Ghose, was appointed as the country's first *Lokpal*, thus giving much-needed teeth to the anti-corruption legislation.

Companies Act, 2013

The Companies Act, 2013 ('**Companies Act**') is India's law governing companies, and places a strong emphasis on corporate governance and prevention of corporate fraud. Under the Companies Act, auditors and cost accountants are mandatorily required to report any suspected frauds (above a specified threshold) to the central government. Certain types of companies are also mandated to establish a vigilance mechanism for reporting of concerns.

The Companies Act defines the term 'fraud' quite broadly, and this could encompass acts of private or commercial bribery. Fraud is a criminal offence under the Companies Act and is punishable with imprisonment ranging from six months to 10 years and/or a fine. The Companies Act also obligates directors and senior management to maintain systems for ensuring compliance with applicable law, as well as accuracy of the books, records and financial statements of the company. Contravention of such provisions is punishable with fines (which depend upon the quantum of the amount involved in the fraud) and imprisonment.

The Companies Act has also led to the establishment of the Serious Fraud Investigation Office ('**SFIO**'), which is empowered to detect, investigate and prosecute white-collar crimes and fraud. The SFIO has broad powers to conduct inspections, discover documents, search and seize evidence, etc. Recently, certain additional sections of the Companies Act have been notified, giving the SFIO additional powers to arrest a person who, the SFIO have a reason to believe, has been guilty of specified offences under the Companies Act (including offences relating to 'fraud'). As per the SFIO website, the agency has filed 1,237 prosecution cases in various courts and designated forums – of which, it has obtained conviction in 92 cases as of March, 2017.

Besides the SFIO, the Companies Act also establishes the National Financial Regulatory Authority ('**NFRA**'), which monitors and enforces compliance with the accounting

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and auditing standards under the Act. The NFRA has also been vested with powers of investigation into matters of professional or other misconduct committed by any member or firm of chartered accountants registered under the Chartered Accountants Act, 1949.

Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 ('**PMLA**') criminalises 'money laundering', which it defines as direct or indirect attempts to knowingly assist or become party to, or actual involvement in, a process or activity connected with the 'proceeds of crime' (including its concealment, possession, acquisition or use) and in projecting or claiming such property to be untainted property. Under the PMLA, 'proceeds of crime' are defined to mean any property derived or obtained, directly or indirectly, by a person as a result of certain identified crimes (which are considered as predicate offences for the application of the PMLA).

The Finance Act, 2019 has further clarified that 'proceeds of crime' shall include any property which may be directly or indirectly derived or obtained as a result of any criminal activity relatable to such identified offence. However, this provision is currently pending notification in the PMLA. A crucial aspect of this law is that it permits the attachment of properties of accused persons (and other parties who are connected with the proceeds of crime), at a preliminary stage of the investigation (and even prior to conviction). The offence of money laundering attracts punishment of imprisonment of three to seven years, and a fine.

Recent legislative changes to the PMLA in 2018 have included 'fraud' under the Companies Act as one of the identified crimes which will attract the application of the PMLA. As a result, any property derived or obtained pursuant to a fraud will be considered 'proceeds of crime' under the PMLA. Unlike the PCA, 'fraud' under the Companies Act is not linked only to bribery of public servants, but covers a much wider ambit.

The PMLA also requires banks, financial institutions and intermediaries (such as brokers and money changers) to maintain records of transactions and KYC details of clients (*as per* norms specified by sectoral regulators), and to report suspicious transactions and transactions exceeding a specified value.

Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015

This enactment levies penal rates of tax on any undisclosed asset or income held abroad by a person resident in India and penalises individuals for non-disclosure of foreign income or assets, wilful attempt to evade tax, failure to furnish requisite returns, etc. The objective of the Act is to target undisclosed incomes and assets (potentially derived through illegal means, including corruption), which have been stashed offshore by resident Indians.

The Fugitive Economic Offenders Act, 2018

In order to prevent offenders accused of economic offences from evading prosecution within the country, the Fugitive Economic Offenders Act, 2018 ('**FEOA**') was recently enacted on July 31, 2018. The FEOA targets fugitive economic offenders against whom an arrest warrant has been issued for certain predicate economic offences involving Rs. 100 crores and who have either left the country to avoid criminal prosecution or are abroad and refuse to return to face criminal prosecution. Predicate offences under the FEOA cover cheating and counterfeiting under the Indian Penal Code, 1860, offences under the PCA, PMLA, corporate fraud under the Companies Act, *benami* transactions and tax evasion. The strength of the FEOA lies in its far-reaching measures of immediate confiscation of all properties of any abscondee, which act as a strong deterrent against any desertion from the country.

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Overview of enforcement activity and policy

The past few years have witnessed a stark change in the approach towards enforcement of anti-corruption laws. One of the driving forces behind this change has been the increased public focus on the issue of corruption in government, combined with an active role played by the judiciary in corruption matters. This movement against corruption was triggered by the discovery of several instances of large-scale corruption by highly influential ministers and bureaucrats (in particular, scams concerning the allocation of telecom spectrum and organisation of the Commonwealth Games in Delhi in 2010) within the government machinery. This led to a large-scale public outcry regarding the impact of corruption on the Indian economy and its citizens.

Amidst growing public dissatisfaction regarding the state of affairs, the government reacted by enacting various legislative measures. In an attempt to bolster and cure India's perceived weakness in its anti-corruption machinery, in March 2019, the government appointed the first *Lokpal* under the Lokpal and Lokayuktas Act, 2013. Further, alarmed by the increasing number of financial defaulters absconding the jurisdiction of domestic law enforcement agencies to avoid prosecution, the government enacted the Fugitive Economic Offenders Act, 2018. In early 2019, the former chairman of United Spirits was declared as India's first Fugitive Economic Offender under the new law, thus enabling the government agencies to confiscate his properties in the INR 9,000 crore loan default case. While certain accused individuals have fled India, the Indian government has, in parallel, increased its efforts to extradite such individuals and has charged them under provisions of the PCA, PMLA and the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015.

On account of an increasing number of delinquent borrowers and non-performing assets, anti-corruption enforcement has recently directed its focus towards corruption in the financial services sector, particularly in the approval of large loans. In an effort to bridge the information asymmetry in the loan market and attempt to shield the credit environment from further shocks, the Reserve Bank of India has begun work in setting up a digital Public Credit Registry. This registry will act as a central repository drawing real-time information from the Securities and Exchange Board of India, the corporate affairs ministry, the Goods and Services Tax Network and the Insolvency and Bankruptcy Board of India. The registry aims to allow banks and financial institutions to have a complete view of the financial profiles of existing and prospective borrowers.

Law enforcement agencies have initiated proceedings against various corporate giants and multi-millionaire businessmen for defrauding public and private sector banks. Another growing trend is that enforcement agencies have become more sophisticated in unravelling complex corporate or financial structures, and have increased their reliance on technological tools. Importantly, government agencies have also shown a willingness to take the assistance of specialists such as private forensic auditors or investigators to help them in this endeavour, and provide expertise that they may lack themselves. Indian enforcement agencies have also strengthened their relationships with agencies from other jurisdictions, and we have witnessed far more cooperation and coordination in cross-border enforcement efforts.

Perhaps the most welcome change has been an increased appetite among enforcement agencies to aggressively investigate and pursue corruption cases, even against high-profile politicians and powerful bureaucrats – this marks a clear departure from the past, where such cases may have been approached with lethargy and caution. Recent years have seen instances where former central government ministers (telecom spectrum scam), high-

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ranking politicians and bureaucrats (Commonwealth Games scam), a former head of the Indian air force (defence procurement scam), etc., have been investigated, charged and prosecuted by Indian enforcement agencies – such cases remain under trial as of date. Recently, an influential state politician was convicted by the Supreme Court of India for possessing disproportionate assets.

Law and policy relating to issues such as facilitation payments and hospitality

At the outset, it should be noted that unlike the US Foreign Corrupt Practices Act, the PCA expressly prohibits the payment of 'facilitation payments' or 'grease money'. It is important to recognise that, unlike the Service Rules or the FCRA, the PCA does not provide for any *de minimis* thresholds for gifts, meals, or hospitality in respect of public servants and the thresholds specified under the Service Rules and the FCRA can, at best, be viewed as guidelines for *de minimis* amounts, on the assumption that there is no intent to violate the PCA. Moreover, the Supreme Court of India has held that the quantum paid as gratification is immaterial and that conviction will ultimately depend upon the conduct of the delinquent public official and proof established by the prosecution regarding the acceptance of such illegal gratification.[2] It should be noted that the true test of whether a person shall be prosecuted under any anti-bribery legislation is whether the *mens rea* to commit an act of corruption or violate any anti-bribery law existed as on the date of such payment.

Therefore, the receipt of gratification or valuable things (however insignificant their value) by a public servant, which is not within the legal remuneration of the public servant, could potentially attract prosecution under the PCA. The provision of gifts, meals, or hospitality of a nominal value (and below the thresholds specified in the Service Rules or FCRA) could also be considered inconsistent with the PCA and constitute an illegal act. The 2018 amendment has made available the 'adequate procedures' defence to commercial establishments. Thus, a company can demonstrate its lack of *mens rea* to commit an offence under the PCA by proving compliance with such guidelines as may be prescribed by the central government to prevent persons associated with it from undertaking such conduct. This defence is in line with that provided under the US Foreign Corrupt Practices Act and the UK Bribery Act.

In view of the foregoing, the compliance regimes of multinational organisations operating in India have to be carefully crafted and customised to the Indian legal framework, and specific legal advice ought to be obtained in this regard.

Key issues relating to investigation and enforcement procedures

Attorney-client privilege

Indian law recognises that communications between an attorney and a client are privileged. It is, however, important that advice on Indian law be sought when evaluating the availability of privilege in the specific facts of every case. In the context of an investigation, we suggest that the company should appoint an Indian law firm to conduct the investigation, and (although this position remains untested as a matter of law) any experts, investigators or auditors should be appointed by the law firm to extend the privilege (to the extent available) to any work product prepared by such experts, investigators, or auditors.

Data privacy concerns

Companies are generally permitted under Indian laws to collect and review electronic data stored on their servers or electronic equipment (such as laptops or phones) in the context of an investigation, and this right should be specifically reserved by the company in its

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policy manuals or employee handbooks. The Information Technology Act 2000 and the rules issued thereunder regulate the collection, storage, use and disclosure of sensitive personal information ('**SPI**'), such as passwords, financial information, medical records and biometric information, etc.; therefore a company should obtain the consent of an employee before accessing or reviewing data from an employee's personal electronic devices.

Reporting

There is no express obligation under Indian law to self-report offences under the PCA. However, a reporting obligation imposed upon auditors may be triggered if the act also qualifies for reporting under the Companies Act. Although the Code of Criminal Procedure, 1973 contains provisions relating to reporting obligations, it remains to be seen whether Indian courts will extend these obligations to offences under the PCA.

Presumptions and exemptions under the PCA

Where the authorities can establish the receipt of gratification or a valuable thing by a public servant, the PCA creates a legal presumption that the receipt was pursuant to an offence under the PCA – the burden of proof is then on the accused to demonstrate that such receipt was not improper. Additionally, recent legislative changes to the PCA in 2018 provide immunity to individuals accused of providing gratification, if such individual has been compelled to give such gratification and is willing to report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such gratification.

Multiplicity of enforcement proceedings and agencies

From the perspective of commercial organisations, it is important to recognise that multiple agencies with similar powers are often competent to investigate different aspects or facets of a single set of facts. For example, the use of company funds to bribe an official of the central government may constitute related but distinct offences under the PCA, the PMLA and the Companies Act, each of which may be investigated by a different agency. If the company in question is listed, the securities market regulator, the Securities and Exchange Board of India may also initiate proceedings against the company. Therefore, addressing any compliance issues and/or dealing with an investigation requires companies to adopt a nuanced and carefully crafted strategy.

Overview of cross-border issues

As noted previously, we have recently seen greater levels of interaction between Indian authorities and their counterparts in other jurisdictions, and they have demonstrated a willingness to invoke treaties and join forces for mutual assistance to investigate corruption matters. Indian authorities have also been known to take note of settlements agreed between multi-national corporations with offshore regulators such as United States Department of Justice, and initiate proceedings into the Indian businesses of such corporations. Therefore, corporations being investigated in other jurisdictions should also be prepared in respect of potential investigations in India.

India has ratified the United Nations Convention against Corruption ('**UNCAC**') and the United Nations Convention on Transnational Organized Crime and its three protocols, both of which mandate the criminalisation of corruption and bribery of public officials. The legislative changes to the PCA in 2018 have been introduced with the intention of removing any inconsistencies and aligning the provisions of the PCA with India's international obligations under the UNCAC.

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It may be noted that there is no existing Indian law that applies to bribery of foreign public officials by Indian companies, and a bill introduced in Parliament in this regard (The Prevention of Bribery of Foreign Public Officials and Officials of Public Interest Organisations Bill, 2011) has since lapsed.

India has signed an Inter-Governmental Agreement with the United States to implement the Foreign Account Tax Compliance Act ('**FATCA**') in India, allowing automatic exchange of information between the two countries, and to combat tax evasion by nationals and companies in both countries. India is also a signatory to the Convention on Mutual Administrative Assistance in Tax Matters, and has agreed to implement the Common Reporting Standard for automatic exchange of tax and financial information, with effect from 2017.

Corporate liability for bribery and corruption offences

The Supreme Court of India has recognised the principle of corporate criminal liability in India, and held that *mens rea* may be attributed to companies on the principle of 'alter ego' of the company, i.e. the state of mind of directors and managers who represent the 'directing mind and will' of the company.[3] It has stated that in order to attribute the *mens rea* of a person or group of persons in a company, it is necessary to ascertain whether '*the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons*'. Accordingly, for authorities to succeed in holding a company criminally liable, the *mens rea* of the relevant employees will have to be attributable to the company. In practice, however, Indian authorities typically always charge an employer company for the offence along with the individual employee (regardless of the seniority of the employee), and the liability of the company would need to be proved (or disproved) at trial.

The PCA and the FCRA recognise the principle of corporate criminal liability. Recent legislative changes to the PCA in 2018 have included provisions which expressly state that in case an offence is committed by a commercial organisation, such commercial organisation shall be liable to a fine if any person 'associated with the commercial organisation' provides any illegal gratification intended at obtaining or retaining business or advantage in the conduct of business, for such commercial organisation. A person is considered to be associated with a commercial organisation if such person provides services on behalf of such commercial organisation. This is a question of fact, and not just the relationship between the person and the organisation – and such person could be acting as an employee, agent or subsidiary of such commercial organisation. Hence, an employee of the commercial organisation is deemed to have performed services for such commercial organisation.

As regards liability of senior management or directors for offences committed by a company, the 2018 amendment to the PCA, has under section 10, clarified that when an offence has been proved in court to have been committed by a commercial organisation with the consent or connivance of a director, manager, secretary or any other officer of such commercial organisation, such persons shall be liable to be proceeded against, and be punished with imprisonment and fine if found guilty. The maximum term of imprisonment provided is seven years. Recent legislative changes to the PCA have now incorporated vicarious criminal liability. Such provisions state that in case any offence is committed by a commercial organisation, the directors, managers, secretaries and any other officers with whose consent and connivance the offence has been proved to have been committed, shall be liable to penalties.

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Additionally, the PCA now includes an 'adequate procedures' defence for commercial organisations – however, the central government is yet to issue guidelines regarding the compliance measures required to be undertaken by a company.

Proposed reforms

Pursuant to recent legislative developments in relation to various anti-corruption laws, no proposed reforms, amendments or updates are currently contemplated. The implications of recent developments, along with their enforcement and any practical difficulties arising therefrom, will need to be analysed in future.

* * *

Endnotes

1. *CBI v. Ramesh Gelli & Ors.*, 2016 (3) SCC 788.
2. *AB Bhaskara Rao v. Inspector of Police, CBI, Visakhapatnam*, 2011 (4) KLT (SN) 35.
3. *Iridium India Limited v. Motorola Incorporated & Ors.*, AIR 2011 SC 20.

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Indonesia

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Overview of the law and enforcement regime

This past year has been an exciting one for Indonesia, which held legislative and presidential elections in April. There was also a significant development in the anti-corruption sector, with the issuance of an amendment to the law on the nation's anti-corruption body, known as the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or "KPK").

While the KPK Law amendment has received significant media attention and been the focus of protest in large cities across the country, as of this writing it has not been made public. This despite some reports that the amended law was promulgated on October 17, 2019, as Law No. 19 of 2019 (the "Amended KPK Law"). While we have not seen the Amended KPK Law, if it has in fact already been enacted, we will nevertheless attempt to address the most significant changes introduced by the amendment, based on the most recent draft bill prior to its promulgation, as well as public reports.

Apart from the Amended KPK Law, we address key developments in the Indonesian anti-corruption legal regime from the past year. We start with the general legal framework for corruption and bribery in Indonesia. It must be noted that the legal regime, aside from the Amended KPK Law, remains the same as in previous years. That said, we believe it will be helpful to provide a brief overview.

The Indonesian anti-corruption regime is primarily based on Law No. 31 of 1999 regarding Eradication of Criminal Acts of Corruption (August 16, 1999), as amended by Law No. 20 of 2001 (November 21, 2001) (together, the "Anti-Corruption Law").

The Anti-Corruption Law governs the following types of corruption crimes, namely corruption:

- that causes loss to the state's finances;
- related to bribery;
- related to gratuity;
- related to malfeasance;
- related to extortion; and
- related to conflict of interest in procurement.

As can be seen from the above, the Anti-Corruption Law adopts a broad definition of corruption, which encompasses bribery. Therefore, in the Indonesian legal context, the term "corruption" also covers bribery.

The Anti-Corruption Law also addresses the commission of corruption crimes by certain perpetrators in addition to or involving state officials, namely judges, advocates, and certain

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types of contractors (those that render services related to public projects during wartime).

There are also other related crimes that are punishable under the Anti-Corruption Law, including obstruction of justice and perjury.

In addition to the Anti-Corruption Law, Law No. 11 of 1980 regarding Bribery (October 27, 1980) (the "Anti-Bribery Law") stipulates punishment for any person who bribes a public official. It would appear that both the Anti-Corruption Law and the Anti-Bribery Law punish corruption crimes related to bribery. However, the Anti-Bribery Law provides that the law applies to bribery crimes that have not been regulated. The Anti-Bribery Law complements the Anti-Corruption Law. We are not aware of any recent cases charged under the Anti-Bribery Law.

Corruption is a special crime under Indonesian law. Perpetrators of corruption acts are brought before the Corruption Court pursuant to Law No. 46 of 2009 regarding the Corruption Court (October 29, 2009) (the "Corruption Court Law"). The Corruption Court is a special court having jurisdiction over corruption crimes in Indonesia and has an extraterritorial reach. The Corruption Court Law expressly empowers the Corruption Court to adjudicate corruption crimes committed by Indonesian citizens in overseas territories.

The Anti-Corruption Law applies not only to the party providing the illicit payment (bribe, gift, or gratification), but also to the recipient of such payment. Under the Anti-Corruption Law, any person attempting, assisting, or conspiring to commit a criminal act of corruption is subject to the same penalties as the perpetrator.

The forms of punishment under the Anti-Corruption Law can be divided into two categories, namely: (i) primary sanctions, and (ii) additional sanctions.

(i) Primary sanctions can be any of fines, imprisonment, and/or capital punishment.

Fines that can be imposed range from a minimum of IDR 50 million (approximately US$ 3,350 using the current exchange rate of US$ 1 = IDR 14,900) up to IDR 1 billion (approximately US$ 67,115 using the current exchange rate).

Prison sentences that can be imposed range from one year up to life in prison.

Capital punishment may be applied if the criminal act of corruption involves funds intended for the eradication of a dangerous situation, a national disaster, riots, or an economic or monetary crisis, or for repeated criminal acts of corruption.

(ii) Additional sanctions comprise the following sanctions/penalties:

(a) confiscation of tangible or intangible movable or immovable goods used for or obtained from criminal acts of corruption, including any company owned by the accused where a criminal act was perpetrated, and the same shall apply to goods that replace the aforementioned movable or immovable goods;

(b) payment of compensation in a maximum amount equal to those assets obtained from the criminal acts of corruption;

(c) whole or partial closure of the company for a maximum period of one year; or

(d) revocation of all or certain rights, or the cancellation of all or certain profits that have been or can be given by the government to the accused.

It is important to note that both the Anti-Corruption Law and the Anti-Bribery Law only govern corruption involving government officials or causing losses to state finances. Corruption in the private sector (involving only companies or only among private individuals), which does not involve a government official or relate to state finances, is not subject to these laws. The scope of "private corruption" would fall under the ambit of the

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Indonesian Criminal Code and, in practice, perpetrators would be reported as committing the crime of embezzlement or fraud.

There are essentially three law enforcement bodies tasked with combating corruption in Indonesia, namely: (i) the Police; (ii) the KPK; and (iii) the Attorney General's Office (the "AGO").

Each body is authorised to investigate criminal acts of corruption with different levels of investigative or prosecution authority.

Prior to the inception of the KPK, the Police would investigate alleged corruption crimes and the AGO would proceed with the prosecution of criminal cases in the courts.

The KPK was established pursuant to Law No. 30 of 2002 regarding the KPK (December 27, 2002), which has recently been amended as discussed above. The KPK is empowered to investigate and prosecute criminal acts of corruption that involve the state legal enforcement apparatus, state organisers, and others involved in the enforcement of the anti-corruption legal regime, including alleged corruption that may have been committed by the Police or the AGO. In short, the KPK's authority is focused on corruption committed by public officials.

Overview of enforcement activity and policy during the last year

Since its inception, the KPK has garnered most of the Indonesian public's and media's attention in the fight against corruption. The KPK is known for its sting operations, or *operasi tangkap tangan* ("OTT"), resulting in the red-handed capture of perpetrators, mostly state officials. The KPK's activities are focused on bribery crimes committed by individuals. The KPK has also more recently focused its investigations on corporations. The KPK website reported around a 44% increase in corruption investigations and prosecutions in 2018 compared to the previous year (source: https://acch.kpk.go.id/id/statistik/tindak-pidana-korupsi). To be precise, in 2018, the KPK investigated 199 new cases and prosecuted 151 cases, with a majority of these cases involving legislators and local regional heads. In 2018, the KPK conducted 30 OTT operations.

One high-profile case in 2018 was the prosecution of the head of the Indonesian Bank Restructuring Agency ("IBRA") for the misappropriation of funds disbursed by IBRA to collapsing banks as a result of the 1998 Asian financial crisis. The case was alleged to have caused state losses of more than IDR 4.85 trillion. The Corruption Court initially sentenced the defendant to 13 years in prison and a fine of IDR 800 million. However, in July 2019, the Supreme Court overturned the decision and acquitted the defendant of the corruption charge. The reason for the acquittal revolved around the issue of whether the defendant's action constituted a "criminal act".

Some of the higher-profile cases in 2019 involved the AGO. Another high-profile case occurred in June 2019, in which the Indonesian Corruption Court sentenced the former CEO of Pertamina, a state-owned oil and gas company, to eight years in prison and a fine of IDR 1 billion. That case involved a charge of corruption causing state losses from a business decision that was made in 2009. The business decision in question related to acquiring certain offshore assets form a company in Australia. The decision was said to have been made without due diligence and a proper risk analysis and without the approval of Pertamina's board of commissioners.

In late 2017, the KPK introduced an electronic wealth reporting system. Under Indonesian law, public officials are required to file mandatory annual wealth reports (*Laporan Harta*

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Kekayaan Penyelenggara Negara or "LHKPN") with the KPK. Public officials are required to report their wealth in their LHKPN, including movable and immovable assets. 2019 was an election year, and as a prerequisite for being inaugurated, newly elected legislators were required to file an LHKPN.

Law and policy relating to issues such as facilitation payments and hospitality

We understand that the Foreign Corrupt Practices Act (the "FCPA") permits facilitating payments to be made to foreign officials for routine governmental actions to expedite the performance of their duties. Such payments are generally considered as not being intended to influence the outcome of the official's action or decision, but rather to expedite an action or decision that is already a given. A facilitating payment, therefore, is an exception to the anti-bribery prohibitions in the FCPA.

In contrast, facilitating payments are not recognised under Indonesian law. Generally, there is no provision under the Anti-Corruption Law or in Indonesian law that permits facilitating payments or exempts such payments from the general prohibitions of the Anti-Corruption Law. In fact, unauthorised payment to any government official, regardless of the purpose, is very suspect and may be considered a bribe. The Anti-Corruption Law expressly provides that gifts or gratifications given to a public official shall be considered a bribe if they are related to his/her position and are contrary to his/her official duty or obligations.

The Anti-Corruption Law does not define the term "gift". It merely provides that "gratifications" are "*gifts in a broad meaning, which includes the giving of money, goods, discounts, commissions, interest-free loans, travel tickets, lodging, travel, free medical care, and other facilities*". Such gratification shall also encompass any gift that is accepted outside the country and given by using electronic means or otherwise. The term is thus meant to suggest any consideration of any kind, whether requested or not.

Based on the foregoing broad definition, we are of the view that a facilitating payment provided for the purpose of expediting or securing the performance of a routine governmental action by an official would constitute a gift and gratification within the meaning of the Anti-Corruption Law.

In 2015, the KPK issued *Guidelines for Gratification Control*. Separately, KPK Regulation No. 2 of 2014 regarding *Guidelines for Reporting and the Determination of Gratuity Status* (December 9, 2014) requires state officials to report the receipt of a gratification to the KPK within 30 days of its receipt. While the KPK takes a hard line on this issue, it has not, to our knowledge, exercised its authority to prosecute people who make or receive such payments. These payments are considered relatively small in amount compared to the cases subject to the KPK's sting operations. It would appear that the KPK has much bigger fish to fry and prefers not to expend its limited resources pursuing either donors or government officials engaged in the practice of these "small" payments.

Another issue faced by companies in Indonesia is "official" requests for the payment of travel and logistical costs, or the daily allowances of government officials in the performance of their official duties. Companies will typically receive an official written request for certain payments from the government institution concerned. Companies tend to view such requests as suspect and question, rightfully so, whether such payments are allowed under the Anti-Corruption Law.

To be clear, there is no regulation which expressly provides, obliges, or allows companies to bear the travel costs and pay the daily allowances of government officials. The general rule for official travel clearly stipulates that the daily allowances of government officials are

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to be provided by the relevant government ministry or state institution.

Interestingly, Indonesian law enforcement agencies appear to take a flexible approach to this issue. Law enforcement agencies understand that many government ministries and other government bodies lack the budget to accommodate official travel. Acknowledging the limits of the government's fiscal capability, law enforcement agencies accept, as a matter of unwritten policy, that the private sector may be asked to bear some or all of the costs of official travel, provided that: (i) the amount given to an official does not exceed the maximum amount stipulated by the Minister of Finance for official travel, which is regularly updated, typically on a yearly basis; and (ii) the daily allowance of the officials has not been covered by the state budget.

In our view, a private sector entity paying a government official an amount in respect of official travel to which the official is entitled by statute, but which has not been covered by the state budget, would not likely be deemed unlawful. However, there is no provision of Indonesian law with the clear intent of permitting or prohibiting the practice.

Accordingly, we have prepared a few pointers which we hope are useful for companies in handling such a situation. As the practice normally occurs through the issuance of a request, the company should ask for an official written request from the relevant government institution. The company will need to review whether the activity the government institution will perform and the amount requested are consistent with the prevailing laws and regulations. It is advisable that companies do not make such payments in cash, if possible. In any event, any cash payment should be to an official state bank account and paid through any of the officially appointed state-owned banks. Any request for payment to an individual's bank account should at all times be avoided.

We would recommend that companies consult their legal and compliance teams in every situation where payments to government officials are involved.

Key issues relating to investigation, decision-making and enforcement procedures

As noted at the outset, a significant regulatory development is the Amended KPK Law. Public reports suggest the following key amendments under the Amended KPK Law:

1. The establishment of a Supervisory Board. It appears that this Supervisory Board will have authority over the operations of the KPK.
2. Removal of the prohibition on the KPK from ceasing investigations and prosecutions. Under the Amended KPK Law, the KPK can drop cases if the investigation or prosecution is not finished within two years.
3. Wiretapping, searches and seizures require prior written approval from the Supervisory Board.
4. The Supervisory Board is authorised to prepare a code and conduct formal hearings into possible ethics violations by members of the KPK.
5. Only police can be appointed as KPK investigators.

The Amended KPK Law will likely affect how KPK investigations are carried out. As discussed above, there are three law enforcement bodies authorised to investigate and/or prosecute corruption. These three bodies have equal standing and there is no regulation on which body should initiate an investigation. Whichever body has sufficient preliminary evidence to conduct an investigation may proceed with the investigation, resulting in the potential overlap of authorities. Prior to the Amended KPK Law, the KPK had the authority to take over the investigation or prosecution of a criminal act of corruption

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conducted by the Police or the AGO based on a number of specified criteria. Under the Amended KPK Law, the KPK is required to cooperate with the Police and the AGO. It is unclear how this "cooperation" might play out.

Overview of cross-border issues

The Anti-Corruption Law and the Anti-Bribery Law recognise the extraterritorial principle.

The Anti-Corruption Law stipulates that "individuals outside the territory of Indonesia" are subject to its provisions. These individuals may be held liable for corruption in the event that they provide any assistance, opportunity, infrastructure, or information for a transnational criminal act of corruption in Indonesia (such as transferring funds originating from corruption overseas) that gives rise to a corruption crime specified under the Anti-Corruption Law. The individual will be treated as a perpetrator under the Anti-Corruption Law.

The Anti-Bribery Law provides that bribery committed outside Indonesia is subject to the Anti-Bribery Law. It is important to note that the Anti-Bribery Law concerns the bribery of Indonesian government officials who have authority related to public services in Indonesia. It does not govern bribery of foreign officials.

Separately, the Supreme Court of Indonesia issued Supreme Court Regulation No. 13 of 2016 (December 29, 2016) ("SC Reg. 13/2016"), which sets out the procedures for handling criminal acts, including criminal acts of corruption, committed by corporations. SC Reg. 13/2016 does not seem to limit the "citizenship" of a corporate entity, and in fact requires the "citizenship" information of a corporate entity in the event the KPK or the AGO issues a summons to a corporation as part of an investigation (either as a witness or perpetrator). Article 10 of SC Reg. 13/2016 stipulates that a summons letter for a corporation shall at least contain:

(a) the name of the corporation;

(b) the corporation's domicile;

(c) the nationality of the corporation;

(d) the status of the corporation in the criminal act of corruption (witness, suspect, or defendant);

(e) the place and time of investigation; and

(f) a summary of the criminal act of corruption that relates to the summons.

Although SC Reg. 13/2016 provides the authority to issue summonses to foreign entities, we are not aware of any incident whereby law enforcement bodies have issued such a summons. We also believe that it would be very difficult to enforce such a summons without the cooperation of the country of domicile of the entity to which the summons is addressed.

Corporate liability for bribery and corruption offences

The Anti-Corruption Law may hold corporations responsible for criminal acts of corruption. Pursuant to the Anti-Corruption Law, a corporation found guilty of an act of corruption may be required to pay a maximum fine equal to the maximum fine for an individual, plus an additional one-third on top of such fine. Individual members of management may be held liable for criminal acts of corruption committed by the corporation.

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In a similar vein, SC Reg. 13/2016 stipulates that a corporation shall be represented by member(s) of its management during any investigation and subsequent court proceedings for corporate crimes, except for a corporation that is undergoing a dissolution process, which shall be represented by the liquidator.

SC Reg. 13/2016 also suggests that in deciding criminal penalties for a corporation, the Panel of Judges may assess whether the corporation:

(a) profited or benefited from such criminal act, or whether such act was committed for the corporation's interest;

(b) allowed such criminal act to happen; and

(c) failed to take necessary measures to prevent and/or minimise the impact of such criminal act, and also to ensure the compliance of the corporation with the prevailing laws and regulations to avoid such criminal act from being committed.

We would note that the above provision (c) may be interpreted to mean that the Panel of Judges would likely look into the measures taken by a corporation in preventing the alleged act of corruption. However, it is not clear whether such provision provides a defence or excuse for companies that claim to have taken measures to prevent an act of corruption from occurring. The regulation does not address the forms of valid defence.

Since the enactment of SC Reg. 13/2016, law enforcement agencies have utilised the provisions of SC Reg. 13/2016 to target corporations in relation to corruption allegations. In 2018, the KPK named four state-owned corporations as corruption suspects.

Proposed reforms / The year ahead

The year 2019 was an election year and, as expected, saw a great deal of controversy. As anticipated, the Amended KPK Law received significant public attention and was itself a source of controversy. Reaction to the Amended KPK Law has been sharply divided, with the two sides seeming to have polar opposite views of what the amended law means for the fight against corruption. The only thing seemingly that can be said with any certainty is that Indonesia will have to wait and see whether the newly issued Amended KPK Law will curb corruption investigations or make them fairer.

Another key legislative reform that has been discussed for some time but has not been accomplished as of this writing is the amendment of the Indonesian Criminal Code. Previous reports suggested that there are a number of proposed amendments to provisions relating to corruption. But more recent reports seem to suggest the amendments will focus more on general offences than corruption offences. It is not clear when, or even if, the amendment to the Criminal Code will be issued.

Nevertheless, 2020 is shaping up to be an interesting year.

* * *

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Ireland

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Brief overview of the law and enforcement regime

Up until July 2018, bribery and corruption in Ireland were primarily criminalised under the Prevention of Corruption Acts 1889–2010. Since then, those earlier acts have been repealed and the criminal law on corruption is now largely set out in the Criminal Justice (Corruption Offences) Act 2018 (CJCOA), which came into force on 30 July 2018. The CJCOA also repealed the offences of active and passive corruption set out in the Criminal Justice (Theft and Fraud Offences) Act 2001 (2001 Act).

The CJCOA contains several corruption offences, namely:

- active and passive corruption;
- active and passive trading in influence;
- corruption in relation to office, employment, position or business;
- giving a gift, consideration or advantage that may be used to facilitate an offence;
- creating or using a false document; and
- intimidation.

The CJCOA also defines "corruptly" broadly, to include acting with an improper purpose personally or by influencing another person, whether:

- by means of making a false or misleading statement;
- by means of withholding, concealing, altering or destroying a document or other information; or
- by other means.

It also provides for extensive corporate liability in circumstances where an officer, employee, agent or subsidiary of a body corporate commits an offence with the intention of benefiting the body corporate.

The penalties on conviction for an offence under the CJCOA can include a fine, imprisonment, forfeiture of property or of an office, position or employment as well as a prohibition on holding office, etc. for a specified period. The severity of the penalty will depend on the nature of the specific offence. The CJCOA also provides for seizure and forfeiture of a suspected bribe.

In addition to the offences set out in the CJCOA:

- section 10 of the 2001 Act criminalises false accounting; and
- the Companies Act 2014 contains various offences relating to the falsification of company books and documents.

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Moreover, in recent years, Ireland has adopted a number of other measures designed to promote transparency, particularly in public life. These include the:

- Freedom of Information Act 2014 – This Act gives every person the right to access information held by public bodies and to obtain reasons for decisions affecting that person;
- Protected Disclosures Act 2014 – This Act provides a general suite of employment protections and legal immunities to whistleblowers, including not only employees but consultants, contractors, trainees, volunteers, temporary workers, former employees and job seekers; and
- Regulation of Lobbying Act 2015 – This Act sets out mandatory registration and disclosure requirements for all those carrying out lobbying activities, and applies not only to professional lobbyists but also any business with more than 10 employees.

As a member of the European Union, Ireland is also subject to EU legislation on the internal market, including the anti-money-laundering and counter-terrorist financing framework.

No one agency has overall responsibility for the prevention, investigation and prosecution of corruption in Ireland. Instead, it is shared across a variety of public bodies, including *An Garda Síochána* (the Irish police force), and the Office of the Director of Public Prosecutions. The Standards in Public Office Commission oversees compliance with the Regulation of Lobbying Act 2015 as well as legislation regulating political financing and the conduct of public officials.

An Anti-Corruption Unit within *An Garda Síochána* was established in 2017. This is a section of the Garda National Economic Crime Bureau (GNECB) which is a specialist bureau that investigates fraud-related crime involving complex issues of criminal law or procedure. In September 2018, the Anti-Corruption Unit launched the Bribery and Corruption Confidential Reporting Line. The system is message-based and enables the caller to leave a confidential voicemail which will be evaluated by staff attached to the Garda Anti-Corruption Unit. However, a 2019 evaluation by the implementation review group of Ireland's implementation of aspects of the United Nations Convention Against Corruption (UNCAC), pointed to the low staffing levels of this unit and stated that its corruption prevention mandate was not sufficiently clear. It recommended that these issues be addressed.

Overview of enforcement activity and policy during the last year

Corruption within *An Garda Síochána* itself remained in focus in 2019, with the Disclosures Tribunal continuing its public hearings. This tribunal was set up in February 2017 to investigate allegations that Sergeant Maurice McCabe had been smeared by various individuals or agencies for having made complaints of serious corruption within *An Garda Síochána*. In its 2018 Third Interim Report, the Disclosures Tribunal found that Sergeant McCabe was a "genuine person" who was "repulsively denigrated for being no more than a good citizen and police officer".

The Garda Commissioner fully accepted the findings of the Disclosures Tribunal and committed to ensuring that *An Garda Síochána* is a safe environment for people to raise issues or concerns. In late 2019, the tribunal hearings focused on a similar complaint from another *Garda* that he was previously targeted or discredited with the knowledge or acquiescence of senior members of *An Garda Síochána* following the making of a protected disclosure about alleged wrongdoing in the force.

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It was also announced earlier this year that a dedicated Garda anti-corruption unit would be established by the end of 2019 to investigate allegations of corruption within the force. The new unit will investigate allegations around drug use, the flow of information outside of the organisation, and inappropriate associations with criminals. A Chief Superintendent has been appointed to run the unit with responsibility for the development of policies, procedures and legislative provisions. During late 2019, a significant investigation into Garda corruption in the south of the country was ongoing. Moreover, according to newspaper reports, in February 2019, a detective *Garda* (a police officer) was charged with a corruption offence for revealing confidential information in exchange for a monetary gift.

While there have been no reported prosecutions of corporates under the new corporate bribery offence, the past year has seen an increased focus by corporates on the implementation of appropriate risk management procedures.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments fall within the scope of the CJCOA. Depending on its form, hospitality may constitute a bribe under the CJCOA. However, the acceptance of hospitality is also regulated under the Ethics in Public Office Acts 1995 and 2001 (Ethics Acts), the Local Government Act 2001 and in related codes of conduct.

The Irish corruption offences are widely cast and phrased in general terms without distinguishing between facilitation payments and other types of bribes.

The acceptance of hospitality, including gifts and entertainment, is governed by the Ethics Acts, by Part 15 of the Local Government Act 2001, as well as by codes of conduct. Generally, a public official must disclose all gifts given to him or her in excess of a certain amount (€650), subject to a number of exceptions. Where an officeholder receives a gift valued in excess of €650, the gift is deemed to be a gift given to the State and vests in the Minister for Finance. Generally, the codes of conduct go further than the Ethics Acts and prohibit the acceptance of gifts, or at least those that may pose a conflict of interest or interfere with the honest and impartial exercise of official duties.

The 2019 evaluation of Ireland's implementation of aspects of UNCAC recommended that Ireland consider lowering the limits in relation to gifts to public officials that are subject to mandatory declaration and refusal or remittance.

Key issues relating to investigation, decision-making and enforcement procedures

The CJCOA contains a number of presumptions of corruption which mirror certain aspects of the repealed corruption legislation reversing the burden of proof once certain facts are established. Specifically, there is a presumption:

(a) that a gift, consideration or advantage has been given or received corruptly where an official is tasked with carrying out a certain function and the donor had an interest in the carrying-out of that function (e.g. the grant of a licence) or in the failure of the official to carry out that function (e.g. the prosecution of an offence);

(b) that a political donation over a specific sum, or of a specific type, is given or received corruptly where there has been a failure to comply with applicable reporting and remitting procedures and the donor had an interest in the person concerned doing an act in relation to his or her office, employment, position or business; or

(c) of corrupt enrichment, where interests in land or other property have not been disclosed

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by an Irish official in accordance with applicable legislation: this presumption applies to certain corruption offences.[1]

In *DPP v Forsey*,[2] the accused was convicted of corruption under section 1 of the Prevention of Corruption Act 1906, (PCA) one of the Acts repealed by the CJCOA. When in force, this law provided that an agent or any other person who corruptly accepted any gift, consideration or advantage as an inducement to doing any act in relation to his office or position, was guilty of an offence.

The prosecution relied on the presumption of corruption in section 4 of the PCA against a holder of a public office, where it was proved that he received any gift, consideration or advantage from someone having an interest in the discharge by the office holder of specified functions. The benefit was deemed to have been received – and given – as an inducement or reward "unless the contrary is proved".

However, the Defendant appealed his conviction on the basis that the trial judge had misdirected the jury upon the correct interpretation of section 4. It was argued that this provision imposed a legal burden of proof on the defendant instead of an evidential burden of proof.

The Supreme Court said that section 4 should be interpreted as shifting the evidential burden of proof to the defendant, rather than the legal burden of proof. In giving judgment, O'Malley J said that if an accused bore the legal burden of proof and had to prove that the payments were not received corruptly on the balance of probabilities, he or she would have to persuade the jury that, at least, it was more likely than not that the money was not received corruptly. Since corrupt receipt was an essential element of the offence, this meant that the accused would have to disprove that element. In other words, the accused would have to affirmatively prove innocence. That would be a clear inroad on the presumption of innocence.

According to the Supreme Court, in cases where the prosecution relied on section 4, the trial court should instruct the jury clearly as to the elements of the offence and tell the jury that the prosecution had the burden of proving beyond reasonable doubt all of the elements, with the exception of the corrupt intention. The jury should then be told that if the prosecution had satisfied them beyond reasonable doubt of the matters it had to prove, they were to take corrupt intention as having being proved, regardless of whether the prosecution had given evidence in relation to it or not, or had only given weak evidence, unless there was something in the evidence that made them doubt that the accused had a corrupt motive. The overriding consideration was that a jury should not convict if left in doubt as to guilt.

Although this judgment concerned the repealed corruption legislation, the CJCOA has reproduced the presumption contained in the PCA as well as providing for additional presumptions of corruption, as set out above. The Supreme Court's judgment in *DPP v Forsey* clarifies that each of these presumptions should be read as shifting the evidential burden of proof rather than the legal burden of proof. While on the one hand this clearly makes the prosecution's job more difficult, on the other hand it acknowledges the fundamental importance of the presumption of innocence in our criminal justice system.

A number of provisions impose reporting obligations in relation to corruption offences. Most notably, section 19 of the Criminal Justice Act 2011 imposes a reporting obligation in relation to certain "relevant offences" which are defined in that Act. These include an offence under sections 5–10 inclusive of the CJCOA.[3]

Pursuant to section 19 of the Criminal Justice Act 2011, it is an offence for a person to fail,

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without reasonable excuse, to disclose information to *An Garda Síochána* that he knows or believes might be of material assistance in: (a) preventing the commission of a relevant offence; or (b) securing the apprehension, prosecution, or conviction of any other person for a relevant offence. The maximum penalty for the offence of withholding information is an unlimited fine and imprisonment for up to five years, or both.

However, in *Sweeney v Ireland*,[4] the constitutionality of a similar provision had been called into question in relation to an almost identical provision in the Offences Against the State (Amendment) Act 1998 (1998 Act).

In that case, Sweeney had been questioned in relation to a murder in which he was originally a suspect. He was not charged in relation to that murder but faced prosecution under section 9(1)(b) of the 1998 Act for failing to disclose, without reasonable excuse, information which he knew or believed might be of material assistance in securing the apprehension, prosecution or conviction of another person for the offence.

The High Court upheld his challenge to the constitutionality of that section. The decision in *Sweeney* therefore cast doubt on the constitutionality of section 19. However, this High Court decision was reversed by the Supreme Court on appeal in 2019.

In the High Court, Mr Sweeney had argued that the section 9(1)(b) offence breached his constitutional right to silence and had the effect that an accused might be prosecuted for exercising this right. He also argued that the offence was impermissibly and unconstitutionally vague and uncertain. In the High Court, Baker J agreed. However, on appeal by the State, these arguments were rejected by the Supreme Court.

In giving judgment for the court, Charleton J looked in detail at the ingredients of the section 9(1)(b) offence. He made the point that witnessing a crime is not an offence. He was satisfied that section 9(1)(b) only applied to those who had information about the commission of a serious offence. Those who had such information and who knew or believed that disclosing it to the police might be of material assistance to securing the apprehension, prosecution or conviction of any other person were obliged to so.

He concluded that the crime was clearly defined and consequently did not infringe the constitutional prohibition against vagueness. There was no question of an inconsistent application of the section and it was not likely to lead to arbitrary enforcement. The right to silence was protected for any person who did not wish to speak about their own involvement in a crime and thereby incriminate themselves.

Other provisions dealing with reporting include section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Under that provision, the auditor of a company or other entity must report to *An Garda Síochána* any information of which the auditor may become aware in the course of an audit which suggests that the audited entity may have committed any of a number of offences of dishonesty.

The enhanced protection for whistleblowers under the Protected Disclosures Act 2014 aims to encourage whistleblowing. The Protected Disclosures Act also requires public bodies to compile and make public reports on the operation of the Act, including the number of disclosures received on an annual basis. For example, the Central Bank of Ireland reports that it received 128 protected disclosures in the 12 months to December 2018. This compared to 93 in the previous year. It has reported a steady increase in these numbers year on year, beginning with one report of whistleblowing in the first year following the enactment of the legislation. These reports help to shed light on the prevalence of whistleblowing in Ireland and the success of the operation of the Protected Disclosures Act.

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Overview of cross-border issues

The CJCOA has extra-territorial effect. Under section 11, a person may be tried in Ireland for an offence under the CJCOA if any one or more of the acts alleged to constitute the offence were committed in Ireland, on board an Irish ship or on an aircraft registered in Ireland, notwithstanding that the other acts alleged to constitute the offence were committed outside Ireland. This is more liberal than the traditional common law position whereby the State has jurisdiction over offences where the last act necessary for the completion of the offence occurs on Irish territory.

In addition, section 12 of the CJCOA provides for extra-territorial reach where:

(a) a person does an act outside of Ireland that, if done in Ireland, would constitute an offence under specific sections of the CJCOA,[5] and the act is committed on board an Irish ship or aircraft, and the person concerned is an Irish official acting in his or her capacity as such, an Irish citizen or resident, or an Irish company or other body corporate;

(b) a European Union official working for an EU institution or other body set up under the EU treaties and headquartered in Ireland, does an act abroad that if done in Ireland, would be an offence under section 5;[6] or

(c) a person does an act abroad that if done in Ireland, would be an offence under section 5(1),[7] and this involves certain specified individuals.[8]

In all cases, the act in question must be an offence under the law of the place where it was done. Also, in each case, a guilty party will be exposed to the same penalty as if the act had been done in Ireland.

Towards the end of 2018, the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 was amended so as to extend the definition of money laundering to cover conduct involving a foreign official committed outside of Ireland which would be an offence under the CJCOA if it were to occur in Ireland, irrespective of whether the relevant conduct is also an offence in the place in which it is carried out.

In 2019, it was reported in the media that the GNECB had raised concerns with the Department of Justice about the dual criminality requirement under the Irish legislation, pointing out that if Irish persons or companies operated in a jurisdiction where anti-corruption legislation was weak or non-existent, then no offence would occur. This appeared to go against the ethos of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In its October 2019 report on Ireland, the OECD Working Group on Bribery was satisfied that the CJCOA fully implemented its earlier recommendation to consolidate and harmonise two overlapping foreign bribery offences that were previously contained in two separate statutes, and to remove the concept of the bribery of an "agent", previously used in one of the statutes. However, it said that given the legislative techniques used, it was still unclear how effective these provisions would be in practice and that this would be kept under review.

Corporate liability for bribery and corruption offences

Under current Irish law, corporations can be held criminally liable; however, the precise model for imposing liability has not been conclusively determined by the Irish courts. The Law Reform Commission has made certain recommendations in relation to the reform of the law in this area and these are detailed below.

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In the context of bribery and corruption, section 18 of the CJCOA deals explicitly with offences under the CJCOA and bodies corporate. Pursuant to section 18(1) of the CJCOA, a body corporate will be guilty of an offence under the CJCOA if an offence under the Act is committed by:

(a) a director, manager, secretary or other officer;

(b) a person purporting to act in that capacity;

(c) a shadow director; or

(d) an employee, agent or subsidiary of the body corporate,

with the intention of obtaining or retaining business for the body corporate, or an advantage in the conduct of its business.[9]

This is a strict liability offence and the liability is not restricted to cases where the natural person(s) involved are prosecuted or convicted. However, it will be a defence for a body corporate to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

Section 18(3) provides that where a body corporate commits an offence under the CJCOA and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of any director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person will also be guilty of an offence. In order for the prosecution to rely on this provision, it is not necessary that the corporate entity itself be convicted of bribery: it is sufficient if the prosecution proves that the corporate entity has committed that offence.[10]

Finally, where the affairs of a body corporate are managed by its members, the same will apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

Proposed reforms / The year ahead

The law in the area of bribery and corruption in Ireland has undergone significant reform in recent times. There will inevitably need to be a bedding-in period to see what works and whether further reforms are needed in this area.

In November 2017, the Irish Government published a suite of measures aimed at enhancing corporate governance, increasing transparency and strengthening Ireland's response to White Collar Crime. This included a commitment to review Ireland's anti-corruption and anti-fraud structures and procedures in criminal law enforcement. The review will assess the extent to which the various State bodies involved in the prevention, detection, investigation and prosecution of fraud and corruption are working effectively together, and identify any gaps or impediments in this regard. The review group is due to report in 2019.

The Judicial Council Act 2019 was signed into law on 29 July 2019. Aspects of the Act were commenced on 10 September 2019. The Judicial Council will be an independent body and will promote and maintain excellence and high standards of conduct by judges. It will also provide a means of investigating allegations of judicial misconduct.

In October 2018, the Law Reform Commission published its Report on Regulatory Powers and Corporate Offences. The Report considered the current law in Ireland concerning the attribution of criminal liability for corporate crime and made a number of recommendations for its reform. It noted that there is uncertainty in Ireland about the correct test to apply to determine the criminal liability of corporate bodies, and that this uncertainty may have

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contributed to a lack of prosecutions in Ireland of corporate bodies, for subjective fault-based offences in particular, which include offences that would be used to target commercial or economic wrongdoing, such as theft, fraud and bribery offences.

It recommended that the long-established but often criticised common law identification doctrine should be replaced. The identification doctrine attributes liability to a corporate body by requiring that the fault and conduct elements of the offence must be identified in a single natural person who operates high within its managerial structure, and is taken to have acted as the corporate body in committing the offence. The Commission noted that this model has been subject to significant criticism, as it works best in cases where it is needed least (small businesses where a single person can often be identified as the key decision-maker) and works worst in cases where it is needed most (large businesses where decision-making is necessarily delegated to many persons).

The Commission recommended a new test to reflect the reality of how modern corporate bodies, especially large ones, actually operate; that is, by delegating corporate policy-making not just to one senior manager but to many managers. This new test of attribution should involve a "tracking" approach, which requires that the fault element of the secondary offender, whether a single senior manager or more than one senior manager, should track that of the principal offender, the corporate body. It said that the precise calibration of this model would depend on the nature of the fault element of an offence; that is, whether it was a subjective fault offence, an objective fault offence, or a no-fault offence.

The Commission also concluded that the complicity of managerial agents in corporate offending was at risk of under-criminalisation in certain circumstances, and recommended the introduction of a new statutory scheme to target the complicity of certain managerial agents, who exercise a defined level of control or authority over the conduct of the corporate body and its agents. Where that control and authority operates in a manner that culpably contributes to corporate offending, this new scheme allows for the imposition of derivative criminal liability.

In February 2019, the Oireachtas (Irish Parliament) Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach discussed the Report and its recommendations. The recommendations await implementation.

* * *

Endnotes

1. "Irish official" is also a widely defined term under section 2 CJCOA, including such diverse persons as a member of parliament and a member of a jury in court proceedings.
2. *DPP v Forsey* [2018] IESC 55.
3. Namely, active and passive corruption; active and passive trading in influence; corruption in relation to an office, employment, position or business; giving a gift, consideration or advantage that may be used to facilitate an offence under the CJCOA; creating or using a false document; and intimidation.
4. [2017] IEHC 702 (High Court); [2019] IESC 39 (Supreme Court).
5. These are sections 5 (active and passive corruption); 6 (active and passive trading in influence); 7 (corruption in relation to office, employment, position or business); 8 (giving a gift, consideration or advantage that may be used to facilitate an offence under the CJCOA); 18(1) (offence by a body corporate); or section 9 concerning the creation or use of a false accounting, auditing or financial document.

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6. Section 5 deals with the offences of active and passive corruption.
7. 5. (1) A person who, either directly or indirectly, by himself or herself or with another person—

   (a) corruptly offers, or

   (b) corruptly gives or agrees to give,

   a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to his or her office, employment, position or business shall be guilty of an offence.
8. Those specified persons are: an Irish citizen; a national official of a Member State or an Irish official, or a member of—

- the European Commission,
- the European Parliament,
- the Court of Justice of the European Union, or
- the Court of Auditors of the European Union.

9. This provision is without prejudice to any circumstances under the general law, whereby acts of a natural person are attributed to a body corporate resulting in criminal liability of that body corporate for those acts. It also does not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in an offence under this Act.
10. *DPP v Hegarty* [2011] IESC 32.

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Italy

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Brief overview of the law and enforcement regime

Bribery of both domestic and foreign public officials is prohibited as a criminal offence under the Italian Criminal Code (ICC). On November 28, 2012, by Law no. 190/2012, a significant reform of the Italian anti-corruption system entered into force, introducing, *inter alia*, new bribery offences, increasing the punishments for existing offences, and generally enlarging the sphere of responsibility for private parties involved in bribery. Additional amendments, providing especially for increase of punishments, entered into force on January 31, 2019, further to Law no. 3/2019 (the so-called "Bribe Destroyer Act").

Domestic bribery

The bribery offences relating to domestic public officials are provided for by articles 318–322 ICC and by article 346-*bis* ICC and, in principle, their sanctions apply equally to the public official and the private briber (article 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 (article 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 (article 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's 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 performed in exchange for a bribe. Punishment is imprisonment from three 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 (article 319-*ter* ICC). Punishment is imprisonment from six to 12 years, and it can be increased due to 'aggravating circumstances';

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(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 (article 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, which sentences 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' (article 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' (article 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, which punishes anyone who, out of the cases of participation in the offences of 'proper bribery' and 'bribery in judicial acts', by exploiting existing or alleged relations with a public official, unduly pressurises someone to give or promise, to him/her or others, money or other advantage, as the price for his/her unlawful intermediation towards the public official, or as consideration for the public official for carrying out an act conflicting with the office's duties, or for 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 (article 346-*bis* ICC). Punishment is imprisonment from one year to four years and six months, and it can be increased due to 'aggravating circumstances'; or

(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 (article 322 ICC). Punishments provided for 'proper' bribery and for 'bribery for the performance of the function' apply, reduced by one-third.

Mental element

The mental element required for bribery offences is always intent (including, for the private party, knowledge and will to carry out an undue payment to a public official).

Foreign bribery

The bribery offences relating to foreign public officials are provided for by article 322-*bis* ICC (introduced by Law no. 300/2000, which implemented into the Italian legal system both the EU Anti-Corruption Convention of Brussels of 1997 on European Officials, and the OECD Anti-Bribery Convention of Paris of 1997 on Foreign Officials).

EU officials

As far as bribery relating to public officials of the EU institutions and of EU Member States is concerned, article 322-*bis* (paragraphs 1 and 2) ICC extends to such public officials, and to the private briber, the same bribery offences provided for domestic public officials indicated above.

Foreign and international officials

With respect to bribery relating to public officials of foreign states, and of international organisations (such as the UN, OECD, European Council, etc.), article 322-*bis* (paragraph

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2) ICC extends to these situations the application of the mentioned domestic bribery offences, but with the following limitation: 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).

Council of Europe Conventions

It should be noted that Italy has ratified both the Council of Europe Criminal Law Convention against Corruption, signed in Strasbourg on January 27, 1999, through Law no. 110/2012, which came into force on July 27, 2012 and the Council of Europe Civil Law Convention on Corruption, signed in Strasbourg on November 4, 1999, through Law no. 112/2012, which came into force on July 27, 2012.

Entities

As far as entities/corporations are concerned, as of 2001, prosecutions can also be brought against them for bribery offences (article 25 of Legislative Decree no. 231/2001). In that respect, it is necessary that a bribery offence is committed in the interest or for the benefit of the corporation by its managers or employees.

The corporation's responsibility is qualified as an administrative offence, but the matter is dealt with by a criminal court in accordance with the rules of criminal procedure, in proceedings which are ordinarily joined with the criminal proceeding against the corporations' officers/employees.

Where the bribery offence is committed by an 'employee', the corporation can avoid liability by proving to have implemented effective 'compliance programs' designed to prevent the commission of that type of offence (article 7 of Legislative Decree no. 231/2001).

Where the bribery offence is committed by 'senior managers', the implementation of effective 'compliance programs' does not suffice, and the corporations' responsibility is avoidable only by proving that the perpetrator acted in 'fraudulent breach' of corporate compliance controls (article 6 of Legislative Decree no. 231/2001).

Sanctions

Individuals. As previously mentioned, the sanctions for bribery offences (domestic and foreign) vary depending on the nature of the offence. In particular:

(i) for 'proper bribery', punishment is imprisonment from six years to 10 years, and it can be increased due to 'aggravating circumstances';

(ii) for 'bribery for the performance of the function', punishment is imprisonment from three years to six years, and it can be increased due to 'aggravating circumstances';

(iii) for 'bribery in judicial acts', punishment is imprisonment from six to 12 years, and it can be increased due to 'aggravating circumstances';

(iv) for the offence of 'unlawful inducement to give or promise anything of value', punishment is imprisonment from six 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';

(v) for the offence of 'trafficking of unlawful influences', punishment is imprisonment from one year to four years and six months, and it can be increased due to 'aggravating circumstances'; and

(vi) for 'instigation to bribery', punishments provided for 'proper' bribery and for 'bribery for the performance of the function' apply, reduced by one-third.

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In addition, in case of conviction, confiscation of the 'profit' or 'price' of the bribery offence has to be applied (even 'for equivalent', on assets of the offender for a value corresponding to the profit or price of the offence; article 322-*ter* ICC).

Entities. As far as corporations are concerned, they are subject to sanctions represented by fines, disqualifications and confiscation.

Disqualifications can be particularly damaging, because they can include the suspension or revocation of government concessions, debarment, exclusion from government financing, and even prohibition from carrying on business activity (articles 9–13 of Legislative Decree no. 231/2001).

Such sanctions can also be applied at the pre-trial stage, as interim coercive measures. In case of conviction, confiscation of the 'profit' or 'price' of the offence has to be applied, even by confiscating 'for equivalent' the assets of the corporation (article 19 of Legislative Decree no. 231/2001).

At the pre-trial stage, prosecutors can request the competent judge to grant freezing of the 'profit' or 'price' of the bribery offence (article 45 of Legislative Decree no. 231/2001).

Private commercial bribery

Until 2002, bribery offences were only applicable to the bribery of 'public officials' or 'persons in charge of a public service'. In 2002, an offence related to the corruption of private corporate officers has been introduced by article 2635 of the Italian Civil Code, which has then been amended by Legislative Decree no. 38/2017, which has implemented the EU Framework Decision 2003/568/JHA on combating bribery in the private sector.

The offence punishes with imprisonment, from one up to three years, of both the briber and the corporate officer, where money or other undue benefits are solicited, agreed or received by the corporation's directors, general managers, managers in charge of the accounting books, internal auditors and liquidators, to carry out or omit an act in violation of the duties of their office.

The punishment is imprisonment up to one year and six months for ordinary employees, who are subject to the direction or supervision of the mentioned senior managers, whilst the punishments are doubled in relation to corporations listed in Italy or in the European Union.

Overview of enforcement activity and policy during the last year

Main bodies responsible for the investigation of corruption offences

The main bodies responsible for the investigation and prosecution of corruption offences are the Public Prosecutors, who are assisted by the Public Forces, which include the State Police, the Carabinieri and the Financial Police.

Italian Public Prosecutors are not related to the government, but are professional magistrates. Their duties to bring criminal actions are compulsory and not discretionary (article 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. In the event the Public Prosecutor assesses that the 'notice of crime' against a certain suspect is ungrounded, he has to request the dismissal to the competent judge (the so-called Judge for the Preliminary Investigations).

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Enforcement

In relation to bribery offences, several investigations and prosecutions have been conducted by Italian authorities during the last year, also involving foreign companies. The following cases can be mentioned.

Domestic bribery (relating to Italian public officials)

(i) *The Lombardy Region case*

In the course of 2019, appellate proceedings against top politicians and officers of the Lombardy region reached a final verdict, with respect to charges of having facilitated the obtainment of public healthcare funds by certain private hospitals in exchange for money or other patrimonial advantages.

In the main leg of the prosecution, involving the former President of the Lombardy Region, the trial before the Milan Court of first instance started on May 6, 2014, and ended on December 23, 2016, with the conviction of the former President and his sentencing to six years' imprisonment for the charge of proper corruption. In September 2018, the Milan Court of Appeal confirmed such conviction, increasing the sentence to seven years and six months' imprisonment. On February 21, 2019, the Court of Cassation confirmed the conviction, reducing the sentence to five years and 10 months.

(ii) *Expo*

In May 2014, the Prosecutor's Office of Milan started an investigation in relation to the alleged altered adjudication of public tenders in the context of the 2015 Universal Exposition of Milan. A relevant leg of the proceeding has already been completed in previous years, with plea bargaining granted by the Judge of the Preliminary Hearing to most of the main defendants. The most severe sentence given was three years and four months' imprisonment. In another leg of the proceeding, on May 9, 2018, the Milan Court of first instance sentenced a relevant public official to three years' imprisonment. Appellate proceedings are currently pending.

(iii) *Mose*

In 2014, the Prosecutor's Office of Venice started an investigation against top politicians of the Veneto Region and businessmen for corruption relating to public funds used for the so-called *Mose project*, a huge dam aimed at protecting Venice from the high tide. On October 16, 2014, a relevant leg of the proceeding ended with the plea bargaining of 19 defendants, granted by the Judge of the Preliminary Hearing of Venice. The most severe sentence was two years and 10 months' imprisonment and the confiscation of €2.6 million. With respect to another leg of the proceeding transferred for geographical competence to Milan, the Milan Court of first instance, on April 15, 2016, sentenced a relevant public official (former member of parliament and adviser of the Ministry of Economy) to two years and six months' imprisonment for the offence of 'trafficking of unlawful influences'. Such conviction was first confirmed by the Milan Court of Appeal on June 29, 2017, but was then quashed by the Court in Cassation in April 2018 due to a time-bar.

(iv) *Mafia Capitale*

In 2014, the Prosecutor's Office of Rome started investigations against top politicians of the Municipality of Rome and businessmen for corruption and conspiracy with mafia modalities, in relation to the adjudication of public tenders concerning assistance services to be carried out by the Rome Municipality (in particular, assistance services

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for immigrants and refugees). Forty-four people were arrested in December 2014. In the main leg of the proceeding, the trial started in 2015 before the Rome Court of first instance and ended on July 20, 2017, with 41 convictions ranging from one to 20 years' imprisonment. In September 2018, the Rome Court of Appeal confirmed most of the convictions, and it considered applicable the aggravating circumstance of mafia methods. Appellate proceedings before the Court of Cassation are currently pending.

Foreign bribery (relating to foreign public officials)

(i) *Nigeria Bonny Island*

The Nigeria Bonny Island case concerns an investigation conducted by the Milan Prosecution's Office against the companies Eni Spa and Saipem Spa in relation to the offence of foreign bribery allegedly committed by the companies' officers (in the frame of the international consortium Tskj, involving the US company KBR-Halliburton, the Japanese Jgc, and the French Technip), allegedly consisting of significant payments to Nigerian public officials between 1994 and 2004, in order to win gas supply contracts.

On November 17, 2009, the Milan Judge for the Preliminary Investigations rejected the prosecutors' application to apply to Eni Spa and Saipem Spa the pre-trial 'interim measure' of prohibition from entering into contracts with the Nigerian National Petroleum Corporation, owing to lack of Italian jurisdiction. The case against Eni Spa was subsequently dismissed, and the case against five officers of Saipem Spa was also dismissed on April 5, 2012 due to the time bar. By contrast, in July 2013, Saipem Spa was sentenced by the Milan Court of first instance to a fine of €600,000 and the confiscation of €24.5 million. The conviction of Saipem was then confirmed by the Milan Court of Appeal in February 2015, and finally by the Court of Cassation in February 2016.

(ii) *Finmeccanica-AgustaWestland/India*

The *Finmeccanica-AgustaWestland* case concerns an investigation conducted by the Prosecution's Office of Busto Arsizio (an area close to Milan) against the companies Finmeccanica and AgustaWestland, and their top managers, in relation to the offence of foreign bribery allegedly committed in 2010 in connection with the supply to the Indian government of 12 helicopters. In summer 2014, the Prosecutor discontinued the investigations against Finmeccanica, in the light of the assessment that the company was not involved in the alleged wrongdoing, and had implemented adequate compliance programmes to prevent corruption offences.

During the same period, AgustaWestland Spa and AgustaWestland Ltd. entered into a plea bargain with the Prosecution's Office, approved by the Judge. In October 2014, the Court of first instance acquitted on the merits the top managers of both companies of having committed the bribery offences, but convicted them with two years' imprisonment for the offence of tax fraud. In April 2016, the Milan Court of Appeal overturned the acquittal of the two managers, and sentenced them to, respectively, four years, and four years and six months' imprisonment. On December 16, 2016, the Court of Cassation quashed such convictions, and ordered the case to be retried before the Milan Court of Appeal, which acquitted the two managers in January 2018. In May 2019, the Court of Cassation confirmed the final acquittal of the two managers.

(iii) *Pending prosecutions*

Prosecutions for alleged foreign bribery are currently pending against the companies Eni Spa and Saipem and their managers, in relation to the adjudication of public tenders and/or licences in Algeria and Nigeria. In particular:

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a) with respect to Algeria, in the past few years the Milan Prosecution's Office started a criminal investigation against the companies Eni Spa and its subsidiary at the time Saipem Spa, some of their former top managers and foreign agents, in relation to the alleged offences of bribery of Algerian public officials and tax fraud, with respect to the adjudication of several tenders in Algeria in the period 2007–2010. After a few years of trial before the Milan Court of first instance, the judgment was issued in September 2018. Eni Spa and its top managers were acquitted on the merits, whilst Saipem and its top managers and agents were convicted with sentences of up to five years and six months' imprisonment. Appellate proceedings are currently pending; and

(b) with respect to Nigeria, in November 2013, the Milan Prosecution's Office started a criminal investigation against the company Eni Spa, its 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, in relation to the granting in April 2011 by the Nigerian government to the subsidiaries of Eni and Shell of the licensing of an oil field located in the offshore territorial waters of Nigeria. In the course of 2016, the foreign company Shell and its managers were also added as suspects to the investigation. The trial of first instance, which started in 2018, is currently pending, and the decision of first instance is expected in the course of 2020 (whilst two defendants who opted for the summary trial were sentenced in September 2018 to four years' imprisonment, and appellate proceedings will take place in the course of 2020).

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

Facilitation payments are prohibited by Italian law. Payments amounting to bribery offences are prohibited whether they are carried out directly or indirectly, through intermediaries or third parties. In the event of payments made through intermediaries, Italian prosecutors should prove, and Italian courts should assess, that the payment to the intermediary was made with the knowledge and intent of the intermediary to subsequently bribe the Italian or foreign public official.

Gifts/hospitality

Criminal provisions. Italian criminal provisions do not expressly restrict the provision of gifts, meals, entertainment, etc., either to domestic or foreign officials. However, all these advantages could potentially represent 'undue consideration' for a public official, prohibited as a criminal offence by Italian law.

In particular, with respect to the offence of 'bribery for the performance of the function', the consolidated case law excludes *tout court* criminal relevance with regard to gifts/hospitality of objective 'small value', and which could be considered as 'commercial courtesy' in the concrete case. Therefore, in the event no act conflicting with the duties of the office is carried out, and the two mentioned criteria are satisfied ('small value', to be considered as 'commercial courtesy' in the concrete case), criminal responsibility should, in principle, be excluded.

On the contrary, in relation to the offence of 'proper bribery' (act of the public official conflicting with the duties of his office), the consolidated case law maintains that the 'small value' of the gift/hospitality never excludes the criminal responsibility, as such. A crucial criterion for affirming or excluding criminal liability is therefore the relation of '*do ut des*'

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between the gift (or other advantage) and the 'act' of the public official, in terms that the gift (or other advantage) represents the consideration for carrying out the mentioned 'act'.

Non-criminal provisions. Some Italian non-criminal regulations provide for specific restrictions about providing Italian officials with gifts and other benefits.

In particular, the Decree of the Prime Minister of December 20, 2007, which entered into force on January 1, 2008, provides that Italian government members and their relatives are prohibited from keeping for their personal possession so-called 'entertainment gifts', received on official occasions, for a value higher than €300 (article 2). Gifts having a value higher than €300 shall remain in the possession of the administration, or could be kept by the government members, on condition they pay the related difference (for the amount higher than €300).

Furthermore, on June 19, 2013, a new code of conduct for employees of the public administration entered into force (incorporated into Presidential Decree no. 62 of April 16, 2013), specifically aimed at preventing corruption and ensuring compliance with the public officials' duties of impartiality and exclusive devotion to the public interest. Pursuant to this code of conduct, the limit on the permissible value of 'gifts of courtesy of small value' is equivalent to a maximum of €150.

A similar prohibition on receiving gifts or hospitality of any kind, with the exception of ones considered to be 'commercial courtesy of small value', is ordinarily contained in most of the ethical codes implemented by the various state-owned or state-controlled corporations.

Notion of public officials

Bribery offences apply not only to 'public officials' but also, with some exceptions, to the so-called 'persons in charge of a public service' (article 320 ICC).

As far as the definitions of 'public officials' and 'persons in charge of a public service' are concerned, according to Italian criminal law:

(i) 'public officials' are such persons 'who perform a public function, either legislative or judicial or administrative' (for criminal law purposes, '[it is public] the administrative function regulated by the rules of public law and by acts of a public authority and characterised by the forming and manifestation of the public administration's will or by a procedure involving authority's powers or powers to certify'; article 357, paragraphs 1 and 2, ICC); and

(ii) 'persons in charge of a public service' are 'the ones who, under any title, perform a public service' (for criminal law purposes, 'a public service should be considered an activity governed by the same forms as the public function, but characterised by the lack of its typical powers, and with the exclusion of the carrying out of simple ordinary tasks and merely material work'; article 358, paragraphs 1 and 2, ICC).

In accordance with the above definitions, the notion of 'public officials' includes members of parliament, judges and their consultants, witnesses (from the moment the judge authorises their summons), notaries public, police officers, etc. By contrast, the notion of 'persons in charge of a public service' includes state or public administration employees lacking the typical powers of a public authority (i.e. electricity and gas workers, etc.).

With respect to employees of state-owned or state-controlled companies, they are not expressly included within the law definition, but they implicitly fall within the relevant 'public' categories mentioned above, on condition that the activity effectively carried out by them is governed by public law or has a public nature.

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Key issues relating to investigation, decision-making and enforcement procedures

Plea bargaining

Under certain conditions, plea bargaining with prosecuting authorities is recognised by Italian law (article 444 of the Italian Code of Criminal Procedure). It has to be approved by the competent judge, the punishment agreed upon cannot be more than five years' imprisonment, and it is considered to have the same effects of a conviction sentence (although with lower weight, because there is no assessment of responsibility further to a trial).

Furthermore, under certain conditions, a civil settlement with the person injured, aimed at compensating damage, can qualify as a 'mitigating circumstance' to reduce the criminal sentence.

Self-reporting and/or co-operation with prosecuting authorities

As of January 31, 2019, Italian law has introduced express benefits for individuals who voluntarily disclose criminal conduct in the context of corruption crimes. In order to qualify as a clause of non-punishment, the self-reporting has to comply with the following stringent requirements: it has to be made within four months of the offence and prior to have notice to be 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 corporation, co-operation with the prosecuting authorities before trial (in terms of removal of the officers/body members allegedly responsible for the unlawful conduct, implementation of compliance programmes aimed at preventing the same type of offences, compensation of damage, etc.) can have a significant impact in reducing the pre-trial and final sanctions to be applied to a corporation (articles 12 and 17 of Legislative Decree no. 231/2001).

Overview of cross-border issues

Jurisdiction

The governing principle of Italian law, also applicable to bribery offences, provides that Italian courts have jurisdiction on all offences committed within Italian territory; namely, when at least a segment of the prohibited conduct takes place in Italy (e.g., in relation to the bribery of foreign public officials, the decision to pay a bribe abroad). Italy has not established a general extra-territorial jurisdiction. A derogation in favour of extra-territorial jurisdiction applies only to a limited extent (e.g., presence in Italy of the suspect, and request of proceedings by the Italian Minister of Justice; see articles 9–10 ICC).

However, as previously explained, the Italian 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. In that scenario, the existence of the Italian jurisdiction is broadly asserted by Italian prosecuting authorities, and broadly affirmed by Italian courts, also with respect to foreign nationals and foreign residents.

Jurisdiction over non-nationals for offences committed within Italy

Italian courts have jurisdiction over all offences committed within Italian territory (namely, when at least a segment of the prohibited conduct takes place in Italy), regardless of the offender's nationality (or corporate offender's main seat) (article 6 ICC).

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Jurisdiction over Italian nationals for offences committed abroad

Italian courts have jurisdiction to prosecute a bribery offence involving Italian public officials even if the offence is committed abroad (article 7, no. 4, ICC). In this respect, therefore, the Italian courts have extra-territorial jurisdiction over Italian nationals (and also over non-nationals, in the limited cases where they have the quality of public officials of the Italian state).

In addition, Italian law has limited extra-territorial jurisdiction over corporations whose main seat is in Italy, for a bribery offence committed abroad, where the bribery offence is not prosecuted by the state where it was committed, and all the other requirements for establishing Italian extra-territorial jurisdiction over the corporations' officers/predicate offenders are fulfilled (e.g., presence of the suspect in Italy, request of proceedings by the Minister of Justice, etc.).

Jurisdiction over non-nationals for offences committed abroad

With respect to bribery offences committed abroad by offenders lacking the quality of Italian public officials (e.g., a private briber), Italian extra-territorial jurisdiction applies only to a limited extent, and under stringent requirements (e.g., presence in Italy of the suspect, and a request of proceedings by the Italian Minister of Justice; see articles 9–10 ICC).

Co-operation with foreign authorities

Italian Public Prosecutors do co-operate with foreign authorities. Where there is an international treaty in force with the relevant foreign country, this governs the mutual legal assistance to be provided, and the regime is supplemented by domestic law. In the absence of a treaty, co-operation is governed by the specific provisions of the Italian Code of Criminal Procedure (article 696 *ff.* ICCP).

A request to a foreign authority for gathering evidence abroad (i.e., interview of suspects and witnesses, search and seizure, etc.) can be made by Italian Public Prosecutors, usually through the Italian Minister of Justice, but with simplified procedures within the European Union, and where provided by the relevant applicable treaty. 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 Court of Appeal usually have to approve it, and the latter delegates the execution of the request to the Italian Judge for the Preliminary Investigations.

Corporate liability for bribery and corruption offences

See the first paragraph under '*Brief overview of the law and enforcement regime*' above.

Proposed reforms / The year ahead

Law no. 190/2012 has provided for a reshaping of the functions and powers of the so-called Anti-Corruption National Authority (ANAC) in the frame of new compliance procedures within the public administration aimed at improving transparency in the decision-making process, at avoiding conflicts of interest and essentially at preventing the causes of corruption.

By Law Decree no. 90 of June 24, 2014, significant new powers have been attributed to the ANAC, providing for the effective co-ordination and exchange of information of that body with the various Prosecution's Offices investigating cases of corruption, and for the effective powers of supervision of ANAC about the relevant public tenders.

The working experience of ANAC during the last years has been unanimously appreciated, and it is expected that in the year ahead the role and effectiveness of ANAC will continue to increase.

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Roberto Pisano obtained a law degree, *summa cum laude*, from the State University of Milan in 1992, and a Ph.D. from the University of Genoa in 1999. Between 1993 and 1997 he was a research associate at Bocconi University of Milan where, since then, he has worked as a contract professor on business and tax crimes. Mr. Pisano was co-chair of the business crime committee of the IBA in 2007–2008, and vice-chair of the ECBA in 2008–2009. He is the author of several publications on the subject of business crime and mutual legal assistance.

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Over the course of his practice, Mr. Pisano has successfully represented prominent individuals and entities in high-profile Italian criminal proceedings, including: various cases of corruption involving international corporations and their top officials (with multiple investigations in the US, the UK, etc.); various cases of extradition, including the recent FIFA investigation by the US authorities and representation of foreign States; three cases alleging international tax fraud involving the former Italian Prime Minister; a case involving a claim for restitution of antiquities by the Italian Ministry of Culture against a prominent US museum; a case involving a major US bank in the bankruptcy of the Parmalat group; various appeals in foreign jurisdictions (e.g. the USA, Hong Kong, Switzerland, etc.) against search and seizure and freezing of assets relating to Italian MLA requests; and internal investigations for foreign multinationals and Italian corporations. Mr. Pisano also advises and represents relevant foreign governments.

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Japan

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Background

Japan is widely perceived to be one of the least corrupt countries in the world. Transparency International ranked Japan as the 18th least corrupt country out of 180 in the most recent *Corruption Perceptions Index*.[1] The World Justice Project's 2018–2019 Rule of Law Index ranked Japan as the 13th least corrupt country out of 126,[2] and the US State Department has characterised the direct exchange of cash for favours from Japanese government officials as "extremely rare".[3]

Corruption had been a prevalent feature of Japan's post-war economic boom, which was built on a close-knit alliance known as the "iron triangle" among Japanese businesses, politicians of the ruling Liberal Democratic Party ("LDP"), and elite bureaucrats. This close coordination guided Japan to its growth as the world's second-largest economy, but it also created a culture of secret, backroom dealings which, when exposed, shocked the public.

Some of the most notorious scandals of that era include: the Lockheed case (1976), which led to the conviction of former Prime Minister Kakuei Tanaka (and was partly responsible for the creation of the US Foreign Corrupt Practices Act); the Recruit case (1989), which brought down the administration of Prime Minister Noboru Takeshita; the *Zenecon* (general contractors) cases (1993–1994), which resulted in several prefectural governors along with dozens of others being convicted, and the death of one governor by suicide; and the Bank of Japan ("BoJ") and Ministry of Finance ("MoF") cases (1997–1998), which led to the arrests, resignations and suicides of several high-ranking finance officials.

The type of conduct in these cases included firms seeking to win lucrative contracts through massive cash payments (Lockheed, Zenecon); firms offering highly lucrative insider stock information to win influence (Recruit); and officials receiving lavish entertainment, sometimes of a sexual nature, in exchange for favours (BoJ/MoF).[4] Japan's economic downturn through the 1990s soured the public's patience for such behaviour, and increasingly became the focus of blame for the nation's woes.[5] In response, the Japanese government enacted various reforms, including requiring disclosure of politicians' assets, bringing more transparency to political contributions, and imposing stricter ethical rules on public officials.[6]

In addition, especially during the past 15 years, Japanese firms have instituted codes of conduct that prohibit giving or receiving inappropriate payments, gifts, or entertainment, not only to government officials, but in business transactions generally. Today, the websites of nearly every listed Japanese firm trumpet their commitment to compliance and corporate social responsibility. While some challenges remain, as discussed in the "Current issues" section below, bribery is now widely understood in Japan to be impermissible, and corruption is no longer as prevalent a feature of the Japanese political and business landscape as it was 25 years ago.

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Since July 2013, an LDP-led coalition under the leadership of Prime Minister Shinzo Abe has dominated the Japanese government. But the popularity of the Abe administration has diminished recently, in the wake of scandals involving known associates of Abe and his wife appearing to receive favourable treatment in government approval processes.[7] In relation to these scandals, *sontaku*, a seldom-used Japanese term referring to the pre-emptive, placatory following of a superior's inferred wishes, is increasingly being used to imply a system corrupted through governance-by-guesswork.[8] In August 2018, the Tokyo District Public Prosecutors Office decided not to prosecute a long-time aide to Shinzo Abe, who allegedly received 2m yen (approximately US$18,600) in undeclared donations from a scandal-tainted school operator.[9]

As discussed below, in March 2017, the Ministry of Education, Culture, Sports, Science and Technology ("MEXT") disclosed that 63 current or former ministry employees had illegally negotiated with universities to secure post-retirement jobs for their colleagues. A little more than one year later, two former senior MEXT officials were indicted for unrelated corruption charges. In July 2018, a former director-general of the ministry's Science and Technology Policy Bureau was indicted for bribery. He allegedly helped a private medical university win ministry subsidies; in return, his son's entrance exam score was altered to secure the son a place at the university. An executive of a medical care consulting firm, who allegedly served as an intermediary between the official and the school, was also indicted. In August 2018, a former director-general for international affairs at the ministry was indicted for allegedly receiving bribes worth about 1.5m yen (approximately US$14,000) in the form of wining and dining. The above-mentioned consulting firm executive was also involved in this case, and was indicted for bribing the official.[10]

Legal overview

Bribery of Japanese public officials

Article 197 of Japan's Penal Code prohibits a public official, defined (in Article 7) as "a national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations",[11] from accepting, soliciting, or promising to accept a bribe in connection with his or her duties. It also prohibits a person who is to be appointed as a public official to do likewise, in the event that he or she is appointed. Furthermore, it is an offence under Article 198 to give, offer or promise to give a bribe to a public official or a person to be appointed a public official. So-called "legal persons" (*i.e.*, firms and organisations) are not liable for bribery under the Penal Code. Non-Japanese nationals are liable for bribery under the Penal Code only if the crime is committed within Japan. Japanese public officials are liable for accepting bribes outside Japan.

The punishment for a public official (or a person to be appointed a public official) who accepts a bribe is imprisonment with work for up to five years, as well as confiscation of the bribe or its monetary value. If a public official agrees to perform an act in response to a request, the sanction is imprisonment with work for up to seven years. Further, if such public official consequentially acts illegally or refrains from acting in the exercise of his or her duty, the sanction is imprisonment with work for a period within a range of one to 20 years. The sanction for offering or promising to give a bribe to a public official is imprisonment with work for up to three years, or a maximum fine of 2.5m yen (approximately US$23,200).

In July 2017, Japan revised the Act on Punishment of Organised Crime and Control of

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Crime Proceeds[12] to forbid conspiracies by groups of two or more people to commit certain crimes, including giving and receiving bribes. The revision ostensibly was necessary in order for Japan to ratify the United Nations Convention against Transnational Organised Crime. The government rushed through the passage of the revision, characterising it as an "Anti-Terrorism Law", and arguing that the conspiracy statute would only be used against criminal organisations and terrorists, not the general population.

"Deemed public officials" and other prohibitions against bribery of employees in public services

Under various laws specific to formerly or predominantly state-owned enterprises, employees of such entities have the status of "deemed public officials" (*minashi koumuin*). These laws expressly forbid anyone from bribing such persons, and forbid such persons from accepting bribes.[13] In addition, without using the term "deemed public officials", certain laws prohibit the employees of specific firms that perform public services from accepting or demanding bribes.[14]

Bribery of foreign public officials

Japan has been a member of the Organisation for Economic Co-operation and Development ("OECD") since 1964. Japan implemented the 1997 OECD Anti-Bribery Convention in 1998, by amending the Unfair Competition Prevention Act ("UCPA") to add Article 18, which criminalised bribery of foreign public officials. An additional law was enacted in 2004 to broaden the jurisdiction of Article 18 to cover conduct by Japanese nationals while abroad. The Japanese government also amended the Income Tax Act in 2006 to prohibit deducting bribes paid abroad as business expenses. Unlike the Penal Code, Article 22(1) of the UCPA expressly imposes criminal liability on legal persons (firms and organisations).

Article 18 was intended to track the language of the Anti-Bribery Convention, and provides as follows:

> *No person shall give, or offer or promise to give, any money or other benefit to a Foreign Public Official, etc. in order to have the Foreign Public Official, etc. act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc. use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to obtain a wrongful gain in business with regard to international commercial transactions.*[15]

Originally, the penalty for bribing a foreign public official was imprisonment with work for up to three years or a maximum fine of 3m yen (approximately US$27,900), or both, and the statute of limitations for natural persons had been three years. However, in response to the OECD's recommendations, Japan increased the penalties to five years and 5m yen (approximately US$46,500), and extended the limitations period to five years.[16] In addition, if an individual bribed a foreign official in connection with the business of a legal person, such legal person could now be subject to a maximum fine of 300m yen (approximately US$2.8m). The law does not provide for confiscation of the proceeds of bribing a foreign public official.

In March 2019, the OECD Working Group reiterated its recommendations that Japan: 1) increase the level of sanctions and the limitation period for foreign bribery; 2) broaden its framework for establishing nationality jurisdiction over legal persons; 3) encourage its agencies to become more proactive in detecting foreign bribery; 4) ensure that the Ministry of Justice transmits and clarifies allegations of foreign bribery without creating delays in opening investigations; 5) ensure that the prosecution exercises its role independent from

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the Ministry of Justice and the Ministry of Economy, Trade and Industry ("METI"); and 6) ensure that both the police and the prosecution are more proactive and coordinated when investigating foreign bribery, including by reducing the reliance on voluntary measures and confession.[17]

The METI administers the UCPA, including Article 18, but the Public Prosecutors Office handles prosecutions under Article 18. METI's website includes a section dedicated to preventing the bribery of foreign officials (http://www.meti.go.jp/policy/external_economy/zouwai/index.html (in Japanese)). The site provides a detailed "Guideline to Prevent Bribery of Foreign Public Officials" ("METI Guideline") that explains the law, as well as how firms can prevent bribery.

The Japan Federation of Bar Associations ("JFBA") issued the "Guidance on Prevention of Foreign Bribery" in July 2016, as a supplement to the METI Guideline, with the purposes of clarifying: (1) the elements of an anti-bribery compliance programme necessary to fulfil the duty of firms to implement an internal control system; (2) the elements of an internal control system that may help firms seek mitigation of or relief from penalties; and (3) a practical approach to foreign bribery issues for firms and lawyers.[18]

The Japan International Cooperation Agency ("JICA"), an agency that coordinates Official Development Assistance ("ODA") for the Japanese government, issued an Anti-Corruption Guidance in 2014, which describes various anti-corruption measures, including JICA's anti-corruption consultation desk and required actions by governments, partner countries, executing agencies and companies. JICA will reject an applicant for procurement for grant aid and ODA loan projects if it determines that it has engaged in corrupt or fraudulent practices in competing for the ODA-related contract. Likewise, it will debar an applicant for a particular period of time if it determines that the applicant has engaged in corrupt or fraudulent acts in competing for, or executing, a prior ODA-backed contract or if, under certain conditions, the company has been debarred by the World Bank Group.[19]

Facilitation payments

The original METI Guideline issued in 2004 indicated that the UCPA does not explicitly exempt "small facilitation payments", but that such payments would not be a criminal offence under the OECD Anti-Bribery Convention. The OECD criticised this (and METI's attempts to explain its interpretation) as confusing, and METI updated the Guideline in September 2010 to clarify that facilitation payments would be illegal under Japanese law if the payments were intended "to obtain or retain improper business advantage in the conduct of international business". The OECD subsequently criticised Japanese authorities for not actively encouraging Japanese firms to prohibit making even small facilitation payments, and METI removed the paragraph related to facilitation payments in its July 2015 revision of the Guideline.

The JFBA Guidance, noting that the issue of handling facilitation payments often arises both in business practices and in legal consultations, states that paying even small sums to facilitate the smooth progress of ordinary administrative services is prohibited. Additionally, the JFBA Guidance suggests Japanese companies cooperate with the Japanese embassy or consulate, chamber of commerce, Japan's Ministry of Foreign Affairs, and other institutions to press the local government to eliminate facilitation payments.[20]

Introduction of plea bargaining

The amendments to the Code of Criminal Procedure that came into effect in June 2018[21] introduced a plea-bargaining system with respect to certain specified crimes, including

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bribery. Under the system, a prosecutor may enter into a formal plea-bargaining agreement with a suspect or defendant to withdraw or reduce criminal charges or agree to pre-determined punishment when the suspect or defendant provides evidence that may be used against other suspects or defendants.

Notably, the first plea bargain under the system was reached in a case that involved employees of a major Japanese power plant construction firm bribing Thai officials. The firm cooperated with the Tokyo District Public Prosecutor's Office by providing evidence that could be used to prosecute the former executives for conspiring to bribe a Thai public official with approximately US$357,000 to speed up the clearance of cargo related to a local power plant project. This case garnered a mixed reaction: on the one hand, it showed the plea-bargaining system to be a useful tool for prosecuting bribery of foreign public officials, for which gathering evidence overseas is often difficult; on the other hand, there is concern of a firm's "scapegoating" its employees in return for escaping corporate liability.[22]

A second plea bargain under the system was reportedly reached in relation to an arrest of and charges against the then-chairman of a multinational automobile manufacturer for violations of the Financial Instruments and Exchange Act. Two executives of the company are said to have handed the Tokyo District Public Prosecutor's Office materials relating to the charges against the former chairman for underreporting his income, as well as information relating to suspicions that he had the company provide luxury housing. It has also been reported that the two executives, in exchange for promises to submit all necessary evidence as well as to testify in court, would not be indicted.

Commercial bribery

Article 967 of the Companies Act prohibits commercial bribery. Under that statute, if certain specified types of corporate executive or employee, or an accounting auditor, accepts, solicits, or promises to accept property benefits in connection with such person's duties, in response to a wrongful request, the conduct is punishable by imprisonment with work of up to five years or a fine of up to 5m yen (approximately US$46,500). In addition, the bribe or its monetary value may be subject to confiscation. Giving, offering, or promising to give a commercial bribe is punishable by imprisonment with work of up to three years or a fine of up to 3m yen (approximately US$27,900). This statute is analogous to Article 197 of the Penal Code, and the analysis of what constitutes a bribe is virtually the same.[23] However, prosecutors have not used this statute, instead preferring to go after managers who accept bribes based on "aggravated breach of trust" against the firm, under Article 960 of the Companies Act. Corporations are not liable for commercial bribery under the Companies Act.

Current issues

Kansei dango

Despite the reforms discussed above, one type of corruption that remains deeply entrenched in Japan is government-led bid-rigging on public projects (*kansei dango*): a type of bid-rigging scheme in which a public official acts as an organiser to determine which firm will win. Typically, the official is a representative of the government entity that issued the bid request, who wishes to dole out favours to firms (especially in construction) that are major sources of political funds, or are potential sources of work after the official leaves government. After long acceptance, the government started prosecuting this type of conduct in the 1990s as part of the general trend towards anti-corruption. As the widespread nature of the practice became apparent, legal reforms were instituted in the early 2000s, including the passage of a law specifically prohibiting *kansei dango,* and amendments to the Anti-Monopoly Act.

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But a flood of major bid-rigging incidents in 2005 and 2006, including those resulting in the arrests of three prefectural governors, led in 2006 to an accelerated passage of amendments to the existing law against *kansei dango*. Additionally, starting with a bid-rigging case on a steel bridge construction project in 2006, shareholders began suing corporate executives on the premise that the executives' participation in the bid-rigging schemes had damaged their firm. Further, the Japan Fair Trade Commission ("JFTC") found in three separate cases (2007, 2009, and 2012) that officials of the Ministry of Land, Infrastructure and Transportation ("MLIT") were involved in bid-rigging, requiring the JFTC to demand improvements of the MLIT.

Despite these changes, new *kansei dango* cases continue to emerge.

- In February 2017, the Nagoya District Court imposed a three-year suspended sentence and a fine of 320,000 yen (approximately US$3,000) on a former regional employee of MLIT for leaking information related to the construction of a bridge in Mie Prefecture. The court also imposed three-year suspended sentences on former employees of the construction company that received confidential bidding information from the former regional MLIT employee.
- In May 2017, the Nagoya District Court imposed a five-year suspended sentence and a 1.95m yen (approximately US$18,100) fine on a former regional employee of MLIT for leaking information related to the construction of a tunnel in Mie Prefecture.
- In March 2018, the Saitama District Court imposed a two-and-a-half-year suspended sentence and a fine of 600,000 yen (approximately US$5,600) on a former mayor of Ageo City, Saitama Prefecture for receiving bribes of 600,000 yen in return for changing bidding qualifications for the city garbage-disposal operation in favour of a local company.
- In April 2019, an Osaka City Construction Bureau employee was indicted and dismissed for receiving bribes of 4m yen (approximately US$37,200) in return for leaking information related to the city's electricity construction projects.
- In October 2019, an electric utility company announced that 20 current and former executives of the company had received a total of 320m yen (approximately US$3m) in cash and gifts of various forms such as gold coins, gold bars and certificates for tailored suits from a late former official of a town hosting one of its nuclear plants, who passed away in March 2019. In particular, two senior current and former executives who were responsible for the utility's nuclear business received more than 100m yen (approximately US$936,000) each from the influential former official. A construction company linked to the former official received orders worth at least 3bn yen (approximately US$28m) from the utility over a period of four years between September 2014 and March 2019.

Amakudari

A related issue is *amakudari*, which literally means "descent from heaven", and refers to the practice of government officials retiring into lucrative positions in businesses they used to regulate. This practice has been identified as a significant cause for *kansei dango*, because bidders are populated by former officials of agencies requesting the bids, or providing future job opportunities for such officials.[24] Reportedly, for example, 68 bureaucrats retired from METI into top positions at Japan's 12 electricity suppliers, which METI oversees,[25] and between 2007 and 2009, 1,757 bureaucrats were hired at organisations and firms that received subsidies or government contracts during 2008.[26]

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In the wake of the *kansei dango* scandals of the mid-2000s, in which collusion was found to have occurred between current and former government officials, the National Public Service Act ("NPSA") was amended in 2007. The amendment prevents ministries from finding post-retirement jobs for their officials, limited job-hunting by officials while still in government, and prohibited former officials from recruiting activities. However, the reform has not been particularly effective, with many officials still being hired by firms and organisations they used to oversee.

During the administration of the Democratic Party of Japan ("DPJ") from 2009 to 2012, further attempts to amend the NPSA stalled. In July 2013, the "Headquarters for Promotion of Reform to the National Public Service System", which was founded in 2008 to implement the 2007 amendment, formally disbanded after its five-year term expired; in fact, it was virtually non-operational during the DPJ years. The LDP included the eradication of *amakudari* as one of its campaign promises in 2012, but has not pressed for new legislation on this issue to date. In March 2017, the MEXT announced that it had confirmed 63 cases in which current or former ministry employees had illegally negotiated with universities to secure their colleagues' post-retirement jobs. The ministry's discovery resulted in the resignation and penalisation of 43 senior ministry bureaucrats.[27]

Low enforcement of UCPA Article 18

In the 18 years since its enactment in 1998, UCPA Article 18 has been enforced only four times,[28] in addition to the indictment of the employees of the power plant construction firm discussed above:

- In March 2007, two Japanese individuals were found guilty of bribing two senior Filipino officials with about 800,000 yen (approximately US$7,400) worth of golf clubs and other gifts, in an effort to win a government contract. They failed to win the contract, but the bribes were reported by a whistleblower. The individuals were fined 500,000 yen (approximately US$4,600) and 200,000 yen (approximately US$1,900), respectively. It appears that the firm they worked for (the Philippines subsidiary of a Japanese firm) was not prosecuted.
- In January and March 2009, four Japanese individuals were found guilty of bribing a Vietnamese official in connection with a highway construction project that was partly financed by ODA from Japan. The value of the contract was approximately US$24m, and the total amount given to the official was about US$2.43m, but the court specified the amount of the bribes at US$820,000, partly because the statute of limitations had expired on some of the earlier conduct. The court imposed three-year suspended sentences on the individuals. The firm they worked for was fined 70m yen (approximately US$650,900), and was also temporarily delisted by the Japan Bank for International Cooperation and JICA.
- In September 2013, a former executive of a Japanese automotive parts manufacturer was fined 500,000 yen (approximately US$4,600) for bribing an official in China to ignore an irregularity at a subsidiary's factory in Guangdong Province.
- In February 2015, the Tokyo District Court found a railway consulting firm and its three former executives guilty of violating the UCPA by bribing government officials of Vietnam, Indonesia, and Uzbekistan with approximately US$1.2m in order to obtain consulting contracts related to ODA projects in the three countries. The court imposed three-year suspended sentences on the three individuals, and fined the consulting firm 90m yen (approximately US$836,800).

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The OECD has criticised the low level of enforcement activity, issuing a news release in March 2019, both in English and Japanese, declaring that Japan must step up enforcement of its foreign bribery laws and strengthen the capacities of its law enforcement agencies to proactively detect, investigate and prosecute foreign bribery offences. While noting positive developments, the OECD still emphasised that Japan's enforcement rate is not commensurate with the size and export-oriented nature of its economy or the high-risk regions and sectors in which its companies operate.

The greatest challenge for increasing enforcement of UCPA Article 18 is creating incentives for firms to self-report, or for whistleblowers to come forward. The type of whistleblower award programme instituted by the US Securities and Exchange Commission will be difficult to implement in Japan, considering the smaller potential recovery available (*i.e.*, the amount of the potential reward is unlikely to offset the downsides of reporting on one's employer). Instituting a leniency-type system to reduce potential fines in exchange for cooperation may encourage some firms to self-report, but the maximum corporate exposure of 300m yen (approximately US$2.79m) may not be large enough to justify the trouble. In addition, the four decided cases – to the extent that they provide any guidance – seem to indicate that courts will impose a fine that is roughly equivalent to the amount of the bribe.

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* * *

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Mexico

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Brief overview of the law and enforcement regime

Anti-bribery and anticorruption laws in Mexico

Background

Mexico is a federation and thus legislative powers are distributed between the federal Congress[1] and the legislatures of the several States (31) and Mexico City. Until recently, corruption was not specifically addressed in the Federal Constitution as a subject matter in respect of which either Congress or the states had jurisdiction.

As a consequence of this lack of uniform approach, until 2012 the legal framework aimed at preventing and punishing corruption was formed by different sections of a collection of federal and local statutes (none of which was an anticorruption piece of legislation *per se*), the more relevant of which were:

(i) *the criminal codes* (federal and local), which contained specific chapters of felonies committed by public officers (among others, bribery and influence peddling); and

(ii) *the laws governing public service* (federal and local), which laws set forth the main duties and responsibilities of public officers (including prohibitions on accepting anything of value in addition to their salary, and refraining from asking for or accepting bribes);

The landscape described above changed in June 11, 2012, with the enactment of the Federal Anti-Corruption in the Public Contracts Act (the "2012 Act"). Differently from the aforementioned statutes, the main objective of the 2012 Act was to introduce a legal framework specifically aimed at preventing and punishing corruption in public contracts and providing administrative means for the prosecution and enforcement thereof. Thus, for the first time, administrative (i.e., civil) enforcement and liabilities against private parties engaging in corrupt practices were introduced in the legal framework.

Accordingly, the 2012 Act applied to: *(i)* Mexican or foreign individuals or corporations that participated in federal public bids and procurements proceedings, directly or as shareholders, partners, associates, representatives, principals or agents, brokers, agents, managers, advisors, consultants, subcontractors, or employees acting on behalf of another person; *(ii)* Mexican individuals or firms that participated, directly or indirectly, in international business transactions; and *(iii)* Mexican public officers.

The 2012 Act was also a step forward in terms of scope. Virtually any corrupt practice involving federal funds or resources was captured by it. In particular, actions and proceedings relating to public bids for the granting of federal permits and concessions were treated as public contracts for the purposes thereof. International business transactions (contracting,

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implementation and enforcement of contracts, licences or authorisations carried out by any foreign public officer in which persons or entities of Mexican nationality were directly or indirectly involved) were also subject to the provisions of the 2012 Act.

Generally speaking, the 2012 Act made illegal and punishable with administrative liability: *(i)* bribing (i.e., promising, offering or giving money or other gifts to a public officer); *(ii)* influence peddling (i.e., using economic, political or other type of influence to obtain or retain a benefit or advantage); and *(iii)* circumventing federal laws or decisions to participate in federal procurement processes.

Offences under the 2012 Act were punished with fines and disqualification from participation in federal procurement processes.

The National Anticorruption System and the 2016 overhaul of anticorruption laws

On May 27, 2015, the Federal Constitution was amended to include, for the first time, different provisions on anticorruption matters. These amendments introduced a catalogue of aggravated administrative offences of both public officers and private individuals and entities, for engaging in corrupt practices. Also, the Constitution was amended to create the National Anticorruption System (*Sistema Nacional Anticorrupción* or "SNA"). As was the case with the 2012 Act, these amendments were a comprehensive effort addressed at preventing and fighting corruption. For the first time, however, such effort took a uniform approach, targeting all levels of government and both public and private sectors.

The SNA was designed as a consulting body (not an enforcer) to coordinate the efforts of all competent authorities (local, state and federal) to prevent, detect and sanction administrative offences and acts of corruption, and to audit and control the use and distribution of public funds. In addition, the SNA is in charge of promoting the culture of legality and preventing corruption through recommendations, training and other similar measures.

In an effort just as relevant as laying the grounds for the creation of the SNA, the Federal Constitution was amended to empower Congress to issue two general laws: *(i)* the general law that set forth the bases of coordination of the SNA; and *(ii)* a general law to distribute jurisdiction among the different levels of government to establish the administrative responsibilities of public officers, their obligations, the applicable sanctions for aggravated acts and omissions of public officers and citizens, as well as the proceedings for the imposition thereof. These general laws were enacted on July 18, 2016.

Additionally, Congress was empowered to enact the law creating and organising the Federal Court of Administrative Justice (*Tribunal Federal de Justicia Administrativa*) ("TFJA"). The TFJA retained the same powers as the Federal Court of Tax and Administrative Justice (*Tribunal Federal de Justicia Fiscal y Administrativa*), but it became a constitutional autonomous entity endowed with new powers to sanction aggravated administrative offences of public officers of the Federation and, in certain cases as set forth in the Constitution, public officers of the states, municipalities, the Federal District and its territories. The TFJA was also vested with authority to impose liability on civilians and private entities involved in aggravated administrative offences (i.e., acts of corruption).

The current anticorruption framework

On July 18, 2016, Congress passed the General Administrative Liabilities Act (*Ley General de Responsabilidades Administrativas* or the "Anticorruption Act"). The Anticorruption Act became effective on July 2017, thus repealing the 2012 Act and the federal and state laws regulating public service. State legislatures were required to pass new legislation or to amend existing laws to conform to the provisions of the Anticorruption Act. Accordingly,

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there is now a comprehensive body of anticorruption laws at the federal and local levels.

The Anticorruption Act applies to public officers (all individuals holding office or serving in any of the branches or agencies of the Federal, State and Municipal governments, including state-owned entities and trusts) and candidates running for office (together with their campaign teams[2]), officers of public service labour-unions and private parties (individuals and companies, foreign or domestic) who engage in corrupt practices.

Public service rules and principles

From the public service angle, the Anticorruption Act sets forth the principles and obligations applicable to public officers in the performance of their duties as well as the liabilities that the said persons may incur for failure to comply with the same. Among others, public officers may incur administrative liability for engaging in corrupt practices, such as obtaining or soliciting bribes or other benefits in exchange for doing or not doing something related to their positions.

The statute also sets rules prohibiting public officers to act under conflict of interest and mandating that situations in which such conflict may exist or arise, be disclosed to the relevant supervisor. Also of relevance are the provisions which require that public officers refrain from requesting, accepting or receiving, directly or indirectly, for them or related persons, gifts or anything of value.

Violations of the Anticorruption Act by public officers are divided into *(i)* minor offences; and *(ii)* aggravated offences. Minor offences are acts of public officers that contravene the principles of public service but that do not necessarily amount to corruption. Aggravated offences, on the other hand, are actions that result in both the violation of the public service principles and corruption, such as taking bribes.

Corrupt practices of private parties

Private parties (individuals and corporations) may incur liability under the Anticorruption Law in the following cases:

(a) Bribery. Offering, promising or actually delivering, directly or indirectly, anything of value to a public officer, in exchange for an illegal advantage or benefit. It is worth noting that the conduct is *per se* illegal, notwithstanding if the benefit is actually received or not.

(b) Influence peddling. Using influence, economic or political power, or claiming to have such power, to induce a public officer to do or refrain from doing something in order to obtain an advantage or benefit.

(c) Use of false information. Using false information or simulating compliance with applicable requirements in the context of an administrative proceeding, in order to obtain an illegal advantage or benefit.

(d) Obstruction of justice. Presenting, in the context of an investigation of violations to the Anticorruption Act, false information, or failing to provide or unduly delaying the submission of required information.

(e) Collusion. Directly or through intermediaries, colluding with other private parties to obtain an illegal advantage or benefit in a public tender, or engaging in arrangements with competitors if the same result in harm to the public finances.

(f) Misappropriation of public resources. Illegally appropriating public resources or using the same for unauthorised purposes, or failing to report the use of authorised public resources.

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(g) Illegal hiring of former public officers. Hiring or engaging persons who served as public officers within the immediately preceding year and who are in possession of material non-public information obtained in the performance of their duties as public officers, to obtain a competitive advantage.

It is important to note that all these conducts may also be pursued in international commercial transactions in which a Mexican private party (directly or indirectly) and a foreign public officer participate.

Liability

Liability for public officers is graduated differently for minor offences and aggravated offences. In the former case, the same may range from private or public reprimand to suspension, dismissal or even ban from public service. In the case of aggravated offences, the public officer may be suspended or dismissed from office, banned from public service for up to 10 years and/or fined for an amount not lower than, and up to two times, the economic benefit obtained by such officer from the corrupt act.

Private individuals can also incur liability under the Anticorruption Act, and also private corporations if the offences described above are committed on their behalf and for their benefit. Liability for private parties may include:

(i) fine for an amount of up to two times the economic benefit obtained from the corrupt act or, if no benefit is obtained, up to approximately MXN$12.7 million, in the case of individuals, or MXN$127.0 million, in the case of corporations;

(ii) ban from public tenders for a period of up to eight years in the case of individuals and 10 years in the case of corporations;

(iii) the obligation to indemnify the public treasury for losses and damages (*daños y perjuicios*) caused to it; and

(iv) solely in the case of corporations, [a] the prohibition to engage in trade for a period not to exceed three years and/or [b] the order to dissolve and liquidate the corporation, if and to the extent, in each case, that the relevant corporation obtained economic benefit from the corrupt act and it is established that the shareholders or partners, board of directors or other management and supervision bodies thereof participated in the corrupt act, or that the corporation is systematically used as a means to engage in corrupt acts.

It is important to note that the Anticorruption Act considers that the existence of compliance programs (integrity policies) and the active participation and cooperation of management in an investigation, are mitigating factors that must be weighed when imposing liability to a corporation. By contrast, it is considered an aggravating factor (that thus weighs in favour of a more severe penalty) that the management or oversight bodies of a corporation fail to report corrupt acts.

The statute of limitations for pursuing liability under the New Anticorruption Law is three years, in the case of minor offences of public officers, and seven years in the case of aggravated offences of public officers or offences of private parties.

Leniency

The Anticorruption Act features a leniency program, by virtue of which an offender that confesses a violation thereof gets a 50% to 70% reduction of the applicable fine, plus immunity from being banned from participating in public tenders, provided that: *(i)* a formal investigation has not been notified to any of the alleged offenders; *(ii)* the applicant is the first to provide evidence sufficient to verify the existence of the infringement; *(iii)* the applicant cooperates fully and continuously with the competent authority investigating

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and prosecuting the matter; and *(iv)* the applicant ceases its infringement upon instruction from the competent authority. Latter applicants may obtain up to a 50% discount in the applicable fine, provided that they produce further evidence to the investigative or prosecuting authority.

An application to this program does not grant immunity from criminal prosecution. Moreover, the statute does not clarify if a leniency marker would also grant immunity from suspension of activities and/or liquidation. It also fails to provide details as to the scope of the marker for corporations (in other words, if the same will extend to directors, officers and employees).

Proceedings

Proceedings under the Anticorruption Act are divided into: *(i)* investigations; *(ii)* trial-type proceedings; and *(iii)* sentencing. Each body of the federal and local administrations must appoint an investigating authority, a substantiating authority and a sentencing authority. The former is in charge of the investigations and acts as prosecutor in the trial-type proceedings, whereas the substantiating authority conducts the trial-type proceedings. Finally, the sentencing authority makes a decision on liability upon the case presented by the investigative authority and the evidence and pleadings of the accused party (which can be a private party or a public officer).

Investigative and substantiating powers cannot be vested in one single person or entity. In the case of minor offences, the sentencing authority is the administrative liabilities office within the relevant body of the federal or local administration. In the case of aggravated offences or offences of private parties, the sentencing authority is the competent panel of the TFJA.

(a) Investigations

Investigations may be launched by the investigative authorities on their own initiative or upon receipt of a complaint, which can be anonymous. In the course of their investigations, the investigative authorities are authorised to conduct inspections (which include the premises of private parties) and request information (including from private parties). Upon conclusion of its investigation, the investigative authority must issue a resolution either closing the case (assuming that no violation of the law is found) or a statement of charges (*informe de presunta responsabilidad administrativa* or "IPR"), which must classify the violation of the law as a minor offence or an aggravated offence. The IPR, once filed with the substantiating authority, opens the trial-type phase of the proceedings.

(b) Trial-type proceedings

The parties to these proceedings are: *(i)* the investigating authority, as prosecutor; *(ii)* the public officers and private parties charged in the IPR; and *(iii)* third parties who can be affected by the resolution of the case, including the person who filed the complaint giving rise to the investigation (if applicable). The investigative authority may request, and the substantiating authority may grant, injunctive relief to avoid the destruction of evidence, causing harm to the public finances or suspend the alleged violation. These may include the order to produce evidence and attachment of assets, among others.

Upon admission of the IPR, the substantiating authority must summon the charged public officers and private parties to a proceeding in which such parties may contest the charges and submit evidence in connection therewith. Interested third parties also have the right to file briefs and submit evidence.

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In the case of aggravated offences or private party offences, the substantiating authority will turn the matter to the TFJA. Upon receipt of the matter, the TFJA will verify that the conduct described in the IPR qualifies as an aggravated offence or private party offence within the scope of the Anticorruption Act, and that the same has been properly classified in the IPR. If the TFJA admits the matter, it will so notify the parties and issue a resolution stating which evidence is admitted and, if necessary, setting proceedings for hearing such evidence (witnesses, expert testimony, inspections, etc.). After all evidence and arguments have been heard, the TFJA will issue a decision on the matter.

Decisions of the sentencing authority imposing liability for minor offences are appealable before the sentencing authority and the resolution of such appeal may be further challenged before the TFJA. Decisions of the TFJA imposing liability for aggravated offences or private party offences, on the other hand, may be appealed before the High Chamber of the TFJA. The decisions of such High Chamber are subject to judicial review before Federal Circuit Courts.

Fines imposed pursuant to these proceedings are deemed fiscal credits and collected by the Internal Revenue Service (*Servicio de Administración Tributaria*) pursuant to the provisions of the Tax Code (*Código Fiscal*), or the local tax authorities pursuant to local fiscal laws.

The criminal angle

The Federal Criminal Code (the "FCC") and the criminal codes of the several states, feature a specific chapter of felonies associated with acts of corruption (*delitos por hechos de corrupción*). Among others, influence-peddling, bribery, bribery of foreign public officers and embezzlement, are considered felonies and are punishable with prison (in addition to fines and disqualification from public tender processes).

Corrupt practices may thus be pursued through both administrative (i.e., civil) and criminal enforcement.

Asset forfeiture

The recently enacted Asset Forfeiture Act (*Ley Nacional de Extinción de Dominio*) creates a mechanism pursuant to which prosecutors may seek forfeiture of assets obtained pursuant to certain criminal behaviour including, among others, felonies resulting from acts of corruption.

Overview of enforcement activity and policy during the last year

On July 1, 2018, Mexico held what the National Elections Board (*Instituto Nacional Electoral*) called the largest election to date, as Mexican voters elected their president and 128 senators for the 2018–2024 term, and the 500 representatives for the 2018-2021 legislature (representatives are voted for a three-year term). The clear winner of the election was Morena, the political party behind President López Obrador, as it (together with its allies) won the presidency, the majority of the seats in the Senate and the majority of the seats in the House of Representatives.

During his run for office, President López Obrador made the fight on corruption the flagship of his campaign. Although he did not provide specifics on proposed enforcement or legal or institutional changes, there were (and still are) high expectations that his administration would aggressively act on this front.

In his inaugural speech, President López Obrador called out generalised corruption and influence-peddling as the worst disaster in Mexican history. He also fairly noted that Mexico has fallen in the Transparency International *Corruption Perceptions Index* from

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59th place in 2000, to the 70th in 2006, to the current 135th place out of 176 ranked countries. During the first year of his administration, corruption has been at the core of his speeches.

As far as enforcement is concerned, during the transition period and the first six months in office, no meaningful cases were brought. This, however, changed in the past few months as criminal charges were brought against former high-ranking officers, such as the former CEO of *Petróleos Mexicanos* (the Mexican state-owned oil company) and the former Minister of Social Development. Both cases are ongoing.

While no meaningful sanctions have been imposed to date, the current administration has publicly called out companies and individuals for allegedly having engaged in illegal or unethical behaviour. Among others, the administration has targeted pharmaceutical companies that sell medicines and medical devices to the government, and companies rendering services to the state-owned oil company (*Petróleos Mexicanos*) and power utility (*Comisión Federal de Electricidad*), or having large contracts with them, on these grounds.

Law and policy relating to issues such as facilitation payments and hospitality

Differently from other jurisdictions, the concepts of tips, *de minimis* or facilitating payments are not considered by Mexican criminal or administrative laws as carve-outs for liability.

With respect to gifts and hospitality, it is worth noting that while making gifts to public officers may not be illegal (as long as no *quid pro quo* exists), said officers are statutorily required to declare such gifts and turn them over to an office within the government in charge of managing and selling such public property. Moreover, the Ministry of Public Service (*Secretaría de la Función Pública*) has issued an interpretation of the Anticorruption Act stating that there is no *de minimis* threshold or similar parameter that would allow public officers to receive and keep even symbolic or low-value gifts.

Along the same lines, President López Obrador stated in a speech on the day of his inauguration that officers of the Public Finance, Communications, Energy and other ministries will not be allowed to attend parties, meals, sports or other events if they are invited by contractors, vendors, investors or large companies that have some relationship with their public duties. While this has not translated into actual regulation, the Administration has clearly signalled its discontent with past practice surrounding gifts and hospitality to public officers.

Key issues relating to investigation, decision-making and enforcement procedures

As noted above, the Anticorruption Act features a leniency program that may result in the reduction of applicable fines but which does not grant immunity from criminal prosecution.[3] Thus, decision-makers are faced with a difficult decision, as self-reporting to the administrative authorities requires an admission of wrongdoing that could expose the applicant to criminal prosecution. Another challenge of self-reporting is that plea-bargaining is not an institution of Mexican law or practice. Thus, leniency applicants may know the percentage of discount to which they are entitled but may not discuss the actual amount of the fines that the agencies will finally imposed.

To further complicate the decision-making process around self-reporting, it is worth noting that there is not a well-established practice surrounding the leniency program set forth in the Anticorruption Law. There is thus little indication or precedent as to whether the agencies would favour administrative (i.e., civil) rather than criminal enforcement or the other way around, or with respect to the evidentiary and cooperation thresholds to which they will hold their grants of leniency.

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Overview of cross-border issues

Mexico is one of the largest economies in the Americas and thus benefits greatly from trade with other countries, including the United States and Canada. As a consequence of this, foreign anticorruption laws with extraterritorial reach, such as the FCPA, and foreign enforcement policy, have impacted the Mexican legal practice on anticorruption matters. For instance, subsidiaries of U.S. companies and Mexican entities which qualify as U.S. persons for FCPA purposes, usually apply the FCPA standard to their relationships with Mexican business partners, vendors and counterparties, thus effectively causing that such persons upgrade their compliance efforts.

Along the same lines, it is not surprising that the United States-Mexico-Canada Agreement ("USMCA"), features an entire chapter (Chapter 27) to anticorruption. If ratified, the USMCA will be the first trade agreement signed by Mexico that brings the discussion around the fight against bribery and corruption, to the trade negotiations table.

With respect to international cooperation on enforcement efforts, while Mexico has entered into bilateral legal assistance and cooperation agreements with several countries (including the U.S.), there are no meaningful precedents of cases where Mexican enforcers have cooperated with their peers in other jurisdictions to crack down on cross-border corruption cases. In the Odebrecht investigations, for instance, Mexico has not been able to bring to justice any key players (public officers of private parties). Likewise, there are several cases in which corporations and individuals have entered into consent-decrees and similar arrangements with the U.S. authorities for acts of corruption involving Mexican government agencies, which have not resulted in enforcement in Mexico.

Corporate liability for bribery and corruption offences

The general rule under Mexican law is that criminal liability only attaches to the individuals who actually commit an offence. Thus, while actions of employees or representatives of a corporation could expose them to criminal liability, the same should not, in principle, expose the corporation itself to such liability.

Notwithstanding the foregoing, Article 11 of the FCC states that if a member or representative of a corporation engages in criminal behaviour with the means provided by such corporation, in such a manner that the offence is committed on behalf or in the name of said corporation, a competent court may, in those cases where the definition of the specific offence so authorises (among others, the article of the FCC that defines the offence of bribery of international public officers), order the suspension of activities of the relevant corporation or the dissolution thereof.

In addition to this, a recent amendment to the Federal Code of Criminal Procedure specifically subjects corporations to criminal liability for certain offences (including, among others, influence peddling, bribery and bribery of foreign officers) if, among others, the latter appear to have been committed in the name and on behalf of such organisation, for its benefit or with resources provided by the same, if and to the extent it is established that said organisation failed to exercise "adequate controls". Local criminal codes may also regulate the cases in which corporations may be subjected to criminal liability.

Criminal prosecution of a corporation is independent of the prosecution of the individuals that actually engaged in the relevant criminal behaviour. In other words, criminal liability may be imposed on a corporation that lacks adequate controls even if the aforementioned individuals are not prosecuted or found not guilty.

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Liability to corporations may come in the form of: fines; indemnification of damages; confiscation of property; the order to suspend activities (from six months to six years); the order to shut down premises or agencies (from six months to six years); disqualification to engage in certain activity or trade (six months to 10 years); ban from public procurement (six months to six years); and, in extreme cases, the order to liquidate. Criminal liability is not extinguished by the transformation, merger or spin-off of the corporation. Additionally, criminal liability will not disappear with the dissolution of a corporation if it can be proved that the same economic activity is being carried out by a successor (that is, if substantially all the clients, employees and vendors of the former are maintained by the latter).

The aforementioned penalties are imposed based on: the degree of inexistence of adequate controls within an organisation; the amount involved in the illegal action; the nature and annual revenue of the corporation; the position within the organisation of the individuals involved in the wrongdoing; the existence (or inexistence) of a law-abiding culture within the organisation; and the public interest. Entities that, prior to engaging in a felony for which charges are brought, have internal compliance bodies or officers in charge of implementing and overseeing legal risk-prevention policies, may be entitled to a reduction of up to 25% of applicable penalties (economic or otherwise).

Proposed reforms / The year ahead

At the time this article is submitted, Congress has already approved the Republican Austerity Act (*Ley Federal de Austeridad Republicana*) which is pending to be published and enacted by the Executive. The proposed piece of legislation will further strengthen the controls imposed on the spending of public funds and the benefits that public officers may enjoy in addition to their salary.

Perhaps the more relevant provision in the proposed legislation is the change in the revolving door rules. Currently, it is illegal to hire a former public officer within the year following their stepping down from office, if and to the extent such former public officer is in possession of material non-public information, to take advantage of such information. It is also illegal for former public officers to accept a position in private practice in violation of these principles. The proposal in the Republican Austerity Act is to increase the waiting period for senior officers to 10 years prior to joining any private organisation that was subject to their supervision or regulation, or with respect to which they could have had possession of material non-public information.

Another relevant proposal in the aforementioned statute is the introduction of an article that empowers courts to declare null and void any contracts entered with domestic or foreign corporations to the extent the same are the result of influence-peddling or corruption, or cause harm to the public finances.

* * *

Endnotes

1. The *Congreso de la Unión*, a bicameral legislative branch comprised by the lower Chamber (*Cámara de Diputados*) and the Senate (*Senado de la República*).
2. In addition to anticorruption laws, federal laws set forth limits to the amounts that individuals and organisations can contribute to public campaigns and typify certain conduct as electoral criminal offences including, among others: (i) issuing phony

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invoices or receipts that purport to prove that political parties or candidates appropriately used public funding of their campaigns, or that overstate the cost really paid by the former; (ii) rendering goods or services to a campaign without being registered with the list of approved vendors maintained by the competent electoral regulators; (iii) organising rallies or other campaign events using funds or property under the custody or possession of a public officer, the use of which for such purposes is not permitted by applicable law; and (iv) making contributions to candidates, parties or campaigns in excess of the statutorily thresholds or the thresholds set forth by the competent regulators pursuant to applicable law.

3. Differently, for instance, from the leniency program set forth in the Federal Competition Act which does grant immunity (assuming that leniency is granted) from criminal prosecution.

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Netherlands

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Brief overview of the law and enforcement regime

Under Dutch law, multiple forms of bribery are criminalised in the Dutch Criminal Code (**DCC**). A distinction is made between bribery of (foreign) public officials and private commercial bribery, depending on the capacity of the person who was bribed. Furthermore, a distinction is made between active bribery, which relates to the briber's conduct, and passive bribery, which relates to the person who was bribed.

Bribery of public officials

Active bribery

Active bribery of public officials is regulated in Articles 177 and 178 DCC. Article 177 DCC criminalises making a gift or promise, or providing or offering to provide a service, to a public official: (i) with the aim to induce him or her to perform an act or to refrain from acting in the performance of his or her duties; or (ii) as a result or as a consequence of acts or omissions of the public official in the current or former performance of his or her duties. The situation as mentioned under (i) also applies if the bribed person has the prospect of an appointment as public official, once such appointment has followed.

Whether the public official acts, will act or has acted in accordance with or contrary to his duty, is of no relevance. Furthermore, the completion of the offence does not require the gift, promise or service to be accepted by the public official, nor that the public official responds in any way to the gift, promise or service by acting or refraining to act. Solely the making of a gift or promise, or providing or offering to provide a service, with the aforementioned intention, is punishable as such. Therefore, bribery attempts are also punishable under Dutch law. Moreover, the Dutch Supreme Court ruled that Article 177 DCC not only applies in the situation that there is a direct link between the gift or promise, on the one hand, and a concrete consideration on the other hand; it also covers the situation of making a gift or promise in order to establish or maintain a relationship with the public official in order to gain a (future) preferential treatment. In addition, the Dutch Supreme Court ruled that gifts and promises in the private sphere can also be made in the context of Article 177 DCC, since it cannot be excluded that the briber had the intention to bribe the public official and that the public official also accepts this.

Passive bribery

Passive bribery of current, future or former public officials is criminalised in Articles 363 and 364 DCC. Article 363 DCC prohibits a public official to accept or ask for a gift, promise or service: (i) in order to be induced to act or refrain from acting in the performance of his duties; or (ii) as a result or consequence of acts or omissions of the public official in the current or former performance of his or her duties. With regard to accepting a gift, Article

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363 DCC requires that the public official does so while knowing or reasonably suspecting that the purpose thereof is to induce him or her to act or refrain from acting.

Articles 177 and 363 DCC are also applicable to bribery of judges. A separate criminalisation applies in Articles 178 and 364 DCC for the situation in which a judge is (actively or passively) being bribed with the aim or purpose to: (i) influence the decision in a case which is subject to his or her judgment; or (ii) obtain a conviction in a criminal case. Bribing a judge, or an attempt to bribe a judge, with the intention as mentioned under (i) or (ii), tends to be considered more severely than bribing a public official, which is the reason why higher maximum penalties apply. Whether the judge is actually influenced is of no relevance. Criminal liability exists, even if the (i), decision or (ii), conviction that one tries to obtain is correct and justified.

Definition of public official

The question is when a bribed person qualifies as a public official. The DCC does not contain a definition of the term *public official*. The Dutch Supreme Court has ruled in the past that someone qualifies as a public official if he or she is appointed to a public position by a public authority to perform a part of the tasks of the state or its bodies, regardless of whether this person qualifies as a public official according to labour law. A definition in more recent case law seems to show a broader interpretation, namely: a person who is appointed under the supervision and responsibility of the government in a function to which a public character cannot be denied. Article 84 of the DCC extends the definition of public official to, amongst others, members of public representative bodies and members of the armed forces.

According to Articles 178a and 364a DCC, the provisions on bribery of public officials are also applicable to public officials of a foreign state or organisation governed by international law.

Gift, promise or service

According to case law of the Dutch Supreme Court, each transfer of something material (for instance, money, presents, discount, etc.) or immaterial (for instance, sex) which represents, or is of value to the receiver, constitutes a gift. Remarkable gifts that we have seen so far are, for instance, expensive watches, football tickets, flower subscriptions, paintings (sometimes considered ugly by the recipient and therefore questionable whether this represents any value to the receiver) and donations to the local carnival.

A promise comprises the offender's word to a public official that something with value will be given (in the future). Therefore, offering money is considered to be a promise. A service can, for instance, consist of junkets and beanfeasts, or offering a vacation home for a special rate.

Whilst in principle, anything of value can constitute a bribe, the legislative history indicates that the legislator accepts certain gifts or promises to be permissible (small gifts that do not represent a serious threat of influencing a public official). In the past, there were discussions about the question of whether or not more clarity had to be given on what was being considered a permissible/socially acceptable, *vs*. a punishable, gift or promise. However, the legislator considered it to be too difficult to provide objective criteria in this regard, due to the fact that the permissibility/social acceptance of the gift can depend on multiple factors (for instance, currency depreciation and norms and values). Instead, the legislator noted that the Dutch Public Prosecution Service (**DPPS**) itself could provide guidance by publishing own guidelines on this matter.

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Since 2002, the DPPS has published Instructions on the investigation and prosecution of public corruption in the Netherlands (next to the Instructions on the investigation and prosecution of public corruption abroad), in which the DPPS describes which factors it takes into account in determining whether or not to start investigation and/or prosecution. The Instructions do not mention a strict limitation regarding the value of the gift in euros. Whilst the Code of Conduct for Integrity in the public sector states that public officials are in principle allowed to accept gifts of a maximum of €50 per year, the Instructions indicate that it does not mention an amount in euros. This is because the multiple making/acceptance of gifts worth €50 can be worthy of prosecution on the one hand, while on the other, a relatively small, one-off payment can lead to official behaviour that makes the case prosecutable. Dutch case law also shows that gifts with a value of less than €50 can constitute a bribe (if it is being given with the intention to induce the public official).

Private commercial bribery

Both active and passive commercial bribery are criminalised in Article 328*ter* DCC.

Passive private commercial bribery

Passive private commercial bribery concerns a person, not being a public official, who, in the (current, former or future, once appointment has followed) service of his employer or acting as an agent, as a consequence of what he has undertaken or refrained from undertaking contrary to his duty, requests or accepts a gift, promise or service. In this case, there should be a direct link between the gift, promise or service and the compensation of the person being bribed. The kind of compensation is not clarified by law. Article 328*ter* DCC does require that the compensation should be given contrary to his or her duty as employee or agent. According to Article 328*ter* DCC, "contrary to his duty" in any case means that the employee or agent, contrary to good faith, fails to disclose to his employer or principal the request for or acceptance of a gift, promise or service.

Active private commercial bribery

Active private commercial bribery exists if the person making the gift or promise, or providing or offering a service, knows or can reasonably assume that the employee or agent, by receiving the gift, promise or service, acts contrary to his or her duty. This also includes the situation in which someone makes a gift or promise, or provides or offers a service, to a former employee or agent or to a future employee or agent, once appointment has followed. Also in this situation, "contrary to his duty" in any case means that the employee or agent, contrary to good faith, fails to disclose to his employer or principal the request for or acceptance of a gift, promise or service.

Penalties

The maximum penalties for bribery of public officials vary and can consist of 6 to 12 years' imprisonment or a fine up to €83,000, per violation, depending on the intention of the bribe and the status and function of the public official. Legal entities may be subject to a maximum fine of €830,000 or, if the Court rules that such fine is not a proper punishment for the crime, a fine of 10% of the annual turnover of the company. We note that we have not yet seen such fines being imposed by the Court for bribery offences.

The maximum penalties for private commercial bribery consist of four years' imprisonment or a fine up to €83,000. Legal entities may be subject to a maximum fine of €830,000 or, if the Court rules that such fine is not a proper punishment for the crime, a fine of 10% of the annual turnover of the company.

In practice, when deciding upon a penalty, the Court can take into account the so-called

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LOVS-guidelines, which include starting points for sentencing. These guidelines were made after research of sentences in practice and after consulting all Dutch Courts. The guidelines provide a framework for the Courts, to which they can refer in order to satisfy the convicted person that their sentence is in accordance with national practice. The fraud section, which includes bribery, contains seven categories depending on the financial disadvantage arising as a consequence of the crime. Penalties vary from one week to two months' imprisonment (€10,000 financial disadvantage) to 24 months' imprisonment (€1 million or more financial disadvantage).

However, the Courts are not bound by the guidelines. They are responsible for determining and imposing appropriate penalties in individual cases. According to the LOVS-guidelines, different factors can be taken into account in this respect, such as the duration of the crime, the advantage gained from the crime for the suspect, whether the suspect is an individual or legal entity, and the duration of the criminal procedure.

Furthermore, the DCC provides for certain measures that may be imposed by the Court in the case of a conviction. Relevant measures in this respect are, for instance, a professional prohibition and the recovery of illegally obtained assets.

Settlements

Apart from bringing a case before the Court, which could lead to a conviction and aforementioned penalties, the DPPS is also entitled to settle a case itself with a suspect. In the case of bribery, we have seen a few out-of-court settlements with large amounts of fines and confiscation. This will be discussed further below. In any event, the overall picture appears to be that suspects pay much higher fines when settling a case with the DPPS than the Court is used to imposing. In addition, it is the DPPS's policy that settlements representing amounts of €50,000 or more will be made public via a press release. Large bribery cases that have been made public via a press release include Ballast Nedam (2012), SBM Offshore (2015), Vimpelcom (2016) and Telia Company (2017).

Enforcement

The DPPS is responsible for the investigation and enforcement of criminal offences. The Public Prosecution Office in Rotterdam has appointed a special prosecutor in charge of coordinating bribery cases. This prosecutor has particular expertise in investigating and prosecuting bribery cases and provides assistance to local public prosecutors, who are authorised to investigate and prosecute bribery cases in their jurisdictions.

To guarantee the impartiality of the investigation as far as possible, the National Police Internal Investigations Department is charged with investigating cases of public bribery involving high-ranking officials, judges and politicians. In other cases of (public and commercial) bribery, the investigation can be conducted by regular police forces as well.

The starting point is that the DPPS may only prosecute offences which are criminalised by law (principle of legality, Article 1 DPC). If an offence is criminalised by law, the DPPS can decide to start prosecution (so-called discretionary principle, Article 167 DCC). The DPPS may also refrain from prosecution on public-interest grounds. Furthermore, the DPPS is entitled to use an alternative solution (such as offering a settlement) in a case. Mitigating circumstances may be taken into account by the DPPS in deciding whether or not to prosecute in a specific case. In addition, as discussed, the DPPS has drafted its own guidelines (which are publicly available) which can be used by the DPPS in deciding how to deal with a criminal case. The DPPS Instructions on the investigation and prosecution of public corruption in the Netherlands and abroad contain factors which the DPPS takes

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into account when deciding on the opportunity of prosecution in bribery cases, such as:

- the initiator of the gift;
- the value of the gift (as discussed above);
- the degree to which the relevant civil service organisation meets the integrity policy prescribed in the Civil Servants Act;
- the (social) acceptance of the gift;
- whether or not there have been actions contrary to the organisation's integrity code of conduct;
- the secrecy of the gift;
- the frequency of the gift;
- the relationship between the provider and recipient;
- the function of the briber public official in terms of status, relation to colleagues and content;
- the effect on the government;
- the possibility of alternative measures, such as those involving the public official in a disciplinary procedure; and
- the consequences of the official's actions.

If the DPPS decides not to prosecute a certain person, interested parties may file a complaint against such decision with the Court of Appeal (Article 12 DCC). The Court of Appeal assesses the complaint and – if it finds the complaint to be well-founded – may order the DPPS to start prosecution. However, this does (solely) mean that the DPPS should bring the case before a criminal judge, and does not particularly mean that someone will be convicted for a criminal offence by the criminal judge.

Jurisdiction

According to Article 2 DCC, Dutch criminal law is applicable to anyone who commits a criminal offence in the Netherlands (the so-called principle of territoriality). The DCC also establishes jurisdiction for the DPPS for certain types of bribery committed abroad. For instance, the DPPS has jurisdiction to prosecute, amongst others, the following persons: (i) a Dutch national who commits (public or private commercial) bribery abroad; (ii) the bribed Dutch public official abroad; and (iii) anyone who bribes a Dutch public official abroad. For these situations, the DCC requires that the (criminal) act is also punishable in the foreign country where it has been committed.

Limitation periods

The limitation period depends on the maximum penalty that can be imposed for the specific criminal offence (Articles 70 and 71 DCC). In the case of bribery, the limitation periods vary from 12 years (for general active/passive public and private commercial bribery) to 20 years (for bribery of a judge in order to gain a certain decision in a case that is subject to his or her judgment), provided that no aggravating circumstances apply. No limitation period applies for bribing a judge in order to gain a conviction in a criminal case.

Associated criminal offences

Bribery hardly ever comes alone. The most frequently related criminal offences are: forgery, money laundering, fraud and tax offences.

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Overview of enforcement activity and policy during the last year

Though the DCC has contained several provisions on bribery for decades, enforcement of bribery action had a limited priority for the DPPS until the last few years. It can only be guessed at, whether this lack of enforcement was linked to the fact that the Netherlands has always been ranked high and therefore (very) clean in Transparency International's *Corruption Perception Index* since the 1990s. Nevertheless, the Netherlands was criticised by the OECD Working Group on Bribery in International Business Transactions (the **Working Group**), especially in its report of 2012, in which it stated that it had "*serious concerns that the overall results of foreign bribery investigations and prosecutions to date are too low*".

An OECD press release following that report stated that the Netherlands was failing to vigorously pursue foreign bribery allegations, and must do more to enforce its foreign bribery laws. The fact that 14 out of 22 foreign bribery allegations did not result in the opening of an investigation, called into question the Netherlands' ability and proactivity in investigating and prosecuting foreign bribery, and therefore triggered such statement. As a consequence, the Working Group made numerous recommendations on the Netherlands's implementation and enforcement of the OECD Anti-Bribery Convention and related instruments. Additionally, Transparency International reported in 2014 that the Netherlands had little or no enforcement activity.

Since these reports, the (foreign) bribery enforcement culture seems to have gone through significant changes. The OECD Working Group on Bribery reported in 2015 that the Netherlands demonstrated significant progress with regard to enforcement, as it had opened seven new foreign bribery investigations since December 2012, bringing the total number to 16 since 2001. The Working Group reported positively on the out-of-court settlements that the DPPS reached with SBM Offshore (US$ 240 million, 2014), Ballast Nedam (€17.5 million, 2012) and KPMG Accountants NV (€7 million, 2013). According to Transparency International's *Progress Report 2015*, the Netherlands moved from little or no enforcement activity to "Little Enforcement".

As of 1 January 2015, amendments to (foreign) bribery provisions of the DCC entered into force. The amendments, amongst other things, contained an increase of the maximum penalties for foreign bribery, to six years of imprisonment for individuals and up to 10% of annual turnover for legal entities. In addition, promises by the Netherlands to increase the resources of Dutch anti-corruption bodies resulted in an extra budget allocation to intensify the fight against corruption since 2016. Over the last few years, the DPPS reached large settlements with telecom company VimpelCom Ltd (US$ 397.5 million, 2016), Telia Company AB (US$ 274 million, 2017) and ING Bank NV (€775 million, 2018). In addition, the VimpelCom settlement (2016) and Teliasonera settlement (2017) were close collaborations between the DPPS and foreign state authorities, which shows that the DPPS investigations are increasingly gaining a cross-border character.

Other recent developments that were significant in Transparency International's *Exporting Corruption* report 2018 include: the Dutch Whistleblower's Authority Act, which entered into force in 2016; increased public awareness, following the 'Panama Papers', that Dutch 'mailbox companies' pose a risk for the Netherlands' financial integrity; and a greater focus by the DPPS on the role of service providers in facilitating foreign bribery.

Despite these efforts, Transparency International's *Exporting Corruption* report 2018 concludes that there is still too limited enforcement on corruption in the Netherlands, because to date, only one foreign bribery case (against Takilant Ltd) has been brought to court, and that was a trial *in absentia*. This conclusion has led to Parliamentary questions. The Minister

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of Justice and Security answered that the number of foreign bribery cases that have been investigated has increased since 2013. Some of these are still under investigation while other, new investigations have started. According to the Minister, investigating foreign bribery cases is very labour-intensive and time-consuming and therefore the results of the increased efforts will become apparent over time. The DPPS expects the upward trend to continue.

So far, the DPPS seems more eager to start prosecution in national bribery cases, especially in cases concerning bribery of public officials. For instance, the DPPS charged a Dutch politician for bribery offences, which case resulted in a conviction in the first instance and appeal (verdict on appeal in 2017 and confirmed by the Supreme Court in 2019). In June 2019, the DPPS ordered 12 months' imprisonment for a public official and six months' imprisonment for a former public official for alleged bribery offences. However, the Limburg district court acquitted the (former) public officials. In the same month, the Overijssel district court convicted a former police chief for bribery and imposed a sentence of one year's imprisonment (of which six months were suspended). In October 2019, the National Police Internal Investigations Department raided offices of two public officials in The Hague who are currently suspects in a corruption case.

In recent years, the DPPS has prosecuted high-placed executives of, amongst others, Dutch railway company NS, and requested the court to impose imprisonment sentences of up to one year. However, all suspects were acquitted, which was seen as a heavy defeat for the DPPS (verdict in December 2017).

Since last year, intense discussions have arisen about DPPS enforcement policy in major cross-border criminal cases, some of them involving bribery offences. The DPPS is being criticised for certain decisions it took, for instance, in the Libor affair (Rabobank) and, more recently, the ING Bank case. The criticism includes so-called back-room politics of the DPPS, of which it is being said that it closes agreements with suspected multinationals without providing (enough) transparency. The DPPS is also being criticised for settling such major cases out of court with multinationals and not bringing the responsible individuals before the Court, while small(er) legal entities and the involved individuals are often being dragged through long criminal proceedings, with all the associated consequences. This is also why the term "class justice" is often heard these days.

Another recent development in the enforcement landscape is that the DPPS demands that a suspect has to explicitly admit guilt of certain actions in order to reach an out-of-court settlement. Whilst the DPPS has not yet clarified what this condition exactly includes (admission of guilt to specific criminal actions, or perhaps a certain admission that, with hindsight, things could have been done in a better way), this also attracted a lot of criticism, especially from defence counsel.

These developments show that the DPPS, also in bribery cases, nowadays sets high requirements for suspects to gain an out-of-court settlement. In April of last year, the Dutch *Financial Times* reported that Ernst & Young had declined a proposal for an out-of-court settlement for its involvement in the aforementioned VimpelCom case and, as a consequence, decided to let the DPPS bring the case before the Court. However, it is unclear if the condition of admission of guilt played a (significant) role in this decision.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

As a starting point, for criminal liability on the basis of Dutch (criminal) law, the aim of a certain payment, etc. to a public official is not relevant. Therefore, strictly speaking,

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'facilitation payments' can lead to criminal liability as well. However, according to the DPPS Instructions on investigation and prosecution of public bribery abroad, the DPPS does not consider it appropriate to conduct a more rigorous investigation and prosecution on tackling bribery of foreign public officials than is called for by the OECD Convention. This means that payments which, in terms of the OECD Convention, are considered to be 'facilitation payments' will, in general, not lead to prosecution. The Instructions mention a few factors that, according to the DPPS, weigh against prosecution, namely:

- It concerns acts or omissions to which the official concerned was already legally obliged. The payment in no way had a distorting effect on competition.
- It concerns small amounts, in absolute or relative terms.
- It concerns payments to lower officials.
- The gift must not be kept secret but be included transparently in the accounts of the company.
- The initiative to the gift must have come from the foreign official.

Hospitality

As discussed, in principle, anything of value to the recipient can constitute a bribe. Therefore, providing or accepting gifts and hospitality, also (seemingly) for promotional purposes, can qualify as bribery. Of relevance is the answer to the question of whether or not the intention to induce, as mentioned above, exists.

Key issues relating to investigation, decision-making and enforcement procedures

Although Dutch law does not contain a statutory provision that provides for an obligation or process for self-reporting bribery and corruption cases, Dutch case law shows that various factors can be taken into account as mitigating circumstances by the DPPS when reaching a settlement, as well as by the criminal judge when deciding the level of penalties, such as:

- voluntary disclosure of wrongdoing/self-reporting;
- cooperation with enforcement authorities through the investigation;
- existing prevention and detection measures, such as risk-assessment, training and detection mechanisms;
- commitments to implement new prevention and detection measures; and
- assistance in investigation and prosecution (of individuals).

Dutch law does not recognise the concept of a "plea bargain" as such. However, according to Dutch law, the public prosecutor is authorised to settle a case under certain circumstances and under certain conditions, where settlement could, for instance, include paying a certain amount of money (as discussed).

Whilst the Dutch Whistleblower's Act has been in force since 1 July 2018, up until now it has not proven very effective. Transparency International reported, in its 2018 *Exporting Corruption* report, that there is still weak protection for whistleblowers. These days, it is often heard that there are too many reporting points, which also causes difficulties for whistleblowers in reporting wrongdoing. It is expected that the new EU whistleblowers' directive will provide more clear rules and additional protection for whistleblowers.

In the past, some Dutch whistleblowers became famous in the Netherlands for standing up against (alleged) criminal offences, including bribery, occurring within their companies.

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For instance, the following Dutch criminal cases came to light via whistleblowers: SNS Fraud case (2013); SBM Offshore (2012); the Construction Fraud case (1990s); and the housing association Vestia case (2012).

Corporate liability for bribery and corruption offences

Corporate criminal liability

Legal entities

According to Article 51 of the DCC, both individuals and legal entities are capable of committing criminal offences. It follows from Dutch case law that a legal entity can be held criminally liable for criminal offences of individuals (for instance, employees) if these offences can be 'reasonably attributed' to the legal entity, which depends on the specific facts and circumstances of the case. According to the Dutch Supreme Court, an important point of reference in this context is whether the offence (of the individual) took place within the 'sphere' (context/interest) of the legal entity. This can be the case if one or more of the following criteria apply:

(i) it concerns an act or omission of someone who works for the benefit of the legal entity either via an employment contract or otherwise;

(ii) the act or omission fits within the normal business activity of the legal entity;

(iii) the act or omission has benefited the legal entity (financially or otherwise) in the performance of its business; or

(iv) the legal entity was able to prevent or influence whether the act or omission would occur but instead accepted the act or omission or similar conduct. In this respect, the failure to exercise due care is considered to be evidence of the act or omission.

It follows from this case law that a legal entity can defend itself by arguing that the aforementioned criteria have not been met. However, case law shows that in practice, Courts consider these criteria to be met very soon, especially in the situation where (sometimes solely) criteria (ii) applies. In determining whether a legal entity should be held criminally liable, the Court can take into account whether or not the entity had procedures in place to prevent criminal behaviour (this especially relates to criteria (iv)). However, Dutch law does not provide for a statutory defence if a legal entity had adequate procedures in place to prevent criminal behaviour as such. Unlike, for instance, the UK Bribery Act, the DCC also does not criminalise solely the failure to prevent bribery.

Individuals

According to Article 51 DCC, if criminal liability of the legal entity has been established, individuals who ordered the commission of the criminal offence or actually directed the unlawful behaviour may also be prosecuted and convicted for such criminal offences. According to Dutch case law, criminal liability for an individual could exist when he or she, while he or she was authorised and reasonably obliged to take measures to prevent or end the criminal conduct, knowingly accepted the likely change that the criminal conduct would occur. By doing so, the individual is considered to have intentionally facilitated the criminal conduct. It often concerns persons holding managerial or legal positions within the legal entity. However, the mere circumstance that a person is a director of the legal entity is not sufficient to hold him or her criminally liable. On the other hand, such a legal status is no requirement. Someone who is not employed by the legal entity can be considered as the one who directed or ordered the criminal offence by the legal entity as well. Criminal liability therefore does not depend on someone's formal position, but on

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his or her actual involvement in the criminal offence committed by the legal entity.

Criminal liability of individuals in this regard can only exist if criminal liability of the legal entity has been established. This does not mean that the legal entity itself has to be actually prosecuted and convicted for the alleged offence. It is very well possible that only individuals will be prosecuted, and not the legal entity. However, in practice, in major criminal cases we often see legal entities reaching a settlement with the DPPS, and individuals getting off the hook as a consequence.

Proposed reforms / The year ahead

As discussed in this chapter, the DPPS seems to be under fire for the way it deals with major criminal cases involving large multinationals. Last year, the Council for the Judiciary has also stated that major out-of-court settlements, such as seen in the ING case, are harmful to trust in the rule of law. Though we have seen developments whereby the DPPS tries to provide more transparency (for instance, via major press releases), different voices are being heard that such major out-of-court settlements should be subject to judicial authorisation. In Dutch literature, reference is also made to the "Americanisation of the fight against corruption".

However, it is not yet clear how a judge can be involved in such settlements, or what the scope of his involvement should be. Perhaps we can provide some more information on this in the 2021 edition. Nevertheless, the situation seems to have become unsustainable and the DPPS, and maybe even the legislator, should act in order to stop the negative feelings these major settlements cause in society. The Minister of Justice and Security last year stated that the settlement practice is currently being reviewed. In an interview in May 2019, a spokesperson from the DPPS stated that the DPPS is exploring the option to implement a self-reporting procedure and corresponding sentencing guidelines, for which it will also consult the judicial authority and advocacy. We expect the DPPS to apply such guidelines also in (future) corruption cases.

In addition, in 2019 the OECD Working Group on Bribery launched its fourth phase of monitoring the implementation of the OECD Anti-Bribery Convention in the Netherlands. The phase 4 Report will be discussed in June 2020.

A last trend, which we expect to evolve in the near future, is the appointment of monitors in major corruption cases. While at the moment the DPPS does not have the power to appoint a monitor as condition of a settlement agreement, large settlements such as the one with VimpelCom show that the importance of (external) monitors is increasing. Therefore in future criminal cases, we expect more companies to explore the option of a monitorship in order to gain a settlement with the DPPS.

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Jurjan Geertsma's legal practice focuses expressly on disciplinary law, the law of sanctions and the reputational issues involved. He helps his clients to identify potential risks, jointly draws up an appropriate strategy, and proactively and resolutely goes in search of solutions. He assists companies from a wide range of sectors (including the chemical, food and property sectors), financial institutions (such as trust offices) and professional practitioners (in e.g. the healthcare sector and the notarial and accountancy practices) who are faced with criminal accusations, administrative enforcement, and supervisory and disciplinary issues.

Jurjan is a member of the Dutch Association of Defence Counsel (NVSA) and the European Criminal Bar Association (ECBA), where he forms part of the Anti-Corruption Working Group. He is also involved in the Corporate Responsibility & Anti-Corruption Commission of the International Chamber of Commerce (ICC), and the Asset Tracing & Recovery working group of the Institute for Financial Crime (IFFC).

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Madelon specialises in financial, economic and tax sanctions law. She advises and assists legal entities, banks and other financial institutions (managing directors and/or supervisory directors) that are faced with (imminent) supervision or enforcement issues under administrative or criminal law, e.g. involving matters of corruption, (tax) fraud, forgery, bribery, money laundering or compliance with environmental and working conditions legislation. Madelon also has experience in organising and conducting internal investigations. She frequently advises on compliance and integrity issues, particularly in the field of Dutch and international anti-corruption and anti-money-laundering regulations (under the Dutch Money Laundering and Terrorist Financing (Prevention) Act). Furthermore, she organises training sessions, e.g. on how to act in the event of an investigation or dawn raid by supervisory authorities or law enforcement agencies. Madelon is a board member of the NVJSA (Dutch Association of Young Criminal Lawyers) and member of the Women's White Collar Defence Association.

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New Zealand

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Overview of the law and enforcement regime

Sources of law

New Zealand law treats bribery and corruption as criminal matters. Two principal statutes apply:

- the Crimes Act 1961 (Part 6, sections 99 to 106) (**Crimes Act**); and
- the Secret Commissions Act 1910 (**Secret Commissions Act**).

The Crimes Act applies principally to public sector corruption. It contains criminal offences related to, among other things, the corrupt use of official information and the corruption and bribery of the Judiciary, Ministers of the Crown, Members of Parliament, law enforcement officers and public officials. Penalties include terms of imprisonment of up to 14 years for the most serious cases. Foreign bribery offences can carry fines up to the greater of NZ$5 million or three times the value of the commercial gain obtained.

The Secret Commissions Act contains bribery and corruption-style offences relevant to the private sector. Penalties range from seven years' imprisonment to unlimited fines for individuals and corporations.

New Zealand law also contains many other offences covering corruption-style crimes. These include money laundering (under the Crimes Act) and fraud (under the Serious Fraud Office Act 1990), as well as civil sanctions under the Securities Market Act 1978 relating to insider trading and market manipulation. There is also an offence under the Income Tax Act 2012, which is targeted at the bribery of local and foreign tax officials. Electoral laws also require disclosure of donor support to politicians.

Certain international treaties to which New Zealand is a signatory require New Zealand's law makers (Parliament) to ensure that local statutes are consistent with international norms. International treaties may also impose obligations on New Zealand to assist other nations in criminal and non-criminal investigations and proceedings. Relevant treaties to which New Zealand is a signatory are:

- OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (signed 1997: ratified 2001).
- United Nations Convention Against Corruption (signed 2003: ratified 2015).
- United Nations Convention Against Transnational Organised Crime (signed 2000: ratified 2002).

New Zealand is also a member of the Asia Pacific Economic Cooperation (APEC) Network of Anti-Corruption Authorities and Law Enforcement Agencies, which was established in 2014.

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This commentary will focus on the principal local law offences under the Crimes Act and Secret Commissions Act.

Bribery and corruption under the Crimes Act

The offences under the Crimes Act essentially cover the corrupt bribery of judges, parliamentarians and other public officials (**Public Servants**) and foreign officials, and the corrupt use of official information.

- *Bribery of Public Servants*

  In relation to bribes, it is an offence for a Public Servant to corruptly accept or obtain, agree or offer to accept or attempt to obtain any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted by him in his capacity as a Public Servant.

  It is also an offence for any person to corruptly give or offer or agree to give any bribe to any person with intent to influence any Public Servant in respect of any act or omission by that Public Servant in his capacity as a Public Servant.

  "*Bribe*" is defined to mean "*any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect*".

- *Bribery of foreign public officials*

  With regard to a foreign public official, it is an offence to corruptly give or offer or agree to give a bribe to a person with the intention of influencing a foreign public official in respect of any act or omission by that foreign public official in his or her official capacity in order to obtain or retain business, or obtain any improper advantage in the conduct of business. This applies whether or not the bribery of the foreign public official occurs within or outside of New Zealand. The offence does not require dual criminality (that is, it remains an offence in New Zealand even if the act is lawful in the country of the foreign public official involved).

  It is not an offence if the primary or sole purpose of the act or omission was to ensure that a routine government action was performed by that foreign public official and if the value of the benefit was small. Note that this 'facilitation payment' defence only applies to foreign public officials, not Public Servants (see more on this below).

- *Corrupt use of official information*

  In relation to the corrupt use of official information, it is an offence for a public official to corruptly use or disclose any information acquired by him in his official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or any other person. Similarly, it is an offence for any person to use information obtained in this way in order to gain an advantage or pecuniary gain.

Bribery and corruption under the Secret Commissions Act

The Secret Commissions Act covers bribery offences in the private sector. Under that Act it is an offence (in general terms) to:

- corruptly give a gift to an agent (and for an agent to accept such a gift) without the consent of the principal, where the gift (or other consideration) is an inducement or reward for doing or forbearing to do something in relation to the principal's affairs or business;
- fail to disclose (as an agent) to the agent's principal a pecuniary interest in a contract;
- give an agent a false receipt or invoice (or for an agent to deliver a receipt or invoice he or she knows is false to his or her principal); and

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- advise any person to enter into a contract with a third person and receive or agree to receive, without the person's knowledge, a gift or consideration from that third person as an inducement or reward.

The maximum penalty for such offences is seven years' imprisonment. Prior to 2015 it was two years.

'Corruptly'

The word 'corruptly' is common to most bribery offences. New Zealand's highest court (Supreme Court) opined on the meaning of that word in *Field v R* [2011] NZSC 129. This case involved a prosecution against a Member of Parliament (Mr. Taito Philip Field) for corruptly receiving a bribe. There was evidence that he had benefited through unpaid work undertaken by Thai immigrants on his private properties after he had provided assistance to those Thai immigrants in relation to applications for New Zealand residency. Mr. Field's defence was that the unpaid work undertaken by the Thai immigrants was a gift and not a *quid pro quo* for his activities on their behalf. That defence failed.

The Supreme Court, perhaps somewhat simplistically, resolved the matter by saying that Mr. Field had acted corruptly because "*... it is simply wrong for an official to accept money or like benefits in return for what has been done in an official capacity*".

This approach would suggest that receipt of any benefit other than salary will – save only for the exception about to be noted – always be received 'corruptly' because it is 'simply wrong' to receive the benefit.

The Supreme Court did, however, introduce a *de minimis* defence. That is one "*in relation to gifts of token value which are just part of the usual courtesies of life*", or where some "*unexceptional ... other benefit*" was received. The Supreme Court opined that in such an instance the transaction would be 'innocent' and therefore not corrupt. The example considered in the case was a Member of Parliament being given an item of sports club attire in return for attending the opening of that sports club's premises.

There has been academic criticism of the Supreme Court's approach as being circular and unclear. There has also been criticism that the *de minimis* defence amounts to an attempted amendment by the Court of the statute or the creation of a form of facilitation payment defence by stealth. Furthermore, there will always be doubt as to what is *de minimis* and therefore permissible, and what is not.

OECD reporting has also commented that New Zealand legislators should consider removing reference to the term 'corruptly' from the offence provisions. They argue that this term is unnecessary given the 'intent to influence' element to the offences, and the possibility that the word 'corruptly' increases the evidential burdens placed on prosecutors.[1]

The Serious Fraud Office, for its part, adopts an approach which defines corruption as "*.... the abuse of entrusted power for private gain*".[2]

Overview of enforcement activity and policy during the past two years

New Zealand is a small country (5.0 million people approximately) and has a reputation for a low level of local corruption[3] In fact, in the 2018 *Corruptions Perceptions Index* by Transparency International, New Zealand was ranked as the second-least corrupt country in the world (albeit down from first in 2017). It follows that prosecutions in New Zealand for bribery and corruption are few.

Recent relevant statistics that are available (which record the position up until December 2015[4]) are as follows:

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- Between 2010 and 2015 there were 20 prosecutions for public service domestic bribery offences. These resulted in 15 convictions.
- Between 2010 and 2015 there were nine prosecutions for private sector bribery offences. These resulted in seven convictions.
- There have been no local prosecutions for foreign bribery offences.

Prosecutions tend to receive a good level of publicity and certain high-profile matters have been highlighted in the media and in wider public debate of recent date.[5]

A recent 2016 OECD report, however, has suggested (as have prior OECD reports) that there may be an under-reporting of bribery, particularly in relation to foreign bribery. The report notes some progress by New Zealand in its detection and investigation of foreign bribery but nevertheless "*stresses the significant need for New Zealand to strengthen enforcement of its foreign bribery offence*".[6]

A 2015 report by Deloitte,[7] which focused on Australia and New Zealand, revealed that of those organisations surveyed, 23% had experienced one or more known instances of domestic corruption within the last five years. The survey also revealed that 40% of the organisations surveyed had operations in high-risk jurisdictions, with 35% of those having experienced some form of bribery or corruption incident within the last five years. A large number of organisations who did have overseas operations in high-risk jurisdictions did not, however, have formal compliance programmes and many had not conducted risk assessments in this area.

There was some concern that the rebuilding of Christchurch (New Zealand's second-largest city), after devastating earthquakes in 2010 and 2011, could increase corruption. This is due to the large amount of insurance money that has flooded into that region and the large amount of building and other service work that will be required in this decade to rebuild the city.[8] There has not, however, been any reported increase in corruption as a result, although substantial rebuilding work is yet to be completed.

Some reform took effect in late 2015 (see further below), however, and the OECD subsequently reported that the SFO had investigated at least six foreign bribery complaints in the period October 2013 to September 2015. Four of those investigations were said to be ongoing.[9] There is no recent or updated reporting in this area, however, in 2018 Transparency International reported that New Zealand needed to do more in responding to the threat of international corruption and foreign bribery.[10]

Law and policy relating to issues such as facilitation payments and hospitality

Foreign public officials

In the case of the bribery of a foreign public official, the Crimes Act provides that there will be no bribery offence where the benefit given or offered was "*committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action and the value of the benefit is small*".[11]

'*Routine government action*' is defined to include any decision about whether to award new business or whether to continue existing business, or the terms of new or existing business. The exception does not apply to any action that provides either an undue material benefit to a person who makes a payment, or an undue material disadvantage to any other person.[12]

This provision appears to permit small or nominal facilitation payments or hospitality when it comes to the provision of benefits to foreign officials, even if that official is responsible for determining the award or continuation of business.

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The OECD has been critical of this exception (even if recently narrowed). The New Zealand Government is presently conducting targeted consultation on this issue. Present guidance highlights the risks involved in making such payments.

Local bribery offences

The facilitation payment exception available in respect of foreign public officials does not apply to New Zealand Public Servants.

What a local Public Servant can rely on is the *de minimis* defence suggested by the Supreme Court in *R v Field*. That is one "*in relation to gifts of token value which are just part of the usual courtesies of life*", or where some "*unexceptional ... other benefit*" was received.

However, this defence does not strictly refer to 'facilitation payments'. Rather 'thank you' gifts, albeit that such a gift might facilitate an appearance or attendance at an event.

Key issues relating to investigation, decision-making and enforcement procedures

Investigation and enforcement process

Bribery and corruption offences will usually be investigated and prosecuted by either the New Zealand Police (if it is a low level of criminal behaviour) or the Serious Fraud Office (for more serious, complex or high-profile matters).

The Office of the Ombudsman can also look into complaints about corrupt behaviour. The Office of the Controller and Auditor General will also report to Parliament any corrupt use of public money to Parliament.

Prosecutions will be dealt with through the criminal courts. The Crimes Act offences will usually be dealt with by the High Court (the superior first instance court), although prosecutions can also be determined through the lower, first instance courts (District Courts).

Prosecutorial guidelines

Decisions to prosecute crimes in New Zealand are made by the Police or Serious Fraud Office with the Solicitor General's Prosecution Guidelines in mind. These guidelines state that prosecutions are to be initiated or continued only where:

- the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of a conviction; and
- prosecution is required in the public interest.

One aspect that is relevant to the public interest test is 'where there is any element of corruption'.

It is expected, therefore, that where there is a case that has a reasonable prospect of conviction on the admissible evidence gathered, a prosecution will be brought against a person for a bribery and corruption offence. There are, however, further hurdles in terms of actually bringing a prosecution to trial. These are addressed in the next section.

Prosecutors are expected to read the Prosecution Guidelines consistently with Article 5 of the UN Convention Against Corruption when deciding whether to bring a prosecution for foreign bribery.[13]

Restrictions on prosecutions

Bribery and corruption under the Crimes Act involving judges, judicial officers, law enforcement officers, official information or foreign public officials cannot be prosecuted without the permission of the Attorney General who, before giving such permission, may make such enquiries as he thinks fit.[14]

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A prosecution against a senior (High Court) judge must also only be pursued if Parliament so resolves.

Where a prosecution involves a Minister of the Crown or Member of Parliament, then leave of the High Court must be obtained. The application for leave must be on notice to the proposed defendant, who must have an opportunity to be heard against the application. In determining such matters, the High Court will apply the following guidelines:[15]

- Is prosecution being brought in good faith?
- The court will examine the strength and sufficiency of the evidence.
- Whether the public interest required a prosecution in the circumstances of the case.
- Are there other considerations that are relevant?

Extraterritoriality and international co-operation

Extraterritoriality

Even if the acts or omissions relevant to a bribery offence under the Crimes Act were committed wholly outside of New Zealand, proceedings may be brought against a person in New Zealand, provided that person is a citizen or New Zealand incorporated company, ordinarily resident in New Zealand, or that has been found in New Zealand and not extradited.[16]

The New Zealand courts will also have jurisdiction to determine prosecutions where any act or omission forming part of an offence occurs in New Zealand or, alternatively, any event necessary to the completion of any offence occurred in New Zealand.[17] In respect of the former, the act or omission must form part of the *actus reus* of the offence.[18]

Bribery outside of New Zealand of foreign public officials is specifically covered by provisions in the Crimes Act (see above).

Foreign cooperation

New Zealand law has provision for mutual legal assistance, as required by the OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions. This is covered by the Mutual Assistance in Criminal Matters Act 1992. Recent reporting records that no mutual legal assistance requests received by New Zealand up until end 2015 concerned bribery or corruption offences.[19]

New Zealand also has a relatively developed extradition process which is covered by the Extradition Act 1999 and numerous international treaties.

Corporate liability for bribery and corruption offences

Bribery and corruption offences can be brought against both natural and corporate persons. A "person" under the Crimes Act includes both incorporated and unincorporated bodies of persons.[20]

In relation to corporate liability, the New Zealand courts had previously tended to follow the English law approach established in *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 (HL). That is where the courts will look at whether the natural persons involved were the 'directing mind and will' of the corporation involved.

However, the Privy Council decision in the New Zealand appeal concerning *Meridian Global Funds Management Asia v Securities Commission* [1995] UKPC 5 has most likely extended the identification theory, such that the Court is also encouraged to look at the

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purpose of the provisions creating the relevant offence. That case involved a regulatory offence where certain executives were delegated a reporting task, which was not complied with. In that instance, that delegation permitted the court to find the company liable for the non-reporting by reference to the purpose of the provisions and, due to the general principles of agency and vicarious liability, the knowledge of the employees was attributed to the company.

Such principles may be difficult to apply to bribery and corruption-type offences. It has to be expected that only where very senior levels of management or directors are involved in bribery, may a company also be charged. As such, the 'directing mind and will' test will most likely still remain relevant in this area.

Recent reforms, however, clarify that if an employee commits an offence under the foreign public official provisions, then his corporate employer can be liable if the offence fell within that employee's scope of authority, the employer benefited and the employer did not take reasonable steps to prevent the offence.[21] It has been suggested that the same broad principles now outlined in the Crimes Act for foreign bribery could be applied to investigations and prosecutions against organisations for domestic bribery and corruption offences.[22]

Proposed reforms / The year ahead

The Organised Crime and Anti-Corruption Legislation Bill (covered in this publication's 3rd edition) was passed in November 2015. This led to many of the recent reforms mentioned above. These reforms allowed the New Zealand Government to ratify the UN Convention Against Corruption at that time.

Since that reform, the New Zealand Government has been active in raising public and private sector awareness of bribery and corruption in general. This has led to a number of recent publications by various government departments and ministries. There has been additional training given to public sector workers, particularly those who have contact with foreign trade and investment.

In its 2018 Annual Report, the Serious Fraud Office emphasised the Anti-Corruption Work Programme (**ACWP**) that it runs in collaboration with other Government agencies.[23] The SFO hopes that by providing a national framework for anti-corruption efforts, the ACWP will improve New Zealand's compliance with the UN Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

As noted, there have to date been no prosecutions in New Zealand in the area of foreign bribery and corruption. There are, however, several ongoing investigations. Whether any of these (or indeed other reported matters) will lead to a prosecution in this area will be a matter of interest to lawyers and commentators alike.

Targeted consultation is taking place in relation to the facilitation payments exception. This consultation is not expected to lead to any reform, however. Rather, a possible update on the guidance is already available.

The New Zealand Government has signalled possible reform in the area of mutual assistance in criminal matters, although this project is said to likely require considerable time (as it involves reform in the area of extradition law), and so no new proposed legislation is anticipated within the coming year.

* * *

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Endnotes

1. This recommendation was not followed (see the last section of this chapter).
2. NZ Government Publication: "Saying No to Bribery and Corruption – A Guide for New Zealand Business" (2015).
3. New Zealand often features in reporting as one of the world's least corrupt countries. It ranks as the world's second least corrupt country (behind Denmark) in the Transparency International *Corruption Perceptions Index* 2018.
4. OECD Report: New Zealand: Follow-up to the Phase 3 Report and Recommendations (March 2016), page 12 (OECD Report 2016).
5. Recent cases or prosecutions which have been publicised have involved several high-profile matters. These include: alleged bribery in the obtaining road maintenance contracts from a local body organisation (*SFO v Borlaze, George & Anr.*); and obtaining a secret commission (*R v Love*). There have also been matters before the courts involving alleged failures to declare political donations (*R v Banks*) and defrauding of local government bodies (*R v Sweney*), which whilst not strictly corruption matters, did highlight allegations around the probity of public officials. A relatively recent scandal involving payments to a Saudi businessman by the New Zealand Government has also attracted public debate around corruption issues.
6. OECD Report 2016, page 4.
7. Deloitte Bribery and Corruption Survey 2015 – Australia and New Zealand. The survey was conducted in November and December 2014. 269 respondents were involved, including some from listed companies.
8. The Christchurch earthquakes represented one of the largest global insurance events since 2000.
9. OECD Report 2016, pages 6 and 16.
10. https://www.transparency.org.nz/new-zealand-needs-increase-efforts-fight-foreign-bribery/.
11. Crimes Act 1961, section 105C(3).
12. Crimes Act 1961, section 105C(1).
13. On 22 January 2014, the Acting Deputy Solicitor-General sent a letter to all Crown Solicitors stating this, following concerns raised by the OECD in this area.
14. Crimes Act 1961, section 106. The OECD remains critical of that requirement; it sees it as inconsistent with Article 5 of the UN Convention Against Corruption. New Zealand asserts that there are sufficient safeguards against political interference given that such decisions will usually be delegated to the Solicitor General who acts independently of the political process. See OECD Report 2016, page 19.
15. *Burgess v Field*, HC Auckland, CIV-2007-404-3206, 5 October 2007, Randerson J.
16. Crimes Act 1961, section 7A.
17. Crimes Act 1961, section 7.
18. *Tipple v Pain* [1983] NZLR 257.
19. OECD Report 2016, page 20.
20. Crimes Act 1961, section 2.
21. Crimes Act 1961, section 105C(2A) – (2C).
22. Government Publication: "Saying No to Bribery and Corruption – A Guide for New Zealand Business" (2015).
23. SFO 2018 Annual Report – https://www.sfo.govt.nz/file/544 at 8.

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Nigeria

James Okoh, Johnson Agwu & Ogechi Nwobia
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Brief overview of the law and enforcement regime

Nigeria is an interesting case in the discussion of corruption. Each day presents news of efforts for and against corruption. As a matter of historical fact, the eradication of corruption was the mantra of the current political leadership of the country, which helped it to defeat the incumbent President in the 2015 Presidential elections. However, the question remains unanswered of whether the much-touted eradication of corruption by the current administration has had a tangible impact.

Corruption is a criminal offence and the subject has received a fair share of legislative time and attention, considering the number of substantive laws that have been enacted by the National Assembly in Nigeria. Some of these include:

1. The Constitution of the Federal Republic of Nigeria 1999 (as amended), which contains the code of conduct for public officers in the 5th schedule.
2. Code of Conduct Bureau and Tribunal Act.
3. Corrupt Practices and other Related Offences Act.
4. Economic and Financial Crimes Commission (Establishment) Act.
5. Money Laundering Prohibition Act.
6. Dishonoured Cheques (Offences) Act.
7. Fiscal Responsibility Act.
8. Public Procurement Act.
9. Finance (Control and Management) Act.
10. Advanced Fee Fraud and other Fraud-Related Offences Act.
11. Failed Banks (Recovery of Debt) and Financial Malpractices in Banks Act.
12. Nigerian Financial Intelligence Unit Act.
13. Nigerian Extractive Industries Transparency Initiative Act.

The underlying element of these laws is the intention to prevent or eradicate corruption at all levels, from private individuals to public officials. From regulation of conduct of public officers to regulations on public procurement and due process and transparency in financial transactions, the laws attempt to set policies in place that effectively prevent corruption and prescribe sanctions for defaulters.

Investigating authorities

Some of these laws also establish the agencies responsible for the investigation and prosecution of related offences. The agencies include: the Economic and Financial Crimes

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Commission ("EFCC"), established by the Economic and Financial Crimes Commission Act; the Code of Conduct Bureau ("CCB"), established by the Nigerian Constitution and the Code of Conduct Bureau and Tribunal Act; and the Independent Corrupt Practices Commission ("ICPC"), established by the Corrupt Practices & Other Related Offences Act.

These laws generally highlight more common offences such as cybercrime, fraud, bribery, money laundering, etc. However, there are activities which would not meet the definition of offences under the criminal legislation but would constitute infractions under the Code of Conduct for Public Officers contained in the fifth schedule of the Nigerian Constitution intended to fight corruption. For instance, the Code of Conduct for Public Officers prohibits the President and other key members of the Executive arm of government from maintaining foreign accounts. The same law also provides for the declaration of assets for public officers upon assumption of office, failing which they would be liable for breaching the code. These are not offences under other legislation. It was based on this law that a high-profile case was instituted this year, involving the most senior judicial officer in the country.

However, we must note that there are infractions of the Code of Conduct for Public Officers which also constitute offences under the regular penal laws. Sanctions for breach of Code of Conduct provisions generally listed under these laws range from milder punishments like vacation of office, to seizure and forfeiture of property acquired in abuse or corruption of office (for public officers). Sanctions for breach of regular criminal provisions include forfeiture, restitution, binding over, fines and imprisonment. Again, we must note that the Code of Conduct Tribunal does not have the capacity to, and indeed does not, impose custodial sentences.

Apart from the agencies listed above, the National Assembly also has investigative powers pursuant to section 88 of the 1999 Constitution (as amended), which it occasionally exercises over issues of alleged corruption. The powers of investigation are essentially for the purpose of making or correcting defects in laws within the legislative competence of the National Assembly, and "*to expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it*".[1]

However, in recent times, the powers of the National Assembly to investigate and expose corruption under this provision have come under serious and consistent challenge. Individuals accused of corrupt practices rush to submit the accusation to court so that they may plead the principle of "*sub judice*" when the National Assembly commences its investigation.

For instance, in 2018, the Honourable Attorney General of the Nigerian Federation sought an injunction from the Federal High Court restraining the National Assembly from enquiring into the circumstances leading to the recall, reinstatement and promotion of Mr. Abdulrasheed Maina. Mr. Maina had been: (i) dismissed for absconding from his position as a civil servant following his disappearance over his mismanagement and stealing of pension funds of civil servants; and (ii) declared wanted by the EFCC and the International Criminal Police Organisation ("Interpol") over the alleged offences.

It was later exposed that the "wanted Maina" had been surreptitiously recalled, reinstated, double-promoted and paid arrears of all salaries skipped during the days he had gone into hiding. The National Assembly took up the challenge to investigate the circumstances, leading to the payment of public funds to a legal fugitive wanted over corruption charges. Surprisingly, the Attorney General of the Federation served a court order restraining the National Assembly from continuing its investigation.[2]

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Following outrage of Nigerians over the role of the Executive Government in Maina's case, there seems to have been a flurry of activities to prosecute Mr. Maina in recent times. For instance, the EFCC secured an order of the court on 7 October 2019 to detain Maina for fuller investigations, following his arrest effected by the Department of State Service.[3]

Overview of enforcement activity and policy during the last year

The various anti-corruption agencies appear to have been busy this past year, investigating and prosecuting numerous cases ranging from false asset declaration to cybercrime, money laundering, illegal dealing in oil products and others.

Pursuant to the Code of Conduct Tribunal Act, public officers are expected to declare their assets immediately upon assumption of office and before beginning to perform their duties, and at the end of their term in office. The declaration extends to their spouses and their children below the age of 18 years. Assets not attributable to their just remuneration, gifts or approved loans while in office, are presumed to be proceeds of corruption until the contrary is proven. The Bureau is obligated to verify the assets, and statements that are false are considered a breach of the Code of Conduct.[4]

Early this year, Hon. Justice Walter Onnoghen, ex-Chief Justice of Nigeria ("CJN") and the country's highest-ranking judicial officer, was petitioned for allegedly operating undisclosed foreign accounts contrary to section 11(1)(2) of the fifth schedule of the 1999 constitution as amended and section 15 of the Code of Conduct Bureau and Tribunal Act. The Federal Government filed a six-count charge of false asset declaration against him before the Code of Conduct Tribunal, and he was temporarily suspended while the trial proceeded.[5]

Onnoghen's trial was heavily criticised for the procedure adopted which, on the surface of it, appeared contrary to the prescribed procedure for investigating judicial officers. Many regarded the trial as a ploy by the Federal government to remove the sitting CJN ahead of the upcoming elections. The tribunal ruled that he forfeit the assets in the accounts, be removed from office and be banned from taking up any public office for 10 years.[6] Mr. Onnoghen handed in his voluntary resignation in April 2019 and stands banned from taking up any public office for the next 10 years. Pursuant to an interlocutory appeal on jurisdiction, the Court of Appeal has ruled that the Code of Conduct Tribunal ought not to have assumed jurisdiction.

Still on the subject of asset declaration, Dr. Abubakar Saraki (a former governor of Kwara State and erstwhile president of the Nigerian Senate) was tried for false and anticipatory asset declaration, but was acquitted in 2018.[7] However, recently on 21 October 2019, Dr. Saraki's house at 17a Macdonald Avenue, Ikoyi, Lagos was subjected to an interim forfeiture order obtained by the EFCC from the Federal High Court sitting in Lagos over the same conducts that had been tried by the Code of Conduct Tribunal.

On the face of it, a trial at the Code of Conduct Tribunal does not generate the plea of double jeopardy, so a new trial in a regular court (if the conducts constitute a contravention of our regular criminal laws) would be fine.[8] However, it is difficult to see how this interim order is regular if Dr. Saraki's preliminary media response[9] is correct, particularly the allegation that there is an order by the Federal High Court restraining the EFCC from seizing or purporting to apply for seizure of the same property.

The ICPC has also made significant progress in fighting corruption this year. The commission announced that it has recovered over 200 public properties in 2019,[10] and has commenced major investigations into the "constituency projects" scam that often involves members of the National Assembly.

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By way of background, each year, as part of its functions, the executive arm of the Nigerian government proposes budget estimates in the form of an appropriation Bill to the National Assembly pursuant to section 81 of the Nigerian Constitution. Under sections 59 and 81 of the Nigerian Constitution 1999, the Nigerian National Assembly is mandated to review the budget estimates and pass the bill into the Appropriation Act subject to consent of the Nigerian President. The National Assembly also has the inherent power to introduce projects into the proposed budget which the executive had not included originally. While the executive describes this act of including projects into the budget as "budget padding", the National Assembly had justified it on the basis that the members of the National Assembly are in a position to determine which projects are of priority to the constituencies they represent. The projects introduced into the national budget on the basis of constituency priorities are described as the "constituency projects".

There are allegations (which are widely believed) that the members of the National Assembly insert these constituency projects into the National budget as smokescreens (to enable to them steal the funds designated as constituency project funds). Many members of the public believe that members of the National Assembly obtain the release of funds for constituency projects but divert the funds to their personal use without executing the projects, only for the same projects to resurface in the National Budget in the next budget cycle under the same name or in other names.

Against this background, the ICPC has commenced the investigation of constituency project heists. Just on 8 October 2019, the ICPC clarified that although it had embarked on the first phase of its Constituency Projects Tracking initiative, with remarkable success in terms of the return of contractors to hitherto abandoned sites, completion of projects, as well as the recovery and putting to use of equipment that had been misappropriated or left to idle away, the evaluation of these successes is still ongoing.[11] The ICPC therefore urged members of the public to await the presentation of factual and unambiguous reports.

On 4 August 2019, the media was awash with the reported sealing of the house of Senator Chuka Utazi, representative for one of the senatorial districts in Enugu State.[12] It was reported that the ICPC discovered some items which were procured as part of a poverty-alleviation scheme component of the Senator's constituency project, and which he did not distribute to intended beneficiaries. However, on 7 August 2019, Senator Utazi reacted to the news, stating that the ICPC did not seal his house but was simply doing its normal work of supervising the distribution and implementation of constituency projects.[13]

On 19 October 2019, the media reported that the Constituency Projects Tracking Group of the ICPC had recovered over six tractors from the erstwhile Senator Misau and handed them over to the targeted beneficiaries.[14] Nothing was said of whether Senator Misau would be prosecuted. To the extent that the report is true, this effort has reduced the effect of the allegedly corrupt act of diverting the six tractors received for distribution as constituency projects for personal use.

Pursuant to its mandate to prevent corruption, the ICPC has also inaugurated an Anti-Corruption and Transparency Monitoring Unit ("ACTU") in each Ministry, Department and Agency ("MDA") of Government in Nigeria, aimed at checking the prevalence of corruption in each organisation.

The EFCC has also had its hands full with a host of cases. In 2018, a certain official of the Joint Admissions and Matriculations Board, when questioned over missing funds belonging to the board, alleged that a mysterious snake had swallowed the money, amounting to about N36,000,000 (£78,774).[15] The story made news headlines for its sheer absurdity and, after

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investigations by an internal disciplinary committee, the staff alongside other accomplices were finally arraigned before a High court in 2019 on charges of fraud and misappropriation of funds by the EFCC.[16] The case is still ongoing and is yet to be determined, as the parties involved have pleaded not guilty to the charges.

The EFCC has also paid a lot of attention to fraud and cybercrime this year. Dozens of arrests have been made following months of investigations by the agency, and even in partnership with foreign security agencies such as the Federal Bureau of Investigations in the United States of America.[17] Beyond the arrests, prosecutions are also ongoing which are being facilitated not just by the EFCC but also other anti-graft agencies. TransparencIT, a civic technology organisation in Nigeria, has a database of about 1,344 corruption cases that have either been decided or are currently ongoing, being prosecuted by the different agencies.[18] These cases broadly cover fraud, cybercrime, misappropriation of funds, illegal dealing in oil products amongst others, and the sanctions applicable in these cases mostly include jail terms with the option of a fine.

Law and policy relating to issues such as facilitation payments and hospitality

Section 10 of the Code of Conduct Bureau and Tribunal Act prohibits public officers from receiving gifts or benefits of any kind on account of anything done or omitted to be done by them in the discharge of their duties. However, the same Act allows for the receipt of gifts and benefits by public officers on public or ceremonial occasions, as gifts given to a public officer on such an occasion would be deemed as gifts to the institution he represents and not to his person. It would appear that this only forms an easier avenue for facilitation payments to be carried out, as all that needs to be done is to ensure the facilitation payment is made as a gift during a recognised public or ceremonial occasion.

Sections 12, 20–23 of the Corrupt Practices and other Related Offences Act also prohibit all forms of bribery and gratification of public officers but despite the laws in place, individuals still run foul.

As Mr Fisayo Soyombo's report confirmed, Nigerians pay heavy facilitations (outside official fees) to facilitate the release of documents, licences, permits and approval from staff of institutions. For example, bail in Nigeria is said to be free, but security officers such as Police and prison officers as well as court officers take (often negotiated and/or extorted) sundry sums to facilitate perfection of bail.

In 2016, prominent Nigerian lawyer, Rickey Tarfa SAN was arraigned by the EFCC on account of facilitation/gratification payments made to judges of the Federal high court in a bid to pervert justice. The trial has been ongoing since then and is yet to be concluded as proceedings have been stalled by a breakdown in Rickey Tarfa's health.[19]

Mr Joseph Nwobike SAN was charged for paying bribes/gratification to judges to pervert the cause of justice, amongst other counts. He was convicted on some of these and sentenced to one month's imprisonment.[20] Nwobike was subsequently stripped of the prestigious title of Senior Advocate of Nigeria by the Legal Practitioners Privileges Committee.[21]

However, as a general rule, Nigerian law would appear not to disallow facilitation payments to neutral individuals who merely broker or mediate deals without corruption of any kind. In this regard, the Nigerian court allowed Dr. John Abebe (who had described himself as a consultant, although functioning as a facilitator) and his company, Inducon Ltd to claim against Statoil Ltd.[22] Dr. John Abebe is, however, standing trial before Hon. Justice Dada of the Lagos State High Court, at the instigation of the EFCC, for tendering forged document(s) in the facilitation proceedings.[23]

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For law enforcement officers like the police and other agencies deployed to Nigerian roads, facilitation payments remain a steady, ongoing practice. These officers demand and receive payments from motorists who may have committed a range of traffic offences or whose vehicle papers are not in order, and these practices go on largely unchecked.

Key issues relating to investigation, decision-making and enforcement procedures

Different laws in Nigeria impose a general duty on both public and private individuals to report cases of bribery and corruption which they may have witnessed or been personally involved in. For example, section 23 of the Corrupt Practices and other Related Offences Act not only imposes such a duty to report bribery transactions, but also dictates punitive measures to be taken against anyone who reasonably fails to make such a report.

Corruption offences are often reported to prosecutorial authorities. If the individual being reported is a public officer within the category mentioned in Part II of the Fifth Schedule of the Nigerian Constitution, and has not by permissive enactment been excluded, a petition may be made to the Code of Conduct Bureau for investigation of misconduct against him. Where the CCB believes that a conduct contravenes the code of conduct provisions, it may decide to institute proceedings in the Code of Conduct Tribunal (CCT) and the CCT may impose any punishment it deems appropriate, consistent with the provisions of paragraph 18 of Part I of the Fifth Schedule to the Nigerian Constitution.

If the public officer is a judicial officer, it is imperative that such judicial officer is first reported to the National Judicial Council which is exclusively in charge of the appointment, promotion, discipline and dismissal of judicial officers. If the NJC believes that the judicial officer has committed a misconduct in his judicial capacity, the NJC dismisses the judicial officer; thereafter, the judicial officer may be prosecuted by any other prosecutorial authority where such conduct is also an infraction of any other code or law.[24]

This procedure is criticised because it seems to confer immunity on judicial officers, which critics say does not exist in the Nigerian constitution. However, it seems that this procedure is intended to shield judicial officers from abusive use of investigative and prosecutorial discretion of the executive, which could undermine the independence of the judiciary. We take the view that such temporary immunity is required in the interest of the independence of the judiciary although it can breed tyranny of the judiciary, where members of the NJC habitually abuse their powers to shield their own members, irrespective of the reality and gravity of the alleged misconduct.

If the conduct is also an offence under the ICPC Act or any of the enactments impliedly incorporated under the EFCC Act, either the ICPC or the EFCC is empowered to take up the case on its own or following a petition from members of the public or government establishment. Upon completion of an investigation, the EFCC or ICPC may present the case to the court for adjudication (subject to the over-riding constitutional authority of the Attorney General of the Federation to take over the proceeding, continue it or discontinue it).

There used to be a Special Investigation Panel for the Recovery of Public Property ("SPIP") headed by Mr Okoi-Obono-Obla, responsible for the recovery of public property, but its operations were shrouded in mystery. While it asserted its right to prosecute offenders, and indeed commenced proceedings on behalf of Nigeria, the SPIP was ultimately disbanded. It was alleged that the panel had no such powers of its own and must pass through the Attorney General for approval before commencing proceedings.

Following the disbandment, on 22 October 2019, the ICPC declared the hitherto

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chairman, Mr Okoi-Obono-Obla wanted, for failure to attend to investigative invitations over allegations of fraud and corruption. Mr Obla had been accused of "abuse of office, falsification of admission records, living above his income and collection of gratification from suspects under his investigation". Mr Obla was also accused of working outside the guidelines governing the panel by investigating unauthorised petitions and prosecuting suspects without recourse to the office of the Attorney General of the Federation.[25]

Corrupt practices may also be brought to light by the reports of investigative journalists. Only recently, investigative journalist Fisayo Soyombo went undercover to investigate and track corruption in Nigeria's criminal justice system, uncovering bribery and a host of other corrupt practices within the system. In a three-part report released only this October, Soyombo shares chilling details of the workings of the Nigerian criminal justice system, from the point of arrest of an accused person up to his arraignment in court and being remanded in prison.[26]

The Comptroller-General of Nigerian Correctional Service has reportedly set up a panel to investigate the Ikoyi prison where the undercover investigation was carried out.[27] However, one wonders whether this purported investigation will lead to any prosecution of the individuals involved or reform of the system, or if Soyombo will instead be silenced for daring to bring these corrupt practices into the spotlight, as reports already indicate that the authorities intend to arrest and prosecute him.[28]

Whistle blowers policy

Nigeria has an existing whistleblowing policy, introduced by the Federal Ministry of Finance ("FMF") in 2016. The policy is designed to encourage anyone with information about a violation of financial regulations, mismanagement of public funds and assets, financial malpractice, fraud or theft to report it.[29]

The purpose of the policy is to: increase the exposure of financial or financial-related crimes; support the fight against financial crimes and corruption; improve the level of public confidence in public entities; enhance transparency and accountability in the management of public funds; improve Nigeria's Open Government Ranking and Ease of Doing Business Indicators; and to recover public funds that can be deployed to finance Nigeria's infrastructure deficit.[30] False information attracts an investigation and prosecution, while verified, relevant information attracts a reward of between 2.5 to 5% of sums recovered under the policy (according to paragraph 12 of the policy).

In 2017, two whistle blowers in Borno state were charged with giving false information to the EFCC and are still standing trial for that.[31] James Urah (aka John Godwin) was also charged with giving false information to the ICPC and was convicted after a trial that lasted two years.[32] Interestingly, certain persons claiming to be whistle blowers have at some point sued the government for failing to keep its end of bargain with the payment of their promised commission.[33]

Since inception of the policy, it is reported that at least 1,983 tips have been received and 623 investigations completed out of 918 investigations that were initiated, while the sums of N7.8 billion, $378 million and £27,800 have been recovered.[34]

Although there is a promise of protection for whistle-blowing under paragraph 10 of the policy, it must be noted that certain whistle blowers have reported instances of harassment and victimisation as a result of coming forward to give up information on superiors.[35] This is perhaps due to the lack of a solid legal framework guaranteeing protection of whistle-blowers.

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The Senate of the Nigerian National Assembly attempted to pass a law to give statutory effect to this policy but it does not appear to have received the concurrence of the House of Representatives or the assent of the President.[36] It is believed that until that law is passed, it is likely that whistle blowers will continue to be harassed, dismissed, threatened or actually prosecuted for breach of Official Secrets Act,[37] criminal defamation or sedition[38] (where the person is not an employee of the MDA concerned) or simply be forced into hiding.

We accept that the Official Secrets Act remains relevant, as it restrains garrulous public officers from disclosing information that may harm the country. However, there should be a balance between operating an "iron curtain" regime and an inclusive/open government system. In this regard, the Freedom of Information Act, passed by the Goodluck Jonathan administration (2010–2015), has assisted where members of the public have inklings and decide to pursue it with a Freedom of Information Request.

In 2019, the Federal High Court (sitting in Lagos by Hon. Justice C. Obiozor), in Suit Number FHC/L/CS/105/19 between the Socio-Economic Rights and Accountability Project (SERAP) and the Federal Government, ordered the Federal Government (Ministry of Power) to disclose details of failed contracts awarded in the power sector and those contractors who abandoned the contracts, pursuant to Freedom of Information proceedings.

There is thus an urgent need to create a legal framework to encourage whistle blowers within the MDAs to speak up, seeing as the subsidiary instrument by the Ministry of Finance does not override the provisions of a statute such as the Official Secrets Act. It is nonetheless arguable that the whistleblowers policy might constitute some form of defence to a trial under the Official Secrets Act, but this is yet to be tested.

Nature of proceedings

Enforcement bodies often follow the criminal prosecution route in cases of corruption which are adversarial. However, where these cases involve politicians particularly in the ruling party, the lack of enthusiasm in prosecuting is painfully obvious, as most of the cases either mysteriously go away or are dismissed on some technicality or the other. The impact of this is that it weakens the faith of the average citizen in the judicial system as well as the enforcement agencies and their supposed fight against corruption.

Where there are risks of dissipation of proceeds of corruption before the conclusion of trial, prosecutorial authorities have often obtained from courts, orders to preserve the assets. Most of the interim orders (including forfeiture orders, possession and injunctions) are obtained *ex parte*, but the accused, or owners of the properties, have chances to show cause why the courts should not make the orders absolute.

On plea bargaining

Plea bargains are not alien to Nigerian criminal law nor, more specifically, to the prosecution of corruption-related offences. Section 270(2)(a)-(c) of the Administration of Criminal Justice Act provides that the prosecution may enter into a plea bargain arrangement with a defendant with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence.

Section 14(2) of the Economic and Financial Crimes Commission (establishment) Act also provides for what would appear to be a plea bargain arrangement. The section reads as follows:

> "*subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person*

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in any court of law), the Commission may compound any offence punishable under this act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence."

The EFCC continues to explore the plea bargain option in cases it prosecutes and while this works sometimes, the courts have been known to reject such plea bargains at other times. For instance, in 2019, a High court in the Federal Capital Territory struck out a plea bargain arrangement that had been entered into between the EFCC and a defendant, convicting him of internet fraud and imposing a three-year jail term without the option of fine.[39] Also, in the case of Prof Akindele, a university lecturer who demanded sex in exchange for good grades for a student, the judge, who convicted him on his guilty plea following a plea-bargain struck with the ICPC, refused to honour the bargain and sentenced Prof Akindele to six years' imprisonment.[40]

The refusal of the judge to impose the agreed punishment is within the powers of the judge, except that the Administration of Criminal Justice Act 2015 requires the judge to inform the accused of the sentence he intends to impose, to enable the accused to reconsider his plea. If the accused had rejected the proposed change by the judge, the judge was required to record "not guilty", and trial would start *de novo* before a new judge, without mention of the previous plea agreement. The judge must review proof of evidence to confirm that the accused is truly guilty of the offence he had agreed to plead and that the agreement was not obtained involuntarily.

So, while the option of plea bargaining exists, the courts still maintain and indeed exercise discretionary powers over the acceptance or rejection of such plea bargains when brought before them. While it is possible that the pattern of refusal of the judge to abide by the plea arrangement is within its powers in exercise of its independence, it appears to be capable of creating unreliability for the plea bargain option; in that accused persons may refuse to take the plea option because they fear that the judge may not honour it. This would defeat the advantage of the plea bargain option: every accused would then go to trial even where it may have been best to plea and save judicial time.

Deferred plea/prosecution agreements are alien to Nigerian law, as there are no such arrangements available in the system. By deferred plea, we mean a type of plea bargaining where the adjudicator (judge or magistrate) is involved in the negotiation of the plea. The applicable law (section 270(8) of Administration of Criminal Justice Act ("ACJA") 2015) prohibits the adjudicator from participating in plea bargain discussions. The negotiation is strictly between the defendant and the prosecutor, who must consult with the victim (or victims' representative) to agree on charge and sentence before presentation to court. The applicable laws to corrupt practices dictate that where, after investigation, a person has been found with a case to answer, such a case will be prosecuted before the courts until it is fully determined.

Before the enactment of ACJA, there were no elaborate plea-bargain provisions applying to all parts of Nigeria and to all offences. Therefore, States in Nigeria which had not adopted the ACJA would have challenges applying the plea bargain option. However, it would appear that Nigeria had applied plea bargain options in some cases decided before the enactment of the ACJA. Cases such as *FRN v Tafa Balogun & Ors*[41] and *FRN v Cecilia Ibru* fall in this category. These cases were probably conducted under section 14 of EFCC Act and the ACJA 2011 of Lagos State which predated the ACJA 2015.

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Overview of cross-border issues

Cross-border issues typically arise in situations where corrupt practices of individuals or organisations transcend their immediate environment and take on an international nature, or where the anti-corruption or security agencies of different countries intersect in their investigations of corrupt practices across borders.

Cross-border corruption occurs within and among many jurisdictions, each of which may experience only a part of a much more complicated process. A world in which capital, people, information and enterprises move freely and rapidly from place to place offers new development opportunities of many sorts, but also makes accountability more difficult; because the agents of cross-border corruption are capable of doing business almost everywhere, it is difficult to hold them accountable anywhere.[42]

In the year under review, an Italian court assumed jurisdiction and commenced the trial of officials of Shell and Eni in Italy for corrupt practices (bribery of public officials) in Nigeria, involving an oil bloc (OPL 245), often described as the Malabu scam.

The EFCC also sought to commence the trial of Mohammed Bello Adoke (former Attorney General of Nigeria, who is in exile), Dan Etete (former Minister of Petroleum of Nigeria) and other officials of Shell and Eni (some of whom are also standing trial in the Italian court) for the same corruption charges.

The officials of Eni and Shell currently on trial in Italy ought to be able to plead the rule against double jeopardy under Nigerian law, should the trial eventually commence in Nigeria. However, the *ex parte* order previously granted for the arrest and prosecution of Mr Adoke and others for the commencement of their trials was set aside on 25 October 2019 on the ground that it was obtained improperly.[43]

Another recent illustration of cross-border issues in corruption is the investigation and arrest of Obinwanne Okeke (aka Invictus Obi) by the Federal Bureau of Investigation ("FBI") in the United States and the subsequent arrest of other Nigerian internet fraudsters following coordinated investigations with the EFCC in Nigeria in August 2019.[44] Obinwanne was regarded in many circles as a successful businessman involved in construction and oil and gas with companies that employed at least 28 full-time employees and 100 part-time employees.[45] He had even been featured in *Forbes*' "30 under 30 entrepreneurs to watch out for" in 2016. Following his arrest in the US, the EFCC obtained a court order for the forfeiture of sums in Obinwanne's company accounts on the premise that the funds must have been proceeds of cybercrime.[46]

Even more recently, in October 2019, in another coordinated operation with Interpol, the EFCC arrested yet another Nigerian on allegations of cybercrime.[47] This spate of arrests reveals the extent of collaboration between the EFCC and other foreign agencies working to clamp down on cybercrime, both on a national and international level.

In April 2019, it was reported that Interpol had provided the EFCC with an application to enhance intelligence-sharing in tracking money-laundering and terrorism-financing organised crimes.[48] This is yet another example of how local anti-graft agencies collaborate with foreign agencies in the fight against corruption.

Other issues arising

When a suspect is in a different country from the one in which their trial is sought to commence or progress, cross-border issues arise yet again. The first is usually political consideration of sovereignty and asylum, and another issue is mutuality. To enable one sovereign state to prosecute a subject of another, there are often mutual legal assistance

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agreements which determine the scope (its applicability), and procedure. Such mutual legal assistance agreements often discuss such subjects as extradition.

Between 2018 and 2019, the EFCC sought the extradition of Ms. Deziani Madueke from the United Kingdom, against whom they had filed Charge No. FHC/ABJ/CR/208/2018 (at the Federal High Court, Lagos) and Charge No. CR/22/2018 (at the FCT High Court in Abuja).[49]

At some time in the past, the EFCC had opposed a voluntary application made by Ms. Madueke to be returned to Nigeria to enable her to attend trial and defend herself. The EFCC had filed affidavits and opposed the application on the ground that the UK government held Ms. Madueke for the purpose of prosecuting her for sundry offences, and her return to Nigeria was merely a ploy to evade prosecution in the UK. Nigerians became curious when, in November 2018, the EFCC confirmed that it intended to seek the extradition of Ms. Madueke to Nigeria for her trial on the grounds that the UK government had held her for too long without commencing her trial. This suggested that the EFCC had lost faith in the UK prosecution system and was in a hurry to take over her trial. Whether this would meet the provisions under which the UK would exercise its sovereign discretion to arrest and return Ms. Madueke to Nigeria remains to be seen.

Another interesting angle to cross-border issues can be seen in the ongoing dispute between Nigeria and Process and Industrial Development ("P&ID") Ltd, an Irish company, over a gas contract which Nigeria alleges was procured through corruption and circumvention of the Public Procurement Act.

A director in the relevant government ministry stood trial for abuse of office, and the company has purportedly been convicted in Nigeria for fraud in controversial circumstances with an order directing that the company be wound up and its assets forfeited to Nigeria.[50] At that time, an arbitral award had already been made against Nigeria in favour of P&ID in London for a breach of contract to the tune of US$ 9.8 billion, but Nigeria succeeded in obtaining a stay on the enforcement of the arbitral award, pending an appeal of the award.[51]

Corporate liability for bribery and corruption offences

A company may be liable for bribery and corruption in Nigeria. The latest case is the one of P&ID, discussed earlier.

Another instance can be seen in *Federal Republic of Nigeria v Waripamo Dudafa & Ors*,[52] where the EFCC secured the conviction of Pluto Property and Investment Co Ltd, Seagate Property and Investment Co Ltd, Transocean Property and Investment Co Ltd, and Avalon Global Property Dev Co Ltd for participating in corruption and money-laundering on the guilty pleas of persons who claimed to be directors of the various companies (although in controversial circumstances). However, the proceedings were stalled before sentencing and several appeals have emanated from it.

When a company is found guilty of corruption offences, it may lose its assets in a forfeiture order. In addition, its officers who procured the company to commit the offence may be sentenced as if they had committed the offences individually.

Proposed reforms / The year ahead

The Mutual Assistance in Criminal Matters Act was signed into law in 2019 and seeks to facilitate the identification, tracing, freezing, restraining, recovery, forfeiture and

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confiscation of proceeds, property and other instruments of crime by Nigerians in other countries.[53] This was a major reform in the law aimed at combatting corruption but apart from this, no other relevant laws have been passed this year.

The Proceeds of Crime Bill and Whistleblower Protection bill are also yet to be passed into law, even though they were proposed at least three years ago. The process of law reform in Nigeria can be tricky but it will be interesting to see how things play out in the coming year.

It is our view that there is a multiplicity of enforcement agencies, leading to conflict of authorities. We have seen even the Department of State (secret police) arrest and hold someone for alleged corruption and financial crimes. The SPIP saga is typically a reflection of a power tussle amongst organs and agencies that should be working together. We hope to see a harmonisation of the agencies under one umbrella.

Nigerians would like to see a checklist of the considerations to be applied by anti-corruption institutions in determining cases that would qualify for investigation and trial.

* * *

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Poland

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Brief overview of the law and enforcement regime

Preliminary issues

In the Polish legal system, regulations on preventing corruption and penalising acts of corruption are scattered among many legal acts, each of which performs a different function, in a comprehensive system designed to prevent this phenomenon in both public and private sectors.

Anti-corruption legislation in its broad sense can be divided into two basic categories: legal acts designed to eliminate the threat and emergence of mechanisms of corruption; and criminal law provisions penalising acts of corruption and giving the relevant authorities the power to impose appropriate penalties on perpetrators. The former include, among others: regulations[1] concerning restrictions on conducting business activity by persons performing public functions; issues of organisation and functioning of dedicated units whose statutory task is to combat corruption in Poland; and regulations defining the principles of public procurement.

When it comes to the latter, most types of corruption offences in the Polish law as well as penalties for their commission are described and regulated by the Act of 6 June 1997, the Criminal Code[2] (further referred to as the "Criminal Code"), in Chapter XXIX entitled "Crimes against the Activities of State Institutions and Local Government", although this is not the only legal act penalising such activities[3]. The following parts of this chapter will discuss the types of basic corruption offences, which are the most common subject of ongoing criminal proceedings.

Basic terminology related to corruption

Pursuant to the statutory definition of the concept of corruption defined in Article 1.3a of the Act of 9 June 2006 on Central Anti-Corruption Bureau (further referred to as: "Act on CAB"), a corruption within the meaning of the Act on CAB is an act consisting of, among others, promising, proposing, demanding, giving away, accepting by any person, directly or indirectly, any undue financial, personal or other advantage, for themselves or for any other person, or accepting a proposal or promise of such advantages in exchange for an activity or a failure to act in the performance of a public function or in the course of a business activity.

In Poland, criminal liability for acts of corruption may be incurred by public officials, persons performing public functions, as well as other persons who, contrary to specific regulations or provisions of the law, accept or promise to grant a financial or personal benefit.

The Criminal Code provides for a specific list of positions or functions,[4] performance of which makes a given person a public official[5] within the meaning of the Criminal Code.

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Moreover, Article 115.19 of the Criminal Code contains a statutory definition of a person performing a public function, including, among others: any public officer; member of a self-governing body; person employed in an organisational unit which has public funds at its disposal, unless it performs exclusively service activities; as well as any person whose rights and obligations in the field of public activity are defined or recognized by an act or an international agreement binding the Republic of Poland. Public officers and persons performing public functions are subject to criminal liability for committing crimes of a corrupt nature, consisting in granting or accepting (or a promise to grant or accept) a financial or personal benefit in exchange for the fulfilment of demands or promises.

Financial and personal benefits are not fully defined in Article 115.4 of the Criminal Code. According to this provision, a property or personal benefit is a benefit for both oneself and for someone else.

Although the above definition specifies neither the concept of benefit nor the difference between a financial benefit and a personal benefit, it is generally accepted that the distinction between these concepts is based on the nature of the satisfied needs or the feasibility of their conversion into money. Thus, if a given good received by a recipient is used primarily for a non-economic need, it is considered as a personal benefit, and if it serves primarily an economic need, it should be treated as a financial benefit.[6]

The section below briefly describes the basic forms of corruption offences regulated by the Polish criminal law, i.e.: passive and active bribery; passive and active paid protection; abuse of public authority; paid protection; bribery in a managerial position; and attestation of an untruth for financial gain.

Prohibited acts of corruption

1. *Passive and active bribery*

The crime of bribery, which can be committed in passive and active form, is the most common form of corruption in Poland, and is enacted in Articles 228 and 229 of the Criminal Code. In both cases, the relevant provisions aim at protecting the correct functioning of public institutions, but also the selflessness of persons performing public functions, as well as trust in the reliability of actions of state institutions, local (not only) self-governments, public institutions in foreign countries, and international organisations.[7]

The provision of Article 228 of the Criminal Code (passive bribery, accepting bribes) is the basis for imposing criminal penalties on a person performing a public function who accepts or demands a bribe. This offence is punishable by imprisonment from six months to eight years. The statutory threat of criminal penalty is increased if a person performing a public function accepts a financial benefit or its promise for a conduct constituting a violation of law, and also if he/she makes the performance of a business activity dependent on such benefit. In such a case, the perpetrator shall be subject to a penalty from one year of imprisonment for up to 10 years. If, however, the accepted financial benefit constitutes property of a significant value, the statutory penalty shall increase from the minimum limit of two years to the maximum limit of 12 years of imprisonment.

The provision of Article 229 of the Criminal Code penalises the crime of active bribery. According to this provision, if the perpetrator induces a person performing a public function to violate the law, or gives or promises to give such person a material or personal benefit for violating the law, the perpetrator shall be punished with imprisonment from one to 10 years. If the bribe is of a significant value, the perpetrator of the offence shall be punished with imprisonment from two to 12 years.

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2. *Paid protection in passive and active form*

The crimes of passive and active paid protection are regulated in Articles 230 and 230a of the Criminal Code. The aim of these provisions is to protect the authority and good name of state and local government institutions, international and domestic organisations as well as foreign organisational units disposing public funds. Passive paid protection consists in invoking outflows in the abovementioned institutions, or evoking a justified belief in the existence of such influences and undertaking mediation in settling the matter in exchange for accepting financial or personal benefits. This crime is punishable by imprisonment from six months to eight years.

The crime of active paid protection under Article 230a of the Criminal Code is committed if a perpetrator grants a financial or a personal gain to a person in exchange for such person's intermediation in settling a matter in a state or local government, international or national organisation, or in a foreign organisational unit disposing public funds, through an unlawful influence on a decision, act or omission by a person performing a public function made in connection with performance of that person's public function. The perpetrator is punishable by imprisonment from six months to eight years.

3. *Abuse of public authority*

The abuse of public authority, defined in Article 231 of the Criminal Code, occurs when a public official exceeds his authority, fails to comply with his obligations, or acts to the detriment of public or private interests. The perpetrator is subject to the penalty of imprisonment for up to three years. However, if the perpetrator commits an offence in order to achieve a financial gain, such offence is punishable by imprisonment from one year up to 10 years. If, on the other hand, the perpetrator acts unintentionally and causes his own material damage, he may be subject to a fine,[8] penalty of restriction of liberty[9] or imprisonment for up to two years. The aim of this provision is to protect not only the proper functioning of state institutions and local governments, but also their authority.[10]

4. *Corruption of managers*

The crime of corruption carried out by managers, outlined in Article 296a of the Criminal Code, penalises corruption in economic relations rather than in public law, as the other crimes and offences mentioned above. The relevant provisions protect the principles of fair economic turnover in the conditions of a free market economy.[11]

The crime of corruption is committed if a person (who performs a managerial function in an organisational unit, performing business activity or who remains with them in an employment relationship, contract of mandate or contract for specific work):

- demands or accepts a material or personal benefit or its promise,
- in exchange for abuse of the rights granted to him/her or for failure to fulfil the obligation incumbent on him/her,
- to cause material damage or constituting an act of unfair competition, or an unacceptable preferential action for the benefit of the buyer or recipient of goods, services or services,

he/she shall be subject to the penalty of imprisonment from three up to five years.

The statutory threat shall be appropriately increased if the perpetrator causes significant material damage – in such a case he/she shall be subject to the penalty of imprisonment from six months up to eight years.

5. *Attestation of an untruth*

The provision of Article 271 of the Criminal Code penalises the crime of intellectual

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counterfeiting (attestation of an untruth), which consists in certifying untruth for a circumstance of legal significance.[12] The aim of these provisions is to protect the credibility of documents, the trust of citizens in the authenticity of documents issued by public officers and officials, and trust in the reliability of persons authorised to issue documents with legal effects.[13] Pursuant to the provisions of Article 271 of the Criminal Code, a public officer or another person who issues a document certifying untruthfulness as to a circumstance of legal significance shall be subject to imprisonment from three months up to five years. If the perpetrator acts in order to obtain a material or personal benefit, he/she is subject to imprisonment from six months up to eight years.

Acts of lesser significance

The Polish Criminal Code also recognizes a "privileged" standard of "act of lesser significance" of the crimes and offences described above. According to the definition established by the case law, "*an act of lesser significance is a privileged form of an act which has the characteristics of a basic type of crime but at the same time is characterised by the predominance of mitigating material and subjective elements"*.[14]

When the committed offence is considered as an act of lesser significance, the statutory penalty is reduced to a maximum of two years of imprisonment, a restriction of liberty, or a fine (for the offences of passive and active bribery, paid protection in passive and active form, or bribery in a managerial position). In case of an attestation of an untruth being an act of lesser significance, the most severe penalties that can be imposed are the restriction of liberty or a fine.

It should also be noted that the legislator, while penalising crimes of bribery and paid protection in an active form, as well as bribery in a managerial position, introduced a prosecution preclusion clause, the task of which is to protect so-called whistleblowers, i.e. persons notifying about the commission of the crime – the prosecution preclusion clause is discussed in detail below in the paragraph regarding key issues relating to investigation, decision-making and enforcement procedures.

Other corruption offences

Polish criminal law also distinguishes other forms of corruption. These include, among others: electoral corruption (Article 250a Criminal Code); money laundering (Article 299 of the Criminal Code); corruption against creditors (Article 302.2 and 302.3 of the Criminal Code); disruption of public tenders (Article 305 of the Criminal Code); corruption in sport (Articles 46, 46 and 47 of the Act of 25 June 2010 on Sport); as well as corruption related to the manufacture or trade in medicines or other medical devices (Article 54 of the Act of 12 May 2011 on the Reimbursement of Medicines, Foodstuffs for Particular Nutritional Uses and Medical Devices).

It is worth noting that apart from criminal liability, persons who commit acts of corruption may also be subject to disciplinary or professional liability under separate provisions.

Law enforcement authorities established to fight corruption

In Poland, combating corruption is vested in the Central Anti-Corruption Bureau ("CBA"), which is a dedicated governmental bureau, established to combat corruption in Polish public and economic life and, in particular, in state and local government institutions, as well as for combating activities detrimental to the economic interests of the state. The CBA has a wide range of powers and competences to enable it to efficiently detect and prevent corruption in the public space.

The basic task of the CBA is primarily to conduct operational and exploratory activities as well as inspection in order to disclose cases of corruption in state institutions and local

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government and abuses of persons performing public functions. The aim of these activities is to prevent, identify and detect corruption offences as well as to obtain and process information essential for combating corruption in state institutions.

In the event that the inspection activities of the CBA lead to the collection of such evidence as to give grounds for suspicion that a given person or unit has committed a corruption-related crime, the CBA has the competence to initiate a preparatory proceeding, which is the first stage of a criminal proceeding. Subsequently, anti-corruption proceedings are conducted in accordance with the general procedure of proceedings in criminal matters set forth in the Act of 6 June 1997 – the Code of Criminal Procedure.[15]

Overview of enforcement activity and policy during the last year

Despite the increasing activity of law enforcement agencies in combating corruption in the public sector and in economic relations, there are still high-profile corruption scandals involving representatives of key government bodies in Poland.

One of the most famous corruption-related scandals in 2018 was the so-called "PFSA scandal".[16] The corruption-related offence was supposed to have been committed by the former chairman of the Polish Financial Supervision Authority, who was suspected of offering a high-profile Polish bank mogul, an opportunity to employ a designated lawyer on the supervisory board of his bank – in exchange for the PFSA's favour towards this bank, which was in a difficult financial situation.[17] The scandal was revealed on 13 November 2018 by the popular daily *Gazeta Wyborcza*, through the publication of a recording from a conversation between the PFSA chairman and the banker which took place earlier in March 2018. At the moment, the case is still at the stage of preparatory proceeding.

Another example of a high-profile corruption scandal occurred at the Polish Post Office and was revealed in June 2019.[18] Irregularities detected by the law enforcement authorities concerned services provided under the public procurement procedures to create an "anti-corruption shield" by an external IT company. The services were worth over PLN 30 million, with the suspects allegedly accepting a financial benefit of over PLN 300,000. Currently, 13 people are detained, including five employees of the Polish Post Office (including the deputy director of the Management Board, deputy managing director in the IT and telecommunications division responsible for IT development, and representatives of the Warsaw IT company). The CBA performed a number of activities in the case, including searches at the registered office of Polish Post Office, the registered office of the IT company, flats of detainees and other places related to detained persons.

Facilitation payments and hospitality

In the Polish legislation, as a rule, granting any financial or personal benefits to persons performing public functions in connection with their performance of these functions is a prohibited act within the meaning of the Criminal Code. However, analysis of the jurisprudence of common courts and the Supreme Court leads to the conclusion that in certain situations, giving a small gift to a person performing a public function may be legally permissible, due to the fact that, pursuant to Article 1.2 of the Criminal Code, the social harmfulness of the committed act is less than negligible.

When assessing the degree of social harmfulness of an act, courts take into account the type and nature of the infringed interest, the scale of the caused or anticipated damage, the method and circumstances of perpetrating the act, the importance of the duties infringed by the perpetrator and the form of intent, motivation of the perpetrator, the type of precautionary rules breached and the degree of the breach (Article 115.2 of the Criminal Code).

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The Supreme Court's jurisprudence indicates that the assessment of whether, in a specific case, the giving of a gift was in fact a hidden form of a punishable granting or acceptance of a financial gain, depends on many circumstances of a subjective and substantive nature, requiring appropriate factual findings and situational and moral assessments.[19] Therefore, each case of giving small financial benefits, and the question of whether a given behaviour satisfies the characteristics of a criminal offence, requires a separate, individual analysis. For example, giving a small gift to a doctor once the treatment of a patient has been completed will not be considered as bribery, as it can be considered as accepting gifts under customary conditions.[20]

Key issues relating to investigation, decision-making and enforcement procedures

In January 2019, the CBA published a report on combating corruption crimes in Poland, presenting statistical data for the years 2015–2017 in this respect.[21] The collected information indicates a significant increase in the number of corruption offences registered in recent years. In 2015, there were 17,790 registered corruption offences; in 2016 – 25,968; whereas in 2017, the number increased to 36,247 registered crimes. For comparison, in 2011, there were only 9,703 corruption offences registered.[22]

According to the presented data, attestation of an untruth in order to obtain financial gain is the most frequently registered corruption crime in Poland; while active and passive bribery, as well as failing to fulfil one's obligations in order to obtain a financial or personal benefit, are the most frequent offences.

The Police is the law enforcement agency which registers over 95% of corruption offences. Other units which have been specially established to fight corruption, such as the CBA, the Internal Security Agency,[23] the Border Guard[24] and the Military Police[25] register fewer corruption cases; however, these agencies are often responsible (and the CBA, in particular) for detecting the largest corruption scandals.

Apart from the above official agencies and units, whistleblowers play an increasingly important role in the process of prosecuting and detecting corruption offences in Poland. Although currently the Polish legislation does not provide extensive mechanisms for whistleblowers' protection,[26] individuals who inform the law enforcement agencies about the corruption can be treated more favourably, even if they are subject to criminal liability themselves.

For example, according to Article 229.6 of the Criminal Code (Article 229 of the Criminal Code penalises active bribery), a perpetrator of active bribery is not punishable if he/she informed the law enforcement authority of the granting of a financial or personal benefit or a promise thereof, before the law enforcement authority learned about it or the benefit or promise was accepted. Similar provisions are foreseen for the crimes of active paid protection and corruption of managers.

Overview of cross-border issues

Poland participates in many international initiatives aimed at counteracting the phenomenon of corruption, both at the European and global level. In 2002, Poland ratified the Criminal Law Convention on Corruption of the Council of Europe,[27] which was drawn up in Strasbourg on 27 January 1999, and the Civil Law Convention on Corruption[28] which was drawn up in Strasbourg on 4 November 1999. Since 10 December 2003, Poland has also been a party to the United Nations Convention against Corruption[29] adopted by the United Nations General Assembly on 31 October 2003.

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Moreover, in accordance with the information provided by the CBA, the bureau currently cooperates with 54 countries and 13 international organisations in fighting corruption. The most important activities undertaken by the CBA include, among others, establishing cooperation with the World Bank, participation in projects concerning prevention and combating crime financed from European Union funds, as well as participation in associations of supervisory bodies whose task is to counteract corruption, such as European Partners against Corruption or the European Contact-Point Network against corruption.[30]

Corporate liability

Under the current Polish legislation, corporate bodies (collective entities) cannot be subjected to criminal liability in the strict sense – nor for corruption acts. However, they may be financially liable for acts committed by, or on behalf of, persons acting in their name. The principle of liability of corporate bodies (collective entities) for corrupt acts is currently regulated in detail by the Act of 28 October 2002 on Liability of Collective Entities for Prohibited Acts.[31]

Within the meaning of the Act, a collective entity is a legal entity and an organisational unit without legal personality, which is granted legal capacity by separate regulations (i.e. commercial companies, foundations, associations). According to the Act, the liability of collective entities is secondary to the liability incurred by natural persons acting in the name of or on behalf of such entity. Only in the case of a final conviction of a physical person for a given offence, is it possible to determine secondary liability for this offence of a corporate body (collective entity) in the course of criminal proceedings.

The Act specifies in detail the sanctions that may be imposed on collective entities, which include:

(i) A financial penalty in the maximum amount of PLN 5 million, and not higher than 3% of the revenue generated by the collective entity in the financial year in which the prohibited act was committed.

(ii) A number of prohibitions that may be imposed on the collective entity (such as: promotion and advertising; use of grants, subsidies and other forms of financial support by public funds and capital from European Union Funds; assistance of international organisations of which the Republic of Poland is a member; applying for public procurement, etc.), each of which may be imposed for a period of one to five years.

(iii) A penalty of announcing the judgment to the public.

A collective entity may exclude its liability to the extent provided by the law only if it has exercised due diligence in selecting and supervising a physical person who acted on its behalf and who has been the subject of a criminal conviction, or if it proves that the organisation of its activities was planned with due diligence in order to prevent the commission of prohibited acts.

In practice, however, once the Act entered into force, its scope of application has remained marginal – no more than 40 cases per year are submitted to courts under this Act, most of which concern small entities.

Due to the perceived ineffectiveness of the existing solutions in the context of bringing corporate bodies (collective entities) to justice, on 11 January 2019, the Parliament received a draft amendment to the Liability of Collective Entities for Prohibited Acts.[32] The most important assumption of this project was to broaden the application of the Act and to make more collective entities liable for prohibited acts committed through its representatives. The draft deleted the requirement of prior conviction of a physical person acting on behalf of a

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given collective entity as a mandatory condition to hold a given collective entity financially liable.

In theory, the new rules would also increase the amount of penalties that could be imposed on collective entities – the maximum fine that could be imposed would be as high as PLN 30 million. Moreover, the Act was to introduce a new type of punishment that could be imposed, i.e. the penalty of dissolution of a collective entity. However, as of January 2019, the bill has not been passed, and due to the customary principle of discounting parliamentary works in Poland and the parliamentary elections that took place in October 2019, this draft will not be automatically submitted to the new parliament for further consideration.

Proposed reforms / The year ahead

On 13 October 2019, parliamentary elections took place in Poland. The first meeting of the newly elected chambers will take place on 12 November 2019, and only after that date will work on the formation of the Council of Ministers begin. Until then, it is difficult to predict which legislative initiatives will be addressed by the new parliament. It should be borne in mind, however, that as in the elections in 2015, an independent majority in the lower house of Poland's Parliament will be held by the same political party which, in the previous term of office, submitted draft laws to the Parliament aimed at tightening the anti-corruption system.

One of such drafts, the adoption of which may contribute to increasing the effectiveness in combating corruption, may constitute the aforementioned draft of the Act on Liability of Collective Entities for Prohibited Acts. It should be noted that the Act in its current form is used to a marginal extent; for example, in 2017, 14 cases against collective entities were filed to courts. Remodelling of the current system of holding such entities liable (i.e., by broadening the list of crimes for which collective entities may be liable and abolishing the requirement of prior conviction of a physical person acting in the name and on behalf of a collective entity), and simplifying the system of imposing high penalties on such entities, may translate into a real reduction of corruption cases in the corporate environment through general prevention.

Another draft, which was meant to contribute to strengthening anti-corruption mechanisms in Poland and which had not been adopted by the end of the previous parliamentary term of the office, was the Act on Transparency of Public Life,[33] on which work began already in the second half of 2017. The draft law provided for the collection and systematisation of the principles of openness of public life, so far dispersed in several dozen legal acts. The project also assumed the introduction into the legal system of the principles of functioning and protection of so-called whistleblowers, i.e. persons whose cooperation with the justice system consists in reporting information on the possibility of committing a crime by the entity with which they are connected. This Act was also aimed at defining in detail the principles of preventing corruption practices in the economic and public spheres, by defining internal anti-corruption procedures, to the introduction of which the Act was to oblige a wide range of economic and public entities.

It seems that the adoption of the above-mentioned legal acts in an appropriate form, which would not violate the freedom to conduct business activity, while at the same time expanding the existing system for detecting and prosecuting corruption offences, could contribute to a more effective fight against the pathological phenomenon of corruption in Poland. However, whether the above bills will be finally passed depends on the final shape of the Polish political scene, which is currently difficult to predict.

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A final thought: each of these projects has raised many controversies in the context of adopting excessively radical solutions – the individual provisions will require separate analysis.

* * *

Endnotes

1. Detailed regulations concerning the creation of a system to prevent corruption can be found in the following legal acts: the Act of 21 August 1997 on Restrictions on Conduct of Business Activities by Persons Performing Public Functions (Journal of Laws of 2006, item 1584, as amended); the Act of 9 June 2006 on the Central Anti-Corruption Bureau (Journal of Laws of 2018, item 2104, as amended); the Act of 21 June 1990 on the Return of Profits Unduly Obtained at the Expense of the State Treasury or Other State Legal Persons (Journal of Laws of 1990, item 255, as amended); the Act of 29 January 2004 on Public Procurement Law (Journal of Laws 2004 item 177, as amended); the Act of 1 March 2018 on Counteracting Money Laundering and Terrorist Financing (Journal of Laws 2019, item 115); and Resolution No. 207 of the Council of Ministers of 19 December 2017 on the Governmental Anti-Corruption Programme for the years 2018-2020 (Journal of Laws Monitor Polski 2018, item 12).
2. Journal of Laws of 2018, item 1600, as amended.
3. Other, more detailed criminal law provisions, can also be found in the Act of 10 September 1999 Fiscal Penal Code (Journal of Laws of 1999, item 930, as amended), the Act of 15 September 2000 Commercial Companies Code (Journal of Laws 2000, item 1037, as amended) and the Act of 28 October 2002 on the Liability of Collective Entities for Prohibited Acts (Journal of Laws 2002, item 1661, as amended). Individual criminal provisions concerning corruption offences can also be found in the Act of 25 June 2010 on Sport (Journal of Laws of 2010, item 857, as amended) and the Act of 12 May 2011 on Reimbursement of Medicines, Foodstuffs for Particular Nutritional Uses and Medical Devices (Journal of Laws of 2011, item 696, as amended).
4. A public official pursuant to Article 115.13 Criminal Code is thus the President of the Republic of Poland; member of the parliament, senator, a member of the European Parliament; a judge, a juror, a public prosecutor, a financial officer of a preparatory proceedings body or a superior body over a preparatory proceedings body, a notary public, a judicial officer, a court curator, a trustee, a court supervisor and a manager, a person adjudicating in disciplinary bodies acting pursuant to an Act; a person who is an employee of the government administration, other state authority or local government, unless he/she performs exclusively service activities, and another person in the scope in which he/she is authorised to issue administrative decisions; a person who is an employee of the state control authority or local government control authority, unless he/she performs exclusively service activities; a person holding a managerial position in another state institution; an officer of a body appointed to protect public security or an officer of Prison Service; a person performing active military service, with the exception of territorial military service performed by dispatching officers; an employee of an international criminal tribunal, unless he/she performs exclusively service activities.
5. R. Stefański [ed.], Criminal Code. Commentary, LEX.
6. Judgment of the Court of Appeal in Lublin of 17 April 2007, ref. no. II Aka 81/07.

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7. O. Górniok [in:] Criminal Code. Commentary, ed. A. Wąsek, p. 52.
8. Pursuant to Article 33.1 and 33.3 of the Criminal Code, a fine shall be imposed in daily rates, specifying the number of rates and the amount of one rate, the lowest number of rates shall be 10 and the highest 540. The amount of one rate may not be lower than 10 PLN or exceed 2,000 PLN.
9. Pursuant to Article 34.1 and 34.1a of the Criminal Code, the penalty of restriction of liberty lasts from one month up to two years and consists in the obligation to perform unpaid, controlled work for social purposes in the amount of 20 to 40 hours per month or a deduction of 10% to 25% of the remuneration for work per month for social purposes indicated by the court.
10. M. Mozgawa (ed.), Criminal Code. Updated Commentary, LEX.
11. A. Zoll (ed.), Criminal Code. General part, Part III, Commentary to Articles 278–363 of the Criminal Code, LEX.
12. M. Mozgawa (ed.), Criminal Code. Updated Commentary, LEX.
13. R. Zawłocki [in:], A, Wąsik (ed.), R. Zawłocki (ed.), Criminal Code: Special Part. Part II, Commentary to Articles 222-316, p. 796.
14. Judgement of the Supreme Court of 6 February 1997, ref. no. V KKN 79/96; judgement of the Court of Appeal in Katowice of 2 August 2001, ref. no. II AKa 284/01.
15. Journal of Laws of 2018, item 1987.
16. The Polish Financial Supervision Authority ("PFSA") is a central government administration body in Poland, whose task is to supervise the financial market in Poland. This body was created on the basis of the Act of 21 July 2006 on supervision of the financial market (Journal of Laws of 2006, item 1119).
17. More on this issue: https://polandin.com/39931149/analysis-what-the-knf-scandal-means-for-polish-finance; access on: 17.10.2019; 23:27.
18. More on this issue: http://wyborcza.pl/7,155287,24886964,korupcja-na-poczcie-polskiej-cba-zatrzymalo-11-osob-chodzi.html; access on: 19/10/2019; 20:21.
19. Decision of the Supreme Court of 26 February 1988, ref. no. VI KZP 34/87.
20. Judgment of the Supreme Court of 1 December 2016, ref. no. WA 14/16.
21. Combating Corruption Crimes in Poland in 2017. Report; publication prepared by the CBA; source: https://cba.gov.pl/ftp/dokumenty_pdf/Zwalczanie%20przestepczosci%20korupcyjnej%20w%20Polsce%20w%202017%20r..pdf; access on: 17.10.2019; 18:07.
22. Corruption Map. The State of Corruption Crimes in Poland in 2011; publication prepared by the CBA; source: https://cba.gov.pl/ftp/publikacje/Mapa_Korupcji_2011.pdf; access on: 17.10.2019; 18:19.
23. The Internal Security Agency established on the basis of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency (Journal of Laws of 2018, item 2387) is a special service whose statutory task is to protect the constitutional order of the Republic of Poland by ensuring the internal security of the state and citizens.
24. The Border Guard established on the basis of the Act of 12 October 1990 on the Border Guard (Journal of Laws of 2019, item 235) is a law enforcement authority performing tasks related to the protection of the state border and border traffic control in the Republic of Poland.

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25. Military Police established on the basis of the Act of 24 August 2001 on Military Police and Military Law Enforcement Agencies (Journal of Laws of 2001, item 1353), is a law enforcement authority in the form of a separate and specialised service of the Armed Forces of the Republic of Poland, whose task is, i.a, to prevent the commission of crimes and offences, their detection and active cooperation with other services for security and public order.
26. In the current Polish legal system, an exception in this respect are solutions adopted in the Act of 1 March 2018 on Counteraction to Money Laundering and Financing of Terrorism (Journal of Laws of 2019, item 1115), which in Article 53 provides for framework procedures for anonymous reporting of potential violations of anti-money laundering and anti-terrorist financing regulations by employees and other persons obliged to do so.
27. Journal of Laws 2005, item 249.
28. Journal of Laws 2004, item 2433.
29. Journal of Laws 2003, item 563.
30. The European Partners against Corruption (EPAC) and European contact-point network against corruption (EACN) are independent forums for practitioners, united in the common goal of preventing and combating corruption. EPAC is composed of anti-corruption authorities and police oversight bodies from Council of Europe Member Countries. EACN, a more formal network established by a European Council decision, brings together anti-corruption authorities from European Union Member States. The two networks mostly work together as one, given their equal mission and goals; source: https://www.epac-eacn.org/; access on: 18.10.2019; 00:34.
31. Journal of Laws 2019 item 628.
32. Draft of the Act on Liability of Collective Entities for Prohibited Acts togethers with reasoning behind it; source: http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf; access on: 17.10.2019; 18:08.
33. Draft of the Act on Transparency of Public Life together with reasoning behind it; source: https://legislacja.rcl.gov.pl/docs//2/12304351/12465433/12465434/dokument324982.pdf; access on: 17.10.2019; 18:41.

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Romania

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Brief overview of the law and enforcement regime

Romania has implemented specific anticorruption legislation since 2000 ("**Law 78/2000**"), also setting up a specialised anti-corruption prosecutorial structure in 2002 – the National Anticorruption Directorate ("**DNA**"), manned by prosecutors and officers competent in economics, finance, banking, customs, IT etc., in order to deliver swift and thorough prosecutions. This has led to the existence of a two-tier system of enforcement in corruption offences: while the common law (the "**Criminal Code**") applied prior to 2000, continues to include common corruption offences, which are generally prosecuted by prosecutorial offices attached to the courts of law, Law 78/2000 provides for specific types of corruption offences, which fall under DNA competence.

Romania criminalises both active and passive corruption, in both the public and private sectors, providing for imprisonment penalties that are correspondingly reduced in cases of private sector corruption acts. Law 78/2000 widens the span of anticorruption legislation beyond the typical offences of bribery and influence peddling, criminalising the so-called assimilated corruption offences, as well as corruption targeting EU finances and funds.

Romania has also enforced whistleblowing protection. Law 571/2004 on the protection of personnel in public authorities, institutions and other units signalling breaches of the law (generally, "**Whistleblower Protection Act**") provides protection of personnel who file a complaint about an infringement of the law within public authorities, public institutions or public companies. Specific provisions are also included in the Criminal Code to protect the bribery giver/influence purchaser from incurring criminal liability if he/she discloses the act prior to the criminal investigation bodies being otherwise informed of the offence.

Technically, Romanian criminal law distinguishes four main categories of corruption offences as stipulated in the Criminal Code in Title V, Chapter I Corruption offences: active and passive bribery, namely: receiving bribery (art. 289); giving bribery (art. 290); as well as influence peddling (art. 291); and buying influence (art. 292).

Receiving bribery – art. 289, paragraph 1 Criminal Code criminalises the act of a public servant who, directly or indirectly, for themselves or on behalf of others, solicits or receives money or other undue benefits or accepts a promise of money or benefits, in exchange for performing, not performing, expediting or delaying an action falling under or running contrary to professional duties. The offence is punishable by a term of imprisonment of 3 to 10 years, denial of civil rights and confiscation of assets.

A public servant is generally a person who, on a temporary or permanent basis, with or without remuneration: (i) performs legal duties under the legislative, executive or judicial powers; (ii) holds public dignities or public functions of any nature; or (iii) performs duties

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related to the activity of a public enterprise, economic agent or legal entity in which the state is a shareholder.

The definition of a public servant is extended by criminal law to also include any person who performs a service of public interest for which he/she was vested by public authorities, or that is subject to the control or supervision of a public authority – so-called private servants. Receiving bribery is only criminalised for the private servant if the offence is perpetrated in connection with the failure or delay to fulfil their lawful duties, or in connection with performing an act contrary to such duties.

Art. 308 of the Criminal Code extends the criminal offence of receiving bribery to the private sector, in which cases offenders stand for punishments that are reduced by one third (attenuated version). Law 78/2000 increases by one third the punishment limits for receiving bribery for special categories of public servants, namely where the perpetrator is a public dignitary, a judge, arbitrator or prosecutor, a criminal investigation body or agent (aggravated version).

Giving bribery – corresponding to the offence of receiving bribery, Romanian legislation also regulates (art. 290 Criminal Code) the offence of promising, giving or offering money or other undue benefits, in exchange for the performance or non-performance, expediting or delaying an action falling under or running contrary to professional duties. Giving bribery is punishable by a term of imprisonment of two to seven years.

The person offering, promising or giving bribery is nevertheless exempt from punishment if: (i) he/she was coerced into this practice by the person receiving bribery; or (ii) he/she discloses the deed prior to the criminal prosecution bodies being otherwise informed. The latter constitutes a measure taken by the legislator in order to encourage whistleblowing. Moreover, the money or other material undue benefits constituting bribery would be returned to the coerced giver of bribery or to the whistleblower, in such cases where they changed hands after the denouncing report was filed.

Influence peddling – consists in soliciting, receiving or accepting the promise of money or other undue benefits, directly or indirectly, for oneself or for another, committed by a person who holds influence or alleges to be holding influence over a public servant, and who promises they would persuade the latter to perform, fail to perform, expedite or delay the performance of a professional duty or the performance of an act running contrary to such professional duty. Art. 291 Criminal Code provides that influence-peddling is punishable by a term of imprisonment of two to seven years. Moreover, the money, assets or material undue benefits thus received are confiscated. In cases where such proceeds are not identified, their equivalent is seized and confiscated. Attenuated and aggravated versions of this offence are provided by art. 308 Criminal Code and by Law 78/2000, respectively.

Buying influence – the offence consists in the promise, offering or giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who holds influence or alleges to be holding influence over a public servant, in order to persuade the latter to perform, fail to perform, expedite or delay the performance of an act falling under or running contrary to their professional duty. Buying influence is similarly punishable by a term of imprisonment of two to seven years and denial of certain rights. Moreover, the money, valuables or material undue benefits thus given are confiscated. In cases where such proceeds are not identified, their equivalent is seized and confiscated.

Similar to the bribery-giver, the influence-buyer incurs no criminal liability if he/she discloses the deed prior to the criminal prosecution bodies being otherwise informed. In addition, the money or other material undue benefits are returned to the whistleblower in

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cases where they changed hands after the denouncing report was filed.

Both influence-peddling and influence-buying have been extended by art. 308 of the Criminal Code to apply to the private sector, in which cases offenders qualify for punishments that are reduced by one third (attenuated version). Law 78/2000 increases the punishment limits for influence-peddling and buying by one third for special categories of public servants, namely where the perpetrator is a public dignitary, a judge, arbitrator or prosecutor, a criminal investigation body or agent (aggravated version).

Law 78/2000 acts as special anti-corruption legislation, breaking down the general provisions on corrupt practices to three deeper levels of recrimination: (i) aggravated forms of corruption offences provided by the Criminal Code; (ii) corruption-assimilated offences; and (iii) offences against the financial interests of the European Union. Given that the aggravated form of the corruption offences provided by the Criminal Code has been discussed under the sections above, we shall briefly refer below to the new categories of corruption offences included in Law 78/2000, namely corruption-assimilated offences and offences against EU financial interests:

Corruption-assimilated offences – Law 78/2000 (arts. 10–16) regulates offences assimilated to corruption offences, such as:

- deliberately establishing a reduced value, compared to the real market value, of the goods belonging to the economic units in which the state or an authority of the local public administration is a shareholder, committed during a privatisation or enforcement action, reorganisation or judicial liquidation or on the occasion of a commercial operation, or of the goods belonging to public authorities or public institutions, during a selling or enforcement action thereof, committed by those holding management, ruling, administrative, enforcement, reorganisation or judicial liquidation duties;
- granting subsidies in violation of the law or not monitoring, according to law, compliance with the subsidies' intended destination;
- using subsidies for purposes other than those for which they were granted, as well as other use of guaranteed loans granted from/reimbursed from public funds;
- the act of a person with duties to monitor, control, reorganise or liquidate a private company, or who fulfils any task for it, who intermediates or facilitates the conduct of financial or commercial transactions or participates with capital to such company, if the act is capable of directly or indirectly providing an undue advantage; and
- the act of a person who has a leading position in a political party, a trade union or association of employers or in a non-profit legal entity, to use influence or authority in order to obtain for himself or for another money, goods or other undue benefits.

Such offences are punished by a term of imprisonment (ranging from 1 to 10 years) and denial of certain rights, if perpetrated with the purpose of obtaining money, assets or other undue benefits for oneself or for another. Law 78/2000 further aggravates by one third the punishments applicable to the offences of blackmail and abuse of office, when they involve public servants obtaining undue benefits for themselves or for another.

Offences against the financial interests of the European Union – Corruption offences targeting EU financial interests are criminalised by Law 78/2000 (art. 18^1–18^5), with penalties ranging between 1 and 10.5 years of imprisonment and denial of rights.

Procedurally, during criminal investigation, the prosecutor conducting or supervising the prosecution determines, by way of an accounting expert or a specialist report, the amount of damages, and orders asset freezing – for example, seizure – to ensure that the individual/

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entity under investigation cannot alienate property and, thus, avoid a situation where, upon resolving the criminal proceedings, the state should find it impossible to recover the damages. Subsequently, as the court can maintain asset-freezing measures during trial or can even extend them, special or extended confiscation may be ordered (the latter only in cases of convicted offenders).

Special confiscation, provided by art. 112 Criminal Code, refers to confiscation of assets originating from/used in any way/destined for or otherwise related to the perpetration/covering-up of the offence, or otherwise used to determine the perpetration of the offence, to secure escape for the offender, etc. Special confiscation applies to each perpetrator individually, meaning that the money/assets cannot be confiscated jointly, but only separately from each perpetrator. If the money/assets under special confiscation cannot be identified, equivalent money/assets are confiscated.

Extended confiscation, provided by art. 112[1] Criminal Code, can be ordered if the following conditions are cumulatively met:

(a) the value of the assets acquired by a convicted person during the five years prior[1] and, as the case may be, after the perpetration of the offence, until the issuance of the indictment, clearly exceeds the revenues lawfully obtained by the convict; and

(b) the court is convinced that the relevant assets originate from criminal activities such as (among others) corruption offences, assimilated offences, offences against EU financial interests etc., if the act is liable to procure a material benefit and the punishment provided by law is a term of imprisonment of four years or more.

According to DNA's 2018 activity report,[2] discovering and seizing the proceeds of crime has been addressed as an essential part of prosecutions. Briefly, DNA issued 196 indictments and guilty plea agreements in 2018, which accrued to a total corresponding prejudice of €412.7 million. During criminal investigation, freezing measures were ordered over a total of €400.1 million, in 89% of the cases. It should be noted in this context that special and extended confiscation measures are being increasingly used by Romanian authorities, proving to be both an effective instrument in the fight against corruption and a deterrent to corrupt practices.

Final court decisions passed in 2018 in DNA files resulted in the Romanian State actually recovering €76.3 million, whereas – under the same court decisions – the State instituted special confiscation or was awarded civil damages amounting to €65 million. It is therefore noted that a significant percentage of damages is being awarded to public institutions or public interest entities compromised by means of criminal and corrupt practices. Moreover, increased interest by competent bodies appears to be directed at prosecuting high-level corruption offences and economic crime, targeting recovery of losses and the freezing of proceeds in a more dynamic and competent manner.

Apart from the above special and extended confiscation measures, pertaining to criminal law, there is another – civil – means of confiscating unjustified assets. The National Integrity Agency ("**NIA**"), an autonomous administrative authority functioning at national level, may request courts to confiscate property, assets or money if, after verification of their acquisition, it finds that the person cannot justify their origin. As indicated in the activity report for 2018[3] issued by the NIA, there were 24 final decisions to confiscate unjustified assets, compared to 20 decisions in 2017, whereas incompatibilities identified by the NIA remained final in 1,026 cases, regarding 42 central dignitaries, 714 local representatives, 165 public officers, three judges and two prosecutors.

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A bird's eye view of the general legal framework in Romania shows that it is vast and insufficiently correlated, which brings about both: (i) motions for unconstitutionality – as a dynamic instrument, whereby the RCC constantly verifies the correspondence of various norms to the Constitution; and (ii) numerous proposals to amend the legal framework, both material and procedural. As such, 2018 was marked by changes in the management of the anticorruption prosecution office, by changes in the legislation that is relevant to the activity of DNA, as well as by numerous RCC decisions that massively impacted the framework of anticorruption efforts in Romania.

Additionally, important projects for amending criminal legislation and reforming the judiciary were the subject of intense public debates and strong controversies, such debates focusing – more often than not – on specific files or the general activity of DNA, or on the intensity of the fight against corruption. During 2018, the activity of DNA was targeted on extensive and complex control activities by means of judicial inspection, organised under the auspices of the Superior Magistracy Council.

From the point of view of the management of DNA, 2018 was marked by significant events, given that the DNA chief prosecutor since 2013 was removed mid-year, at the proposal of the Minister of Justice, following RCC Decision no. 358 dated 30 May 2018, so that DNA management was provided thereafter by an interim chief prosecutor, delegated by order of the general prosecutor. During this timeframe, the Minister of Justice organised two procedures for appointing a new chief prosecutor of DNA, which produced no effect: the first resulted in none of the candidates being proposed by the Minister of Justice; while the second procedure, after which a candidate was proposed by the Minister but received a negative opinion from the Superior Council of Magistracy, was rejected by the President of Romania.

The last year was also marked by major shifts and changes in the legal framework, impacting both the activity of the anticorruption prosecutors' office and the general performance of the judicial act in the fighting of corruption. As such, the main legislative change adopted during 2018 that influenced the activity of DNA consisted in Law no. 207 of 20 July 2018 modifying Law no. 304/2004 on judicial organisation, and Emergency Ordinance no. 92 of 15 October 2018, amending various norms in the field of justice.

The provisions of art. 88^1 introduced in Law no. 304/2004 by Law no. 207/2018 reduced DNA jurisdiction by transferring all cases regarding offences committed by magistrates into the competence of the newly established Section for the investigation of justice offences, created under the General Prosecutor's Office attached to the High Court of Cassation and Justice as of 23 October 2018.

In addition, a significant number of RCC decisions[4] with implications in anticorruption cases have been passed during the last year. Moreover, the Constitutional Court found a series of constitutional conflicts between the main pillars of democratic power in Romania. Thus, the first was Decision no. 358 dated 30 May 2018 on the request to settle the constitutional conflict between the Minister of Justice, on the one hand, and the President of Romania, on the other, published in the Official Gazette no. 473 of 7 June 2018, which established that the President of Romania must issue the revocation decree for the chief prosecutor of the National Anticorruption Directorate.

Additionally, by way of Decision no. 685/2018 on the request to settle the constitutional conflict between Parliament and the High Court of Cassation and Justice, the RCC found the conflict in question, as generated by the decisions of the council of the High Court of Cassation and Justice, starting in 2014, whereby only four of the five members of the five-

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judge panels were appointed by lot, to be contrary to art. 32 of Law no. 304/2004 on judicial organisation, and ordered that the High Court of Cassation and Justice proceed immediately to appoint by lot all the members of the five-judge panels, in compliance with art. 32 of Law no. 304/2004.

This RCC decision resulted in a total of 19 appeals for annulment being filed in DNA cases, which had been settled with finality by the five-judge panels of the High Court of Cassation and Justice, prior to the RCC decision indicated above.

Romania is still bound by the Cooperation and Verification Mechanism ("**CVM**") of the European Commission, which continues to target, under two of its four remaining benchmarks, matters of corruption – tackling high-level corruption and tackling corruption at all levels. The latest CVM report,[5] released on 13 November 2018, notes that, despite the progress noted on a number of recommendations set out in January 2017, the reform momentum was lost overall, slowing down the fulfilment of the remaining recommendations, and with the risk of re-opening issues which the January 2017 report had considered fulfilled. As a result, the 12 recommendations of the January 2017 report are no longer sufficient to close the CVM and, to this end, additional recommendations were set out in the November 2018 report of the European Commission.

Overview of enforcement activity and policy during the last year

Under the Romanian Constitution, prosecutors perform their activity within the Public Ministry in accordance with the principles of lawfulness, impartiality and hierarchical control, under the authority of the Minister of Justice. The Public Ministry represents the general interests of society as a whole and defends the rule of law, as well as the rights and freedoms of Romanian citizens. This role is accomplished through prosecutors, who are organised in prosecutorial offices attached to the courts of law, managing and supervising the criminal investigation activity of the judicial police.

According to GEO no. 43/2002, DNA is set up as a structure with legal personality, within the Prosecutor's Office attached to the High Court of Cassation and Justice. It is a structure with clearly defined powers, created according to a model adopted by several European countries, such as Spain, Norway, Belgium and Croatia. Under Romanian law, DNA prosecutors (magistrates) are the lead investigators in corruption cases, an approach that has been based on the experience and advice of countries with more advanced economies, including the United States, that call for specialised units to deal with corruption. DNA is independent in relation to the courts and to the prosecutor's offices attached to them, as well as in relation to other public authorities.

As briefly referenced above, Law no. 207 dated 20 July 2018 modifying Law no. 304/2004 on judicial organisation, and then GEO no. 92 dated 15 October 2018, modified the conditions and the procedure for appointing prosecutors within the DNA. Thus, the seniority standard for prosecutors being appointed within DNA was increased from six to eight and subsequently to 10 years. Moreover, specific legal provisions were enacted to discontinue the practice that had been started in specialised prosecutorial bodies to "delegate" prosecutors into positions, so as to circumvent the seniority criterion indicated above. These legal measures led to 15 DNA prosecutors having to leave their previous positions in DNA and return to lower prosecutorial offices.

Modifications have also been made to the jurisdiction or competence of the DNA. The Directorate represents the specialised Romanian anticorruption prosecutors' office, competent over major corruption offences provided by Law 78/2000:

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a) if, regardless of the capacity of the offenders, they have caused material damages of €200,000 or more, or if the money or the assets targeted by the corruption offence exceed €10,000; or

b) if, regardless of the material damage or the value of the object of the corruption offence, they are committed by specific categories[6] of public servants, ranging from members of Parliament and Government, to directors of public interest entities.

Offences against the financial interests of the European Union fall under DNA jurisdiction, as well as offences of diverting public tenders, abuse of office, provided that damages exceed €1,000,000.

As briefly mentioned above, as of 23 October 2018, the Section for the investigation of justice offences was set up under the General Prosecutor's Office, competent over criminal offences committed by magistrates. Therefore, the jurisdiction of DNA was correspondingly reduced by all corruption offences perpetrated by magistrates, which have been duly transferred to the Section.

Pre-trial technical surveillance

Under the Criminal Procedure Code, corruption offences punished by a term of imprisonment of more than five years may be investigated through special technical methods, if the following conditions are met:

(a) there is a reasonable suspicion that a criminal offence is under preparation or is being perpetrated;

(b) the surveillance measure must be proportional to the restriction imposed on fundamental rights and freedoms, in consideration of the specific case, the importance of the information or evidence to be gathered, and the serious nature of the offence; or

(c) the evidence could not be otherwise obtained, or obtaining such evidence would cause difficulties liable to harm the investigation, or there is a state of peril to the safety of individuals or valuable assets.

Whenever prosecution considers it necessary that technical surveillance measures be enforced in a certain case, a warrant must be obtained issued by the Rights and Freedoms Judge, allowing one (or several) of the following special surveillance or investigation methods: wire-tapping or long-distance communication surveillance; access to IT systems; video/audio/photo surveillance; geo-location or tracking; obtaining financial and transactional data; intercepting/delivery/search of post deliveries; use of undercover investigators and collaborators; authorised participation in certain activities; supervised delivery; and obtaining traffic and location data from public communications networks.

The Romanian justice system has been gripped by fierce public debate and controversy regarding the involvement of the intelligence services in criminal prosecutions, their enforcement of surveillance methods, cooperation and collaboration between such services and public prosecutors, the creation of "mixed teams" or "operative groups", etc.

As briefly indicated in our previous edition of *GLI – Bribery & Corruption*, the Romanian Intelligence Service ("**SRI**") acted to provide prosecutors with technical support in wire-tapping individuals. However, the major concern of civil society indicated that SRI was too involved in the DNA's activity, a matter liable to deeply affect the institution and impair the administration of justice. RCC Decision no. 51/2016 settled the matter by declaring the unconstitutionality of the phrase "*or other specialised state bodies*" in art. 142 para. 1 Criminal Procedure Code, which had allowed the performance of technical surveillance through an ambiguous number of state bodies (among which, the SRI), other than those expressly indicated in criminal procedure.

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The decision stirred highly complex debates regarding fears of undue intrusions in the conduct of criminal investigations and trials, as well as in the private life of individuals, which have been further ignited by the disclosure, during 2018, of a series of secret documents, representing so-called *Protocols*, concluded by and between the Romanian secret intelligence services and the main pillars of the justice system, namely the General Prosecutor's Office and the High Court of Cassation and Justice. The oldest Protocol made public so far dates back to 1998, specifically targeting corruption cases and setting up a special, parallel, secret structure meant to identify, select and investigate cases of corruption. The existence and enforcement of these secret protocols in criminal investigations and trials represents a matter of paramount importance – that would have to be resolved by the competent courts and authorities – as they represent a breach of due process, an illegal restriction of fundamental rights and freedoms, and a violation of the rule of law.

The RCC passed a decision on 16 January 2019, identifying a constitutional conflict between Parliament and the Public Ministry as regards the secret protocols concluded with SRI, ordering that, as regards pending cases, each court of law and prosecutors' office shall verify to what extent a violation of material or personal competence of the criminal investigation body was perpetrated in each individual case.

Accordingly, there have been court rulings that identified gross violations of the principle of loyally adducing evidence. The Bucharest Military Appeals Court passed Decision no. 35 on 12 July 2018,[7] establishing that the secret protocols had been enforced in that case, with the consequence that the evidence obtained by way of such unlawful cooperation with the intelligence service was eliminated from the case file. Given that, in Romania, criminal accusations must be proven by the prosecution beyond any reasonable doubt, this constitutes a complex process, which requires the court of law to carry out a careful and detailed analysis of the evidence adduced to the case file, which may also result in excluding illegally/unlawfully obtained evidence. This process ends in a court decision that must be based on a reasoning relying solely on the information provided by the evidence declared valid. Consequently, Decision no. 35/2018 acquits the defendants of the criminal charges filed by DNA.

In matters of time-efficiency in DNA investigations, we note that durations of prosecutions range from one month to over three years, whereas the trial stage may last from one year to over seven years, with the swiftest trial lasting four months and 18 days, and the longest exceeding 12 years. Moreover, DNA boasts in its 2018 activity report an impressive number of high-level defendants sent to trial, referring to 584 individuals in management and control positions or in public office (e.g., one senator, two deputies, one minister, a DIICOT chief prosecutor, 10 lawyers, three ministers, as well as 24 legal entities, 119 directors and associates).

Law and policy relating to issues such as facilitation payments and hospitality

In planning a new approach to the fight against corruption, the Romanian legislator has opted to criminalise the offence of receiving undue benefits (formerly provided as a stand-alone offence) as a specific act of bribery. Therefore, under Romanian criminal law, no distinction is made between bribes and 'facilitation' payments, which are also prohibited.

A facilitation payment is a small payment to a low-level public official who is not officially required to enable or expedite a procedure (i.e., in exchange for non-discretionary acts), whereas a bribe consists in a benefit given or received in any form, with the purpose of determining the performance, non-performance, expedition or delay of an action falling

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under or running contrary to professional duties. Bribes may include: cash; favours; unfair advantages for family or friends; offering training or employment opportunities (secondments, work experience, trainee positions, internships or permanent positions); or the provision of services, gifts, hospitality or entertainment.

The giving and receiving of modest gifts and *bona fide* hospitality is an acceptable business practice provided that it is proportionate, open, transparent and properly recorded. Under Law 78/2000, individuals in public office who carry out control duties are under an obligation to declare, within 30 days from receipt, any direct or indirect donation, present or gift received in connection with the exercise of their professional duties, with the exception of gifts having solely a symbolic value.

The National Integrity Agency ("**NIA**") has been set up in Romania since 2007, to verify, review and enforce the principles of integrity and transparency in the exercise of public office, so as to prevent institutional corruption, by evaluating the statements made by public officials with respect to their assets and interests, as well as any changes or significant modifications in the assets declared.

Under its specific regulations, the NIA evaluates the dynamics of a person's assets during the exercise of their public function, and conflicts of interests and incompatibilities incurred by individuals holding public office. There are no fewer than 39 categories of public office that have an obligation to declare their assets, such as the President of Romania, Members of Parliament, Government members, magistrates, members of the Court of Accounts, the Ombudsman or the governor of the National Bank of Romania, just to name a few. A person who intentionally submits untrue statements of assets or interests is liable under the Criminal Code. Failing to timely submit such statement constitutes a misdemeanour, punishable by fine, and the NIA may initiate *ex officio* evaluation proceedings.

Key issues relating to investigation, decision-making and enforcement procedures

Self-reporting and whistle-blowers

As already discussed, self-reporting is controlled by a particular impunity clause within the corruption offences of giving bribes and buying influence, which provides for the following conditions to be met:

- the briber/purchaser of influence reports the criminal act; and
- the report is made before the criminal body is otherwise notified of the offence.

The provisions of art. 290 para. 3 and art. 292 para. 2 of the Criminal Code are designed to prevent corruption offences by creating, for those who would be tempted to take bribes, the fear that they would be denounced. The prospect is made even more plausible by the fact that the money, valuables or other assets are returned to the briber/purchaser of influence if they were given after the report was filed with the competent authorities.

Under the Whistleblower Protection Act, any individual working in a public authority, institution or unit, in central or local administration, a state enterprise or a company in which the state is a shareholder, and who makes a report for any violation of the law, professional deontology or good practices, is afforded legal protection. Unfortunately, despite the fact that the legal protections under the Whistleblower Protection Act are adequate and extensive, exercise of these rights has been rather scarce, due mainly to a lack of proper information to the public.

Plea bargaining

The guilty plea agreement is an act concluded between the prosecutor and the defendant in

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such cases where the defendant (individual or legal entity) acknowledges the facts of the accusations and their legal classification, agreeing to an individualised punishment, namely the type and amount of the punishment and its form of execution.

Procedurally, a guilty plea agreement may be initiated by the prosecutor or by the defendant during criminal investigation, provided the following conditions are met: criminal action has been initiated; legal assistance is mandatory – the defendant must be assisted by defence counsel or an attorney appointed; the offence subject to plea bargaining is punished by a maximum of 15 years of imprisonment; evidence adduced during criminal investigation sufficiently indicates that the offence exists and that the defendant is guilty of the said offence; and the hierarchically superior prosecutor grants his prior consent on the limits of the agreement.

Concluding and accepting the plea bargain agreement requires acceptance by the defendant of the incriminating factual basis, the defendant thus benefiting from a one-third reduction of the penalty limits provided by law in case of imprisonment punishments, or by a quarter, in case of criminal fines.

Persons who agree to be convicted using this agreement give up most of the rights they would have during court trial. Thus, for example, they lose the privilege against self-incrimination, the right to remain silent, the right to participate in direct administration of evidence before the judge, or the right to request new (disculpatory) evidence. The most important consequence is, nevertheless, that this agreement, once accepted by court, is equivalent to determining the circumstances of an offence without the judicial investigation being performed.

On the other hand, at least theoretically, a guilty plea agreement gives the defendant an opportunity to *negotiate* an arrangement with the prosecutor in terms that are less formal and technical and, therefore, to participate in the decision-making process of determining the punishment. Such participation not only promotes the dignity of the individual, but also has an instrumental value, since the defendant may feel morally obliged to honour the compromise and will be more likely to feel reconciled with the penalty thus imposed.

Simplified trial procedure

The simplified trial procedure is actually an abbreviated trial which is based on a "guilty plea" made in court, whereby the defendant pleads guilty to a charge in return for a reduction of the penalty limits provided for by law. Under art. 374, para. 4 of the new Criminal Procedure Code, in cases where criminal proceedings do not concern an offence punishable by life imprisonment, prior to the start of court investigations, the judge informs the defendant that he/she may request that judgment be based only on evidence adduced during the criminal prosecution phase and documents submitted by the parties and by the victim, if he fully acknowledges the facts incriminating him.

The clear benefits that the law grants defendants after confessing are quite attractive – reducing the term of imprisonment by one third, and the criminal fine by one quarter. Another benefit in favour of this procedure lies in the much-accelerated trial proceedings, in matters of both time and costs for the defence.

Admission of guilt has been successfully used in ordinary criminal trials since 2010, but over recent years it has also begun to be used in corruption cases – 55 plea bargain agreements have been concluded in the last year by DNA, whereas, in 2017, DNA had concluded 91 plea bargain agreements. There is not yet sufficient data to draw any firm conclusions as to the circumstances and, therefore, the terms of the plea bargain agreements which

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remain workable in the specific cases, depend on various elements, such as the charged offence, the evidence on file, the level of reform a specific defendant may indicate, personal circumstances, etc.

Overview of cross-border issues

The fight against corruption has achieved a global dimension. Be it worldwide organisations, such as the United Nations, the Organization for Economic Cooperation and Development, the World Bank, the Council of Europe, or strictly regional organisations, such as the Organization of American States, the African Union or the European Union, the global orientation and determination to counter this phenomenon is clearly outlined.

Generally, Romanian law is applicable and DNA is competent in all cases where criminal offences are perpetrated over the territory of Romania, even in cases where only certain acts of execution, instigation or complicity, or (even part of) the result of the criminal offence took place over Romanian territory. Moreover, Romanian criminal law is applicable in cases where criminal offences perpetrated by a Romanian citizen or legal entity outside Romania are punishable by a term of imprisonment of 10 years or more. In all other cases, Romanian legislation is applicable to offences perpetrated outside Romania by a Romanian citizen or company if the offence is also provided by the criminal law of the respective state. Furthermore, Romanian criminal law is applicable if the criminal offence perpetrated outside Romanian territory by a foreign citizen targeted the Romanian State, a Romanian citizen or company.

Under art. 548 Criminal Procedure Code, international judicial cooperation may be requested or granted under EU legal acts, under international treaties in the field of international judicial cooperation on criminal matters to which Romania is a party, and under Romanian law. With a specific view to cross-border corruption cases, a Liaison Office is set up under DNA with a view to performing mutual consultations, cooperation and data/information exchanges with corresponding institutions in other countries.

During the last year, the DNA Liaison Office contributed significantly to DNA activity in fighting and prosecuting corruption through 44 active international judicial assistance requests on matters of: adducing evidence filed with foreign authorities; responding to 11 passive international judicial assistance requests for criminal procedure acts filed by the competent authorities in nine different countries; 45 requests for verifications and data exchanges with 11 states; *ad hoc* data exchanges with foreign authorities, etc.

According to its 2018 report, DNA was an active partner in the activities organised by the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), the Organization for Economic Co-operation and Development (OECD) and international anticorruption networks, to strengthen the implementation of European and international conventions on matters of anticorruption, to promote cooperation, good practices and the exchange of data and information.

Corporate liability for bribery and corruption offences

Legal entities are criminally liable for corruption offences committed by any person in achieving their core activity, acting in the interest or on behalf of the legal entity (e.g., as a member of the management body, decision-makers, persons holding control or supervision powers over the decision process within the legal entity, etc.). The Romanian Criminal Code has set out a general criminal liability of legal entities, meaning that – at least theoretically – a legal entity may be held criminally liable for any offence provided for under the law.

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Moreover, criminal liability of the legal entity does not preclude the criminal liability of the individual who contributed to the perpetration of the offence.

State authorities and public institutions, at both central and local level, are exempt from criminal liability for offences committed in carrying out an activity that cannot be subject to the private domain and which therefore lies exclusively within the competence of public bodies.

Art. 135 of the Criminal Code provides that, in order for a legal entity to be held criminally liable, the criminal offence must be perpetrated:

- for the entity's core business activity;
- in the interest of the legal entity, meaning that the offence must bring a benefit or avoid a loss or other negative effect to the legal entity;
- on behalf of the legal entity, by an agent, representative or proxy; or
- further to a resolution issued by the legal entity or because of its negligence, taking into consideration the conduct of the managing bodies of such legal entity.

Legal literature has expressed the view that, given the broad criminal law definition of the public servant, a legal entity may be prosecuted for corruption offences, as long as such offence is committed in the accomplishment of the business activity, or in the interest or on behalf of that legal entity. Its partaking in committing the offence as an instigator or accomplice is also possible. Moreover, under art. 151 Criminal Code, clear rules are provided on the criminal liability of the legal successors of an entity that perpetrated a criminal offence, punishments being correlated with the turnover/value of assets pertaining to the perpetrator that underwent M&A procedures.

The legal entity faces the main punishment of a fine and ancillary punishments consisting in: dissolution of the legal entity; suspending activity for three months to three years; shutdown of working points for three months to three years; ban on public procurement for one to three years; and judicial surveillance and posting or publishing the conviction decision. The day-fine system is applicable in Romania – the amount corresponding to one day-fine ranges from approx. €20 to €1,100, which is then computed with the number of days, ranging between 30 and 600 days, corresponding to the terms of imprisonment provided for each offence.

The statistical analysis of DNA revealed that 24 legal entities have been convicted by final court decision in large-scale corruption files in 2018.

Proposed reforms / The year ahead

Romania is expected to continue its fight against corruption – a phenomenon becoming more organised, specialised and professionalised, appearing as a network of organisations and individuals "glued" to one another, reaching corrupt decision-makers at all levels of state administration, economic and social life. Corruption puts a price on the rule of law, on human rights and liberties, leaving citizens utterly vulnerable.

For this specific reason, the state must take decisive action to fight corruption – which is being achieved in Romania through the (special) legal framework and special, duly regulated authorities. Nevertheless, appropriate checks and balances must be in place and operational, with sufficient guarantees and safeties to ensure that procedures are followed, rights and liberties are observed, and that sufficient balance between the collective and the individual is achieved. Also, a transparent and fair system in terms of applying and verifying law enforcement is imperative.

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A key role in guiding the prospects of deterring and tackling the phenomenon of corruption is played by the National Anticorruption Strategy for 2016–2020, a multidisciplinary document approved through Government Decision no. 583/2016, aiming to promote integrity through the rigorous application of the anticorruption legal and institutional framework. Strategic intervention in terms of anticorruption is threefold: prevention, education and countermeasures. Further direct action and nationwide awareness must be achieved.

At the same time, monitoring and approval offered by equivalent European and international institutions, and professional collaboration between such entities, must be maintained and materialised.

* * *

Endnotes

1. According to Decision no. 11/2015 of the RCC, extended confiscation only applies to assets acquired after the entry into force of the provisions on extended confiscation, namely 22 April 2012, as it would otherwise breach the principle of non-retroactivity.
2. http://www.pna.ro/obiect2.jsp?id=377.
3. https://www.integritate.eu/Files/Files/Noutati/Raport_Activitate_Anual_ANI_2018.pdf.
4. Such as, e.g., Decision no. 802 dated 5 December 2017 regarding the exception of unconstitutionality of the provisions of art. 345 paragraph (1) of the Criminal Procedure Code, published in the Official Gazette no. 116 dated 6 February 2018 (the legislative solution that does not allow the preliminary chamber judge to adduce other means of evidence except for "any new documentation" is unconstitutional); Decision no. 21 dated 18 January 2018 regarding the exception of unconstitutionality of the provisions of art. 352 paragraph (11) and paragraph (12) of the Criminal Procedure Code, published in the Official Gazette no. 175 dated 23 February 2018 (the phrase "the court requests" with reference to the phrase "allow access to such classified information by the defendant's attorney" is unconstitutional); Decision no. 22 of 18 January 2018 regarding the exception of unconstitutionality of the provisions of art. 102 paragraph (3) of the Criminal Procedure Code, published in the Official Gazette no. 188 dated 26 February 2018 (the provisions are constitutional only insofar as the phrase "exclusion of evidence" means the elimination of such evidence from the case file); Decision no. 297 of 26 April 2018 regarding the exception of unconstitutionality of the provisions of art. 155 paragraph (1) of the Criminal Code, published in the Official Gazette no. 518 of 25 June 2018 (the legal provision regarding interruption of the statute of limitations for criminal liability by the performance of "any procedural act" is unconstitutional); Decision no. 651 of 25 October 2018 regarding the exception of unconstitutionality of the provisions of art. 595 paragraph (1) of the Criminal Procedure Code and of art. 4 of the Criminal Code, published in the Official Gazette no. 1083 of 20 December 2018 (the provisions which do not include the decision of the RCC finding the unconstitutionality of a criminal norm as a case of removal or modification of the educational penalty/measure, are unconstitutional).
5. https://ec.europa.eu/info/files/progress-report-romania-2018-com-2018-851_en.
6. Namely, under art. 13 paragraph 1 letter (b) of Government Emergency Ordinance no. 43/2002 on the National Anticorruption Office, deputies; senators; Romanian members of the European Parliament; the member appointed by Romania within the European

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Commission; Government members; state secretaries; under-state secretaries and persons assimilated to them; counsellors of the ministers; judges of the High Court of Cassation and Justice and of the Constitutional Court; other judges and prosecutors; members of the Superior Council of Magistracy; the president of the Legislative Council and his/her alternate; the Ombudsman and his/her deputies; presidential and state counsellors within the Presidential Administration; state counsellors of the Prime Minister; external public members and auditors from the Court of Accounts of Romania and of the County Chambers of Accounts; the Governor and the First Deputy Governor and the Deputy Governor of the National Bank of Romania; the president and the vice-president of the Council of Competition; officers, admirals, generals and marshals; police officers; the presidents and the vice-presidents of county councils; the general mayor and the deputy mayors of the Bucharest municipality; the mayors and the deputy mayors of the sectors of Bucharest; the mayors and the deputy mayors of municipalities; county counsellors; prefects and sub-prefects; leaders of the central and local public institutions and authorities and the persons filling control positions therein, except for the leaders of public institutions and authorities at the level of towns and communes and of persons with control positions within them; lawyers; commissioners of the Financial Guard; customs employees; persons with leading positions, higher than and including that of a director within the autonomous administrators of national interest, of national companies and firms, of banks and trading companies where the state is a main shareholder, of public institutions having tasks in the privatisation process, and of central financial banking units; and persons provided by arts. 293 and 294 of the Criminal Code, which refer to certain categories of members of arbitration panels or foreign officials.

7. http://rolii.ro/hotarari/5b5d342ee49009ac2000002a.

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Russia

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Brief overview of the law and enforcement regime

Russian bribery and corruption legislation

The Russian bribery and corruption legislation mainly consists of the following inter-related blocks:

- **Anti-corruption laws** – in particular, the National Anti-Corruption Plan (adopted every two years by the Russian President; coordinates the efforts to combat corruption in Russia and lists the specific anti-corruption measures to be taken by the Russian state), and Federal Law 273-FZ "On Combating Corruption" of 25 December 2008 (the "**Anti-Corruption Law**"; sets out the legal and organisational framework for the prevention and combating of corruption as well as the mitigation and remediation of the consequences of corruption).
- **Antitrust regulation** – in particular, Federal Law 135-FZ "On Protection of Competition" dated 26 July 2006 (e.g., Article 17 regulates antitrust requirements applicable to public tenders; Article 18 sets out rules for the selection of financial organisations by the state).
- **Public procurement regulation** – in particular, Federal Law 44-FZ "On the Contract System in State and Municipal Procurement of Goods, Works and Services" dated 5 April 2013 (adopted to prevent corruption and other violations in the area of public procurement; aims to ensure the efficiency and transparency of decision-making, equal access of bidders, as well as control over the procurement process), and Federal Law 223-FZ "On Procurement of Goods, Works and Services by Certain Types of Legal Entities" dated 18 July 2011 (establishes specific procurement procedures for legal entities of the Russian Federations such as state corporations and state companies).
- **Administrative Offences Code** – establishes administrative liability for violations of anti-corruption laws, antitrust and public procurement regulation.
- **Criminal Code** – establishes criminal liability for violations of anti-corruption laws, antitrust and public procurement regulation.

Applicable international anti-corruption conventions

In addition, the following international anti-corruption conventions apply in Russia:

- **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime** of 8 November 1990 (ratified by Federal Law 62-FZ dated 28 May 2001, entered into force on 31 May 2001).
- **International Convention for the Suppression of the Financing of Terrorism** adopted by the General Assembly of the United Nations on 9 December 1999 (ratified by Federal Law 88-FZ dated 10 July 2002, entered into force on 24 July 2002).

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- **United Nations Convention against Transnational Organised Crime** of 15 November 2000 (ratified by Federal Law 26-FZ dated 26 April 2004, entered into force on 29 April 2004).
- **United Nations Convention against Corruption** of 31 October 2003 (ratified by Federal Law 40-FZ dated 8 March 2006, entered into force on 21 March 2006).
- **Council of Europe Criminal Law Convention on Corruption** of 27 January 1999 (ratified by Federal Law 125-FZ dated 25 July 2006, entered into force on 28 July 2006).
- **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** of 21 November 1997 (ratified by Federal Law 3-FZ dated 1 February 2012, entered into force on 13 February 2012).
- **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism** of 16 May 2005 (ratified by Federal Law 183-FZ dated 26 July 2017, entered into force on 6 August 2017).

Competent Russian law-enforcement authorities

Bribery and corruption offences under the Administrative Offences Code (committed by legal entities) and the Criminal Code (committed by individuals) are generally investigated and prosecuted by the Prosecutor's Office of the Russian Federation.

In addition, the Investigative Committee of the Russian Federation – a federal authority previously part of the Prosecutor's Office, but since 2011 separate and subordinated to the President of the Russian Federation – performs pre-investigative reviews of notifications of offences as well as preliminary investigations into individuals for bribery and corruption offences under the Criminal Code.

In specific sectors, the functions of other law-enforcement authorities may overlap with the investigative functions of the Prosecutor's Office and the Investigative Committee; e.g., violations of anti-trust requirements during public procurement processes, in particular state tenders, are often accompanied by bribery and corruption offences which are then also investigated by the Federal Antimonopoly Services (FAS). Following the completion by FAS of its own investigations and the imposition of administrative sanctions for the violation of anti-trust requirements, the matters can then be transferred to the Prosecutor's Office for the opening of investigations for bribery and corruption.

Specific bribery and corruption offences

The key corruption and bribery offences in Russia are:

- **Unlawful remuneration on behalf of a legal entity** (Article 19.28 of the Administrative Offences Code) – the legal basis for corporate liability for bribery; prohibits the bribery of Russian or foreign public officials or executives of commercial or other organisations to induce them to use their authority to act in favour of a legal entity.
- **Bribery in a commercial organisation** (Article 204 and 204.2 of the Criminal Code) – prohibits bribe-giving to and bribe-taking by **executives** of commercial or other organisations in connection with their position in these organisations.
- **Mediation in bribery in a commercial organisation** (Article 204.1 of the Criminal Code) – prohibits the direct transfer of bribes to executives of commercial or other organisations on a considerable scale (i.e. exceeding RUB 25,000; currently approx. US$ 380) on instructions by the bribe-giver or bribe-taker, as well as promises and proposals of such transfers.
- **Bribe-taking by a public official** (Articles 290 and 291.2 of the Criminal Code) –

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prohibits bribe-taking by Russian or foreign public officials to induce them to use their authority to act in favour of the bribe-giver.

- **Bribe-giving to a public official** (Article 291 and 291.2 of Criminal Code) – prohibits bribe-giving to Russian or public officials.
- **Mediation in bribery of a public official** (Article 291.1 of the Criminal Code) – prohibits the direct transfer of bribes to Russian or foreign public officials on a considerable scale (i.e. exceeding RUB 25,000) on instructions by the bribe-giver or bribe-taker, as well as promises and proposals of such transfers.

Sanctions against legal entities

For the commission of offences under Article 19.28 of the **Administrative Offences Code** (**Unlawful Remuneration on Behalf of a Legal Entity**), the following penalties may be imposed on legal entities:

- **Minimum:** Penalty of up to triple the amount of the bribe sum, but not less than RUB 1 million (US$ 15,000).
- **Large-scale bribery:** If the bribe sum exceeds RUB 1 million (US$ 15,000), penalty of up to thirtyfold amount of the bribe sum, but not less than RUB 20 million (US$ 300,000).
- **Extra-large-scale bribery:** If the bribe sum exceeds RUB 20 million (US$ 300,000), penalty of up to a hundredfold amount of the bribe sum, but not less than RUB 100 million (US$ 1.5 million).

Sanctions against individuals

Individuals may be held liable for committing anti-corruption offences under the **Criminal Code** as follows:

- **Bribery in a commercial organisation** (Article 204): Depending on the bribe sum and other circumstances, up to: (i) a penalty in the amount of (a) RUB 2 million (US$ 30,000) to RUB 5 million (US$ 75,000), (b) two to five years' salary, or (c) fiftyfold to ninetyfold of the bribe sum, and an occupational ban from certain professions for up to six years; or (ii) imprisonment from seven to twelve years, a penalty in the amount up to fiftyfold of the bribe sum, and an occupational ban from certain professions for up to six years.
- **Mediation in bribery in a commercial organisation** (Article 204.1): Depending on the bribe sum and other circumstances, up to: (i) a penalty in the amount of (a) RUB 1.5 million (US$ 23,000), (b) one and a half years' salary, or (c) fortyfold to seventyfold of the bribe sum, and an occupational ban from certain professions for up to six years; or (ii) imprisonment from three to seven years, a penalty in the amount up to fortyfold of the bribe sum, and an occupational ban from certain professions for up to six years.
- **Bribe-taking by a public official** (Article 290): Depending on the bribe sum and other circumstances, up to: (i) a penalty in the amount of (a) RUB 3 million (US$ 45,000) to RUB 5 million (US$ 75,000), (b) three to five years' salary, or (c) eightyfold to hundredfold of the bribe sum, and an occupational ban from certain professions for up to 15 years; or (ii) imprisonment from eight to 15 years, a penalty in the amount up to seventyfold of the bribe sum, and an occupational ban from certain professions for up to 15 years.
- **Bribe-giving to a public official** (Article 291): Depending on the bribe sum and other circumstances, up to: (i) a penalty in the amount of (a) RUB 2 million (US$ 30,000) to RUB 4 million (US$ 60,000), (b) two to four years' salary, or (c) seventyfold to ninetyfold of the bribe sum, and an occupational ban from certain professions for up to 10 years; or (ii) imprisonment from eight to 15 years, a penalty in the amount up to seventyfold of the

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bribe sum, and an occupational ban from certain professions for up to 10 years.

- **Mediation in bribery of a public official** (Article 291.1): Depending on the bribe sum and other circumstances, up to: (i) a penalty in the amount of (a) RUB 1.5 million (US$ 23,000) to RUB 3 million (US$ 45,000), (b) two to three years' salary, or (c) sixtyfold to eightyfold of the bribe sum, and an occupational ban from certain professions for up to seven years; or (ii) imprisonment from seven to 12 years, a penalty in the amount up to seventyfold of the bribe sum, and an occupational ban from certain professions for up to seven years.

Overview of enforcement activity and policy during the last year

Russian corporate bribery enforcement

According to information published by the General Prosecutor's Office, in 2018 the Russian law enforcement authorities opened 487 investigations into legal entities for bribery (based on Article 19.28 of the Administrative Offences Code, i.e. Unlawful Remuneration on Behalf of a Legal Entity). These investigations resulted in the conviction of 439 legal entities; the total amount of imposed penalty payments was RUB 691 million (slightly above US$ 10 million).

More than 300 new legal entities have been included in the public register of offenders, which at the end of 2018 listed more than 1,700 entities in total. As an additional sanction, all legal entities convicted of bribery are prohibited from bidding in state procurement tenders (not including tenders of state-owned companies) for a period of two years from the date of conviction.

The new enforcement statistics slightly fall behind the final statistics for 2017 with 503 investigations into legal entities, 464 convicted entities and total penalty payments of RUB 950 million (US$ 14.6 million).

Press releases on the website of the General Prosecutor's Office provide further details of about one third of all convictions. The information published for 2018 reveals that, as in previous years, the Russian enforcement actions focused on small and mid-scale bribery in the day-to-day operations of Russian companies:

- Most bribe payments were made to low-ranking public officials to avoid the payment of administrative fines (e.g. for the breach of road safety, migration or industrial safety requirements), or to receive state licences or accelerate registration proceedings. In some cases, the companies paid bribes to civil servants to obtain smaller-scale local business (e.g. to win municipal tenders for construction works or to lease municipal property).
- Commercial bribery mostly involved bribe payments to executives of both state-owned entities and private companies. While bribe payments to executives of state-owned entities were made mostly to obtain supply contracts (quite often with hospitals), or to conceal administrative violations (e.g. in the forestry industry or the transportation sector), executives of private companies were usually paid to manipulate tenders or otherwise favour the bribing company's business.
- The bribe sums in the disclosed cases ranged from RUB 5,000 (US$ 75) to RUB 5 million (US$ 75,000). Most bribe sums were in the five- or six-digit rouble range. Only in a few cases did the amount of the bribe exceed RUB 1 million (US$ 15,000).
- The maximum penalty payment in the disclosed cases was RUB 30.5 million (US$ 450,000); in three cases, penalties of RUB 20 million (US$ 300,000) were imposed. In most cases, only the statutory minimum penalty of RUB 1 million (US$ 15,000)

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was imposed. In quite a number of cases, this minimum amount was further reduced to RUB 500,000 (US$ 7,500) or RUB 400,000 (US$ 6,000), presumably because the entities were unable to pay RUB 1 million.

In addition, the published information for 2018 shows that the Russian enforcement actions targeted almost exclusively small and medium-sized companies with Russian beneficiaries (many in the construction and transportation business). No major Russian company was held liable in 2018. Apparently, there were no convictions of Russian subsidiaries of foreign companies and only one conviction of a foreign company – a Polish entity active in the mining industry.

Increased efforts in 2019

Preliminary enforcement statistics for 2019 which have recently been published by the General Prosecutor's Office indicate that the number of convictions of legal entities for bribery in 2019 can be expected to be comparable to that of 2018. At the same time, the press releases which have been published on the website of the General Prosecutor's Office in the first three quarters of 2019 seem to demonstrate increased efforts by the Russian law enforcement authorities to prosecute more serious bribery offences as well.

To date, nine cases with penalty payments of RUB 20 million (US$ 300,000) or more for commercial bribery or the bribery of public officials have already been disclosed – compared to only four cases in whole 2018. While the disclosed maximum penalty in 2018 was RUB 30.5 million, the current year has already seen one penalty payment of RUB 50 million (US$ 750,000) for commercial bribery. The conviction of AO Russian Standard Bank, which is one of Russia's largest banks, to pay a penalty of RUB 26.5 million (US$ 400,000) for bribing a public official, may indicate that in practice, major Russian companies are no longer excluded from the prosecution of corporate bribery.

Law and policy relating to issues such as facilitation payments and hospitality

No specific rules on facilitation payments

There are no specific rules under Russian law regulating facilitation payments. Such payments are therefore subject to the general rule on the prohibition of gifts with a value exceeding RUB 3,000 (US$ 45) (see further details below) and the sanctions for unlawful remuneration and bribery under the Administrative Offences Code and the Criminal Code.

Prohibition of gifts exceeding RUB 3,000 in relations between commercial organisations

Article 575 (1) of the Civil Code prohibits any gifts – except for common gifts with a value not exceeding RUB 3,000 (currently approx. US$ 45) – in relations between commercial organisations. Since under Russian law any benefits transferred to the donee qualify as a gift, this prohibition also formally extends to travel expenses, meals, entertainment and other hospitality costs which are borne by companies for the benefit of representatives of their (potential) business partners.

In practice, the prohibition of gifts with a value exceeding RUB 3,000 is usually also reflected in the internal compliance regulations of Russian organisations. Under Russian labour law, the employees of Russian organisations are obliged to fully comply with such internal regulations. Giving or receiving gifts in violation of Article 575 (1) of the Civil Code may therefore lead to the relevant employee being subjected to disciplinary sanctions.

General prohibition of receipt of gifts by public officials

Russian legislation setting out the regulatory framework of public service generally prohibits the receipt by Russian public officials (including so-called state servants and state officials) of

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any remuneration in connection with the performance of their duties from individuals or legal entities (including gifts, money, loans, services, entertainment costs and travel expenses).

The general prohibition on accepting gifts does not apply to gifts received by Russian public officials in connection with protocol events, business trips and other official events. However, gifts received at such occasions are deemed to be state property and subject to transfer to the relevant state body (e.g. Article 17 (1) (6) of the Federal Law 79-FZ "On Public Service of the Russian Federation"). A legislative initiative provided by the National Anti-Corruption Plan for 2018 to 2020, according to which the general prohibition on receiving gifts may not apply in certain cases of "*force majeure*", currently seems to be on hold.

General prohibition of receipt of gifts by employees of state corporations

According to Article 349.1 Part 4 (4) of the Labour Code and Article 2 (b) of the Order 841 of the Russian Government of 21 August 2012, the general prohibition on receiving gifts is extended to certain positions in state corporations and state companies.

State corporations and state companies are non-commercial organisations which are set up by the Russian Federation under a federal law (Articles 7.1 and 7.2 of the Law on Non-Commercial Organisations). Examples of state corporations are Vnesheconombank, Rusnano, Rostec, Roscosmos and Rosatom. Commercial organisations with a majority participation by the Russian state (e.g., Gazprom Public Joint Stock Company and Rosneft Oil Company) do not qualify as state corporations/companies under Russian law.

Administrative and criminal liability

The violation of the aforementioned restrictions on the granting and receiving of gifts as such does not entail any administrative or criminal liability for legal entities and/or their representatives. Such a liability would require the existence of additional elements of a bribery offence, in particular an action to be taken or an omission to be made by the recipient in return for the gift. The scope of the sanctions under the Administrative Offences Code and the Criminal Code depends on the amount of the bribe sum (see above).

Key issues relating to investigation, decision-making and enforcement procedures

Self-reporting of corporate bribery

According to legislative changes which entered into force in August 2018, companies operating in Russia can exclude themselves from liability for bribery by way of self-reporting to the Russian law enforcement agencies. Based on changes to the Administrative Offences Code, legal entities are released from such liability if they have enabled the:

- uncovering of the relevant violation (by the company);
- conducting of an administrative investigation (into the company); and/or
- uncovering, disclosure and investigation of the related criminal offence (committed by individuals).

The self-reporting releases the company from penalty payments under Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of a Legal Entity). In contrast to other jurisdictions, this release includes 100% of the penalties and is mandatory; it is not subject to the discretion of the law enforcement agencies or courts. The new self-reporting rules apply to all types of bribery except for bribery of foreign public officials. Last year's court practice, including a decision of the Supreme Court of the Russian Federation, confirms that, in practice, companies can be excluded from liability based on these rules.

The benefits of the self-reporting described above are limited to the reporting company itself.

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The individuals who made the bribe payments in the interest of the company – typically its employees and agents – continue to face prosecution under the relevant provisions of the Criminal Code. These individuals may, however, separately self-report under the leniency provisions of e.g. Articles 204 (Bribery in a Commercial Organisation) and 291 (Bribe-giving to a Public Official) of the Criminal Code.

No liability for extorted payments

Based on the same legislative changes, companies are now also released from penalty payments under Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of Legal Entity) if the bribes were extorted. These changes further harmonised corporate liability for bribery with the liability of individuals under the Criminal Code.

Pre-trial cooperation agreements

Since 2009, the Criminal Procedural Code has allowed so-called pre-trial cooperation agreements with the suspects in criminal investigations (Chapter 40.1), including for bribery and corruption offences. They are particularly relevant for individuals who committed offences on which they cannot self-report, such as Article 290 of the Criminal Code (Bribe-taking by a Public Official), to be excluded from liability.

Under such a pre-trial cooperation agreement, the suspect undertakes to assist in the investigation of other individuals who participated in the relevant offence. If all statutory requirements are met, his or her sentence will be reduced to not more than half the maximum punishment for the relevant offence under the Criminal Code. Irrespective of many practical problems, these pre-trial cooperation agreements are entered into in practice also in bribery and corruption cases.

Whistleblower protection

Article 9 (4) of the Anti-Corruption Law states that public officials who report on corruption violations are protected by the state in accordance with Russian law. The law therefore only confirms that whistleblowers in the public sector enjoy the protection of the general rules of, for example, Federal Law 45-FZ "On state protection of judges, officials of law enforcement bodies […]" dated 20 April 1995, Federal Law 119-FZ "On state protection of victims, witnesses and other participants of criminal court proceedings" dated 20 August 2004, and the Criminal Procedural Code. In addition, Presidential Decree 309 dated 2 April 2013 provides for some restrictions on the taking of disciplinary measures against state employees who report corruption.

Even less protection is granted to whistleblowers reporting corruption who are employed in the private sector. Except for a general provision of Presidential Decree 309 dated 2 April 2013 according to which citizens shall be granted legal aid when preparing to report corruption, they are only protected by the general rules of criminal procedural law. A draft law which provided for extensive protection of whistleblowers reporting on corruption in the public and private sector, and which already had been adopted by the State Duma at its first reading on 13 December 2017, has been ultimately rejected on 19 June 2019. In the foreseeable future, whistleblowers in the private sector therefore can rely only on the protection which is granted to them by their employers in accordance with applicable internal rules.

Irrespective of the insufficient whistleblower protection, the Russian state is trying to encourage whistleblowing with monetary rewards. Since 28 August 2018, the Russian Ministry of the Interior is authorised to pay individuals who report on crimes, including bribery and corruption, rewards which may exceed RUB 3 million (US$ 45,000) according to Order 356 of the Ministry of the Interior dated 6 June 2018.

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Immediate payment of penalty

The changes to the Administrative Offences Code which entered into force in August 2018 significantly shortened the payment term for penalty payments under Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of Legal Entity) – from 60 to seven calendar days from the day the relevant court decision entered into force.

Asset freeze to secure penalty payment

The above changes to the Russian Administrative Offences Code also authorised the Prosecutor's Office opening the investigation into a legal entity for violation of Article 19.28 of the Administrative Offences Code to freeze its assets based on a court decision in order to secure the penalty payment. The decision of the court must indicate the specific circumstances justifying the asset freeze and determine the restrictions imposed on the company's assets. The freezing of bank accounts is only permitted if other assets of the company are not available. The value of the frozen assets must not exceed the maximum amount of the penalty payment under Article 19.28 of the Administrative Offences Code.

According to information published by the General Prosecutor's Office, in the first half of 2019, the Prosecutor's Offices have applied for such an asset freeze in almost every investigation.

Overview of cross-border issues

Non-Russian enforcement actions

In 2018/19, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) – assisted by law enforcement agencies in various Western jurisdictions – completed a number of investigations for violations of the U.S. Foreign Corrupt Practices Act (FCPA) in Russia and other former Soviet republics (Uzbekistan, Kazakhstan and Azerbaijan). These investigations concerned large-scale bribery in the telecommunications sector (Uzbekistan), energy sector (Russia), pharmaceutical (Kazakhstan) and equipment manufacturing (Azerbaijan) sectors, and resulted in the payment of significant fines. In particular, Russia's largest mobile network operator MTS has paid the U.S. authorities US$ 850 million to resolve charges arising out of the bribery of foreign public officials in Uzbekistan.

Apparently there has been no cooperation between U.S. and Russian law enforcement authorities in any of the above investigations (e.g. under the bilateral Treaty on Mutual Legal Assistance in Criminal Matters of 17 June 1999). Further, as in previous years, no foreign enforcement action against bribery and corruption offences related to Russia (in particular under the US FCPA or the UK Bribery Act) seems to have triggered any parallel or subsequent investigations by Russian law enforcement authorities.

Extraterritorial Russian jurisdiction

Since March 2016, Russian law enforcement authorities may prosecute Russian and foreign legal entities for bribery offences committed outside of Russia too. Such extraterritorial prosecution requires additional justification – the offence must be directed against the interests of the Russian Federation, or such possibility must be established by international agreements acceded to by the Russian Federation (Article 1.8(3) of the Administrative Offences Code). Since the term "interests of the Russian Federation" is not defined under Russian law, theoretically any foreign bribery offence involving a Russian element may be subject to administrative proceedings in Russia.

However, the risk of ungrounded investigations is limited to a certain extent by the express

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prohibition of double jeopardy – Russian jurisdiction arises only if the legal entity has not been held liable in a foreign state. To date, apparently no Russian or foreign entity has been convicted for bribery committed outside of Russia under these rules.

Cross-border data transfer

Bribery and anti-corruption investigations by non-Russian law enforcement authorities, as well as corporate investigations by international businesses whose Russian operations may be the target of such enforcement actions, regularly require the transfer of protected data from Russia to foreign jurisdictions. The collection and cross-border transfer of such data is subject to extensive Russian regulation.

In particular, emails, WhatsApp messages, text messages and other correspondence by Russian employees are protected by the privacy of communication principle. Unless the Russian company has adopted internal rules on the use of office communication tools for business purposes only, the collection and transfer of such data requires the prior written consent by the relevant employees.

The transfer of personal data of Russian employees also requires the relevant employee's written consent to the transfer (which may, by way of precaution, also be reflected in the employment agreement). In case of a cross-border transfer, such a transfer must be specifically allowed by the consent. Since the employee's consent can be difficult to obtain in practice, the relevant data may have to be depersonalised prior to the transfer. Further, a data-transfer agreement must be signed between the employing Russian company and any foreign recipient. In addition, due to Russian data localisation requirements, the primary database for personal data transferred abroad must be set up in Russia and, prior to the transfer of any new data, be updated accordingly.

Further, confidential materials may be protected by the co-called commercial secret regime (i.e. statutory rules, according to which the owner of confidential information can take certain specifically listed measures to achieve protection of the materials as "commercial secret") or otherwise be subject to confidentiality obligations of the company. In this case, sufficient confidentiality obligations must be imposed on the third party recipient to maintain the protection of the materials as confidential following a cross-border data transfer.

Attorney-client privilege

There is no general attorney-client privilege under Russian law. Only the results of the work of specially licensed advocates on client matters are protected. These results fall under what is known as advocate secrecy and are barred from being used as evidence for the prosecution. However, the materials can still be seized by the Russian law enforcement authorities based on a court order.

Therefore, it is for the investigators to take practical measures to protect the results of the investigation – such as excluding particular sensitive information from the documentation and limiting the scope of correspondence regarding the investigation results. Apart from that, the investigators must consider what is required to maintain privilege protections under other jurisdictions – in particular, the U.S. attorney-client privilege.

Determination of beneficial owners

For various reasons, the beneficial owners of Russian businesses are often concealed by sophisticated cross-border corporate structures. Amendments to Federal Law 115-FZ "On Combating Money Laundering […]", which have been effective since December 2016, upped the pressure on Russian legal entities to identify their beneficial owners.

Each Russian legal entity must now take feasible action – even in difficult circumstances – to

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identify their Russian or foreign beneficial owners and, upon request, disclose such information to the Russian Federal Financial Monitoring Service or the tax authorities. Shareholders and persons otherwise controlling a legal entity are obliged to provide the required information to the legal entity. The beneficial owner data must be verified once a year and kept for at least five years. Failure to collect, disclose or provide relevant information may result in administrative fines for legal entities and their officers.

However, in 2018 the Russian Federation for the first time took comprehensive counter-measures to respond to the US/EU sanctions. One of these measures was restricting the disclosure of information with respect to sanctioned persons in publicly available sources (e.g. the Legal Entities' Register). Apparently, these restrictions are designed to protect the business partners of sanctioned persons from the consequences of sanctions violations. In practice, these sanction-driven restrictions may complicate the determination of the beneficial owners of Russian businesses for anti-bribery and corruption purposes.

Corporate liability for bribery and corruption offences

Administrative liability of legal entities

For bribery and corruption, companies may be held liable according to Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of a Legal Entity; see above). Under the Administrative Offences Code, a legal entity shall be guilty of an administrative offence, if it can be established that it has not taken all measures which are necessary to ensure compliance with the regulations whose violation constitutes the relevant administrative offence (Article 2.1 (2)).

Since its introduction in 2013, these measures arguably include a raft of measures listed in Article 13.3 of the Anti-Corruption Law (see below). That means that a legal entity accused of an offence according to Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of a Legal Entity) may claim that it has taken all measures necessary to prevent such bribery committed by its employees or agents.

Article 13.3 of the Anti-Corruption Law

Article 13.3 of the Anti-Corruption Law obliges organisations to develop and implement measures to prevent corruption. According to the law, these measures can include, but are not limited to:

- designating departments and officers responsible for preventing bribery and other violations of law;
- cooperating with law-enforcement authorities;
- developing and implementing policies and procedures designed to ensure ethical business conduct;
- adopting a code of ethics and professional behaviour by its employees;
- identifying and regulating conflicts of interest; and
- preventing the creation of false accounts und the use of forged documents.

The general obligation under the Anti-Corruption Law to develop and implement anti-corruption measures is further elaborated by the "Methodical Recommendations for the Development and Adoption of Anti-Corruption Measures […]" of the Federal Labour Ministry dated 8 November 2013. This document lists in detail the specific steps which are recommended to be taken by organisations in order to fully comply with their obligation under the Anti-Corruption Law.

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Anti-corruption measures as defence

In 2018, the Supreme Court of the Russian Federation for the first time expressly referred to the requirements of Article 13.3 of the Anti-Corruption Law in a decision when convicting an organisation for bribery (Order 5-AD17-110 of 21 February 2018). According to available court practice, some of the lower courts have also referred to Article 13.3 of the Anti-Corruption Law in their decisions. Further, following information published on the website of the General Prosecutor's Office, the Prosecutor's Offices at the municipal level apparently have started to consider non-compliance with these requirements when bringing bribery charges against legal entities.

However, even though a legal entity's anti-corruption efforts seem to play an increasingly important role in the Russian enforcement practice, available court practice still gives no guidance on the proper implementation of the anti-corruption measures in order to avoid liability under Article 19.28 of the Administrative Offences Code.

Inspection of companies

Outside of bribery investigations, public prosecutors are actively performing inspections of Russian organisations to check whether they have actually adopted the anti-corruption measures of Article 13.3 of the Anti-Corruption Law. These inspections seem to be quite frequent and target mostly Russian limited liability companies. Practice shows that Russian subsidiaries of foreign companies are also subject to such checks.

Russian law does not specify sanctions for non-compliance with the requirements of Article 13.3 of the Anti-Corruption Law. Therefore, if companies have not complied with the Prosecutor's Office's request to remedy defects identified during the inspection, the prosecutors file civil law claims against those companies "in the interest of an indefinite number of persons", which are processed by the courts. These claims regularly result in court orders obliging the companies to implement specific anti-corruption measures within a certain time period – usually one to two months.

The relevant court practice confirms that each organisation operating in Russia must implement the anti-corruption measures of Article 13.3 of the Anti-Corruption Law – irrespective of its legal form or the number of its employees. For example, even small limited liability companies with not more than 15 employees are obliged to fully implement the anti-corruption measures according to Article 13.3 of the Anti-Corruption Law.

Liability of corporate bodies

Each director of a Russian legal entity (CEO, management board member, supervisory board member) has statutory duties to act in the interest of the company, and to exercise his rights and obligations in good faith and reasonably. A director is liable for damages, including lost profit, caused to the company due to his culpable actions or inaction.

Already in 2013, the Russian Supreme Commercial Court issued clarifications of certain questions which had arisen in court cases dealing with directors' liability. The court stated that directors must take necessary and sufficient measures to ensure that the company complies with its public obligations imposed by applicable law. Otherwise, the penalties paid by the company due to non-compliance can be recovered from the director. Approval by the company's shareholders' meeting does not exclude this liability.

There is no statutory obligation of the company's corporate bodies to claim damages from directors. However, in recent years the number of successful court proceedings against directors to recover penalty payments has been constantly increasing. In most cases, claims were made against the company's CEO to recover penalty payments for administrative

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violations which occurred during the company's day-to-day operations. Also supervisory board members – in particular, those of public joint stock companies – have been subject to such claims.

In case of bribery offences, so far the courts seem to have required that the director performed actions that resulted in the company's liability under Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of a Legal Entity) to constitute his personal liability for compensation of damages. That means that the mere failure to prevent bribery (i.e. failure to implement anti-corruption measures according to Article 13.3 of the Anti-Corruption Law) currently does not suffice to recover penalty payments from the management.

Proposed reforms / The year ahead

Extended term for investigations into foreign companies

Currently, the Prosecutor's Office must complete an investigation for corporate bribery under Article 19.28 of the Administrative Offences Code (Unlawful Remuneration on Behalf of a Legal Entity) within a maximum of two months after the case has been opened. Legislative changes which have been adopted by the State Duma at its first reading on 17 July 2019 (Draft Law 711643-7), provide for an option to extend this term to up to 12 months in cases where judicial assistance is required. The explanatory comments to the bill explain these changes by the need to obtain judicial assistance in foreign states when prosecuting foreign legal entities for domestic or foreign bribery which is directed against the interests of the Russian Federation (see above). This may be an indication that in future, Russia intends to intensify its efforts to prosecute foreign companies for bribery as well.

Sanctions for violation of data localisation requirements

On 10 September 2019, the State Duma adopted at its first reading, legislative changes which would introduce severe fines for non-compliance with Russian data localisation rules (Draft Law 729516-7). Since 2015, these rules require that personal data of Russian citizens must primarily be stored and processed using databases located in Russia (see above). The now proposed fines for violations of these requirements by legal entities are up to RUB 6 million (US$ 90,000) for the first offence and RUB 18 million (US$ 270,000) for repeated offences. These fines mainly target non-compliant data operators on the internet such as the organisers of information distribution, owners of audio visual services and search engine operators. However, the sanctions could also apply to the processing of Russian personal data when operating cross-border whistleblower hotlines or conducting corporate investigations.

Criminal liability for transfer of information relating to sanctioned persons

Draft Law 710099-7, submitted to the State Duma on 15 May 2019, would introduce a new offence to the Criminal Code which punishes individuals for, among other things, the transfer of any information to organisations incorporated under the laws of states taking so-called unfriendly actions (i.e. the U.S. or EU member states), provided that this information transfer enabled the imposition of anti-Russia sanctions. The maximum penalty under this offence is up to five years' imprisonment with a fine of up to RUB 5 million (US$ 75,000) and a ban from certain professions for up to 10 years. The main purpose of this bill is to protect companies maintaining relations with sanctioned persons from being added to U.S. sanctions lists. If adopted, it could significantly complicate the cross-border transfer of information on Russian businesses, such as findings regarding their ultimate beneficial owners (see above) or the results of corporate investigations.

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Singapore

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Brief overview of the law and enforcement regime

The Attorney-General plays the role of the Public Prosecutor in Singapore. As the Public Prosecutor, the Attorney-General has powers to institute, conduct or discontinue any proceedings for any offence. The Attorney-General has the control and direction of all criminal prosecutions and proceedings in Singapore.

Criminal offences in Singapore are prosecuted under a number of different statutes. The main criminal law statute is the Penal Code (Chapter 224), which sets out a wide range of statutory offences, including murder, cheating, theft, criminal misappropriation and rape. The Singapore Police Force is the main enforcement agency that is responsible for investigating criminal conduct.

Bribery offences are usually prosecuted under the provisions of the Prevention of Corruption Act (Chapter 241). The Corruption Practices Investigation Bureau (the "**CPIB**") is the enforcement agency that is responsible for investigating offences relating to corruption and bribery. In respect of bribery offences, punishments that the Court can impose include fines and custodial sentences. The Court can also order that the corrupt offender forfeit gratification received.

Money-laundering and similar offences are commonly prosecuted under the provisions of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A). Such offences are commonly investigated by the CPIB and the Commercial Affairs Department of the Singapore Police Force (the "**CAD**").

Securities and market misconduct offences are mainly prosecuted under the provisions of the Securities and Futures Act (Chapter 289) and the Companies Act (Chapter 50). These offences are investigated, often jointly, by various enforcement agencies, including the CAD, the Monetary Authority of Singapore and the Accounting and Corporate Regulatory Authority. On 13 March 2018, MAS and CAD announced that they would extend their joint investigations arrangement to cover all offences under the Securities and Futures Act and Financial Advisers Act.

Overview of enforcement activity and policy during the last year

Singapore adopts a zero-tolerance stance towards corruption and bribery. In the most recent Transparency International *Corruption Perceptions Index* (TI-CPI) 2018, Singapore was ranked the third-least corrupt country out of 180 countries and territories.

The majority of prosecutions for bribery in Singapore continue to be against private

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sector employees. According to the recent 2018 CPIB Corruption Statistics Press Release ("**CPIB Press Release**"), approximately 88% of all cases registered for investigation by the CPIB in 2018 involved private sector individuals. In respect of cases that resulted in prosecutions, in 2018, 112 individuals were charged in Court for bribery-related offences. Of these, five involved public sector employees. Upon conviction, custodial sentences were imposed in the majority of cases.

In its recent CPIB Press Release, the CPIB identified the following areas of concern for corruption-related offences involving private sector employees: Construction Activities (involving building construction, work safety and inspection of construction work), and Building Maintenance Work (such as water leakage repair, air-conditioning maintenance, painting works and building maintenance-related inspections).

The CPIB has continued to pursue Singapore's zero-tolerance stance towards corruption. In the past year, the CPIB has emphasised its commitment to enhancing its ability to detect and investigate corruption offences. It has also highlighted the importance of support and commitment from different segments of society and the community. The CPIB has encouraged members of the public to report suspected acts of corruption, and private sector companies to take steps to combat corruption in their business transactions. It also launched the *Anti-Corruption Partnership Network* in September 2018 to promote ownership over the prevention of corruption in the private sector.

Singaporeans who commit corrupt acts overseas can be prosecuted under the provisions of the Prevention of Corruption Act, which provides for extra-territorial powers over Singapore citizens. The global nature and impact of corruption offences have been highlighted by the ongoing investigations related to Operation Car Wash in Brazil, the country's biggest anti-graft crackdown. This has resulted in investigations in Singapore involving various significant players in the offshore and marine industry.

Law and policy relating to issues such as facilitation payments and hospitality

Singapore's anti-bribery law does not provide an exemption for facilitation payments. Under the Prevention of Corruption Act (Chapter 241), any gratification that is given to or received by a person in the employment of the Government, or any Government department, or a public body, from a person who has or seeks to have any dealing with the Government or department or public body, is presumed to be a corrupt bribe. The Prevention of Corruption Act (Chapter 241) also provides for enhanced penalties where the corrupt offence was committed in relation to a contract or a proposal for a contract with the Government, or any Government department, or a public body.

The Prevention of Corruption Act (Chapter 241) also does not provide an exemption for hospitality payments. For such payments, it is a question of fact in every case as to whether the payment was a corrupt gratification. This would be established if there was an objectively corrupt element in the gift, and if it was given with subjective knowledge that the gift was meant to act as an improper influence.

The Prevention of Corruption Act (Chapter 241) further provides that, in any proceedings under the Act, it is not permitted to admit evidence to show that any corrupt gratification is customary in any profession, trade, vocation or calling. As such, even if it is customary to make corrupt payments in the form of facilitation payments or hospitality gifts, it is not possible to adduce any evidence to establish this fact.

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Key issues relating to investigation, decision-making and enforcement procedures

The CPIB is empowered to investigate any person, including police officers and Government ministers. The Prevention of Corruption Act (Chapter 241) provides that, in any trial or inquiry by a court into a corruption offence, if an accused is in possession of pecuniary resources or property that is disproportionate to his known sources of income for which he cannot satisfactorily account, that may be taken into consideration by the Court as corroborating the testimony of any witness that the accused had accepted a bribe.

There is no formal process for plea-bargaining in Singapore. It is nevertheless common for Defence Counsel to engage in discussions with the Prosecution to seek a withdrawal or reduction of charges. It is also common for Defence Counsel to engage in discussions with the Prosecution to seek a plea offer, so that the accused person can consider whether to plead guilty. These discussions are generally conducted in Criminal Case Management System Conferences, which are organised by the Attorney-General's Chambers.

The Criminal Justice Reform Act was passed by Parliament on 19 March 2018 and, amongst others, introduced the option of deferred prosecution agreements ("**DPAs**") under which an accused can negotiate terms with the Attorney-General to avoid prosecution in return for adherence to various conditions imposed. Singapore's DPA regime is broadly modelled on the United Kingdom's approach. A DPA in Singapore can be entered into only in respect of offences specified in the Sixth Schedule of the Criminal Procedure Code (Chapter 68), which includes corruption-related offences under the Prevention of Corruption Act (Chapter 241). As at the time of writing, there are no reported cases of any DPAs having been approved by the Singapore High Court.

There is no formal process for self-reporting bribery and corruption cases. Persons who provide the CPIB with information or evidence of corrupt activities as 'whistle-blowers' are not provided with any statutory protection against prosecution. The decision on whether to prosecute a 'whistle-blower' who was involved in unlawful activities remains at the discretion of the Attorney-General.

The Prevention of Corruption Act (Chapter 241) provides statutory protection to keep the identity of informants confidential. The Act provides that no witness shall be permitted to disclose any matter in Court which might lead to the discovery of the name or address of any informer in a corruption case.

In the course of investigations or proceedings relating to a corruption offence by any person in the service of the Government or any public body, the Attorney-General is given additional and extensive powers to obtain information from the accused person and even his family members. Section 21 of the Prevention of Corruption Act (Chapter 241) specifically empowers the Attorney-General in such cases to issue a written notice to:

(a) require that person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by that person and by the spouse, sons and daughters of that person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;

(b) require that person to furnish a sworn statement in writing of any money or other property sent out of Singapore by him, his spouse, sons and daughters during such period as may be specified in the notice;

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(c) require any other person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by that person where the Public Prosecutor has reasonable grounds to believe that the information can assist the investigation;

(d) require the Comptroller of Income Tax to furnish, as specified in the notice, all information available to the Comptroller relating to the affairs of that person or of the spouse or a son or daughter of that person, and to produce or furnish, as specified in the notice, any document or a certified copy of any document relating to that person, spouse, son or daughter which is in the possession or under the control of the Comptroller;

(e) require the person in charge of any department, office or establishment of the Government, or the president, chairman, manager or chief executive officer of any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control; and

(f) require the manager of any bank to give copies of the accounts of that person or of the spouse or a son or daughter of that person at the bank.

Singapore does not apply any period of limitation to the enforcement or prosecution of criminal offences.

Overview of cross-border issues

As mentioned above, the Prevention of Corruption Act (Chapter 241) has extra-territorial jurisdiction in relation to acts committed by Singapore citizens. The Act provides that its provisions will have effect, in relation to citizens of Singapore, outside as well as within Singapore. Where an offence under the Prevention of Corruption Act (Chapter 241) is committed by a Singapore citizen in any place outside Singapore, that Singapore citizen may be dealt with in respect of that offence as if it had been committed in Singapore.

The Mutual Assistance in Criminal Matters Act (Chapter 190A) sets out the framework for providing and obtaining international assistance in criminal matters. Such assistance may include:

(a) identifying and locating a person who is believed to be in Singapore;

(b) obtaining evidence;

(c) arranging for the attendance of persons in foreign countries;

(d) seeking custody of persons travelling through Singapore; and

(e) enforcement of foreign confiscation orders.

The CPIB often works closely together with other anti-corruption enforcement agencies, such as the United Kingdom Serious Fraud Office. It also has a strong working relationship with other anti-corruption enforcement agencies in the region and in October 2018, the CPIB assumed Chairmanship of the Southeast Asia Parties Against Corruption (SEA-PAC), a grouping of anti-corruption agencies from ASEAN countries.

In 2018, CPIB worked with the United Nations Office on Drugs and Crime to conduct a training course, held in Singapore, on "Combating Corruption: Financial Investigations Techniques and International Cooperation Mechanisms". The course was aimed at improving the knowledge and skills of investigators and prosecutors that handle financial crime and corruption cases. Various anti-corruption officials and investigators from Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, India, Indonesia, Lao

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PDR, Malaysia, Maldives, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Vietnam attended.

Corporate liability for bribery and corruption offences

It is possible for a company to be held liable for criminal conduct. The Prevention of Corruption Act (Chapter 241) states that any "person" who commits corruption shall be guilty of an offence. Similarly, the Penal Code (Chapter 224) states that every "person" shall be liable to punishment for every act or omission that is contrary to the provisions of the Code. The Interpretation Act (Chapter 1) defines a "person" as including any company or association or body of persons, corporate or unincorporated.

Whilst it has historically been rare for companies to be prosecuted for bribery and corruption offences, in 2018, two companies were charged with and convicted of one count of corruption each for being in conspiracy with their own directors and shareholders to corruptly give gratification to a town council general manager as an inducement to advance the business interests of the companies. The town council general manager and a director and shareholder of the companies were also charged and convicted of corruption offences.

Proposed reforms / The year ahead

Singapore has been consistently ranked as one of the least corrupt countries in the world in publications such as Transparency International's *Corruption Perceptions Index* and is expected to continue to emphasise its zero-tolerance policy towards corruption.

In line with a nationwide movement to transform Singapore through technology into a "Smart Nation", CPIB has focused on leveraging technology to enhance the effectiveness of its investigations, and further developed the capabilities of its computer forensics branch to include the use of polygraph testing. It is expected that the CPIB, together with Singapore's other enforcement agencies, will continue, in the year ahead, to develop its technological capabilities and processes to assist with and enhance its investigations.

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May Ling's key areas of practice are in corporate & commercial disputes and white collar crime & investigations. She has acted in a wide range of matters for multinational corporations, corporate trustees and private and publicly-listed entities.

May Ling advises companies on putting in place and managing whistleblowing and dawn raid policies and procedures. She also regularly acts for companies who are conducting internal investigations and/or are involved in investigations by enforcement authorities such as the Commercial Affairs Department, Corrupt Practices Investigation Bureau and the Monetary Authority of Singapore. This includes situations where the investigations develop into criminal prosecutions by the Attorney-General's Chambers.

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Slovenia

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Brief overview of the law and enforcement regime

According to Transparency International ("TI") Slovenia, a positive trend towards reducing corruption has been observed in Slovenia because, since 2015, Slovenia has improved its position by four places according to the *Corruption Perceptions Index*. However, we still cannot talk about significant progress, as the country still occupies only 31st place among the 176 countries that have been surveyed.

Corruption in the public sector, as a consequence of poor governance, non-transparent adoption of legislation, lobbying and wrong actions by the justice administration, remains the main problem in Slovenia concerning corruption and bribery. Recently, the most significant and, in the opinion of many, the most problematic type of corruption is in the public health system, especially in public procurement. Otherwise, it should be emphasised that Slovenia is ranked highest in the detection and control of corruption among the EU Member States from Central and Eastern Europe, as it has a fairly well-developed legal and institutional anti-corruption framework.

In 2002, the Commission for the Prevention of Corruption ("CPC") was established on the basis of the Prevention of Corruption Act ("PCA") and the UN Convention against Corruption ("UNCAC"), which replaced the previous Office of the Government of the Republic of Slovenia for the Prevention of Corruption, and Slovenia got an independent State body with greater powers in the fight against corruption. In 2010, the Integrity and Prevention of Corruption Act ("IPCA") came into force and the PCA therefore expired. The Act brought the most important changes for the CPC, but above all, it significantly expanded its tasks and responsibilities, including the introduction of certain mechanisms for verifying the property situation, and with the provisions on the protection of applicants and lobbying, but it also significantly expanded its tasks and responsibilities, and increased its independence.

Since then, the president of the Commission has been appointed by the President of the State on the proposal of a special commission. In 2014, the act amending the Political Parties Act came into force which, after a warning from the GRECO Group stating that in this area there remained a considerable gap in the Slovenian legislation, finally regulated and limited the financing of political parties in the light of the prevention of corruption, in particular by banning legal entities' donations to parties.

Slovenia received the first legal description of the concept of *corruption* in the Code of Obligations, which summarised the definition of the Civil Law Convention on Corruption of the Council of Europe of 1999. A more detailed definition came only with the 2004 PCA, followed by the definition of the IPCA. In accordance with Slovenian

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law, corruption is defined as follows: "*any violation of due operation of functionary or responsible persons in the public or private sectors, as well as the operation of persons instigating violations or persons who can take advantage of the violation through directly or indirectly promised, offered or given or required, accepted or expected benefit for themselves or for another person*". With the term "any violation" we understand all forms of behaviour, both services and omissions, committed either in the public or in the private sector, or where the boundaries between the two spheres are not completely clear. In addition, the principle of universality applies for violation, so that all corruptive activities are possible, either abroad or at home.

Corrupt practices, which are also criminal offences, are specifically defined by the Criminal Code of the Republic of Slovenia ("CC-1"), which contains eight corruption crimes:

1. Obstruction of freedom of choice of voters (Article 151).
2. Acceptance of a bribe in elections (Article 157).
3. Unauthorised acceptance of gifts (Article 241).
4. Unauthorised giving of gifts (Article 242).
5. Acceptance of bribes (Article 261).
6. Giving bribes (Article 262).
7. Accepting benefits for illegal intermediation (Article 263).
8. Giving of gifts for illegal intervention (Article 264).

Roughly speaking, the abovementioned criminal offences can be divided according to who can be the perpetrator of an individual offence; on the active side, the perpetrator can be anyone, whereas the passive side can only include individual categories of persons: these are usually officials who are punished more strictly for the same offence than informal persons. An official, as defined by the CC-1, is in accordance with the law:

- a member of the National Assembly, a member of the National Council, and a member of a local or regional representative body;
- a Constitutional Court judge, a judge, a lay judge, State prosecutor, or State defender;
- a person carrying out official duties or exercising a public function with management powers and responsibilities within a State authority;
- any other person exercising official duties by authorisation of the law or by-law, or of the contract on arbitration concluded on the basis of the law;
- a military person designated as such, with special regulations in instances where the act is not already criminalised as a criminal offence against military duty;
- a person in a foreign country carrying out a legislative, executive or judicial function, or any other official duty at any level, providing that he/she meets the substantive criteria under points 1, 2, or 3 above;
- a person recognised as an official within a public international organisation providing that he/she meets the substantive criteria under points 1, 2, or 3 of this paragraph; or
- a person carrying out judicial, prosecutorial or other official function or duty with the international court or tribunal.

In any case, Slovenian legislation makes an important distinction between **corruption crimes** and **corrupt practices**. Corruption crimes are only the above-mentioned crimes, which are defined as such by the CC-1, while in accordance with the IPCA, corrupt practices cover a much broader range of practices (other than criminal offences).

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Corruption crimes

The criminal offence of **obstruction of freedom of choice** under Article 151 of the CC-1 is committed by those who attack the voters' right to a free decision, namely at an election or ballot, so that a person compels another person to vote, or not to vote, or to cast a void vote, or to vote in favour of or against a particular proposal by means of force, serious threat, bribery, deception or in any other unlawful manner and shall be punished by a fine or sentenced to imprisonment for not more than one year. This criminal offence can be committed by anyone, but if it is committed by an official, such an official shall be sentenced to imprisonment for not more than two years. However, a legal person may also be responsible for this offence.

The criminal offence of **acceptance of a bribe during the election or ballot** under Article 157 of the CC-1 is so-called pre-passive bribery, committed by those who demand or accept any award, gift or other material or non-material gain for himself or a third person for voting or not voting, or for casting his vote in favour of or against a certain proposal, or for casting an invalid vote, and such perpetrators shall be punished by a fine or sentenced to imprisonment for not more than one year.

Unauthorised acceptance of gifts under Article 241 of the CC-1 means a special type of passive bribery in business. The perpetrator of such criminal offence may not only be a responsible person who performs an economic activity, but also the legal entity shall be responsible for such criminal offence. The criminal offence is committed by whoever in the performance of an economic activity requests, or agrees to accept, for himself or any third person, an unauthorised award, gift or other property benefit, or a promise or offer for such benefit, in order to neglect the interests of his organisation or other natural person or to cause damage to the same when concluding or retaining a contract or other unauthorised benefit. For this criminal offence the perpetrator shall be sentenced to imprisonment for not less than six months and not more than six years, and he/she shall also be punished by a fine. Whoever requests or agrees to accept an unauthorised award, gift or other property benefit, for himself or any third person in exchange for making or retaining a contract or other benefit, shall be sentenced to imprisonment for not less than three months and not more than five years and shall also be punished by a fine, whereas if the perpetrator requests or agrees to accept an unauthorised award, gift or other property benefit after the contract is concluded or service performed, or other unauthorised benefit is acquired for himself or any third person, he shall be sentenced to imprisonment for not more than four years and shall be punished by a fine.

Unauthorised giving of gifts under Article 242 of the CC-1 is committed by whomsoever promises, offers, or gives an unauthorised award, gift or any other property benefit to a person performing an economic activity, intended for such a person or any third person with a view to obtaining any unjustified benefit for himself or any third person when concluding or retaining a contract or other unauthorised benefit. The perpetrator shall be sentenced to imprisonment for not less than six months and not more than six years and shall be punished by a fine. Whoever promises, offers, or gives an unauthorised award, gift or any other property benefit to a person performing an economic activity, intended for such a person or any third person in exchange for making or retaining a contract or other benefit, shall be sentenced to imprisonment for not more than four years and shall be punished by a fine.

Acceptance of bribes under Article 261 of the CC-1 means passive bribery of officials, whereby the criminal offence is committed by an official or a public officer who requests or agrees to accept for himself or any third person an award, gift or other property benefit, or a promise or offer for such benefit, in order to perform an official act within the scope of

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his official duties which should not be performed, or not to perform an official act which should or could be performed, or make other abuse of his position, or whoever serves as an agent for the purpose of bribing an official, and shall be thus sentenced to imprisonment for not less than one and not more than eight years and punished by a fine. If an official or a public officer requests or agrees to accept for himself or any third person an award, gift or other property benefit, or a promise or offer for such benefit, in order to perform an official act within the scope of his official duties which should or could be performed, or not to perform an official act which should not be performed, or make other use of his position, or whomsoever intermediates in such a bribery of the official, shall be sentenced to imprisonment for not less than one and not more than five years and punished by a fine. An official or a public officer who requests or accepts an award, gift or other favour with respect to the performance of the official act under preceding paragraphs after the official act is actually performed or omitted, shall be punished by a fine or sentenced to imprisonment for not more than four years and punished by a fine.

Giving bribes under Article 262 of the CC-1 encompasses cases of active bribery and is the counterpart of the criminal offence of accepting bribes under Article 261 of the CC-1. This criminal offence is committed by whomsoever promises, offers or gives an award, gift or other benefit to an official or a public officer for him or any third person, in order for him either to perform an official act within the scope of his official duties which should not be performed, or not to perform an official act which should or could be performed, or makes other abuse of his position, or whomever serves as an agent for the purpose of bribing an official, and shall be sentenced to imprisonment for not less than one and not more than six years, and punished by a fine. Whoever promises, offers or gives an award, gift or other benefit to an official or a public officer for him or any third person, in order for him either to perform an official act within the scope of his official duties which should or could be performed, or not to perform an official act which should not be performed, or makes other use of his position, shall be sentenced to imprisonment for not less than six months and not more than four years.

Accepting benefits for illegal intermediation under Article 263 of the CC-1 is committed by whomsoever accepts or requests an award, gift or any other favour or promise or offer for such a favour for himself or any third person, in order to use his rank or real or presumptive influence to intervene so that a certain official act be or not be performed, and shall be sentenced to imprisonment for not more than four years and punished by a fine. Whoever uses his rank or his real or presumptive influence to intervene, either for the performance of a certain official act which should not be performed, or for the non-performance of an official act which should or could be performed, is punished to the same extent. If the perpetrator, prior to or after the intervention, accepts any award, gift or other favour for himself or any third person in exchange for his intervention referred to in the preceding paragraph, he shall be sentenced to imprisonment for not less than one and not more than six years and punished by a fine.

Giving of gifts for illegal intervention under Article 264 of the CC-1 is committed by whomever promises, offers or gives an award, gift or any other favour to another person for himself or any third person, in order to use his rank, or real or presumptive influence, to intervene so that a certain official act be or not be performed, and shall be sentenced to imprisonment for not more than four years and punished by a fine. Whomever promises, offers or gives an award, gift or any other favour to another person for himself or any third person, in order to use his rank or real or presumptive influence to intervene either for the performance of a certain official act which should not be performed or for the non-performance of an

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official act which should or could be performed, shall be sentenced to imprisonment for not less than one and not more than six years and punished by a fine.

Sanctions

Natural persons

As mentioned earlier, penalties for perpetrators of corruption crimes are also dependent on the issue of whether the perpetrator is a person who is an official person in accordance with CC-1 or a natural person without the character of official persons. Penalties for perpetrators are defined in a range, namely:

- The criminal offence of obstruction of freedom of choice shall be punishable by a fine or imprisonment for not more than one year. However, if this criminal offence is committed by an official in the performance of his duty, he shall be sentenced to imprisonment for not more than two years.
- The criminal offence of acceptance of a bribe during the election or ballot shall be punishable by a fine or imprisonment for not more than one year.
- The criminal offence of unauthorised acceptance of gifts shall be punishable by imprisonment for not less than six months and not more than six years and shall also be punished by a fine.
- The criminal offence of unauthorised giving of gifts shall be punishable by imprisonment for not less than six months and not more than six years, whereby if a perpetrator declares the offence before it was detected or he knew it had been detected, his punishment may be remitted.
- The sentence for the criminal offence of acceptance of bribes is imprisonment for not less than one and not more than eight years and punished by a fine.
- The criminal offence of giving bribes shall be punishable by imprisonment for not less than six months and not more than six years, whereby if a perpetrator declares the offence before it was detected or he knew it had been detected, his punishment may be remitted.
- The criminal offence of accepting benefits for illegal intermediation shall be punishable by imprisonment for not more than six years and punished by a fine.
- The criminal offence of giving of gifts for illegal intervention shall be punishable by imprisonment for not more than six years and punished by a fine, whereas if a perpetrator declares the offence before it was detected or he knew it had been detected, his punishment may be remitted.

Reduction of sentence

For almost all of the abovementioned corruption crimes, the CC-1 allows for the possibility that the perpetrator is not punished or it applies a less severe type of sentence. The court has the possibility to remit the punishment when the perpetrator declares the offence before the competent authority, i.e. the State prosecution service, court or the authority of the interior, before the criminal offence was detected or he knew it had been detected.

Confiscation of property

In addition to the prescribed sentences and as a side sanction with all corruption crimes, the CC-1 also provides for the confiscation of property benefits gained through the committing of such criminal offence.

Intention

All corruption offences can only be done by direct intent. This means that a negligent form of execution of any criminal offence is not possible. Due to the special nature of corruption

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offences, however, it should be further emphasised that for all actions that we perceive as corruption, it is required or essential that there is "corruptive purpose". We speak about such a purpose when a benefit is promised or given with the intention to encourage or reward the violation of due conduct, or when the benefit is accepted for the repayment of due conduct.

Overview of enforcement activity and policy during the last year

Financing of political parties

The Political Parties Act was passed in 1994, but in 2013 it was significantly amended. The amendments occurred mainly due to the conclusion of the GRECO group that Slovenian legislation does not meet the standards of the Council of Europe, mainly due to the lack of transparency of contributions and loans for electoral campaigns.

With the Political Parties Act that was amended in 2013 and the Elections and Referendum Campaign Act this area was regulated, namely with a complete prohibition of contributions from businesses to political parties. Contributions for a political party can thus only be made by natural persons, but only up to the amount determined on the basis of the act governing the tax procedure. In addition, the contributions of a natural person may not exceed in the year 10 times the gross monthly salary per worker in the Republic of Slovenia. The two laws also brought a much stricter arrangement of loans to political parties. Parties may only obtain loans from banks and loan institutions under the same conditions as other legal entities. A party may also obtain a loan from a natural person provided that a loan agreement is concluded in writing, while the amount of the loan of a single natural person may not exceed 10 times the average gross monthly salary per year.

Control over the operations of political parties is carried out by the Court of Audit, and a political party and the responsible person shall be punished for violations by a fine.

Erar application

Public procurement of works, goods and services in Slovenia account for a large share of GDP, which is why transparency in this area, in connection with the prevention of corruption, is all the more important. In the area of transparency of public procurement, Slovenia introduced an important novelty when in 2007 it launched the public procurement portal e-Procurement Supervisor for the publication of public procurement notices and tender documents.

The supervisor application, now named Erar, provides information on business transactions of public sector bodies, including the bodies of the legislative, judicial and executive branches. The application lists receipts of funds for all services and goods and payments above €4,000, as well as the dates and purposes of transactions. The application is managed by the CPC, and in 2013 it also received the United Nations Prize for significant achievements in the public administration.

Restrictions on the acceptance of gifts

The restrictions on accepting gifts of public officials are also regulated by the IPCA, which defines protocol and occasional gifts in Article 30.

Protocol gifts are gifts given to officials by representatives of other State bodies, other countries and international organisations and institutions on the occasions of visits, guest appearances and other occasions, and other gifts given in similar circumstances, while occasional gifts of small value are gifts given on special occasions that do not exceed €75 in value, and a total value that does not exceed €150 during a particular year when they are received from the same person. In no circumstances may money, securities or precious metals be accepted as a gift of small value.

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Restrictions on the acceptance of gifts in accordance with the IPCA apply to officials, State authorities, local communities and holders of public authority, but the disposal of gifts is stipulated in more detail in the Rules on restrictions and duties of officials regarding the acceptance of gifts.

Lobbying

The CPC is also competent for the control of lobbying and lobbyists, who received their first regulation in 2010 when the first legal provisions on lobbying, including the register of lobbyists, came into force.

The IPCA defines that lobbying means the activities carried out by lobbyists who, on behalf of interest groups, exercise non-public influence on decisions made by State and local community bodies, and holders of public authority in discussing and adopting regulations and other general documents, as well as on decisions made by State bodies, the bodies and administrations of local communities, and holders of public authority on matters other than those which are subject to judicial and administrative proceedings, and other proceedings carried out according to the regulations governing public procurement, as well as proceedings in which the rights and obligations of individuals are decided upon. Lobbying means any non-public contact made between a lobbyist and a lobbied party for the purpose of influencing the content or the procedure for adopting the aforementioned decisions. The purpose of the law is to ensure transparency of lobbying, promoting good and preventing bad practices in this field.

As already stated above, Slovenia requires the registration of lobbyists, and a mechanism for monitoring lobbying activities has also been established. The law obliges all public servants to inform the CPC of any lobbying contacts, and any attempt at illegal lobbying. For unlawful lobbying, the following conditions must be met:

- a non-public contact between a lobbied person and a lobbyist or a representative of an interest organisation;
- the purpose of influencing decision-making within the public sector in matters of public interest; and
- influencing or lobbying is carried out in the interest, name or at the expense of a particular interest organisation.

Controlling the property status of persons with obligations

One of the important measures in the fight against free corruption, which Slovenia introduced in 1994, is the system for declaring the assets of public sector employees. This system was strengthened by the IPCA, and was significantly revised in 2011 by the IPCA-B amendment. The amendment brought a simplified electronic system for persons with obligations to declare their assets.

Persons with obligations who, in accordance with the IPCA, are liable to declare to the CPC their assets are: professional officials; non-professional mayors and deputy mayors; high-ranking civil servants; managers of public agencies, public funds, public institutes, public utility institutes, and other entities in which a dominant influence is held either by the State or a local community; persons responsible for public procurement; civil servants of the National Review Commission for Reviewing Public Procurement Award Procedures; citizens of the Republic of Slovenia who hold office in EU institutions; and members of the board of directors, the supervisory board, procurators, and the chief compliance officer of the Slovenian Sovereign Holding ("SSH").

Persons with obligations must declare changes in their assets by 31st January of the current

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year for the previous year, but it should be emphasised that there are many persons with obligations. According to the CPC data, there are about 10,000 of them. Persons with obligations shall report: any change in the function, activities or ownership, or of shares, stocks and management rights in a company, private institution or other private activity; any change in shares, stocks and rights held by the aforementioned entities in another company, institution or private activity; and any other change in assets that exceeds €10,000. Communication of changes shall be made via an electronic form available at the Commission's web page, which also includes the possibility to state the reason for the increase of the assets. Some data from asset declarations are then publicly posted on the CPS's website.

Law and policy relating to issues such as facilitation payments and hospitality

With precise and comprehensive regulation of the acceptance of gifts, there is less opportunity for groundless attacks on or doubts in the honesty of officials as they perform their public function. The handling of gifts and the maintenance and content of gift lists are laid out in the Rules on the Restrictions and Duties of Officials Regarding the Acceptance of Gifts ("RDORAG"), but the rule of thumb is that an official may not accept gifts or other benefits in relation to the performance of their public function, with the exception of protocol gifts and occasional gifts of small value (no single gift may exceed €75 in value, and the total value of all gifts received from the same person in a single year may not exceed €150). In no circumstances may money, securities or precious metals be accepted as a gift of small value. All gifts received, with the exception of gifts not exceeding €25 in value, and their values must be recorded on the gift list; state- and other bodies must forward the lists to the CPC to be included in the public catalogue of accepted gifts, published annually on the CPC's website.

Restrictions on the acceptance of gifts apply to officials, state bodies, local communities and holders of public authority. For the public sector, issues of conflict of interest, monitoring of assets, receiving gifts and/or hospitality are regulated by the Public Employees Act ("PEA"). The PEA applies to individuals employed in the public sector. For a general overview, our legislation forbids officials to accept or demand gifts or benefits that could influence or appear to influence the performance of duties, with the exception of conventional hospitality and minor gifts. Gifts received from functionaries or civil servants of other states or international organisations, given during visits, guest appearances or on other occasions, and other gifts given in similar circumstances, are deemed as protocol gifts.

The prohibition and the restriction also apply to the spouses of public servants, to persons living with civil servants in extramarital communities, their children, parents, and persons living with civil servants in joint housekeeping. Civil servants are obliged to warn donors that gifts exceeding the above-mentioned value set will become the property of the employer. In case the donor insists on presenting the gift, civil servants or persons pursuant are obliged to deliver the gift to the employer or to the body of the employer authorised to dispose of the gifts. Data on the accepted gifts, their value, the donors and other circumstances need to be entered in a list of gifts. Civil servants accepting the gifts are obliged to report the data subject to entry.

Regarding the issue about hospitality, the CPC took the view that the following practices cannot be considered as gifts within the meaning of the IPCA:

- lunch, dinner, reception or similar event intended primarily for official conversations or arrangements in the official's field of work or for making contacts that are appropriate and necessary for the performance of the official's function;

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- lunch, dinner, reception or similar event organised as a social event, if such events are common in the circles or sphere in which the official performs his function; and
- lunches, dinners, receptions or similar events attended by a functionary commanded by the customs, rules of conduct or protocols of the country in which the event takes place.

Lunch, dinner, banquet, etc. as an intangible benefit, according to the CPC, receives the status of a gift in accordance with the IPCA when it is actually provided or given as a gift to a functionary who is motivated by work already performed or expected to be performed, which is part of his function (e.g. if a functionary, who, in the course of his work, provided or assisted in establishing contacts between an economic operator and a business partner abroad, the representative of that economic operator invites him to thank him for lunch). In the light of the above, therefore it is not possible to answer in general whether some gifts (such as hosting a functionary) constitute a gift within the meaning of the provisions of the IPCA. It all depends on the circumstances of the particular case.

Key issues relating to investigation, decision-making and enforcement procedures

Criminal police, public prosecutors, the National Bureau of Investigation and the CPC are primarily responsible for investigating and detecting corruption. The CPC was established in 2002 and has already undergone many institutional changes, which have brought more powers to it, and thus increased its capacity.

Despite the fact that corruption offences have already been defined in our legislation, the first systemic law in the area of corruption was only adopted in 2004, namely the PCA (2004), which provided the basis for the establishment of the CPC. The CPC's primary task was more of a preventive nature, which was finally amended by the IPCA (2011). The latter brought to the CPC new competences, guaranteed its independence, shaped it as a minor offence authority, and defined non-reporting of property status by persons with obligations as offences.

Commission for the Prevention of Corruption (CPC)

Today, the CPC has thus a wide range of competences, but it does not have the power to investigate corruption practices, and it cannot use certain techniques, such as covert investigation measures, for which the police are solely responsible. In any case, the Commission cooperates with the police and the prosecutor's office and keeps them informed on a regular basis about suspected criminal offences. If necessary, it then cooperates with both authorities to detect these criminal offences. As already said, the CPC became a minor offence authority with the enforcement of the IPCA.

This means that the law gives it the power to rule in minor offences proceedings and to impose sanctions.

The CPC may, within its jurisdiction, punish individuals for various offences, responsible persons, holders of public authority and other legal entities of public or private law and interest organisations. The maximum fine that can be imposed on an individual is €2,000, while for a responsible person it is €4,000, and for a holder of public authority and other legal entities of public or private law or interest organisation, it is €100,000.

The CPC is an autonomous and independent body and, in its work, is bound only by the Constitution and laws, and it answers to none of the three branches of power for its work. It is led by the president who organises the work; otherwise the Commission is a collegiate body with three members who deliver decisions at sessions. The Commission supervises and deals with cases of suspicion of corruption on the basis of the IPCA within

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the Supervisory and Investigation Service ("SIS"). SIS also deals with the protection of applicants, incompatibility of functions, restrictions on accepting gifts, restrictions on business, supervision over the property status of officials, and it is also the generator for administrative and minor offences proceedings.

The types of violations for which the CPC may impose a sentence are:

- violation of the obligation of authorities and organisations from the public sector to include an anti-corruption clause, as a compulsory element, in contracts in the amount of over €10,000 entered into by suppliers, sellers of goods, services or works contractors;
- refusing or failing to provide the requested information and documents to the Commission;
- failure of public sector employees to participate at a Commission meeting;
- violation of the protection of whistle-blowers;
- unauthorised identification or disclosure of the identity of whistle-blowers;
- violation of the measures for the protection of whistle-blowers;
- malicious reporting of corruption (if no signs of a criminal offence are given);
- violations in relation to the prevention of conflicts of interest and supervision of the acceptance of gifts;
- omission of the obligation to notify the principal in writing of the existence of a conflict of interests or the possibility of the occurrence of the conflict. If the official person does not have a principal, he/she must inform the Commission;
- officials may not engage in professional or other activities intended to generate income or proceeds;
- violations of the unauthorised acceptance of gifts and other benefits related to the function;
- omitting the entry of gifts into the list;
- violation of the prohibition on retaining a gift;
- violation of the obligation to report the property, functions, activities and income;
- violation of the operating restrictions of the contractor with officials in public procurement;
- non-communication or omission of information about subjects with which an official and his family members are linked in such a way that they participate more than 5% in founder's rights, management or capital;
- violations in relation to lobbying;
- a lobbyist who does not produce a prescribed record on lobbying;
- a lobbied person who makes contact with a lobbyist who is not entered into a register of lobbyists; a contact in which a conflict of interest would occur or a contact with which the lobbyist does not identify, or who does not indicate for which lobbying organisation he/she is lobbying and the purpose and goal of lobbying;
- a lobbyist must not provide a lobbied person with false, incomplete or misleading information, and must not act contrary to the rules governing the prohibition on the acceptance of gifts related to the performance of functions or the public duties of lobbied persons;
- a lobbied person who, within 10 days of lobbying or an attempt at lobbying, does not report to the Commission a lobbyist that is not entered in a register of lobbyists, or a

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lobbyist who provides inaccurate, incomplete or misleading information, or acts against the rules defining the prohibition of the acceptance of gifts related to performance of functions or public tasks of lobbied persons;

- abandoning the obligation to formulate and accept an integrity plan for State bodies, local authorities, public agencies, public institutes, public economic institutes and public funds; and
- abandoning the duty of public sector entities to report on activities for implementing measures from the action plan for the implementation of the resolution on the prevention of corruption in the Republic of Slovenia.

Police

Corruption crimes are detected and investigated during the pre-trial procedure after the direction given by the prosecutor's office by the police, which is a body within the Ministry of the Interior. It should be understood in this context that it is bound by the provisions of the existing substantive and procedural legislation, which defines the practices that can fall within the context of corruption criminality. The definition of corruption in criminal law is, however, significantly narrower than the definition prescribed by the PCA, which means that any corruption offences, which are treated by the CPC in accordance with this extended definition, are simultaneously not necessarily also criminal offences investigated and dealt with by the police. The State gives powers to investigate criminal offences to the police under the Criminal Procedure Act.

Due to the specific nature of corruptive offences, it is necessary to act in a special way when detecting them; in particular, police activities are required before the crime is completed. Therefore, a systemic approach to detecting suspicions of corruption is needed, which must lead to the reasons for suspicion or well-founded reasons for suspicion in order for the police to carry out covert investigative measures, e.g. secret surveillance, eavesdropping, etc.

Public Prosecutor's Office

The prosecutor's office also works towards detecting and perceiving corruption offences. Also, within the prosecutor's office there is a specialised economic corruption department which deals with criminal cases from the legal field of corruption and economic crime.

Overview of cross-border issues

In the field of corruption, Slovenia has already ratified a number of international conventions, namely:

- the United Nations Convention against Corruption;
- the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations Convention against Transnational Organised Crime;
- the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty of the European Union on the fight against corruption involving officials of the European communities or officials of Member States of the European Union;
- the Criminal Law Convention on Corruption; and
- the Civil Law Convention on Corruption.

In addition, Slovenia also participates in numerous other anti-corruption initiatives, some of which are directly related to Slovenia, while others are merely non-compulsory policies aimed at preventing corruption. The most active international organisations in which

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Slovenia participates are:

- GRECO (the Group of States against Corruption);
- OECD (the Organisation for Economic Co-operation and Development); and
- UNODC (United Nations Office on Drugs and Crime).

Corporate liability for bribery and corruption offences

Despite the fact that Slovenian criminal law is subject to the principle of culpability, if a perpetrator has committed a criminal offence on its behalf, for its account or for its benefit, the legal person may also be responsible. The rules on the liability of legal persons for criminal offences are set out in the Liability of Legal Persons for Criminal Offences Act ("LLPCOA"), which stipulates that a legal person may also be responsible for certain corruption offences, namely:

- the criminal offence of unauthorised acceptance of gifts under Article 241 of the CC-1;
- the criminal offence of unauthorised giving of gifts under Article 242 of the CC-1;
- the criminal offence of giving bribes under Article 262 of the CC-1;
- the criminal offence of accepting benefits for illegal intermediation under Article 263 of the CC-1; and
- the criminal offence of illegal intervention under Article 264 of the CC-1.

Criminal offences committed by legal entities may be punishable by the following fines:

- a fine: the amount which may be prescribed may not be less than €10,000 or more than €1,000,000. In the case of the legal person's criminal offence having caused damage to another's property, or of the legal person having obtained an unlawful property benefit, the highest limit of the fine imposed may be 200 times the amount of such damage or benefit;
- confiscation of property: half or more of the legal person's property or its entire property may be confiscated. Confiscation of property may be imposed for criminal offences which carry a punishment of five years' imprisonment or a harsher punishment;
- winding-up of legal person: the winding-up of a legal person may be ordered if the activity of the legal person was entirely or predominantly used for the carrying-out of criminal offences; and
- the prohibition of disposing of securities the holder of which is a legal person may be imposed on a legal person if the perpetrator has committed on its behalf the criminal offence of giving a bribe, the criminal offence of accepting benefits for illegal intermediation, and the criminal offence of giving gifts for illegal intermediation.

Proposed reforms / The year ahead

As stated in the introduction, Slovenia has a fairly good legal and institutional anti-corruption framework. Nevertheless, in the last few years, mainly because of doubts about the integrity of political officials, the course of preventing corruption appears to have backtracked.

In the future, it is necessary to adequately update the IPCA; in particular, it is necessary to clearly define the control mechanisms over the operation of the CPC and ensure the integrity of the institution itself, and ensure the protection of the human rights of persons under investigation. It is necessary to ensure the protection of whistle-blowers already at the IPCA level, including the non-disclosure of information about the identity of the whistle-blower.

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In addition, it is necessary to strengthen mechanisms and *ex post* controls in the award of public contracts and the execution of public procurement contracts and the provision of the results of dissuasive penalties for infringements. It is necessary to establish an integrated approach to the fight against corruption in healthcare, including for small providers of health services, and to establish a new systemic regulation in the field of operation and financing of disability, humanitarian and sports organisations.

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Switzerland

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Introduction

In the 2018 "Corruption Perception Index" of Transparency International, Switzerland ranked 3rd out of 180 countries, together with Finland, Singapore and Sweden. And still, even though Switzerland is perceived to be one of the least corrupt countries in the world, it is still affected by corruption. Switzerland's unique political system, which is governed by a militia structure and contains a lot of small decision-making bodies, is vulnerable to nepotism and "trading in influence".

Switzerland is also a preferred base for non-governmental organisations. In particular, about 65 sports organisations have their headquarters in Switzerland, e.g. the International Olympic Committee ("IOC"), the World Football Federation ("FIFA"), the Union of European Football Associations ("UEFA"), the International Ski Federation ("FIS") and the International Cycling Union ("UCI"). In connection with awarding big sporting events such as the FIFA World Cup, those organisations are regularly faced with allegations of corruption (see below).

Above all, however, the biggest challenge in the fight against corruption are enterprises based in Switzerland that do business abroad where they are confronted with corruption. The relatively small size of Switzerland, and the accordingly restricted opportunities of doing business within its borders, impels a lot of small and medium-sized enterprises ("SMEs") to operate abroad. According to a study conducted a few years ago, "40% of Swiss SMEs operating abroad are confronted with bribery of public officials".

But this problem is not limited to SMEs. The attractive Swiss tax regime, as well as its geographical position in the middle of Europe, has encouraged international companies to relocate their headquarters to Switzerland. When those companies operate in foreign countries, they face the same corruption issues as their smaller counterparts (see below the section entitled "Cross-border issues").

These challenges are dealt with by a quite comprehensive anti-corruption law set out in the Swiss Criminal Code ("SCC"). The SCC, in turn, is subject to a steady development driven by three multilateral instruments in the fight against corruption of which Switzerland is a part: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Council of Europe's Criminal Law Convention on Corruption; and the UN Convention against Corruption.

These instruments have already led to several substantial reforms of the SCC. In 2000, provisions regarding the active bribery of foreign public officials, and regarding the granting and acceptance of an undue advantage, were introduced. In 2003, corporate criminal liability for bribery offences was introduced and, in 2006, the prohibition of bribery was

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extended to passive bribery of foreign public officials as well as to passive bribery in the private sector (see below the section entitled "Brief overview of the law and enforcement regime"). Since 1 July 2016, bribery in the private sector has also been governed by the SCC and – apart from minor cases – prosecuted *ex officio*.

Brief overview of the law and enforcement regime

Until 2016, bribery of public officials and bribery in the private sector were governed by two different legal acts.

The bribery of *public officials* is governed by the SCC. The SCC defines a public official as a "*member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces*" (Article 322ter SCC), including private individuals who carry out a public function (Article 322^{decies}(2) SCC). Persons in this category are "foreign public officials" when they act for a foreign state or an international organisation (Article 322^{septies} SCC). Public officials include employees of state-owned or controlled legal entities, if and to the extent they pursue an official activity. The Federal Supreme Court approved this view a few years ago in a case concerning the manager of the public servants' pension fund of the Canton of Zurich.

By contrast, bribery of *private individuals* was exclusively regulated by the Federal Law against Unfair Competition ("UCA"; Article 4a). Unlike the bribery of public officials, bribery of private individuals was pursued under criminal law only upon complaint (Article 23 UCA). As of 1 July 2016, however, bribery of private individuals was also included in the SCC – in addition to the provisions in the UCA, which remain in force.

Swiss law sanctions both so-called active and passive bribery. In the case of public officials, *active bribery* is an act by which an official is offered, promised, or granted any undue advantage, for his own benefit or for the benefit of any third party, for the commission or omission of an act in relation to his official duties that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322ter SCC). Active bribery in the private sector is described similarly as an act by which an employer, company member, agent or any other auxiliary to a third party in the private sector is offered, promised, or granted any undue advantage for that person or a third party for the commission or omission of an act in relation to his official duties that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322^{octies} SCC; Article 4a(1)(a) UCA). *Passive bribery* occurs when a person solicits, elicits a promise of, or accepts an undue advantage, for his own benefit or for the benefit of a third person, for the commission or omission of an act that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322^{quater} and Article 322^{novies} SCC; Article 4a(1)(b) UCA).

In a narrow sense, bribery is defined as an act whereby a person offers, promises or gives a private individual or a public official an undue advantage in exchange for a specific act. In a broader sense, bribery also includes any acts whereby a person offers, promises or gives a person an undue advantage in exchange for a future behaviour which is not directly linked to a specific act (Article 322^{quinquies} to 322^{sexies} SCC) as well as payments done with the intention to speed up the execution of administrative acts to which the payer is legally entitled ("facilitation payments"). The giving and accepting of undue advantages according to Article 322^{quinquies} to 322^{sexies} SCC are only punishable when a Swiss public official is concerned. In contrast, facilitation payments may be punishable as bribery (and thus irrespective of whether a Swiss or a foreign official is concerned) if the payment influences the discretion of the public official.

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In all cases of corruption, advantages permitted under public employment law or contractually approved by a third party, as well as negligible advantages that are common social practice, are not undue (Article 322^{decies}(1) SCC). This would typically include small Christmas or thank-you gifts, as long as such gifts are not given with the intention of influencing a public official's performance.

Individuals found guilty of bribing (either Swiss or foreign) public officials are sentenced to prison for a term of up to five years or a monetary penalty of up to CHF 540,000 (Article 322ter and Article 322^{septies} SCC). When determining the amount of the monetary penalty, the court takes into account the culpability of the offender and his or her personal and financial circumstances at the time of conviction (Article 34(1) and (2) SCC). Bribery in the private sector results in imprisonment for up to three years or a monetary penalty (Article 322^{octies} (1) and Article 322^{novies} (1) SCC; Article 23 UCA). In minor cases in the private sector, the offence is only prosecuted upon complaint (Article 322^{octies} (2) and Article 322^{novies} (2) SCC).

Depending on the circumstances, penalties may also include a prohibition from practising a certain profession (Article 67 SCC), or expulsion from Switzerland for foreigners as an administrative sanction (Article 62(b) and Article 63(1)(a) of the Federal Act on Foreign Nationals). Further, the court can order the forfeiture of assets deriving from corruption or intended to be used for corruption (Article 70 SCC). Finally, Swiss criminal procedure law provides for the possibility that the person suffering harm from corruption may bring civil claims as a private claimant in the criminal proceedings.

The day bribery of private individuals was included in the SCC, the Anti-Money Laundering Act was tightened too. Senior officials of international organisations and senior civil servants of international sports bodies in Switzerland now qualify as "politically exposed persons" ("PEPs"), forcing Swiss banks to manage legal risks (e.g. bribery) associated with this group of individuals much more closely.

Overview of enforcement activity and policy during the last year

In Switzerland, the number of reported corruption cases is rather limited. Statistics show a total of around 20 convictions on average per year, the majority of which are relatively minor domestic cases. Arguably one of the most prominent such cases in recent years concerned corruption among officials in connection with a major IT project at the Federal Office for the Environment ("FOEN"). In December 2016, the Federal Criminal Court convicted a former IT section head as well as a former external IT project manager (whom the court deemed a public official, as he assumed tasks in the area of awarding contracts at the FOEN) of multiple counts of accepting bribes, and sentenced them to prison terms of two-and-a-half and three years, respectively.

In addition to that, there is currently a major case pending before the Federal Criminal Court against a former head of department of the State Secretariat for Economic Affairs ("SECO") and three entrepreneurs. They have been accused of active and passive bribery in the context of the award of IT contracts of SECO worth a total of nearly CHF 100 million. In particular, the former head of department is accused of having demanded and accepted undue advantages in the amount of more than CHF 1.7 million over a time period of almost 10 years. It took more than five years for the Public Prosecutor's Office to complete the investigations and bring charges against the accused.

Cases dealing with transnational corruption (other than in the context of a foreign request for international mutual assistance) are still relatively rare. Nevertheless, there has been a considerable rise of ongoing investigations in recent years, and there are some investigations

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and decisions that are noteworthy and might be regarded as a sign that foreign and transnational corruption is increasingly under scrutiny by Swiss enforcement authorities.

A first leading case in this regard is the "Alstom" decision (see the below section entitled "Overview of cross-border issues"). Another interesting case is the "Ben Aissa" case relating to bribery payments to Saadi Gaddafi, the son of the former Libyan dictator Muammar Gaddafi.

In October 2014, Mr. Riadh Ben Aissa, the former head of global construction at the Canadian engineering and construction firm SNC-Lavalin, was sentenced to three years in prison on charges of bribery of a foreign public official (Article 322^{septies} SCC), criminal mismanagement (Article 158 SCC) and money laundering (Article 305bis SCC).

The Swiss Federal Criminal Court held that Mr. Ben Aissa paid briberies to Saadi Gaddafi in order to secure a construction project and other benefits for SNC-Lavalin.

A particularly interesting aspect of this case is that the Federal Criminal Court characterised Saadi Gaddafi as a *de facto* public official and applied Article 322^{septies} SCC by stating that, even though Saadi Gaddafi did not hold any office or official function in the relevant field, he was a member of the ruling family and had the *de facto* power to grant SNC-Lavalin the requested benefits. This decision is of fundamental importance with regard to dictatorial regimes, where *de facto* power is often not congruent with official power. The unlawful payments were made from bank accounts in Switzerland. This was the (only) nexus to Switzerland but was sufficient to give rise to the OAG's (Office of the Attorney General) investigation (see the below section entitled "Overview of cross-border issues").

In August 2015, the OAG instigated an investigation in the context of the financial scandal, of which the Malaysian sovereign fund 1MDB is supposed to have fallen victim. Within the framework of improper financial operations, several billion USD is said to have been embezzled at the expense of that fund, with the operations branching out into Singapore, Luxembourg, the US and Switzerland. This case has caused great furore in the media due to its scope. The Swiss investigation, which was instigated on the suspicion of fraud, bribery and money laundering, is directed against Malaysian officials and officials of the United Arab Emirates, who each held several bank accounts in Switzerland to which funds from a criminal origin allegedly flowed.

In December 2015, banknote press manufacturer KBA-NotaSys reported itself to the OAG after it uncovered evidence that bribery had taken place in Nigeria. This was the first case of self-reporting with regard to corruption and resulted in a settlement with a symbolic fine of CHF 1 and the skimming of profits of CHF 35 million.

In May 2016, the OAG opened criminal proceedings against BSI SA bank and on 12 October 2016 against Falcon Private Bank Ltd for corporate criminal liability within the meaning of Article 102(2) SCC. The OAG decided to open proceedings, *inter alia*, because of information disclosed in the criminal proceedings in the 1MDB case. The OAG suspects that both banks failed to prevent, *inter alia*, bribery by their respective employees and thus violated Article 102(2) SCC (for more information on corporate liability see the below section, entitled "Corporate liability for bribery and corruption offences").

Another noteworthy aspect is that since June 2017, Swiss law enforcement has a new instrument to help combat corruption. The web-based platform www.whistleblowing.admin.ch enables anyone with information on possible acts of corruption in the Federal Administration and related organisations to report their suspicions anonymously to the Swiss Federal Audit Office ("SFAO").

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Law and policy relating to issues such as facilitation payments and hospitality

The giving and accepting of undue advantages are currently only punishable when a Swiss public official is concerned (see above the section entitled "Brief overview of the law and enforcement regime"). Over the last decade, Swiss courts have sentenced individuals for giving or accepting undue advantages in approximately 20 cases altogether. In September 2015, the Federal Criminal Court held that a public official who accepts 40 lunch invitations from long-standing suppliers is culpable for accepting undue advantages.

With regard to hospitality, the SCC expressly states that advantages permitted under public employment law, or contractually approved by a third party, as well as negligible advantages that are common social practice, are not undue (see the above section entitled "Brief overview of the law and enforcement regime"). While there is no statutory definition of what negligible means, one would assume that gifts of up to around CHF 150 are common social practice.

In general, however, there has been a growing public awareness of corruption and of hospitality, in particular. As an example, Twint, a subsidiary of various Swiss Banks, has been criticised publicly because it gave journalists at a press conference credit of CHF 100 to test a newly launched payment application for smartphones. In response to increased public pressure, the signatory companies of the Pharma Cooperation Code have committed to publicly disclose each year on their websites the pecuniary benefits they have granted in the previous year to professionals (primarily physicians and pharmacists) as well as healthcare organisations (in particular, hospitals and research institutes). Most recently, the focus of attention in the context of hospitality has been on a cantonal politician who is under the suspicion of having accepted undue advantages for himself and his family because he had travelled to Abu Dhabi with his family as a public official on someone else's expense and had also received payments for his political campaign and his birthday party.

Key issues relating to investigation, decision-making and enforcement procedures

Bribery is subject to federal jurisdiction insofar as the offences are committed by a member of an authority or an employee of the Swiss Confederation or against the Swiss Confederation (Article 23(1)(j) Swiss Criminal Procedure Code ("CPC")), or if the offences have to a substantial extent been committed abroad, or in two or more cantons with no single canton being the clear focus of the criminal activity (Article 24(1) CPC).

Criminal investigations regarding bribery cases subject to federal jurisdiction are conducted by the OAG. All other investigations into bribery cases are handled by the competent cantonal law enforcement authorities; generally the cantonal public prosecutor's office. According to Article 29 of the Council of Europe Corruption Treaty, the Federal Office of Justice (FOJ) is the central authority in matters of international cooperation, e.g. in questions of mutual legal assistance and extradition.

Swiss anti-corruption law does not provide for credit or leniency during an investigation. However, cooperative behaviour of the accused person or entity may be taken into account when determining the sentence.

Further, there is no general mechanism to resolve corruption cases through plea agreements, settlement agreements or similar means without trial. However, in all cases of corruption (bribery as well as the giving or accepting of advantages according to Articles 322ter through 322^{novies} SCC), criminal prosecution, judicial proceedings or the imposition of a penalty can be waived in *de minimis* cases (Article 52 SCC). Further, the competent authority shall

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refrain from prosecuting or punishing an offender if the latter "*has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused*" and the interests of the general public and of the persons harmed in prosecution are negligible (Article 53 SCC). In addition, under certain circumstances, there is no need for fully fledged criminal proceedings, and they may be substituted by accelerated or summary judgment proceedings.

Overview of cross-border issues

According to Article 3 SCC, anyone who *commits* an offence in Switzerland is subject to Swiss Criminal Law. Article 8 SCC further specifies that an offence is considered to be committed both at the place where the person concerned acts or unlawfully omits to act, and at the place where the offence has taken effect. Even attempts to commit or omit are sufficient. However, mere preparatory acts are not deemed sufficient to trigger jurisdiction in Switzerland. As an example, the opening of a bank account in Switzerland with the intention to use it to pay or to receive bribes in the future, does not yet give jurisdiction to Swiss authorities.

The place of commission is broadly construed. For instance, as the Ben Aissa case mentioned above has confirmed, it may suffice to establish Swiss jurisdiction if the only connection to Switzerland is the existence of a Swiss bank account from which − or to which − the bribe was paid, even though all persons involved were acting outside Switzerland, and all negotiations took place outside Switzerland.

Of particular interest are cross-border issues in the context of corporate criminal liability. In these cases, Swiss authorities may claim a wide jurisdiction.

A corporation can be held liable under the SCC if specific prerequisites are met (see the section below, entitled "Corporate liability for bribery and corruption offences"). According to Article 102(2) of the SCC, a company is penalised irrespective of the criminal liability of any natural persons and with a fine of up to CHF 5 million if:

- the offence committed is, *inter alia*, an active bribery offence; and
- the company is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.

In cross-border cases, Swiss corporate criminal liability is deemed to be applicable not only when the bribery offence was committed in Switzerland, but also if the only place where the company failed to take all the reasonable organisational measures is within Switzerland. This may be the case if the lack of organisation occurred (at least partially) in Switzerland. It is not necessary that the company is headquartered in Switzerland. Instead, it may be sufficient if only a branch of an international company group is located in Switzerland.

Corporate criminal liability in combination with the offence of bribery of a foreign official may lead to a very broad jurisdiction of Swiss authorities and even allow for extraterritorial jurisdiction, with the only connection to Switzerland being the lack of organisation.

Such circumstances were at the core of the case of the French-based Alstom Group ("Alstom"). Alstom has its headquarters in France. In order to receive construction contracts in foreign, in particular Asian and African, countries, Alstom hired so-called "consultants". These consultants acted as intermediaries and were responsible for building up relationships with foreign governments and companies. For their services, the consultants received a "success fee" that was calculated as a percentage of the mediated contracts.

Alstom was aware of the fact that consultants may be exposed to corruption and, therefore,

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implemented specific anti-corruption measures. In this context, Alstom Network Switzerland Ltd ("Alstom Switzerland"), which has its registered office in Switzerland, was established. Its purpose was to act as an intra-group compliance service provider, i.e. to ensure that the consultants conformed to the internal compliance rules, and to transfer payments to these consultants via Alstom Switzerland's Swiss bank accounts. However, these anti-corruption measures did not work properly. In at least three cases, the consultants used part of their salaries, which were paid by Alstom Switzerland, to bribe foreign officials to win contracts and, in some cases, to avoid claims against Alstom for breaching contracts.

In November 2011, after three years of investigation, Alstom Switzerland was held criminally liable as a company and was convicted for bribery of foreign officials, fined CHF 2.5 million, and a compensatory claim of CHF 36.4 million was imposed. According to the relevant decision, Alstom Switzerland's overall anti-corruption measures were sufficient in theory. However, these measures were not well-implemented or enforced in practice.

Even though only the Swiss-based company Alstom Switzerland was fined, the authority also conducted its investigation against Alstom in France, irrespective of the fact that the parent company has its registered office outside of Switzerland and all bribes were paid outside of Switzerland. The Swiss authority claimed extraterritorial jurisdiction, as the lack of organisational measures at least partially occurred in Switzerland.

Criminal liability of companies and the extraterritorial jurisdiction as applied in Switzerland are comparable to the respective provisions in the UK. According to the UK Bribery Act, a company is criminally liable if part of a business of the company is carried out in the UK and the company does not have in place adequate procedures designed to prevent bribery of foreign officials (Section 7 of the Bribery Act 2010). Thus, the Swiss and the UK provisions are strikingly similar in this regard.

Corporate liability for bribery and corruption offences

In cases of corruption, it is primarily the *individual* ("natural person") who is liable to punishment and is prosecuted.

However, in addition to the liability of the acting individuals, Article 102 SCC establishes corporate criminal liability. Generally speaking, corporate criminal liability exists if, due to inadequate organisation of the company, it is not possible to attribute a felony or misdemeanour (including bribery) that was committed in the exercise of commercial activities to any specific individual (Article 102(1) SCC). Furthermore, a company may also be punished irrespective of the criminal liability of any natural persons if the enterprise did not undertake all requisite and reasonable organisational precautions required to prevent the bribery of Swiss or foreign public officials or persons in the private sector (Article 102(2) SCC).

In both cases, the company is subject to criminal prosecution and a fine of up to CHF 5m. The amount of the fine is determined taking into account the seriousness of the offence, the degree of the organisational inadequacies, the loss or damage caused, and the economic ability of the company to pay the fine.

The exact scope of the organisational measures required under Article 102(2) SCC is not defined by law. Clearly, it is insufficient to merely stipulate compliance rules (e.g. in a code of conduct). Rather, a company is required to show that its employees were made aware of, trained in and monitored regarding such rules. In general, Swiss prosecuting authorities take international good practice standards into account when determining the required compliance measures.

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A prominent recent example regarding corporate liability was the OAG's criminal investigation, ongoing since summer 2015, into the Odebrecht conglomerate based in Brazil. Odebrecht, which decided to co-operate with the law-enforcement agencies, was found guilty in Switzerland under Article 102 SCC and fined CHF 4.5 million. By sequestration and determination of a corresponding compensation claim, Odebrecht was further obligated in Switzerland to refund proceeds from crimes in the amount of CHF 200 million (in addition to the amount of US$ 1.8 billion to be repaid on the basis of corresponding arrangements with the competent authorities in Brazil and the US).

Proposed reforms / The year ahead

As mentioned before, the SCC has been amended with effect as of 1 July 2016 to target bribery in the private sector.

The formerly applicable regime regarding private sector bribery was regularly discussed and criticised in Switzerland. This topic received special media attention in the context of the selection process for the FIFA World Cup in Russia (2018) and Qatar (2022), as there have been allegations of bribery. Indeed, in March 2015 the OAG opened criminal proceedings against persons unknown in connection with the allocation of the 2018 and 2022 Football World Cups after a criminal complaint was filed by FIFA in late 2014. The opening of the OAG's investigation was based on information contained in a report commissioned by FIFA, as well as on information taken from a mutual legal assistance request from the US Department of Justice (DOJ). Based on the latter, several football officials and suspected bribers were arrested in Zurich by order of the Swiss Federal Office of Justice in May 2015 and were placed in detention pending extradition as part of criminal investigations of the US Attorney's Office for the Eastern District of New York. In 2016, the proceedings in connection with FIFA saw a phase of the investigation results being consolidated. Over the year, Swiss authorities carried out various compulsory measures to secure and collect evidence.

However, even though the awarding body, FIFA, has its headquarters in Switzerland, the Swiss private bribery provisions were deemed inapplicable and the investigations by the OAG were initiated on the grounds of suspicion of criminal mismanagement and money laundering, but not of private bribery. As a matter of fact, there was a lack of application of the former provisions – there had not been any convictions for bribery in the private sector at all.

The reason for this was twofold. First, the provisions were, as outlined above, only contained in the Unfair Competition Act and, thus, only applicable when private bribery has an effect on a competitive relationship. Therefore, for instance, bribery in a tender process for an international sporting event, such as the FIFA World Cup, did not fall within the scope of the provision. Second, the prosecution of such offences required a formal complaint from a person who suffered harm due to the bribery act. This requirement of "no plaintiff, no judge" had the effect that certain forms of corruption were typically not punished.

Those weaknesses were the driving force behind the newly enacted provisions in the SCC targeting bribery in the private sector (Article 322^{octies} and Article 322^{novies} SCC). By this amendment, private bribery has become an *ex officio* crime, i.e. an offence which has to be prosecuted by the authorities, whether reported or not. The only exemption is "minor cases" – the definition of which yet has to be established by jurisprudence. Furthermore, as the offence of private bribery was included in the SCC, all cases of private bribery, notwithstanding their effect on a competitive relationship, are now covered. As a consequence, bribery in the tender process of a sporting event would be within the scope of the new provisions. However, irrespective of the introduction of the private bribery offence

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into the SCC, the offence remains a misdemeanour with a maximum penalty of three years' imprisonment (while bribery of a public official and bribery of a foreign public official have a maximum penalty of five years' imprisonment). This may lead to a situation where private sector bribery will still not qualify as a predicate offence for money laundering, as money laundering is only punishable under Swiss criminal law if the assets that are "laundered" originate from a felony (like, for instance, bribery of a public official and bribery of a foreign public official).

In addition to the reform of private sector bribery, there was an amendment to the offences of granting or accepting an undue advantage (Article 322^{quinquies} and Article 322^{sexies} SCC). Since 1 July 2016, those offences also cover cases in which the undue advantage is given in favour of a *third party*. The coming years will show the first effects, if any, of the reform of private sector bribery.

Currently, a legislative amendment proposed by the Swiss Federal Council is being discussed in the Parliament regarding better protection of whistleblowers, so that they can report incidents without fear of repercussions from their employers. Whistleblowers shall be entitled to report misconduct to the authorities without breaching civil and criminal law obligations, as long as they report the matter internally first.

Apart from that, in its last report on the implementation of the OECD Anti-bribery Convention by Switzerland, the OECD particularly called for stricter penalties for companies in the context of foreign bribery convictions. However, to date, there is no legislative amendment planned in this respect.

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Ukraine

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Brief overview of the law and enforcement regime

The Ukrainian anti-corruption legal framework consists of the following major segments:

- the anti-corruption legislation itself;
- provisions of the Code of Ukraine on Administrative Offences (the "**Administrative Offences Code**") and the Criminal Code of Ukraine (the "**Criminal Code**") regulating corruption-related administrative offences and crimes; and
- legal provisions establishing the rules of conduct of Ukrainian governmental officials, including officials representing Ukrainian legislative, administrative and regulatory bodies (the "**Officials**").

Starting from 26 April 2015, the main legislative act dealing with combating corruption in Ukraine is the Law of Ukraine No. 1700-VII "On Preventing Corruption" dated 14 October 2014 (the "**Anti-Corruption Law**"). The Anti-Corruption Law:

- defines corruption, a corruption offence, an unjustified benefit and, importantly, a gift;
- distinguishes between a corruption offence and a corruption-related offence;
- introduces changes in the groups of subjects of liability for corruption offences;
- provides for an algorithm for preventing acceptance of unjustified benefits and gifts, and for dealing with them when provided;
- introduces several important restrictions aimed at preventing and combating corruption (e.g. restriction on receiving gifts by Officials);
- sets up the rules aimed at preventing corruption in legal entities;
- introduces certain changes related to liability for corruption and corruption-related offences to the Criminal Code and the Administrative Offences Code;
- regulates protection of whistle-blowers;
- emphasises the importance of corporate anti-corruption compliance programmes;
- establishes the ethical conduct rules for certain groups of Officials; and
- tightens the financial control regulation for Officials.

Unlike the U.S. Foreign Corrupt Practices Act ("**FCPA**") and the UK Bribery Act 2010 ("**UKBA**"), the Anti-Corruption Law does not have extraterritorial application. Nor does the Anti-Corruption Law use the term 'bribery'; however, the legal meaning of the bribery notion under the FCPA and the UKBA is mostly covered by the corruption-related crimes of the Criminal Code (e.g. corruption payments to the officers of private companies and

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persons rendering public services, exercising undue influence, giving unjustified benefits to Officials, etc.).

In 2014, Ukraine became a jurisdiction, the legislation of which provides for criminal liability of companies, including for crimes of corruption committed by their authorised representatives (*please see section below, 'Company liability for corruption offences', for more detail*).

Neither the Anti-Corruption Law nor the Criminal Code establish liability of the officers and employees of the company for corruption offences and crimes committed by agents and other third parties, including if they commit them specifically to get business, keep business, or gain a business advantage for this company.

Bribery *vs* Unjustified Benefits

The notable distinction of the Ukrainian anti-bribery and anti-corruption legislation is that it has never clearly distinguished between corruption and bribery. For instance, the Anti-Corruption Law contains provisions directly or indirectly related to bribery (e.g. gifts to officials, payment of charitable contributions, membership of NGOs, etc.) and the legal meaning of the bribery notion under the FCPA is mostly covered by the corruption-related crimes of the Criminal Code (e.g. corruption payments to the officers of private companies and persons rendering public services, exercising undue influence, giving unjustified benefits to officials, etc.). However, the legal notions of 'bribe' and 'bribery' were eliminated from the Ukrainian law a few years ago and replaced with the notion of 'unjustified benefits', (i.e. the term 'bribery' is no longer used under Ukrainian law). Therefore, the words 'anti-corruption legislation' or 'anti-corruption legal framework' will be a sufficient equivalent of bribery in the meaning of the FCPA and the UKBA.

Under the Anti-Corruption Law, the unjustified benefits are defined as money or other property, preferences, advantages, services, non-pecuniary assets, and any other benefits of non-pecuniary or intangible nature that are being illicitly promised, offered, delivered, or received. Under the old anti-corruption legislation, the unjustified benefits were defined as money or other property, preferences, advantages, services, non-pecuniary assets being illicitly promised, offered, delivered, or obtained free of charge or at a price lower than a minimum market value. This definition suggested two tests for classifying benefits as unjustified, being their promise, offer, delivery or obtaining: (1) illicitly; and (2) free of charge or at a price lower than a minimum market value. In the definition of the unjustified benefits provided by the Anti-Corruption Law, the second test (i.e. price) is missing. Considering that the unjustified benefits are the key category of the anti-corruption legislation, its definition in the present wording gives the law enforcement authorities and courts more discretion in applying the anti-corruption laws and deciding on the guilt of the potential subjects of liability for corruption offences.

Subjects of liability for corruption offences, corruption and corruption offence

The term 'Officials' is not defined in the Anti-Corruption Law *per se*. However, it speaks of the 'individuals authorised to perform state or local government functions' and covers government officials, as well as public servants and local government officers.

In addition to Officials, Article 3 of the Anti-Corruption Law lists other groups of individuals who potentially can be held liable for committing corruption offences (the "**Subjects of Liability**"), including:

- persons conferred the same status as persons authorised to perform state or local government functions for the purposes of the Anti-Corruption Law, namely: (i) officers

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of the public legal entities other than Officials, as well as members of supervisory boards of public banks, public companies and public for-profit organisations (the "**Public Entity Officers**"); (ii) individuals, other than public servants or local government officials, rendering public services (e.g. auditors, notaries, experts, and other persons determined by law) (the "**Public Services Officials**"); and (iii) representatives of NGOs, scientific and educational institutions, and relevant experts of contest committees created in accordance with the Law of Ukraine on the Public Service;

- individuals permanently or temporarily holding positions related to organisational, executive, or administrative and economic responsibilities, or persons specifically authorised to perform such duties in any private company in accordance with the law, as well as other individuals who are not officers but perform works for or render services to such companies based on respective agreements (in cases provided by the Anti-Corruption Law) (the "**Private Company Officers**");
- duly registered parliamentary candidates, presidential candidates, as well as local councils and government candidates; and
- individuals who: (i) receive funds and property in the course of implementing in Ukraine technical and other assistance (including grant-in-aid) programmes in the anti-corruption area (either directly or via third parties, or as otherwise may be provided by a relevant programme (project); (ii) systematically, within a year, provide services related to implementing the anti-corruption policy standards, if financing of (payment for) such work/services is provided within the framework of a technical or other assistance (including grant-in-aid) programme in the anti-corruption sphere; and (iii) are managers or members of the governing bodies of NGOs and non-profit companies engaged in anti-corruption activities and/or participating in taking measures aimed at fighting and preventing corruption.

Ukrainian law defines corruption as an activity of Officials and other Subjects of Liability aimed at unlawful use of their powers and related opportunities to obtain unjustified benefits or accept such benefits, or accept a promise/offer of such unjustified benefits for themselves or other individuals, as well as a promise/offer of unjustified benefits to Officials and other Subjects of Liability or provision of unjustified benefits to them or, at their demand, to other individuals or legal entities, aimed at persuading Officials and other Subjects of Liability to unlawfully use their powers and related opportunities.

The Anti-Corruption Law distinguishes between a corruption offence and a corruption-related offence, which is a novelty in the Ukrainian anti-corruption regulation. A corruption offence is the intended act of corruption, for which the law establishes criminal, disciplinary and/or civil law liability, committed by an Official or other Subjects of Liability.

A corruption-related offence is a wrongdoing that does not fall under the characteristics of corruption but violates the requirements, prohibitions and limitations imposed by the Anti-Corruption Law, for which the law establishes criminal, administrative, disciplinary and/or civil law liability, committed by an Official or other Subjects of Liability.

The Anti-Corruption Law gives significant attention to prevention and regulation of the conflict of interest. Under this Law, the key for establishing a potential or real conflict of interest of Subjects of Liability is discovering their private interest that may affect the objectivity and impartiality of their decisions or performance of their official or representative duties. The Anti-Corruption Law defines a private interest as any tangible or intangible interest of a person, including the one caused by his/her personal, family, friendship, and other outside-of-duty relationships with individuals and legal entities,

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including those arising from membership in and activities of political, religious and other NGOs. The conflict of interest may arise if the restrictions established by the Anti-Corruption Law are violated (e.g., those related to receiving gifts, new employment after quitting the public service, etc.).

Liability for corruption offences

The Anti-Corruption Law sets forth criminal liability for legal entities (*discussed in section 'Company liability for corruption offences' below*), as well as criminal, administrative, civil and disciplinary liability for corruption offences and corruption-related offences for responsible Officials and other Subjects of Liability.

The Anti-Corruption Law introduced a new wording to or supplemented several Sections of the Administrative Offences Code, resulting in increased administrative liability for corruption-related offences. This includes establishing administrative liability for violating the restrictions to:

- engage in other paid or entrepreneurial activities (except for teaching, scientific and creative work, as well as some other activities);
- become a member of governing bodies of profitable companies (except when representing the state interests in the governing bodies of such companies);
- receiving gifts;
- violating the financial control requirements;
- preventing and resolving conflicts of interest;
- unlawful use of information which became known during the performance of official duties; and
- failure to take anti-corruption measures.

Additionally, the Anti-Corruption Law introduced a new Article 188^{46} into the Administrative Offences Code, establishing liability for:

- not observing the lawful requirements (orders) of the National Anti-Corruption Agency of Ukraine (the "**Anti-Corruption Agency**");
- failing to provide it with information and documents (violation of the statutory terms of their provision); or
- providing knowingly untrue or incomplete information.

According to the Order of the General Prosecutor's Office No. 135 "On Distribution of Authorities of Prosecutors in the Area of Prevention and Fighting Corruption Outside of the Criminal Proceeding" dated 13 July 2018, the participation of prosecutors in court proceedings in corruption-related administrative offences envisaged by Articles 172-4 – 172-9, 172-9-2 of Administrative Offences Code is mandatory.

The Criminal Code provides for the following types of corruption crime:

- receiving unjustified benefits;
- receiving the offer or promise of unjustified benefits;
- promising or providing unjustified benefits;
- corrupt payment[1] to Private Company Officers;
- corrupt payment to Public Services Officials;
- corrupt payment to an employee of an entity, other than the Official, or a person working for the benefit of an entity; and

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- unlawful influencing of Officials performing state duties.

Penalties for individuals convicted of corruption offences

Depending on the degree and type of a particular crime, the corruption crimes committed by individuals are punishable by (as a single penalty or in combination with the below penalties):

- a fine;
- community works;
- confinement or imprisonment; and, as the case may be,
- deprivation of the right to hold certain office or engage in certain activities for up to three years and confiscation of property and/or special confiscation.

Other legal consequences of corruption activities

Under Ukrainian law, information on persons and legal entities liable for corruption shall be listed in the Unified Register of Individuals Liable for Committing Corruption Offences within three days after receipt by the Anti-Corruption Agency of an electronic copy from the Unified State Register of Court Decisions of a respective judgment that came into force, or receipt by the Anti-Corruption Agency of the paper copy of the internal order of the relevant employer on taking disciplinary action for committing a corruption/corruption-related offence.

Under Article 22 of the Anti-Corruption Law, performance of duties of an Official or another Subject of Liability shall be suspended if formal charges are filed against such person to initiate prosecution for committing a crime within the scope of his/her official duties. Officials brought to criminal or administrative liability for corruption offences shall be subject to dismissal within three days after a respective judgment comes into force, unless otherwise provided by law.

The Anti-Corruption Law supplemented Article 36 of the Labour Code of Ukraine (the "**Labour Code**") with a new ground for employment termination, namely concluding an employment agreement (contract) contrary to the requirements of the Anti-Corruption Law established for Officials listed in Article 3, part 1 (1) of the Anti-Corruption Law.

According to Article 53 of the Anti-Corruption Law, whistle-blowers cannot be fired or caused to terminate their employment, or brought to disciplinary liability or otherwise face retaliation (or be threatened with retaliation) by their employers in connection with reporting by such whistle-blowers of violations of the Anti-Corruption Law committed by other persons. Article 235 of the Labour Code was amended with a new provision aimed at protecting whistle-blowers or members of their families from such retaliation. The new part 4 of this Article 235 provides that in case whistle-blowers refuse being reinstated at their job, they shall be entitled to compensation in the amount of their average salary for six months. The above should be considered, in particular, during the workforce restructuring.

Apart from the aforementioned administrative, criminal and disciplinary liability, Officials violating provisions of the Anti-Corruption Law may be held liable for damages. In addition, they can be forced to eliminate the consequences of their corrupt actions by:

- compensating damages;
- annulling unlawful laws, regulations and decisions initially enacted in the course of corruption activities;
- restoring rights of and compensating damages to the offended companies and individuals; and
- seizing the unlawfully gained property.

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Anti-Corruption Agency

Under the Anti-Corruption Law, the Anti-Corruption Agency is a central government body having a special status and tasked with forming and implementing the state anti-corruption policy. The Anti-Corruption Agency is authorised, in particular, to:

- control and verify financial declarations of Officials, keep and publish such declarations, as well as monitor the Officials' way of living;
- control compliance with the statutory restrictions regarding the political parties' financing and financial reporting;
- maintain the Uniform State Register of Declarations of Individuals Authorised to Perform State Functions or Local Government Functions and the Uniform State Register of Individuals who Committed Corruption and Corruption Related Offences;
- develop a template anti-corruption compliance programme for legal entities; and
- cooperate with whistle-blowers, ensure their legal and other protection, and bring to liability those guilty of violating whistle-blowers' rights related to notification of possible corruption or corruption-related offences.

Corruption activities investigation and law enforcement bodies

Under the Criminal Procedure Code of Ukraine (the "**Criminal Procedure Code**"), pre-trial investigation of the abovementioned corruption offences falls within the competence of the National Anti-Corruption Bureau of Ukraine (the "**Anti-Corruption Bureau**").

The State Bureau of Investigations is responsible for investigating offences committed by the highest Officials, as well as by judges and officers of the law enforcement bodies, except for the offences within the investigation authority of the Anti-Corruption Bureau (defined below).

In accordance with the Law of Ukraine No. 1698-VII "On the National Anti-Corruption Bureau of Ukraine", the Anti-Corruption Bureau is a state law enforcement agency authorised with preventing, detecting, stopping, investigating, and exposing corruption offences within its competence, as well as discouragement from committing new ones. The task of the Anti-Corruption Bureau is fighting corruption crimes committed by high public Officials that threaten the national security of Ukraine.

According to the Law of Ukraine № 2447-VIII "On the High Anti-Corruption Court" dated 7 June 2018, jurisdiction in corruption and corruption-related crimes is vested in the specialised High Anti-Corruption Court of Ukraine (the "**Anti-Corruption Court**"). The Anti-Corruption Court is also tasked with controlling pre-trial investigation of such crimes and observance of rights, liberties and interests of individuals in criminal proceedings. The Anti-Corruption Court, in particular, exercises justice as a trial court and an appellate court in criminal proceedings for crimes in its jurisdiction.

Overview of enforcement activity and policy during the last year

Recently, the Ukrainian anti-corruption legislation was significantly amended. For instance, some important amendments were introduced to the Anti-Corruption Law (e.g., the list of the Subjects of Liability was extended), and the Law No. 1975 "On Amending Certain Laws of Ukraine Regarding the Specifics of Exercising Financial Control over Particular Categories of Officials" was enacted on 23 March 2017. On 26 February 2019, the Constitutional Court of Ukraine by its Decision No. 1-p/2019 declared unconstitutional Article 368^2 of the Criminal Code of Ukraine. As a result, unlawful enrichment is no longer considered a crime under Ukrainian law.

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In the past few years, the Anti-Corruption Agency adopted its first regulations giving some guidance regarding several important issues (e.g., conflict of interest in activities of Officials, Officials' gift vs. entertainment, companies' anti-corruption compliance programmes, etc.). The most significant of these acts are: (i) Methodical Recommendations Related to Preventing and Regulating the Conflict of Interest (Decision No. 839 dated 29 September 2017); (ii) the Model Anti-Corruption Program for Legal Entities (Decision No. 75 dated 2 March 2017) (the "**Model Anti-Corruption Program**"); (iii) the Procedure for Informing the Anti-Corruption Agency on Opening a Foreign Currency Bank Account Abroad (Decision No. 20 dated 6 September 2016); (iv) Methodical Recommendations Related to Preparing Compliance Programs of Government Authorities (Decision No. 31 dated 19 January 2017); and (v) Methodical Recommendations Related to Preparing and Implementing Anti-Corruption Programs of Legal Entities (Decision No. 734 dated 22 September 2017) (the "**Anti-Corruption Programs Methodical Recommendations**").

On 5 August 2016, the National Public Service Agency of Ukraine approved the General Code of Ethical Conduct of Public Servants and Local Government Officials.

Considering that the Anti-Corruption Law became fully effective on 26 April 2015, and other anti-corruption legislation was significantly amended and that the new legislation introduces a number of new notions and concepts into the Ukrainian law, the enforcement of the new anti-corruption legal framework remains an issue, while the success of its application will largely depend on interpretation of the new laws by the Ukrainian enforcement agencies and courts.

There have been no significant or policy-shaping court cases in the anti-corruption area during the last year. On the other hand, court rulings on various corruption/corruption-related offences seem to be relatively consistent for many years in a row.

Based on established court practice, it appears that the most frequently prosecuted corruption-related cases remain crimes punishable under Article 368 of the Criminal Code (i.e. for accepting the offer or promise of unjustified benefits, or for receiving unjustified benefits by an Official). Particular punishment ordered by courts normally depends on the circumstances of a committed crime, position held by the Official, amount of the unjustified benefits involved, and the level of the criminal intent's implementation.

The established court practice evidences that law enforcement in the anti-corruption area remain rather subjective in Ukraine. Mainly prosecution and conviction have been carried out with respect to mid- or low-level Officials (i.e. mostly local government Officials), judges and Public Entity Officers, as well as related to so-called "social corruption" (e.g. against doctors, teachers, etc.).

In 2019, the number of corruption-related criminal proceedings against top Officials increased significantly. However, only a few of them resulted in court judgments and bringing the prosecuted officials to liability.

The Ukrainian legal and business community is anticipating first court rulings related to bringing companies to criminal liability for corruption offences to receive some guidance on prospective law enforcement in this area.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

Unlike the FCPA, facilitation payments are not allowed by Ukrainian legislation. The facilitation or 'grease' payments defence under the FCPA should be carefully considered

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while doing business in Ukraine. Normally in Ukraine, various central and local government agencies and state and municipal entities officially establish higher fees for the expedited performance of their services. Therefore, any payments other than such official fees may be viewed as corruption under Ukrainian law.

Gifts

Under Article 1 of the Anti-Corruption Law, the notion of a 'gift' is defined as money or other property, advantages, preferences, services, intangible assets provided/received free of charge or at a price lower than the minimum market price. This legal definition of a gift is rather broad and the only clear test for distinguishing between a gift and an unjustified benefit seems to be the pecuniary nature of the gift. Analysis of the relevant provisions of the Anti-Corruption Law allows another test for differentiating between a gift and an unjustified benefit, being the illegitimate ground for providing/receiving unjustified benefits. Finally, a gift is something that can be given/received, while an unjustified benefit is something that can also be promised/offered. The Anti-Corruption Agency in its Anti-Corruption Programs Methodical Recommendations offers a value as an additional test for differentiating between a gift and an unjustified benefit.

Based on the above, a company or an individual presenting a gift to an Official may bear a risk of such gift being treated as a corrupt payment or provision of unjustified benefits (i.e. commit corruption crimes punishable under the Criminal Code), depending on the value of the gift, intent of the gift giver, circumstances and the timeframe.

Article 23, part 1 of the Anti-Corruption Law bans Officials, as well as Public Entity Officers and Public Services Officials (the "**Restricted Individuals**") from demanding, asking and receiving, either directly or through closely associated persons, gifts from legal entities and individuals: (i) with respect to conducting activity related to the implementation of state or municipal government functions by liable individuals; and (ii) from subordinates of such persons (the "**Prohibited Instances**").

An Official can be held criminally liable for receiving unjustified benefits only if s/he received those unjustified benefits for performance (non-performance) of actions, which could have been performed only by using his/her powers or duties in his/her capacity as an Official or related to his/her position.

An Official can be charged for committing the act of corruption notwithstanding his/her actual performance or non-performance of any actions (their consequences) for the benefit of a person who provided this Official with the valuables, services, preferences or other benefits (i.e. the mere fact of the receipt of benefits is sufficient for bringing the charges).

Notwithstanding the abovementioned prohibition on Officials and Restricted Individuals receiving gifts from companies and individuals, these individuals may accept so-called "permitted" gifts, as follows: (i) gifts (except for the Prohibited Instances) consistent with generally recognised ideas of hospitality (the "**Business Gifts**"); (ii) gifts received from close persons; and (iii) gifts provided as generally available discounts for goods, services, and wins, prizes, and bonuses (the "**Permitted Gifts**").

Any of the Permitted Gifts cannot be presented: (i) on a regular basis; and (ii) to affect the objectivity and impartiality of decisions taken by an Official/Restricted Individual receiving a Permitted Gift or performing/non-performing actions by such person within his/her authorities.

Under the Anti-Corruption Law, the value of a one-time Business Gift may not exceed the amount of one minimum subsistence level amount established for capable-of-working

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individuals on the date of a particular gift acceptance (currently constituting €72). The aggregate value of gifts from the same person (group of persons) within a given year should not exceed two minimum subsistence level amounts established for individuals capable of working as of 1 January of the year during which the gifts were received (currently being €144).

The above 'group of persons' notion is a recently introduced amendment. Therefore, there is no official or commonly accepted interpretation of it yet. The 'group of persons' can mean either several persons visiting an official and presenting a gift to him/her at the same time, or just people from the same organisation presenting gifts to such official during a given year. In the latter case, this amendment appears to be a more precise equivalent of the 'same source' notion under the previous anti-corruption statute. Therefore, until there is more clarity on this issue, it is recommended to interpret the 'group of persons' as people from the same organisation.

It should be emphasised that not only the gift's value, but also the circumstances under which it is presented, are important for determining the corporate policy for giving gifts to Officials. Under certain conditions, even a Business Gift of the equivalent of €20, or a modest private lunch with an Official, could raise the suspicion of the law enforcement authorities and result in allegations of corruption. Therefore, in addition to the value/timeframe established by the Anti-Corruption Law, it is always important to consider circumstances under which each particular gift is presented. Otherwise, there is a significant risk of prosecution against responsible Officials, a company's officers or a company itself.

Hospitality/entertainment

There is no definition of a hospitality/entertainment under Ukrainian law. However, the definition of the gift provided in the Anti-Corruption Law seems to be broad enough to cover hospitality/entertainment (similarly to the FCPA, UKBA, and some other foreign anti-bribery legislation). Even though the Methodical Recommendations Related to Preventing and Regulating the Conflict of Interest approved by the Decision No. 839 of the Anti-Corruption Agency dated 29 September 2017 no longer expand on the topic of gifts and entertainment, and the Anti-Corruption Programs Methodical Recommendations seem to distinguish between entertainment (hospitality) and gifts, the Model Anti-Corruption Program and the Methodical Recommendations No. 0020323-13 of the Ministry of Justice of Ukraine "Preventing and Fighting Corruption in the State and Municipal Agencies" dated 16 October 2013 expressly refers to hospitality (entertainment) as to a gift. Therefore, each case of entertaining an Official should be carefully evaluated.

For instance, paying a fee (honorarium) to an Official for speaking at a conference organised or sponsored by a company is not prohibited by the Anti-Corruption Law and, therefore, should not be treated as an act of corruption. On the other hand, compensation of an Official's expenses for his/her travel to the venue of the conference, accommodation, etc. could be viewed as corruption. Furthermore, whereas an invitation of an Official to attend a formal reception might be acceptable, treatment of the same Official to a private dinner might be considered a corrupt activity. Some Ukrainian companies prefer to extend invitations to government agencies rather than to particular Officials, to minimise the risk of being accused of corruption.

Key issues relating to investigation, decision-making and enforcement procedures

Article 96^{10} of the Criminal Code directly provides that, while deciding on penalties to be imposed on companies, courts have to consider the following:

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- degree of the corruption crime committed;
- level of implementation of criminal intent;
- amount of damage caused by this crime;
- nature and amount of unjustified benefits received or which may have been received by the company; and
- measures taken by the company to prevent the crime.

The Criminal Procedure Code provides that a prosecutor and a suspected or accused person may conclude special agreements on recognition of guilt (the "**Plea Agreement**") under which they can determine:

- precise wording of the suspicion or accusation and its legal qualification under the appropriate Section of the Criminal Code;
- essential circumstances for the proper criminal proceeding;
- unconditional recognition by a suspected or accused person of his/her guilt in committing the relevant crime;
- obligations of a suspected or accused person in relation to collaboration in investigating the crime committed by another person (in case it was agreed);
- agreed punishment and consent of a suspected or accused person for his/her punishment or for declaring the agreed punishment and his/her further release from serving the sentence on the terms of probation;
- consequences of conclusion and approval of the Plea Agreement provided by the Criminal Code; and
- consequences for a suspected or accused person in case of his/her failure to execute the Plea Agreement.

Ukrainian law does not generally stipulate for Plea Agreements with companies. Under the Criminal Code, a provider of unjustified benefits responsible for committing certain crimes (e.g. offering, promising or providing unjustified benefits to an Official) provided by the Criminal Code may be released from criminal liability: (i) if unjustified benefits were given due to their extortion; or (ii) in case of his/her voluntary reporting on providing unjustified benefits to the body responsible for commencing criminal proceedings prior to initiation of investigation by such body in respect of the provider of unjustified benefits. This provision of the Criminal Code is widely applied by Ukrainian courts in the abovementioned cases.

In addition to the abovementioned release from criminal liability, the Criminal Code provides for leniency and its conditions (e.g., voluntary compensation of damages, committing a crime under duress or due to a pecuniary or subordination dependence, etc.). These circumstances are evaluated by the court and mentioned in its judgment.

Under the Criminal Code, confession to the commission of a crime, sincere repentance and active assistance in investigation of a crime are considered as defences.

Overview of cross-border issues

Article 7 of the Criminal Code provides that citizens of Ukraine who have committed crimes abroad shall be held criminally liable under the Criminal Code, unless otherwise provided by the international treaties of Ukraine ratified by the Ukrainian parliament. If such individuals were brought to liability abroad for committing crimes envisaged by the Criminal Code, they may not be brought to criminal liability in Ukraine for these crimes.

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Under the general rule stipulated by Article 8 of the Criminal Code, foreigners who do not permanently reside in Ukraine and committed crimes abroad, can be held liable in Ukraine under the Criminal Code in cases provided by the ratified international treaties of Ukraine, or if they committed grave or especially grave crimes against human rights and liberties or interests of Ukraine.

Part 2 of this Article 8 provides that foreigners who do not permanently reside in Ukraine can be prosecuted in Ukraine under the Criminal Code if they committed any of the following corruption crimes abroad in complicity with Officials who are nationals of Ukraine:

- accepting an offer or promise, or receiving unjustified benefits by an Official;
- corrupt payment to a Private Company Officer;
- corrupt payment to a Public Services Official;
- offering, promising or providing unjustified benefits to an Official; or
- improper influence.

In addition, such foreigners can be prosecuted in Ukraine under the Criminal Code if they offered, promised or provided unjustified benefits to such Officials, or accepted from them an offer or promise of unjustified benefits, or received such benefits.

Foreign legal entities are not expressly listed in the Criminal Code of Ukraine as subjects of corruption-related crimes (unlike other crimes where foreign entities are expressly listed as potential subjects) and, to our knowledge, there is no practice when they were held criminally liable for such crimes in Ukraine.

FCPA/UKBA enforcement in Ukraine

To our knowledge, as of today there have been no precedents of the FCPA/UKBA's enforcement in Ukraine. Ukrainian authorities cannot initiate any action in Ukraine under foreign law.

On the other hand, Ukraine is required to provide legal assistance for foreign law enforcement authorities on their request, in accordance with a respective international treaty on legal assistance in civil or crime cases ratified by Ukraine. For instance, the Treaty between the US and Ukraine on Mutual Legal Assistance in Criminal Matters, effective as of 27 February 2001, requires Ukrainian government bodies to cooperate with the US authorised agencies by providing legal assistance to the US authorities during ongoing investigations, prosecution or for crime-prevention purposes (e.g. to provide copies of publicly accessible documents, to pass requests from the competent US agencies for a potential witness (including an Official) to testify before a US court, etc.). However, during the past few years there have been several FCPA-related cases prosecuted by the U.S. Securities and Exchange Commission, in particular, cases that involved charges for violation of the FCPA by paying bribes to foreign government officials in Ukraine,[2] and for failing to prevent illicit payments made by a Ukrainian subsidiary of a U.S.-based company to Ukrainian government officials in violation of the FCPA.[3] In addition, the UK Serious Fraud Office has investigated possible money laundering arising from suspicions of corruption in Ukraine, but closed investigations on the basis that there was insufficient evidence.[4]

Article 72 of the Anti-Corruption Law provides that the competent Ukrainian agencies can give to/receive from the relevant foreign agencies information, including restricted data, related to preventing and fighting corruption. In addition to that, under Article 11 of the Anti-Corruption Law, the Anti-Corruption Agency is authorised to exchange information with competent authorities of foreign countries and international organisations, as well as cooperate with foreign public agencies, NGOs and international organisations on matters within the Anti-Corruption Agency's authority.

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Moreover, the Anti-Corruption Bureau is entitled to conclude agreements with foreign and international law enforcement bodies on cooperation in matters within its competence, and to participate in international investigations.

Even though the number of publications on the FCPA and the UKBA and their extraterritorial application has been growing in Ukraine, and more Ukrainian companies and enforcement agencies (especially those dealing with US or UK companies) are aware of the existence of the FCPA and the UKBA and their effect on US and UK companies (their subsidiaries, officers and employees, and agents), based on our observation it rarely influences their business and other decisions.

Corporate liability for bribery and corruption offences

The Anti-Corruption Law and the Criminal Code provide, among others, that a company may be brought to criminal liability for committing corruption crimes listed in Article 96[3] of the Criminal Code by the company's authorised representative (independently or in complicity with this legal entity) on behalf and in the interests of this company. In such case, according to the Anti-Corruption Law, to identify the reasons for and conditions of committing the crime by this company employee, the company's CEO orders (based on the action of the Anti-Corruption Bureau or the order of the Anti-Corruption Agency) the conduct of an internal compliance investigation.

Criminal liability is introduced only for private companies (i.e. any companies that are not in state or municipal ownership).

A company may be brought to criminal liability for committing the following corruption crimes by the company's authorised representative on behalf and in the interests of this company:

- corrupt payment to a Private Company Officer;
- corrupt payment to a Public Services Official;
- offering, promising or providing unjustified benefits to an Official; or
- improper influence.

Under the Criminal Code, in case the company's authorised representative is found guilty of committing a corruption crime, the company may be ordered to pay a fine in an amount ranging from 5,000 to 75,000 tax-exempted incomes (currently being approximately €2,591 to €38,872), depending on the degree of the particular crime committed by the company's authorised representative.

The Anti-Corruption Law gives special attention to preventing corruption in the activities of legal entities by dedicating its entire Section X to this issue. In particular, it requires Ukrainian companies to ensure adequate measures are developed and implemented to prevent corruption in their activities. It also mandates companies' CEOs and founders (participants) to ensure regular assessment of the corruption risks their companies may face and implementation of relevant anti-corruption measures. A company may engage independent experts to facilitate detection and elimination of corruption risks in the company's activities, including during anti-corruption due diligences.

The Anti-Corruption Law directly imposes the following obligations in the anti-corruption compliance area on all employees of any Ukrainian companies, violation of which (if made part of the employment duties) may result in taking a disciplinary action against guilty employees, up to their dismissal):

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- not to commit and not to participate in committing corrupt offences related to the company's activities;
- to refrain from behaving in a manner that might be interpreted as readiness to commit a corruption offence related to the company's activities;
- immediately inform the company's anti-corruption compliance officer, its CEO or founders (shareholders) of instances of incitement to commit a corruption offence related to the company's activities, as well as about actual commission of corruption or corruption-related offences by other company employees or by other persons; and
- immediately inform the company's anti-corruption compliance officer, its CEO or founders (shareholders) of any actual or potential conflicts of interest.

The Anti-Corruption Law introduces the notions of the anti-corruption compliance programme of a legal entity and an anti-corruption compliance officer of a company.

Based on the above, introduction and effective implementation by Ukrainian companies of sound corporate anti-corruption programmes (including adoption by them of sophisticated anti-corruption policies/regulations) may mitigate the risk of potential criminal liability of these companies for corruption offences committed by their officers and other authorised representatives.

Proposed reforms / The year ahead

The Anti-Corruption Law is more consistent and clear in comparison to the earlier legislation, and generally seems to conform to the world's best practices. However, the Ukrainian anti-corruption legislative, regulatory and law enforcement environment still needs significant improvement to fully meet the world standard.

Most of the national anti-corruption bodies have been formed by now. However, not all of them are fully functional. Hopefully, this problem will be fixed in 2019-2020.

It is expected that the year ahead will be marked by the following:

- Ukrainian anti-corruption legislation will continue to develop. In particular, it is highly expected that criminal liability for unlawful enrichment will be restored.
- Various national bodies tasked with preventing and fighting corruption will stop playing power struggle games and start to cooperate, and this cooperation will bring long-awaited results.
- The High Anti-Corruption Court will become fully functioning. For this, in particular, it is hoped that the Law of Ukraine No. 2447-VIII "On the High Anti-Corruption Court" dated 7 June 2018 will be amended to limit its jurisdiction exclusively to cases investigated by the detectives of the Anti-Corruption Bureau and prosecutors of the Specialised Anti-Corruption Prosecutor's Office.
- Hundreds of significant corruption cases investigated by the Anti-Corruption Bureau during 2018-2019 will be decided by court and those found guilty will be awarded punishments adequate to the gravity of a particular corruption/corruption-related office.
- The Anti-Corruption Agency will continue issuing its recommendations and decisions showing its official position with respect to the most ambiguous provisions of the Anti-Corruption Law and other anti-corruption legislation.
- Serious compliance initiatives (launching/amending anti-corruption compliance programmes, assessing corruption risks, conducting internal compliance investigations, etc.) of Ukrainian companies can take place.

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Endnotes

1. Corrupt payment (‘підкуп’, in Ukrainian) is formally called in English ‘commercial bribery’. For the purposes of this chapter, it was decided to replace it with the term ‘corrupt payment’ to avoid confusion with the term ‘bribery’, which was eliminated from Ukrainian law in 2013.
2. https://www.sec.gov/news/pressrelease/2016-277.html.
3. https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139.
4. https://www.sfo.gov.uk/cases/ukraine-money-laundering-investigation/.

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UAE

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Brief overview of the law and enforcement regime

Bribery offences under the UAE Penal Code

The UAE does not have stand-alone anti-bribery or corruption legislation. The main provisions in respect of corruption are set out in Articles 234 to 239 of Federal Law No. (3) of 1987 as amended (the **UAE Penal Code**). These particular articles were amended and expanded at the end of 2018 by Federal Law No. (24) of 2018 and provide as follows:

- **Articles 234, 235 & 237(*bis*)** set out the principal offences of receiving a bribe. It is an offence for any public official, person assigned to a public service, foreign public official or international organisation employee to request, accept or take, directly or indirectly, a bribe, or promise of the same, in return for the performance of an act or omission in breach of their duties, or of an act included in their duties.

  The applicable penalty for a recipient of a bribe, as provided for under Articles 234 and 235, is temporary imprisonment.
- **Article 236(*bis*)** provides a separate offence for public sector "passive bribery" (receiving or requesting a bribe). It prohibits those who administer or are employed by a public sector entity or establishment from requesting, accepting or being promised, directly or indirectly, a bribe in order to commit or omit an act that is included in their duties. The offence will have been committed even where the individual never intended to proceed with the act or omission.
- **Article 236(*bis*)(2)** creates the active offence of bribing somebody in the private sector. It is an offence to promise, offer or grant, directly or indirectly, a private sector manager or employee a bribe in order for that person to perform or to omit an act that is included in their duties or constitutes a violation thereof.
- **Article 237** applies to any person who promises, offers or gives a public servant or official, a foreign public servant or an employee of an international organisation an undue gift, benefit or grant in order for such employee to commit or omit an act included in their duties against the obligations of his office.

  The penalty applicable to Articles 236(*bis*) – 237 is imprisonment not exceeding five years.
- **Articles 237(*bis*) & 237(*bis*)(2)** prohibit any person from abetting or assisting in the commission of a bribe, or acting as an intermediary for a bribery transaction. The latter crime is punishable by imprisonment of up to five years.

In addition to the punishments above, the bribery offences set out in Articles 234 to 237(*bis*)(2) are punishable by a fine equal to the bribery amount but no less than 5,000 AED.

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Any gifts accepted by or offered to a public official will be confiscated.

There is no statute of limitations applicable to bribery crimes or related civil actions (Article 239(*bis*)(2)).

Another result of the recent legislative changes is that arbitrators, experts and investigators are to be treated as public officials for the purposes of Articles 234 and 237 subject to the scope of their instructions (Article 236). This particular article, prior to the 2018 amendment, had caused concern, and was narrowed. Previously, the UAE Penal Code legislated that an arbitrator, expert, translator or investigator appointed by the administrative or judicial authorities or selected by parties, who breached his/her duty to act with neutrality and integrity, could be subject to imprisonment. The amended text now omits the arbitrator from this provision and also imposes a criminal sanction only upon an expert, translator or investigator who knowingly makes a *false statement*.

The law does not currently legislate for any defences to the above corruption offences. Article 239 does provide protection for a briber or intermediary who reports a bribe (i.e. protection for self-reporting).

Other applicable Federal laws

In addition to the UAE Penal Code, other Federal laws that may apply to bribery and corruption are:

- Federal Decree Law No. (11) of 2008 (the **Federal HR Law**) – this applies to federal government employees and public servants and governs gifts, bribes and conflicts of interest (Articles 70-71). Article 83 sets out the applicable sanctions for a breach of these provisions.
- Federal Law No. (7) of 2014 on Combating Terrorism Crimes.
- Federal Decree Law No. (20) of 2018 concerning Anti-Money Laundering (**Anti Money Laundering Law**).
- Cabinet Resolution No. (10) of 2019 concerning the Executive Regulations of (20) of 2018.

Individual Emirates laws

Laws of the individual Emirates may also apply to situations of bribery and/or corruption, including:

Abu Dhabi

- Abu Dhabi Law No. (1) of 1970 (the **Abu Dhabi Penal Code**);
- Abu Dhabi Law No. (1) of 2006 concerning the civil service in the Emirate of Abu Dhabi and its amendments.

Dubai

- Dubai Penal Law of 1970 (the **Dubai Penal Code**);
- Dubai Law No. (27) of 2006 regarding Human Resources Management (the "**Dubai HR Law**"); and
- Dubai Law No. (37) of 2009 relating to Procedures for the Recovery of Illegally Obtained Public and Private Funds (the **Dubai Financial Fraud Law**).

With regard to the Financial Free Zones (the Abu Dhabi Global Market and the Dubai International Financial Centre), whilst civil and commercial Federal laws do not apply within the financial free zones, criminal law, and laws relating to anti-money laundering, do. The UAE Penal Code will therefore apply, along with the Anti-Money Laundering Law, but

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the Federal HR Law and the Dubai HR Law will not – unless the employees are specifically government employees.

Enforcement authorities

The following authorities are responsible for investigating scenarios that could trigger anti-bribery and anti-corruption laws in the UAE:

At a Federal level:

- The State Audit Institution (**SAI**) is tasked with investigating and fighting corruption within the public sector as part of its broader role of auditing UAE Federal institutions.
- In accordance with the Federal HR Law, a Violations Committee will be established to conduct the official investigation into any Federal HR Law offences committed by public sector officials on behalf of ministries and government departments.
    - The Federal Anti-Money Laundering Law (Federal Decree Law No. 20 of 2018) imposes a general requirement on all financial institutions and designated non-financial businesses and professions to report suspected incidents of money laundering offences to the Financial Intelligence Unit (**FIU**), an independent unit of the Central Bank of the UAE. The Federal Anti-Money Laundering Law protects persons who make such suspicious transaction reports, and also contains some more general protections for whistle-blowers.

      The details of the suspicious transactions required to be reported, as well as the rules and controls to follow, are set out in the Implementing Regulations of the Law, (Cabinet Decision No. 10 of 2019).

      Other disclosure requirements contained in the Federal Anti-Money Laundering Law include a requirement that any person entering or leaving the UAE disclose whether he/she brings in or takes out any currency, bearer-negotiable instruments or precious metals or stones of value in accordance with the disclosure system issued by the Central Bank. Guidance is expected to follow in the Implementing Regulations.

At an Emirate level:

- The local Emirati police forces (each Emirate has its own police force operating under the Federal Minister of the Interior) and Public Prosecution offices are responsible for the prosecution of individuals under the UAE Penal Code.
- The Abu Dhabi Accountability Authority (**ADAA**), established in 2015 by Abu Dhabi Law No. (14) of 2008, is responsible for overseeing public sector body finances, including investigating any financial or administrative irregularities.
- The Dubai Economic Security Centre (**DESC**), established in 2016 by Dubai Law No. (4) of 2016, has a wide range of responsibilities including combatting fraud, bribery and corruption. Entities within its remit include local government, charities and Free Zone operators, including the Dubai International Financial Centre (**DIFC**).
- The Dubai Financial Audit Department, established in 2018 by Dubai Law No. (4) of 2018, is responsible for overseeing public sector body finances, including investigating any financial or administrative irregularities.

Only the SAI, the police and the public prosecutor have the power to prosecute.

The Dubai Financial Services Authority (**DFSA**) and the Financial Services Regulatory Authority (**FSRA**) may also be involved in the investigation of bribery and corruption crimes in the Abu Dhabi Global Market and the DIFC, respectively, as part of their ongoing supervision of authorised persons.

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Overview of enforcement activity and policy during the last year

In the UAE, as a civil law jurisdiction, judicial judgments are not published. Despite this, the news outlets frequently publish information about decisions handed down. Some of these include:

- A court-appointed auditor was jailed for 12 months as he requested 50,000 dirhams to issue a false and misleading financial report in favour of a businessman facing commercial issues. As the auditor was an expatriate, he will be deported after serving his jail sentence.
- Recently a Dubai police officer was charged with accepting bribes to access the police data systems and share confidential information with paying "customers". The police officer had accepted more than 10,000 dirhams in bribes in return for undertaking illegal data access on 17 people. The officer was convicted of accepting bribes, abuse of position and breach of duties as well as disclosing confidential information and was fined 10,000 dirhams and sentenced to two years' imprisonment.
- A sergeant at the General Directorate of Residency and Foreigners Affairs was sentenced in October 2018 to three years in jail for accepting AED 30,000 in bribes from individuals who requested that he issue nine exit permits for illegal residents without collecting the required exit fees. As part of his penalty, he was ordered to pay the total amount of the uncollected fees, as well as serve the jail sentence.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments are considered a form of bribery in the UAE and both the briber and the recipient may be liable to criminal prosecution. The relevant Articles of the UAE Penal Code are 234, 235 (in the case of the recipient of the bribe), and 237 (in the case of the briber).

In terms of gifts and hospitality, there are specific provisions in the Federal HR Law and Dubai HR Law, which prohibit the receipt of material gifts by public sector employees. An exception will apply where the gift is purely symbolic or of a promotional nature. In the latter case, the gift must bear the name and logo of the company/institution providing it.

Key issues relating to investigation, decision-making and enforcement procedures

Only the police and Public Prosecution Office have powers of arrest and prosecution (i.e. enforcement powers). All other authorities work with the Public Prosecution Office to assist with the investigation and collate evidence and information.

The SAI has the power to seize properties and to use "whatever means necessary" to protect and recover lost or illegally used public monies.

The DESC has a wide range of powers set out in Article 13 of Dubai Law No. (4) of 2016. It has the authority to control, research, investigate and collect information in "any way possible" and the power to take preventive actions and measures to detect crimes and engage in information exchanges with local and international authorities. It does not expressly have the power to seize funds, properties and documents but is entitled to request that the Public Prosecution do so.

The FAA has, pursuant to its establishing law, the legal capacity required to undertake all acts and dispositions that ensure the achievement of its objectives.

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Overview of cross-border issues

The UAE is a signatory to the United Nations Convention against Corruption (ratified by Federal Decree No. (8) of 2006). The Arab Convention to Fight Corruption (the Arab Convention) was ratified in 2010 by the UAE.

The UAE is a signatory to many other judicial treaties, for example Federal Decree (39) of 2006, proving judicial cooperation in extradition matters. However, the UAE follows the example of reciprocity when it comes to the enforcement of judgments against its citizens, or cooperation with extradition requests.

Pursuant to Article 239(*bis*)(1) of the UAE Penal Code, the bribery provisions set out in the UAE Penal Code as discussed above have an extra-territorial effect such that where the bribe is committed outside the UAE it will apply if:

- the criminal or the victim is a citizen of the UAE;
- the crime involves UAE State property; or
- the crime is committed by a public or private sector employee of the UAE.

Articles 234, 235 and 237 of the UAE Penal Code explicitly make it a crime to bribe foreign public officials or for foreign public officials to accept bribes. A foreign public official is defined under Article 6(*bis*)(1) of the UAE Penal Code as "*any person who occupies a legislative, executive, administrative or judicial position in another country, whether permanent or temporary, and whether he is elected or appointed, with or without a salary, and any person entrusted with public service functions*".

Corporate liability for bribery and corruption offences

Companies can be held liable for crimes committed by their representatives, directors or agents acting on their behalf pursuant to Article 65 of the Penal Code. This would include bribery and corruption offences.

Proposed reforms / The year ahead

Given the recent changes to UAE anti-bribery and anti-corruption law at the end of 2018, it is not currently expected that 2020 will see any further legislative changes or other reforms in respect of bribery and corruption. However, it is important to note that the UAE has made significant changes to its Anti Money Laundering regime.

The new federal Anti-Money Laundering Law imposes a general requirement on all financial institutions and designated non-financial businesses and professions to report suspected incidents of money-laundering offences to the FIU. In general terms, the Anti-Money Laundering Law upholds the main requirements of the previous Anti-Money Laundering Law of the UAE, but also imposes more onerous due diligence obligations on financial institutions and on designated non-financial businesses and professions.

In a first for the UAE, there is whistleblower protection in the new Anti-Money Laundering Law – which is, of course, one of the many recommendations made by the Financial Action Task Force.

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United Kingdom

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Brief overview of the law and enforcement regime

The main legislation in the UK governing bribery and corruption is the Bribery Act 2010 (the "**Act**"), which came into force on 1 July 2011.

The Act defines the criminal offences of bribery very widely and includes the principal offences of bribing another person, being bribed and bribing a foreign public official. Significantly, the Act also introduced a new strict liability corporate offence of failure to prevent bribery, where the only defence available to commercial organisations is for them to show that they have "adequate procedures" in place to prevent bribery.

Even since the last edition of this book was published, there have been few cases prosecuted under the Act. However, we still expect to see the number of cases increase as time passes, when more offending will presumably be alleged to have taken place on or after 1 July 2011.

The principal bribery offences

The offence of bribing another person includes offering, promising or giving a financial or other advantage intending to induce or reward improper conduct, or knowing or believing its acceptance to amount to improper conduct.[1] "Improper" means breaching an expectation of good faith, impartiality or trust. The bribe does not actually have to be given; just offering it, even if not accepted, could be sufficient to constitute bribery. In addition, the offer does not have to be explicit, and any offer made through a third party will fall within the Act.

An individual being bribed also commits an offence under the Act.[2] This includes requesting, agreeing to receive, or accepting a financial or other advantage where that constitutes improper conduct, or intending improper conduct to follow, or as a reward for acting improperly.

There is a separate offence under the Act of bribing a foreign public official to gain or retain a business advantage.[3] In contrast to the offences above, this does not require evidence of an intention on the part of the person bribing to induce improper conduct, or knowledge or belief that its acceptance will amount to improper conduct; only that the person bribing intends to influence the official acting in his or her official capacity. Unlike the US Foreign Corrupt Practices Act 1977 ("**FCPA**"), as amended, facilitation payments (also known as "grease" payments) are not permitted under the Act.

The corporate offence of failure to prevent bribery

It is possible for a corporate body and its senior officers to be found guilty of any of the general offences of bribing, being bribed and bribing a foreign public official. For a corporate body to be found guilty of the general offences, the prosecution must show that the necessary mental element can be attributed to the directing mind of the corporate body.

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For senior officers, it is necessary to show that the offence has been committed with the consent or connivance of such a senior officer.[4]

The significance of the separate corporate offence of failing to prevent bribery is that it is not necessary to show that any senior officer had any particular mental element, removing a critical obstacle for the prosecution in taking action against corporate entities.

The corporate offence is committed by a relevant commercial organisation where a person "associated" with it bribes another person with the intention of obtaining or retaining business or a business advantage for that organisation.[5] For the purposes of the Act, an "associated" person is widely defined as a person who performs services for, or on behalf of, the relevant commercial organisation. This could include not only employees or agents but also, depending on the circumstances, subsidiaries, consultants, representatives or others who perform services on the relevant commercial organisation's behalf.

The only defence available to the commercial organisation is that it had "adequate procedures" in place to prevent bribery. Section 9 of the Act requires the Secretary of State to publish guidance about such procedures; this guidance was issued on 30 March 2011[6] and set out the following key principles:

- **Proportionate procedures** – the procedures to prevent bribery should be proportionate to the bribery risks faced by the organisation and the nature, scale and complexity of the organisation's activities.
- **Top-level commitment** – senior management should be committed to preventing bribery and a senior person should have overall responsibility for the programme.
- **Risk assessment** – the organisation should carry out periodic, informed and documented assessments of its internal and external exposure to bribery, and act on them.
- **Due diligence** – appropriate checks should be carried out on persons performing services for the organisation, and those persons should in turn be required to carry out similar checks on the persons they deal with.
- **Communication (including training)** – bribery prevention policies should be clearly communicated internally and externally, and there should be continuous training.
- **Monitoring and review** – the risks and procedures should be regularly monitored and reviewed to ensure that they are being followed in practice.

Extra-territorial reach

Importantly, under the Act, the act of bribery itself does not necessarily need to have occurred in the UK for the offence to have been committed.

In relation to the general offences of bribing, being bribed or bribing a foreign public official, provided the person committing the offence has a close connection with the UK (for example, they are, among others: a British citizen; a British overseas territories citizen; ordinarily resident in the UK; or a body incorporated in the UK), the physical act of bribery can occur inside or outside of the UK.[7] This means that an individual who is a citizen of, for example, the British Virgin Islands or Bermuda, will be subject to these laws even if the act occurs entirely outside of the UK mainland itself and the individual is not, and never has been, a British citizen.

The corporate offence of failure to prevent bribery is not just confined to acts of bribery carried out in the UK. Provided the organisation is incorporated or formed in the UK, or the organisation carries on a business or part of a business in the UK (wherever in the world it is incorporated), then the organisation is within the ambit of the offence, wherever the act of bribery takes place. The guidance issued by the Secretary of State asserts that the question of whether or not an organisation carries out a business or part of its business in any part

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of the UK will be answered by applying a common sense approach, and the final arbiter in any particular case will be the courts (who have not yet had the opportunity to do so at the date of writing). The guidance states that the Government would not expect, for example, the mere fact that a company's securities have been admitted to the UKLA's official list and are trading on the London Stock Exchange to, in itself, qualify that company as such for the purposes of the corporate offence. Likewise, in relation to a UK subsidiary of a foreign parent company, since a subsidiary may act independently of its parent company, its parent company may not necessarily be caught by the offence, but the point is yet to be tested.

Investigating and prosecuting authorities

According to the Joint Prosecution Guidance on the Bribery Act 2010 issued on 30 March 2011, the Serious Fraud Office ("**SFO**") is the primary agency in England and Wales for investigating and prosecuting cases of overseas corruption; the Crown Prosecution Service ("**CPS**") also prosecutes bribery offences investigated by the police, committed either overseas or in England and Wales.

In England and Wales, consent needs to be sought from the Director of Public Prosecutions ("**DPP**") or the Director of the SFO for proceedings to be initiated for offences under the Act. They will make this decision in accordance with the Code for Crown Prosecutors (applying the two-stage test of whether: (i) there is sufficient evidence to provide a realistic prospect of conviction; and (ii) whether a prosecution is in the public interest), and also by taking into account the Joint Prosecution Guidance on the Bribery Act 2010, together with the Joint Guidance on Corporate Prosecutions, where relevant.

The prosecutor with responsibility for offences under the Act in Scotland is the Lord Advocate; in Northern Ireland, the Director of Public Prosecutions for Northern Ireland and the Director of the SFO are responsible.

Penalties

The penalty for an individual convicted of any of the general offences under the Act is a maximum of 10 years' imprisonment and/or an unlimited fine. A commercial organisation convicted under the Act faces an unlimited fine. In addition to any fine and/or sentence of imprisonment, a person can face forfeiture of the proceeds of crime (under the Proceeds of Crime Act 2002). Forfeiture can be by way of a criminal process known as confiscation, or by way of a civil process known as a civil recovery order ("**CRO**").

The Sentencing Council Definitive Guidelines on Fraud, Bribery and Money Laundering Offences, effective from 1 October 2014, provides Criminal Courts with guidance on how to approach the sentencing of individuals and commercial organisations in cases of bribery and corruption.

The high-level fines specified for the sentencing of corporate offenders suggest that heavy reliance is placed upon deterrent sentencing as a means of enforcing the Act. The Guidelines indicate that the Criminal Courts must first consider making a compensation order, requiring an offender to pay compensation for any personal injury, loss or damage resulting from the offence. Confiscation must then be considered if either the Crown asks for it or if the court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).[8] The Guidelines state that the level of fine will be determined by reference to the level of culpability and harm caused by the offending corporation. Examples of high culpability are:

- a corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others);

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- corruption of local or national government officials or ministers;
- corruption of officials performing a law enforcement role; and
- offending committed over a sustained period of time.

An example of lesser culpability will be where some effort has been made to put bribery prevention measures in place but these are insufficient to amount to a defence (this applies only to the offence under section 7 of the Act).

Under the Guidelines, the harm is a financial sum representing the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure of harm for offences under section 7 of the Act may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery. The fine to be imposed is calculated by the level of culpability multiplied by the harm figure. For instance, a case in which the court determines the corporation's role to have been of high culpability would multiply the harm figure by around 300%. In circumstances where the gross profit from a contract obtained was £1,000,000, the level of fine would, therefore, constitute *circa* £3,000,000 (300% of £1,000,000). A case determined by the court to involve low culpability would multiply the harm figure by around 100%. Once a starting point for the fine is determined, it can be adjusted to take into account aggravating or mitigating factors. If a guilty plea was entered, this will also serve to reduce the fine.

Other consequences that may flow from a conviction under the Act include directors' disqualification and trade sanctions, such as disbarment from EU contract tenders.

Civil bribery

In addition to the criminal offences under the Act, there is long-established case law in the UK relating to the civil tort of bribery. This concerns the payment of secret commissions to agents without the principal's knowledge or consent. Where the payer is aware of the agency relationship and the payment is kept secret from the principal, there is an irrebuttable presumption of corruption. If a claim for bribery is made, the principal may be entitled to recovery of an amount equal to the bribe paid. Indeed, in a recent case (***FHR European Ventures LLP & Ors v Cedar Capital Partners LLC***),[9] the Supreme Court decided that bribes and secret commissions are held on trust by an agent for his principal.

Key issues relating to investigation, decision-making and enforcement

Self-reporting

Until October 2012, the SFO had indicated the potential for matters that had been self-reported to the SFO to be dealt with through a civil process. Under the leadership of Sir David Green QC between 2012 and 2018, the SFO was very keen to emphasise its role as a prosecutor, and stated that "self-reporting was no guarantee that a prosecution will not follow". Under the Joint Guidance on Corporate Prosecutions, self-reporting is, at most, a public interest factor tending against prosecution. However, the SFO has also stated that a self-report can also be the single most important factor in a decision not to prosecute.

Co-operation

In August 2019, under the leadership of its new director, Lisa Osofsky, the SFO issued guidance on corporate co-operation. The five-page guidance sets out what the SFO expects of a corporate who wishes to co-operate. Co-operation is described as relevant to the SFO's charging decision and an important factor in considering whether a Deferred Prosecution Agreement ("**DPA**") is appropriate. Co-operation is described as providing assistance which goes above and beyond what the law requires and includes:

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- identifying suspected wrongdoing and criminal conduct and the people responsible;
- self-reporting to the SFO within a reasonable time;
- preserving evidence and providing it in a digestible and ready-to-use format by the SFO (including digital and hard copy); and
- obtaining and providing material, including summaries and relevant background and industry information. The SFO's corporate co-operation guidance also focuses on the waiver of privilege in relation to witness accounts which may have come into being as a result of an internal investigation conducted by a corporate, and which are viewed by the corporate as privileged. Through its guidance, the SFO has expressed a willingness to challenge claims of privilege or to require a corporate to submit the material to an independent lawyer for consideration.

The decision to self-report and/or co-operate will depend on whether there is sufficient incentive to do so or, indeed, sufficient adverse consequences from not doing so. The SFO's co-operation guidance makes it clear that even where a corporate has co-operated, that is no guarantee of any particular outcome. The considerations to take into account in such circumstances are numerous and complex, and it is rare for a company to self-report to the SFO without taking legal advice. Companies considering a self-report and/or co-operate should take specialist advice on the potential consequences, as well as the process.

An advantage to the SFO of a DPA (discussed in more detail below) is that if the terms of the agreement are not met and the DPA is terminated, prosecution is likely to follow. For companies, however, the outcome of self-reporting and co-operation is uncertain and a DPA is not guaranteed. The most notable DPA to date, involving Rolls-Royce, indicates that a DPA is not automatically barred by the lack of a self- report, but the company will simply be at a "disadvantage", which might require exceptional cooperation to compensate. Negotiation with the SFO is now more difficult also, due to the risk that unless complete control is provided to the SFO (including but not limited to the SFO expecting a waiver of privilege over certain documents), the DPA may be withdrawn without much hesitation. The High Court has criticised the SFO for relying on "oral summaries" of employees' interviews. The Court, in *obiter* comments, criticised the SFO for failing to require from the corporate, under the provisions of the DPA, waiver of privilege in respect of the full interview notes.[10]

The position taken by the SFO in its guidance is that the decision not to waive privilege over material gathered in an initial investigation will not attain the corresponding factor against prosecution that is found in the Code for Crown Prosecutors.

Further, the requirement to enter into a detailed statement of facts admitting liability against the backdrop of a criminal indictment makes the DPA process a difficult one for some companies to engage with. Companies are often encouraged to admit facts to obtain a DPA so that the company can remain (in one form or another), and employees who have committed no wrongdoing do not lose their jobs. However, the admissions are required at a relatively early stage of the investigation when the evidential landscape is unclear and the basis of the case broad.

We are yet to see the result of a trial following a terminated DPA, but it is likely that the SFO may seek to rely on the statement of facts provided in the course of the DPA proceedings as an admission to be used against the company in any subsequent trial. Section 13 of Schedule 17 of the Crime and Courts Act 2013 provides that the DPA statement of facts is not barred by statute and can be used as evidence in criminal proceedings: (i) in a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information; or (ii) in a prosecution for some other offence where, in giving evidence, a person makes a statement inconsistent with the material.

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All of the above serves to make the self-reporting/co-operation option less certain, less controlled, more intrusive and less worthwhile for many corporations.

Deferred Prosecution Agreements

DPAs were introduced by the Crime and Courts Act 2013, the relevant provisions of which came into force on 24 February 2014, and introduced a new enforcement tool into the UK. DPAs can be used in cases involving financial crime, including bribery and corruption and, from 30 September 2017, in cases brought under the Criminal Finances Act 2017. DPAs are voluntary agreements entered into between prosecutors and corporate and unincorporated entities (but not individuals) under which a prosecutor agrees to put on hold criminal proceedings (an indictment having been 'preferred' (i.e. the prosecutor serving the draft indictment on the crown court officer), but then 'deferred' on terms agreed between the parties and the court), provided the entity in question complies with a range of conditions.

Such conditions, for example, may include the payment of penalties, the disgorgement of profits and the implementation of training and compliance programmes. When imposed, a DPA must also specify an expiry date; that is, the date on which it ceases to have effect. Since DPAs came into force, the courts have imposed them in five cases, three of which have involved offences of bribery and corruption. Judicial oversight is required at most stages in the process of the entering into a DPA. All DPAs were dealt with exclusively by the President of Queen's Bench Division, Sir Brian Leveson, until his retirement in June 2019. The fifth and most recent DPA, imposed in July 2019, was the first imposed by another judge, Mr Justice William Davis. It is not known whether he or another nominated judge will have overall oversight of all future DPAs.

Once negotiations for a DPA have begun, the Director of the SFO or the DPP (as the case may be) must apply to the Crown Court for a declaration that the DPA is likely to be in the interests of justice and that the proposed terms of the DPA are fair, reasonable and proportionate. This first hearing must be in private. Once the DPA is approved, the judge must make the declaration in open court and give reasons. If, once the DPA is agreed and the criminal proceedings have been deferred, the prosecutor believes that there has been a breach of the terms of the agreement, it may apply to the court, who may determine whether there has been a breach and ask the parties to remedy the breach or terminate the DPA. Termination of the DPA will lead to the prosecution being pursued. Any variation of a DPA must be approved by the court.

It is intended that any financial penalty under a DPA shall be broadly comparable to a fine that the court would have imposed upon the organisation following a guilty plea. This is intended to enable the parties and the courts to have regard to sentencing guidelines in order to determine the penalty.

Organisations that enter into DPAs can expect a reduction of one third off any fine (the same as entering an early guilty plea), or potentially a further reduction in certain cases; for example, where an organisation assists the authorities. In ***XYZ Ltd*** and ***Rolls-Royce***, reductions in excess of one third were granted to recognise the companies' exceptional cooperation with the SFO investigation. Nonetheless, any reduction in the financial penalty will very much depend upon the discretion of the judge.

A joint code ("**the DPA Code**") published by the Director of the SFO and the DPP sets out the prosecutors' approach to the use of DPAs. The DPA Code and sentencing guidelines bring greater clarity to the DPA process itself and the guiding factors for and against prosecution, particularly in relation to self-reporting. The factors set out in the DPA Code make it clear that DPAs are available only to pro-active, genuine and complete reports. What this

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means has been elucidated by the SFO's recent guidance on corporate coo-operation. The guidance undoes the SFO's prior emphasis on its position that a company which reports a problem to the SFO early and genuinely cooperates in resolving the issue is unlikely to be prosecuted. Under the co-operation guidance, even full co-operation does not mean a company is unlikely to be prosecuted.

One issue arises in relation to the naming of individuals in the DPA itself or in the Statement of Facts agreed by the corporate. The Statement of Facts often names individuals, who have no right to intervene at court, and implicitly criticises them. This creates a real risk of reputational damage and is at odds with the position taken by the Financial Conduct Authority ("**FCA**") in relation to its notices. In ***FCA v Macris***[11] the Supreme Court held that the FCA erred in identifying a former JP Morgan manager in a notice, even if he was not named directly but rather identified by the position he held at the bank. No such safeguard currently exists in relation to DPAs: this has caused some consternation in relation to a DPA agreed with Tesco Plc and Sarclad, whose executives were subsequently prosecuted unsuccessfully.

Another concern for individuals in the context of DPAs is whether material disclosed by the company, for example as the result of an internal investigation, can be used in subsequent criminal proceedings brought against them. The SFO has the power to disclose information obtained to other government authorities.[12] In fact, there is no explicit safeguard against the sharing of information with third parties, most notably foreign regulatory agencies. However, it is yet to be seen whether evidence obtained from the company might be considered inadmissible in future trials against the individuals, particularly in relation to employees' interviews conducted by the company as part of internal investigations and later shared with prosecution authorities. The SFO's current difficulties highlighted in its cooperation guidance arise out of the difficulty in obtaining the accounts at all.

Overview of enforcement activity and policy during the past two years

Prosecutions of commercial organisations

Only a few corporations have been prosecuted for offences under the Act, and all have been in respect of the new section 7 offence of failing to prevent bribery (perceived to be much easier to prosecute than the principal bribery offences under sections 1, 2 or 6 of the Act, referred to above). The section 7 offence is committed on a strict liability basis, where a bribe has been paid by someone who performs services for, or on behalf of, the relevant commercial organisation. Unlike the principal bribery offences, it does not require the prosecutor to establish intent on the part of a directing mind of the company.

The only defence for the corporate offence is for the company to show that it had in place "adequate procedures" to prevent the bribery from taking place. As a result, it is expected that any decision as to whether or not to prosecute will involve detailed consideration of the procedures that the suspect company has had in place and how they have been implemented. It is important to emphasise here that the focus will not just be on what the written procedures look like, but how they have operated in practice. The prosecutor will be looking at questions such as:

- What is the tone from the top, and does this company really subscribe to anti-corruption compliance in its truest sense?
- Has this company undertaken a properly documented risk assessment? Without this, it will be difficult for a company to show that it has put in place appropriate and proportionate procedures to plug the risk gaps.
- What do its written procedures look like, and are they adequate?

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- How does the company go about the process of due diligence on third parties who perform certain services on its behalf?
- Is the training adequate?
- To what extent has the company monitored compliance, evaluated the adequacies of its procedures and assessed the true understanding of its employees and agents?

The wording of the section 7 offence means that the onus of establishing "adequate procedures" will be on the company as the defendant in proceedings. The defence must be established to the civil standard of proof (on a balance of probabilities). All that the prosecution will have to establish is that a bribe has been offered, promised or paid, even if the individual who committed the bribery offence has not himself been prosecuted. If the company has established the defence to the relevant standard, it is for the prosecution to rebut it to the criminal standard of proof (beyond reasonable doubt).

All of the companies prosecuted thus far, save one, pleaded guilty or entered into a DPA:

Standard Bank – November 2015. This was the first prosecution opened for the strict liability offence which was concluded by way of the first DPA requiring the payment of a US$25 million.

Sweett Group – December 2015. The Sweett Group entered a guilty plea to the strict liability offence of failing to prevent an act of bribery intended to secure and retain a contract with an insurance company as a result of a conviction arising from an SFO investigation into its dealings in the United Arab Emirates. The SFO's investigation into the Sweett Group uncovered that one of its subsidiaries had made corrupt payments to the Vice Chairman and Chairman of the investment committee of an insurance company in order to secure a contract for the building of a hotel in Abu Dhabi. The Sweett Group was ordered to pay £2.25 million.[13]

- ***'XYZ' Limited*** – In July 2016, Sarclad Limited, referred to as XYZ Limited in its DPA in order protect the fairness of the subsequent trial its former executives, entered into a DPA and paid a £6.5 million fine. In July 2019, the three former executives were acquitted by a jury of charges of bribery.
- ***Rolls-Royce*** – In January 2017, Rolls-Royce entered into a DPA in relation to offences including two counts of failure to prevent bribery carried out by its employees or intermediaries. It paid a £497 million fine. No individuals were subsequently charged or prosecuted.
- ***Tesco Plc –*** Tesco Plc was fined £129 million under a DPA. Three individuals were then prosecuted. The trial was abandoned in February 2018 owing to the ill-health of one of the defendants. The two remaining defendants were retried in October 2018, but the trial collapsed a month later after the trial judge ruled there was no case to answer against them. In January 2019, the SFO offered no evidence against the remaining defendant whose trial had been abandoned due to ill-health. He was formally acquitted.
- ***Serco Geografix Ltd*** ("***SGL***") – in July 2019 SGL entered into a three-year DPA in relation to three offences of fraud and two offences of false accounting. It was fined £19.2 million. (£12.8 million in compensation had already been paid to the Ministry of Justice in 2013 as part of a £70 million civil settlement. To date, the SFO has not made a decision in relation to whether to charge any individuals).

The first prosecution under the Act was brought by the CPS in February 2018, when it secured the first successful contested prosecution for failure to prevent bribery in respect of a small (and dormant) interior design company, Skansen Interiors Ltd. The case related to corruption in respect of the development of £6m of prime commercial property in London. The company attempted to persuade the jury that it had "adequate procedures" designed to prevent bribery

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occurring, however this argument was rejected and the company was convicted. Since the company was dormant and without assets, the court ordered an absolute discharge.

Recent prosecutions of individuals

Individuals facing charges in respect of corruption offences may still face prosecution under the old law (the Prevention of Corruption Act 1906). Between 2016 and 2018, in a series of prosecutions brought against Alstom Group companies and individuals under the Prevention of Corruption Act and in relation to conspiracy to corrupt, relating to the Alstom Group:

1. Alstom Network UK Ltd was convicted in relation to trams and signalling equipment contracts in Tunisia, India and Poland. Two individuals were acquitted.
2. Alstom Power Ltd and two individuals pleaded guilty in relation to separate power station contracts in Lithuania. One individual was acquitted.
3. Alstom Network UK Ltd, and a further three individuals were acquitted of charges relating to a Budapest Metro rolling stock contract in Hungary.

In September 2017, six current and former employees of F.H. Bertling Ltd, and the company itself, were convicted of conspiracy to make corrupt payments between 2004 and 2006 to an agent of the Angolan state oil company, Sonangol, in relation to F.H. Bertling's freight forwarding business in Angola and a contract worth approximately $20 million. The SFO secured guilty pleas from the corporate entity, FH Bertling, as well as from five individuals although the sole defendant, who chose to fight the accusations in court, was acquitted of the charges by a jury in the Crown Court. In 2018, in subsequent proceedings against FH Bertling executives concerning an alleged bribery scheme connected to an oil exploration project in the Jasmine field in the North Sea, three individuals were acquitted by a jury and one convicted. On an earlier occasion, three others had entered guilty pleas to related charges.

In April 2018 the CPS secured convictions under the Act in respect of two of the directors of Skansen Interiors (see above) who (having pleaded guilty), received sentences of 12 months' and 20 months' imprisonment, respectively.

Interaction with other regulatory agencies

The interaction with the UK's anti-money laundering regime, which requires reporting to the National Crime Agency ("**NCA**") and applies very strictly to the regulated sector (but also in a number of circumstances to other business sectors), further complicates the position. Any suspicion that a bribery offence has been committed (together with any past or future revenues that flow from contracts related to such bribes) may, in certain cases, need to be reported to the NCA.

Any regulated firms in the financial services sector are also subject to the enforcement powers of the financial regulator in the UK: the FCA (previously the Financial Services Authority) or Prudential Regulatory Authority ("**PRA**"), as the case may be. The significance of this is that any conduct relating to bribery or corruption risks may also constitute a breach of the rules and/or principles of the FCA Handbook, but, unlike the SFO, there is no need for the FCA necessarily to prove the act of bribery itself.

There are also indications that Her Majesty's Revenue and Customs ("**HMRC**") is using the Bribery Act during its enquiries and investigations into taxpayers. Although the extent of this is not clear, UK taxpayers should be wary that there are permitted information gateways between HMRC (and other regulators) and the SFO in relation to the sharing of information regarding illegal activities. The relevance of the Act to HMRC is that some companies may be claiming tax deductions for overseas bribes (which is no longer permitted) and are therefore under-declaring tax.

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Cooperation with other global enforcement agencies

The development of an increasing level of cooperation between the UK authorities and other global regulators in the fight against corruption is also apparent.

In the UK, the Crime (International Cooperation) Act 2003 empowers judges and prosecutors to issue requests to obtain evidence from another country for use in domestic proceedings or investigations. Additionally, the Proceeds of Crime Act 2002 enables prosecutors to send requests for restraint and confiscation to the Secretary of State, for onward transmission to the relevant authority abroad. The UK is also a party to numerous mutual legal assistance treaties, such as those with the US, China, Hong Kong and other EU Member States.

It is rare to find an SFO corruption case which does not involve cooperation with other global enforcement agencies. Traditionally, the SFO has worked closely with authorities such as the US Department of Justice ("**DoJ**") and the Office of the Attorney-General in Switzerland ("**OAG**"), but more and more countries now have highly effective anti-corruption provisions (such as France's *Sapin II* law, which came into force in 2017). This means that it is increasingly common to see parallel investigations being conducted, and a closer level of cooperation between countries.

Hot topics

Three areas in particular have led to much recent debate in the UK: privilege in internal investigations, extraterritoriality of SFO section 2 notices, and the Criminal Finances Act 2017. There is also a continuing discussion surrounding the question of whether DPAs for individuals should be introduced in order to level the playing field between corporates and individuals.

Privilege in internal investigations

The SFO has proved ready to litigate cases where it disputes assertions of privilege. Very recently, the Court of Appeal was called upon to decide claims of both litigation and legal advice privilege in the case of ***SFO v Eurasian Natural Resources Corporation Ltd***[14] ("**ENRC**"). In that case, ENRC's lawyers had been issued with a compulsory notice requiring them to produce a number of documents (including notes of interviews which had been conducted with ENRC employees as part of an internal investigation, and presentations to the board and governance committee about the investigation findings). ENRC claimed that such documents were either covered by litigation privilege, in that they were prepared for the dominant purpose of litigation (namely a criminal prosecution by the SFO), or legal advice privilege.

The SFO (who had been successful in the High Court) argued that litigation privilege did not apply because the documents had been created at too early a stage for criminal proceedings to have been in reasonable contemplation. The Court of Appeal overturned the High Court decision, and held that litigation privilege applied from the point at which ENRC engaged lawyers to conduct an internal investigation, which was well before the SFO opened its own investigation. Comments made by the SFO, and the sub-text of ENRC's interactions with the SFO, made clear that criminal proceedings were possible, if not likely, unless the matter was settled, and therefore within reasonable contemplation. The Court of Appeal stressed that it is "*obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation*".

ENRC had separately raised a claim of legal advice privilege in respect of some of the documents, including interviews of employees conducted as part of an internal investigation

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(if those employees were not tasked with seeking and receiving such advice on behalf of ENRC). Whilst the Court of Appeal concurred with the High Court that – under current English law – such privilege could only cover information received from ENRC (or persons it authorised to seek or receive legal advice), they did make it clear that as far as they were concerned, this position was out of step with international common law and (were they in a position to decide the matter) they would be in favour of broadening the concept of legal advice privilege. This, however, is a matter for the Supreme Court to decide in due course.

Extraterritoriality of section 2 notices

Under section 2(3) of the Criminal Justice Act 1987, the Director of the SFO has the power to compel any individual or entity to provide information or documentation which is believed to be relevant to a matter under investigation. There has long been debate as to whether this power extends to material held outside the United Kingdom – for example, many companies hold electronic data on servers located overseas.

The issue was raised in a recent case, ***KBR v SFO***,[15] where a section 2 notice had been issued to KBR Inc., the parent company of the UK subsidiary under investigation (KBR Ltd), to provide documents which were held outside of England & Wales, but which the SFO felt were potentially relevant to their investigation of KBR Ltd.

The High Court confirmed that section 2 notices must have an element of extraterritorial application, stating that it was "*scarcely credible that a UK company could resist an otherwise lawful s.2(3) notice on the ground that the documents in question were held on a server out of the jurisdiction*". UK companies are therefore required, upon receipt of a section 2 notice, to furnish the SFO with relevant material that they hold both domestically and overseas, unless they have a reasonable excuse for failing to comply.

As for whether KBR Inc. (as a foreign parent company) was obliged to provide the SFO with documents held overseas, the High Court stated that there was a clear public interest in the extraterritorial ambit of section 2(3). It held that section 2(3) should extend to foreign companies in respect of documents held outside the jurisdiction "*when there is a sufficient connection between the company and jurisdiction*". The Court felt that this struck a principled balance between facilitating the SFO's investigation of serious fraud with an international dimension and making excessive requirements in respect of a foreign company with regard to documents abroad.

The mere fact that KBR Inc. was the parent of KBR Ltd did not amount to a sufficient connection, nor was the fact that KBR Inc. had cooperated to a degree with the SFO's request for documents. However, amongst other things, the SFO's investigation had revealed a purported link between KBR Inc. and the method of making the alleged corrupt payments, and this *was* felt to be a "sufficient connection" as far as the High Court was concerned. It is important to note that KBR Inc has been granted leave to appeal to the Supreme Court on this issue. At the time of writing, no hearing date has been set.

The current ruling is not inconsistent with the Crime (Overseas Production Orders) Act 2019 ("**COPO**") which received royal assent on 12 February 2019 but its principal provisions have not been brought into force. COPO will enable UK law enforcement agencies to apply to the court for an order to obtain electronic data from a company based outside the UK in order to assist with a domestic investigation and prosecution of serious crime. The country in question must have in place an international co-operation agreement. The requirements for making such an order include that the judge must be satisfied that: (a) there are reasonable grounds for believing that an indictable offence has been committed and the offence is being investigated/prosecuted; or (b) if the order is sought for the purposes

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of a terrorist investigation, the material itself needs to be of "substantial value" to the proceedings/investigation.

In this digital age, we should expect to see investigators and prosecutors increasingly seek to avoid the cumbersome mutual legal assistance ("**MLA**") process to obtain documents – whether through the use of compulsory powers (section 2) or from new legislation.

Criminal Finances Act 2017

The Criminal Finances Act 2017 is of particular interest because, although it was introduced to penalise corporates who failed to prevent the facilitation of tax evasion by persons performing services on their behalf, the offences themselves are modelled on the strict liability corporate offence in the Bribery Act. If a corporate can show that it had in place reasonable prevention procedures, then it can take advantage of the statutory defence, but otherwise these offences (like section 7 of the Bribery Act) are strict liability.

The Government guidance refers to six guiding principles: risk assessment; proportionate procedures; top-level commitment; due diligence; communication (including training); and monitoring and review. Similar principles are set out in the Bribery Act Guidance, and companies may find that their existing anti-bribery procedures can be expanded to incorporate reasonable anti-facilitation measures. However, the Government has made clear that it is not sufficient for relevant bodies to simply rely on (or make token additions to) existing procedures – they will need to show that they have considered these principles specifically in relation to the offences, and implemented appropriate procedures as a result.

Many commentators are anticipating that legislators, at some stage, will seek to introduce a "failure to prevent economic crime" offence, which will make it much easier to prosecute corporates for economic crime. The "failing to prevent" concept – first introduced in the Bribery Act – may be a blueprint of things to come.

DPAs for individuals

When individuals are acquitted following a DPA entered into by their former employers, such as in the Tesco and Sarclad cases, the issue of whether DPAs for individuals should be available resurfaces. DPAs are not available to individuals in the UK as they are in the US. If DPAs were made available to individuals, it would enable them to engage in the process and participate in establishing the factual basis upon which any DPA, including one entered into by the corporate, is established.

As it currently stands, an individual may be named and blamed for misconduct in the formal DPA, and there is no recourse for correcting the documents in the event of the individual's acquittal. The integrity of the factual basis of the corporate DPA would be maintained where an individual is also able to take advantage of the DPA process. The process itself would involve the making of admissions by the individual. However, as explained below, there appears to be little legislative willingness to provide a mechanism for individuals which avoids criminal prosecution. The prosecution of individuals responsible for corrupt conduct is considered to be the ultimate objective, and the co-operation of the corporate is designed to assist in identifying and pursuing individuals.

What next for the Bribery Act?

On 14 March 2019, the House of Lords Select Committee on the Bribery Act 2010 published its post-legislative scrutiny report. In summary, it concluded that the Act is an "*excellent piece of legislation which creates offences which are clear and all embracing*", and an "*example to other countries, especially developing countries which need to deter bribery*". The Select Committee recognized that the guidance issued is less useful for small

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and medium-sized enterprises. In relation to DPAs, the Select Committee did not accept the criticism that they were an easy way out for large companies. The discounts applied were appropriate to encourage self-reporting, but not so large that they deprived the penalty of its effectiveness. It also concluded that a DPA with a company was not a substitute for the prosecution of individuals involved in corrupt conduct.

The future of the SFO

In an upturn in fortune for the SFO, discussions about its abolition and transfer of its powers to the National Crime Agency appear to have gone away for the foreseeable future.

Lisa Osofsky, who succeeded Sir David Green QC as Director of the SFO for a five-year term in August 2018, has allayed doubts about the future of the SFO and emphasised her commitment to "*maintaining the independence and prominence of this organisation*". As previously highlighted by the former Director, the SFO's net contribution to the Treasury over a four-year period was £460 million, equivalent to approximately £1 million per member of staff. This success is almost entirely due to the introduction of DPAs, which alone generated £676 million over the same period.

The new Director has pledged to build upon the SFO's successes, including continuing to resolve cases through DPAs when appropriate and in the public interest do so, alongside strengthening cooperation with foreign enforcement agencies. Perhaps in contrast to her predecessor, the current Director has indicated less willingness to initiate prosecutions and has described the decision not to prosecute as one of the hardest a prosecutor has to make. She has also made clear that she intends for the SFO to work more efficiently and to make use of its intelligence capabilities.

* * *

Endnotes

1. S. 1, Bribery Act 2010
2. S. 2, Bribery Act 2010.
3. S. 6, Bribery Act 2010.
4. S. 14, Bribery Act 2010.
5. S. 7, Bribery Act 2010.
6. The Bribery Act 2010: Guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing another person (section 9 of the Bribery Act 2010).
7. S. 12, Bribery Act 2010.
8. Sentencing Council Definitive Guideline, Fraud, Bribery and Money Laundering Offences, 1 October 2014, p.49.
9. [2014] UKSC 45.
10. *R (on the application of AL) v Serious Fraud Office* [2018] EWHC 856 (Admin).
11. [2017] UKSC 19.
12. Section 3(5) of the Criminal Justice Act 1987.
13. https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/.
14. [2018] EWCA Civ 2006.
15. [2018] EWHC 2010 (Admin).

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Jonathan heads the London White Collar Crime team and has over 30 years of experience representing corporates and individuals in investigations by UK and international agencies. He also advises firms on internal investigations, due diligence, compliance and risk in relation to criminal and regulatory matters. Clients benefit from his experience in dealing with law enforcement and regulators, his strategic thinking and his pragmatism.

Jonathan's practice focuses on allegations relating to money laundering, corruption, market misconduct, fraud, tax evasion and insider trading. He frequently interacts with the Serious Fraud Office, the National Crime Agency, HM Revenue & Customs, the Financial Conduct Authority, the police and other agencies.

Jonathan has represented corporate and individual clients under investigation in some of the most significant cases of the last three decades. These have involved investigations into money laundering, bribery and corruption, tax, accounting fraud, bench mark manipulation (e.g. foreign exchange and LIBOR), criminal cartels and insider dealing.

Jonathan is recognised by the top legal directories and was recently ranked Band One in *Chambers UK* 2019, Financial Crime: Corporates. He was also recognised as a 2019 *Who's Who Legal*: Thought Leader, for Crime Corporates, Crime Individuals and Investigations.

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Joanna has broad experience across a wide range of white collar related areas. Many of her cases have an international dimension and she has particular experience of multi-jurisdictional investigations, including bribery and corruption and cartel investigations undertaken by authorities in both the UK and abroad (SFO, SOCA, Arab Republic of Egypt, DOJ, Canadian Competition Bureau), as well as complex extradition, Interpol red notices and mutual legal assistance matters.

Joanna also has considerable experience in the field of international sanctions, having represented individuals facing restrictive measures, as well as corporations requiring compliance and litigation advice arising from the enforcement of sanctions by the European Council, OFAC and the Swiss Federal Council.

Joanna is recognised by *Who's Who Legal* 2019 as a future leader in Investigations and Crime Defence: Individuals, and was one of four lawyers across EMEA to be rated as 'most highly regarded'. Joanna is also ranked as an 'Up and Coming' Lawyer in *Chambers UK* 2019 for Financial Crime: Corporates and Financial Crime: Individuals, as well as being listed the Global Investigations Review Top 100 Women in Investigations in 2018.

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Brief overview of the law and enforcement regime

The United States Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") investigate and prosecute business corruption worldwide under the US Foreign Corrupt Practices Act of 1977, as amended ("FCPA").[1] The FCPA, which prohibits bribery of non-US government officials and imposes certain accounting and internal controls requirements upon companies listed in the United States, has a broad geographical reach and creates significant exposure for both companies and individuals.

In recent years, the DOJ and SEC have aggressively pursued anti-corruption enforcement actions, and subjected both US and foreign companies, as well as their subsidiaries and agents, to FCPA scrutiny. Risks associated with such proceedings include not only the cost of investigations, civil and criminal penalties, and disgorgement of profits, but also threats to corporate reputation and management careers.

Overview of enforcement activity and policy during the last year

The application and interpretation of the FCPA continues to be driven more by the views of US enforcement officials than by the decisions of US courts or legislative bodies. Those US authorities continue to emphasise policies that increase the incentives for voluntary self-disclosures of apparent FCPA violations. In 2019, the DOJ put forth revisions to two major policies: (1) in March 2019, the DOJ updated its 2017 guidance on corporate compliance programs; and (2) in April 2019 the DOJ announced the latest revisions to its FCPA Corporate Enforcement Policy (stating that corporations that timely disclose, cooperate and remediate will enjoy a presumption that the DOJ will decline to prosecute and will not impose a monitor).

Enforcement actions in 2018 and 2019 demonstrated that global enforcement efforts remain strong. In June 2018, for example, US officials brought their first coordinated action with French authorities against Société Générale S.A. in a June 2018 action related to a scheme involving bribery of Libyan officials.[2] That action resulted in a total payment of $585 million, split equally between US and French authorities. In June 2019, the US announced a resolution with Technip FMC PLC (a British company) for conspiracy to violate the FCPA's anti-bribery provisions.[3] That resolution resulted in a combined total criminal fine of more than $296 million to resolve charges with both the DOJ and Brazilian law enforcement, with approximately $82 million in fines going to the DOJ, and $214 million going to Brazilian authorities.

Law and policy relating to issues such as facilitation payments and hospitality

The FCPA contains two sets of provisions; the anti-bribery provisions and the accounting

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provisions. The FCPA's anti-bribery provisions apply to: (i) "issuers" of securities on US exchanges; (ii) "domestic concerns," namely, US citizens, nationals, residents, and business entities organised under US law; and (iii) persons other than issuers or domestic concerns who act within US territory in furtherance of a promise or payment prohibited under the FCPA.[4] Thus, any person, including foreign persons or entities who take any act in furtherance of the unlawful conduct in the US, could be liable for violations of the FCPA. The US government takes the position that if funds pass through a US bank or an email passes through US servers, that US connection would be sufficient to expose the participants to FCPA liability.

Bribery provision

Broadly speaking, the anti-bribery provisions prohibit the corrupt payment, authorisation, or offer to pay anything of value to a non-US government official, political party, party official or candidate for political office to influence an official act or decision for the purpose of obtaining, retaining, or directing business, or securing an improper advantage. Not only are direct payments to non-US government officials for a corrupt purpose unlawful, but corrupt payments to third parties (e.g., consultants, agents, or other intermediaries), if the person or entity making, authorising or offering the improper payment knows, or is aware of, a high probability that all or part of a payment will be offered, promised or given, directly or indirectly, to a non-US government official, are also violations of the FCPA. A violation of the anti-bribery provisions is punishable by substantial monetary fines and, for individuals, by imprisonment.

(i) *Facilitation Payments Exception*

The bribery provision contains an exception for "facilitating or expediting payments" made in furtherance of "routine governmental action".[5] These so-called "facilitation" payments are modest payments made to foreign officials to expedite the performance of routine, non-discretionary acts (e.g., processing visas, providing police protection or mail service, or supplying utilities like phone service, power, and water). Not only is this exception narrowly construed by U.S. enforcement authorities, but most other national anti-corruption laws do not recognize an exception for such payments.

(ii) *Hospitality*

The FCPA contains an affirmative defence based upon a reasonable and *bona fide* expenditure directly related to the promotion, demonstration or explanation of goods or services, or the performance of a relevant contract, including legitimate hospitality for government officials. According to the FCPA Resource guide, "hallmarks" of appropriate hospitality are when a gift is "given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law. . . . Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC."[6] Expensive or extravagant gifts (e.g., exotic travel, tickets to sporting events, watches, etc.) are more likely to be considered improper payments.

Accounting provisions

The accounting provisions of the FCPA apply only to "issuers" of securities on US exchanges and consist of the "books and records" and "internal controls" provisions.[7] In general, the provisions require: (i) making and maintaining books, records, and accounts that, in

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reasonable detail, accurately and fairly reflect their transactions and use of assets; and (ii) devising and maintaining an adequate system of internal accounting controls to prevent and detect corruption. Thus, if a corporation paid a bribe but did not record the expenditure as a bribe in its books and records, it would be subject to additional, and often higher, penalties. The FCPA accounting provisions do not contain any materiality requirements, which means that any violation, no matter how trivial, could be prosecuted.

Under the FCPA, issuers are responsible not only for their own compliance with the accounting provisions but also for the failure of their majority- or wholly-owned subsidiaries, and subsidiaries that they otherwise control, to comply with these provisions. The SEC has taken the position that issuers' books and records necessarily include those of their consolidated subsidiaries. Thus, in practice, the SEC applies strict liability for accounting violations by a corporate parent, even if a parent's books and records are unknowingly inaccurate only because of its subsidiaries' inaccurate books and records. For instance, if a company's majority-owned subsidiary inaccurately characterises payments in a misleading way, such as describing a payment as a "consulting fee" when no work was performed, the company could still face FCPA prosecution for violation of the accounting provisions.

Individuals and companies can face both civil and criminal liability for violating the accounting provisions. Criminal liability can result from a knowing circumvention of, or failure to implement a system of, internal controls, or from a knowing falsification of any book, record, or account of an issuer.[8] Further, companies may be debarred from US federal contracts, and institutional investors may be barred from doing business with a corporation that is subject to an FCPA enforcement action. Although the same course of conduct can violate both the anti-bribery and accounting provisions of the FCPA, a violation of the accounting provisions may be found regardless of whether the anti-bribery provisions have been violated and *vice-versa*.

Scope of prohibitions and risk

The FCPA makes it illegal to directly or indirectly make, promise, authorise or offer anything of value to a non-US government official to secure an improper advantage, obtain or retain business, or direct business to any other person or entity.[9]

"Anything of value" is defined very broadly and can include, for example:

- gifts;
- travel, meals, lodging, entertainment, or gift cards;
- loans or non-arm's length transactions;
- charitable or political donations; or
- business, employment, or investment opportunities.

This prohibition includes payments to third-parties where the US person knows, or has reason to know, that the third-party will use any part of the payment for bribes. Thus, one of the areas of greatest risk to companies, particularly those that operate in jurisdictions known for widespread corruption, is the activity of agents. Corporations can be held liable for actions taken by their agents, including consultants, joint venture partners, customs brokers, distributors, "finders" or vendors, if the corporation authorises, has knowledge of, or turns a blind eye to corrupt payments by such agents.

Potential 'red flags' in relation to third-party agents include situations where:

- a government official recommends the third party;
- the third party has previously engaged in suspicious or illegal activities;

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- the third party requests unusual payment arrangements, unusually high commissions, or success fees dependent on favourable government action; or the third party is a charity (even *bona fide*) affiliated with a foreign government or official(s).

Key issues relating to investigation, decision-making and enforcement procedures

Enforcement of FCPA Violations

In 2019, as in 2018, the DOJ and SEC have continued to bring significant numbers of enforcement actions against companies and individuals for FCPA violations. In 2018, the DOJ brought six corporate enforcement actions, resulting in nearly $597 million in corporate criminal fines, penalties, and forfeiture; charged 31 individuals; convicted one individual at trial; and secured guilty pleas from 18 individuals.[10] The DOJ also issued four declinations.

The SEC brought 13 corporate enforcement actions, and settled charges with three individuals. In the first three quarters of 2019, the DOJ brought four corporate enforcement actions, issued one declination, and charged 11 individuals. The SEC brought 12 enforcement actions, charged two individuals, and settled charges with two individuals.[11]

International law enforcement cooperation continues

Mobile Telesystems PJSC ("MTS") became the third FCPA enforcement action brought against a telecommunications company in connection with bribes paid to facilitate entry into the Uzbek market.[12] The DOJ and SEC announced settlements with MTS, Russia's largest telecommunications provider, in March 2019, with settlements totaling $850 million. The resolutions relate to a scheme to bribe Uzbek officials, including Gulnara Karimova, the daughter of the former president of Uzbekistan, a scheme similar to those which led to a 2016 resolution with VimpelCom Limited, a Netherlands-based company, for $795 million, and a 2017 resolution for $965 million with Telia Company AB, based in Sweden.[13]

DOJ's collaboration with Brazil has continued to be significant. In December of 2016, Odebrecht, the Brazilian construction conglomerate, entered into a guilty plea with the DOJ where it agreed to pay the US $253 million, with $3 billion going to Brazil and Switzerland (mostly Brazil).[14] In September 2018, Petrobas, a Brazilian oil company, agreed in a non-prosecution agreement to pay the US over $170 million and Brazil over $682 million.[15] In June 2019, TechnipFMC agreed to pay $214 million to Brazil and $82 million to the US for violations of the anti-bribery and conspiracy provisions of the FCPA.[16]

DOJ FCPA Corporate Enforcement Policy

In July 2018, the DOJ announced that successor companies that discover potential FCPA violations in connection with M&A transactions, and which subsequently disclose that conduct and provide cooperation to the DOJ, would be treated in accordance with the principles of the DOJ's FCPA Corporate Enforcement Policy (the "CEP"). That policy, which was incorporated into the US Attorney's Manual in November 2017, creates a presumption that companies will receive a declination of prosecution for FCPA violations, absent aggravating circumstances, when they voluntarily self-disclose the misconduct, fully cooperate with the DOJ, and timely and appropriately remediate the issue, subject to disgorgement of any ill-gotten gains.[17]

The approach marked an evolution from the guidance provided by the 2012 DOJ and SEC Resource Guide to the FCPA, which stated that the DOJ "may … decline to bring enforcement actions" against companies that undertake certain M&A best practices.

In March 2019, the DOJ revised the CEP. Notably, under the new guidance, the DOJ relaxed the requirements for full remediation credit. In the original CEP section discussing

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the remediation actions companies should take in FCPA matters for business records, the guidance required that companies *prohibit* employees from using ephemeral messaging platforms in order to be eligible for full remediation credit. Under the March 2019 update, companies must ensure that guidance and controls are *appropriate*. Specifically, the guidance now states:

> [a]ppropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including *implementing appropriate guidance and controls* on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations (*emphasis added*).

Given the DOJ's past use of similar language in the Resource Guide to the FCPA, the agency will likely expect companies to design and implement controls over ephemeral messaging platforms that are tailored to a company's risk.

Corporate compliance programs

In April 2019, the DOJ released an update to its guidance document, "Evaluation of Corporate Compliance Programs". Companies may use the guidance to anticipate what enforcement authorities will evaluate during investigations and/or settlement proceedings.[18] The update is a restructured and more detailed version of its February 2017 predecessor. It is organised into three parts, tracking the "fundamental questions" the DOJ's Justice Manual directs prosecutors to ask in assessing corporate compliance programs: (1) is the compliance program well designed?; (2) is it implemented effectively and in good faith?; and (3) does it actually work in practice?

By identifying categories and a detailed catalogue of key questions, the guidance provides insight into what the DOJ considers to be the indicators of a well-designed and effective compliance program.

FCPA litigation

In *United States v. Seng*, the US Court of Appeals for the Second Circuit said in an August 2019 opinion that the FCPA is not limited to bribes paid in exchange for "official acts."[19] In 2017, a federal jury found Macao billionaire Ng guilty of violating and conspiring to violate the FCPA, as well as domestic bribery and money laundering, for bribing officials at the United Nations to win support for building a conference center in Macao.

Ng argued in his appeal that the DOJ failed to prove any "official act" had occurred in connection with the bribe payments and the jury should have been instructed to meet the standard laid out by the Supreme Court in *McDonnell*,[20] which overturned the conviction of former governor of Virginia Bob McDonnell on public corruption charges because prosecutors overstretched the meaning of an "official act" under the US federal bribery statute.

The Second Circuit distinguished *Ng* from *McDonnell*, noting that the FCPA prohibits giving "anything of value" for four specified actions: (i) influencing an act or decision of a foreign official; (ii) inducing a foreign official to do or omit to do any act; (iii) securing any improper advantage; or (iv) inducing the foreign official to influence an act of a foreign government. The Second Circuit held that the McDonnell standard does not extend to the FCPA.

In *United States v. Hoskins*, the Second Circuit affirmed a US district court's dismissal of part of the indictment against Hoskins, holding that a non-US citizen, national, or resident

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could not be held criminally liable under theories of conspiracy or aiding and abetting a violation of the FCPA.[21] Although the Second Circuit's decision limited the government's efforts to expand the extraterritorial reach of the FCPA, it also ruled that Hoskins could be held liable as an agent, and the DOJ chose to pursue charges on those grounds. In August 2019, a US district court ruled that Hoskins, a British national and former executive of Alstom S.A., will have to stand trial for violating the FCPA and related offences. Thus, the actual limiting effect of the court's decision on the US government's extraterritorial application of the FCPA is questionable.

Although not an FCPA matter, in a case involving Libor-rigging charges against two former employees of Deutsche Bank, *United States v. Connolly,* a US district court judge found that the DOJ effectively outsourced a criminal investigation to the target of the investigation.[22] According to the decision, Gavin Black, a Deutsche Bank employee convicted of the charges, made a "rather convincing showing" that Deutsche Bank and its external counsel were "*de facto* the government".

The court questioned whether the government had truly run a parallel investigation, stating: "…there are profound implications if the Government, as has been suggested elsewhere, is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position *vis-à-vis* potential targets of criminal activity."

Nevertheless, the indictment against Black was not dismissed, based on other factors relevant to the analysis (including that his statements were not introduced at trial). Given the recent emphasis on, and incentives for, corporate compliance, voluntary disclosure, and cooperation with government investigations, the ruling may serve as a warning to US enforcement authorities pursuing FCPA charges as well.

SEC litigation

The Ninth Circuit concluded in a whistleblower action that the FCPA is not a "rule or regulation" of the SEC, and that the anti-retaliation provisions of the Sarbanes-Oxley Act do not protect whistleblowers who make internal complaints about potential violations of the FCPA.[23] The court's ruling limits the available remedies for employees who claim to have suffered adverse employment actions in retaliation for reporting FCPA concerns.

Proposed reforms / The year ahead

In July 2019, representatives in the House of Representatives introduced the "Foreign Extortion Prevention Act", a bill seeking to "prohibit a foreign official from demanding a bribe". Currently, the FCPA only captures so-called supply-side bribery, i.e., the offering or provision of a bribe. The Foreign Extortion Prevention Act aims to address the demand-side of bribery. Although the likelihood of enactment is impossible to predict, enforcement of such a law would face jurisdictional hurdles as well as the presumption against extraterritoriality.

In the past year US authorities have highlighted themes such as the importance of corporate compliance, and providing companies with incentives for voluntary self-disclosure. The DOJ and SEC may bring enforcement actions in cases in which they deem a company's compliance program to be inadequate, relying on the FCPA's accounting provisions, as they did in the $282 million resolution with Walmart for violations of the FCPA's books and records and internal accounting provisions (resolving both criminal and civil charges).[24]

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Going forward, US authorities will likely continue to focus on individual accountability, incentivising companies to self-disclose and cooperate with investigations, corporate compliance, multi-jurisdictional coordination, and international cooperation.

* * *

Endnotes

1. 15 U.S.C. §§ 78dd-1-78dd-3.
2. Press Release, US Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018).
3. Deferred Prosecution Agreement, *U.S. v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. Jun. 25, 2019). The DOJ also recognized the significant assistance provided by legal authorities in Australia, France, Guernsey, Italy, Monaco, and the United Kingdom; *see also* Press Release, Dep't of Justice, TechnipFMC PLC and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Criminal Fines to Resolve Foreign Bribery Case (Jun. 25, 2019).
4. 15 U.S.C. §§ 78dd-1-78dd-3.
5. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
6. US Dep't of Justice, Criminal Division & US Sec. and Exch. Comm'n, *FCPA: A Resource Guide to the US Foreign Corrupt Practices Act* (Nov. 2012) (hereinafter "Resource Guide").
7. 15 U.S.C. § 78m.
8. 15 U.S.C. §§ 78m(b)(4)-(5), 78ff.
9. There are a number of tools that US authorities may employ other than the FCPA to combat bribery and corruption. For instance, although the FCPA does not prohibit commercial bribery (bribery involving someone other than a government official), the Travel Act does. Specifically, the Travel Act prohibits the use of the US mail, or interstate or foreign travel, for the purpose of engaging in certain specified criminal acts, including but not limited to bribery. Other US mail and wire fraud statutes, anti-money laundering statutes, and tax laws can also establish corruption offences where FCPA offences are not present.
10. US Dep't of Justice, Fraud Section Year in Review 2018, at p. 5.
11. US Sec. and Exch. Comm'n, SEC Enforcement Actions: FCPA Cases, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.
12. See Letter to Gary DiBianco and Lanny Breuer, US Dep't of Justice (Feb. 22, 2019); Cease-And-Desist Proceedings, US Sec. and Exch. Comm'n, In the Matter of Mobile TeleSystems PJSC, Exchange Act Release No. 85261 (Mar. 6, 2019).
13. Press Release, US Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017); Press Release, US Dep't of Justice, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016).
14. Press Release, US Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to

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Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).

15. Cease-And-Desist Proceedings, US Sec. and Exch. Comm'n, In the Matter of Petroleo Brasileiro S.A. – Petrobras, Exchange Act Release No. 10561 (Sept. 27, 2018).
16. Deferred Prosecution Agreement, *U.S. v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. June 25, 2019).
17. US Dep't of Justice, FCPA Corporate Enforcement Policy (Nov. 29, 2017) (hereinafter "CEP")
18. US Dep't of Justice, Evaluation of Corporate Compliance Programs (Apr. 2017) (hereinafter DOJ Evaluation Guidance); Press Release, US Dep't of Justice, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019).
19. *United States v. Seng*, 934 F.3d 110 (2d Cir. 2019).
20. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).
21. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
22. *United States v. Connolly*, No. 1:16-cr-00370-CM (S.D.N.Y May 2, 2019).
23. *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176 (9th Cir. 2019).
24. Letter to Karen P. Hewitt, US Dep't of Justice (June 20, 2019); Cease-And-Desist Proceedings, US Sec. and Exch. Comm'n, In the Matter of Walmart, Inc., Exchange Act Release No. 86159 (June 20, 2019); see also Press Release, Dep't of Justice, Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case (June 20, 2019).

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