Bribery & Corruption

2018

Fifth Edition

Contributing Editors:
Jonathan Pickworth & Jo Dimmock

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GLOBAL LEGAL INSIGHTS – BRIBERY & CORRUPTION

2018, FIFTH EDITION

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PREFACE

Once the exclusive preserve of the United States, anti-corruption enforcement is now becoming a truly global phenomenon. We are very pleased to present the fifth edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 25 countries worldwide. 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.

As is revealed in this book, there have been some very substantial enforcement actions around the world since the fourth edition was published. There have also been significant developments in relation to deferred prosecution agreements (particularly in the United Kingdom where the Serious Fraud Office has come of age), and in France we have seen the introduction of its own anti-corruption law *Sapin II*. Consequently, the management of both preventative compliance programmes and – when things go wrong – multi-jurisdictional investigations, is becoming ever more complex and requiring of specialist support.

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
October 2017

Finding evidential needles in massive data haystacks

The role of financial and data analytic experts in an investigation

David Lawler, Keith McCarthy & Paul Nash
Kroll

Companies with international operations today face scrutiny at an unprecedented level. They are subject to reviews and investigations by national governments, as well as local, state, and foreign government agencies. They may then face civil claims by other aggrieved stakeholders who may call into question a company's conduct. It is vital that companies faced with allegations or suspicions of wrongdoing properly understand them, and conduct their own detailed internal investigation to resolve them.

The last 20 years of technological evolution has deeply and permanently altered business record-keeping. In matters involving bribery and corruption, the majority of the facts will now be found inside corporate networks, email servers, and electronic devices, and in accounting systems which capture the details of millions of transactions.

In this chapter, we set out some of the elements that should be considered when undertaking a multi-jurisdictional anti-bribery and corruption investigation, focusing on the increasing role that the non-legal experts play – the forensic accountants, data analysts, and investigators – and how they can be used most effectively to search the data haystacks for evidence as to what has gone on and where problems might arise in the future, while minimising disruption to the business.

Developing the strategy and structuring the team

When a company is confronted with evidence or allegations of potential wrongdoing, it needs to respond deliberately and carefully, ensuring that it has gathered and interpreted all the facts. The most important thing when first instructed is to ensure that the questionable conduct has stopped. The investigation then typically seeks to answer the two fundamental and interlinked questions: 'Is the company's compliance programme well designed?' and 'Does it work effectively?'

It typically does this by a combination of: talking to people; observing how things are currently done; and (because those who cannot remember the past are condemned to repeat it) a review of historic transactions – in other words, a hunt for bribes.

There are therefore three practical components of any investigation, all of which require expertise in addition to that provided by legal counsel:

- talking to people – interviewing;
- looking at the company's electronic and hard-copy documents and data – document review and electronic evidence interrogation; and
- looking at the company's financial and business records – forensic accounting and data mining.

The expert team

Corporate internal bribery and corruption investigations have traditionally been led by, and carried out by, lawyers. Strict delineations, however, are quickly breaking down. Consulting firms are often instructed directly or via financial stakeholders, and financial investigators (whether 'forensic accountants', or seconded auditors wearing a 'forensic' hat for a couple of months), data analysts, and investigators are playing an increasingly vital role.

The legal team will often be assisted by an experienced team of practitioners, including:

- **Forensic accountants**: In multi-jurisdictional investigations the financial footprint relating to the potentially unlawful activity is often hidden through shell companies, trusts, transactions with group companies and other disguised mechanisms. The forensic accountants are experienced in unravelling complex and opaque structures, and should know how bribes and other illicit payments can be disguised.
- **Technology specialists**: In many investigations, mobile and social media data will need to be forensically captured and processed, alongside the other systems data from the business. Applying forensic data collection techniques will ensure that the evidence is captured to a legally supportable standard, and provided in a format that can be easily analysed and shared.
- **Investigators and researchers**: Background and real-time intelligence can help focus the investigation and ensure that suspect individuals, associates and entities are researched thoroughly.
- **Local language experts**: The global nature of investigations often necessitates the need for translators for interviews and document review. In any multi-jurisdictional investigation it is essential that there is a clear understanding of evidence, and that interpretation of any nuanced messages between parties is properly deciphered.

The team will work closely with the legal advisers in order to obtain a clear understanding of the legal landscape and requirements to ensure that evidential documents are handled correctly, privilege is protected as much as possible, and that any interviews undertaken are conducted appropriately in line with company policy and local laws.

It is also important that corporate management are able to provide their support, where appropriate, in order to assist in the progress of the enquiries. Often those working with the external team will be the General Counsel, the Chief Compliance Officer, the Chair of the Audit Committee and often a senior board member that is advised as to progress of the investigation as it develops.

Interviewing

One of the first issues to address when faced with an internal investigation is figuring out where the useful data and information might reside and how to get detailed data and evidence without bringing the company's operations to a standstill. The first point of call is often the company staff, and the review team will typically perform interviews with the key managers regarding, among other things:

- corporate culture and attitude toward ethics and compliance;
- vetting procedures for and use of third parties and agents;
- interactions with foreign officials and departments;
- red flags and instances where bribes have been requested and paid; and
- ideas for compliance improvements.

Identification and selection of custodians

Financial investigators should be experts in the operations of the 'purchase-to-pay' function in a business, so will typically assist with interviews, and collect data from, the key managers. The high-risk functions (i.e. those most susceptible to paying bribes – directly or through agents) tend to be salespeople, and those typically responsible for areas like freight forwarding, logistics, procurement, licences, and visas.

The interview team should ideally have legal, forensic accounting, and IT disciplines all taking part, although there will be a lead interviewer – normally a lawyer. This will negate the requirement for each advisor to perform their own separate interviews, and also allow the same big picture approach to the investigation. The other advantage to a group interview is that follow-up questions can be brought up right away, and intelligence gathered will be integrated with the investigation as a whole. Interviews need to be conducted by skilled people who know how to structure the meeting and ask the right questions.

With the recent ENRC decision (*The Serious Fraud Office v Eurasian Natural Resources Corporation*) calling into question the scope of privilege; for example, over the notes taken during interviews, it is vital to obtain legal input on the approach that will be taken to notes taken during interviews, and ensure a consistent approach is maintained across all the interviews.

Identifying and securing electronic evidence

An investigation review doesn't get very far without emails and financial records to examine. Interviewing is crucial, but the core of any investigation or response to government interest is the review and assessment of electronic and accounting documents.

Approach to gathering information

There are several approaches to gathering information for an investigation, and the scale and scope depends on the objectives of the review:

Historic information: Invariably, where the aim is to evidence misconduct, there will be a need to gather historic information. Gathering such information can be a complex process, especially where the information required stretches back multiple years and is held in several jurisdictions, often with opaque information access systems.

In addition, the introduction of new accounting software has seen many companies update or transition to new Enterprise Resource Planning systems, with legacy accounting systems (together with the data they hold) being archived. Retrieving this data can often be a time-consuming process, and for investigations that require the analysis of large volumes of information, combining data from an archived system with data from a modern system can complicate data cleansing.

Live information: In certain investigations, there may be a requirement to gather current information. For example, it may be necessary to gather evidence of interactions between certain individuals currently taking place, and for surveillance to be undertaken.

Background research: During the course of an investigation it is sometimes necessary to undertake covert information searches, surveillance of subjects and indeed the covert imaging of suspects' work computers. Investigators need to be conversant with the techniques that might need to be deployed, as well as with local laws relating to these activities, and often have previous experience of working within law enforcement agencies.

Recognition of evidence/material

Most investigations will gather documents and information that might later be used as evidence and will aim to develop the material in order to support the facts emerging from the investigation. All such material needs to be handled securely and capable of being critically reviewed, as it might be developed and used in the investigation as 'evidential material' – in other words, the material must be appropriate for supporting or defending any claims or proceedings.

As material is reviewed and information developed over the lifecycle of the investigation, it is possible that what was initially relied on by the investigation team and formed part of the principal strategy might become less important. By managing the material with an open mind and ensuring that it is reviewed regularly, the investigation and any conclusions reached will be stronger. Ensuring that there is a clear protocol around the handling of material and its review is a key strength in the development of a solid multi-jurisdictional investigation able to withstand robust challenges.

Securing the data

Investigations that are multi-jurisdictional pose particular issues when determining the physical location of potentially relevant material. The first step in the data collection process, however, requires that the review team obtains a complete picture of the way in which data is stored in the organisation, the purpose and operation of the IT systems, and how each user interacts with it. This is normally done by interviewing the company or region's in-house IT specialists, as well as asking custodians during their interviews how they use email, what documents they typically use, and where they store them.

A 'litigation hold' should generally be put in place, and no data should be destroyed while the investigation process is ongoing.

All investigations will need professional assistance to collect, process and host electronic documents in a form suitable for review. It is vital though that the client knows and understands what the data consultants are doing, in order to manage their costs. Electronic evidence gathering and processing, culling it and hosting it in a form that can be easily reviewed can be expensive, and the way the team approaches data collection will impact both the cost and speed of the review. It is invariably faster (and therefore cheaper) to collect data custodians' emails directly from the corporate email server rather than by performing individual collections from their desktops and laptops.

The approach to data collection should be proportionate and cost-effective.

Data privacy and protection

In large corporate investigations and regulatory responses, local laws, and the conflicts between them, may play out in a variety of ways. Compliance investigations are never easy, but cross-border ones have particular challenges.

It will often be necessary to work directly with employees to retrieve data from devices, such as their laptops, that they consider personal, and in any investigation the gathering, storage and processing of information will need to be considered in the context of local data privacy and protection legislation, as well as cross-border information sharing.

Often it is necessary to conduct data processing in the country where the data originated, which avoids the risk of moving data. In cases where data is deemed particularly confidential, or subject to secrecy laws, it is often necessary to process and manage the data within the

client's corporate network. Fortunately, portable systems are available which enable such work to be completed at the client site, and at reasonable cost.

If there is a compelling reason to transfer the data to another jurisdiction, this process should be thought through carefully, and with the advice of lawyers.

Forensic accounting and financial data mining

Current estimates show that data volumes produced by companies are doubling every 12 to 18 months, and multinationals can process well in excess of 10 million transactions per day. This has challenges – but also many advantages, because as more financial data is being captured, there is an enhanced ability to see trends and patterns, and spot outliers. In any investigation, forensic accountants can show how payments were recorded by the company in its accounts, and can uncover red flags hidden deep in the accounting databases.

The forensic accountants typically concentrate on two main areas:

- Compliance testing: do controls work as designed?
  A compliance test checks that a control has operated in accordance with its intended design. For example, if a control specified that all petty cash vouchers need authorising by the financial controller, the compliance test would be to check a sample of petty cash vouchers to see if they were in fact correctly authorised.
- Substantive testing of transactions.
  A substantive test is a check of the substance of transactions, ensuring they have been:
  - properly authorised;
  - properly accounted for;
  - are for the company's benefit; and
  - are in conformity with the law and company's compliance regime.

Much of the forensic accounting team's time will be spent on such a top-down review, trying to spot red flags and potential bribes in the detailed accounting data.

The first job of the forensic accountants is to obtain the right accounting data, clean it up and assemble it into a form that can be worked with and easily analysed. This can be done either by querying the relevant accounting transaction directly from the accounting system, or (more commonly) by getting a data dump of the entire accounting database. From there, the data will be imported into an analysis program. Databases, and sophisticated data analysis and manipulation tools are now used to more easily process, analyse and query massive datasets, and stratify, summarise, age, and look for gaps and duplicates in financial data. Modern data visualisation tools, such as Tableau, make such searches much more intuitive.

Data analysis involves a high level review of financial data including searches for anomalies that may suggest that the data has somehow been manipulated or massaged. Data mining enables a rapid screening of an organisation's transactions against predetermined criteria. Query tools, scripts and macros automate a set of data analytics procedures.

High-risk transactions

Rarely is it possible to say that a transaction is definitely a bribe, but the forensic accounting process highlights transactions that warrant further attention: a payment, for example, with unusual characteristics that makes us say: 'Hang on – is this legitimate, or has someone tried to bypass the controls?' The forensic accounting team will search the accounting system for the following types of high-risk transactions, and then review the supporting documentation and talk to those involved to ensure all was in order, and if not, what the implications were.

Examples of transactions that may warrant further attention might include the following:

- identification of multiple gifts to a single individual;
- identification of cheques made to 'cash';
- payments to suppliers made in cash;
- transactions with individuals or entities on PEP or OFAC lists;
- identification of vendors where payee names or bank accounts have been changed;
- payments to vendors not on the approved vendor list;
- identification of payments made from out of country bank accounts or sent outside the country of operation;
- identification of payments just below authorisation limits;
- use of new lawyers/accountants/agents/consultants with no prior relationship;
- invalid or suspicious journal entries to temporary or suspense accounts;
- adjustments to inactive accounts; and
- missing descriptions or suspicious key words for payments, including:
  - 'services rendered';
  - 'suspense';
  - 'gift';
  - 'facilitation'; and
  - 'consulting', etc.

Finding needles in data haystacks

The exponential increase in data volumes means that if data is to be reviewed for, say, 20 individuals, stretching over, for example, five years, together with an accounting database, there is going to be a lot of it. The initial data set could involve millions of emails and files, and large investigations featuring terabytes of data with hundreds of millions of documents are now common. This vast volume of data is not, however, the most significant problem faced by defence and prosecution lawyers, because powerful software is now available that can process a terabyte of data in a few hours. The biggest challenge is the inability to quickly cull through the information that has been processed and surgically identify relevant documents at the earliest possible stage.

From the collection phase, the data is put onto a review platform where it can be accessed remotely by the compliance team. There are many different review platforms, although all have similar features allowing the reviewer to search the population of documents by all manner of metadata and keywords, mark documents as 'responsive' (contain relevant information), collate, print them, annotate, manage queues of documents, and redact (hide words), as well as (more recently) use heuristics to cluster, concept search and target more precisely documents that are likely to be interesting.

Keyword searching

During any type of detailed investigation, iterative searching electronic data using keywords is still the most common method of identifying relevant documents. Performing searches for names (for example, of agents under suspicion, or government ministers), dates, locations, and amounts at interest is a vital first step once you have a target or suspicious transaction to investigate more closely.

But simply searching for the text 'bribe' is not going to get you very far, although when searching emails, one key search that has to be made is the search for words that suggest either extortion, or bribery, and has the potential to lead to 'smoking-gun' emails. Corruption

has its own language, and bribes hide behind terms ranging from innuendo to elaborate code. Emails should therefore be searched against search strings relevant to the industry and sector under review, including terms such as:

Agent	Bribe	Conflict	Crime
Favor/favour	FCPA	Fraud	Friend
Gift	Intervene/Intervention	Lobby	Minister/Ministry
Demand	Back hander	Pressure	Scam
Scheme	Slush	Bung	Special
Extort	Facilitation	Grease	Under the table

Much of the challenge around ABC compliance comes from doing business in foreign countries, where the red-flag keywords that are so important for testing are likely to be in a language other than English. Care needs to be taken though, because as well as the obvious direct translations of the word 'bribe', non-native speakers are in danger of getting entangled in a web of subtext. Many synonyms for bribery downplay the serious of the payment (in Egypt people may offer *ashaan ad-dukhaan*, or 'something for your cigarettes' or in France an innocuous-sounding *pot-de-vin* or 'glass of wine'. In Russia, you may see 'coming to an agreement' or 'understanding each other'. In India one may be invited to 'do the needful', or in China, 'go through the back door').

The limitation of search terms

Confronted with a massive volume of data, is it more effective to dive straight in and start to read documents to learn about their content, or is it better to look at the data as a whole to search for key features that are likely to identify relevant information? The legal industry has historically answered this question in favour of the first: the keyword approach. Pick some keywords and start to read documents responsive to those terms.

But let us assume that our data collection exercise in one particular country has 10 million documents and emails. A de-duplication procedure might reduce the data down to 5 million, and then the keyword searching reduces it to 500,000. Assuming that a team of junior lawyers is used, as a first review, to get rid of everything that is not obviously relevant, how long would it take to review all of the documents, quickly? If each document takes just 60 seconds to look at, and mark, in the review platform as 'relevant' or 'non-relevant', it would take a team of 10 lawyers 80 days (assuming 10-hour days) at a likely cost approaching £1m. And that is just for a first-pass email review.

The preference for keywords might be understandable, because internet search engines have proven the value of keywords as the means to quickly access the information we seek. Or have they? In fact, running a Google search on the internet is a radically different process from applying search terms against corporate data. Google uses sophisticated algorithms that rank and prioritise webpages, so you only normally see what Google thinks are the 'best' pages from what are often millions of pages responsive to the words you typed in. Most review platforms give you *all* the responsive pages without any ranking, and furthermore, abbreviations, misspellings, naming conventions, and unknown references conspire to reduce the effectiveness of searches. The superficial similarity between Google and search-terms is misleading, and offers a possible explanation for the over-reliance by lawyers on keyword searches.

Modern strategies for pinpointing the 'smoking gun' documents

Modern sampling and software-assisted tools can dramatically cut the time and cost spent in searching for potentially relevant documents. Software is available that uses statistical inference and ontology to group conceptually similar documents into different clusters, each one relating to a particular subject or theme. In this way, the review team can target all those documents first that concern the most interesting topics, rather than having to go sequentially through one custodian at a time.

Targeting 'suspicious' behaviour using pattern analysis involves using metadata to pinpoint custodians who act unusually; perhaps they:

- blind copy external domains;
- send ZIP files or encrypted content to outside parties;
- rename documents and forward them under an innocuous name;
- use proxy servers or services which disguise IP addresses;
- use instant messaging or webmail to send documents;
- use browsers or mail programs that are different to the corporate standard; and
- visit the domains of competitors, government agencies or regulators.

People tend to communicate in patterns and according to relationships. Software is able to look at which people are emailing each other, and highlight unexpected patterns. As an example, people within organisations most often email their immediate subordinates and their immediate supervisor. Often emails are copied one or two levels up, giving typically 'linear' patterns. It is rarer to get the most senior people emailing directly the most junior, or the most junior member of staff in one group emailing the most junior in another. Such unusual patterns lead to email exchanges which should be reviewed first. Modern software can indicate who knows who, and shows how the communities aggregate and evolve.

Reporting

Finally, the requirements for reporting should be carefully considered at the outset, recognising that investigations have the ability of developing very quickly and taking unforeseen twists and turns.

It is essential that regular updates on the progress of the investigation are appropriately conveyed to the relevant stakeholders to eliminate any surprises. There are several points to consider when drafting a report, including the intended recipient, the purpose of the report, the confidentiality of information and/or sources and the language being used. Drafting investigation reports can be complex, especially when considering: how to deal with potential wrongdoing; how to protect confidential information and strategy; and limiting distribution. Increasingly, certain stakeholders may seek to disclose the content of a confidential investigation report outside the company. Consideration should always be given as to how best limit the distribution of a report and to prevent prohibited onward disclosure.

The investigations strategy should set out the frequency, format and key milestones of any report, and deal with the challenges of privilege from the outset. It is possible that the investigation team will prefer in-person oral progress updates, rather than formal written reports. In comparison, certain external stakeholders such as regulators or law enforcement agencies will require less frequent, but significantly more detailed formal reports, to include conclusions based on facts emanating from the investigation.

The investigation might have uncovered instances of control weaknesses, and even of bribes being paid, which the report should not shy away from. However it is usually not all bad… Most companies going through an internal investigation have already made progress on putting their house in order, and will have made improvements in their policies, procedures and controls to minimise the chances of problems happening in the future. The investigation report often presents a good opportunity to end on this positive note!

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David is a seasoned forensic accountant, with over 25 years' experience helping multinational companies, financial institutions and their advisers identify, investigate and respond to complex financial issues. He is an expert in internal investigations and the use of analytics to highlight high-risk transactions and to put in place best-of-breed procedures and controls to stop problems recurring. David has significant experience working with companies, regulators, prosecutors, and monitors on worldwide compliance, ABC, and AML matters, both reactive, and proactive. He is also an experienced expert witness.

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Albania

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Brief overview of the law and enforcement regime

The legal regime (whether civil or criminal) relating to anti-bribery and anticorruption in Albania is constituted by:

(1) The Criminal Code of the Republic of Albania approved by Law no. 7895, dated 27 January 1995, as amended (the "Criminal Code"). The first and second section of the Criminal Code (criminal acts against the activity of the state committed by public officials) amended by Law no. 9272, dated 16 September 2004, clearly defines criminal offences relating to anti-bribery and corruption.

(2) The Criminal Procedure of the Republic of Albania approved by Law no. 7905, dated 21 March 1995 (the "Criminal Procedure Code") as amended, governs the investigation procedures of bribery and corruption.

(3) Law no. 9754, dated 14 June 2007 "On the criminal liability of legal entities", which provides for the criminal liability of legal entities where the offence has been committed on behalf of the legal entity or for the benefit of the legal entity through its bodies or representatives.

(4) Law no. 9643, dated 20 November 2006 "On public procurement", which also contains anticorruption provisions.

(5) Law no. 9367, dated 07 April 2005, "On the prevention of the conflict of interests in the exercising of public functions" (the "Conflict of Interest Law") as amended. The rules defined by this law are obligatory for implementation *inter alia* by every state institution, central or local, and every organ or subject created by and/or under the above subjects, including state or local undertakings, commercial companies with a controlling participation of state or local capital, non-profit organisations and other legal entities controlled by the above subjects.

(6) Law no. 9508, dated 10 April 2006 "Public collaboration in the fight against corruption".

(7) Law no. 9049, dated 10 April 2003 "On the declaration and audit of assets, financial obligations of elected persons and certain public officials" (hereinafter the "Declaration of Assets Law").

(8) The upgrading of the legislative framework for the fight against corruption in Albania was manifested in the ratification of two Council of Europe conventions: the Criminal Law Convention against Corruption (2001); and the Civil Law Convention against Corruption (2000).

(9) In 2006, Albania also became party to the United Nations Convention against Corruption (UNCAC), a consequence of which is the Implementation Review Mechanism, established in 2009 to enable all parties to review their implementation of UNCAC provisions through a peer review process.

(10) Law no. 60/2016 "On Signaling and Protection of Informers for Signals" for private entities.
(11) Law no. 84/2016 "On the transitional re-evaluation of the judges and prosecutors".
(12) Law no. 99/2016 "For the organisation and function of the Constitutional Court in the Republic of Albania".
(13) Law no. 96/2016 "On the status of the judges and prosecutors in the Republic of Albania".
(14) Law no. 98/2016 "On the organisation of judicial power in the Republic of Albania".
(15) Law no. 115/2016 "For the governing bodies of the justice system".
(16) Law no. 97/2016 "On the organisation and functioning of the Prosecution in the Republic of Albania".
(17) Law no. 95/2016 "On the organisation and functioning of institutions to fight corruption and organised crime".

The main bodies involved in investigating and enforcing such activity, and the sanctions imposed:

The Criminal Code of the Republic of Albania provides for offences of corruption regarding: active corruption (bribery) of persons exercising public functions (Article 244 of CC); active corruption of public officials (Article 244/a of CC); active corruption (bribery) of senior state or local elected officials (Article 245 of CC); and the exercise of unlawful influence on persons exercising public functions (Article 245/1 of CC).

It also provides for: abuse of office (Article 248 of CC); violations of the law of pensions or other income from social security (Article 248/a of CC); abuse of contributions made by the State (Article 256 of CC); unlawful profit of interests (Article 257 of CC); refusal to declare, omit, conceal or declare false assets, private interests of elected persons and public servants or any other person having the legal obligation to declare (Article 257/a of CC); violation of equality of participants in tenders or public auctions (Article 258 of CC); passive corruption (bribery) of persons exercising public functions (Article 259 of CC); passive corruption of foreign public servants (Article 259/a of CC); and passive corruption (bribery) of high state officials or local elected officials (Article 260 of CC).

It also provides for: active corruption (bribery) of judges, prosecutors and other justice officials (Article 319 of CC); active corruption of the judge or official of international courts (Article 319/a of CC); active corruption of local and foreign arbiters (Article 319/b of CC); passive corruption (bribery) of judges, prosecutors and other justice officials (Article 319/c of CC); passive corruption of judges, prosecutors and other justice bodies officials (Article 319/ç of CC); passive corruption of the judges or international court official (Article 319/d of CC); passive corruption of domestic and foreign arbiters (Article 319/dh of CC); passive corruption of members of foreign court jury (Article 319/e of CC); offering rewards and promises (Article 328 of CC); and passive corruption in elections (Article 328/b of CC).

The main bodies involved in the identification and prevention of bribery and corruption are the Prosecutor Office and the High Inspectorate of Declaration. The main bodies involved in the identification and prevention of bribery and corruption are the Prosecutor Office, the High Inspectorate of Declaration and Audit of Assets, and all structures created for such purpose within the public bodies.

The penalties provided by Albanian legislation for cases of bribery and corruption are the following:

- Active corruption of persons exercising public functions is punished with a prison term of six (6) months to three (3) years.

- Active corruption of high state officials and of local elected/representatives is punished with a prison term of one (1) to five (5) years.
- Passive corruption of persons exercising public functions is punished with a prison term of two (2) to eight (8) years.
- Passive corruption of high state officials and of local elected/representatives is punished with a prison term of four (4) to twelve (12) years, etc.

The usual sentences given to legal entities which are responsible for committing the offence are a fine and termination of the entity. Moreover, legal entities may be punished additionally with: a) the closure of one or more activities or structures of the legal person; b) the establishment of administrative control; c) prohibition to participate in procurement procedures of public funds; d) removal of access or use of licences, authorisations, concessions or subsidies; e) prohibition to publicly seek funds and financial resources; f) removal of the right to exercise one or more activities or operations; and g) the obligation to publish the court verdict.

Fines, in terms of Article 9 of Law no. 9754, dated 14 June 2007 "On the criminal liability of legal entities", consist in the payment, in favour of the state, of an amount of money within the limits provided in this law.

Depending on the type of offence, the applicable fines are as follows: a) for crimes under the Penal Code which provide for a penalty of at least 15 years of imprisonment or life imprisonment, the legal person shall be punished by a fine of from 25 million ALL (approximately €186,987) up to 50 million ALL (approximately €373,975); b) for crimes that, under the Criminal Code, envisage a sentence of at least seven to 15 years' imprisonment, the legal person shall be punished by a fine of from 5 million ALL (approximately €37,415) up to 25 million ALL (approximately €186,987); and c) for crimes that, under the Criminal Code, envisage a sentence of less than seven years, the legal person shall be punished with a fine from 500,000 ALL (approximately €3,741) to 5 million ALL (approximately €37,415). In the case of liability of legal persons for committing a criminal offence, the legal person shall be punished with a fine of from 300,000 ALL (approximately €2,245) to 1 million ALL (approximately €7,483).

Overview of enforcement activity and policy during the past two years

According to the Code of Criminal Procedure, the prosecution and the judicial police are the investigation bodies.

In order to implement the constitutional amendments of 2012, and to limit the immunity of high officials which had not yet been implemented in practice, in 2014 the "Anti-corruption package" was approved. Amendments to the Criminal Procedure Code and amendments to the Anti-Mafia Law graded the corruption of high officials as a serious criminal offence.

Cases that have been prosecuted (or received other civil sanctions where applicable) and the sanctions

According to the Tirana Judicial District Court, in 2015, 22 cases were judged on the offence provided by "Active corruption of persons exercising public functions" provided by Article 244 CC. In all the above-mentioned cases, the court found the defendant guilty, leading to a conviction, including: decision no. 2, dated 12.01.2015; decision no. 1054, dated 07.04.2015; and decision no. 979, dated 31.03.2015, etc.

Significant cases currently under investigation

Significant cases currently under investigation include those involving three judges, a prosecutor and two attorneys accused of passive corruption.

Current trends of enforcement action

In the framework of the strategy against corruption, Decision of Council of Ministers 330 dated 28.05.2014 "For the approval of the guidelines for the 5 priorities recommended by the European Commission" was approved, aiming at the strengthening of the integrity of the judiciary, prosecution, etc., as well as judges, prosecutors and other justice officials. In order to achieve this objective, the Albanian Government in collaboration with EU and other international representatives in Albania undertook the initiative for a thorough reform in the Judicial System, which starts with approval of a number of laws to fight corruption in the judiciary and governmental institutions. This change starts with the amendments in the Albanian Constitution with Law no. 76/2016, dated 22.7.2016, which among other changes has reorganised the judiciary system creating the Special Courts for the judgment of the criminal offence on corruption and organised crime against high officials and representatives, the Special Prosecution and the Special Investigative Unit for investigation of the abovementioned crimes. Among the laws that were approved under this reform is the Law "On organisation and the functioning of the institutions in the fight against corruption and organised crime", no. 95/2016. This law aims to grant the functioning of the Special Prosecution and the Special Investigative Unit as independent body, free from any illegal, internal or external influence. From the institutional point of view, these changes have been followed by the approval of new laws regarding the prosecution and judiciary system: respectively Law no. 97/2016; and Law no. 98/2016. With Law no. 98/2016, the judiciary system has created the Special Court of First Instance and Appeal for the judgment of the criminal offences of corruption and organised crime. Many amendments have also been made to previous laws regarding the fight against corruption, such as Law no. 10192 dated 03.12.2009, which was been amended for the purposes of justice reform. Regarding the actions that have been taken in relation to the integrity of the judiciary, it is also important to mention the approval of the new law on the status of the judges and prosecutors in the Republic of Albania.

Other actions that have been made in the fight against corruption include the cooperation and interaction of these bodies with other state bodies, as well as cooperation and interaction with NGOs, civil society, and the public including private companies and public institutions. For this purpose, a new law on whistleblowers and whistleblowers' protection has been enacted, which aims to organise cooperation in the fight against corruption between private companies and public institutions through the creation of a special unit in the structure of every private company with more than 100 employees, which examines and evaluates allegations raised by the whistleblower in relation to a suspected corruption action or practice. In the event that at the end of the investigation it turns out that the whistleblowing for the alleged corruption action or practice has grounds, the responsible unit immediately notifies the prosecution or the State Police.

Among other policies put in place to prevent corruption, it is also important to mention the law on the declaration and auditing of civil servants' assets and a law for the prevention of conflicts of interest while engaged in public work.

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

Facilitation payments are not allowed by the Albanian legislation. The facilitation payments defence should be carefully considered while doing business in Albania. Normally in Albania, various central and local government agencies and state and municipal entities officially establish computerised systems for the expedited performance of their services

(i.e. issuance of licences, registering a company, etc.). Therefore, any payments other than such official fees may be viewed as corruption under Albanian law.

The Albanian law distinguishes between a simple gift and unjustified benefits. For the gift to be qualified as unjustified benefits, a person must give money or other valuables to an Official with an intent that the Official performs (or refrains from performing) certain actions in that person's favour or in favour of a third party.

Therefore, 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, the intent of the gift-giver, the circumstances and the time frame.

Article 23 of the Conflict of Interest Law defines that it is prohibited for an official to seek or to accept, directly or indirectly, gifts, favours, promises or preferential treatment, given because of his position, from an individual, natural person or private legal person.

An official to whom gifts, favours, promises or preferential treatment is offered according to the above should:

(a) refuse them and, if the offer was made without his knowledge or in advance, return it to the offeror or, if this is impossible, officially submit it to his superior or to the nearest superior institution;
(b) try to identify the person who offers them and his motives and interests;
(c) in any case, immediately inform his superior or the nearest superior institution about the gift, favour, promise or preferential treatment offered or given, the identity of the offeror, when he can be identified, and the circumstances, as well as stating his point of view about the possible reasons for this event and its relation to his duties as an official;
(d) continue the exercise of duty normally, especially concerning that for which the gift, favour, promise or preferential treatment was offered, and continually keep his superior informed about every possible development; and
(e) if the offering or granting of the above-mentioned goods is related to the commission of a criminal offence, report it to the competent organs for criminal prosecution.

According to the Decision of Council of Ministers no. 714, dated 22.10.2004, the employee may be allowed to keep gifts, without being obliged to declare them if they exceed a value of 10,000 ALL (approximately €70) for gifts, while if the gifts are expensive, he must declare them within 30 days and submit them to his/her direct superior in the human resources unit of the institution.

The giving of gifts or hospitality to government officials and public servants is considered as active bribery and prohibited by Articles 244, 245 and 245/1, first paragraph, 319, 319/b and 328 of the Criminal Code.

The same consideration should also be made in relation to the giving of gifts and hospitality in the private sector, as far as it constitutes a corruptive practice. The relevant provision prohibiting such practice is Article 164 (a) of the Criminal Code.

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

Investigations and enforcement related to bribery offences mainly emanate from the police and the prosecutor's services, and potential victims' complaints in Albania. The prosecutor is the sole and competent body that conducts the investigative activity and carries out any investigative action that deems it necessary. The prosecution body has at its disposal the judicial police, which if it receives a notification of a criminal offence, has the legal

obligation to, within 72 hours, refer to the prosecutor, in writing, the essential elements of the fact and other elements that have been collected up to that moment, indicating the sources of evidence. When there is an emergency and in cases of serious crimes, the judicial police immediately notify the prosecutor. Article 406/d of Law no. 35/2017, Code of Criminal Procedure, provides the right of the prosecutor's office and the defendant or his/her special representative for reaching an agreement on the conditions for admission of guilt and setting the sentence. The agreement also provides for the reimbursement of damages if there are persons who have filed civil lawsuits within the criminal process. This agreement also requires the approval of the court which is defined in Article 406/dh.

The court is the competent decision-making authority whose decisions are enforceable. According to case law, all defendants require an application for summary trial (when the court evaluates that the case may be solved in the state where the acts occurred, and decides to perform the accelerated trial). When a sentencing decision is given, the court lowers the punishment of the imprisonment or fine by one third (⅓).

Under Article 280 of the Albanian Criminal Procedure Code, the prosecutor and judicial police receive notice of criminal offences *ex officio* and through the notification of others. Also Articles 281, 282 and 283 of the Albanian Criminal Procedure Code provide for criminal reports by public officials, criminal reports by medical personnel and criminal reports by citizens.

Law no. 95/2016 "For the organisation and function of institutions to fight the corruption and organised crime" created the Special Prosecution Office against corruption and organised crime, and the Independent Investigative Unit as a Constitutional body according to point 4 of the Article 148 of the Constitution of the Republic of Albania. The aim of the law is to guarantee the function of the Special Prosecution Office, as a specialised prosecution to exercise its competencies provided in point 1 of Article 148/dh of the Constitution, efficiently and independently from any illegal, internal or external influence.

This also ensures the function of the Independent Investigation Unit to investigate criminal offences of Corruption and Organised Crime, as well as other criminal offences committed only by the entities provided in point 2 of Article 135 of the Constitution, independently from any illegal, internal or external influence. The First Instance Court against Corruption and Organised Crimes, the Court of Appeals against Corruption and Organised Crime and the High Court will judge these offences. The Court of First Instance against Corruption and Organised Crimes and the Court of Appeal against Corruption and Organised Crimes have been created specifically for these offences.

Overview of cross-border issues

Albania has become more and more aware that bribery and corruption are the main obstacles to political, economic and social development as well as to EU accession. The government is committed to the war against, and has zero tolerance of, bribery and corruption. This movement has started through the ratification of international conventions on the war against corruption such as the United Nations Convention against Corruption, the Criminal Convention of the Council of Europe against Corruption, and the Civil Convention of the Council of Europe against Corruption, etc.

The fight against corruption is a key priority of the Albanian government in the EU integration process. In the National Plan for European Integration 2017–2020, the measures in this fight have been expanded in all fields and objectives of this process. In continuity of its integration plans and strategies, the government has fixed as its main objectives (1)

the improvement of international judicial and police cooperation with the establishment of joint investigation teams for international crime, (2) joint training with foreign counterparts, (3) the strengthening of cooperation with foreign counterparts by increasing the number of operations and exchanges of information, and (4) the improvement of international judicial and police cooperation in the war against economic and financial crime.

Recently, Albania has accomplished and is implementing one of the biggest reforms performed in the last 25 years, and the main aim of all this is to fight against corruption in the judicial bodies. For this purpose, many reforms have been implemented in the judiciary bodies, namely: Laws no. 84/2016; 99/2016; 96/2016; 98/2016; 115/2016; 97/2016; and 95/2016.

Corporate liability for bribery and corruption offences

Criminal liability of legal entities was introduced by Law no. 9754, dated 14.06.2007 "For the criminal liability of legal entities". This law, even though it is not exclusive to bribery and corruption offences, plays a determinant role in the issuance of criminal liability of legal entities.

Legal entities are responsible for criminal offences committed: (a) in his name or on his behalf, from organs and representatives of the legal entity; (b) in his name or on his behalf, from a person who is under the authority of a person who represents, governs, or manages the legal entity; and (c) in his name or on his behalf, resulting from the lack of control or supervision from the person who governs, represents or manages the legal entity. Both Albanian legal entities and foreign legal entities may be subject to criminal penalties.

The law further defines the "*organs or representatives of the legal entity*" as any physical person who is in charge of the representation, governance, managing or supervision of the activity of the legal entity or its structures. This definition is relatively large and includes in the list of probable offenders any physical person who has a managing or supervisory role in the company. If such responsibility is exercised by a collective organ, the legal entity is no less responsible.

Convicted legal entities may be subject to primary and additional penalties. The primary penalties are financial fines or the termination of the legal entity. Additional penalties may be of a different nature; the most common penalty applied in the case of bribery and corruption offences is exclusion from participating in tenders or public procurement procedures, as well as the granting of concessions, licences or authorisations.

The termination of the legal entity is ordered in case (a) the legal entity has been established with the objective of committing the criminal offence, (b) the legal entity has conducted its activity in service of the criminal offence, (c) the criminal offence has caused serious consequences, and/or (d) the legal entity is a recidivist.

The criminal liability of legal entities is not frequently requested by the prosecution office. It is becoming, however, more common in cases of highly publicised events and offences resulting in serious consequences. From the other side, bribery and corruption offences are, as a general rule, prosecuted towards the physical persons actually responsible for the offence; convictions of legal entities are particularly rare.

Proposed reforms / The year ahead

Corruption and the fight against it continue to be one of the major challenges and priorities for Albania. In the context of reforms, few have been undertaken. Through the adoption of Law no. 119/2014 "for the right to information", there is an improved possibility for

citizens and entities to control the activity of the state. Further, regarding transparency in the use of budgetary funds, in the legal changes in March 2014 the Council of Ministers adopted a decision to carry out electronic tendering procedures for concessions and public-private partnerships.

The changes to the Criminal Procedure Code transferred jurisdiction for active and passive corruption of judges, prosecutors, judicial officials, senior officials of the state and local elected officials to the Special Prosecution and the Court against Corruption and Organised Crimes. The amendments to the Anti-Mafia Law in 2014 also expanded powers for seizure and confiscation of illegal assets stemming from corruption in all criminal offences that fall in the sphere of competence of the Court against Corruption and Organised Crimes. Amendments to the State Police Law in September 2014 sanctioned the establishment of a National Investigation Bureau, tasked with investigating cases of corruption.

Following these amendments and the identified problems, challenges remain in the investigation and prosecution of corruption.

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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

is not necessary to show that such an intention was expressed.[3] Section 70.1(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$1.8m, or both. A corporation can be fined the greatest of: AU$18m; 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 April 2017 the Commonwealth Attorney-General's department issued an exposure draft of proposed changes to the foreign bribery offences in the *Criminal Code*[5] together with a consultation paper.[6] The proposed changes are:

- extending the definition of foreign public official to include candidates for office;
- removing 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 exposure draft also proposes introducing a provision which specifies matters which may and must not be taken into account in determining whether influence is improper;
- extending 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;
- creating a new offence of recklessly (as opposed to intentionally) bribing a foreign public official. The exposure draft also allows a court which is not satisfied that intentional bribery is proved to make a finding of reckless bribery;
- creating 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;
- removing the requirement of influencing a foreign official in their official capacity; and
- certain clarifying amendments to remove supposed uncertainties in the existing provisions.

The consultation period for the exposure draft closed on 1 May 2017. The Attorney-General received 16 submissions.

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.

Defences to foreign public sector bribery

The Criminal Code provides two defences to the offence of foreign bribery under section 70.2(1). The first defence is engaged where the conduct in question was lawful according to the written law of the place where the conduct occurred.[7]

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.[8]

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.[9]

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.[10] 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 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.[11] 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.[12] 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.

Whistleblower protection

There is no general legislative protection for whistleblowers who report bribery. However, there are some specific legislative protections. For instance, Part 9.4AAA of the Corporations Act protects an officer or employee of a company from victimisation if he or she discloses information in good faith to the Australian Securities & Investments Commission (ASIC) or an auditor, director or senior manager of the company where the discloser has reasonable grounds to suspect that the information shows the company, or an officer or employee of it, has contravened the Corporations legislation (meaning the Corporations Act, the ASIC Act and certain rules of court). Similar protection is provided by provisions of the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth). In some instances, bribery will constitute an offence under certain of these Acts, in which case the whistleblower may be entitled to rely on the relevant protections offered.

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.

A report published on the Transparency International Australia website concluded that Australia had significant room for improvement, particularly in relation to the private sector.[13] This conclusion appears to be gaining widespread acceptance in Australia. In November 2016, the Australian Senate referred an inquiry into whistleblower protections to the Joint Parliamentary Committee on Corporations.[14] The Committee was due to report by 30 June 2017, but this date has been twice extended and at the time of writing is 14 September 2017. Separately on 20 December 2017 the Australian Treasury released a consultation paper in relation to tax and corporate whistleblower protections,[15] which canvasses a range of possible reforms to strengthen whistleblower protection and incentives in Australia (including by establishing a system of rewards for whistleblowers). In late June 2017 the Financial Services Minister said that the government would shortly introduce legislation to extend protections for tax and corporate whistleblowers.

There has already been a strengthening of whistleblower protections in one specific area. The *Fair Work (Registered Organisations) Amendment Act* 2016 (Cth), an Act containing a range of measures intended to fight union corruption, was passed by the Australian Parliament on 30 November 2016. It includes protections from reprisal for union whistleblowers.

Investigation and enforcement agencies

Australia has adopted a multi-agency approach to combatting 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; 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.

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).[16] 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. The scope of ICAC's powers in respect of conduct by private individuals was the subject of a High Court judgment (*ICAC v Cunneen* (2015) 89 ALJR 475), which held that ICAC did not have power to investigate conduct of private individuals which could affect the efficacy, but not probity, of public officials. The NSW government has since passed legislation retrospectively validating investigations undertaken by ICAC before the High Court's judgment.

In September 2015, following the recommendations of an Independent Panel appointed by the Premier of NSW, the NSW Parliament passed legislation which expanded the definition of corrupt conduct in ICAC's governing legislation to include specified types of conduct by private individuals which could impair confidence in public administration.[17] The types of conduct include certain types of fraud on the public revenue and fraud in relation to applications for public licences, permits or clearances. The legislation also limited ICAC's power to make findings of corrupt conduct to cases involving serious corruption.

Overview of enforcement activity and policy during the past two years

Cases prosecuted

The first case prosecuted under Australia's 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.

Following the AFP's investigation, dubbed 'Operation Rune', the AFP charged Securency, Note Printing Australia Limited (NPA) and several of the companies' former senior managers with offences of bribing foreign officials under section 70.2(1) of the Criminal Code. Committal hearings commenced on 27 July 2011 and marked the first-ever bribery prosecution under the anti-bribery provisions of the Criminal Code. Some details of the case against Securency were the subject of a suppression order, but that order was lifted in June 2015 (*Commonwealth DPP v Brady* [2015] VSC 246). The Court's reasons disclose that the proceedings involve offences in connection with banknote printing contracts for Malaysia, Indonesia, Vietnam and Nepal between 1999 and 2004. There have been 112 court sitting days spent on committal hearings. It is expected that there will be separate trials for each country, each of which will run for multiple months. Those trials have yet to begin.

The suppression order made in June 2014 prevented disclosure of the names of certain foreign politicians in Malaysia, Indonesia and Vietnam who had been named in connection with the alleged criminal conduct, but were not alleged in the proceedings to have been a

party to any of the alleged bribes. It was lifted following the publication of a copy of the suppression order (including the names of the individuals concerned) on Wikileaks and the subsequent widespread publication of their names by press outside Australia.

One former Securency officer, the former Securency CFO, David John Ellery, pleaded guilty to a charge of false accounting in July 2012. Mr. Ellery admitted that he had created a false document enabling the payment of AU$79,502 to a Malaysian intermediary. One month later, he received a six-month suspended sentence. Mr. Ellery had previously raised his concerns internally with respect to accounting anomalies within Securency.

On 12 May 2016, Peter Chapman, Securency's former manager of African business, was convicted on four counts of making corrupt payments to a foreign official for bribing a Nigerian government official and sentenced by a London Court to 30 months' imprisonment. Mr Chapman was released immediately, having spent 162 days in a Brazilian prison awaiting extradition and 358 days in a UK prison awaiting trial. His conviction was upheld by the Court of Appeal in March 2017.

The second charges under Australian 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. The three men pleaded guilty in 2017 and are awaiting sentencing.

In March 2015, two men (one formerly employed by an Australian bank and the other by the Australian Bureau of Statistics (ABS)) were sentenced to 7¼ and 3¼ years of imprisonment respectively after pleading guilty to charges of insider trading, abuse of public office, money laundering and identity theft. The offences related to an agreement between the men that the ABS employee would provide to the other sensitive and unpublished ABS data, obtained in his capacity as a Commonwealth public official, and that the other would use that information to trade in margin foreign exchange derivatives. Those trades resulting in gross profits of over AU$8 million, being the largest insider trading profit to come before an Australian court.

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 are brought under domestic anti-bribery laws. One of the former executives, who pleaded guilty, was sentenced in late 2016 to 3½ years' gaol.

Current investigations

It is difficult to obtain reliable data in relation to the number of investigations currently under way. However, in April 2015, the OECD's Follow Up Report to its Phase 3 Report on Australia (discussed further below) recorded that the AFP had 17 foreign bribery investigations underway (an increase on seven as at October 2012). The AFP does not generally publish details of its ongoing investigations.

On 28 December 2015, a Royal Commission into Trade Union Governance and Corruption delivered its final report to the government.[18] The report found numerous instances where union officials may have engaged in corrupt or unlawful conduct. It has recommended numerous law reforms, including the establishment of a single regulator to oversee employee and employer organisations throughout Australia. That recommendation was given effect by the passage of the *Fair Work (Registered Organisations) Amendment Act* 2016 (Cth), through the Australian Parliament on 30 November 2016.

On 30 August 2016, ICAC released its report in relation to Operation Spicer, an investigation into political donations made in the lead up to the 2011 NSW State election.[19] It also involved a related investigation into whether members of Parliament improperly used their influence in relation to a proposal to build a coal terminal at Newcastle. The investigation resulted in one finding of corrupt conduct against a former NSW government minister and seven recommendations that the DPP consider criminal prosecutions against seven individuals. Because the report was issued after the amendments to ICAC's enabling legislation (discussed above), the finding of corrupt conduct necessarily involved the conclusion that the corrupt conduct in question was serious corrupt conduct.

On 3 August 2017, ICAC released its report in relation to the closely related Operation Credo, which concerned dealings between a company known as Australian Water Holdings and various members of the NSW Parliament.[20] The investigation resulted in findings of corrupt conduct against three former cabinet ministers and one senior public servant. The conduct in question related to attempting to influence the government to favour Australian Water Holding in its negotiation with the government

The circumstances which gave rise to Operations Credo and Spicer resulted in the resignation of the Premier and several Ministers of the previous New South Wales Government.

In 2013, two other investigations into the grant of mining exploration licences (Operations Jasper and Acacia) resulted in corrupt conduct findings against a number of former members of the NSW Parliament and senior mining executives.

The former government minister at the centre of each of the investigations in Operations Credo, Spicer, Jasper and Acacia, Eddie Obeid, was found guilty in December 2016 of misconduct in public office. He has lodged an appeal which has yet to be determined. In June 2017, another former government minister, Ian Macdonald, was sentenced to 10 years' gaol for misconduct in public office.

Current trends of enforcement action

It is evident from the scarcity of prosecutions to date that 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 over the last three 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.

The OECD Phase 3 report criticised Australian enforcement efforts and was particularly scathing about the failure of the AFP to resource, prioritise and pursue foreign bribery investigations. It also criticised the AFP for a lack of sufficient coordination and cooperation with both its international contacts and other Australian regulatory and enforcement agencies. More generally, the report said that Australia should improve its measures to ensure that public officials report suspicions of foreign bribery and protect whistleblowers, and expressed concern about the lack of transparent policies and guidelines for the debarment of persons convicted of foreign bribery.

The AFP and the Australian government responded to the OECD Phase 3 Report with a number of initiatives. These include:

- at the time of the Phase 3 Report, the AFP had already in April 2012 established a Foreign Bribery Panel of Experts which now has responsibility for ensuring that allegations of foreign bribery are investigated thoroughly;

- the AFP has entered into a Memorandum of Understanding (MOU) in respect of collaborative working arrangements and the sharing of information with each of ASIC and the Australian Prudential Regulation Authority. In an October 2013 speech, ASIC Chairman Greg Medcraft made it clear that, while the AFP was responsible for investigating foreign bribery and corruption, and taking criminal action through the courts, ASIC would look at allegations concerning directors' duties in appropriate cases;
- in February 2013, the AFP established dedicated Fraud and Anti-Corruption teams in five capital cities;
- the establishment in July 2014 of the Fraud and Anti-Corruption Centre (FAC), a centre hosted by the AFP, but also involving officials from a range of government departments, regulators (including ASIC and the Australian Taxation Office), and investigation and enforcement agencies. The FAC's role appears to be to improve coordination amongst agencies, to develop standards and procedures for fraud and anti-corruption investigation and to provide training to investigators; and
- in March 2016, the creation of new false accounting offences in the Criminal Code (discussed above), which may be investigated by the AFP.

All these developments, other than the last one, were all noted in the OECD Working Group's Follow-Up to the Phase 3 Report & Recommendations (OECD Follow-Up Report), published in April 2015. This report noted that, since the OECD Phase 3 Report, 15 new allegations of foreign bribery had surfaced and the number of matters under investigation by the AFP had increased from seven to 17. While noting that good progress had been made in implementing the recommendations of the Phase 3 Report, the Follow-Up Report identified the following areas for further work:

- increased enforcement of foreign bribery, corporate liability and false accounting provisions;
- the extension of whistleblower protection in the private sector;
- the introduction of transparent debarment processes for government procurement agencies; and
- further action on the OECD's recommendations for legislative change in a number of areas.

Law and policy relating to facilitation payments and hospitality

Facilitation payments

A facilitation payment is a small bribe or 'grease' payment made to a public official to secure or expedite the performance of a routine procedure to which the payer is legally entitled. Typical examples of routine procedures involve processing visas and other government papers, and granting permits or licences for conducting business in a country.

In the Commentaries on the OECD Convention, facilitation payments are distinguished from bribery on the basis that a small facilitation payment does not constitute an attempt to obtain or retain business or other improper advantage. However, a different approach is taken in the UNCAC, in which no distinction is made between bribery and facilitation payments.

The former approach has been adopted in Australia, where the Criminal Code excludes criminal liability for facilitation payments. However, the OECD recognises that the operation of the defence can be problematic. While the practice of Australian companies making facilitation payments appears to be prevalent, there is general confusion about

the scope of the defence, and a lack of understanding about what constitutes a facilitation payment. Individuals and corporates alike need to be aware that they will only be able to rely upon the defence if the payment is of a minor nature, made for the sole or dominant purpose of securing a routine government action of a minor nature, and the details of the payment are properly recorded as soon as is reasonably practicable.

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. In 2009, the OECD recommended that, in view of the corrosive effect of small facilitation payments, States Parties to the OECD Convention should:

- periodically review their policies on and approach to small facilitation payments in order to combat this practice; and
- encourage companies to prohibit or discourage the use of small facilitation payments, because such payments are usually illegal in the foreign countries in which they are made.

While the Australian government published a public consultation paper in relation to repealing the facilitation payments defence in November 2011, the exposure draft of proposed amendments to the *Criminal Code Act* released in April 2017 does not contain any change to the facilitation payment defence.

The OECD Phase 3 Report noted that there were inconsistencies between the record-keeping requirements for facilitation payments in the Criminal Code and those in Australia's tax legislation dealing with the claiming of deductions which should be reconciled. As the OECD Follow-Up Report noted, nothing has yet been done in this regard.

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 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. On 20 May 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. This was the largest FCPA settlement in 2015.

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 3 Report was published, at least three companies had self-reported evidence of bribery committed by persons related to them. In each case, the AFP proceeded with ongoing investigations.

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.

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.

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) 326 ALR 476, 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 OECD Phase 3 Report recommended that a clear framework be provided to address uncertainties around self-reporting and plea bargaining. Issues requiring clarification include how a person or company might be expected to cooperate, the credit to be given for cooperating with the AFP, measures for monitoring compliance with a plea agreement, and the prosecution of natural persons related to companies. This recommendation has been addressed by the AFP and DPP developing a presentation for industry about the benefits of cooperation.

In March 2017, the Commonwealth Minister for Justice issued a public consultation paper relating to a proposed model for a deferred prosecution scheme.[21] This paper followed a March 2016 consultation paper about whether Australia should introduce a deferred

prosecution scheme. Most of the submissions to that consultation endorsed or conditionally endorsed such a scheme.[22]

The elements of the proposed model are as follows:

- DPAs would be available only to companies for certain specified crimes which are regarded as 'serious corporate crime'. This would include fraud, false accounting and foreign bribery;
- only the prosecutors in respect of a particular offence would be authorised to initiate negotiations for a DPA;
- there would be certain mandatory terms of a DPA, including a formal admission of liability by the company. The terms of a DPA would be public;
- in order for a DPA to be finalised, a prosecutor would need to be satisfied that:
  - there are reasonable grounds based on admissible evidence to believe that a relevant offence has been committed by the company;
  - there are reasonable prospects of securing conviction;
  - the full extent of the company's offending has been identified; and
  - a DPA is in the public interest;
- the proposed terms of any DPA would need to be referred to a retired judge who would determine whether the terms are in the interests of justice and are fair, reasonable and proportionate (although the paper recognised an alternative, which was to give the prosecutor sole discretion);
- the model would allow for an independent monitor to have oversight of company compliance with the DPA, but this would not be required;
- if a DPA was successfully concluded, at the end of the DPA, the prosecutor could give the company an undertaking that it will not be prosecuted in respect of the subject matter of the DPA. The Commonwealth DPP already has power to give such an undertaking under its enabling legislation; and
- there would be restrictions on use of information supplied by the company during DPA negotiations.

The consultation period in respect of the proposed deferred prosecution scheme closed on 1 May 2017. The Minister received 18 submissions, which were generally supportive of the introduction of a DPA scheme, although with numerous specific comments and criticisms of the proposed model.

Civil *versus* criminal prosecution

Foreign and domestic public sector bribery offences are prosecuted in Australia under provisions of the Criminal Code. At the State and Territory level, 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 2001* (Cth) (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, which arose out of the so-called 'Oil for Food' programme. 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, and the importance of not ignoring 'red flags'.

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.

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 2016, the G20 published its Anti-Corruption Action Plan for 2017–2018, 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 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 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 a physical and mental (or 'fault') element be satisfied.

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.[23] The 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".[24] 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 new false accounting provisions in the Criminal Code.

The scope of corporate liability provisions in the Criminal Code is broad. In particular, the provisions relating to corporate culture direct attention to the adequacy of a corporation's anti-bribery compliance programme. However, as is discussed above, the proposed amendments to the *Criminal Code* would see the introduction into Australia of a corporate offence of failure to prevent bribery closely modelled on section 7 of the UK *Bribery Act* 2010.

Proposed reforms / The year ahead

The Joint Parliamentary Committee on Corporations is due to present its report on corporate whistleblowing in September 2017 and the Senate Standing Committee on Economics is conducting an enquiry in relation to foreign bribery which is due to report on 7 December 2017.[25]

It is possible that the next 12 months 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 a deferred prosecution scheme; and
- enhanced protection for corporate whistleblowers.

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

* * *

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 offences under the Criminal Code requires proof of a physical element of the offence and a fault element of the offence. In the case of the 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".
4. *Criminal Code*, s 70.5.
5. https://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/Exposure-draft-provisions-amendments-to-the-foreign-bribery-offence.pdf.
6. https://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/public-consultation-paper-amendments-to-the-foreign-bribery-offence.pdf.
7. *Criminal Code*, s 70.3.
8. *Criminal Code*, s 70.4.
9. 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.
10. *Crimes Act 1900* (NSW), Part 4A; *Crimes Act 1958* (Vic), s 320; *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 59–88.
11. 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 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.
12. *Criminal Code*, s 490.1 and 490.2.
13. Wolfe, S *et al.* "*Whistleblower Protection Laws in G20 Countries - Priorities for Action*", September 2014 (http://transparency.org.au/wp-content/uploads/2014/09/FINAL__-Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for__-Action.pdf).
14. http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections.
15. https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/.
16. 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.
17. *Independent Commission Against Corruption Amendment Act 2015* (NSW).
18. https://www.tradeunionroyalcommission.gov.au/reports/Pages/Final-Report.aspx.
19. https://www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/220.
20. https://www.icac.nsw.gov.au/component/investigations/article/5146?Itemid=4195.
21. https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf.
22. https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx.

23. *Criminal Code Act 1995* (Cth), s 12.2.
24. *Criminal Code Act 1995* (Cth), s 12.3.
25. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th.

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Brazil

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Brief overview of the law and enforcement regime

Over the last few years, Brazil has made great efforts to improve effectiveness in fighting bribery and corruption in all branches of Government. Brazilian society has developed a growing intolerance of such offences and, in response, a quicker and more efficient system of fighting corruption and other related offences (e.g. money laundering) is being structured. This new system is being formed through new legislation as well as changes in the structure of the bodies in charge of control, review, investigation and prosecution.

The Brazilian Government is divided into three independent branches: Legislative; Executive; and Judicial. In this context, we will provide a brief overview of the existing legislation and how it is implemented by the Executive and Judicial branches.

Naturally, the highlight of the Brazilian Penal Code as it relates to bribery and corruption are the crimes of passive and active corruption. The passive form (Article 317) punishes the public official that requests or accepts any undue advantage because of his or her position. On the opposite side, the active form (Article 333) punishes the private party who offers or promises any undue advantage with the intention of making a public official delay, perform or neglect a public duty. Both crimes are punished with penalties of two to 12 years of imprisonment and a fine. The penalties are increased by ⅓ if as a result the public official delays, performs or neglects a public duty. The current legislation does not foresee punishment for bribery in the private sector in general, with the exception of one specific situation, related to the payment and acceptance of bribery in private relations in the context of unfair competition (Article 195, IX and X of Law n.º 9,279/1996). The nonexistence of criminal provisions for bribery in the private sector is considered a serious flaw in the Brazilian Justice System and has attracted a lot of criticism from the international community.

Besides the crimes set forth in the Penal Code, the Brazilian legal system also has some specific criminal laws that are very important in the fight against corruption. The Public Bid Law (Law n.º 8,666/93) foresees crimes that were specifically conceived to punish acts of bribery and corruption in public bids. Another very important law is the Anti-Money Laundering Act (Law n.º 9,613/98), which was modified in 2012 to improve the control mechanisms and broaden the possibilities of conviction (e.g. allowing punishment for actions carried out with oblique intent).

In the Administrative field, we highlight the Administrative Improbity Act, which applies to situations of undue enrichment of a public official, damages to public money or assets or other actions that violate the principles of Public Administration. The penalties include the confiscation of assets that were unduly obtained by the public official, suspension

of political rights, exclusion from public procurement and from fiscal incentives, full compensation of damages, and the payment of fines. Furthermore, the "Clean Record" Act provides that individuals who have been convicted of certain crimes or wrongdoings (including administrative and civil convictions) are ineligible to hold public office.

In the Civil area, Brazilian legislation provides specific mechanisms for compensation of damages caused to the Public Administration. The most relevant are the Civil Public Action (Law n.º 7,347/85 – compensation for moral and/or material damages caused to any diffuse or collective interest) and the Class Action Lawsuit (Law n.º 4,717/65 – annulment of any official act that is damaging to public funds or assets). It is worth noting that the above-mentioned laws apply to public bodies or officials as well as private parties or entities that benefit from wrongdoings.

Finally, there are two very important laws that were sanctioned in 2013 (Anti-Corruption Act – Law n.º 12,486 and Criminal Organizations Act – Law n.º 12,850/13) and will be discussed in greater detail ahead.

Within the Executive Branch, there are many bodies and institutions related to the corruption enforcement regime, of which the most relevant are:

(i) The Federal General Comptroller's Office (CGU), which oversees the use of federal public money, develops mechanisms to prevent corruption, applies the Anti-Corruption Act and produces reports of frauds for Public Prosecutors to take legal action.

(ii) The Council for Control of Financial Activities (COAF), which is a body connected to the Ministry of Finance and Treasury and plays a major role in fighting money laundering. Bribery and corruption are historically linked to money laundering, since the proceeds of crime are usually integrated in the financial system through this type of criminal offence. COAF stands out in the role of coordinating different mechanisms of cooperation and exchange of information between public bodies.

(iii) The Administrative Council for Economic Defence (CADE) is responsible for defending the economic order and free trade and preventing anticompetitive behaviour. CADE has played an important role in the investigation of cartel offences. The main instrument that has allowed CADE to achieve expressive results in fighting economic crimes is an efficient form of leniency agreement through which whistleblowers may benefit from exemptions and/or significant reductions of administrative and criminal penalties.

(iv) The Department of Asset Recovery and International Legal Cooperation (DRCI), linked to the Ministry of Justice, has played an important role in identifying and recovering assets located abroad originated from bribes, corruption of public officials and other related crimes.

(v) The Federal and State Polices, whose main duty is to investigate criminal offences in their respective jurisdictions, are administratively linked to the Executive Branch, although the result of the investigations is destined to allow criminal prosecution before the Judicial Branch.

(vi) Finally, we must mention that the Public Prosecutor's Offices (Federal and State levels) form an institution that is administrative and financially independent from the three branches of government. Their main duty is to defend the society by taking legal action in the criminal, administrative and civil areas to prevent and punish offences. The Public Prosecutors have been of great importance for the fight against corruption in Brazil, especially due to coordinated actions with the Police and technical cooperation with the above mentioned bodies such as CGU, COAF and CADE.

The Judicial Branch (divided into Federal and State jurisdictions according to the nature of the matters being discussed) is formed by first instance courts, appellate courts and Superior Courts.

During the course of an investigation or criminal lawsuit, there are a wide range of measures that the enforcement authorities can take to gather evidence and guarantee the application of the law. Among the most relevant measures, we can point to the search and seizure of documents or objects, breach of tax and bank secrecy, interception of telephone and electronic communications, precautionary detention of suspects, and confiscation of assets. All of the measures mentioned above can only be carried out with court orders in the course of a criminal investigation or lawsuit.

Overview of enforcement activity and policy during the last year

Since March 2014, Brazil has been enduring a major political crisis precipitated by an anti-corruption operation carried out by the Federal police in tandem with the federal prosecutor's office. *Operação Lava Jato* has often been compared to Italy's *Mani Pulite* due to its overarching consequences and devastating effects on Brazil's political system.

Operação Lava Jato is an investigation of a multi-party, multi-million graft scheme within Brazil's State-owned oil company, Petrobrás. The involved suspects range from high-ranking politicians such as former and current presidents of Brazil to the executives and owners of some of Brazil's biggest companies, many of whom are in jail.

Many analysts view *Operação Lava Jato* as a turning point for corruption and money laundering enforcement in Brazil. The scale of the probe is as impressive as it is controversial. Using new legal mechanisms such as criminal collaborations, as well as devising new usage for older ones, such as the coercive conduction of suspects in a massive scale, *Lava Jato* has changed the public's paradigmatic view of impunity of corrupt politicians and businesspersons while raising questions of alleged violations to the rights of the accused such as the right to a fair trial, privacy and legality of lengthy preventive arrests.

As of August 31, 2017, there have been 1,765 procedures brought by *Lava Jato*, with 877 search and seizure warrants, 221 coercive conduction of suspects, 97 preventive arrests, 110 temporary arrests, 158 criminal collaboration deals, 10 leniency agreements, culminating in 67 criminal lawsuits against 282 different people, which resulted in 165 convictions against 107 individuals, adding up to over 1,634 years of jail time distributed between those convicted.[1]

Lava Jato has contributed to the impeachment of the former president, Dilma Roussef, as well as been responsible for: the indictment of the current president, Michel Temer; the arrest of the former Speaker of the House, Eduardo Cunha; as well as the investigation and sometimes arrest of a considerable number of key State Ministers who worked with either one of the last three presidents: Lula da Silva; Dilma Roussef; and Michel Temer.

Criminal collaborations have been the driving force of *Lava Jato's* rapid expansion. A pattern has been observed of pre-trial arrests, which persist for some time, until the suspect decides to collaborate, a decision that is then usually followed by his or her release from jail.

Presently, *Lava Jato* has culminated in the increasing antagonism between the judiciary and the legislative and executive branches. This has strengthened the popular support for anti-corruption measures while weakening legislative support for proposed changes in the law backed by prosecutors. With the entrenched political elites in an all-time low in terms

of popularity and political strength, *Lava Jato* has a potential for political disruption which can be compared to what happened in Italy after *Mani Pulite*.

Regardless of its political consequences, *Lava Jato* has already changed the way the police and prosecutors enforce corruption laws in Brazil. Jumpstarted by massive public support and favourable decisions, anti-corruption probes are set to become the norm for Brazil's top law enforcement agencies and should influence businesses, law and society for years to come.

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

Facilitation payments are defined as those made to public officials in order to expedite the performance of routine duties of non-discretionary nature. In other words, they are payments made to speed up the performance of actions that were bound to happen anyway. In this sense, the payment does not interfere or in any way alter the result of the action, only its timing.

The discussions about facilitation payments result from the fact that they are accepted in some countries. In Brazil, facilitation payments are illegal. As mentioned above, the crime of passive corruption punishes the public official that requests or accepts any undue advantage because of his or her position, regardless if his subsequent actions consist of simply performing his duty or violating them.

Likewise, the crime of active corruption punishes an act of offering or promising undue advantage with the intention of making a public official delay, perform or neglect a public duty. Therefore, the offering of an undue advantage will always represent a crime, even if the intention is for the public official to perform an act that is within his normal duties.

In line with the conclusions reached above, the law that establishes the administrative rules of conduct for federal public officials classifies as an offence punishable with employment termination the acceptance of presents, regardless of value, personal loans or any other advantage. The law also regulates some specific situations and conditions in which public officials can accept the payment of expenses, transportation and lodging for events such as congresses and seminars, as well as souvenirs and corporate gifts.

Regarding the participation of public officials in events of institutional interest, the expenses, transportation and lodging must be paid for by the public entity or body to which the official belongs or by the sponsor, as long as it is an international organism, foreign Government or academic, scientific or cultural institution. Private entities can pay for expenses as long as they are not under the jurisdiction of the public official or cannot benefit from any decision in which he takes part, individually or collectively. When the event is of the public official's private interest, the sponsor can pay for the expenses if the official publicises all the conditions that apply to his participation, including fees, and the promoter of the event does not have an interest in any individual or collective decision that can be made by the official.

Furthermore, the public official cannot accept the payment of expenses related to transportation or lodging from any individual or legal entity with which the body he is connected to maintains business, unless his participation is due by a contractual obligation.

The distribution and delivery of souvenirs and gifts is regulated by Decrees 4,081/2002 and 6,029/2007, as well as by Resolution 3 of the Public Ethics Committee. Distribution and delivery is legal if they don't have any commercial value or if they are being distributed as courtesy, propaganda, by occasion of a special event or commemorative dates, as long as

the unit value does not surpass the amount of R$ 100.00 (one hundred reais). Distribution must observe a minimum interval of 12 months and cannot be destined for one specific public official.

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

One of the main issues related to the enforcement against bribery and corruption is the discussion about the limits, effects and guarantees surrounding criminal collaboration agreements. As stated above, the use of these institutions is increasing, in part due to encouragement by authorities in order to obtain stronger evidence in cases of corruption. The private nature of the encounters between parties involved in corruption, along with the complex structures used to hide the proceeds, present serious obstacles for the authorities. With the use of leniency and cooperation plea-bargain agreements, authorities are able to save years of investigation and reach public officials in high positions.

Until 2011, most of the laws that allowed plea bargains in case of voluntary collaboration of suspects and/or defendants (e.g. article 159 of the Penal Code – kidnapping and extortion; Law 8,072/90 – heinous crimes; Law 11,343/06 – drug trafficking; Law 7,492/86 – financial crimes; Law 8,137/90 – tax crimes, etc.) only offered the possibility of penalty reductions. Only Law 8,072/90 – witness protection and Law 9,613/98 – money laundering, allowed the judge to forego the application of penalties for the collaborator. In any case, the defendant was always required to face trial before receiving the benefits resulting from the collaboration.

The alterations in the System for Economic Defense implemented by Law 12,529/11 allowed, for the first time, the possibility of a party that enters into a leniency agreement with authorities not suffering criminal charges. The conditions for this type of cooperation agreement are: that the lenient is effectively involved in the offence; that he is the first to notify the authorities about that specific offence; that he confesses and ceases his behaviour immediately; that at the moment of the agreement the authorities do not have enough evidence to build a case against the offenders; and that the lenient's cooperation results in the identification of all the other offenders and the gathering of enough evidence to prove that the offence occurred. This type of leniency programme, which can result in the dismissal of charges against the offender who is willing to cooperate, was restricted to the crimes of cartel, fraud in public tenders and criminal association.

In 2013, two new laws were created to further develop the collaboration mechanisms. The Anti-Corruption Act (Law n.º 12,846/13) contains provisions of a leniency programme for legal entities that benefit from acts of corruption. Lawmakers focused only on the legal entities and did not include any provisions on how the leniency set forth in that law would affect individuals. This could cause problems and hinder the effectiveness of the law, since directors, employees and other individuals connected to the legal entity that seeks leniency could feel insecure and unprotected in an eventual agreement. However, the Criminal Organizations Act (Law n.º 12,850/13) from the same year allows plea bargains with penalty reductions or even dismissal of charges for offenders who cooperate. This law applies to crimes that occur in the context of a criminal organisation and has been widely used for individuals related to legal entities that enter into leniency agreements based on the Anti-Corruption Act.

There has recently been an explosion in the number of criminal collaborations within the Criminal Organizations Act framework, especially in *Operação Lava-Jato*. Although the law provides for new instruments, both federal police and prosecutors have been innovating

in their deals, many of which do not appear to follow material and procedural rules set by the Criminal Organizations Law, a fact that has been raised in some discussions in the Supreme Court, but so far to no practical consequences.

Another key issue related to enforcement against bribery and corruption is related to the difficulties in producing evidence and conducting trials, which often move at a very slow pace and may drag on for several years. This delay in the trials is caused mostly by the complexity and type of evidence that these cases require (e.g. analysis of bank statements, transcription of telephone interceptions) as well as the public offices held by some defendants, which may result in jurisdiction privileges. The prosecution of authorities before higher instance courts may cause delays in the proceedings because such courts have reduced capacity of taking certain measures.

The establishment of goals and priorities for the conclusion of lawsuits, the creation of specialised police departments, Prosecutor's Offices and courts (e.g. bodies specialised in organised crime and money-laundering, which are often connected to corruption), the enhancement of monitoring systems and changes in legislation, among other measures, are slowly but steadily transforming enforcement procedures towards greater efficiency.

Overview of cross-border issues

The current scenario of the fight against bribery and corruption is marked by the growing need for interaction among countries that seek to develop and improve enforcement mechanisms through mutual cooperation. For this reason, corruption and other related offences, such as money-laundering, are among the central topics of the international conventions in which Brazil participates.

Brazil has signed three international treaties in this area: the Inter-American Convention Against Corruption of the Organization of American States (OAS); the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (OECD); and the United Nations Convention Against Corruption.

The OAS treaty was signed in 1996 and incorporated into the Brazilian legal system in 2002. It was the first international instrument to fight corruption and it provides for mutual assistance among the participating countries in legal and technical fields including extradition and confiscation of assets.

The OECD convention was signed in 1997 and incorporated into the Brazilian legal system in 2000. It focuses on fighting corruption in international business transactions and resulted in legislative innovations to include an entire new chapter in the Brazilian Penal Code, named "Crimes Against Foreign Public Administrations". This innovation included crimes such as the corruption of foreign public officials and influence-peddling regarding a foreign public official.

It is important to note that the OECD convention contained dispositions regarding the liability of corporate entities. It also stated that if such form of liability was not possible, the participating country should impose non-criminal sanctions to corporate entities involved in acts of corruption. This disposition is in line with the new above-mentioned Anti-Corruption Act, which sets forth administrative and civil sanctions due to the impossibility of imposing criminal sanctions.

Finally, the United Nations Convention Against Corruption is the most important international instrument related to such matter. It was approved by the United Nations General Assembly

in 2003 and incorporated into the Brazilian legal system in 2005. Among several other relevant aspects, we highlight the provisions that states parties should implement measures to increase transparency in the financing of political parties and candidates, develop codes of conduct that encourage officials to report acts of corruption, and discourage the acceptance of gifts. The convention also contains measures to prevent corruption in the public and private sectors, including the development of standards for auditing and accounting records of private companies.

The United Nations convention foresees the creation of several offences in the respective legislation of states parties. The goal is to go beyond fighting corruption in its basic forms and also prevent other actions that contribute to corruption such as obstruction of justice, influence-peddling, money-laundering, unjust enrichment and bribery in the private sector, among others. There is a project for a new Penal Code pending discussion in Congress. This project aims to fulfil the compromises that were assumed in this convention and includes a provision to punish bribery in the private sector.

Cross-border enforcement and mutual cooperation have been an important element of *Lava Jato*'s success. As of June 2017, Federal Prosecutors have initiated 174 requests for international cooperation directed to 38 different countries. At the same rate, just in relation to *Lava Jato*, Brazilian prosecutors have received 89 requests from 28 countries, including 32 depositions which took place in Brazil at the request of foreign countries. Thanks to international cooperation measures, R$ 757m (USD 243m) have been repatriated due to international asset recovery actions undertaken within *Lava Jato*.

Corporate liability for bribery and corruption offences

In Brazil, the only instance where corporations can be held criminally liable is within environmental crimes. When companies are involved in corruption accusations, they can be held liable under the Anti-Corruption Act (Law 12,486/2013). This Law provides sanctions that are applicable against corporations found to be guilty of corruption under the terms provided by the statute. Although these sanctions are not criminal in nature, they are extremely similar and in some instances, identical, to the sanctions for environmental crimes.

Proposed reforms / The year ahead

Looking to take advantage of the positive repercussion that the *Lava Jato* operation had within the Brazilian society and media outlets, federal prosecutors launched a proposal called *10 measures against corruption*. It is a manifesto/legislative proposal advocating for 10 changes in Brazilian material and procedural criminal law. Under the guise of fighting corruption, these proposals are little more than measures that undercut basic fundamental rights guaranteed by the Brazilian Constitution.

Out of 10 proposals, only one is dedicated to actually stop corruption from happening, proposing an increase in transparency and accountability in the public sector, as well as a controversial "integrity test" for public servants (a.k.a. entrapment). The other proposals are: increase in mandatory minimum sentences; decrease in the possibility for appeals; reforming the statute of limitations; the acceptance of illegal evidence collected "in good faith"; conditioning the suspect's pre-trial release on the deposit of the amount he is accused of misappropriating; broader requirements for seizing assets; and other measures that increase prosecutorial powers.

These measures focus on facilitating the prosecution of crimes after they take place, something that is not very effective in preventing corruption from happening. Brazilian congressmen, many of which are being investigated in the *Lava Jato* operation, altered the bill, making it almost unrecognisable, even adding the criminalisation of "abuse of powers" by prosecutors and criminal judges. This was a clear pushback against the initiative of the prosecutors. This bill is still pending approval by Congress and there is a lot of uncertainty as to how things will unfold.

Besides the prosecutorial agenda, there is a movement advocating for a more liberal approach to criminal procedure. This movement, historically tied to human rights advocates, has recently been adopted by lawmakers who until very recently had a more conservative approach to criminal law. This illustrates the magnitude of the pushback exerted by politicians who are seeing the Attorney General's Office as their enemy, which wants to "criminalise politics", a criticism retorted by allegations that prosecutors are merely doing their jobs, and it's not their fault that politics has become such a fertile field for criminal prosecutions.

In short, the scenario is stark: prosecutors who are trying to expand their powers while limiting due process and presumption of innocence are opposed by lawmakers who recently switched sides in the criminal law debate in the interest of self-preservation.

* * *

Endnote

1. http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros.

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Cayman Islands

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Brief overview of the law and enforcement regime

The Cayman Islands' Anti-Corruption Law (2014 Revision) (the "**Law**") came into force on 1 January 2010 with the intent of giving effect to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as the United Nations Convention Against Corruption. The Law replaced the provisions relating to anti-corruption and bribery which previously existed under the Penal Code, and provides generally for four categories of corruption offences: Bribery (both domestic and foreign); Fraud on the Government; Abuses of Public or Elected Office; and Secret Commissions. There are also ancillary offences for failure to report an offence.

The Law also creates the Anti-Corruption Commission (the "**Commission**"), which oversees the administration of the Law. The Commission comprises the Commissioner of Police, the Complaints Commissioner, the Auditor General, and two 'appointed members', selected by the Governor from retired members of either legal practice, law enforcement or the judiciary.

Bribery

The key bribery offences under the Law are:

(a) *Bribery of public officers and elected members of the Cayman Islands Legislative Assembly*

It is an offence for a (Cayman Islands) public officer[1] or member of the Legislative Assembly ("**LA**"), to, directly or indirectly, solicit, accept or obtain (or agree to accept or obtain) for themselves or another person, any loan, reward, advantage or benefit (an "**improper payment**") with the intent to interfere with the administration of justice; procure or facilitate an offence; or protect an offender from detection or punishment. It is also an offence for any person to give or offer an improper payment to a public officer, or member of the LA, with such intent.

The penalty for bribery of a Cayman Islands public officer, or member of the LA, under the Law, is imprisonment for a term of 14 years.

(b) *Bribery of foreign public officer*

It is also an offence if any person, in order to obtain or retain an advantage in the course of business, directly or indirectly, promises, gives or offers, or agrees to give or offer, an improper payment to a foreign public officer,[2] save where such improper payment is either:

(i) permitted or required under the laws of the applicable foreign country or organisation; or

(ii) was made to pay the reasonable expenses incurred in good faith by, or on behalf of, the foreign public officer that are directly related to:

(1) the promotion, demonstration or explanation of the person's products or services; or

(2) the execution or performance of a contract between the person and the foreign country for which the officer performs duties or functions.

The penalty for bribery of a foreign public officer, under the Law, is imprisonment for a term of up to 14 years.

Where money is paid to a foreign public officer, the Law provides that such payment is not considered an improper payment to obtain or retain an advantage in the course of business, if it meets the criteria for a facilitation payment (see section below, 'Law and policy relating to issues such as facilitation payments and hospitality' for further detail).

Fraud on the Government

It is an offence for any person who:

(a) directly or indirectly, gives, offers or agrees to give or offer an improper payment to a public officer or a member of the LA,[3] in connection with:
   (i) Government business;
   (ii) Government claims, regardless of whether the relevant public officer or member of the LA (or other such person) is in fact able to cooperate, render assistance, exercise influence or do or omit to do what is proposed; or
   (iii) the appointment of any person, including himself, to an office;
(b) has or pretends to have influence with the Government, a member of the LA or public officer, and accepts a benefit for himself in connection with:
   (i) Government business;
   (ii) Government claims; or
   (iii) the appointment of any person, including himself, to an office;
(c) when dealing with a public officer or a member of the LA, provides benefit to such person without the prior written consent of the chief officer of the relevant Government entity; or
(d) having made a tender to obtain a contract with the Government, provides or receives benefit in consideration for the withdrawal of their or another's tender.

The penalty for the offence of committing a fraud on the Government is a term of imprisonment of up to 10 years.

Abuses of public or elected office

Any person who:

(a) agrees to an appointment to or resignation from a public office;
(b) consents to any such appointment or resignation; or
(c) receives or agrees to receive a reward or profit from the purported sale thereof, commits an offence liable on conviction to imprisonment for a term of up to five years.

Any person who, in order to obtain or retain a contract with the Government, or as an express or implied term of such a contract, directly or indirectly provides a benefit to any person:

(a) for the purpose of promoting the election of candidates to the LA; or
(b) with the intent to influence or affect the election of any candidate to the LA, commits an offence liable on conviction for a term of imprisonment of up to 10 years.

Any person who:

(a) agrees to an appointment to or resignation from a public office;
(b) consents to any such appointment or resignation; or
(c) receives or agrees to receive a reward or profit from the purported sale thereof,

commits an offence liable on conviction for a term of imprisonment of up to five years.

Further, any person who:
(a) receives, agrees to receive, gives or procures to be given, directly or indirectly, an improper payment as consideration for cooperation, assistance or exercise of influence to secure the appointment of any other person to a public office;
(b) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from a public office, in expectation of a direct or indirect improper payment; or
(c) keeps, without lawful authority, a premises for transacting or negotiating any business relating to:
    (i) the filling of vacancies in public offices; or
    (ii) the sale or purchase of public offices, or appointments to, or resignation from public offices,

commits an offence liable on conviction for a term of imprisonment of up to five years.

Secret commissions

There is also a more general offence provision relating to secret commissions that may not necessarily need to involve a public official (whether local or foreign). The section provides that any person who gives, offers or agrees to give or offer to an agent any improper payment in consideration of any act relating to:
(a) the affairs or business of the agent's principal;
(b) for showing favour or disfavour towards any person in relation to the affairs or business of the agent's principal; or
(c) with the intent to deceive an agent's principal, gives the agent a receipt, account or other writing in which the principal has an interest that:
    (i) contains any statement that is false, erroneous or defective in any material particular; and
    (ii) is intended to mislead the principal,

commits an offence liable upon conviction for a term of imprisonment of up to five years.

Further, any agent who demands, accepts or offers or agrees to accept any improper payment to achieve (a), (b) or (c) above, from any person, also commits an offence liable upon conviction for a term of imprisonment of up to five years.

Reporting offences

The Law also provides for a mandatory reporting obligation in that any person from whom an improper payment has been solicited or obtained, in contravention of any provision of the Law, is also required to make a report to the Commission, or a constable, at their earliest opportunity. Failure to do so, without reasonable excuse, is an offence liable upon conviction to a fine of up to CI$10,000 (approximately US$12,000) and/or imprisonment for up to two years.

There are further offence provisions applicable to persons who provide false, misleading or inconsistent reports. The Law also makes it an offence to victimise a person who makes a report or disclosure to the Commission, or constable, of the bribery of a public officer or member of the LA, with a penalty of imprisonment for two years. The Law defines "victimisation" as an act:
(a) which causes injury, damage or loss;
(b) of intimidation or harassment;
(c) of discrimination, disadvantage or adverse treatment in relation to employment; or
(d) amounting to threats of reprisals.

Inchoate offences and vicarious liability

In addition to the primary offence categories outlined above, the Law also provides for "inchoate offences", which apply to the:

(a) attempt, conspiracy, or incitement to commit corruption offences; and
(b) aiding, abetting, counselling or procuring the commission of corruption offences.

The inchoate offences are liable on conviction to a fine of up to CI$5,000 (approximately US$6,000) and/or imprisonment for a term of up to two years.

Overview of enforcement activity and policy during the past two years

The Commission is supported by both the Royal Cayman Islands Police Service ("**RCIPS**") (through a dedicated Anti-Corruption Unit) and the Auditor General of the Cayman Islands in the investigation and determination of bribery and related offences under the Law. The investigative and enforcement arms of the regime are also complemented by a statutory freedom of information framework with an independent Information Commissioner and a free press.

The Commission's capabilities were recently strengthened by the provision of analytical, research and administrative support from the Commonwealth Secretariat. The Commission has adopted a multi-faceted approach to tackling corruption, which includes investigations, prosecutions and educational campaigns to improve the public's awareness of the Law.

However, the Commission does not have investigative resources of its own and must largely rely on the RCIPS to investigate any claims brought to it, introducing a risk that corruption cases may be deprioritised. Additionally, the independence of the Commission has been questioned, as it includes seats for the Auditor General and the Police Commissioner. Certain observers have argued that the Commission may be more effective if its members did not already have other full-time employment and would not be confronted by a potential conflict of interest if a matter actually involved some of their staff.

As at 24 November 2014 (the last date for publicly available records), there have been 113 complaints received and registered by the Commission since its inception (six of which have been received within the most recent reporting period of 1 July 2014 to 30 June 2015, although the figures for the remainder of this period are not currently publicly available). Of those complaints: 10 were 'pending' (awaiting further or significant information); 74 had been concluded; 10 were transferred to other investigative units for action; and nine were under active investigation.

There have been notable corruption cases since the introduction of the Law, two of which have progressed to trial and resulted in convictions. The first, *R v Webster*,[4] concerned a civilian employee of the RCIPS who plead guilty to two charges of misconduct of public office contrary to common law (i.e. not a charge under the new provisions of the Law), stemming from improper use of confidential police and immigration databases. Noting that there had been no previous cases in the Cayman Islands which would provide guidance as to the appropriate sentence, the Grand Court of the Cayman Islands referred to similar cases in the United Kingdom as persuasive authority. In part due to a lack of malice, or an intention to obtain a pecuniary benefit, a suspended sentence was imposed for 12 months.

In the second case of *R v Ebanks*,[5] a jury found a former Police Constable (PC) of the RCIPS guilty of two counts of soliciting a bribe and two counts of breach of trust. A social inquiry report has been requested by the presiding Grand Court Judge, with sentencing pending.

In *R v Myles*,[6] the former deputy chairman and director of the National Housing and Development Trust Board, who was accused of deceiving applicants of the Cayman Islands

Government's housing assistance scheme into unnecessarily purchasing homeowners' insurance, was convicted on seven deception offences and sentenced to six months' imprisonment. Although no official statements were released, it was widely reported that despite having initially been charged with breach of trust and abuses of public or elected office offences under the Law, these were later dropped due to an unforeseen technicality in the Law with respect to private sector appointees to the boards of government companies and authorities.

Certainly, the most prominent corruption case involved charges against the former Premier of the Cayman Islands. The initial charges had included two counts of misconduct in public office, four counts of breach of trust by a member of the LA, and five counts of theft in connection with the importation of explosive substances without a legal permit, although none were made pursuant to the Law. The former Premier was cleared by a Cayman Islands jury of all 11 charges in October 2014.

More recently, the former Chairman of the Health Services Authority in the Cayman Islands, and a member of FIFA's audit committee, Canover Watson, was charged with five corruption and money laundering offences in November 2014. Additional charges of conspiracy to defraud and breach of trust were added in July 2015, and he and his former PA are due to stand trial in November 2015. The charges relate to the award of a Cayman Islands health service swipe card contract to a private company whilst Mr Watson was head of the relevant awarding authority. The specific charges against Mr Watson include: (a) conflict of interest contrary to section 19(2) and 19(3) of the Law; (b) breach of trust contrary to section 13 of the Law; (c) fraud on government contrary to section 11 of the Law; (d) failing to disclose a pecuniary interest contrary to section 10(1) of the Health Services Authority Law 2005; and (e) acquiring criminal property contrary to section 135(1) Proceeds of Crime Law (2014 Revision).

In another, potentially more high-profile indictment, suspended FIFA vice-president and CONCACAF president Jeffrey Webb, already facing charges in football's global bribery scandal, has also been charged in connection with the same healthcare fraud case faced by Canover Watson. Mr Webb, although not a government official at the time, is alleged to have been connected to one of the companies that secured the lucrative swipe card contract. Mr Webb now faces two charges of conspiracy to defraud and one charge of breach of trust, as well as conspiracy to convert criminal property. In a separate, unconnected case that has garnered worldwide attention, Mr Webb was arrested on 27 May in Zürich based on allegations made by the US authorities that he was involved in a massive US$150 million FIFA racketeering and bribery scandal. Mr Webb is currently on bail in the US, and it remains unclear when he may appear before a Court in the Cayman Islands.

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

Facilitation payments

The Law recognises the limited business circumstances and/or cultural practices relating to facilitation payments and provides a statutory exception. Where money is paid to a foreign public officer, the Law provides that such payment is not considered an improper payment to obtain or retain an advantage in the course of business if:

(a) the value of the payment is small;
(b) the payment is made to expedite or secure the performance by a foreign public officer of "an act of a routine nature" that is part of the foreign public officer's duties or functions, including:
    (i) the issuance of a permit, licence or other document to qualify a person to do business;
    (ii) the processing of official documents, such as visas and work permits;

(iii) the provision of services normally offered to the public, such as mail pickup and delivery, telecommunication services and power and water supply; and

(iv) the provision of services normally provided as required such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration, or the scheduling of inspections related to contract performance or transit of goods; and

(c) as soon as practicable after the payment and act of a routine nature are performed by the foreign public officer, the person making such payment makes a record of such payment or act, and the person has retained that record at all relevant times. Such a report must include:

(i) the value for the payment;

(ii) particulars of the act of a routine nature that was sought to be expedited or secured by the payment;

(iii) the date or dates on which the payment was made and on which the act of a routine nature occurred;

(iv) the identity of the foreign public official; and

(v) the signature or other means of verifying the identity of the person making the report.

Hospitality

The Public Service Management Law (2013 Revision) concerns the narrower definition of "public officer" as the holder of any office of emolument in the public service, and includes any person appointed to act in any such office. Public officers are subject to "General Orders" which are contained within subsidiary legislation. Earlier versions of the General Orders regulated the acceptance of gifts by public officers. The specific provisions dealing with the acceptance of gifts have now been removed from the General Orders.

Public officers must be careful about receiving valuable presents (unless they are from personal friends) whether in the shape of money, goods, passages, subsidies or services or any other personal benefits.

Gifts received from foreign governments may be accepted where to do otherwise would be viewed by the particular foreign government as offensive, and where the public servant receives approval from the Governor of the Cayman Islands. There is no official guideline as to what constitutes a "valuable present", but previous wording was sufficiently wide to cover any gift.

The Public Servants Code of Conduct is overseen by the Commission for Standards in Public Life and provides that a public servant must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) with his duties as a public servant, and must not use his official position for personal or familial gain.

As part of its regulatory handbook, the Cayman Islands Monetary Authority ("**CIMA**") issues a code of conduct for the directors of the Board of CIMA and members of its management committee ("**MC**"), who are expected to carry out their responsibilities to the exclusion of any personal advantage. For example, Board directors and members of the MC should not accept favours, fees or gifts from regulated institutions or the institutions' staff, professional companies or the general public, including commissions, special discounts or other forms of compensation, in order to avoid the appearance of improper influence on the performance of their official duties. All gifts received without prior notification from the sender must be declared immediately to the Managing Director of CIMA or in his/her absence to the Deputy Managing Director, who will deal with the matter appropriately.

Board directors and members of the MC are required to exercise discretion in accepting hospitality from any relevant organisations and professional advisers. Routine business lunches are accepted unless they become frequent or lavish. Attendance at expensive or exclusive sporting or cultural events which might draw criticism must be declined unless circumstances have been discussed with the Managing Director of CIMA.

Members are expected to turn down any invitation when they and their partner are the only guests, or where the host's party is only six or eight, and where the price of the tickets and accompanying fare is likely to exceed CI$100 (approximately US$120) per head. Invitations are to be automatically refused where they could be construed to be unusual or to risk creating a sense of obligation to the host, or bias in their favour (e.g. because of the circumstances of the invitation, or cost or rarity value of the event).

Key issues relating to investigation, decision making and enforcement procedures

The Commission is given broad powers to prevent and detect corruption offences under the Law. For example, the Commission may, upon successful application to the Grand Court of the Cayman Islands, order any person to refrain from dealing with a person's bank account or other property for a period not exceeding 21 days, if there is reasonable cause to believe that it relates to the proceeds or the suspected proceeds of a corruption offence. Further, the Commission may, in writing, require any person to provide information (excluding information communicated to professional legal advisers) for the purpose of clarifying or amplifying information relating to corruption offences.

Although the Attorney General must consent to the instigation of proceedings in relation to a corruption offence, a person may be arrested, charged, remanded into custody or released on bail before such consent is received.

The Law also expressly provides that, in any trial or proceedings for a corruption offence, the court, in relation to the proceeds of such an offence, shall apply the provisions of the Proceeds of Crime Law (2014 Revision).

Cross-border issues including mutual legal assistance

Mutual legal assistance is also extensively provided for under the Law, which allows the Commission to disclose any information received in relation to corruption offences to CIMA, as well as other designated institutions or persons. The Commission may also disclose any information to any foreign anti-corruption authority relating to conduct which constitutes a corruption offence, or would constitute a corruption offence if it had occurred in the Cayman Islands.

The Law also makes offences extraditable and an offence occurs if the conduct:

(a) was committed wholly or partly within the Cayman Islands;
(b) was committed wholly or partly on board a Cayman-registered ship or aircraft (wherever located); or
(c) was committed wholly outside the Cayman Islands and the alleged offender:
    (i) is a person with Caymanian status;
    (ii) is a resident of the Cayman Islands; or
    (iii) is a body corporate incorporated by or under a Cayman law.

The territorial provisions of the Law are much more extensive than any predecessor legislation, as corruption offences are deemed to be offences for which extradition may be granted, pursuant to existing Cayman Islands extradition laws and treaties. Moreover,

corruption offences involving cross-border transactions and/or entities in different jurisdictions can also give rise to complex conflicts of law questions.

Although not Cayman law, it is noted that certain provisions of the United Kingdom Bribery Act 2010, which came into force in July 2011, have extraterritorial effect in certain British Overseas Territories, including the Cayman Islands.

For example, the offences of active or passive bribery (in the public or private sector) apply to acts committed overseas (where the act or omission would have been an offence, if done or made in the UK), provided the offender has a close connection with the UK. A close connection includes a British citizen, a British overseas territories citizen (which may include many Cayman Islands citizens), an individual ordinarily resident in the UK, or a body incorporated in any part of the UK. Furthermore, an offence of failing to prevent bribery (by not having adequate procedures) applies to companies, wherever incorporated, which conduct part of their business in the UK.

Corporate liability

While the offences under the Law are primarily directed to individuals, where an offence is proved to have been committed by a body corporate with the consent, connivance of, or be attributable to any neglect on the part of any director, manager, secretary or similar officer, including any person purporting to act in such a capacity, both the body corporate and the individual person shall be liable.

Proposed reforms / The future

In its June 2012 Annual Report, the Commission noted, in relation to the implementation of Part I of the Cayman Islands Constitution Order 2009 – the Bill of Rights, Freedoms, and Responsibilities, which came into force on 6 November 2012 – that respect and support for human rights are closely interlinked with anti-corruption initiatives.

In addition to continuing to successfully work in conjunction with the RCIPS Anti-Corruption Unit and the Auditor General to detect and expose corruption, the Commission has taken, and will continue to take, an active role in public awareness campaigns with other institutions and associations with similar or complementary objectives. For example, in April 2013 the Commission joined forces with the Cayman Islands Elections Office to educate and inform the public about the importance of integrity to the elections process.[7]

While there are currently no proposed reforms of the Law, publicised criticism stemming from the Law's perceived inadequacies in the *R v Myles* decision suggests that a legislative review of the Law as it applies to private sector appointees will be forthcoming.

* * *

Endnotes

1. A "public officer" includes a person holding public office, judge, magistrate, arbitrator, umpire, assessor, jury member, Justice of the Peace, or member of statutory body, tribunal or commission of enquiry.
2. A "foreign public officer" includes: (i) employee/officer of a foreign government body; (ii) contract worker for a foreign government body; (iii) person appointed under foreign law, custom or convention; (iv) member of the executive, judiciary, magistracy

or legislature; (v) employee, officer, contractual worker for a public international organisation; and (vi) authorised intermediary of a foreign public officer.

3. Including members of their families or any other person to their benefit.
4. Indictment No. 0085/2011, 7 May 2013; *R v Webster* [2013] 2 CILR 72.
5. Indictment No. 105/2012, 27 June 2014; *R v E.K. Ebanks* [2013] 2 CILR 381.
6. (Unreported) Indictment No. 70/2012, 13 June 2014.
7. http://www.electionsoffice.ky/index.php/the-news/224-acc-and-elections-office-partner-to-promote-integrity.

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China

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Introduction

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 ("**SPP**"), Cao Jianming, to the National People's Congress in March 2017, there were 47,650 persons charged for corruption or dereliction of duty. Indicative of the seriousness of the anti-corruption campaign, 2,882 state functionaries above the county level, including 446 state functionaries at the bureau level and 48 state functionaries at the provincial/ministerial level, were investigated in these cases. In total, 10,472 state functionaries were investigated and punished for taking bribes and 7,375 persons were investigated and punished for giving bribes to state functionaries.[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 is indicative of the seriousness of the Chinese government's efforts in its anti-corruption campaign.

In November 2014, the Chinese government announced that a new anti-corruption bureau is to be established. It is anticipated that this new bureau will act as an anti-graft bureau and will investigate officials suspected of corruption. The bureau will be combined with three existing bodies – the Anti-Corruption and Anti-Bribery Bureau, the Prevention of Duty-Related Crimes Department and the Investigation of Dereliction of Duty and Power Abuse Department. It will be established at vice-ministerial level, higher than a regular bureau.[4]

Foreign entities operating in China face the potential of being investigated and charged in connection with this 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.[5] 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.[6] Five former GSK senior executives were sentenced to suspended imprisonment of two to three years.[7]

Following the GSK bribery investigation, the State Administration of Industry and Commerce stated that local Administrations of Industry and Commerce should pay 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.[8] A number of foreign drug manufacturers – UCB, Novartis, AstraZeneca PLC, Pfizer, Bayer AG, and Roche Holding AG − were subsequently visited by the Chinese authorities.[9] There were also news articles reporting that Sanofi SA and Eli Lilly were visited by the Chinese authorities as well.[10]

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 ("**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.[11] The term "entity" includes state organs, state-owned companies, enterprises, institutions, and people's organisations.[12]

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;[13]
(ii) offering of a bribe to a non-state functionary;[14]
(iii) offering of a bribe to a foreign official or an officer of a public international organisation;[15]
(iv) offering of a bribe to an entity;[16]
(v) offering of a bribe by an entity;[17]
(vi) offering of a bribe to a close relative of, or any person close to, a current or former state functionary;[18]
(vii) introduction to a state functionary of an opportunity to receive a bribe;[19]
(viii) acceptance of a bribe by a state functionary;[20]
(ix) acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary;[21]
(x) acceptance of a bribe by a non-state functionary;[22] and
(xi) acceptance of a bribe by an entity.[23]

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 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.[24] 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
(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.[25] 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.[26] 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".[27] 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.[28]

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.[29]

As interpreted by the SPP and SPC, bribery may be distinguished from a gift by reference to the following factors:[30]

(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.

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".[31] 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;[32]
(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;[33] 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.[34] 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.[35] 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 afterwards 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".[36] The 2016 Judicial Interpretation re-establishes the monetary thresholds and standards for bribery-related prosecution and sentencing.[37] 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.[38] A summary comparing the previous monetary thresholds and the new ones is set out as follows:

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

Offence	Previous Thresholds	New Threshold
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
"Bribe-accepting" cases		
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
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
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 bribes 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

Offence	Relevant Factors	Penalty
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 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
"Bribe-accepting" cases		
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

Offence	Relevant Factors	Penalty
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 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 SPP, enumerates the "aggregating factors" that shall be taken into account in connection with the prosecution and sentencing of individuals offering or accepting bribes.

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 1m.

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":[39]

(i) to gain unlawful benefits through bribery;
(ii) the bribery of more than three persons;
(iii) the 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.[40]

Statute of limitations

The limitation periods for the prosecution of a crime are:[41]

(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 prohibition of commercial bribery

The *AUCL* is intended to regulate business activities which may cause unfair competition.

It prohibits, *inter alia*, "commercial bribery", which is defined as follows:[42]

(i) the use by a business operator;
(ii) of the means of giving money, property or other benefits;
(iii) to another person; and/or
(iv) in order to sell or buy goods or to obtain business transactions or other economic benefits.

Whilst not expressly set out in the relevant legislation, this offence appears to require an element of dishonesty. However, the threshold for dishonesty is not defined.

The broad scope of prohibition

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

Pursuant to the *Interim Provisions on Prohibition of Commercial Bribery issued by the State Administration for Industry and Commerce* ("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.[43] The term "other benefits" can include things such as the provision of tours and travel within China or abroad.[44]

Kickbacks and rebates

In particular, Article 8 of the *AUCL* expressly provides that any "off-the-book" kickback which is secretly provided to any individual or entity shall be treated as an offer of a bribe, and any acceptance of such kickbacks by any individual or entity shall be treated as the acceptance of a bribe.

However, the *AUCL* does offer a degree of leeway for business operators, as they may give or accept discounts or commissions in the course of a transaction, provided that such arrangements are transparent and are clearly recorded in the books of accounts. The party receiving the commission must have the legal qualifications necessary to provide the related services, and must also record the amount in its accounts.

Enforcement and penalties under *AUCL*

If an offence of commercial bribery under the *AUCL* is sufficiently serious, the respective monetary thresholds to commence an investigation under the *AUCL* are not clearly set out in in the law or in the Anti-Commercial Bribery Provisions. Whether an act of commercial bribery is considered sufficiently serious will be considered on a case-by-case basis.

Depending on the severity of the situation, acts of commercial bribery under the *AUCL* may attract fines of between RMB 10,000 and RMB 200,000.[45] All illegal gains will also be confiscated, and prosecution will also be sought if the offence reaches the level of criminal conduct.

Draft amendments to the *AUCL*

The current effective 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*.

At the 26th Session of the Standing Committee of the Twelfth National People's Congress on February 22, 2017, the State Council submitted a modified draft of the *AUCL* to the Standing Committee for review. On August 8, 2017, the Law Committee of the National People's Congress submitted a second review modified draft of the *AUCL* ("*2017 Second*

Review Draft") to the Standing Committee for review. On September 5, 2017, the Standing Committee approved and published the *2017 Second Review Draft* seeking the views of the public. The *2017 Second Review Draft* contains considerable legal reform in the area of commercial bribery when compared against the existing *AUCL* but the proposed amendments are not as extensive as those proposed in prior draft amendments.

The definition of commercial bribery under the *2017 Second Review Draft*

The *2017 Second Review Draft* defines "commercial bribery" as follows:[46]

(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 *AUCL* in its current form, the *2017 Second Review Draft* clarifies the definition of commercial bribery by listing four categories of entities or individuals who could be the recipients of bribes; these categories include: 1) employees of the counterparty in a transaction; 2) agent entities or individuals hired by the transaction counterparty to handle matters related to the transaction; 3) state authorities, state-owned companies and enterprises, state institutions, people's organisations and governmental officials; and 4) other entities or individuals that may affect a transaction by taking advantage of the powers and functions of a government official.[47]

A significant change contained within this review draft 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 transaction party employees are included in the categories of potential bribe recipients, transaction counterparties themselves are excluded. On this basis, one of the potential interpretations is that beneficial payments made between the two transactional parties, such as transactional rebates may be excluded from the scope of commercial bribery.

Special provision for commercial bribery conducted by employees under the *2017 Second Review Draft*

The *AUCL* does not currently separate unauthorised conduct of commercial bribery by an employee from that of a business operator. In practice, however, the authorities typically regard any commercial bribery carried out by an employee as an instance of commercial bribery carried out by the individual's employer.

The *2017 Second Review Draft* makes it clear that that any commercial bribe offered by an employee shall be seen as the conduct of the business operator.[48] The *2017 Second Review Draft* further provides the exception that if the business operator can prove the bribe offered by the employee is not related to the business operator's objective of obtaining specific business transaction opportunities or other competitive advantages, it will not be liable.[49]

Safe harbour provisions for the provision of rebates and commissions

The *2017 Second Review Draft* retains the safe harbour provisions which allow business operators to provide rebates or commissions in a public manner, provided accurate accounting records are kept.

Further, under the Law of the PRC on Donations for Public Welfare ("Donation Law"), donations are to be made voluntarily and *gratis*. Any monetary or goods contributions that are made as donations but with commercial purpose of seeking economic benefits or transaction opportunities will be seen as commercial bribes.[50] The Anti-Commercial Bribery Provisions also provides 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.[51]

Penalties under *2017 Second Review Draft*

There are three levels of penalties provided by the *2017 Second Review Draft*. 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 resulted 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 license of the business operator in question if the situation is sufficiently serious.[52] Whether an act of commercial bribery is considered sufficiently serious will be determined on a case-by-case basis.

Furthermore, according to Article 26 of the *2017 Second Review Draft*, where business operators receive 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 *2017 Second Review Draft,* appears to addresses concerns from the business community that the current version of the *AUCL* does not credit business operators for maintaining effective compliance programmes and/or taking steps to discover and rectify misconduct.

The *2017 Review Draft* additionally provides that business operators which carry out commercial bribery and cause damage to third parties are liable to pay compensation. Article 17 of the *2017 Second Review Draft* clarifies that the amount of compensation payable is determined with reference to the actual loss suffered by third parties, or the illegal gains received by the business operators when such loss is difficult to determine, and shall include compensation for reasonable expenses incurred by damaged parties seeking to cease the illegal conduct.

Prevention and remediation

The problems 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 optimal 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.

The designated investigative body should be properly resourced and the scope of the investigation should be proportionate with 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 run afoul 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.

* * *

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France

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Brief overview of the law and enforcement regime

Bribery and corruption are criminalised in France by different criminal offences, all contained in the French Penal Code. Act No 2016-1691 of 9th December 2016 on transparency, the fight against corruption and the modernisation of the economy, referred to as "Sapin II", could be a game-changer with respect to the fight against corruption in France.

Domestic bribery

Domestic bribery laws apply to all domestic public officials, including members of the judiciary, legislature, and executive branches. More precisely, they apply to any person holding a public authority, discharging a public service function, or holding a public electoral mandate in France. The mere soliciting or offering of a bribe is construed as an act of corruption, regardless of whether the bribe has actually been paid. Such an act may be punished as though the bribe had been fully paid.

Passive corruption

It is a criminal offence for a person holding public authority, charged with a public service mission, or invested with a public elected office to unlawfully solicit, or accept, at any time, directly or indirectly, offers, promises, donations, gifts, and benefits of any kind for himself, herself, or another to carry out, or have carried out, to abstain from, or have abstained from, an act of his or her office, mission, or mandate, or facilitated by his or her office, mission, or mandate (see Article 432-11(1) of the French Penal Code).

Active corruption

It is a criminal offence for a person to unlawfully proffer at any time, directly or indirectly, offers, promises, donations, gifts, and benefits of any kind to a person holding public authority, charged with a public service mission, or invested with a public elected office for him, her, or another to carry out, or have carried out, to abstain from, or to have abstained from, any part of his or her office, mission, or mandate, or facilitated by his or her office, mission, or mandate (see Article 433-1(1) of the French Penal Code).

It is also a criminal offence to yield to a person holding public authority, charged with a public service mission, or invested with an elected public office, who unlawfully solicits, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind for himself, herself, or another to carry out, or have carried out, to abstain from, or to have abstained from, an act mentioned above (see Article 433-1 of the French Penal Code).

Bribery of foreign public officials

Passive corruption

It is a criminal offence for a person holding public authority, charged with a public service

mission, or invested with a public elected office in a foreign State, or within a public international organisation, to unlawfully solicit, or accept, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind for himself, herself, or another to carry out, or have carried out, to abstain from, or to have abstained from, an act of his or her office, mission, or mandate, or facilitated by his or her office, mission, or mandate (see Article 435-1 of the French Penal Code).

Similar provisions apply to broadly defined members of the judiciary of a foreign State or members of an international court or an arbitration court (see Article 435-7 of the French Penal Code).

Active corruption

It is a criminal offence for a person to unlawfully proffer, at any time, directly or indirectly, to a person holding public authority, charged with a public service mission, or invested with a public elected office in a foreign State, or within a public international organisation, offers, promises, donations, gifts, or benefits of any kind to carry out, or abstain from carrying out, or because he or she carried out, or abstained from carrying out, an act of his or her office, mission, or mandate, or facilitated by his or her office, mission, or mandate.

It is also a criminal offence to yield to a person described above who unlawfully solicits, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind for himself, herself, or another, to carry out, or for having carried out, for abstaining from, or for having abstained from, an act described above (see Article 435-3 of the French Penal Code).

Trading in influence

Trading in influence laws used to apply to transactions in France only. For transactions taking place in the international arena, they were only applicable within public international organisations or international courts and not foreign States (see Articles 435-2 and 435-4 of the French Penal Code). Since Sapin II, trading in influence relating to foreign public officials is also a criminal offence.

Passive trading in influence (domestic)

It is a criminal offence for a person holding public authority, charged with a public service mission, or invested with a public elected office to unlawfully solicit, or accept, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind for himself, herself, or another to abuse, or to have abused, his or her real or supposed influence, with a view to obtaining from an authority, or public administrative body, distinctions, employment, contracts, or any other favourable decision (see Article 432-11(2) of the French Penal Code).

Active trading in influence (domestic)

- Trading in influence involving an official

  It is a criminal offence for a person to unlawfully proffer, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind to a person holding public authority, charged with a public service mission, or invested with a public elected office for himself, herself, or another to abuse, or have abused, his or her real or supposed influence, with a view to obtaining from an authority, or public service administration, distinctions, employment, contracts, or any other favourable decision.

  It is also a criminal offence to yield to a person holding public authority, charged with a public service mission, or invested with a public elected office who unlawfully solicits, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind for himself, herself or another to abuse, or to have abused, his or her real or supposed influence (see Article 433-1(2) of the French Penal Code).

- Trading in influence where no official is directly involved
  It is a criminal offence for a person to solicit or accept, at any time, directly or indirectly, offers, promises, donations, gifts, or benefits of any kind for himself, herself, or another to abuse, or to have abused, his or her real or supposed influence, with a view to obtaining from an authority, or public service administration, distinctions, employment, contracts, or any other favourable decision.
  It is also a criminal offence to yield to solicitations described above, or to proffering, without the right, at any time, directly or indirectly, offers, promises, donations, presents, or advantages of any kind to a person, for himself, herself, or another to abuse, or to have abused, his or her real or supposed influence, with a view to obtaining from an authority, or public service administration, distinctions, employment, contracts, or any other favourable decision (see Article 433-2 of the French Penal Code).

Commercial bribery

To qualify as commercial bribery, the target of the bribe must be a person acting within the scope of his or her personal or professional activity, management position, or any occupation for any person, whether natural or legal, or any other body.

Passive corruption

It is a criminal offence for a person not holding public authority, nor charged with a public service mission, nor invested with a public elected office, as part of his or her personal or professional activity, management position, or any occupation for a natural or legal person or any other body, to unlawfully solicit or accept, at any time, directly or indirectly, offers, promises, gifts, donations, or benefits of any kind for himself, herself, or another, with a view to carrying out, or for having carried out, for abstaining from, or for having abstained from, any part of his or her function or mandate, or facilitated by his or her function or mandate, in violation of his or her legal, contractual, or professional obligations (see Article 445-2 of the French Penal Code).

Active corruption

It is a criminal offence for a person to unlawfully proffer, at any time, directly or indirectly, to a person not holding public authority, nor charged with a public service mission, nor invested with a public elected office, as part of his or her personal or professional activity, management position, or any occupation for a natural or legal person or any other body, offers, promises, gifts, donations, or benefits of any kind for himself, herself, or another, with a view to carrying out or for having carried out, for abstaining from, or for having abstained from, any part of his or her occupation or position, or facilitated by his or her occupation or position, in violation of his or her legal, contractual, or professional obligations (see Article 445-1 of the French Penal Code).

It is also a criminal offence to yield to a person described above who unlawfully solicits at any time, directly or indirectly, offers, promises, donations, gifts, or advantages of any kind for himself, herself, or another to carry out, or to have carried out, to abstain from carrying out, or for having abstained to carry out, an act specified above, in violation of his or her legal, contractual or professional obligations.

Penalties

Individuals violating domestic bribery laws and regulations are liable for up to 10 years' imprisonment and a maximum fine of €1,000,000 or a fine of twice the amount of the proceeds.

Sanctions imposed on individuals violating foreign bribery laws and regulations are the same as those imposed for violating domestic bribery laws, apart from the trafficking of

influence offence in the international arena, which is only punishable by imprisonment for up to five years and a fine of €500,000 or a fine of twice the amount of the proceeds.

A foreigner found guilty of one of these offences is also subject to these penalties. In addition, he or she may be banished from French territory for a period of up to 10 years, or permanently.

Concerning commercial bribery, those offering or accepting bribes may be sanctioned by a term of five years' imprisonment and a fine of €500,000 or a fine of twice the amount of the proceeds for the acceptance of bribes.

Criminal liability for companies is a general principle under French criminal law. Companies which violate bribery laws and regulations are liable for a fine of up to €5,000,000 or a fine of up to 10 times the amount of the proceeds of the offence.

Additional penalties

There are additional possible sanctions.

These include the forfeiture of civil and family rights, the prohibition on holding public office for a maximum of five years or undertaking the professional or social activity in the course of which the offence was committed, the public dissemination of the decision, or confiscation of the sums or objects unlawfully solicited or the sum representing the benefit of the corruption (see Article 445-3 of the French Penal Code). Where these sums have not been seized or where they are indeterminable, confiscation may be ordered for the value of said sums.

In addition, other additional penalties may be imposed such as prohibition on undertaking certain professional activities, and ineligibility or disqualification from public tenders under other French statutes.

Similar legislation that could affect a foreign company doing business in France

Legislation similar to that described in the preceding sections includes provisions against conflict of interest, favouritism, money laundering, and political party funding.

Conflict of interest

Engaging in behaviour which gives rise to a conflict of interest, such as the taking, receiving, or keeping of any direct or indirect interest in a business or business operation, by a person holding public authority, charged with a public service mission, or invested with a public elected office, who has the duty of ensuring, in whole or in part, the business operation, supervision, management, liquidation, or payment, is punishable by five years' imprisonment and a fine of €500,000 or a fine of twice the amount of the proceeds (see Article 432-12 of the French Penal Code).

Favouritism

Any person holding public authority, or discharging a public service mission, or holding a public electoral mandate, or acting as a representative, administrator, or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission, and local mixed economy companies, or any person acting on behalf of any of the above-mentioned bodies, who obtains, or attempts to obtain for others, an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services, shall be punished by two years' imprisonment and a fine of €200,000 or a fine of twice the amount of the proceeds (see Article 432-14 of the French Penal Code).

Money laundering

As corruption is a predicate to money laundering, it should be mentioned that laundering the proceeds of corruption is forbidden by Article 324-1 of the French Penal Code. Money laundering is broadly defined as any means of facilitating the false justification of the origin of property or income of a person responsible for perpetrating a felony or misdemeanour that brought him or her direct or indirect benefit. It also comprises assistance in investing, concealing, or converting the direct or indirect products of a felony or misdemeanour. Money laundering is punished by five years' imprisonment and a fine of €375,000.

Political party funding

French political party funding is among the most heavily regulated in the world, with supply (i.e., caps on the amounts of possible donations in both cash and kind), demand (i.e., limitations on party spending and how much a party can raise), and transparency (i.e., links between parties and donors are public information) all falling under legal scrutiny. The intention of the legislature in creating these laws was to sever all ties between the economic and political world. Political parties are publicly funded.

Since Law No. 90-55 of 15th January 1990 was enacted, businesses cannot fund political parties. Individuals can fund political parties up to €7,500, and criminal sanctions apply for breaches.

Businesses cannot contribute to election campaigns through direct (monetary donations) or indirect means (rendering services, granting favours, or advantages by providing services and products below market rates). Individuals can fund election campaigns in an amount up to €4,600.

OECD criticisms of French enforcement

Between 1999 and 2014, there have been 361 individuals and 126 entities sanctioned under criminal proceedings for foreign bribery in 17 State Parties to the OECD convention. Sadly, France shows poor results in that respect. From 2000 (when the OECD convention was implemented in France) to 2014, France sanctioned only seven individuals, and no legal person at all.

These results are indicative of a complex problem in France: the French Penal Code contains all the offences necessary to sanction individuals and legal persons, as it provides for every behaviour relating to bribery and corruption. The real problem is enforcement, which shows significant deficiencies (see below). And although the OECD has been criticising France for years now for this lack of enforcement, France has been unable to remedy the situation. The end result is highly problematic. French companies used to weak enforcement in the economic crime arena have been lagging behind when it comes to compliance and have become easy prey for the DOJ (Total, Alstom, Alcatel, Technip) and possibly now for the SFO (Alstom, Airbus).

Overview of enforcement activity and policy during the last year

OECD criticisms of French enforcement

France shows poor results in sanctioning individuals or companies for international bribery. From 2000 (when the OECD convention was implemented in France) to 2014, France sanctioned only seven individuals, and no legal person at all. The sanctions are lenient.

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Total and the "Oil for Food" programme

The Oil-for-Food programme was created in 1996 by the United Nations Security Council to ease the hardship caused by the sanctions imposed against Iraq in 1990. The programme allowed Iraq to sell its oil on the condition it followed specific terms and conditions, and that the proceeds would be deposited to an escrow account used to purchase food, drugs and staples, under the oversight of the United Nations. The programme was suspended following the 2003 invasion of Iraq by the United States and its allies.

Saddam Hussein asked foreign companies involved in the programme to pay a 10% surcharge, which in reality went to the regime's coffers. A UN inquiry alleged in 2005 that the 2,200 companies involved in the programme had paid a total of $1.8 billion in bribes to be granted supply deals.

After charges had been dismissed in the lower court, French oil giant Total was sentenced by the Court of Appeal, on 26th February 2016, to pay €750,000 for corruption linked to the UN "oil-for-food" programme. Total is appealing this decision with the *Cour de cassation*, the French Supreme Court. This is the only significant conviction of a legal person on the basis of the international bribery provisions in France and as explained, it is not final. Noteworthy is the leniency of the fine.

Alcatel

Alcatel entered into a DPA in the US in 2010 for transactions in Costa Rica. A trial took place in France in 2017 and Alcatel was found not guilty.

Sapin II

The Act No 2016-1691 of 9th December 2016 on transparency, the fight against corruption and the modernisation of the economy, referred to as "Sapin II", could be a game-changer with respect to the enforcement environment in France. Until Sapin II, there was no independent Anti-Corruption Agency in France, but simply a "service" of the Ministry of Justice called the Central Service for the Prevention of Corruption (*Service Central de la Prévention de la Corruption*, "SCPC"). Sapin II creates a National Anti-Corruption Agency (*Agence française anticorruption*) in charge of investigating and sanctioning non-compliance with new binding provisions on companies' compliance systems. Moreover, it introduces a new form of DPA (*convention judiciaire d'intérêt public*) for legal persons suspected of bribery, trading in influence and/or tax fraud laundering.

The new DPA procedure has already been tried with UBS in relation to alleged tax fraud laundering, but the negotiations appear to have failed as the Financial Prosecution Office allegedly refused any fine lower than €1.1 billion (the amount of bail posted by the bank).

It is worth noting that, in 2016/2017, the National Financial Prosecutor ("PNF") opened investigations against Airbus, the naval supplier DCNS for the sale of submarines to Brazil, individuals connected to the election of Rio and Tokyo for the Olympic Games.

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

Facilitation or 'grease' payments are not allowed. These fall within the scope of the bribery provisions.

Concerning hospitality and gifts, there are no specific provisions restricting the giving of gifts, travel expenses, meals or entertainment to foreign officials; however, the general provisions concerning such advantages fall within the scope of bribery. The weakness of enforcement in France makes it difficult for companies to really grasp what is acceptable when it comes to gifts and business courtesies. There are few guidelines in case law and neither public administrations (with a few exceptions such as the Ministry of Defence) nor enforcement authorities provide guidance to companies on these issues. Thus, companies often rely on foreign examples to draft their policies. Such policies become accepted rules in the business community in the hope that enforcement authorities will consider them relevant. This situation may evolve following Sapin II. It is expected that the newly created National Anti-Corruption Agency will issue more precise guidelines on this issue.

With regard to case law, the courts construe all gifts, presents or advantages of any kind as acts of bribery depending on the actual intention that lies beneath their proffering, rather than on their actual value.

What matters to the courts is whether the advantage has been offered as consideration (*quid pro quo*) for obtaining an advantage.

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

Despite solid legislation covering almost all bribery and corruption behaviours, France has often been criticised in the OECD reports for its lack of conviction.

Commentators argue that one reason is France's lack of mechanisms that enable prosecutors to enter into settlement agreements with alleged criminal offenders to resolve a case without going through a traditional criminal trial. In dealing with crimes, particularly white-collar crimes, in this way, French courts are overburdened and cannot render any timely judgments in such matters. However, the French Criminal Procedure Code does provide for a criminal plea procedure, which could be called Appearance upon Prior Admission of Guilt (*Comparution sur Reconnaissance Préalable de Culpabilité*, or CRPC), which could theoretically be applicable to corporate liability for foreign bribery offences. Yet, it is in fact very rarely used for white-collar crimes.

The principal reason for this is that there is currently no incentive for corporations to plead guilty pursuant to this procedure, given that the punishment imposed under this form of plea bargaining would entail all the collateral consequences of a criminal conviction, such as potential debarment from public tenders (on this issue, see below) and there is no guarantee that the fine would be lighter than the one that would be given by a Court.

Given all this, there are few incentives for a company to self-report or even to cooperate with the prosecution. This may change with Sapin II and the introduction of French-style DPAs (see below).

Also noteworthy is that a specific Prosecutor, the National Financial Prosecutor ("PNF"), is now in charge of significant corruption cases (either domestic or international). It allows for a specialised office to be in charge of these cases and indeed, it has been fairly active in opening probes lately.

Overview of cross-border issues

International conventions

In order to facilitate French penal law enforcement in a cross-border context, France is signatory to several international and European anti-corruption conventions.

European Union

- The Convention on the Fight against Corruption Involving Officials of the European Union or Officials of Member States of the European Union, Brussels, 26th May 1997 (Convention on European Officials).
- The EU Convention on the Protection of the European Communities' Financial Interests and its First and Second Protocols.
- The EU Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of the EU Member States.

Council of Europe

- The Criminal Law Convention on Corruption, signed by France on 9th January 1999 (accompanied by an agreement establishing the Group of States against Corruption (GRECO)) and ratified on 25th April 2008.
- The Civil Law Convention on Corruption signed by France on 26th November 1999 and ratified on 25th April 2008. No reservations were taken by France.

International

- The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Paris, 17th December 1997, ratified by France on 31st July 2000 (OECD Anti-Bribery Convention).
- The United Nations Convention against Corruption, New York, 31st October 2003, ratified by France on 11th July 2005.

Extraterritorial reach of French law

When French criminal law is deemed applicable, French courts have jurisdiction. And French criminal law is considered applicable on grounds of territoriality and nationality.

Territoriality

French criminal law applies to all offences committed within the territory of the French Republic.

Such an offence is deemed to have been committed within the territory of the French Republic when either the entire act, or one of its constituent elements, is committed within French territory (see Article 113-2 of the French Penal Code). This gives prosecutors some leeway to prosecute offences with some connection to France.

Nationality

A French national who commits a misdemeanour ("*delit*") (this includes corruption offences), outside the territory of the French Republic is subject to French criminal law if the conduct is punishable in the country where it was committed (see Article 113-6 of the French Penal Code).

French criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place (see Article 113-7 of the French Penal Code).

Moreover, Sapin II extends the reach of French law in cases of alleged bribery or trading in influence by removing the abovementioned extraterritorial requirements that the victim be a French citizen, or that the alleged offender be a French citizen and the conduct at issue be an offence in both France and the territory in which the conduct allegedly took place.

As such, and in addition to the key competence criteria on territoriality, the French authorities will be able to prosecute: (i) French citizens who commit acts of bribery or trading in influence abroad, irrespective of whether a complaint is filed by the alleged victims or an

official denunciation is made by the State where the offence took place; and (ii) foreign citizens who usually reside in France for acts of bribery and trading in influence committed abroad, including foreign directors of companies subject to French law.

Blocking statute

International cooperation can be hampered by the French blocking statute, also known as *loi de blocage*. It forbids the disclosure, by any means, of any economic, commercial, industrial, financial or technical document and information to foreign authorities, for the purpose of proceedings abroad unless such information is transferred through mutual legal assistance.

This statute places individuals and companies involved in such proceedings abroad in a delicate situation: on one side, they are required from foreign prosecution services to cooperate, but on the other side the blocking statute can impede them in doing so, or cause penal sanctions in case of violation.

Ne bis in idem

No accused person has successfully and definitely been acquitted in France on a *Ne bis in idem* argument because of a conviction or a plea or a settlement agreement with foreign prosecution authorities or a not guilty verdict abroad. Still, the Paris Court of Appeal recently said that article 14(7) of the International Covenant on Civil and Political rights should be taken into account (although the Court dismissed its application in the instance at stake relating to the oil for food/Total case mentioned above). Article 14(7) says:

> "*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*"

This case is now with the French Supreme Court and it will be interesting to know what it has to say on this issue.

Corporate liability for bribery and corruption offences

Criminal liability for companies is a general principle under French criminal law. Companies which violate bribery laws are liable to a fine of up to €5,000,000 or a fine of up to 10 times the amount of the proceeds.

Additional penalties may be imposed, such as being prohibited from undertaking, either directly or indirectly, the professional or social activity in which, or on the occasion of which, the offence was committed, being placed under judicial supervision, closing the establishment or one of the establishments of the company used to commit the offence, being disqualified from public tenders, being forbidden from drawing cheques (except those allowing the withdrawal of funds by the drawer for the drawee) or certified cheques, or being prohibited from using payment cards. The sums or objects unlawfully solicited or given or the sum representing the benefit of the corruption may be confiscated. The judgment may also be published.

Noteworthy is the automatic and invariable sanction that disqualifies from public tenders any legal persons convicted of corruption. Such an automatic sanction is provided by the Public Procurement Directive (2014/24/EU). Still, the automatic nature of these sanctions that cannot be moderated by a judge means that they may be deemed contrary to Article 8 of the Declaration of Human and Civic Rights 26th August 1789, and thus unconstitutional. Still the *Cour de Cassation* held, in a decision dated 6th April 2011, that this provision was constitutional, but other courts, including the *Conseil Constitutionnel* (France's Constitutional Court) may decide otherwise in the future.

Proposed reforms / The year ahead

There will not be any reforms for a while as Sapin II is still to be implemented. The Anti-Corruption Agency has now to publish compliance guidelines and will have to start its controls over companies under the obligation to put in place compliance programmes. At the same time, the National Financial Prosecutor will have to improve its records concerning the enforcement of bribery laws and will have to use the new tools Sapin II has put in place (DPAs notably). One will have to check decisions rendered by French Courts on the basis of the *Ne bis in idem* principle (double jeopardy). Similarly, one will have to watch sanctions awarded by French courts in case of conviction for bribery. So far, French courts have been extremely lenient and although one could think that it has been a good thing for French companies, to the contrary, it has allowed foreign enforcement authorities (and mostly the DOJ) to probe French companies which were not taking sufficient notice of the new anticorruption environment and of the bribery laws and that have not put in place efficient policies and compliance programmes because of the weakness of the French enforcement authorities and of the judiciary in that respect.

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Stéphane Bonifassi handles international litigation involving complex financial crimes. He was called "a fantastic lawyer" and was noted by *Who's Who Legal Business Crime Defence 2017* for his exceptional work handling both domestic and international corporate crime litigation.

Bonifassi was ranked by *Chambers Europe 2017* for his work in the area of White-Collar Crime. He also received Plume D'Or awards from Les Plumes De L'Economie & Du Droit in 2015 and 2016 for articles he penned in *Le Monde* on international corruption and the benefits of Deferred Prosecution Agreements to France's legal system, respectively. He served as president of the Criminal Law Commission of the International Association of Lawyers (UIA) and past co-chair of the Business Crime Committee of the International Bar Association.

Bonifassi began Bonifassi Avocats in 2016 as a boutique law firm serving local and international clients who seek help with complex business crimes and fraud, as well as regulatory and international litigation.

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Brief overview of the law and enforcement regime

In Germany, corruption and bribery are traditionally combatted primarily through criminal law. The corresponding legal provisions of the German Criminal Code (*Strafgesetzbuch*, "StGB") are subdivided into four different areas: the public sector; commercial practice; the healthcare sector; and the political sphere. In each area, the law prohibits both active and passive bribery.

As opposed to other countries, Germany has no specialised anti-corruption agency, such as the Serious Fraud Office in the United Kingdom. Therefore the general law enforcement authorities (i.e., the public prosecutor's office and the police departments) are also responsible for the enforcement of the laws concerning corruption and bribery. However, most federal states have centralised the prosecutor's offices that specialise in anti-corruption investigations. Additionally, there are often special task forces at the police level.

Recently the German Bundestag adopted one of the most expansive reforms to German criminal anti-corruption legislation. The Act on Combatting Corruption (*Gesetz zur Bekämpfung der Korruption*) came into force on 26 November 2015. It extended the criminal offence of taking bribes in commercial practice (section 299 StGB) and expanded the criminal offences of bribing public officials (section 331 *et seqq*. StGB) and their extraterritorial applicability. In addition, on 4 June 2016 the "Act on Combatting Bribery in the Healthcare-Sector" (*Gesetz zur Bekämpfung von Korruption im Gesundheitswesen*) implemented new criminal offences regarding active and passive bribery of academic healthcare professionals (including physicians, dentists, veterinarians, pharmacists and psychotherapists).

These amendments will affect companies and challenge their compliance and legal departments.

Bribery in the public sector

In Germany, bribery of public officials is a criminal offence and prohibited by sections 331 to 334 StGB.

The term public official is defined in section 11 (1) no. 2 StGB. It encompasses civil servants and judges as well as anybody else who otherwise carries out public official functions or has otherwise been appointed to serve with a public authority or other agency or has been commissioned to perform public administrative services. The organisational form chosen to fulfil such duties does not matter. Therefore employees of state-owned or state-controlled companies may be included if those companies operate as an extension of the state.

The "Act on Combatting Bribery" broadened the scope of Germany's laws concerning bribery in the public sector significantly. In addition to domestic public officials, the current law concerns European officials as well as certain foreign and international public officials (section 335a StGB). The term "European public official" includes not only members of the European Institution such as the European Commission and the European Central Bank and all public officers but also persons only assigned by the EU. Of even greater practical importance is the new provision attached to section 335a StGB. This new provision adjusts criminal liability to domestic officials in all other countries (including EU and non-EU) and is interpreted in a very broad sense. Besides that, section 5 no. 15 stipulates almost universal jurisdiction. Due to that regulation, it is *inter alia* sufficient for the application of section 331 to 337 that the perpetrator is a German citizen at the time of the offence.

In its basic form, bribery in the public sector is punishable with a custodial sentence of up to five years or a fine. Therefore it is sufficient that a public official or a person entrusted with special public service functions without approval by his superior demands, allows himself to be promised or accepts a benefit for himself or for a third person for the performance of an official duty (section 331 StGB). The same applies to the person who offers, promises or grants the benefit (section 333 StGB).

The qualified offences of granting and accepting bribes (section 334 and 332 StGB) require a more specific – expressed or implied – agreement of wrongdoing (*Unrechtsvereinbarung*). Therefore the benefit granted or accepted must be meant as a consideration for the fact that an official act has been or will be performed whereby official duties have been or will be violated. In those cases, the punishment for the public official (section 332 StGB) as well as the "donor" (section 334 StGB) is imprisonment for three months to five years. In especially serious cases as defined in section 335, penalties range from one year to a maximum of 10 years of imprisonment.

Furthermore, misdemeanours under Section 332 (1) StGB and section 334 StGB both in conjunction with section 335a StGB are predicate offences for money laundering.

Bribery in the commercial sphere

Unlike the laws prohibiting bribery in the public sector, the provisions regarding bribery in the commercial sphere only concern benefits for future actions. As a result, retroactive awards for past performances are usually allowed. However, such benefits are illegal if they are also meant as an incentive for future actions; the same goes for retroactive awards which have been agreed prior to the respective performance.

According to section 299 StGB, an employee or agent of a business who demands, allows himself to be promised or accepts a benefit for himself or for a third person in a business transaction as consideration for according an unfair preference to another in the national, as well as international, competitive purchase of goods or commercial services, shall be liable to imprisonment not exceeding three years or a fine (section 299 sub. 1 No. 1). The same applies to the person who offers, promises or grants such benefit to an employee or agent of a business (section 299 sub. 2 No. 1). The preference is considered unfair if it is not based on any reasonable decision-making but only exists because of the benefit itself.

In especially serious cases, section 300 stipulates that the offender shall be liable to imprisonment from three month to five years. An especially serious case typically occurs if the offence relates to a major benefit or the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

With the "Act of Combatting Corruption", section 299 has received an additional sub-clause which protects the employer's interests in the loyal and unbiased performance of duties by its employees and agents. Nowadays it is not just a crime if the benefit shall lead to an unfair competitive advantage. Furthermore, the same goes if the benefit is meant as a consideration to the employee or agent for violating his duties regarding the business by an act or omission in the purchase of goods or commercial services (section 299 sub. 1 no. 2 and sub. 2 no. 2). Therefore, it is sufficient if the breach of duty is connected to the purchase of goods or commercial services. A distortion of the competitive process is not necessary. The relevant duty to the company can arise, in particular, as a result either of law or contract. In consequence, an employee who accepts a benefit from a supplier in consideration for ignoring the internal rule to invite an offer from a competitor for comparison is liable even if the suppliers offer was in fact the best offer available on the market.

In addition to the adoption of this so-called "employer model" (*Geschäftsherrenmodell*) the "Act of Combatting Bribery" from 2015 has expanded criminal liability for money laundering (section 261 StGB). As a consequence, active as well as passive bribery in the commercial sphere is also a predicate offence for money laundering when committed on a commercial basis or as a member of a criminal association. German investigating authorities and courts frequently assume this requirement is met in cases involving companies.

Bribery in the healthcare sector

On 29 March 2012, the Grand Criminal Panel of the German Federal Court had ruled that physicians who work in a private practice are neither "public officials" nor "agents" of the statutory health insurance (BGH, Beschl. v. 29. 3. 2012 − GSSt 2/11). Therefore the granting and receiving of benefits in order to influence their conduct as doctors could neither be considered as bribery in the public sector in terms of section 331–334 nor bribery in the commercial sphere in the meaning of Section 299.

In response the German Parliament adopted the "Act of Combatting Corruption in the Healthcare-Sector". As a result every academic healthcare professional who, in connection with the exercise of his profession, requests, receives or accepts the promise of a benefit for himself or a third person in consideration for preferring somebody surreptitiously with respect to the procurement, prescription or dispensing of drugs and medical products or the referral of patients, is liable to imprisonment of up to three years (section 299a StGB). The same applies to the person who offers, promises or grants the benefit (section 299b).

Similarly to the commercial sphere, section 300 aggravates criminal liability for especially serious cases of bribery in the healthcare sector.

Bribery in the political sphere

Bribery in the political sphere is regulated by section 108e. The German legislator renovated this section in 2014 to implement the provisions of the Criminal Law Convention on Corruption by the Council of Europe and the United Nations Convention against Corruption. Nowadays, members of certain national, European or international parliaments as well as members of a foreign legislative body who demand, allow themselves to be promised or accept an unfair benefit for themselves or a third person in consideration for the execution of an act or omission by order while exercising their mandate shall be liable to imprisonment for up to five years or a fine (section 108e (1)). The same applies to the donor (section 108e (2)).

Compared to the previous legal situation, the existing law covers not only the buying and selling of votes, which in practice was difficult to prove by investigation authorities, but

also influencing actions, e.g. in faction meetings or working committees as well as non-material benefits. Therefore it is expected that section 108e will have a deep impact on all lobbying activities.

Overview of enforcement activity and policy during the last year

Since the corruption scandals at Siemens, MAN and Ferrostaal, Germany's enforcement of anti-bribery and corruption law has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in domestic as well as in foreign anti-bribery and corruption cases. In addition, it seems noteworthy that in reaction to the enactment of sections 299a and 299b StGB, several public prosecutors have already announced that they will take a deeper look into these issues.

Examples of enforcement cases of a higher profile in 2016 were the investigations against employees of the German engine manufacturer MTU, for bribery concerning business in South Korea and investigations against employees of the logistics company Schenker, for bribery concerning business in Russia. Besides that, the Bremen public prosecutor is carrying out investigations into an alleged corruption case against former managers of Atlas Elektronik (a joint venture between ThyssenKrupp Marine and Airbus) and the Cottbus Regional Court sentenced a former department head at Berlin-Brandenburg Airport to three-and-a-half years in prison for accepting bribes from a contractor.

The most significant case currently under investigation is probably the corruption proceedings of Munich's public prosecutor against 16 employees of Airbus.

The law and policy relating to any specific or topical issues, such as facilitation payments and hospitality

Since there are no specific laws in Germany regarding gifts or the provision of hospitality, determining where hospitality ends and where corruption starts is particularly challenging. The German laws concerning bribery and corruption cover in principle any kind of advantage to which the recipient is not legally entitled. Therefore the term "benefit" which is generally used can be defined as any material or immaterial advantage that improves the position of its target in terms of his financial, legal or personal situation. This can include gifts, meals or entertainment of low value or small travel expenses. An exception is only made in cases where the advantage is 'acceptable' because it is 'socially adequate'. To distinguish socially adequate from corrupt behaviour, the Federal Authorities have turned away from fixed amounts of money to examining the individual circumstances on a case-by-case basis. Decisive parameters may be the nature and worth of the promised benefits, the status of the person invited, the relationship between the parties, the apparent objective of the provided benefits, and whether the transactions are handled transparently or secretly and their consistency. The view on gifts and hospitality is usually stricter in the public sector than in the commercial sphere.

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

In regard to the German legal system concerning bribery and corruption, the most important aspect of the German Code of Criminal Procedure ("StPO") is probably the so-called principle of legality, expressed in section 152 (2) StPO. It obliges the investigating authorities in general to take action against any person reasonably suspected of criminal activities. Unlike the situation in many other countries, German prosecutors have no discretion as to whether to initiate investigations.

However, the German Code of Criminal Procedure provides different types of pre-trial settlements in addition to plea bargaining possibilities at trial.

Pre-court settlement

Not every case where there is sufficient evidence against the accused person needs to go to court.

In accordance with section 153 (1) StPO, in cases of a misdemeanour the public prosecution office may dispense with prosecution with the approval of the court competent to open the main proceedings if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution. If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may do the same (section 153 StPO).

According to section 153a (1), the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. If the public charges have already been preferred and the public prosecutor and the indicted person agree to settle, the court may do the same.

Plea bargains

The possibility of plea bargaining is regulated in section 257c StPO. In suitable cases, the court may reach an agreement with the participants on the further course and outcome of the proceedings. The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilty, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.

Whistleblowing

Since the European Court of Human Rights convicted Germany in 2011 for unduly restricting a whistleblower's freedom of expression, several legislative proposals have been presented. Nevertheless the German legal system still does not provide proper and comprehensive protection. While the current labour law requires employees to take their suspicion of wrongdoing to their superiors before going to the authorities, not even big companies are forced to establish a whistleblower hotline or to appoint an ombudsman. Furthermore, a whistleblower may be faced with retributive measures or termination of his employment contract, if his suspicion turns out to be false.

Self-reporting

Even though the law does not provide for such, affected companies usually report potential violations of anti-corruption laws. This derives solely from a company's own interest in leniency. In general, judges make use of their discretion to reduce criminal sentences, depending on the company's cooperation.

Overview of cross-border issues

Germany is a signatory to the Convention on the Protection of the European Community's Financial Interests (signed 27 September 1996; ratified 10 September 1998), the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business

(signed 17 December 1997; ratified 10 September 1998), the Council of Europe's Civil (signed 4 November 1999), the Criminal Law Convention on Corruption (signed 27 January 1999), the Council of Europe's Criminal Law Convention on Corruption (signed 27 January 1999), amended by the Additional Protocol to the Criminal Law Convention on Corruption (signed 15 May 2003) and the United Nations Convention against Corruption (signed 9 December 2003; ratified 12 November 2014).

Therefore, Germany's public prosecutors offices regularly cooperate with foreign investigation authorities. The basis of such cooperation is primarily a bilaterally international treaty between Germany and the relevant foreign country. In its absence, the cooperation is regulated by the provisions of the Act on International Cooperation in Criminal Matters.

Can a body corporate can be found liable for bribery and corruption offences?

Even though there seems to be a strong political desire to strengthen the liability of companies for criminal offences, under current German law only individuals are subject to criminal liability.

However, section 30 of German Administrative Offence Act (*Gesetz über Ordnungswidrigkeiten*, "OWiG") allows legal entities to be punished for bribery offences of their representatives or any other executive employee with fines up to €10m. If the profit generated by the offence is higher, the fine may be as high as that profit. Thus, fines have, in some cases, exceeded €100m. The same goes if the management of the company has intentionally or negligently not adequately fulfilled supervisory measures which are necessary to prevent bribery by employees or agents of that company.

Alternatively to such a fine, sections 73 and 73b StGB allow the confiscation of the economic advantage the company gained through the respective bribe.

Additionally, section 123 obliges public clients to ban companies from procurement procedures if one of their executive employees has been sentenced for bribery.

Proposed reforms / The year ahead

After the Act on Combatting Corruption and the Act on Combatting Corruption entered into force in 2015 and 2016, there are no specific legal reforms concerning bribery and corruption in sight. This may change in the following months after Germany ratified the Council of Europe Criminal Law Convention on Corruption (1999) on 10 May 2017 and a new government has been formed.

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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. Apart from performing functions such as regulation and licensing, the government also operates large commercial enterprises in several sectors, including education, defence, aviation, railways (a near monopoly), infrastructure 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, and until recently the enforcement of anti-corruption laws left much to be desired. This has led to the unfortunate notion (particularly outside India) that corruption is an accepted practice in India – however, this notion is misplaced, and 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 – for example, the incumbent Indian government has also taken a hard line stance on corruption issues.

These factors has prompted the introduction of several legislative measures aimed at tackling corruption in India, including the creation an independent ombudsman (the Lokpal) to investigate and prosecute cases of corruption by public officials (including ministers), 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). 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).

Brief information on the law and enforcement regime

(a) Prevention of Corruption Act, 1988

The primary anti-corruption statute in India, the Prevention of Corruption Act, 1988 ('**PCA**'), criminalises receipt of illegal gratification by 'public servants' and payment of such gratification by other persons. 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 recently 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 taking gratification other than legal remuneration in respect of an official act or while exercising official functions; (2) public servants obtaining a valuable thing without (or for inadequate) consideration from a person concerned in proceedings or business transacted by the public servant; and (3) criminal misconduct by a public servant (including habitual corruption or possession of disproportionate assets). The PCA also targets the conduct of 'middlemen' or intermediaries who facilitate bribery, by criminalising the act of a person taking gratification to induce a public servant either by corrupt or illegal means or through personal influence. Bribe-givers are also brought within the ambit of the PCA through the office of 'abetment' of the offences set out at (1) and (2) above. 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).

Under the PCA, if there is an agreement or attempt to give or receive a bribe, this itself is sufficient to constitute an offence (and attract prosecution), and the actual payment of a bribe is not necessary. 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 – however, recent legislative changes have sought to limit the need for such sanction. Trials for offences under the PCA are conducted before special courts set up for this purpose.

(b) 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. A contravention of the Service Rules can lead to initiation of disciplinary proceedings against the concerned official, the consequences of which could include termination of service.

(c) Foreign Contribution Regulation Act, 2010

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 USD 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.

(d) 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 by facilitating publication of official records, which ensures that any lapses are brought into the public eye.

(e) 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.

(f) 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. However, the government has not yet appointed a 'Lokpal' and the provisions of this legislation are yet to be enforced in an effective manner.

(g) Companies Act, 2013

The Companies Act, 2013 ('**2013 Act**') is India's new law governing companies, and places a strong emphasis on corporate governance and prevention of corporate fraud. Under the 2013 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 2013 Act defines the term 'fraud' quite broadly, and this could encompass acts of private or commercial bribery – this is a key change made by the 2013 Act, as there has been somewhat of a legal lacuna as regards private bribery in the past. Fraud is a criminal offence under the 2013 Act and is punishable with imprisonment ranging from six months to ten years and/or a fine. The 2013 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 and imprisonment.

The 2013 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').

(h) 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 projection 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). 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.

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.

(i) 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.

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 was triggered by the discovery of several instances of large-scale corruption by highly-influential ministers and bureaucrats (in particular, scams concerned the allotment of telecom spectrum and organisation of the

Commonwealth Games in Delhi in 2010. This led to a 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, such as the Lokpal and Lokayuktas Act, 2013, to bolster perceived weaknesses in India's anti-corruption laws. Further, the judiciary also undertook a supervisory role in the investigation into the telecom spectrum case and closely scrutinised the progress of the investigative agencies.

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, they 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-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 does not contain any exemption for 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. Moreover, the term 'gratification' is not restricted merely to pecuniary gratification, and 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] 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. Additionally, the PCA does not have an 'adequate procedures' defence – however, the compliance measures undertaken by a company may be helpful in demonstrating its lack of *mens rea* to commit an offence under the PCA (for example, where an employee performs an unauthorised act of bribery).

In view of the foregoing, the compliance regimes of multinational organisations operating in India have to be carefully crafted and catered to the Indian legal framework, and specific legal advice ought to be obtained in this regard.

Key issues relating to investigation and enforcement procedures

(a) 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.

(b) Data privacy concerns

Companies are generally permitted under Indian laws to collect and review electronic data stored on its 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 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.

(c) 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 2013 Act. Further, Indian courts have taken an expansive view of provisions relating to the PCA and recently extended certain provisions under Indian banking laws to PCA offences, such that employees of banks (whether public or private) are now considered public servants. 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.

(d) 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. As an exception, courts have the discretion to refuse to make such a presumption where the gratification or thing received is, in the opinion of the court, so 'trivial' that no inference of corruption may fairly be drawn. In certain cases, PCA provides immunity to individuals accused of abetting gratification, if such individual is willing to make a statement against the said public servant. However, courts have been of the opinion that this immunity is only available to individuals who are unwilling to pay bribes, approach the authorities prior to payment of the bribe, and aid the authorities in entrapping the corrupt public servant.[3]

(e) 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 be 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.

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 two countries and to combat tax evasion by nationals and companies in both countries. India is also a signatory to 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. The first reporting under this protocol was to take place in September 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. that the state of mind of directors and managers who represent the 'directing mind and will' of the company.[4] 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.

As regards liability of senior management or directors for offences committed by a company, the Supreme Court held that there is no vicarious criminal liability unless a statute specifically provides, and that the acts of a company cannot be attributed and imputed to persons (including directors) merely on the basis that such persons represent the 'directing mind and will' of the company.[5] The Court also stated that vicarious liability of the directors for criminal acts of a company cannot be imputed automatically, and an individual can be accused (along with the company) only if there is sufficient evidence of his or her active role coupled with criminal intent. Accordingly, it is arguable under Indian law that an officer or director should not be held criminally liable for the offences committed by the company, merely by virtue of his or her office.

Proposed reforms

Certain amendments to the PCA were proposed in 2013 by way of the Prevention of Corruption (Amendment) Bill, 2013 ('**PCA Bill**'). However, although heavily debated, not much progress has been made on the PCA bill, and it currently remains under the consideration of Parliament.

The PCA Bill seeks to modify the scope of the offences under the PCA as well as penalties for the same – in this regard, it proposes to draw a nexus between the value of property for which the accused is unable to account, and the amount of fine levied on him. The PCA Bill also proposes to: (i) include specific provisions under the PCA criminalising giving or offering a bribe to a public servant; (ii) provide for the confiscation and attachment of property acquired through corruption; and (iii) delete the limited immunity for persons abetting offences under the PCA Bill.

Two other key proposals of the PCA Bill, which would be of particular interest to corporate organisations, are: (i) the introduction of a specific provision relating to bribery of public officials by commercial organisations and liability of officials of such commercial organisations for such acts; and (ii) the introduction of a corresponding defence to prosecution for commercial organisations, if they can demonstrate that an offence was committed without their knowledge, consent or neglect and they had exercised all due diligence to prevent it (i.e., similar to an 'adequate procedures' defence).

* * *

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. *Bhupinder Singh v. CBI*, 2008 CriLJ 4396.
4. *Iridium India Limited v. Motorola Incorporated & Ors.*, AIR 2011 SC 20.
5. *Sunil Bharti Mittal v. Central Bureau of Investigation*, 2015 (4) SCC 60.

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Ireland

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Introduction

There has been no shortage of corruption scandals in Ireland over the past few years, with various types of corruption continuing to dominate the headlines. There have also been several convictions for corruption, one of which has resulted in a judgment from the Court of Appeal regarding the constitutionality of the reverse burden of proof in certain cases of corruption. Allegations of corruption in Ireland's police force, the Garda Síochána, continue to be the subject of public scrutiny. Meanwhile, the Irish Government established a Commission of Investigation to investigate Project Eagle, the sale, by the National Asset Management Agency, of a portfolio of Northern Ireland property-linked debts, following rampant rumours that the sale was tainted by corruption.

On the regulatory side, recent years have also seen the introduction of a number of legislative measures relevant to bribery and corruption. In particular, in 2014, the then Government finally introduced pan-sectoral protection for whistleblowers through the Protected Disclosures Act 2014. This was followed by the Regulation of Lobbying Act 2015 which improves transparency over lobbying activities. Other measures include the publication, in December 2015, of the long-awaited Public Sector Standards Bill 2015 which is intended to introduce a more robust framework for identifying, disclosing and managing conflicts of interest in the public sector, and minimising corruption risks. The Government has also indicated that it intends to follow up the General Scheme of the proposed Criminal Justice (Corruption) Bill, published in 2012, with a bill over the course of the coming months. More generally, in 2016 the Law Reform Commission launched a public consultation on regulatory enforcement and corporate offences which, among other things, sought views on whether existing legislation is sufficiently robust to deal with serious corporate wrongdoing.

Brief overview of the law and enforcement regime

Corruption is both a common law and a statutory offence in Ireland. At common law, it is an offence to bribe a public officer to act otherwise than in accordance with his or her duty. Each of the statutory offences criminalise both the offer or giving of a bribe, known as active bribery, as well as the solicitation or receipt of a bribe, frequently referred to as passive bribery. The main statutory offences are set down in the Prevention of Corruption Acts 1889–2010 (PCA), and in particular, in the Public Bodies Corrupt Practices Act 1889 (PBCPA) and the Prevention of Corruption Act 1906 (PCA 1906). The Criminal Justice (Theft and Fraud Offences) Act 2001 criminalises bribery which damages EU financial interests.

One of the principal differences between the PBCPA and the PCA 1906 is in terms of their personal scope. While the PBCPA focuses on the bribery of certain public officials,

the PCA 1906 is concerned with bribery involving "an agent", which it defines broadly to include anybody employed by or acting for another. Consequently, while all those falling within the scope of the PBCPA will also fall within the scope of the PCA 1906, the converse is not true. In particular, the PBCPA does not apply to the bribery of Members of the Irish Parliament, foreign public officials or private sector bribery.

With the exception of their scope, the PBCPA and the PCA 1906 share a number of similarities. Both take a broad approach to the concept of a bribe and are likely to encompass not only pecuniary benefits but all benefits which have a material value. Each also covers third party bribery as well as bribery through an intermediary.

The PBCPA and the PCA 1906 both apply to benefits paid in respect of a public official/agent doing or failing to do something within the scope of his or her own functions, as well as doing or failing to do something which he or she is able to do because of his or her position. For example, with respect to the PCA 1906, the Court of Appeal in the recent case of *DPP v Forsey* [2016] IECA 233, held that the appropriate test is "whether the benefit would have been given if the person were not the kind of official he was". In that case, Mr. Forsey, a member of Dungarvan Urban District Council, had received three payments from a developer relating to a property development in Waterford, within the functional area of another council. While Mr. Forsey argued that the payments did not relate to his functions which were connected to the Dungarvan region (and not Waterford), the Court of Appeal rejected this argument. According to that Court, as the payments were made for the purpose of Mr. Forsey exploiting his access as an elected official, they were made in relation to his office or position notwithstanding that his actions did not concern his specific statutory functions.

Under both the PBCPA and the PCA 1906, the benefit must be given or received "corruptly". This term is defined in the Prevention of Corruption (Amendment) Act 2010 to "include acting with an improper purpose 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 any other means".

In addition to the bribery offences, the Prevention of Corruption (Amendment) Act 2001 (PC(A)A 2001) also criminalises corruption in office, which occurs where a public official does any act in relation to his or her office or position for the purpose of corruptly obtaining a gift, consideration or advantage for himself, herself or for any other person. In contrast to the bribery offences, the offence of corruption in office deals with a situation where an official acts corruptly for his or her own ends, without any other person's involvement.

A person guilty of an offence under the PBCPA or the PCA 1906 is liable to a fine and imprisonment. The term of imprisonment will vary depending on the nature of the offence, from under 12 months to 10 years. In the case of certain offences, the convicted person may in addition be ordered to pay the amount of any value or any benefit received in connection with the offence. Further, if such person is an officer or servant in the employment of any public body upon such conviction, the Court has discretion to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

Under the European Union (Award of Public Authority Contracts) Regulations 2016 and the European Union (Award of Contracts by Utility Undertakings) Regulations 2016, a conviction for corruption will result in an economic operator being excluded from participation in a procurement procedure.

Ireland does not have a specialised institution for anti-corruption law enforcement. The Garda Síochána has primary responsibility for investigating suspected incidences of

bribery and corruption. Corruption and bribery may be investigated by local divisions or by the Garda National Economic Crime Bureau (formerly the Garda Bureau of Fraud Investigation), which, among other things, is responsible for investigating foreign bribery. Prosecutions are normally taken on the basis of the statutory offences. The Criminal Assets Bureau may also investigate instances of bribery or corruption when exercising its powers to seize the proceeds of crime on a civil basis.

In 2017, Ireland was the subject of two international reports relevant to corruption. The first was published by the Council of Europe's Group of States against Corruption (GRECO), and concerned its Fourth Found Evaluation Report on corruption prevention in respect of members of parliament, judges and prosecutors. Generally, the Report was critical of the progress made by Ireland in implementing the recommendations made in the Fourth Round Evaluation Report, rating Ireland's compliance as "globally unsatisfactory".

The second report was a Mutual Evaluation Report published by the Financial Action Task Force (FATF) regarding Ireland's anti-money laundering and counter-terrorist financing measures. Broadly, that report concluded that while Ireland has a sound and substantially effective regime to tackle money laundering and terrorist financing, it could do more to obtain money laundering and terrorist financing convictions and to demonstrate its effectiveness in confiscating the proceeds of crime.

Other relevant measures

The corruption offences are bolstered by a number of other measures including account offences and measures which are designed to enhance transparency over official actions. Regarding account offences, section 10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 criminalises the intentional falsification of books and records. The Companies Act 2014 also contains offences in relation to the falsification of company books and documents.

Measures designed to enhance transparency over official actions include, in particular, the Freedom of Information Act 2014, the Protected Disclosures Act 2014 and the Regulation of Lobbying Act 2015.

The Freedom of Information Act 2014 replaces the earlier framework governing freedom of information set out in the Freedom of Information Acts 1997 and 2003. Among other things, it gives every person the right to access information held by public bodies and to obtain reasons for decisions affecting that person.

The Protected Disclosures Act 2014 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.

The Regulation of Lobbying Act 2015 introduces 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.

Overview of enforcement activity and policy during the last year

Recent years have seen a number of corruption cases reaching the courts. In March 2016, a clerical officer, Barry Kindregan, was jailed for two years for processing five passports for foreign nationals who were not entitled to them, in return for €12,500. In December 2015, Frank O'Toole, a former Town Clerk of Wicklow, was convicted of furnishing a letter to a Wicklow town-based solicitor and property developer, asserting that development levies of €64,840 had been paid, when this was not the case. Mr. O'Toole was subsequently given

an 18-month suspended sentence and fined €10,000 for the offence. In this respect, it was significant that Mr. O'Toole had not derived any personal benefit from furnishing the letter. Subsequently, in January 2017, the solicitor to whom the letter was furnished, was charged with two offences: corruption in office; and dishonesty with the intention of making a gain for himself or another or of causing loss to Wicklow Town Council through attempts by deception to induce Wicklow Town Council not to pursue financial contributions owed to it in connection to a development.

Claims of corruption in Ireland's police force, the Garda Síochána, have repeatedly been made over the past number of years. In 2016, a Commission of Inquiry led by Mr. Justice Kevin O'Higgins reported on allegations made by a Garda whistleblower, Sergeant Maurice McCabe, regarding malpractice and corruption in the Cavan-Monaghan division of the Gardaí. The Commission highlighted serious flaws in policing in that division but found no evidence to support claims of Garda corruption. In February 2017, the Government established the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2017, to investigate an alleged smear campaign against the above-mentioned Sergeant McCabe, involving senior members of the Gardaí. The Tribunal, which is chaired by Supreme Court Judge, Mr. Justice Peter Charleton, is ongoing.

The Garda Síochána has continued to be the subject of considerable controversy throughout 2017. In March 2017, the Garda admitted that a considerable number of the two million alcohol breath tests it claimed to have carried out on motorists between 2012 and 2016 had never actually happened. A subsequent report confirmed the existence of a significant disparity between the number of tests recorded and those actually carried out.

Concerns about corruption at the heart of a £1.3 billion Northern Irish property deal have continued to dominate the headlines over the last year. The 'Project Eagle' deal at the centre of the scandal saw Ireland's National Asset Management Agency (NAMA) sell a property portfolio to US equity fund Cerberus in 2014. The portfolio, which consisted of £4.3 billion worth of toxic loans, was sold to the equity fund for £1.241 billion. After the sale, it emerged that Frank Cushnahan, a former member of NAMA's Northern Ireland advisory committee, was advising one of the bidders, US firm Pimco, in return for a success fee. In September 2016, the Auditor and Comptroller General (C&AG) published a report in which it stated that the State lost around £190 million (€220 million) as a result of the sale. The Public Accounts Committee (PAC) subsequently examined the sale. In its report, which was published in March 2017, PAC stated that in its opinion, the C&AG's report was evidence-based, balanced and reasonable. It also concluded that the sale of Project Eagle was marked by a seriously deficient sales process and weaknesses in relation to the management of conflicts of interest. Project Eagle is currently the subject of a Commission of Investigation, chaired by retired High Court judge, John Cooke.

In 2016, the Irish courts awarded the first interim order under the Protected Disclosures Act 2014. Under that Act, where an employee satisfies a Court that he or she has substantial grounds for contending that his or her dismissal was wholly or mainly due to the fact that he or she made a protected disclosure, the employee can apply to Court for an interim order pending the determination of a claim in the Workplace Relations Commission (WRC). In *Clarke & Dougan v Lifeline Ambulance Service Ltd*, the two plaintiffs claimed that they had been dismissed by the defendant as a result of having made a protected disclosure to the Revenue Commissioners in January 2016, alleging that the defendant paid their staff expenses in place of taxable pay. The Court ordered the defendant to pay the plaintiffs their salaries until their unfair dismissal claims are heard by the WRC on the basis that the

defendant was unwilling to reinstate the former employees. In November 2016, another successful application for interim relief was granted in *Catherine Kelly v Alienvault Ireland Limited*. On 5 September 2016, the Labour Court made its first award for penalisation of a whistleblower under the 2014 Act, in *Aidan & Henriette McGrath Partnership v Anna Monaghan*. In 2016, relief was refused in Donegal *County Council v Liam Carr* on the basis that there was no protected disclosure. The matter raised came within an exception under the Act.[1] In April 2017, a nursing home employee who was dismissed as a result of having made a protected disclosure was awarded two years' salary by way of compensation in a case heard before the Workplace Relations Commission.

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

Irish corruption law does not distinguish between facilitation payments and other types of bribes. Specifically, it is clear from the terms of the various bribery offences that there is no explicit requirement for a benefit to be of a specified size. This is not to say that the size of the benefit is irrelevant, but rather that it goes to the issue of intent. In other words, where a benefit is of minor value, then it is less likely to have been paid as a corrupt inducement.

Irish corruption law also clearly covers payments made to a public official or agent to do something that that official/agent was already required to do.

The PCA contains two specific provisions which reverse the burden of proof in a corruption case, including where a public official has received a gift in specified circumstances. Under section 2 of the Prevention of Corruption Act 1916, a presumption of corruption arises where any money, gift or other consideration has been paid, given or received by a certain type of public official, by or from a person holding or seeking to obtain a contract from a Government Minister or a public body. In such cases, the relevant consideration is deemed to be a bribe under the PBCPA and/or under the PCA 1906 unless the defendant proves the contrary.

Under section 4 of the PC(A)A 2001, once a gift, consideration or advantage is given to a specified public official in circumstances where the donor had an interest in the relevant official's discharge of certain specified functions, then it is deemed to have been given corruptly unless the contrary is proved. Section 4 applies generally to a variety of functions concerned with the public administration of the State. In the recent case of *DPP v Forsey*, the Court of Appeal held that section 4 reverses the legal burden of proof and upheld both its constitutionality and its compatibility with Article 6 of the European Convention of Human Rights.

The acceptance of hospitality, including gifts and entertainment is governed by the Ethics in Public Office Acts 1995 and 2001 (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 at 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 which might interfere with the honest and impartial exercise of official duties.

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

A number of provisions impose reporting obligations in relation to corruption offences. Most notably, section 19 of the Criminal Justice Act 2011 sets out a general reporting

obligation. In addition, auditors are subject to reporting obligations, including under the Criminal Justice (Theft and Fraud Offences) Act 2001 and under the Criminal Justice Act 2011.

Section 19 of the Criminal Justice Act 2011 imposes a reporting obligation in relation to certain "relevant offences", including bribery under the PCA 1906. Section 19 makes it an offence for a person to fail, without reasonable excuse, to disclose information to the Gardaí 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.

Under section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, the auditor of a company or other entity must report to the 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 appears to be encouraging 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. These reports should help to shed light on the prevalence of whistleblowing in Ireland.

As mentioned, the Garda Síochána has primary responsibility for investigating bribery and corruption offences. However, two reports published by the Garda Inspectorate over recent years highlight a number of deficiencies in the investigative process specifically, and in the Garda Síochána more generally. In October 2014, the Garda Inspectorate published a report entitled *Crime Investigation*, in which it identified serious failings, among other things, in the recording, classification and reclassification of crime incidents by the Gardaí. This was followed by a second report published in November 2015, *Changing Policing in Ireland,* which made a number of recommendations aimed at improving the structure and culture of policing in Ireland. Among other things, that second report criticised the then Garda Bureau of Fraud Investigation in a number of respects and recommended that it be replaced by the establishment of a new Serious and Organised Crime Unit including agile, multidisciplinary investigation teams.

Overview of cross-border issues

Ireland has jurisdiction over a corruption offence under the PBCPA or the PCA 1906, provided "any of the acts alleged to constitute an offence was committed in the State notwithstanding that other acts constituting the offence were committed outside the State". 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, under the PCA 1906, the State may also exercise jurisdiction in certain cases based on the nationality of the accused, including where he or she is: an Irish citizen; an individual who is ordinarily resident in the State; an Irish company; as well as domestic public officials who are listed as Agents in the PCA 1906.

Despite these powers, there is little to suggest that Ireland is regularly engaging with corruption on a cross-border basis. There have been no foreign bribery prosecutions to date. Annex 1 of the OECD's recent *Phase 3 Written Follow Up Report*, published in February 2016, lists four foreign bribery cases with a possible territorial connection with Ireland. According to Annex 1, investigations into three of those cases have not identified

a credible allegation with territorial links to Ireland. Investigations are continuing into allegations regarding a company which is a subsidiary of a foreign company and Mutual Legal Assistance requests have been made in connection with the case.

It is also noteworthy that it is possible for a person in Ireland to be subject to foreign anti-corruption legislation. Specifically, the extensive extra-territorial application of both the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act 1977 means that offences contained in those Acts may have implications for persons operating within this jurisdiction and persons could be subject to concurrent scrutiny by the UK and US authorities.

Corporate liability for bribery and corruption offences

It is generally accepted that corporations can be held criminally liable; however, the precise model for imposing liability has not been conclusively determined by the Irish courts. Broadly speaking, the preferred model appears to be the identification model. In particular, there are a number of civil cases which refer to companies being liable for the actions of a person who is their directing mind and will. However, it is not clear at what level a person must be in a corporation before his or her intention can be attributed to it.

In general, the fact that a corporate entity has its own independent personality means that a director, officer (or employee) of that company is not personally liable for its acts or omissions. However, in some circumstances, directors and officers may be held personally liable at common law for their participation in corporate crime, including by virtue of inchoate liability and/or secondary liability.

In addition, the PC(A)A 2001 as amended, explicitly provides for the direct liability of directors and corporate officers in situations where the corporate entity itself commits bribery. According to the relevant provision, where a corporate entity commits bribery contrary to the PCA, and that entity is itself guilty of bribery, an officer of that company may also be convicted of that same offence if that bribery is "proved to have been committed with the consent or connivance of or to be attributable to any neglect" on the part of that officer.[2] 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 prove that the corporate entity has committed that offence.[3]

Significantly, the general scheme of a proposed Criminal Justice (Corruption) Bill, published in 2012, includes a new offence whereby an incorporate and unincorporated body may be held criminally liable where a person acting on its behalf, including an employee or agent, commits bribery in order to obtain or retain business, or to retain an advantage in the conduct of business. It is a defence for the relevant body to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

As mentioned, the Law Reform Commission is currently considering the issue of corporate criminal liability in the context of its wider review of regulatory enforcement and corporate offences.

Proposed reforms / The year ahead

Three proposed reforms will have major implications for corruption and bribery law, namely:

- the proposed consolidation and reform of the existing bribery and corruption offences set out in the PCA;
- the reform of the Ethics in Public Office Acts; and
- the transposition of the fourth Money Laundering Directive.

As mentioned, in June 2012, the Department of Justice published the General Scheme of the Criminal Justice (Corruption) Bill 2012 (draft Bill). Among other things, that draft Bill will consolidate the bribery offences set out in the PCA. The Bill itself is expected to be published shortly: the current Government has identified it as a priority Bill in its Legislative Programme for autumn 2017.

The draft Bill aims at consolidating the corruption offences set out in the PCA. In addition, it makes "renewed provision for the main requirements of a number of international agreements relating to corruption to which Ireland is a party". In fulfilling these aims, the draft Bill provides for a number of new offences, including, in particular, three bribery offences: an active and passive general bribery offence; and an active foreign bribery offence. It also provides for a new offence of corporate bribery as well as an offence of bribing through an intermediary.

The Public Sector Standards Bill 2015 was published on 23 December 2015. This Bill consolidates the current legislative framework governing the ethical obligations of public officials and gives effect to the recommendations of several Tribunals of Inquiry. The purpose of the Bill is to significantly enhance the existing framework for identifying, disclosing and managing conflicts of interest and minimising corruption risks, while also achieving a shift towards a more dynamic and risk-based system of compliance and ensuring that the institutional framework for oversight, investigation and enforcement is robust and effective. Key reforms proposed in the Bill include:

- the introduction of a new Public Sector Standards Commissioner to oversee a reformed complaints and investigations process;
- the establishment in legislation of a set of integrity principles for all public officials;
- the strengthening of the legal obligation for public officials to disclose, as a matter of routine, actual and potential conflicts of interest, reinforced by a significant extension of the personal and material scope of disclosures for public officials and graduated disclosure requirements;
- the establishment of a more effective (IT-based) process for the submission of periodic statements of interests;
- the imposition of statutory prohibitions on the use of insider information, on the seeking by public officials of benefits to further their private interests, and on local elected representatives from dealing professionally with land in certain circumstances; and
- the establishment of a new statutory board to address potential conflicts of interest as public officials take up roles in the private sector.

The bill is currently in the committee stage of the legislative process. Ireland's poor rating by the Council of Europe's GRECO, in its recent Report, is partially attributable to its failure to adopt this Bill to date.

The existing framework for combatting money laundering is set out in the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013. In its September Legislative Programme, the Government has indicated that it intends to bring forward a bill to transpose the EU's fourth Money-Laundering Directive into Irish law as a matter or priority. Under EU law, the Directive should have been implemented before June 2017. It is listed as a priority bill in the Government's Legislative Programme for autumn 2017.

On 3 October 2017, it was reported that the Minister for Justice and Equality would bring a memo to Cabinet with wide-ranging proposals in the area of white-collar crime. It is reported that the Cabinet will propose immunity from prosecution for whistleblowers who commit to giving their testimony "where this assists in the more effective suppression and

prosecution of criminal activities". It is understood that this would be restricted to the first person to come forward. There will also be efforts to simplify the rules on admissibility of the paper trails often central to white-collar crime trials.

The Taoiseach has also proposed the establishment of a new Garda unit tasked with investigating organised crime and suspicious financial transactions; however, this development may be delayed while An Garda Siochána undergoes reform over the next 18 months.

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Endnotes

1. Section 5(5) of the Act provides that a matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.
2. Prevention of Corruption (Amendment) Act 2001 s.9.
3. *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.

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 one to six years, and it can be increased due to 'aggravating circumstances';

(iii) 'bribery in judicial acts', which occurs when the conduct mentioned under the first two points above is taken for favouring or damaging a party in a civil, criminal or administrative proceeding (article 319-*ter* ICC). Punishment is imprisonment from six to 12 years, and it can be increased due to 'aggravating circumstances';

(iv) the offence of 'unlawful inducement to give or promise anything of value', introduced by Law no. 190/2012, which punishes both the public official and the private briber, where the public official, by abusing his or her quality or powers, induces someone to

unlawfully give or promise to him/her or to a third party, money or anything of value (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, and they can be increased due to 'aggravating circumstances'. It should be noted that, under the previous regime, only the public official was responsible for the mentioned conduct, in relation to the differing offence of 'extortion committed by a public official' (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 relations with a public official, unduly makes someone giving or promising, to him/her or others, money or other patrimonial advantage, as the price for his/her unlawful intermediation towards the public official, or as consideration for the carrying out of an act conflicting with the office's duties, or 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 patrimonial advantage (article 346-*bis* ICC). Punishment is imprisonment from one to three years, 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 2) ICC extends to these situations the application of the mentioned domestic bribery offences, but with the following two significant limitations:

(i) 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); and

(ii) on condition that the act is committed to obtain an undue advantage in international economic transactions or with the purpose of obtaining or maintaining an economic or financial activity (this last part of the prohibited conduct was introduced by Law no. 116/2009, which has implemented the UN Convention against Corruption of 2003).

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 one 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 three years, and it can be increased due to 'aggravating circumstances'; or
(vi) for 'instigation to bribery', punishments provided for 'proper' bribery and for 'bribery for the performance of the function' apply are reduced by one third.

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 was introduced by article 2635 of the Italian Civil Code, whose reach was then extended first by Law no. 190/2012, and recently by Legislative Decree no. 38/2017 (in force as of April 14, 2017), which has implemented the EU Framework Decision 2003/568/JHA on combating corruption in the private sector.

The offence punishes with imprisonment from one up to three years 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, in order to carry out or omit an act in violation of the duties of their office or of loyalty's duties.

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.

A pre-condition for prosecuting the offence is a criminal complaint filed by the corporation/victim, unless the crime generates a distortion of competition in the acquisition of goods or services. No relevant case law has been developed yet on this offence.

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 discretional (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).

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*

Trials and appellate proceedings are currently pending against top politicians and officers of the Lombardy region for allegedly having facilitated the obtainment of public healthcare funds by certain private hospitals in exchange for money or other patrimonial advantages. In the first leg of the proceeding, on November 27, 2014, the Milan Court of first instance sentenced the alleged intermediary of the bribe to five years' imprisonment. Such conviction was confirmed by the Milan Court of Appeal on March 15, 2017. In another leg, 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 to six years' imprisonment. Appellate proceedings are expected to start in the course of 2018.

(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 July 19, 2016, the Milan Court of first instance sentenced a relevant public official to two years and two months' imprisonment. Appellate proceedings are expected to start in the course of 2018.

(iii) *Mose*

In 2014, the Prosecutor's Office of Venice started an investigation against top politicians of the Veneto Region and business men 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 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. In another leg of the proceeding, before the Venice Court of first instance, the trial is currently pending and the judgment is expected prior to the end of 2017. Furthermore, 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 confirmed by the Milan Court of Appeal on June 29, 2017, and appellate proceedings before the Court of Cassation are expected to start in the next months.

(iv) *Mafia Capitale*

In 2014, the Prosecutor's Office of Rome started investigations against top politicians of the Municipality of Rome and business men 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 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 forty-one convictions ranging from one to 20 years' imprisonment. The Court, however, rejected the charges of mafia type conspiracy (which had given the name to the inquiry).

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. In the same period, AgustaWestland Spa and AgustaWestland Ltd. entered into a plea bargain with the Prosecution's Office. In October 2014, the Court of first instance acquitted on the merits the top managers of both companies for not 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 due to procedural irregularities, and in 2017 a new appellate proceeding has started before the Milan Court of Appeal, which is currently pending.

(iii) *Pending prosecutions*

Prosecutions for alleged foreign bribery are currently pending against the companies Eni and Saipem, and their managers, in relation to the adjudication of public tenders and/or licences in Algeria and Nigeria. In particular:

(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. The trial is

currently pending before the Milan Court of first instance. It should be noted that Eni Spa and its top managers were originally acquitted of all charges on October 2, 2015, by the Milan Judge of the Preliminary Hearing, but the acquittal was subsequently quashed by the Court of Cassation on February 24, 2016, further to an appeal made by the Prosecution's Office; 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 Prosecution's Office has already requested the committal for trial of the suspects, and the proceeding is currently pending before the Milan Judge of the Preliminary Hearing for a decision on the point.

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, as such, the criminal responsibility. A crucial criterion for affirming or excluding criminal liability is therefore the relation of '*do ut des*' 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.

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 substantially considered as 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

Italian law, with the exception of mafia or terrorism crimes, does not provide express benefits for voluntarily disclosing criminal conduct. However, it can be stated that, on a case-by-case basis, a certain degree of co-operation with the prosecuting authorities can produce positive effects, especially if joined with the compensation of damage in favour of the injured party (this could qualify as one or more 'mitigating circumstances' able to reduce the subsequent sentence).

With respect to corporation in particular, 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 (article 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).

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. 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

The recently enacted 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 for many years 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.

Roberto Pisano is the founder and managing partner of Studio Legale Pisano, an Italian boutique firm which specialises in all areas of white-collar crime including corporate criminal responsibility, corruption, tax crimes, money laundering, market abuse and false accounting, fraud and recovery of assets, bankruptcy crimes, environmental and health and safety crimes. The firm also provides assistance in the course of regulatory investigations and specialises in transnational investigations and related aspects of mutual legal assistance and extradition. The firm benefits from the expertise of specialists in criminal and international law and interacts daily with counsel of various jurisdictions to successfully represent defendants during white-collar criminal and regulatory proceedings. The firm has a history of representing prominent individuals and entities in high-profile Italian criminal proceedings, in extradition proceedings, and in the frame of foreign proceedings for judicial review of search and seizure and freezing orders.

In 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 (including alleged corruption of foreign officials by major international oil companies, with multiple investigations in the US, the UK, France, Italy, 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, in which Mr Pisano represented a prominent US museum; a case alleging a fraudulent bankruptcy of managers and contractual parties of Parmalat SpA, including foreign banks, in which Mr Pisano represents a prominent external counsel of a US bank; a case alleging multiple homicide of employees of a multinational company manufacturing hazardous products, in which Mr Pisano was a member of the defence team; various appeals in foreign jurisdictions (e.g. the USA, Hong Kong, Switzerland, Monaco, 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 advises and represents relevant foreign governments on issues of international criminal law and in the frame of extradition proceedings.

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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 20th least corrupt country out of 176 in the most recent Corruption Perceptions Index.[1] The World Justice Project's 2016 Rule of Law Index ranked Japan as the 13th least corrupt country out of 113,[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 one governor committing suicide; and the Bank of Japan/Ministry of Finance 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 particular, one type of entertainment – "*no-pan shabushabu*" (referring to an establishment where a type of hot pot was served by women wearing no underwear) – became synonymous in the public imagination with high-level corruption.[6]

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.[7] 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.

Since July 2013, an LDP-led coalition under the leadership of Prime Minister Shinzo Abe has dominated the Japanese government. His administration pushed for an aggressive economic agenda, dubbed "Abenomics", based on the "three arrows" of fiscal stimulus, quantitative easing, and structural reforms. The results of the programme have been mixed. Japan has made particularly little progress implementing actual structural reforms to its economic system and corporate culture.

The popularity of the Abe administration has plunged over the past year, in the wake of scandals involving known associates of Abe or his wife appearing to receive favourable treatment in government approval processes.[8] 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.[9] In addition, a number of prominent officials have been forced into resignation (but not prosecuted) as a result of corruption scandals in recent years, including then-Governor of Tokyo Naoki Inose in December 2013 and then-Minister of Economy Akira Amari in January 2016.[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$23,000).

In July 2017, Japan revised the Act on Punishment of Organised Crime and Control of 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.

As part of the reforms of the late 1990s, the Japanese government established the National Public Service Ethics Board, which provides a website (http://www.jinji.go.jp/rinri/eng/index.htm (English site)) with the ethics code applicable to bureaucrats, as well as detailed guidelines.

"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$27,000), 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$45,000), 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$2.7m). The law does not provide for confiscation of the proceeds of bribing a foreign public official. In June 2016, the OECD Working Group on Bribery in International Transactions ("the OECD Working Group") reiterated the need to amend the Anti-Organised Crime Law so that firms and individuals convicted of bribing foreign officials cannot keep their illegal proceeds, including by laundering them. The Working Group also repeated its recommendation that Japan establish an action plan to enable police and prosecution resources to proactively detect, investigate, and prosecute cases of foreign bribery by Japanese firms.[17]

The Ministry of Economy, Trade and Industry ("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 detailed "Guidelines to Prevent Bribery of Foreign Public Officials" that explain 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 Guidelines, 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 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]

Facilitation payments

The original METI Guidelines 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 Guidelines 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".[19] 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 Guidelines. The JFBA Guidance, noting that the issue of handling facilitation payments often arises both in business practices and in legal consultations, stated that paying even small sums to facilitate the smooth progress of ordinary administrative services is prohibited. Additionally, the JFBA Guidance suggests engaging 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]

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, it is punishable by imprisonment with work of up to five years or a fine of up to 5m yen (approximately US$45,000). 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$27,000). This statute is analogous to Article 197 of the Penal Code, and the analysis of what constitutes a bribe is virtually the same.[21] 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. But a flood of major bid-rigging incidents in 2005 and 2006, including those resulting in the arrests of three prefectural governors, led to an accelerated passage in 2006 of amendments to the existing law against *kansei dango*. Additionally, starting with the *Steel Bridge Cartel* case of 2006, shareholders began suing corporate executives on the theory that the executives' participation in the bid-rigging schemes had damaged the 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 June 2015, MLIT sued 39 construction companies for damages allegedly resulting from *kansei dango* in relation to 59 construction bids in Kochi Prefecture.
- In February 2017, the Nagoya District Court imposed a three-year suspended sentence and a fine of 320,000 yen (approximately US$2,900) 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$18,000) fine on a former regional employee of MLIT for leaking information related to the construction of a tunnel in Mie Prefecture.

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.[22] Reportedly, for example, 68 bureaucrats retired from METI into top positions at Japan's 12 electricity suppliers, which METI oversees,[23] and between 2007 and 2009, 1,757 bureaucrats were hired at organisations and firms that received subsidies or government contracts during 2008.[24]

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 prevented 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. In March 2017, the Ministry of Education, Culture, Sports, Science and Technology announced that it had confirmed 62 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 37 senior ministry bureaucrats.[25]

Low enforcement of UCPA Article 18

In the 18 years since its enactment in 1998, UCPA Article 18 has been enforced only four times:[26]

- In March 2007, two Japanese individuals were found guilty of bribing two senior Filipino officials with about 800,000 yen (approximately US$7,300) worth of golf clubs and other gifts, in an effort to win a government contract. They failed to win, but the bribes were reported by a whistleblower. The individuals were fined 500,000 yen (approximately US$4,500) and 200,000 yen (approximately US$1,800), 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 official development assistance ("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 run 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$636,000), and was also temporarily delisted by the Japan Bank for International Cooperation and the Japan International Cooperation Agency.
- In September 2013, a former executive of a Japanese automotive parts manufacturer was fined 500,000 yen (approximately US$4,500) 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$818,000). The Japanese government agency in charge of ODA said that Japan will resume providing the ODA funds after Vietnam returns the bribe.

The OECD has criticised this low level of enforcement activity, issuing a news release in June 2016, both in English and Japanese, recommending that Japan establish an action plan to organise police and prosecution resources to be able to proactively detect, investigate, and prosecute cases of foreign bribery by Japanese firms. The OECD admonished Japan's continued failure to fulfil the OECD Working Group's recommendations, noting that the failure would not only increase the Group's concerns but also negatively affect other countries' efforts in the global fight against foreign bribery.

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$2.7m) 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.

An interesting point of comparison may be the JFTC's cartel leniency programme, which is modelled on similar programmes in the US and the EU. When the programme was first proposed, many doubted that it would succeed in a group-oriented culture like Japan. But, to the contrary, Japanese firms immediately began filing applications. Between 2006 and 2015, 938 filings have occurred, resulting in 109 publicised actions against a total of 264 firms. The programme's success indicates that measures initially viewed as unlikely to succeed in Japan may still be worth implementing.

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* * *

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Luxembourg

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Brief overview over the law and enforcement regime

The legal and regulatory framework in Luxembourg has been partially inspired by neighbouring countries such as France and Belgium, as the country's legal system was historically founded upon the same general principles of law as the French "Code Napoléon". Nonetheless, due to both the increasing international features of corruption and bribery practices and the need to have a coherent transnational cooperation (or as suggested, prosecution), Luxembourg laws and regulations have been largely inspired by principles put forth by international organisations, such as the EU, the OECD and the UN. Most notably, the 1997 OECD "Anti-Bribery" Convention, and both the United Nations Convention on transnational organised crime (2000) and the United Nations Convention against corruption (2003) were implemented into national law respectively in 2001 and 2007.

The legal and regulatory framework criminalises both the active and the passive behaviours of agents. Corruption, malfeasance in office (abuse of office powers), facilitation payments (still often referred to as "*pots-de-vin*" in French, implying a certain degree of innocuousness), the offer and the acceptance of gifts (up to a certain degree), as well as any other direct or indirect form of influence peddling are subject to criminal sanctions in Luxembourg. Following the influence of both bilateral and multilateral international conventions and the close cooperation between Member States of the European Union, the national legislator reinforced provisions regarding bribery and corruption following the law of 13th February 2011 concerning the reinforcement of the mechanisms for fighting corruption (hereinafter, the "2011 Law").

As amended by the 2011 Law, articles 246, 247 and 248 of the Luxembourg criminal code ("*code pénal*") classify active and passive corruption of public agents as a felony ("crime"), a legal classification usually reserved for severe criminal violations, denoting the importance the legislator places on the necessity to fight corruption. If found guilty by a criminal court, both the instigating party (considered to have actively contributed to the act of bribery) and the receiving party may be subject to imprisonment from 5 to 10 years and/or fines ranging from €500.00 up to €187,500.00.

Article 247 of the criminal code provides that "*[a]ny person who unlawfully, either directly or indirectly proposes or makes an offer, a promise, a donation, a gift or an advantage of any kind to persons holding public authority, public officials, persons entrusted with public service missions, or any persons entrusted with an elective public mandate, with the objective of getting this person to: 1) either carry out or refrain from carrying out an act relating to their office, duty, or mandate or made possible by the nature of their office, duty or mandate, 2) or abuse their real or alleged influence in order to obtain from a*

public entity or public administration any distinction, employment contract, public private cooperation, or any other favourable decision, is subject to imprisonment of 5 to 10 years and a fine of €500.00 to €187,500.00" (free translation made by the author), whereas article 246 of the same legal text defines the constitutive elements of the "passive" role of acts of corruption, which is subject to identical criminal sanctions.

Further to the modification of the criminal code following a law dated 15th January 2001 (implementing the OECD "Anti-Bribery Convention" dated 21st November 1997), article 249 of the criminal code was rescinded, as it was previously observed by Parliamentary commissions that articles 246 *et seq*. would merely incriminate acts of corruption where a transaction would be made before the misuse of power or the unlawful abstention (under the prementioned circumstances). Following the 2001 law, article 249 of the criminal code was modified to take into account any acts of corruption where any advantages in any form would be given *ex post*.

According to predominant Luxembourg case law, the central feature of corruption is the commission of a criminal act relating to the powers held by persons holding public authority, public officials, persons entrusted with a public service missions, any person entrusted with an elective public mandate, as well as persons entrusted by a non-national public mandate or authority, members of foreign judicial deliberative bodies, employees, agents and members of international organisations and all employees of any pillar of the European Union (e.g. the Court of Justice of the European Union, the European Commission), hereinafter defined as "Public Persons". Generally, national courts rule that acts of corruption or bribery require a transaction between a Public Person and any other third party.

As regards the judiciary, article 250 of the criminal code defines and sanctions the active or passive corruption of magistrates and judges, arbitrators, expert witnesses and any other person being part of a judicial deliberative body. Corruption of the prementioned persons is classified as a felony offence and is punishable by a prison sentence from 10 to 15 years and/or fines from €2,500.00 to €250,000.00.

Influence peddling, on the other hand, classified as a misdemeanour ("*délit*"), is considered a less severe form of a similar criminal behaviour. According to article 248 of the criminal code, as specified in detail by multiple court decisions, the notable difference is the fact that influence peddling does not require any convention between two or more parties where one is a Public Person as a legal prerequisite. Accordingly, the criminal code defines influence peddling as the solicitation or reception of bribes by any person, aiming at the misuse of real or alleged power to obtain from a public entity or public administration any distinction, employment contract, public private cooperation or any other favourable decision.

The characteristic features of influence peddling are thus: (i) the existence of offers, promises, gifts, donations or any advantage of any kind for oneself or for a third party; (ii) the unlawful solicitation or acceptance of any advantage of any kind (directly or indirectly); (iii) the misuse of real or alleged influence; (iv) the providing a favourable decision; and, more generally (v) the intent to commit a criminal act ("*dol général*"). Persons convicted of influence peddling may be imprisoned from six months to five years and/or be fined an amount from €500.00 to €125,000.00.

Other legal violations include misuse of public funds (articles 240 and 244 of the criminal code), over- or undercharging of taxes (article 243 of the criminal code), as well as the unlawful appropriation of advantages ("*prise illégale d'intérêts*"). The latter is defined by article 245 of the criminal code as the unlawful participation, for her or his own benefit, of a Public Person in any enterprise or venture which is subject to supervision of a public authority.

These misdemeanours are sanctioned by imprisonment from six months to five years and/or fines between €500.00 and €125,000.00. Over- or undercharging of taxes will, however, be classified as a crime, punishable by imprisonment from five to 10 years, if it has been carried out using threats or assaults. The criminal code also provides that Public Persons, if found guilty of any of these charges, may be prohibited from exercising public mandates of public offices.

Finally, it is to be noted that all threats and intimidations against Public Persons aiming at obtaining a favourable decision or unlawful abstention is punishable by law (article 251 of the criminal code). Sanctions range from five to 10 years of imprisonment, whereas fines may be ordered between €500.00 and €187,500.00.

Under Luxembourg law, there are no specific provisions incriminating the punishable attempt to commit acts of corruption, bribery or influence peddling, as the attempt is virtually included in the (active) legal definition itself, even if not successful. A notable exception is provided for by article 243 of the criminal code, which prohibits the over- or undercharging of taxes. Article 243 of the criminal code specifically provides that attempts to commit said criminal violation are punishable by the same sanctions as the infraction itself.

As regards the private sector, and following the implementation of the 1997 OECD Convention in 2001, national legislation specifies that "*[a]ny person who can be qualified as manager or director of a legal entity, or as an agent or employee of a legal entity or private individual, and who unlawfully either directly or indirectly solicits or accepts to receive an offer, a promise, or an advantage of any kind, for themselves or for a third person, or to accept an offer or a promise to refrain from carrying out an act relating to their office or made possible by the nature of their office, without prior authorisation given by neither the board of managers, nor the general assembly of shareholders or the employer, is subject to imprisonment of 1 month to 5 years and a fine of €251.00 to €30,000.00*" (article 310 of the criminal code).

As a continuation of efforts to fight corruption and bribery, national and international authorities also specifically target and pursue money laundering activities. Under Luxembourg law, certain regulated professions are subject to specific anti-money laundering obligations by virtue of applicable legislation, *inter alia*, the amended law of 9th December 1976 on the organisation of the profession of notaries public, the amended law dated 20th April 1977 on gambling and sports betting, the amended law on the judicial system dated 7th March 1980, the amended law of 10th August 1991 on the legal profession, the law of 7th December 2015 on the insurance sector repealing the law of 6th December 1991, the amended law of 5th April 1993 on the financial sector and the amended law of 18th December 2009 concerning the audit profession. Luxembourg has progressively adopted all three European Union AML directives, the present legislation resulting from the implementation of the third Anti-Money Laundering Directive (2005/60/EC). Following recommendations made by the Financial Action Task Force, Luxembourg amended its legislation in 2010 to the now applicable legal framework in the field of anti-money laundering.

Overview of enforcement activity and policy during the last year

A comprehensive and detailed overview of the enforcement activities is published annually by the Luxembourg Financial Intelligence Unit ("*Cellule de renseignement financier*"), which is a member of the "Egmont Group" and the Financial Action Task Force. Unlike several other States, the Luxembourg legislator, championed by judicial authorities, ties the Financial Intelligence Unit to the Public Prosecutor's office, so that it is part of the judicial

power. The aim is to guarantee independence from both the executive and the legislative powers and to maintain a sufficient degree of impartiality.

The latest available report of the FIU, published in October 2016, details the enforcement situation in 2015. Of a total of 11,023 declarations of suspicious transactions made to the FIU, corruption-related felonies and misdemeanours represented a relative share of about 1.41% of predicate offences, representing an amount of approximately €630,753.95. Most suspicious transactions relate to forgery and falsification of documents (48%) and general fraud (34%).

Comparatively, a volume equivalent to the legal actions of about 65% was made following international rogatory letters, both from Member States of the European Union and of the OECD, such as Switzerland, Liechtenstein and the United States of America. Of all requests from third-party countries regarding predicate offences such as bribery and corruption, not a single one was refused or challenged by the Luxembourg judicial authorities.

The latest OECD country-specific report dates back to 2013; various recommendations, notably at the level of enforcement (specialisation within the Police and amongst the Public Prosecutor's representatives) have been taken into consideration since.

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

Facilitation payments are not separately incriminated under Luxembourg criminal law, as they fall within the aforementioned legal classifications, depending on the specifics of the case.

Regarding the legislative power, provisions of hospitality, e.g. gifts, travel expenses, meals and entertainments, are limited by a code of conduct, which was implemented for members of Parliament on 15th March 2007 (most recently amended in July 2014).

Furthermore, State employees and public officers are subject to the amended law of 16th April 1979 regarding the general status of public officers and employees, which specifically refers to article 240 *et seq*. of the criminal code, whilst explicitly forbidding the solicitation, promise or acceptance by any source, either directly or indirectly, of any advantages likely to put public officers or State employees into conflict with their legal obligations. More recently, an executive order ("*arrêté grand-ducal*") dated 14th December 2014 (as amended on 28th December 2015), has implemented a more coherent and comprehensive code of conduct for all members of the government.

Key elements of 2014 executive order provide for distinctions between gifts and donations received by national or foreign public officials and gifts and donations received by private entities. According to the order, gifts and offers of hospitality offered by national or foreign public officials can be accepted under the conditions that (1) they must originate from public, national or foreign entities, except for public entities operating mainly in a private competitive sector, and that (2) they must be consistent with the common practices and general rules of diplomacy courtesy. Gifts and offers of hospitality addressed to members of the Government by persons, private or public entities operating mainly in a private competitive sector, on the other hand, might be accepted if they are consistent with the common practices and general rules of diplomacy courtesy, and do not exceed an approximate value of €150.00. Obviously, these provisions are not applicable to any gifts or offers of hospitality potentially likely to influence public officials or State employees in their decision-making. Any gifts or offers of hospitality that would not fulfil said criteria, but have nonetheless been accepted by a member of the government, must be reported to the Luxembourg head of government (the Prime Minister), along with the names of the donors

and the accepting party and the date of the occasion on which gifts or offers were accepted. In their non-public lives, members of government remain free to accept gifts and offers of hospitality within their private relations that remain without any connection to their public function. The distinction may, however, be very delicate.

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

A consultative entity, the Corruption Prevention Committee, established in 2007, tasked with assisting government in fighting bribery and corruption, is mainly involved in the determination and evaluation of national policies regarding the avoidance and observation of repression of acts of bribery and corruption. The Corruption Prevention Committee is not an investigative body and does not have any judicial or administrative powers. It is presided over by the Minister of Justice and composed by members that represent every Luxembourg government branch/ministry.

On an administrative level, various governmental or independent regulatory agencies are charged with the surveillance of bribery and corruption activities, such as the branch of land domains and registration of the Luxembourg government ("*Administration de l'Enregistrement et des Domaines*"), the Regulatory Commission of the Financial Sector (CSSF) for persons subject to the amended law of 5th April 1993 on the financial sector, the Regulatory Commission of the Insurance Sector (CAA) for persons subject to the amended law of 7th December 2015 on the insurance sector.

Under Luxembourg law, the Public Prosecutor's offices of Luxembourg and Diekirch each have sole judicial jurisdiction for criminal offences committed in the respective district. An impartial investigating judge has broad powers to investigate any offence, either if a victim forms a complaint or following a request by the Public Prosecutor.

Article 23 of the Luxembourg criminal procedural code ("*code de procedure pénale*") provides for a general and broad obligation for all State employees, public officers and every person entrusted with a mission of public service, to report any felony and/or misdemeanour brought to their attention to the Public Prosecutor's office, notwithstanding any laws on confidentiality or professional secrecy that would otherwise apply. Whilst the rationale behind this law has always been of a general nature and not specific to bribery and corruption, it has been profoundly amended by the law of 13th February 2011 concerning the reinforcement of the mechanisms for fighting corruption, consisting in the granting of a protection for whistle-blowers (private employees and public agents) from retaliation or sanctions.

In general, Luxembourg law does not (yet) offer additional protection mechanisms or other measures for witnesses and victims of acts of bribery and corruption apart from the provisions of the 2011 Law. Potential changes to the legislation are being discussed by public opinion, notably following a highly publicised trial; some changes are suggested by various NGOs and international organisations. At the time this contribution went to press, however, there were no specific draft bills introduced to reinforce the legal regime of protection for witnesses and/or whistle-blowers.

Some third countries and Member States of the OECD have opted for the possibility, especially regarding whistleblowing, that anonymous testimony may be used either by the prosecution or be admissible in court. In Luxembourg this would, however, not be possible. Anonymous testimony could, and it is the humble opinion of the undersigned that it would, give rise to a shift of balance detrimental to the rights of the defending party in criminal matters. Luxembourg legislators, backed by a majority of magistrates, express

their concern that the right for a defendant to a fair trial, resulting, *inter alia*, from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), prevent the production of anonymous testimony in court hearings. In 2008, the Group of States against Corruption (GRECO) issued a recommendation for Luxembourg to soften the very restrictive practice of using anonymous witness statements, pointing out that international obligations to which the country adhered would authorise anonymous testimony. While Luxembourg reinforced the protection mechanisms of victims of a criminal act following the adoption of the law of 6th October 2009 regarding the reinforcement of the rights of victims of criminal offences, recommendations regarding practices considered to be contrary to the imperative of a fair and balanced trial were not implemented.

Unlike Anglo-Saxon legal provisions, Luxembourg did not, until recently, provide for the possibility for an alleged offender in criminal matters to plead guilty; even if she/he did so, the Public Prosecutor nonetheless needed to prove the constitutive elements of a felony or misdemeanour and the certainty, beyond any reasonable doubt, that the alleged author was, in fact, the perpetrator. This situation has somewhat evolved with the introduction of pre-court settlements ("*jugements sur accord*") in national legislation by a law dated 24th February 2015, amending the Luxembourg code of criminal procedure (articles 563 to 578). Although there are substantial differences between the Luxembourg regime and foreign plea deals, the aim of the pre-court settlements is to simplify and shorten the administration of justice where a case is established to a sufficient degree of certainty. Negotiations are then performed between the Public Prosecutor and the defendant (generally assisted by an attorney-at-law), and the agreement must be validated by a public court hearing. A limitation to conclude pre-court settlements, especially as regards bribery and corruption, is the fact that they can only be concluded if the alleged offender would face a prison sentence of up to a maximum of five years. The pre-court settlement thus only applies to misdemeanours and, to some extent, various felonies if the court decides beforehand to grant specific legal attenuating circumstances.

Overview of cross-border issues

Luxembourg's constitutional law provides that international obligations shall supersede national legislation, although commentators generally agree that an exception is to be made where such international obligations would violate the terms of the Luxembourg constitution, any provision related to human rights or any so-called "general principle of law" as admitted in Luxembourg.

Notwithstanding the superiority, in constitutional law, of international obligations compared to national legislation, it is important to note that most international conventions do not have any direct effect, meaning that they do not confer any specific rights to concerned persons (e.g. alleged offenders, prosecution, witnesses or victims) when they have not been implemented by a national legislative act.

Luxembourg is a signatory State of numerous multilateral and bilateral anti-corruption conventions, such as the aforementioned 1997 OECD "Anti-Bribery" Convention, the UN Convention against Transnational Organised Crime and the respective Protocols from 2000 and the UN Convention against corruption (2003). Furthermore, Luxembourg, as a member State of the Council of Europe, adheres to the Criminal Law Convention on Corruption, dated 1999. Regarding more specifically the European Union, Luxembourg is also subjected to the Convention on the Fight against Corruption Involving Officials of the European Union or Officials of the Member States of the European Union signed by Luxembourg on 26th May 1997, the EU Convention on the Protection of the European

Communities' Financial Interests (Council Act of 26th July 1995) and its First and Second Protocols, as well as the EU Convention on the Fight against Corruption involving Officials of the European Union Communities or Officials of the EU Member States (Council Act 26th May 1997).

Finally, multiple agreements have been concluded both on a European level and at an international legal regarding the international mutual assistance of States in general matters of criminal prosecution (i.e. not limited to bribery and corruption) which provide, for instance, proceedings such as international rogatory letters and close cooperation of Police forces and prosecutions.

Regarding jurisdiction based on territoriality, Luxembourg criminal law has an extraterritorial reach in certain situations, meaning that it applies not only to alleged perpetrators residing or domiciled in the Grand-Duchy for acts carried out in Luxembourg, but also to circumstances where one or more constitutive elements of the criminal offence have been executed or occurred in Luxembourg or to the disadvantage of a Luxembourg person (e.g., a Luxembourg-based credit institution). Additionally, Luxembourg anti-money laundering legislation in principle also applies to situations in which the predicate offences have taken place in a foreign jurisdiction, subject to the principle of double incrimination.

Following Luxembourg case law (e.g. Court of appeals, 3rd June 2009), offences potentially giving rise to acts of bribery and corruption are subject to specific legal requalification under Luxembourg law, insofar as the Luxembourg courts are not bound by the legal qualification of the incriminated act in the jurisdiction where it has been committed.

The question of jurisdiction based on nationality of the alleged offender, historically based upon the belief that national courts would constitute a certain guarantee that trials would be fair has, with the advent of the internationalisation of societies and legal systems, somewhat lost its *raison d'être*. Although article 5 of the code of criminal procedure accordingly provides that every citizen of Luxembourg who is suspected of a violation of criminal law may be prosecuted and judged within the Grand-Duchy of Luxembourg, criminal prosecution will, in fact, only occur in Luxembourg if the defendant is arrested in Luxembourg or if the authorities request an extradition or an international arrest warrant.

Corporate liability for bribery and corruption offences

Under Luxembourg law, a legal entity can be held criminally liable for offences committed by one of its bodies, such as directors, managers and statutory auditors. The law introducing criminal liability for legal entities had been adopted on 3rd March 2010 and has amended the Luxembourg criminal code and the Luxembourg code of criminal procedure. Following the 2010 amendment, article 34 of the criminal code states that "*[if] a felony or misdemeanour is committed in the name of and in the interest of a legal entity by one of its legal bodies or by one of its de jure or de facto managers, that legal person may be held criminally liable and may incur the penalties provided for by articles 35 to 38 [of the Luxembourg criminal code]*". In such respect, "legal entity" refers to legal persons, but also to enterprises owned or controlled by the Luxembourg State; only municipalities are exempt from the scope of the aforementioned article 34.

Legal entities being found criminally liable for an offence committed by one of its bodies, can be convicted to fines between €500.00 and €750,000.00. Depending on the severity of the offence, a legal entity can also face asset seizing and exclusion from participating in open tendering procedures. Finally, a legal person may be dissolved in cases where it had been incorporated only in order to commit or to facilitate the commission of the alleged offence.

Proposed reforms / The year ahead

In the field of bribery and corruption, at the time this contribution went to press, there were no draft bills or proposed reforms for the year ahead.

In the closely related field of the fight against money laundering and financing of terrorism, Luxembourg still faces the obligation to implement the Fourth European Anti-Money Laundering Directive (EU) No. 2015/849, the delay for the implementation into national law having originally been set for 26th June 2017. A draft bill (reference 7128 of the Parliament) is currently being discussed and subject to comments and reservations by various consultative bodies, whose concerns are being taken into consideration, causing a delay in the vote of the draft bill. The key elements of the Fourth AML directive would be the broadening of the scope to include foreign banking and financial institutions if they do business in Luxembourg through a branch or following the freedom to provide services in the Single Market, any person operating in the activity of Family Offices and bailiffs where they carry out valuation and public sales. Furthermore, the threshold for cash transactions which persons trading in goods qualify as "obliged entities" and in which an obligation to identify the customer is triggered is reduced from €15,000.00 to €10,000.00. Most notably, and this may prove helpful in matters regarding bribery and corruption, the Fourth AML directive provides for the obligation by the Member States to create a central registry containing information on the beneficial ownership of legal entities, including structures without a separate legal personality, such as UK and US trust.

In recent Luxembourg news, the so-called "Lux Leaks" trial was highly publicised and debated. The main defendant, a French national working in Luxembourg, had initially been sentenced to imprisonment and a fine by the Luxembourg District Court sitting in correctional matters for having violated both provisions regarding professional secrecy by leaking internal documents from his employer, documents which evidenced various exchanges between private companies and Luxembourg tax authorities. Seeking recourse against this punishment, which he considered harsh and illicit, the defendant has submitted his case to the Court of appeals, where he was fined for the aforementioned infractions, but freed from imprisonment. Following an additional recourse filed with the Luxembourg Supreme Court ("*Cour de cassation*"), the case is, at the time that this book goes to press, still pending.

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Overview

July 19, 2017 marked the entry into force of the General Administrative Responsibilities Law (*Ley General de Responsabilidades Administrativas*, the "Responsibilities Law"), which is at the core of the new National Anticorruption System (*Sistema Nacional Anticorrupción*, the "SNA"). With this, the four new statutes that constitute the SNA have entered into force, whilst only three of the four statutes that were amended as part of the SNA have become effective; namely, the amendments to the Federal Criminal Code have not yet taken effect.

There are fundamental aspects of the SNA that are still pending. On the enforcement front, the appointment of the Anticorruption Prosecutor – which is the trigger for the amendments to the Federal Criminal Code – has not yet occurred as a result of a political impasse in the Mexican Senate. Evidently, this is not a minor pitfall as the deficient enforcement and forensic capabilities of prosecutors in bribery cases is what has allowed corruption to flourish in Mexico.

The designation of an Anticorruption Prosecutor who will be responsible for training specialised staff and developing modern infrastructure to investigate corruption offences on a systematic basis is probably an unsettling thought for some of the political forces that have been busy delaying the appointment. The delay in the appointment of the Justices of the Federal Administrative Justice Court with jurisdiction over corruption cases is also unfinished business before the Senate.[1] All things considered, with Presidential and Congressional elections in Mexico taking place on July 1, 2018, further delay in the appointments will represent a political cost for the stakeholders; accordingly, there will be a great incentive for the Senate to finally appoint the Anticorruption Prosecutor and the Administrative Court Justices during the Congressional period that commences on September 1, 2017.

Another fundamental aspect of the SNA that is still lagging is the adoption of local anticorruption systems by each of the 32 States that constitute the Mexican Federation. Some of the State legislatures were barely on time to enact their own version of the SNA by the July 18, 2017 deadline; despite the last minute enactment by some of the States, the underlying operational aspects of these systems are not functioning properly. Other States simply did not enact the corresponding local legislation before the deadline and are still struggling to do so. Getting this record straight with the States will not be an easy task for the Coordinating Committee, which must ensure this happens according to its mandate contained in the General Law of the National Anticorruption System (*Ley General del Sistema Nacional Anticorrupción*, the "SNA Law").

Not everything with the SNA has been missed deadlines and unfinished business. There have also been developments that highlight the SNA's commitment to transparency. The appointment of members to the Citizens Participation Committee followed an exemplary process that resulted in the nomination of five respected members, including its Chairperson, Ms. Jacqueline Peschard. Moreover, the Citizens Participation Committee has taken a firm stance against the sluggish deployment of the SNA at a local level:[2] on August 7, 2017 the Citizens Participation Committee filed Constitutional procedures (*amparos*) before a Federal Court, requesting that States that are lagging behind in the implementation of their respective local anticorruption systems be forced into doing so and that local laws enacted that are in conflict with the SNA be corrected.

Considering the recent developments of Mexican anticorruption legislation outlined above, this chapter will explain the guiding principles of the SNA, namely: (i) coordination and accountability; (ii) enforcement; and (iii) private party liability and compliance. We will conclude this chapter by referring to recent enforcement activity and the next steps following the enactment of the SNA.

Coordination and accountability

One of the main challenges in Mexico when implementing legislation for nationwide observance, such as the SNA, is to ensure compliance with the Federal system enshrined in the Mexican Constitution. In essence, under the Mexican Federal system, matters not specifically reserved in favour of the Federal Government by Mexico's Federal Constitution are within the sovereignty of each of the 32 States which make up the Mexican Republic.

Prior to the adoption of the SNA, the absence of a nationwide accord to coordinate anticorruption laws and enforcement at the Federal and State levels resulted in a lack of Federal-State as well as interstate cooperation for fighting corruption. As would be expected, the diverging regulation of corruption throughout the land created wide legal gaps that have been astutely relied upon by public and private persons. While, for example, in 2012, the Federal Congress passed the Federal Anticorruption Law in Government Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*) and on that same year the State of Nuevo León overhauled its anticorruption framework, other States such as the State of Mexico still relied on a couple of outdated articles in their criminal codes and a set of patchy regulations applicable only to Government officials.

The first step towards allowing a comprehensive and far-reaching anticorruption framework were the amendments to the Mexican Constitution published on May 27, 2015, which laid out the philosophy of the SNA: a coordinated nationwide system of Federal and State laws and Government bodies charged with the enforcement of the same. Such Constitutional Amendments contemplated the passing of implementing legislation for the SNA.

The SNA Law created the Coordinating Committee (*Comité Coordinador*), which is the body responsible for deploying and coordinating the SNA at the Federal and State levels. Specifically, the Fourth Transitory Article of the Constitutional Amendments imposes an obligation on State legislatures to create or adjust local legislation to be consistent with the Federal SNA.

In order to insulate the Coordinating Committee from the whims of Government and politics, the SNA Law provides that it will always be chaired by a non-Governmental person that is a member of the Citizens Participation Committee (*Comité de Participación Ciudadana*). The Citizens Participation Committee is also a body created by the SNA Law, which is composed of five reputed independent members of civil society that were selected through

a rigorous vetting process that involved the Mexican Senate in order to guarantee their credentials and impartiality. The selection process for the Citizens Participation Committee members concluded on January 30, 2017, and resulted in the appointment of persons from some of the most recognised academic institutions and civil organisations focused on advancing transparency and anticorruption policies in Mexico.[3]

The other members of the Coordinating Committee shall be representatives of the other bodies that play a role in the adequate functioning of the SNA: (i) the head of the Superior Federal Comptroller (*Titular de Auditoría Federal de la Federación*); (ii) the Head of the Anticorruption Prosecutor (*Titular de Fiscalía Especializada de Combate a la Corrupción*); (iii) the Secretary of Public Function (*Secretario de la Función Pública*); (iv) a representative of the Council of the Federal Judiciary (*representante del Consejo de la Judicatura Federal*); (v) the Chairman of the Access to Public Information and Data Protection Institute (*Presidente de Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*); and (vi) the Chief Justice of the Federal Administrative Justice Court (*Presidente de Tribunal Federal de Justicia Administrativa*). At its quarterly meetings, the Coordinating Committee must adopt all measures for the deployment of the SNA.

Once all of the members of the Coordinating Committee have been appointed to their positions,[4] this engine of the SNA will be ready to be put in motion. The SNA Law also contemplates the executive bodies that will enable the Coordinating Committee's mission: namely, the Executive Secretariat and the Executive Commission, which will act through the executive authority of an individual appointed as Technical Secretary. In such regard, the Coordinating Committee appointed Ricardo Salgado Perrilliat, a former member of the Access to Public Information and Data Protection Institute, as Technical Secretary on May 30, 2017. Needless to say, the quality and talent of the individuals nominated to such positions and the budget allocated to the new bodies will be paramount to the successful deployment of the SNA. Thus far, the budget allocated by Congress to the SNA for the year 2017 is in the amount of MXP$214,374,000 (roughly US$11.9 million) and for 2018 the amount of MXP$222,385,000 (roughly US$12.3 million). A greater budget would have been ideal to "kick start" the SNA, especially considering the costs that would be involved in developing an advance technological platform to support the Digital National Platform; in any event, it will be up to the Coordinating Committee to use the available resources efficiently.

One of the main responsibilities of the Coordinating Committee is to prepare and deliver an Annual Work Plan imbedded with mechanisms for its periodic evaluation and adjustment. Coordination with the State anticorruption systems is also the core of the Coordinating Committee's mandate. There will be considerable expectation as to the contents of the Coordinating Committee's initial Work Plan as it will set the tone for implementation of the SNA.

Another challenging task facing the Coordinating Committee will be the development of the Digital National Platform (*Plataforma Digital Nacional*), which is envisioned as a state of the art IT system linking all bodies of Federal and State Government for the sharing of data. The SNA is designed to build on real-time information at the Federal and local level regarding the transparency declarations of Government officials, information about sanctioned officials and private parties, public complaints on administrative offences and acts of corruption and procurement process records. The use of state of the art technology should be top of mind for the Coordinating Committee when approaching this project so that capabilities such as artificial intelligence, which is already being developed for detecting

terrorist activity, are built into the platform. Otherwise, the Digital National Platform runs the risk of becoming a gargantuan system for collecting unconnected data.

The vast attributions of the Coordinating Committee are enhanced by an accountability system which ensures that each of the authorities involved in the functioning of the SNA does its job. On the one hand, the Coordinating Committee's mandate will be measured against its Annual Report in which it will disclose the progress of its initiatives and results. On the other hand, pursuant to article 36 of the SNA Law, State legislatures must enact statutes providing for similar standards of accountability to be observed by the local bodies implementing the SNA, including adequate procedures for complying with recommendations handed down by the Coordinating Committee and the publication of reports describing anticorruption initiatives, risks and the results of recommendations.

Enforcement

Ineffective enforcement of laws is a challenge faced by many Mexican institutions and is a challenge that the SNA intends to correct on the front of the fight against corruption. To that end, the SNA has taken a two-pronged approach that consists of: (i) empowering existing Government institutions in charge of enforcing the new legal framework; and (ii) the enactment of substantive laws that delineate the obligations of Government officials and private parties while regulating in more detail the corrupt practices that will be punished.

Institutional empowerment

The capabilities of four existing institutions have been enhanced to fight corruption. The amendment of the enabling statutes of three of these public bodies, and a brand new enabling statute for one of them, translates into a process of institutional empowerment that cuts through the administrative, prosecutorial, judicial and Government spending audit functions at the Federal level. Thus, the SNA not only creates the framework for institutional coordination, but affords more comprehensive and articulated tools to the authorities responsible for its enforcement. Also, as mentioned, the States of Mexico have the Constitutional mandate to create an equally comprehensive and effective institutional environment.

The Ministry of Public Function (*Secretaría de la Función Pública*) ("SFP") has long served[5] as the agency of the Federal Executive in charge of acting as the comptroller of public service. At the start of the current administration of President Peña Nieto, the SFP had been scheduled to disappear and while it lingered into its sunset it earned a reputation for complacency and turning a blind eye at serious corruption and conflict of interest situations. In contrast, the SNA amendments repealed the decree whereby the SFP had been set to disappear, and relaunched the SFP though the amendments to the Organic Law of the Federal Public Administration (*Ley Orgánica de la Adminsitración Pública Federal*) ("LOAPF"). In an effort to return dignity and respect to the position of Secretary of the SPF, the amendments to the LOAPF provide that he or she must be ratified by the Senate and must file his or her transparency declaration. In line with this, the amendments restate the core functions of SPF, which include the appointment of external comptrollers and internal comptrollership bodies (*órganos internos de control*) to each of the agencies and the conduction of investigations for unethical and corrupt behaviour within such agencies.

On the prosecutorial front, through the amendments to the Organic Law of the General Prosecutor of the Federation (*Ley Orgánica de la Procuraduría General de la República*), a new Specialised Office of the Prosecutor (*Fiscalía Especializada*) has been created for investigating and indicting corrupt practices (the "Anticorruption Prosecutor"). With this

change, the General Prosecutor's Office through the Anticorruption Prosecutor shall be accountable for probing corruption cases, developing investigation capabilities specifically aimed at evidencing the existence of corrupt practices and pursuing criminal charges against offenders. This new development introduced by the SNA should be able to reverse the prior trend where no division of the General Prosecutor's Office was particularly focused on corruption cases and, as a result, prosecution was isolated, random and often concentrated on petty bribes.

The Federal Tribunal of Administrative Justice (*Tribunal Federal de Justicia Administrativa*) ("TFJA") has long been a respected institution of the Mexican State. In the context of the SNA, the TFJA's enabling statute was repealed and its prior name changed;[6] however, the institution remains the same including its respected judges and staff. The novelty of the reform is that in addition to trying cases related to the legality of administrative and tax laws and of Federal Government actions, the TFJA is now responsible for trying cases related to corruption offences. To that end, a newly created Special Chamber (*Sala Especializada*) of the TFJA has jurisdiction over cases brought against Government officials involving "Serious Offences" identified in the Responsibilities Law as well as "Offences of Private Parties". One of the challenges for TFJA will be the form over substance principles that apply to the enforcement of administrative laws, pursuant to which courts must "pigeonhole" conducts within the rigid frame of the legal provisions. Another challenge will be the extremely high burden of proof that the accusations under the Responsibilities Law will need to meet, as TFJA judges must observe a "beyond reasonable doubt" standard.

Finally, the Superior Federal Comptroller (*Auditoría Superior de la Federación*) (the "ASF") is a body within the structure of the Mexican House of Representatives (*Cámara de Diputados*) with technical and procedural independence for reviewing and auditing the Federal Government's spending. Through the corresponding Constitutional Amendments and the new Federal Oversight and Accountability Law (*Ley de Fiscalización y Rendición de Cuentas de la Federación*), the audit process of Federal spending has been streamlined and is now linked with the SNA enforcement mechanisms: the ASF must notify the TFJA and the Anticorruption Prosecutor of any findings of corrupt practices.

Substantive provisions

(i) *Background*

During the heated debate surrounding the SNA reform, the Responsibilities Law was the centrepiece that drew the most attention from the media and the general public. The Responsibilities Law owes its notoriety to being the first "citizens' initiative" in the history of Mexico to be voted into law.[7] For that to happen, the draft legislation had to surmount the burdensome process of gathering signatures from at least 0.13% of registered voters: roughly 120,000 signatures. The high-quality draft legislation, which had been carefully prepared by a group of able academics from recognised research institutions and think tanks – with the collaboration of a well-selected group of experts – quickly gathered the support of 634,143 signatories.

During its passage through the Mexican Senate and House of Representatives, the debates around the initiative focused mainly on its provisions related to the transparency declaration that Government officials must complete and file, including three types of information: (i) asset declaration; (ii) conflict of interest declaration; and (iii) tax return information. Hence the popular name that the Responsibilities Law received throughout its legislative process: "Law 3 of 3"(*Ley 3 de 3*), as well as the widespread belief that its scope is limited to its transparency declaration provisions. Actually, the Responsibilities Law is the statute that,

together with the amendments to the Federal Criminal Code (*Código Penal Federal*), lays out most of the substantive provisions of the SNA.

(ii) *The Responsibilities Law*

The Responsibilities Law is a comprehensive statute that regulates anticorruption in a number of ways. With respect to Government officials, it lays out the standards of conduct and sets forth the mechanisms and procedures for the filing of transparency declarations and sets forth the "Serious Offences" and "Non-Serious Offences" for which they may be punished. As regards private parties – including both individuals and legal entities – the Responsibilities Law sets forth a catalogue of "Acts of Private Parties" that are punishable as well as compliance standards that, if followed, may result in reduced fines. Finally, the Responsibilities Law regulates, at length, the procedures to be followed by the SFP and the ASF in the investigation of Serious Offences, Non-Serious Offences and Acts of Private Parties and the judicial process with respect to Serious Offences and Acts of Private Parties before the TFJA.

Moreover, the Responsibilities Law expands on principles that had been sketched in precursor legislation,[8] namely: (i) it does not limit punishable conduct to bribery, but rather contemplates other practices that are equally noxious in dealings with the Government, such as collusion, influence peddling, presentation of deceiving or false information and covering up banned bidders;[9] (ii) it contemplates large monetary penalties applicable to private parties, both individuals and legal entities; (iii) it sets out that the performance of corrupt practices through an agent or intermediary will be attributable to the principal; (iv) it punishes cases of bribery committed with a foreign Government official; and (v) it sets forth some general principles for receiving leniency treatment upon self-reporting.

(iii) *Criminal legislation*

The amendments to the Criminal Code are scheduled to enter into force on the same date that the head of the Anticorruption Prosecutor is appointed by the Mexican Senate, which has not yet occurred as this chapter goes to press. The amendments to the Federal Criminal Code reorganise existing legal provisions into a Section renamed "Crimes arising from Corrupt Situations" and incorporate the necessary references to the SNA legal framework. The substantive amendments to the Federal Criminal Code, however, are not the most innovative feature of the SNA: for the most part, conduct criminalised prior to the amendments continue to be contemplated in substantially the same terms, including bribery, intimidation, abusive exercise of authority, influence peddling, embezzlement of Government funds and illicit enrichment.

Moreover, the amendments to the Federal Criminal Code forewent the opportunity to improve the wording that defines some of the criminal conducts. For example, the definition of bribery (*cohecho*) retains narrow language that requires the actions prompted by the bribe – or the promise of a bribe – to be within the functions and employment of the relevant Government official. In other words, in order for there to be a determination of criminal liability for bribery, the Federal Criminal Code requires that the relevant Government official be formally vested with the authority to carry out an action or inaction in exchange of which he or she has received something of value.[10] By way of example, in the context of bribery occurring in a procurement process, the narrow language retained by the Federal Criminal Code could lead to the acquittal of a Government official that receives something of value in exchange for having the award issued in favour of one of the bidders, provided that such official does not have the formal authority to issue the award – but causes another Government official that has the formal authority to do so.[11]

Another notable example of the improvements that the amendments to the Federal Criminal Code failed to address, is that paragraph II of article 222 which sets forth the definition of bribery (*cohecho*) as it refers to private parties does not expressly include the possibility of the punishable conduct being committed through an agent or intermediary (*interpósita persona*). This presents an essential inconsistency because the definition of bribery (*cohecho*) as it refers to Government officials in paragraph I of article 222 expressly provides for the commission of the crime through an agent or intermediary. Thus, a private party could argue and rely upon a strict interpretation that the definition does not apply to its conduct when committed through an agent or intermediary and that it is therefore not criminally liable, whilst the Government official involved in that same conduct would not be able to avoid criminal liability on that same basis. Another anomaly is that the private party could be held liable under the Responsibilities Law for giving a bribe through an agent or intermediary but not under the Federal Criminal Code.

The most relevant development on the criminal front, however, does not arise from the amendments to the Federal Criminal Code, but rather it flows from the new National Code of Criminal Procedure (*Código Nacional del Procedimientos Penales*, the "Code of Criminal Procedure"), which entered into force nationwide, at both Federal and State level, on June 14, 2016. In addition to implementing a uniform criminal procedure and oral hearings, it introduces the novel concept under Mexican law of determining criminal liability against legal entities. In this regard, article 11*bis* of the Federal Criminal Code links certain criminal offences, including, specifically, the crime of Bribery (*Cohecho*) to the provisions of the Code of Procedure which contemplate criminal enforcement against legal entities independently of the criminal liability that may be found with respect to the individuals involved.

Articles 421 through 425 of the Code of Criminal Procedure set forth the principles pursuant to which liability against legal entities may be determined, including penalties that a judge may order upon a finding of criminal liability; namely fines, disgorgement of assets used in connection with or that result from the criminal conduct, publication of the judgment and dissolution of the legal entities. The judge may also order the following measures: suspension of activities; closure of its places of business; prohibition to continue conducting the activities in the course of which the criminal conduct was committed; banning from procurement procedures; receivership to protect employees and creditors; and a public warning. Upon assessing the harsh consequences that may attach to a legal entity, the judge will have to take into account the extent to which there has been a failure to exercise due control of the relevant entity, the quantum of amounts and its legal nature and annual volume of business, as well as the entity's level of compliance with applicable laws and regulations.

Two other novel legal concepts have been introduced by the Code of Criminal Procedure which are also very relevant in the context of the new legal framework applicable to corrupt practices. On the one hand, articles 191 through 200 of the Code of Criminal Procedure contemplate the possibility of entering into a consent decree, whereby certain conditions and obligations may be agreed between the criminal offender and the prosecutor, which if complied with by the former, may suspend criminal liability and may ultimately extinguish it. On the other hand, the standard of proof requires that guilt in criminal proceedings be determined upon a finding that is beyond reasonable doubt. The novelty of both concepts is bound to present both opportunities and challenges for prosecutors and defence attorneys. Specifically, from the perspective of the SNA and the anticorruption framework, the alternative of seeking a consent decree will not be available in a bribery case where

the bribe exceeds MXP$36,500 (roughly US$2,000). Regarding the standard of proof, prosecutors will need to introduce evidence that convinces the judge beyond reasonable doubt, something that is bound to raise the bar on prosecutors' diligence.

Finally, a new concept laid out in the Code of Criminal Procedure which is particularly relevant in the context of corruption investigations, is the obligation to report contained in article 222. Previous criminal statutes did not set forth an affirmative obligation to report, although under certain circumstances not reporting could rise to the level of abetting a criminal conduct. The new statutory obligation imposes a duty to report on whoever "has certainty" (*le conste*) that a situation that is likely to be determined as a criminal conduct has taken place. The threshold that would need to be met in order to comply with the duty to report would thus seem quite high as the certainty of a situation that could rise to the level of a criminal conduct would have to rise above a mere suspicion. As with other novel concepts contained in the Code of Criminal Procedure, it will be some time before judicial precedents delineate the scope of the duty.

Private party liability and compliance

Liability of private parties

One of the overarching principles of the SNA is to make private parties co-responsible with Government officials for acts of corruption. To that end, the Responsibilities Law creates a catalogue of conducts labelled "Private Party Offences". Such catalogue essentially restates the conduct currently punished by the previously existing Federal Anticorruption Law on Public Procurement (the "Anticorruption Law") (see endnotes 6 and 7), but broadens their scope of application as they must no longer be linked to public procurement procedures; rather, the punishable conducts capture any corrupt dealings with Government officials. As explained in the section entitled 'Institutional empowerment' above, the TFJA is the judicial body with jurisdiction over such conducts.

The legal consequences of committing Private Party Offences are also amplified *vis-à-vis* what is contemplated in the Anticorruption Law. The penalties that may be assessed against private individuals include fines of up to twice the amount of the benefits obtained or, if no benefits have been obtained, of up to roughly US$550,000; private individuals may also be held liable for damages caused to the Government's finances as well as debarment for three months to eight years from contracting with the Government at any level (Federal, State and Municipal). In the case of legal entities, the finding of Private Party Offences may also result in a fine of up to twice the amount of the benefits obtained or, if no benefits were obtained, of up to roughly US$5.5 million, liability for the damages caused to Government finances and debarment from Government contracting for three months to 10 years. Other measures that may also be imposed upon private legal entities include suspension from activities related to the corrupt practices for a period of between three months and three years and dissolution, provided, in both cases, that a benefit for the legal entity is shown and that management has been privy or that systemic offending conduct is found.

The criteria for assessing the severity of the sanctions outlined above will depend on the seriousness of the offence and whether management of the legal entity has voluntarily disclosed the conduct and cooperated with the investigation or not. Moreover, leniency may be sought by private parties, provided that a procedure for the investigation of the corrupt conduct has not been formally notified and that a precise cooperation protocol is agreed upon with the investigating agency and cooperation commitments are complied with. The first person that submits to a leniency programme may be subject to reductions of between

50% and 75% of the assessable fines and up to total acquittal from debarment. Persons that pursue leniency after the first person has come forward may be granted a reduction of up to 50% of the assessable fines.

As described above, the Responsibilities Law reinforces and better prescribes the sanctions currently contemplated by the Anticorruption Law as well as the availability of leniency programmes. There is little clarity, however, as to how leniency will be sought under the Responsibilities Law before administrative authorities and how the TFJA interacts with the criminal prosecution of those same offences. As explained in the subsection on 'Criminal legislation' above, the ability to enter into a consent decree with a criminal prosecutor is only available in cases of petty bribery, whilst in bribery cases involving an amount in excess of roughly US$1,900, the prosecutor would appear to have no option but to bring charges. Unless there is absolute clarity as to how the disclosing person will be aided on both the administrative and criminal fronts, the virtuous conduct of disclosure and cooperation envisaged by the Responsibilities Law will be of limited practical use.

Compliance

The Responsibilities Law gives a preeminent place to the implementation and maintenance of compliance programmes, stressing to that effect that legal entities will be responsible for corruption offences committed by persons acting on its behalf and that result in a benefit for such legal entity. In line with this, article 24 of the Responsibilities Law lays out the elements that a corporate compliance programme must fulfil (*política de integridad*). Such elements are: (i) an organisation and procedures manual that is clear and complete and sets forth the responsibilities of each area and leadership roles; (ii) a code of conduct that is publicly available that sets forth systems and mechanisms for its real application; (iii) adequate and effective control, supervision and audit systems that are consistently and periodically running; (iv) adequate reporting systems, both internal and before competent authorities, as well as sanctions and specific consequences applicable to offenders; (v) adequate training programmes; (vi) HR policies for screening high-risk individuals in the course of recruiting procedures; and (vii) mechanisms for transparency and publicity of interests.

Whether or not a compliance programme is in place for a legal entity will be considered in an assessment of liability for corrupt practices. Thus, a compliance programme that is duly implemented and functioning will serve legal entities that are being investigated for alleged corrupt practices to obtain more lenient treatment with respect to the fines and measures that may be ultimately imposed. By the same token, the lack of a compliance programme may result in harsher fines and measures being imposed.

On the front of gifts and entertainment compliance ("G&E"), the regulatory approach existing at a Federal level before the Responsibilities Law took effect was that gifts and entertainment had to meet a two prong test to be considered unlawful for receipt by the Government official, namely: (i) the gift or entertainment would need to be delivered to a Government official regulating or directly related to the person delivering the gift; and (ii) the gift or entertainment delivered would need to give rise to a conflict of interest. Additionally, a well-established set of regulations had set a cap on allowable tangible gifts which were not to exceed a monetary value greater than 10 times the Unit of Measurement and Update (UMA) (approximately US$40).

Now, Article 7 of the General Responsibilities Law lays out general conduct guidelines to be followed by Government Officials. Paragraph II of said Article imposes an absolute ban on the acceptance of gifts and similar benefits by Government officials without setting forth a *de minimis* exception such as the one that existed previously. Accordingly, although certain

interpretations can be developed around the new principles contained in the Responsibilities Law, to define the regulations of G&E, a clear delineation of such regulations should be expected from the Coordinating Committee.

Recent enforcement activity

State Government corruption

An ongoing, high-profile corruption investigation and prosecution process is being conducted by Federal authorities and the authorities of the State of Veracruz against Javier Duarte, the former Governor of the State of Veracruz and a series of high-level Government officials that served during his administration. The allegations against Javier Duarte and former Government officials include bribery, fraud and embezzlement of Government funds. Specifically, the accusations include the irregular award of Government contracts to "strawman" companies controlled by Duarte and his accomplices which engaged in overpricing and bid-rigging. Publicly available sources and the investigation files prepared by anticorruption NGOs state that amounts diverted through the various schemes used by Mr. Duarte could reach up to MXP$45bn (roughly US$2.5bn).

Javier Duarte was extradited from Guatemala to Mexico on July 17, 2017 and is currently subject to an indictment process before the General Prosecutor's Office (*Procuraduría General de la República*, "PGR"). Moreover, the PGR and the Prosecutor's Office of the State of Veracruz have requested State and Federal Judges to issue a series of injunctive orders for the seizure of a number of properties owned by the former Governor, his close associates and relatives allegedly involved in such actions. Javier Duarte is also subject to a separate investigation involving alleged bribes in the amount of MXP$3.7m provided by certain offshore companies of Odebrecht in exchange of two Government projects regarding the supply of electricity for the State of Veracruz.

Similar investigations are also open against other former State Governors: Roberto Borge of Quintana Roo who has been arrested in Panama and is awaiting extradition to Mexico; Tomás Yarrington of Tamaulipas who has been arrested in Italy and is awaiting extradition to Mexico or the United States; while Cesar Duarte of Chihuaha who has fled from Mexico and is being persecuted by Interpol. What all these cases have in common, is that they do not arise from a systematic and structured investigation process such as the one contemplated by the SNA, but rather, they are all politically driven by the State Governments that took office after the prosecuted and persecuted governors left power.

Mexican ramifications of the Odebrecht Investigation

During proceedings before the United States District Court of the Eastern District of New York, Odebrecht officials confessed that the Brazilian construction company had paid at least MXP$10.5m in bribes to certain high-level Mexican Government officials. After such information was made public in the United States, numerous exchanges between the PGR and prosecutors in the United States in Brazil ensued during the first and second quarters of 2017, including a trip to Brazil by Mexico's General Prosecutor; however, none of the investigations or findings made by PGR came to public knowledge after that. Then a news article released on August 13, 2017 by the Brazilian newspaper O'Globo took Mexico by surprise as it contained references to the sworn statements of Luis Alberto Meneses Weyll, a high-level officer of Odebrecht, that implicated Emilio Lozoya – former head of Mexico's state-owned oil company Petroleos Mexicanos ("PEMEX"). According to the news, Emilio Lozoya allegedly received US$10m through offshore accounts in exchange for awarding a contract for refurbishing a PEMEX refinery worth US$115m; Mr. Lozoya has categorically

denied the allegations. Because according to Luis Alberto Meneses, the first payments were made while Mr. Lozoya was acting as a campaign manager for the acting President of Mexico, Enrique Peña Nieto, the case has the potential for reaching the highest circles of Mexican politics. However, given the recent developments in this case as this chapter goes to press, its ramifications are yet to be seen.

Conclusions

The SNA represents an important and noteworthy development in the fight against corruption in Mexico. The quality, consistency and comprehensiveness of the legislation implementing the SNA will afford a precious tool to Government and civil society. The deployment of the SNA has been slowed down by the impasse over the appointment of the Anticorruption Prosecutor and the Anticorruption Justices by the Senate. On the other hand, the States of Mexico that, as evidenced by the multiple investigations under way against former Governors, have been ravaged by corruption are ironically late in adopting functional local versions of the SNA. There are, however, committed Mexicans involved in the process that have started to make a difference by using the instruments they have available to speed up the process. The challenge will be to have a fully functional and deployed SNA as soon as possible, before Mexicans and the international community lose the trust and patience they have placed on this historical opportunity.

* * *

Endnotes

1. Even though the provisions of the Responsibilities Law have entered into force including those dealing with the "Offences of Private Parties" and the correlated administrative sanctions, the Special Chamber of the TFJA will be unable to try the related cases until the corresponding Justices are appointed. In order to attend any possible cases involving any of the offences provided under the Responsibilities Law, the TFJA implemented a temporary appointment by means of which an existing regional court of the TFJA will try any corruption matters. Such temporary appointment, however, has raised certain concerns as to the legality of any decision rendered by such court since such appointment contravenes the constitutional mandate that granted jurisdiction only to the Special Chamber of the TFJA. This could also result in further uncertainty as to any guidance that could derive from any decision or precedent rendered by the court considering the fact that such decisions could be challenged based on the regional court's lack of jurisdiction to hear and decide cases involving matters under the Responsibilities Law.
2. Not all of the State legislatures have created or modified local laws implementing local anticorruption systems consistent with the SNA, in spite of the deadline imposed on the States to do so. For example, the States of Chihuahua and Veracruz failed to issue the legislation creating their local anticorruption systems.

   In other cases, State laws contain certain aspects which diverge from those of the SNA. In the State of Morelos, for example, the citizens participation committee of the local anticorruption system is directly appointed by local congress without the vetting process or safeguards provided for the SNA.

   Likewise, the Coordinating Committees of other States are not consistent with the Coordinating Committee of the SNA. In the State of Quintana Roo, for example, the

coordinating committee includes a member of the local congress which has raised concerns as to the committee's impartiality and independence. Quintana Roo also established municipal anticorruption systems and coordinating committees. This has raised concerns as to how will the SNA be able to coordinate and interact with the local and municipal anticorruption systems of the State of Quintana Roo. Similarly, the coordinating committees of the States of Guanajuato, Aguascalientes, the State of Mexico and Mexico City provide for certain mechanisms such as a greater number of members in their respective coordinating committees which dilutes the representation of the members appointed by the citizens participation committees.

Finally, other States, such as the State of Colima, Nayarit, Oaxaca and Puebla have failed to contemplate digital platforms that are consistent with the National Digital Platform of the SNA, which has raised certain concerns as to the effective sharing of information between Federal and State levels on transparency and anticorruption matters.

3. The members appointed to the Citizens Participation Committee are: (i) Jacqueline Peschard Mariscal who in previous years acted as a councilwoman of the Federal Electoral Institute and chairperson of the Access to Public Information Federal Institute; (ii) Mariclaire Acosta Urquidi who is the head of the Freedom House organisation which focuses on protection of human rights and freedom of speech; (iii) Alfonso Hernández Valdez who in previous years acted as head of the Research and Investigations department of the Access to Public Information and Data Protection Institute; (iv) José Octavio López Presa who is a founding member of the Causa en Común (common cause) organisation which focuses on advancing transparency and accountability matters; and (v) Luis Manuel Pérez de Acha who has participated in various citizens' initiatives in connection with transparency and accountability matters in addition to heading a law firm specialised on impact litigation.
4. While some of its members, such as the head of the Superior Federal Comptroller, the Secretary of the Public Function and the head of the Access to Public Information and Data Protection Institute are already appointed, the appointment of the Chief Anticorruption Prosecutor is still pending. It is expected that such appointment should be made prior to the 2018 Presidential and Congressional elections.
5. This agency was originally created in 1982 and existed under the name of *Secretaría de la Contraloría General de la Federación*; in 1994 it changed its name to *Secretaría de la Contraloría y Desarrollo Administrativo* and since 2003 has existed under its current name.
6. Before the enactment of its new enabling statute, the Federal Tribunal of Administrative Justice (*Tribunal Federal de Justicia Administrativa*) was previously known as the Federal Tribunal of Administrative and Fiscal Justice (*Tribunal Fiscal de Justicia Fiscal y Administrativa*). Although the word "*Fiscal*", which refers to its jurisdiction on tax matters, was eliminated from its name, it retains such jurisdiction for settling cases related to the challenge of Mexican tax laws.
7. It was only in 2012 that Articles 35 and 71 of the Mexican Constitution were amended in order to include the rights of citizens to present legislative initiatives before the Mexican Congress.
8. With the Responsibilities Law entering into force on July 19, 2017, the Federal Anticorruption Law in Public Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*) ("Anticorruption Law") was repealed. The scope of the Anticorruption Law was more limited than the Responsibilities Law as it only applied to

corrupt practices occurring in the course of Federal procurement processes. Moreover, there are no reported cases where the Anticorruption Law has been applied, perhaps because it was devoid of an enforcement system such as the one that is being implemented through the SNA.

9. The following practices were considered violations under Article 8 of the Anticorruption Law: (i) promising, offering or delivering money or any other gift to a Government official or a third party (participating in the design or preparation of the call for a public bid or any other act related to the Federal public procurement process) in exchange of such Government official's restraint from performing any act related to his/her responsibilities or to the responsibilities of another Government official, with the purpose of obtaining or maintaining a benefit or advantage, regardless of the acceptance or receipt of said money or gift or of the results obtained in connection therewith; (ii) carrying out any action that implies or has as the purpose of obtaining an undue benefit or advantage within any Federal procurement process; (iii) carrying out any act or omission with the intent or effect of participating in a Federal public procurement process, notwithstanding that such person is restricted by law or a Governmental order from participating in such a process; (iv) carrying out any act or omission with the intent of avoiding or simulating compliance with the requirements or rules set forth in any public procurement process; (v) intervening for the benefit of any person restricted from participating in Federal public procurement processes, with the intent of having such person benefit, either totally or partially, from the relevant contract; (vi) causing a Government official to give, undersign, grant, destroy or deliver a document or a good, with the intent of receiving a benefit or advantage for oneself or a third party; (vii) promoting or using economic or political influence (real or fictitious) on any Government official with the purpose of obtaining for oneself or a third party a benefit or an advantage, regardless of the effectiveness of such influence or the results obtained in connection therewith; and (viii) presenting altered or false documentation or information with the purpose of obtaining a benefit or an advantage.
10. Pursuant to a binding precedent of Supreme Court of Justice of Mexico, the crime of bribery is deemed to have occurred when: (i) money or any other economic benefit is offered or requested, respectively, by a private party or Government official; and (ii) the purpose of said offer or intent is to induce an action or omission of the Government official relating to the duties vested in him/her. *See*, *Cohecho Activo, Elementos que Integran el Tipo Previsto en los Artículos 222 Fracción II de Código Penal Federal y 174 Fracción II del Código Penal Para el Estado de Michoacán*. 1ª/J.99/2001, published in the Judicial Weekly Gazette Book XIV, December 2001.
11. By contrast, the definition of Bribery contained in Article 66 of the Responsibilities Law as it relates to private parties, which as mentioned above will be enforceable through proceedings before administrative courts, does contemplate the situation where a Government official receives a bribe but does not act within his/her authority but causes another official who does have the authority to act instead.

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Romania

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Brief overview of the law and enforcement regime

Recently, the anticorruption fight in Romania seems to have reached deadlock: while the related statistics continue to show impressive numbers, reflecting the perseverance and efficiency of the state actors, there has been increasing concern in the public domain that the overriding objective of deterring corruption has at times challenged the separation and balance of powers.

The featured priorities set out by the National Anticorruption Directorate (DNA), according to an overview of the 2016 Activity Report issued by this prosecutorial structure, dealt with fighting corruption manifested in public procurement proceedings (especially in the health and infrastructure domains), the judiciary, and the use of European funds as well as with recovering the proceeds of crime and the application of extended confiscation.

Legal regime

Although we have a relatively new criminal legislation – which came into force on 1 February 2014 – there have been numerous amendments to the Criminal Code and Criminal Proceedings Code so far, some of them stemming from the decisions rendered by the Constitutional Court, whereby exceptions of unconstitutionality regarding criminal law and procedure provisions have been upheld. For instance, as mentioned in the DNA 2016 Activity Report, no less than 12 such decisions relating to provisions of the Criminal Procedure Code found unconstitutional were given in the course of 2016. Moreover, the mandatory rulings of the High Court of Cassation and Justice, the supreme court of Romania, rendered following referrals in the interest of law or requests for preliminary rulings to settle legal issues in criminal matters have played a significant part in ensuring the unitary interpretation and enforcement of the legal provisions and in developing the relevant case law.

Also, proposals for amending the Romanian criminal legal framework, both material and procedural, are frequently launched for debate. The most recent one, put forward by the Ministry of Justice on April 19, 2017, aims at amending and supplementing the Criminal Code, the Criminal Procedure Code as well as supplementing certain provisions of Law no. 304/2004 on judicial organisation and Law no. 253/2013 on the enforcement of punishments, educational measures and other non-custodial measures ordered by the judicial body throughout criminal proceedings. As per the Explanatory Memoranda of the draft law, these legislative interventions are necessary in order to bring the legal framework in line with the latest Constitutional Court decisions as well as to transpose the provisions of (i) 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 that remained to be inserted in the national legislation, and (ii) article 8 para. (4) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, regarding the right to be present at a trial.

On the other hand, Romania is still under the Cooperation and Verification Mechanism (CVM) under European Commission supervision which provides, *inter alia*, the stability of anticorruption legislation, penalising attempts by lawmakers to change it. As two of the four benchmarks established for Romania address issues pertaining to corruption, the latest CVM report, released on January 25, 2017 by the European Commission, acknowledges the solid endeavours of tackling high-level corruption, while emphasising the need to improve the fight against lower-level corruption.

During the last year, there have not been any newly adopted pieces of legislation affecting the incrimination of bribery. Therefore, corruption offences remain subject to the main legislative acts presented in the previous edition: the Romanian Criminal Code, Law no. 78/2000 on the prevention, discovery, and sanctioning of corruption acts; and Law no. 656/2002 on the prevention and sanctioning of money laundering, with subsequent amendments and supplements thereof.

Romanian criminal law distinguishes four categories of corruption offences as stipulated in the Criminal Code in Title V, Chapter I ("Corruption offences"): bribe-taking (art. 289); bribe-giving (art. 290); influence peddling (art. 291); and buying influence (art. 292).

Law no. 78/2000 regulates three categories of offence which fall within the sphere of acts of corruption. As amended and supplemented, Law no. 78/2000 refers to the following three categories of crimes: corruption offences; offences assimilated to corruption offences; and offences against the financial interests of the European Union. The aforementioned Law also provided for a fourth such category, namely offences directly related to corruption offences or assimilated offences, these provisions having been explicitly repealed by means of Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code, probably in view of eliminating overlapping incriminating provisions.

In accordance with the relevant provisions of the Criminal Code and Law no. 78/2000, the offence of bribery is provided for in a type version, an assimilated version, an attenuated version, and an aggravated version.

Therefore, article 289, paragraph 1 of the Criminal Code incriminates 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, speeding up or delaying the performance of an action which falls under the purview of their professional duties or with respect to the performance of an action contrary to their professional duties.

Pursuant to article 289 paragraph 2 of the same code, the above-described act, if committed by a person in a similar capacity to a public servant under criminal law as per article 175 paragraph 2 of the Criminal Code (i.e. a person exercising a service of public interest for which he/she was invested by the public authorities or that is subject to the control or supervision of the latter with respect to fulfilling that public service), is considered an offence only when perpetrated in connection with the failure or delay of the fulfilment of their duties regarding a legal act, or in connection with performing an act contrary to these duties.

The main punishment for acts which fall under the material element of a bribery offence may be imprisonment from three to 10 years. Article 289, paragraph 1 also states that, in addition to the main penalty, bribe-taking is punishable by a complementary penalty of prohibition from exercising the right to hold public office or to exercise the profession or activity in the performance of which the offender has committed the act, for a period of one to five years. For this offence, considering the gravity of the criminal act, the additional punishment mentioned above is mandatory, the court no longer being required to check, in each case, whether, given the nature and gravity of the offence, the circumstances of the case and the person of the offender, this penalty is necessary. Until the completion of the enforcement of the main punishment or until it is considered as enforced, the same rights will be banned as an accessory punishment.

Correspondent to the offence of **bribe-taking**, our legislation regulates the bilateral offence of **giving a bribe**. The promise, the giving or the offering of money or other benefits in the conditions provided under Article 289 shall be punishable by no less than two and no more than seven years of imprisonment.

The protected social value is the same as for the offence of bribery, namely the honesty of state officials, who must not seek or accept any additional benefit for exercising a public position, nor must they sell the benefit of their status to those who are interested in a particular conduct.

Regulating the offence of bribery as a bilateral offence has an important preventive nature; it also represents an effective means for proving offences of bribery. First, the briber is punishable with a milder punishment than the corrupt official. In addition, through self-denunciation the briber has the opportunity to provide a strong evidentiary means that will help authorities to prove bribe-taking.

However, the minor difference between the penalties of the two offences leads to the conclusion that the Romanian legislator has considered that the act of giving or offering bribes must be sanctioned about the same as the act of receiving bribes.

Also included in the corruption chapter of the Romanian Criminal Code are the offences of **influence peddling**, punished by article 291, and **buying influence**, punished by article 292.

Influence peddling is defined as soliciting, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or who alleges that they have influence over a public servant and who promises they will persuade the latter to perform, fail to perform, speed up or delay the performance of an act that falls under the latter's remit or to perform an act contrary to such duties and is punishable by no less than two and no more than seven years of imprisonment. Buying influence is the promise, the supply or the giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges they have influence over a public servant to persuade the latter to perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties and is punishable by no less than two and no more than seven years of imprisonment and prohibition from exercising certain rights.

In our Criminal Code, as a rule, the perpetrator must be defined as a public servant. However, an attenuated version of each of the four previously analysed corruption offences is provided for under article 308 of the Criminal Code, if the offence is committed by or relating to so-called "private servants", namely persons exercising, in a permanent or temporary manner, with or without remuneration, a duty of any nature in the service of a

natural person as set out under article 175 paragraph 2 of the Criminal Code or of any legal person. This hypothesis determines the reduction by a third of the punishment provided for by law.

According to the aggravated versions stipulated by article 7 of Law no. 78/2000, the acts of bribe-taking or influence-peddling committed by a person who holds a publicly appointed office, is a judge or prosecutor, a criminal investigation body or has duties of finding or sanctioning contraventions, or is one of the persons indicated under article 293 of the Criminal Code (i.e. members of the arbitration courts) are punishable with the penalty provided by art. 289 or 291 of the Criminal Code, whose limits are increased by one third, thereby extending the punishments to imprisonment as follows: between four years and 13 years and four months, as well as between two years and eight months, and nine years and four months, respectively, which reflects the higher severity of the offences.

Law no. 78/2000 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 from public funds or to be reimbursed from public funds;
- the act of a person who, having the task to monitor, control, reorganise or liquidate a private economic operator, fulfils any task for it, intermediates or facilitates the conducting of financial or commercial transactions or participates with capital to such economic operator 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 person, to use influence or authority for the purpose of obtaining for himself or for another money, goods or other undue benefits.

Recently, the offence of **abuse of office** has been widely commented upon and the Constitutional Court has been repeatedly referred to pertaining to exceptions of unconstitutionality invoked with respect to this offence. The abuse of office is incriminated under article 297 and, in an attenuated form, under article 308 of the Criminal Code, as belonging to the category of malfeasances in office. By virtue of the provisions set out under article 13^2 of Law no. 78/2000, according to which, in case of abuse of office or misuse of position offences, if the public servant has obtained for themselves or for another an undue benefit, the special limits of the punishment provided for by law are increased by one third; this offence is assimilated to corruption offences.

There have been some voices arguing for the decriminalisation of the abuse of office because of the excessively general, ambiguous, and unpredictable nature of the provisions incriminating this act, in spite of the warnings expressed by the DNA Chief Prosecutor that, if this situation were to occur, over 800 cases dealing with frauds committed in the public procurement domain, amounting to several million euros, would be closed. DNA has

also made public the figures submitted to the Constitutional Court regarding the relevant cases dealing with abuse of office offences, which indicate that, as of 2006 until 2016, a total number of 241 cases referred to this offence and a number of 1,471 defendants have been arraigned in such cases (569 of them already having been convicted since 2013 for committing abuse of office), which proves a well-established case law of the national courts.

Upon the summing-up of the activity carried out in 2016, the DNA Chief Prosecutor mentioned that over a quarter of the defendants arraigned in 2016 have been charged with abuse of office and the overall damage originating from abuse of office acts identified throughout the same period of time exceeds EUR 260 million.

On 15 June 2016, by means of Decision no. 405, the Constitutional Court upheld the exception of unconstitutionality only with respect to the interpretation of the phrase referring to public servants' "faultily" performing an act, as provided in the legal content of the abuse of office offence, which only complies with the constitutional norms if it is construed as performing it "by infringing the law".

With respect to the possible result of the abuse of office offence, within the merits of this decision, the Constitutional Court notes that the current legal framework does not indicate a certain threshold for the damage or a certain intensity of the harm caused to the rights and legitimate interests of a person. However, the Court adds that the lawmakers' intention is not likely to have been such as to include any act meeting the legal requirements, regardless of its intensity, to fall under the text of incrimination, as there are also more lenient forms of liability available in such cases. Currently, there is no consensus whether the aforementioned criteria should be the subject matter of legislative amendments or of judicial discretion.

Other legal consequences

Other penalties applicable to corruption offences include those of a pecuniary nature.

For recovering damages in criminal cases in Romania, specific procedures are set out, as follows:

- Special confiscation, provided by article 112 of the Criminal Code, refers to confiscation of assets originating from an offence or an act set out under criminal law and involves passing goods into state ownership strictly and exhaustively provided by law. This sanction has personal character and implies that assets cannot be confiscated jointly, only separately from each perpetrator.
- Extended confiscation provided for by art. 112^1 of the Criminal Code can be ordered if the following conditions are cumulatively met:
    a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict; and
    b) the court is convinced that the relevant assets originate from criminal activities such as corruption offences, offences assimilated thereto, as well as offences against the financial interests of the European Union (currently, the list of offences that may allow for extended confiscation is strictly provided for by law, but the draft law launched for debate in April 2017 aims at extending the scope of this text by eliminating the exhaustive enumeration of offences).

According to Decision no. 11/2015 rendered by the Constitutional Court of Romania, extended confiscation shall not apply to the assets acquired prior to the entering into force

of Law no. 63/2012 for amending and supplementing the previous and current Criminal Code (i.e. on 22 April 2012), as it would be contrary to the principle of non-retroactivity of the law.

Apart from the two aforementioned safety measures, namely special and extended confiscation, which have the nature of penalties pertaining to criminal law, there is another means of confiscating unjustified assets, whereby the National Integrity Agency (ANI), an autonomous administrative authority functioning at the national level, may ask the courts to confiscate property or money if, after verification of their acquisition, modality is found that the person cannot justify their origin; in this case, the proceedings being of a civil nature (as indicated in the activity report for 2016 issued by the National Integrity Agency, there were 16 final decisions of confiscating unjustified assets, as compared to nine decisions rendered in 2015, none rendered in 2014, and five decisions rendered between 2008–2013). The evaluation reports drawn up by the integrity inspectors may also be referred to the criminal investigation or tax bodies, as the case may be.

Regarding corruption offences, our criminal legislation stipulates that money, valuables or any other benefits received shall be subject to confiscation, and when such can no longer be located, the forfeiture of the equivalent shall be ordered.

In case of bribe-taking or influence peddling, article 289, paragraph 3 and article 291, paragraph 2 of the Criminal Code do not limit the scope of persons to whom confiscation can be applied only to the convicted person, therefore making extended confiscation possible; in the same way, confiscation is not limited to only the equivalent in cash of the received benefits – any property liable to be valued in money may be subject to confiscation.

Also, giving a bribe or buying influence, money, valuables or any other benefits offered or given shall be subject to confiscation, and when such cannot be located, the forfeiture of the equivalent shall be ordered, except if a denunciation followed the giving of the bribe, in which case these assets shall be returned to the briber who denounced the act of corruption.

In the first stage, the prosecutor conducting or supervising the criminal prosecution in the corruption case shall determine, by accounting expertise or a report compiled by accounting specialists, what the amount of damages is, and will order asset freezing – for example, seizure – to ensure that the person who is being investigated will not alienate property and, thus, avoid a situation where, upon resolving the criminal proceedings, the state should find it impossible to recover the damage.

Subsequently, as the court can maintain asset freezing during criminal proceedings or can even extend it, a special or extended confiscation might be ordered (the latter may be ordered only in the event of a conviction).

When resolving the case, the court will also settle the civil action, where applicable.

According to DNA's 2016 activity report, discovering and seizing the proceeds of crime has been addressed as an essential part of the investigation carried out last year by DNA, and the figures are strikingly illustrative. Out of 259 cases in which indictments have been issued and six cases in which guilty plea agreements have been concluded for offences which generated criminal product, it has been established that the total money and property acquired as object of corruption offences was worth RON 681.5m, the equivalent of €153.3m (as compared to RON 1,918m, the equivalent of €431.6m in 2015), and the damage created as material benefits amounted to RON 3,137.9m, the equivalent of €705.9m (as compared to RON 3,347.2m, the equivalent of €753m in 2015).

During the criminal prosecution carried out by DNA, precautionary measures were ordered in view of special confiscation or to repair the damage caused by the offence up to the total amount of RON 2,999.60m, the equivalent of €667.94 – up by 72% compared to 2015.

There is an increasing degree of recovery from the criminal investigation phase and a concern for maintaining effective implementation of precautionary measures as an important component in the criminal investigation activity carried out by DNA.

It should be noted in this context the importance of using the institution of extended confiscation and the practice and development of Romanian judicial bodies in this area.

Recovery of crime products is of constant interest in the activities of the judicial bodies involved in investigating and prosecuting high-level corruption offences and economic crimes producing damages of great value.

A key challenge is the enforcement of court decisions by the institutions involved in the recovery of confiscated assets or damages against the national budget or the EU budget. The institution with the main role in the recovery of damages to the state is the National Agency for Fiscal Administration (ANAF), being responsible to actually transfer money into state ownership. As stated within the 2016 activity report issued by ANAF on April 7, 2017, during 2016, there were 712 final rulings/judgments/decisions rendered in criminal matters, ordering the confiscation of assets and/or moneys. From the activity of recovering assets and moneys confiscated as such, an amount of RON 22.1m has been collected.

Main bodies involved

The National Anticorruption Directorate (DNA) is a criminal prosecution body specialised in combatting corruption, created as a necessary tool in detecting, investigating and bringing to court cases of medium and high corruption. Through its work, it contributes to reducing this phenomenon, in support of a democratic society closer to European values.

It is a structure with clearly defined powers, created according to a model adopted by several European countries – Spain, Norway, Belgium and Croatia.

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, exercising its duties under the law and only for its enforcement.

The offences provided by Law no. 78/2000 with its subsequent amendments and supplements, applicable in the circumstances described below, fall under DNA's jurisdiction:

a) if, regardless of the capacity of the persons who committed them, they caused a material damage higher than the equivalent in RON of €200,000, or if the value of the sum or of the goods which represent the object of the corruption offence is higher than the equivalent in RON of €10,000; or
b) if, regardless of the value of the material damage or the value of the sum or of the goods which represent the object of the corruption offence, they are committed by: deputies; senators; Romanian members of the European Parliament; the member appointed by Romania within the European 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 articles 293 and 294 of the Criminal Code, which refer to certain categories of members of arbitration panels or foreign officials.

The offences against the financial interests of the European Union fall under DNA's jurisdiction. Also, DNA shall be competent to investigate offences of diverting public tenders, abuse of office, and misuse of office, provided a damage exceeding €1,000,000 was caused thereby.

According to Government Emergency Ordinance no. 43/2002, the National Anticorruption Directorate is set up as a structure with legal personality, within the Prosecutor's Office attached to the High Court of Cassation and Justice, following the reorganisation of the National Anticorruption Prosecutor's Office. As of 2015, a new internal regulation policy of this prosecutorial structure has entered into force, which is approved by Order no. 1643/C/2015, issued by the Ministry of Justice, superseding the previous one, dating from 2006. The legal framework is to be complemented with the rest of the provisions regulating the judicial activity.

The National Anticorruption Directorate has its headquarters in Bucharest and exercises its duties on the entire Romanian territory with specialised prosecutors in combatting corruption.

The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice leads DNA through the Chief Prosecutor of the latter. The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice solves conflicts of jurisdiction which arise between DNA and the other structures or units within the Public Ministry.

In accordance with Government Emergency Ordinance no. 43/2002, the duties of the National Anticorruption Directorate are the following:

- to conduct the criminal prosecution under the conditions provided by the Criminal Proceedings Code, by Law no. 78/2000 on preventing, discovering, and sanctioning corruption acts and by the present emergency ordinance, for offences provided for by Law no. 78/2000 which fall, according to article 13, under DNA jurisdiction;
- to conduct, supervise, and control criminal investigation acts, carried out as a result of the prosecutor's orders by the judicial police officers who are under the exclusive authority of the DNA Chief Prosecutor;

- to conduct, supervise, and control the technical activities of the criminal prosecution, carried out by specialists in the economic, financial, banking, customs and IT fields, as well as in other fields, appointed within DNA;
- to notify the courts for taking the measures provided by law and for conducting the trial in cases regarding the offences provided for by Law no. 78/2000, with its subsequent amendments, which fall, according to article 13, under DNA jurisdiction;
- to take part in trials, under the conditions provided by law;
- to exercise the means of appeal against judges' decisions, under the conditions provided by law;
- to study the causes which generate corruption and the conditions which favour it, to draw up and submit proposals with a view to their elimination, as well as to improve criminal legislation;
- to draw up an annual report on the activity of DNA and to present it to the Superior Council of Magistracy and to the Minister of Justice no later than February the next year, and the Minister of Justice will present to Parliament the conclusions on DNA's activity report;
- to set up and update the database in the field of corruption acts; and
- to carry out other tasks provided for by law.

The National Anticorruption Directorate exercises its rights and fulfils its procedural tasks provided by law in matters regarding the offences provided by Government Emergency Ordinance no. 43/2002 under its jurisdiction. In performing his/her duties, the DNA Chief Prosecutor issues orders.

This criminal prosecution body is enjoying appreciation among Romanians and public confidence in the actions of DNA has largely maintained between 50% and 60% since 2015. In accordance with the INSCOP Research polls, the level of confidence in DNA, as at April 2016, was of 59.8% (as compared to the percentage in September 2015, which registered the highest level of confidence since the establishment of the institution, namely 61.2%). Moreover, as the statistics of the aforementioned DNA activity report show, over 86% of the files registered with DNA in 2016 are based on referrals made by private natural or legal persons as well as by public institutions. A strong public trust in the judiciary has also been noted in the CVM report.

Under Romanian law, prosecutors (magistrates) are the lead investigators in corruption cases. This approach is 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. The Romanian law mirrors this approach.

For the trial of crimes of corruption and of associated crimes, specialised panels of judges may be set up, according to articles 19, 35, 36, and 39 of Law no. 304/2004 on judicial organisation, republished, with the subsequent modifications.

In recent years, the **National Intelligence Service** (SRI) has become an important pillar in the fight against high-level corruption. SRI supports DNA in anticorruption activities through referrals and technical support. However, with all the confidence in the institution, one of the concerns of civil society is that SRI is too involved in the activity of DNA, which could affect the institution.

If a prosecutor investigating the cause deems it necessary that a suspect be listened to/watched, he must obtain a warrant from a judge to intercept communications or carry out surveillance on the person and SRI is legally required to provide technical support to any prosecutor because, according to our legislation, SRI represents the national authority in the

field of intercepting communications. Often, DNA would release a statement something along the lines of: "In the present case, prosecutors were supported by the National Intelligence Service."

However, by Decision no. 51 of 16 February 2016 by the Romanian Constitutional Court, the exception of unconstitutionality pertaining to the provisions set out under article 142, paragraph 1 of the Criminal Proceedings Code has been upheld (according to which the prosecutor enforces the technical surveillance warrant or can order that it be carried out by the criminal investigation body or by specialised police workers or other specialised state bodies), ruling that the phrase "or other specialised state bodies" – which includes other institutions, such as SRI – is not in conformity to the Constitution as it lacks the standards of clarity, precision, and predictability inherent to the legal norms.

This decision has stirred highly complex debates regarding fears related to undue intrusions in the private life of persons, which eventually led to the amendment and supplementing of the legislation in force by means of Government Emergency Ordinance no. 6/2016. Thus, the aforementioned phrase which was deemed unconstitutional has been removed from article 142 and it has been added that, in order to execute the special measures of surveillance or investigation, the prosecutor, the criminal investigation bodies or the specialised police workers directly employ the technical systems and appropriate proceedings in order to ensure the integrity and confidentiality of the collected data and information. Furthermore, it is provided that, at the request of the criminal prosecution bodies, the National Centre for Intercepting Communications within the Romanian Intelligence Service shall ensure direct and independent access of such bodies to the technical systems with the purpose of carrying out technical surveillance.

In the context of institutional improvements, it must be noted that, by means of Law no. 318/2015, a new institution has been established, namely the **National Agency for the Management of Frozen Assets** (ANABI), under the authority of the Ministry of Justice, acting as a national Asset Recovery Office, as per the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, as well as a national office for the management of frozen property, for the purposes of article 10 of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. According to the ANABI 2016 activity report, the Agency's becoming operational is an ongoing process, which required in 2016 the adoption of several legal acts and the carrying out of various subsequent activities according to the law; ANABI started functioning in an autonomous manner on December 27, 2016.

Overview of enforcement activity and policy during the last year

The primary focus of the recent period has undoubtedly been the criminal case formed in connection with the Government's adopting of the Emergency Ordinance (GEO) no. 13/2017 on January 31, 2017, dubbed "The Adoption of Ordinance 13". This act aimed at amending the Criminal Code and Criminal Prosecution Code but, following severe public backlashes, it was repealed by GEO no. 14/2017, published in the Official Journal of Romania on February 5, 2017.

Thus, following a denunciation submitted by two individuals against the Prime-Minister and Minister of Justice at the time, the adoption of GEO no. 13/2017 has become the subject matter of *in rem* criminal prosecution.

According to a press release issued by the Prosecutor's Office attached to the High Court of Cassation and Justice dating from February 27, 2017, the prosecution was initially initiated by DNA and, subsequently to a partial closing of the case with respect to the offence provided for under article 13 of Law no. 78/2000 (consisting in the act committed by a person holding a position within a party, a union or employers' association or within a non-profit legal person of using their influence or authority with the purpose of obtaining, for themselves or for another, money, assets or other undue benefits), it disjoined the case and declined jurisdiction in favour of the Prosecutor's Office attached to the High Court of Cassation and Justice in order to investigate the possible committing of the following offences: aiding and abetting the perpetrator; presenting inexact data to the Parliament or President of Romania with regard to the activity of the Government or of a ministry, in order to conceal acts liable to harm the State's interests; removing or destroying documents; removing or destroying evidence or documents; and forgery.

As per a second press release, dating from June 26, 2017, the case was eventually closed on the grounds that the acts are not provided for under criminal law, as a result of the decision no. 68 rendered on February 7, 2017 by the Constitutional Court, following a referral coming from the Chairman of the Senate. With a majority of votes, the Court had found a constitutional legal conflict in progress between DNA and the Government of Romania, generated by DNA's assigning itself the duty of verifying the legality and appropriateness of a legal act, namely the GEO no. 13/2017, by violating the constitutional powers of the Government and of the Parliament, provided for under article 115 paragraphs (4) and (5) of the Romanian Constitution, as well as those of the Constitutional Court, as per article 146 sub-section d) of the Constitution.

As shown in the merits of this decision, in the case of the proceedings for the adoption of legal acts by the Government, the failure to comply with the legal or constitutional provisions is sanctioned by constitutional, extra-criminal means; namely, the finding that it is unconstitutional, resulting in its lack of producing legal effects. In terms of verifying issues of appropriateness, the Court noted that a simple or emergency ordinance, as a legal act of power, represents the exclusive will of the lawmaker (in this case, the delegate lawmaker, namely the Government), that decided to legislate depending on the necessity of regulating a certain area of social relations and on its specificity. Thus, no other public authority, belonging to any power other than the legislative one, can control legal acts of the Government from the perspective of the appropriateness of the law-making act. In the context of this analysis, the Constitutional Court made reference to the Report on the relationship between political and criminal ministerial responsibility, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013) [CDL-AD (2013)001]. In conclusion, the Constitutional Court established that the adoption of legal acts *per se* cannot amount to an offence, regardless of the legal classification taken into consideration; consequently, the Public Ministry, as part of the judicial authority, cannot verify issues of legislative appropriateness, the compliance with the legislative proceedings and, implicitly, the lawfulness of adopting a Government emergency ordinance, as this would equate to a serious violation of the principle of separation of powers within the state.

Months later, "The Adoption of Ordinance 13" matter continues to reverberate: disciplinary action against the prosecutors dealing with the criminal case is currently being discussed and also an exception of unconstitutionality regarding the GEO no. 14/2017, repealing GEO no. 13/2017, has already been invoked.

There are also other resounding cases that can be highlighted in the analysed timeframe, which are set out below.

For instance, in the criminal case dubbed "Bribery at LPF [i.e. the Professional Football League]", in August 2017, DNA ordered the arraignment of 10 defendants, both natural and legal persons, for committing bribery and money laundering offences. According to the press release, in the course of 2008, an open outcry auction was organised at LPF, with the object of assigning the broadcasting rights relating to the Premier League football matches in the competitional seasons 2008–2009, 2009–2010, and 2010–2011. The consortium of which SC RDS & RDS SA was part was declared the winner, for a price of €101,150,000 (VAT included). In 2009, in the context of the economic crisis, the consortium requested that LPF granted more advantageous contractual terms. Subsequently, the President of LPF allegedly profited from these circumstances, requesting the representatives of SC RCS & RDS SA to form a joint venture with SC Bodu SRL, a company he supposedly controlled, in exchange for allegedly supporting the interests of SC RCS & RDS SA with the League. In between 2009–2011, SC RCS & RDS SA paid to SC Bodu SRL the amount of €3,100,000 and in between 2015–2016, the Prosecutor's Office alleges that the parties to the joint venture acted for concealing the illicit origin of the agreement. In the prosecution phase, precautionary measures have been ordered in view of confiscation and by the indictment it was proposed that they be maintained.

The complex extradition proceedings of three businessmen, namely Sebastian Ghiță, Alexander Adamescu, and Gabriel "Puiu" Popoviciu, from Serbia and Great Britain, respectively, are also noteworthy. The first two are sought for prosecution, while the latter for serving a conviction sentence for charges of corruption offences.

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 decided to sanction the offence of receiving undue benefits (formerly provided as a stand-alone offence) as an act of bribery. This means that, according to Romanian criminal legislation, 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 speed up a process which it is the official's job to arrange.

A bribe includes a benefit given or received in any form, which may include: cash; favours; unfair advantages for family or friends in respect of training or employment opportunities (secondments, work experience, trainee positions, internships or permanent positions); and the provision of services, gifts, hospitality or entertainment.

The giving and receiving of modest gifts and hospitality is an acceptable business practice provided that it is proportionate and not done solely in order to gain or retain business or to create a business advantage.

For example, Law no. 78/2000 provides that the persons who exercise a public position, irrespective of the way in which they are invested, within public authorities or public institutions and who carry out control duties according to the law, are obliged to declare, within 30 days from receipt, any direct or indirect donation or physical presents received in connection with the exercising of their functions or duties, with the exception of those that have a symbolic value.

Also, according to the provisions of Law no. 176/2010 regarding the integrity in the exercising of public office and standing, for the amendment and supplementation of Law no. 144/2007 for the establishment, organisation, and functioning of the National Integrity Agency as well as for the amendment and supplementation of other pieces of legislation, there are no less than 39 categories of persons that have the obligation to declare their assets,

such as the President of Romania, members of the Parliament and of the Government, the prime minister, the magistrates, members of the Court of Accounts, the Ombudsman or the governor of the National Bank of Romania, just to name a few. An act by a person that, intentionally, submits untrue declarations of assets or of interests constitutes the offence of false declaration, and is punishable according to the Criminal Code.

Failing to submit such declaration within the time limits prescribed by law constitutes a contravention, subject to a fine, and the National Integrity Agency may initiate the evaluation proceedings *ex officio*.

By means of preliminary ruling no. 19/2015, rendered by the High Court of Cassation and Justice in settling legal issues in criminal matters, it has been decided that an act committed by a doctor hired under an employment agreement in a hospital unit pertaining to the public healthcare system, who has the status of a public servant, as per the provisions of article 175, paragraph 1, sub-section b), second sentence of the Criminal Code, consisting in receiving additional payments or donations from patients, under the conditions provided for by Law no. 46/2003 on the rights of the patients, does not constitute the exercising of a right acknowledged by law that would justify the act and prevent the incurring of criminal liability on such person.

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

Self-reporting and whistle-blowers

In Romania, self-reporting is controlled by a particular impunity clause within the offences of giving bribes and buying influence.

According to article 290, paragraph 3 of the Criminal Code, the bribe-giver shall not be punishable if they report the action prior to the criminal prosecution bodies being notified thereof. Likewise, article 292, paragraph 2 stipulates that the perpetrator shall not be punishable if they report the action prior to the criminal prosecution bodies being notified thereupon.

The impunity clause will be applicable if the following conditions are met:

- The briber/purchaser of influence reports the criminal act.
- The denunciation is made before the criminal body is notified.

The provisions of Article 290 paragraph 3, as well as Article 292 paragraph 2, are designed to prevent bribery offences by creating for those who would be tempted to take bribes the fear that they will be denounced.

In this case, the money, valuables or any other assets will be returned to the briber/purchaser of influence if they were given following the denunciation. In the 2016 DNA activity report, it is stated that the value of the amounts that were the object of confiscation or payment of damages ordered in a final manner in 2016 by court rulings was greater than that registered in the previous year, following the partial recovery of the damage cause as well as the provisions on returning the sums to whistle-blowers.

Numerous cases dealt with by DNA are formed as a result of denunciations and self-reports, made either by suspects already criminally investigated or people who had knowledge of acts of corruption.

Plea bargain

The guilty plea agreement is provided as the document for initiating proceedings, concluded between the prosecutor and defendant, if the defendant (individual or legal person) intends to acknowledge the facts making up the accusations and their legal classification, and agree

to a punishment and a manner of individualisation, namely the type and amount of the punishment and its form of execution.

Judicial bodies shall notify the defendant of the possibility of signing such an agreement during the criminal investigation phase, as a result of admitting guilt, and it can be initiated either by the prosecutor or by the defendant.

To have concluded such an agreement, the following conditions must be met:

- The criminal action has been initiated.
- The defendant is assisted by a lawyer, either freely chosen or publicly appointed, as legal assistance is mandatory.
- Law must provide a punishment up to 15 years of imprisonment or a fine.
- The evidence adduced during criminal investigation must show sufficient data of the existence of the offence and the guilt of the defendant.
- There is written prior approval from the hierarchically superior prosecutor through his consent to the limits of the agreement.
- The case prosecutor and the defendant must generally agree upon the object of the agreement.

Concluding and accepting the plea agreement requires acceptance by the defendant of the incriminating factual basis.

Pursuant to a supplement brought about in 2016, it is provided that the defendant shall benefit from the reduction of the penalty limits provided for by law by a third in case of imprisonment punishments, or by a quarter in case of fine punishments.

The persons who agree to be convicted using this agreement give up most of the rights they would have during the trial. Thus, for example, they lose the privilege against self-incrimination, the right to remain silent, the right to participate in direct investigation of evidence by the judge or the right to request new evidence, etc. The most important consequence is that this agreement, once accepted by the court, is equivalent to determining the circumstances without the judicial investigation being performed.

On the other hand, at least theoretically, a guilty plea agreement has the potential to diminish the problems brought about by the traditional model for awareness of the defendant. The defendant has the opportunity to negotiate an arrangement with the prosecutor in less formal and technical conditions and, in this way, to participate in the decision-making process in 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 that was reached and will be more likely to feel reconciled with the penalty imposed.

Another form of plea bargaining involves a defendant pleading guilty to a charge in return for a reduction of the penalty limits provided for by law for the offence committed, also known as a simplified trial procedure.

Simplified trial procedure is actually an abbreviated trial which is based on a "guilty plea" and can be applied if the requirements are met.

According to article 374, paragraph 4 of the new Criminal Proceedings Code, in cases where criminal proceedings do not concern an offence punishable by life imprisonment, the judge informs the defendant that he 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.

According to legal provisions, the defendant may plead guilty before the beginning of the court investigation, this meaning the defendant must admit the allegations made by prosecutors against him.

The procedure itself, as evident from the definition, applies only at the trial stage, therefore only before the judge, when the defendant is asked whether he wants to make use of these provisions.

In case of an affirmative answer, the defendant should admit to the facts as they were held in the indictment, following the outcome of the proceedings, to be made only on the basis of evidence given in the prosecution stage. The only permission established by law in accepting new evidence in this case refers to documents the defendant, the other parties and the victim may submit during the trial.

The clear benefits that the law gives to defendants after confessing are quite attractive and are related to punishment, the limits of which are reduced by a third concerning offences punishable with imprisonment or by a quarter in case of offences punishable with a criminal fine. Another benefit of the law is that the judging process is much faster and there is no need for exchange of arguments, because, by confessing, the defendant assumes the evidence adduced by the prosecutors, giving up the classical way of 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.

In the previous editions, the case of a deputy who acknowledged the facts of corruption, trialled in a court of first instance in one day, has been mentioned. He was caught in the act while receiving a bribe from a denouncer. He ran from the place of the crime, but was later caught and detained by prosecutors, with DNA asking permission for preventive detention. At the first hearing of the trial, the court announced that the deputy admitted to his deeds and appealed for the accelerated procedure. This meant that his trial, which could have taken several months or even a year, was judged in one day. Finally, the deputy was sentenced to one year in prison. In this case, the law provides a penalty of one to five years in prison. Through confession, the maximum sentence was reduced by a third to three years and four months in prison.

In 2016, the shortest duration of criminal proceedings in a file handled by DNA, as shown in the abovementioned DNA report, was of two months and 22 days, as a result of pursuing this abbreviated procedure, as per article 396, paragraph 10 of the Criminal Proceedings Code. In this case, the defendant was a director of the Culture House of the Sibiu Unions, who requested from a businessman (whistle-blower) the amount of €20,000, part of which he received, pertaining to fulfilling his work duties regarding the conclusion of a lease agreement between the Culture House and the said businessman for a low-cost rent as well as for extending the initial duration of the agreement from 10 to 20 years.

Overview of cross-border issues

The fight against corruption has achieved a global dimension. Be it global or regional organisations, e.g. the United Nations, the Organization for Economic Cooperation and Development, the World Bank, the Council of Europe; or strictly regional, e.g. the Organization of American States, the African Union or the European Union, the global orientation and determination to counter this phenomenon is clearly outlined.

In this regard, during last year, similarly to the years before, the Service for International Cooperation and Programs fulfilled, through international relations, the specific role and

mission of the National Anticorruption Directorate: to be a specialised structure of the Public Ministry to fight corruption in the central Romanian authority.

To achieve this objective, the international cooperation activity of the DNA has pursued the following main areas, listed in the activity report for 2016:

- following up the fulfilment of DNA's commitments and actions towards the Cooperation and Verification Mechanism of Romania's progress in achieving specific goals in the areas of judicial reform and the fight against corruption;
- providing an accurate reflection of the external view of DNA activity;
- continuation and expansion of cooperation with similar institutions in other states and of DNA work performed in groups and networks of international anticorruption authorities;
- activities regarding international judicial assistance;
- DNA's involvement in assessment and monitoring activities in line with international standards in the fight against corruption in other countries;
- DNA's involvement in the activities of international networks within anticorruption authorities in other states;
- projects with European funding regarding implementation and monitoring, of which DNA is a direct beneficiary;
- providing specialised training for the DNA staff, in partnership with other organisations; and
- providing technical assistance and anti-corruption training to prosecutors in other states.

In relation to cross-border cooperation activities which DNA has carried out in the past year, the anticorruption prosecutors have shared their expertise by actively participating in different international missions and programmes or conferences, organised by the Academy of European Law (ERA), the Technical Assistance and Information Exchange instrument of the European Commission (TAIEX), the German Foundation for International Legal Cooperation (IRZ), the Organisation for Economic Cooperation and Development (OECD), the United Nations Development Programme of the European Commission, the Council of Europe, etc. Also, in 2016, DNA hosted nine training meetings within the European Judicial Training Network (EJTN).

The EU-financed programmes proposed or unfolded in 2016 have aimed, as in the previous years, at the strengthening of the administrative and institutional capacity in the field of consolidating the DNA's infrastructure.

The DNA 2016 report also shows that the Liaison Office, of which there are similar institutions in other countries, has provided an important contribution in the field of judicial cooperation in criminal matters regarding the fulfilling of the following formalities:

- 81 active requests of international judicial assistance, in view of adducing evidence in 27 countries (such as Cyprus, USA, Germany, Austria, Bulgaria, Switzerland, France, etc.) as well as seven requests to institute seizure (in Spain, Cyprus, Germany, Switzerland, Hungary, and two in France);
- 14 passive requests of international judicial assistance submitted by 12 countries (Bulgaria, Germany, Greece, Israel, Italy, Liechtenstein, Serbia, Singapore, Spain, the USA, Ukraine, and Hungary);
- two criminal procedure transfers (Bulgaria – taking-over the criminal procedure and Serbia – handing over the criminal procedure); and

- requests of carrying out verifications or exchange of information addressed to various national or foreign authorities, such as ANABI, DLAF, EUROJUST, etc., as well as received from EUROJUST, EUROPOL, OLAF, FIOD Netherlands (i.e. the Dutch Anti-Fraud Agency), Israel, Russia, Spain, and the USA.

Corporate liability for bribery and corruption offences

Under Romanian law, legal entities, except state and public authorities, are criminally liable for offences committed in achieving the object of activity, or in the interest or on behalf of a legal person.

Basically, criminal liability may arise to any legal entity. This rule, by law, provides exceptions regarding public legal entities, namely the state, public authorities and public institutions, but, as concerns the latter, only for crimes committed in carrying out an activity not subject to private domain. These exceptions are justified, because engaging criminal liability for such entities cannot be conceived or would have negative consequences on society.

The conditions of criminal liability for legal persons are stipulated in article 135 of the Criminal Code. Thus, as summed up in the relevant literature, in order to incur criminal liability on legal persons, the offence is necessary to be committed:

- in achieving the object of its activity, meaning the offence must be directly related to the activities carried out to achieve the core activity of the legal entity or its corporate policy;
- in the interest of the legal entity, meaning the offence has to be committed in order to obtain a benefit or to avoid a loss or other negative effect;
- on behalf of the legal person, for example by an agent, representative or proxy; or
- further to a resolution issued by a legal entity or because of its negligence, taking into consideration the conduct of the managing bodies of such legal entity.

The Romanian Criminal Code has set out a general criminal liability of legal entities. At least theoretically, a legal person may be criminally liable for any offence provided for under criminal law. The provisions of articles 289–292 of the Criminal Code also apply to the managers, directors, administrators and auditors of trading companies, national companies and societies, autonomous administrations and to any other economic units.

There are a number of crimes that cannot be committed by legal entities as a principal perpetrator. Legal literature has expressed the view that, given the current definition of the public servant provided for under article 175 of the Criminal Code, even a legal person may be the author of the bribery-taking offence, as long as such offence is committed in the accomplishment of the object of activity, or in the interest or on behalf of that legal person. Its participation in committing the offence as an instigator or accomplice is also possible.

The other corruption offences – giving a bribe, influence peddling and buying influence – are furthermore possible to be committed by a legal entity, subject to the conditions mentioned above.

The statistical analysis of DNA has revealed that 114 legal entities were sent to trial by indictment or by court referral through a plea bargain agreement in 2016.

Proposed reforms / The year ahead

Corruption and anti-corruption has been a main concern for a long time. Following the thread of history, it may be noted that criminality and corruption, in all its forms of manifestation,

persists from ancient times, with a long tradition, considering that the human tendency toward corruption has always existed, being a permanent and inevitable phenomenon in the existence of society.

In Romania, corruption tends to become an organised phenomenon, specialised and professionalised, appearing as a network of organisations and individuals, who through various means reach corrupt decision-makers at the highest levels of politics, the legislature, the judiciary and the administration. Corruption is present in all areas of economic and social life.

The degree of social threat that corruption acts represent has led to controls being imposed which have punished the corrupt by creating an appropriate regulatory framework and effective anti-corruption bodies.

Although corruption offences are far from sporadic and accidental, the fight against corruption in Romania is on the right path. Considering the intense activity of competent institutions and legislative changes created specifically for sustaining efforts to fight corruption, we can say that all the steps and existing resources are used in solving these kinds of cases and the positive results cannot be overlooked.

The special importance of this fight is represented by the measures taken in the prevention of this type of crime. Also, a transparent and fair system in terms of applying and verifying the law enforcement is imperative. Joint collective efforts are also needed.

A key role in guiding the prospects of deterring and tackling the corruption phenomenon is played by the National Anticorruption Strategy for 2016–2020, a multidisciplinary document approved by means of the Government Decision no. 583 as of 10 August 2016, whose aim is to promote integrity through the rigorous application of the legal and institutional framework in view of preventing corruption in Romania. The strategic intervention in terms of anticorruption has a tripartite nature: prevention; education; and combat. The same Government Decision also regulates performance indicators, the risks associated with the objectives and measures of anti-corruption strategy and verification sources, the inventory of institutional transparency and corruption prevention measures, assessment indicators, as well as the standards for publishing information of public interest.

The monitoring of major corruption cases at the national level by the Judicial Inspection within the Superior Council of Magistracy and the issuing of relevant reports in this respect (the most recent one, referring to 2016, being approved by the Division for Judges of the Superior Council of Magistracy in June 2017) are highly useful, as they provide an incentive of ensuring the settlement of such complex cases within a reasonable time (in order to avoid delayed justice and the application of statutes of limitations) and increasing the degree of accountability of the magistrates involved in the settlement thereof.

At the same time, monitoring and approval offered by equivalent European and international institutions and professional collaborations between such entities must be maintained and materialised.

The coming period shall be highly intense, as the laws on justice are subject to substantial proposals for reform. Among the main prospective changes, the following should be noted: the requirements for entering the magistracy; the career conditions for magistrates; the improving of the management in view of improving the performance of the justice system; creating a specialised directorate within the Public Ministry to prosecute magistrates; as well as integrating Judicial Inspection within the Ministry of Justice.

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Russia

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Brief overview of the law and enforcement regime

Russian bribery and corruption legislation

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 No. 273-FZ "On Combatting Corruption" of 25 December 2008 (the "**Anti-Corruption Law**"; sets out the legal and organisational framework for the prevention and combat of corruption as well as the mitigation and remediation of the consequences of corruption).
- **Antitrust regulations** – in particular, Federal Law No. 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 selecting financial organisations).
- **Public procurement regulations** – in particular, Federal Law No. 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; shall ensure efficiency and transparency of decision-making, equal access of bidders as well as control over the procurement process) and Federal Law No. 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 Federation such as state corporations and state companies).
- **Administrative Offences Code** – establishes administrative liability for violations of anti-corruption laws, antitrust and public procurement regulations.
- **Criminal Code** – establishes criminal liability for violations of anti-corruption laws, antitrust and public procurement regulations.

Applicable international anti-corruption conventions

In addition, the following international anti-corruption conventions apply in Russia:

- **United Nations Convention against Corruption** of 31 October 2003 (ratified by Federal Law No. 40-FZ dated 8 March 2006, entering into force on 20 March 2006).
- **Council of Europe Criminal Law Convention on Corruption** of 27 January 1999 (ratified by Federal Law No. 125-FZ dated 25 July 2006, entering into force on 28 July 2006).
- **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime** of 8 November 1990 (ratified by Federal Law No. 62-FZ dated 28 May 2001 entering into force on 31 May 2001).

- **United Nations Convention against Transnational Organised Crime** of 15 November 2000 (ratified by Federal Law No. 26-FZ dated 26 April 2004, entering into force on 29 April 2004).
- **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 No. 88-FZ dated 10 July 2002, entering into force on 24 July 2002).
- **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 No. 183-FZ dated 26 July 2017, entering 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. The relevant functions of the Prosecutor's Office are distributed among (i) the General Prosecutor's Office on the federal level, (ii) the prosecutor's offices in the 85 so-called subjects of the Russian Federation on the regional level, and (iii) the prosecutor's offices of the districts and cities on the municipal level.

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 on offences as well as preliminary investigations against individuals for bribery and corruption offences under the Criminal Code. As the Prosecutor's Office, the Investigative Committee performs its functions on the federal, regional and municipal levels – through (i) its central office on the federal level, (ii) its investigative departments in the subjects of the Russian Federation, and (iii) its investigative departments of the districts and cities.

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. In particular, 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 criminal proceedings.

Specific bribery and corruption offences

The key corruption and bribery offences in Russia are:

- **Unlawful remuneration on behalf of 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 civil servants/state 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 commercial organisations** (Article 204 and 204.2 of the Criminal Code) – prohibits the bribe-giving and bribe-taking to/by executives of commercial or other organisations in connection with their position in these organisations.
- **Mediation in bribery in commercial organisations** (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. USD 400) on instructions by the bribe-giver or bribe-taker as well as promises and proposals of such transfers.

- **Bribe-taking by civil servants** (Article 290 and 291.2 of the Criminal Code) – prohibits bribe-taking by Russian or foreign civil servants/state officials to induce them to use their authority to act in favour of the bribe-giver.
- **Bribe-giving to civil servants** (Article 291 and 291.2 of Criminal Code) – prohibits bribe-giving to Russian or foreign civil servants/state officials.
- **Mediation in the bribery of civil servants** (Article 291.1 of the Criminal Code) – prohibits the direct transfer of bribes to Russian or foreign civil servants/state officials on a considerable scale (i.e. exceeding RUB 25,000; currently approx. USD 400) on instructions by the bribe-giver or bribe-taker as well as promises and proposals of such transfers.

Sanctions against legal entities

For committing offences according to 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:** The penalty is of up to triple the amount of the bribe sum, but not less than RUB 1m (currently approx. USD 17,000).
- **Large-scale bribery:** If the bribe sum exceeds RUB 1m (currently approx. USD 17,000), the penalty is of up to thirtyfold the amount of the bribe sum, but not less than RUB 20 million (currently approx. USD 350,000).
- **Extra-large-scale bribery:** If the bribe sum exceeds RUB 20m (currently approx. USD 350,000), the penalty is of up to a hundredfold the amount of the bribe sum, but not less than RUB 100m (currently approx. USD 1.7m).

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, the penalty may be up to: (i) the amount of (a) RUB 2m (currently approx. USD 35,000) to RUB 5m (currently approx. USD 85,000), (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 an amount up to fiftyfold of the bribe sum, and an occupational ban from certain professions for up to six years.
- **Mediation in bribery in commercial organisations** (Article 204.1): Depending on the bribe sum and other circumstances, the penalty may be up to: (i) the amount of (a) RUB 1.5m (currently approx. USD 25,000), (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 an amount up to fortyfold of the bribe sum, and an occupational ban from certain professions for up to six years.
- **Bribe-taking by civil servants** (Article 290): Depending on the bribe sum and other circumstances, the penalty may be up to: (i) the amount of (a) RUB 3m (currently approx. USD 50,000) to RUB 5m (currently approx. USD 85,000), (b) three to five years' salary, or (c) eightyfold to a **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 an amount up to seventyfold of the bribe sum, and an occupational ban from certain professions for up to 15 years.
- **Bribe-giving to civil servants** (Article 291): Depending on the bribe sum and other circumstances, the penalty may be up to: (i) the amount of (a) RUB 2m (currently approx. USD 35,000) to RUB 4m (currently approx. USD 70,000), (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 an amount up to seventyfold of the bribe sum, and an occupational ban from certain professions for up to 10 years.

- **Mediation in the bribery of civil servants** (Article 291.1): Depending on the bribe sum and other circumstances, the penalty may be up to: (i) the amount of (a) RUB 1.5m (currently approx. USD 25,000) to RUB 3m (currently approx. USD 50,000), (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 an 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 investigations

According to information published by the General Prosecutor's Office, 397 legal entities were held liable for bribery offences in 2016 alone (based on Article 19.28 of the Administrative Offences Code, i.e. unlawful remuneration on behalf of a legal entity). A similar figure can be expected for 2017 given that 231 legal entities have been sanctioned for bribery offences as of 4 September 2017.

Most cases – almost all dealing with illegal payments to civil servants or employees of other companies – resulted in the imposition of a fine. Depending on the bribe sum, the law provides for fines of up to RUB 100m (approx. USD 1.7m) or more. In most cases, however, only the minimum fine of RUB 1m was imposed. That means that Russian bribery investigations against legal entities currently focus on **small-scale bribery**.

The disclosed information also shows that the bribery investigations have targeted almost exclusively Russian companies with Russian beneficiaries; in 2016 there were only two cases against foreign companies (one Kazakh company and one Turkish construction company) and only a few cases against Russian subsidiaries of foreign companies (e.g. German and Dutch) were disclosed.

Non-Russian enforcement actions

In 2016 and 2017, the U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) completed several enforcement actions for violations of the Foreign Corrupt Practices Act (FCPA) relating to Russia. Most published cases occurred in the **Russian healthcare sector**. In contrast to Russian investigations, these actions targeted **large-scale bribery** and resulted in significant fines.

Other non-Russian law enforcement authorities may investigate bribery and anti-corruption offences related to Russia as well. E.g., in August 2017, prosecutors at Sweden's National Anti-Corruption Unit charged a Russian employee of Bombardier Transportation Sweden and the former head of business development at Bombardier Transportation's Moscow office with bribery in connection with a 2013 tender for the modernisation of the rail-signalling systems in Azerbaijan. The employee had been accused of giving bribes to an official of Azerbaijan Railways to ensure that a contract with a value of USD 340m was awarded to a Bombardier-led consortium. In October 2017, the employee had been acquitted by the Swedish court; however, other (German and Swedish) higher-up employees of Bombardier may still face charges.

In addition to foreign enforcement actions, bribery and corruption offences relating to Russia may have further adverse consequences deriving from non-Russian anti-corruption

requirements. Since, e.g., in the example above, Bombardier's Azerbaijan contract is partly financed by the World Bank, the World Bank is also currently conducting an anti-corruption audit into this project. Should the World Bank audit conclude that Bombardier participated in corrupt practices, Bombardier may be barred from participating in other World Bank-financed projects.

Inspections of companies

Outside of bribery investigations, during the last few years Russian prosecutors have been actively performing inspections of Russian legal entities to check whether they have actually adopted the anti-corruption measures required to be taken by organisations operating in Russia according to Article 13.3 of the Anti-Corruption Law (for these measures please see below under *Article 13.3 of the Anti-Corruption Law*).

Russian law actually does not specify sanctions for non-compliance with the requirements of Article 13.3 of the Anti-Corruption Law. Therefore, the prosecutors filed **civil law claims** "in the interest of an indefinite number of persons" which were processed by the courts. These claims resulted in numerous court orders obliging companies to implement anti-corruption measures within a certain time period (usually one month).

Practice shows that Russian subsidiaries of foreign companies are also frequently subject to such checks.

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 whose value exceeds RUB 3,000 (currently approx. USD 50) (please see further 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. USD 50) – in relations **between commercial organisations**. Since under Russian law any benefits transferred to the donee qualify as a gift, this prohibition formally also extends to travel expenses, meals, entertainment and other hospitality costs which are borne by companies for the benefit of their (potential) business partners.

Transactions performed in violation of Article 575 (1) of the Civil Code are generally considered void. Since in practice it is rather unlikely that the donor demands to return or compensate the relevant benefits, the violation of the RUB 3,000-threshold does not usually entail any civil law consequences.

However, 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 reprimanded or even dismissed.

General prohibition of receipt of gifts by civil servants/state officials

Russian legislation **generally prohibits** the receipt by Russian civil servants/state officials of 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).

A civil servant is any individual professionally exercising state functions on the federal, regional or municipal level according to Federal Law No. 58-FZ "On the System of State Service in the Russian Federation", Federal Law No. 79-FZ "On Public Service of the Russian Federation", Federal Law No. 76-FZ "On the Status of Military Personnel" and Federal Law No. 25-FZ "On Municipal Service in the Russian Federation" (*gosudarstvennaya sluzhba*). The term state official extends to a limited number of individuals who are directly exercising state powers on the federal level or the level of the 85 subjects of the Russian Federation (*gosudarstvennaya dolzhnost*).

The general prohibition to accept gifts does not apply to gifts received by Russian civil servants/state 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 Federal Law No. 79-FZ "On Public Service of the Russian Federation").

General prohibition of receipt of gifts by employees of state corporations

According to Article 349.1 of the Labour Code and Article 2 (b) of the Order of the Russian Government No. 841 of 21 August 2012, the general prohibition to receive 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 for state corporations are Vnesheconombank, Rostec, Roscosmos and Rosatom. Commercial organisations with a majority participation of the Russian state (such as, e.g., Gazprom Public Joint Stock Company and Rosneft Oil Company) do not qualify as state corporations/companies in the meaning of Article 349.1 of the Labour Code. They are, however, still subject to the restrictions of Article 575 (1) of the Civil Code (please see above) and potentially even stricter requirements under the organisation's internal compliance regulations.

Administrative and criminal liability

The violation of the above-listed restrictions as to the granting and receiving of gifts as such does not entail any administrative or criminal liability. Such a liability would require the completion of additional elements of an administrative or criminal offence, in particular criminal intent. The scope of the sanctions under the Administrative Offences Code and the Criminal Code depends on the amount of the bribe sum (please see above).

Best practice in Russia

Best practice in Russia is the adoption by an organisation of internal compliance regulations incorporating (i) the prohibition of granting and receiving gifts exceeding RUB 3,000 in relations between commercial organisations according to Article 575 (1) of the Civil Code, and (ii) the general prohibition of granting any gifts to Russian civil servants/state officials or employees of state corporations/companies.

The adoption of such internal compliance regulations is one of the anti-corruption measures to be – mandatorily – taken by each organisation operating in Russia according to Article 13.3 of the Anti-Corruption Law (please see below under *Article 13.3 of the Anti-Corruption Law*).

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

Self-reporting

Individuals who self-report may benefit from the **leniency provisions** of Articles 204 (bribery in commercial organisations), 204.1 (mediation in bribery in commercial organisations),

291 (bribe-taking by civil servants), and 291.1 (mediation in the bribery of civil servants) of the Criminal Code. Under these provisions, the bribe-giver is in certain cases released from criminal liability, if he (i) actively enabled the discovery and/or investigation of the crime, (ii) had been subject to blackmailing by the bribe-taker, or (iii) following the commission of the crime voluntarily informed the competent law-enforcement authority of the bribe-taking.

Also, under the Administrative Offences Code (Article 4.2 (3)), the voluntary disclosure of an offence to the competent law-enforcement authority qualifies as an extenuating circumstance. That means that the amount of the fine imposed on the legal entity for committing an offence under Article 19.28 of the Administrative Offences Code (unlawful remuneration on behalf of legal entity) will be reduced. The scope of reduction of the fine is, however, within the sole discretion of the court.

Plea bargaining

Since 2009, the Criminal Procedural Code allows entering into plea bargaining agreements in **criminal proceedings** (Chapter 40.1), including proceedings regarding bribery offences. Irrespective of many practical problems, such plea agreements are also entered into in practice.

Under the plea bargaining agreement, the defendant undertakes to provide information and render cooperation in the **investigation of crimes committed by other persons** (disclosure of his own crimes does not suffice). If the defendant fulfils these obligations and circumstances aggravating liability are not determined, the sentence for his own crimes shall not exceed half of the maximum punishment provided for such types of crime by the Criminal Code. The court may – at its sole discretion – show further leniency.

Whistleblower protection

Currently, Russian law contains one specific provision on the protection of whistleblowers – Article 9 (4) of the Anti-Corruption Law states that civil servants/state officials who report on corruption violations shall enjoy the protection of the state. However, this protection is only afforded in accordance with the general provisions of Russian law granting protection to participants in criminal cases (in particular the Criminal Procedure Code, Federal Law No. 119-FZ "On State Protection of Victims, Witnesses and Other Participants in Criminal Proceedings" of 20 August 2004 and Federal Law No. 46-FZ "On State Protection of Judges, Public Officials of Law enforcement and Controlling Bodies" of 20 April 1995).

Overview of cross-border issues

Extraterritorial Russian jurisdiction

Under the Administrative Offences Code, foreign companies bear administrative liability for administrative offences committed on the territory of the Russian Federation.

Since March 2016, Russian law enforcement authorities may prosecute 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 (new Article 1.8(3) of the Administrative Offences Code).

The Strategy of National Security of the Russian Federation (approved by Presidential Decree No. 683 dated 31 December 2015) defines the national interests only vaguely as the "aggregate of internal and external needs of the Russian state to ensure security and sustained development of its identity, society and nation". Based on this vague definition,

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 prohibition of double jeopardy – Russian jurisdiction arises only if the foreign entity has not been held liable in a foreign state.

Cross-border data transfer

Bribery and anti-corruption investigations by non-Russian law enforcement authorities as well as internal investigations by companies 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, e-mails, WhatsApp messages, SMS and other correspondence by Russian employees are protected by the **privacy of communication** principle. Unless the Russian company adopted internal rules on the use of office communication means for business purposes only, the collection and transfer of such data requires the prior written consent of the relevant employees.

Further, **confidential materials** may be protected by the so-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 a "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.

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 the 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.

On the other hand, Russian law does not know a general **attorney-client privilege**. A concept similar to this privilege only exists as "advocate secrecy" in relations between clients and so-called advocates (i.e. lawyers who passed a bar exam to represent clients in criminal and certain civil law court proceedings). Therefore, the protection of the attorney-client privilege does usually not restrict the (cross-border) transfer of data for investigation purposes.

Disclosure of beneficial owners

Amendments to Federal Law No. 115-FZ "On Combatting Money Laundering […]", which have been effective since December 2016, upped the pressure on Russian legal entities to identify their beneficial owners. For various reasons, these beneficial owners are often concealed by sophisticated cross-border corporate structures.

Each Russian legal entity must now take feasible action – even in difficult circumstances – to 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.

These amendments may simplify the **know-your-customer (KYC) due diligence** which currently often fails in practice due to a general reluctance of potential Russian business partners to disclose their beneficial owners.

Corporate liability for bribery and corruption offences

Administrative liability

Under the Criminal Code, companies cannot bear criminal liability (Article 19). However, under the Administrative Offences Code, companies can also be held liable for administrative offences (Articles 1.4 (1) and 2.10). In particular, for bribery and corruption offences, companies may be held liable according to Article 19.28 of the Administrative Offences Code (unlawful remuneration on behalf of legal entity).

Failure to take necessary measures

Under the Administrative Offences Code, a legal entity shall be guilty of an administrative offence if it can be established that is 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 the raft of measures listed in Article 13.3 of the Anti-Corruption Law (please 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 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.

Strict requirements of courts

Following the current court practice, however, only very few of the legal entities prosecuted had implemented the necessary measures and were exempted from liability. The relevant decisions give no guidance on the proper implementation of anti-corruption measures in

order to be exempted from liability. That only very few companies succeeded confirms, however, that the prosecutors and courts seem to have fairly strict requirements as to the sufficiency of a company's compliance management system.

Proposed reforms / The year ahead

Criminal liability of legal entities

As described above, currently under Russian law, only individuals can bear criminal liability – including liability for bribery and corruption (Article 19 of the Criminal Code). Organisations can be held liable only under the provisions of the Administrative Offences Code.

Since 2015, the Russian State Duma has been considering a draft law extending criminal liability to legal entities (Draft Federal Law No. 750443-6 of 23 March 2015), which provides for criminal liability of foreign companies based on principles identical to those of the Administrative Offences Code.

Since the draft was not supported by the Government of the Russian Federation and the Supreme Court of the Russian Federation, it is, however, not possible to predict if/when this law will actually enter into force.

Extended whistleblower protection

In February 2017, the Federal Ministry of Labour proposed a draft law amending the Anti-Corruption Law. On 16 October 2017, the draft law was submitted to the State Duma. The proposed amendments shall encourage individuals in Russia to contribute to the prosecution of corruption-related offences in the public and private sectors. For this purpose, "protection by the state" shall be granted to individuals who report corruption offences to their employer, the Prosecutor's Office or the police, or otherwise contribute to counteracting corruption.

This state protection shall be afforded by:

- protection of the whistleblower from unlawful dismissal or any other disadvantages in his/her employment relations;
- a confidentiality regime with respect to the whistleblower's identity and the reported corruption offence; and
- free legal aid to the whistleblower.

Should the draft law be adopted in its current form, in practice problems could in particular be caused by the proposed confidentiality regime. Under the draft law, the company, its legal advisors and informed third parties shall be obliged to keep confidential both the content of the reporting (i.e. details of the corruption case) and the identity of the whistleblower. Probably also within the company, the whistleblower's identity shall be disclosed only with the whistleblower's consent. In order to comply with these requirements within the framework of Russian law, many companies would have to significantly amend their existing reporting system on compliance violations, in particular where this system provides for cross-border reporting to external compliance departments.

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Serbia

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Brief overview of the law and enforcement regime

Legal regime

Serbia signed and ratified the UN Convention against Corruption and the Council of Europe Convention (Criminal and Civil) on Corruption. All three conventions came into force by a special decree and thus became part of the legal system of Serbia; however, the full implementation of these conventions is yet to be seen.

In Serbia, there is no specific national anti-corruption legislation. The anti-corruption framework is scattered between various pieces of legislation. The principal legislative enactment is the Criminal Code, which recognises both passive and active bribery (which applies both to private/commercial bribery and public bribery) and trading in influence.

Active bribery − bribing public officials or employees, agents or shareholders/owners of private companies with the intention that they act, or omit to act, contrary to/in accordance with their duties.

Passive bribery − where public officials or employees, agents or shareholders/owners of private companies accept advantages in exchange for an act, or the omission of an act, contrary to/in accordance with their duties.

Trading in influence − whoever solicits or accepts, either directly or through a third party, a reward or any other benefit for himself or another in order to use his official or social position, or his real or assumed influence, to intercede for the performance or non-performance of an act; or whoever makes a promise or an offer, or gives to another either directly or through a third party, a reward or any other benefit, so that they might use their official or social position, or real or assumed influence, to intercede for the performance or non-performance of an official act.

The main investigating authority is the Public Prosecution, and the sanctions range from six months up to 12 years' imprisonment. In parallel and in order to eliminate circumstances or conditions that may influence the perpetrator to commit criminal offences in future, the court can impose a security measure of prohibiting a certain duty, e.g. directorship. Similarly, the legal consequence of a guilty judgment can be the termination of employment/appointment.

Overview of enforcement activity and policy during the past two years

The corruption ranking for Serbia for 2016, according to Transparency International, is 72nd out of 167 countries in the world. The main corruption issue in comparison with regional countries and the rest of the world is the proportion of firms that expect to give gifts to secure government contracts, according to Enterprise Surveys (http://www.enterprisesurveys.org), The World Bank.

Cases

In recent years, there have been a few big cases relating to corruption in both the private and public sectors, but considerably more corruption cases come from the public sector, as private companies seek to avoid media publicity on corruption issues. Regardless of the sector where corruption occurs, there are no final or binding convictions for high-profile cases.

On the basis of the existing final and binding convictions, mostly cases of smaller and medium corruption, the analysis made by Partners Serbia found the following rate of convictions:

1) For the crime of "Passive bribery", 68% of convictions were prison sentences, 21% of convictions were fines, 8% of convictions were house arrest, and 3% of convictions were conditional sentences.
2) For the crime of "Active bribery", 7% of convictions were prison sentences, 4% of convictions were fines, and 89% of convictions were conditional sentences.

Most final and binding convictions for the crime of "Passive bribery" came from the public (police) sector (45%), construction sector (25%), medical sector (10%) and educational sector (8%). On the other hand, for the crime of "Active bribery", most final and binding convictions came from the judicial sector (14%), medical sector (14%) and educational sector (7%). It is expected that enforcement activity will be boosted by the proposed new legislation and government strategy, as set below.

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

A bribe can be monetary or non-monetary and there is no specific monetary limit up to which a person can offer gifts without being held criminally liable. However, under the Anti-Corruption Agency Act, an official can accept a protocol or holiday gift (the gift may not be in money or securities) if its value does not exceed 5% of the value of his/her average monthly net salary in Serbia.

The donor of the benefit who reports the offence prior to becoming aware that it had been detected may be remitted from punishment.

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

Self-reporting

Self-reporting is relevant in cases of active bribery, meaning that the perpetrator who reports the offence before becoming aware that it has been detected, may be remitted from punishment. In other cases, self-reporting is relevant for mitigation of the sentence.

Also, the Board of Directors, managers and employees are criminally liable if they knew that a criminal offence was being prepared (only offences punishable of five or more years), but fail to report this during the time of the preparation (when its commission could have still been prevented), and the offence is later committed or attempted.

Deferred plea agreements

In principle, deferred plea agreements (DPAs) do exist in a certain form and the prosecution can defer criminal prosecution for certain criminal offences (up to five years) if the perpetrator accepts one or more of the following obligations: 1) to rectify the detrimental consequence caused by the commission of the criminal offence or indemnify the damage caused; 2) to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution; 3) to perform certain community service or humanitarian work; or 4) to fulfil another obligation determined by a final court decision.

The prosecution shall determine a time limit, during which the perpetrator must fulfil the obligations undertaken, with the proviso that the time limit may not exceed one year and if the suspect fulfils the obligation within the prescribed time limit, the prosecution shall dismiss the charges.

Civil *vs* criminal

In principle, an aggrieved party (in this case, the state) can seek civil compensation before a criminal court and usually the criminal court further refers the party to seek redress in the civil court, once there is a guilty judgment.

Plea agreement

Generally speaking, this kind of agreement has not yet gained its full scope, as seen in purely adversarial systems. However, according to the Serbian Criminal Procure Code, the court shall, upon written agreement between the parties (the prosecution and the defendant/perpetrator), accept the agreement, if: 1) the defendant has knowingly and voluntarily confessed the criminal offence or criminal offences which are the subject matter of the charges; 2) the defendant was aware of all the consequences of the concluded agreement, especially that he has waived his right to a trial and that he accepts a restriction of his right to file an appeal; 3) the other existing evidence does not run contrary to the defendant's confession of having committed a criminal offence; and 4) the penalty, other criminal sanction or other measures in respect of which the prosecution and the defendant have reached an agreement, was proposed in line with criminal and other law.

Other agreements – cooperating witnesses

Agreement on testifying by a defendant − an agreement may be concluded with a defendant who has confessed entirely to having committed a criminal offence, provided that the significance of his testimony for detecting, proving or preventing the criminal offence outweighs the consequences of the criminal offence he has committed.

Agreement on testifying by a convicted person – the prosecution and a convicted person may conclude an agreement on testifying if the significance of the convicted person's testimony for detecting, proving or preventing the criminal offences referred outweighs the consequences of the criminal offence for which he has been convicted.

Whistle-blowers

Under the newly adopted whistle-blowers' legislation, whistle-blowers are protected when reporting suspicions relating to corruption, violation of human rights or the exercise of public authority contrary to the entrusted purpose, danger to life, public health, safety, environment, and prevention of major damage.

Disclosure

Those making disclosure within one year from the day he/she learned about the action which is subject to disclosure, and no later than 10 years from the performance of such action, are entitled to protection in accordance with the law, provided that, at the moment of disclosure, based on available information, an average person with similar knowledge and experience as the whistle-blower would believe that the disclosed information is true.

The employer of a whistle-blower may not, through its actions or omission to act, put the whistle-blower in an unfavourable position due to whistleblowing (in relation to employment or work engagement, promotion, evaluation, acquisition or loss of vocation, disciplinary measures and penalties, working conditions, termination of employment, salary, etc.).

Judicial protection

The whistle-blower is entitled to file a motion for protection to the competent court and request the court to: declare that damaging action was taken against him/her; ban the damaging action or its repetition; remove the consequences and grant pecuniary and non-pecuniary damages; and publish a court decision in the media.

Unlike regular civil proceedings, the burden of proof lies on the defendant, meaning that the defendant will have to prove (if the whistle-blower initially demonstrated the likelihood that the damaging action was a result of whistleblowing) that the damaging action is not related to the whistleblowing.

Overview of cross-border issues

Legal regime

In principle, the Criminal Code of Serbia shall apply to anyone committing a criminal offence on its territory.

However, Serbia is also no stranger to the extra-territorial application of the US Foreign Corrupt Practices Act (FCPA) and, to a lesser extent according to the practice so far, the UK Bribery Act. Recent years have seen the investigation of, and subsequent DPAs on, bribery allegations concerning several multinational pharmaceutical companies.

Bribery and trading in influence also extend to foreign officials, meaning that the foreign official who has committed the offence shall be liable under the same regime as the domestic official.

Corporate liability for bribery and corruption offences

Serbia recognises corporate criminal liability and a company can be held liable if: (i) the responsible person, acting within their authority, culpably commits a criminal offence with the intention of obtaining benefits for the company; or (ii) the person acting under the control or supervision of the responsible person was enabled to commit a criminal offence due to the lack of supervision or control of the decision-maker.

A compliance programme or compliance defence is considered when determining the punishment within the limits for the particular offence, and serves as mitigation. A private company can be exempted from the punishment if it voluntarily and immediately takes necessary actions to remove harmful effects or returns unlawfully obtained property. In addition, a company may be exonerated from a punishment if: (i) it detects and reports a criminal offence before learning that criminal proceedings have been instituted; or (ii) on a voluntary basis or without delay removes incurred detrimental consequences or returns the proceeds from crime unlawfully gained.

Proposed reforms / The year ahead

The year ahead should see the start of the application of newly adopted whistle-blowers' legislation. It should be noted that the relevant whistle-blower legislation does not see breaches of whistle-blowers' rights as criminal offences, nor misdemeanours. It is yet to be seen whether these will be included in the Criminal Code amendments, as announced.

In addition, the announced Law on Property Origin should secure a more efficient system for the fight against corruption, officials claim.

Further changes of the Criminal Code have entered into force, especially the part referring to criminal actions in economic areas, with a special focus on the crime of tax evasion, cartels

and public procurement. Important roles in the actual implementation of this amendment lie with the respective regulatory bodies and the Public Prosecution.

Finally, the Financial Investigation Strategy for 2015–2016 comprehensively addresses the problem of financial crime by: enabling efficient and effective financial investigations so as to keep track of money flows and assets and have proactive identification of criminal offences; facilitating efficient cooperation of relevant agencies responsible for collecting data and conducting financial investigations; providing advanced training to judicial officers and civil servants who handle financial investigations; and preventing shifting of unlawfully gained funds into lawful business flows. One of the features is the introduction of liaison officers to serve as a contact with the prosecutor's office, the police and other authorities, i.e. the Administration for the Prevention of Money Laundering, the Tax Administration, the Tax Police, the Customs Administration, the National Bank of Serbia, the Business Registers Agency, the Central Securities Depository, the Privatisation Agency, the State Audit Institution, the Cadastre, the Anti-Corruption Agency, the Pension Fund, the Property Directorate and databases of different ministries. Also, in complex cases, the prosecutor may form a task force to handle such a case, comprised of police officers and officers of other governmental authorities. Also, a forensic accountant will be introduced to combine knowledge of finances, accounting, audit, banking and exchange operations, information systems, and knowledge of the legal framework, the criminal procedure code, the procedures of government institutions, investigation techniques and other financial skills, all in order to clarify facts and economic transactions for the purpose of criminal proceedings.

Adoption of this mid-term strategy seeks to improve financial investigations overall, and to keep track of money flows and assets for easier identification of criminal offences, and is one of the objectives set by the National Anti-Corruption Strategy for the period 2013–2018.

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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.

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 by various enforcement agencies, including the CAD, the Monetary Authority of Singapore and the Accounting and Corporate Regulatory Authority.

Overview of enforcement activity and policy during the last year

Singapore adopts a zero tolerance stance towards corruption and bribery. The majority of prosecutions for bribery in Singapore were against private sector employees. Upon conviction, custodial sentences were imposed in the majority of cases. Public sector employees form the minority of individuals that are prosecuted for corruption.

In its recent Annual Report, the CPIB identified the following areas of concern for corruption-related offences involving private sector employees: Maintenance Work (such as inspection of electrical equipment, removal of copper cables and provision of cleaning and water-proofing services); and Wholesale/Retail business (such as purchase and supply of fire safety, electrical and mechanical equipment).

The CPIB officially opened its Corruption Reporting and Heritage Centre in June 2017.

The Centre was set up in order to make it more convenient and accessible for members of the public to lodge corruption complaints. The CPIB has noted in its Annual Report that corruption complaints that are lodged in person are more effective, because this allows the CPIB to obtain more detailed information on suspected corrupt practices.

The CPIB has continued to pursue Singapore's zero tolerance stance towards corruption in 2017. In the past year, the CPIB has emphasised that 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 CPIB has also emphasised that bribery will not be tolerated, no matter the amount. In September 2017, an Indian national was prosecuted for offering a bribe to an auxiliary police officer in Singapore. Upon conviction, the accused was sentenced to a custodial term of four weeks' imprisonment. This was despite the fact that the bribe offered was only S$10, and the offer had been rejected by the auxiliary police officer.

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, 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 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 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 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.

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

The CPIB is empowered to investigate any person, even police officers and Government ministers. The Prevention of Corruption Act 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.

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 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 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;
(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

The Prevention of Corruption Act 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 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. Over the past year, the CPIB has hosted a number of its foreign counterparts in Singapore, and specifically emphasised in its most recent Annual Report that it was "*keenly aware that corruption may become increasingly transnational in nature, which underscores the need for law enforcement agencies across different jurisdictions to work more closely together*".

In 2017, the CPIB also joined other law enforcement agencies in Australia, Canada, New Zealand, the United Kingdom and the United States to launch the International Anti-Corruption Coordination Centre (the "**IACCC**") in July 2017. The IACCC is intended to facilitate the sharing of information across multiple jurisdictions, and to coordinate enforcement actions against corruption. As a founding member of the IACCC, the CPIB has declared in its press release dated 6 July 2017 that it intends to contribute to the worldwide prevention of grand corruption, such as acts of corruption by politically exposed persons and those that threaten political stability and sustainable development.

Corporate liability for bribery and corruption offences

It is rare for companies to be prosecuted for bribery and corruption offences. There are presently no reported decisions of the Singapore Court which address a company's liability for such offences.

It is possible for a company to be held liable for criminal conduct. The Prevention of Corruption Act states that any "person" who commits corruption shall be guilty of an offence. Similarly, the Penal Code 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.

Proposed reforms / The year ahead

Singapore is expected to continue to emphasise its zero tolerance policy towards corruption. 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.

It is also likely that Singapore will seek to leverage on technology to enhance the effectiveness of its enforcement agencies' investigations. In a speech presented by the Deputy Attorney-General on 12 September 2017, it was recognised that traditional search and seizure processes to obtain evidence are irrelevant when dealing with the large amounts of data that are no longer stored on local computer hard disks. Mutual legal assistance frameworks are not the most appropriate means of getting cloud evidence, which is highly volatile.

Amendments have been proposed to Singapore's Criminal Procedure Code (Chapter 68) to allow investigators to order the production of evidence stored on computers, including computers outside Singapore such as servers of cloud service providers. Investigators will be given additional powers to order a person to provide login credentials to a computer or cloud services account.

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Jason's practice focuses on commercial litigation and international arbitration. He regularly advises local and overseas corporations on regulatory and white-collar criminal compliance matters, including market misconduct, corporate fraud and corruption. He also advises on corporate investigations and inquiries relating to regulatory and white-collar criminal compliance issues.

Jason is recommended by *The Legal 500 Asia Pacific* (2015) for his expertise in dispute resolution, where he is described as "highly eloquent" and "extremely fast in sizing up any complex issues". He has received numerous awards and commendations for outstanding advocacy.

Prior to joining Allen & Gledhill, Jason was an Assistant Registrar at the Supreme Court of Singapore. Prior to that, he had served as a Deputy Public Prosecutor and State Counsel in the Attorney-General's Chambers of Singapore, and as a Justices' Law Clerk in the Supreme Court of Singapore.

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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 detection index. However, we still cannot talk about significant progress as it 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 remain 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 that 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 Prevention of Corruption Act, followed by the definition of the Integrity and Prevention of Corruption Act. In accordance with Slovenian 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:

- Obstruction of freedom of choice of voters (Article 151).
- Acceptance of a bribe in elections (Article 157).
- Unauthorised acceptance of gifts (Article 241).
- Unauthorised giving of gifts (Article 242).
- Acceptance of bribes (Article 261).
- Giving bribes (Article 262).
- Accepting benefits for illegal intermediation (Article 263).
- 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:

1. a member of the National Assembly, a member of the National Council, and a member of a local or regional representative body;
2. a Constitutional Court judge, a judge, a lay judge, state prosecutor, or state defender;
3. a person carrying out official duties or exercising a public function with management powers and responsibilities within a state authority;
4. any other person exercising official duties by authorisation of the law, of by-law or of the contract on arbitration concluded on the basis of the law;
5. a military person designated as a such with special regulations in instances when the act is not already criminalised as a criminal offence against military duty;
6. 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;
7. 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
8. 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 Integrity and Prevention of Corruption Act, corrupt practices cover a much broader range of practices (other than criminal offences).

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 nonmaterial 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 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 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 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 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 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 whoever 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 it is opposite to the criminal offence of accepting bribes under Article 261 of the CC-1. This criminal offence is committed by 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 not be performed, or not to perform an official act which should or could be performed, or makes other abuse of his position, or whoever 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 whoever 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 whoever 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. Whoever promises, offers or gives an award, gift or any other favour to other 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 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:

1. 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.
2. The criminal offence of acceptance of bribe during the election or ballot shall be punishable by a fine or imprisonment for not more than one year.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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, whereby 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 persecution 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 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 EUR 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 EUR 75 in value, and a total value that does not exceed EUR 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.

Restrictions on the acceptance of gifts in accordance with IPCA apply to officials, state authorities, local communities and holders of public authority, but the disposal of gifts is stipulated more in 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 the public sector employees. This system was strengthened by the Integrity and Prevention of Corruption Act 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 and the citizens of the Republic of Slovenia who hold office in EU institutions, 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 year for the previous year, but it should be emphasised that there are a lot of 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 EUR 10,000.00. 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.

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 Prevention of Corruption Act (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 competencies, guaranteed its independence, shaped it as a minor offence authority, and defined non-reporting of property status by persons with obligations as offences.

Corruption Preventing Commission

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 Integrity and Prevention of Corruption Act ("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 for various offences individuals, 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 EUR 2,000, while for the a responsible person it is EUR 4,000, and for a holder of public authority and other legal entities of public or private law or interest organisation it is EUR 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 Integrity and Prevention of Corruption Act within 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 EUR 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 does not refuse to contact 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, 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 lobbyist who provides inaccurate, incomplete or misleading information, or acts against the rules defining the prohibition of the acceptance of gifts related to performing 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 Prevention of Corruption Act, 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 be led to the reasons of 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 in the direction of detecting and perceiving corruption offences. Also, within the prosecutor's office operates 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 Organized Crime;
- the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on 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 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:

1. a fine: the amount which may be prescribed may not be less than EUR 10,000 or more than EUR 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 two hundred times the amount of such damage or benefit;
2. 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;
3. 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
4. the prohibition of disposing of securities the holder of which is a legal person may be imposed to a legal person if the perpetrator has committed on its behalf the criminal offence of giving a bribe, the criminal offence giving 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 year, mainly because of doubts about the integrity of political officials, it seems that in the course of preventing corruption it appears to have backtracked.

In the future, it is necessary to adequately update in particular the IPCA, in which 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 the 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.

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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Brief overview of the law and enforcement regime

The Examining Magistrates' Courts (*Juzgados de Instrucción*) are responsible for the investigation of the offences of bribery and corruption during the preliminary phase of the proceedings in which the Public Prosecutor acts as the public accusation party and other parties are entitled to hold private or popular prosecution.

Further, a special division called the Anti-Corruption Prosecutor's Office (*Fiscalía Anticorrupción*) investigates and hears cases of particular importance concerning financial crimes or other corruption-related crimes committed by government officials while holding public office.

Note that, in Spain, there is not a corruption crime *per se*, but many other crimes that are included in what is popularly known as corruption. For instance, all the offences referred to government contracting fraud, such as: influence peddling (**Articles 428 to 429**), which implies the criminal liability of legal entities; misappropriation of public funds (**Articles 432 and 433**); fraud and illegal levies (**Articles 436 to 438**); negotiations and activities forbidden to public officials and breaches of trust in the performance of their duties (**Articles 439 to 442**); and also bribery of government officials (**Articles 419 to 422**) is a means of corruption.

On the private sector side, the offences of corruption in business (formerly known as corruption between private individuals) were introduced for the first time in the Spanish criminal legislation by the **Organic Law 5/2010 of June 22**, which came into force on December 24, 2010.

The cited law was reformed by the **Organic Law 1/2015 of March 30**, in force since July 1, 2015, which modified the provisions under the Section named "Corruption in business" and improved the wording of the former version and clearly specifies and differentiates active and passive corruption, including new factual cases.

Firstly, corruption in the private sector (active, passive and in sports) is covered in **Article 286 *bis*** as follows:

1. "*The director, manager, employee or collaborator of a trading company or entity who either directly or through an intermediary, receives, solicits or accepts an unjustified benefit or advantage of any nature for oneself or for a third party as a consideration to unduly favour other in the acquisition or sale of goods, or in the procurement of services or in trade relations shall be punished with a sentence of imprisonment from six months to four years, special barring from practice of industry or commerce from one to six years and a fine up to three times the value of the benefit or advantage*" (so-called active corruption).

2. "*The same penalties shall be imposed to whosoever, directly or through an intermediary, promises, offers or confers to directors, managers, employees or collaborators of a trading company or entity, an unjustified benefit or advantage of any nature, for them or to third parties, as a consideration to unduly favour the former or a third party over others in the acquisition or sale of goods, procurement of services or in trade relations*" (known as passive corruption).
3. "*The Judges and Courts of law may impose a lower degree sentence or reduce the fine, at their discretion, in view of the amount of the benefit or the value of the advantage and the relevance of the offender's duties.*"
4. "*The terms set forth in this article may apply, in the corresponding cases, to directors, managers, employees or collaborators of an sporting entity, irrespective of its legal form, as well as to the sportsmen, referees and judges, with regards to those conducts that aim to deliberately and fraudulently predetermine or alter the results of a sporting event, match or competition of special relevance economically or in sporting terms*" (denominated corruption in sports).

Secondly, prior to the reform, the offence of corruption in international economic transactions was poorly regulated in **Article 445 of the Criminal Code** and it was found not to be in line with the OECD (Organisation for Economic Co-operation and Development)'s Convention on Combating Bribery of Foreign Public Officials, being for that reason strongly criticised by the Organisation.

With the reform of the Criminal Code in 2015, the wording and determination of such offence was modified and is now regulated under **Article 286 *ter*** as follows:

"*Whoever promises, offers or gives any undue benefit or advantage, pecuniary or of other kind, corrupts or tries to corrupt, directly or through a third person, a public authority or official in their own benefit or that of third persons, with the aim they act or refrain from acting regarding the performance of their public functions to gain or retain a contract, deal or any other competitive advantage in the execution of international economic activities shall be punished, unless already punished with a more serious penalty in this Code, with imprisonment from three to six years, a fine from twelve to twenty four months, unless the benefit obtained was higher than the resulting amount, in which case the fine shall be from such amount up to the triple of that benefit.*"

In addition to the above-mentioned penalties, the following penalties shall be imposed on the offender: prohibition from contracting with the public sector, as well as prohibition on access to public subsidies and the right to enjoy tax or social security benefits, and prohibition of involvement in public relevant commercial transactions for seven to 12 years.

At the beginning of 2017, the National High Court (*Audiencia Nacional*) delivered the first sentence in Spain condemning two persons for the commission of the offence of corruption in international economic transactions to: (i) one year's imprisonment; (ii) disqualification for passive suffrage for that period; (iii) a fine of €1,080 (€6 per day for six months); (iv) interdiction to make contracts with the public sector; (v) prohibition on access to public subsidies and the right to enjoy tax or social security benefits; and (vi) prohibition of involvement in public commercial transactions for a period of three-and-a-half years.

Finally, **Article 286 *quater*** provides that if any of the former acts described in this section is of special gravity, the penalty imposed shall be in the upper half of the range.

The facts should be deemed of special gravity when: a) the benefit or advantage is particularly high; b) the author's action is not purely occasional; c) they refer to acts committed within a criminal organisation or group; or d) the object of business deals with humanitarian goods or services or any other basic goods or services.

With regards to the offence of corruption in sports, the acts shall be considered of special gravity when: a) the purpose is to influence the course of gambling; or b) they are committed in an official sporting state competition classified as professional or in an international sporting competition.

On the public corruption side, bribery of government officials is regulated from **Article 419** to **Article 427 *bis*** of the **Spanish Criminal Code**.

Thus, **Articles 419 to 422 of the Criminal Code** govern the so-called crime of acceptance of bribes (*cohecho pasivo*), penalising any authorities, government officials (*civil servants*), juries, arbitrators, mediators, expert witnesses, court-appointed trustees or receivers, bankruptcy trustees or any persons having a public role who, to their own benefit or that of a third party, receive or solicit, by themselves or through an intermediary, gifts, favours or payments of any kind or accept offers or promises:

1. to carry out, in their official capacity, an act which is contrary to the duties inherent thereto;
2. to not carry out or delay unjustifiably an action which they have been entrusted to carry out;
3. to carry out an act inherent to their official duties;
4. a reward for the acts described under numbers 1 to 3 (subsequent bribery or bribery for reward); or
5. which are offered to them in consideration of their office or role.

In addition, **Article 424** provides for the crime of bribery (*cohecho activo*), penalising any individual who offers or delivers any gifts or payments of any kind to any authorities, government officials (*civil servants*), juries, arbitrators, mediators, expert witnesses, court-appointed trustees or receivers, bankruptcy trustees or any persons having a public role, either on their own initiative or at the request of the latter, in the cases described in numbers 1, 2, 3 and 5 above.

Finally, **Article 427** governs bribery of: (a) any person holding a legislative, administrative or judicial position in a country in the European Union or any other foreign country, whether by appointment or by election; (b) any person holding a public appointment for a country in the European Union or any other foreign country, including in a public organisation or public company, for the European Union or for any international public organisation; and (c) any civil servant or agent of the European Union or of an international public organisation.

A legal person can be held liable for any of the public bribery offences described above according to the provisions of **Article 31 *bis***. The penalties to be imposed to the entity are set out in **Article 427 *bis***, which will be covered further in this article.

There is a particularity to the offence of bribery regarding the trial phase which is the right to a jury, regulated under **Organic Law 5/1995, of May 22, on the Jury** (**LOTJ**). The jury institution is very limited in Spain for technical, legal and financial reasons and that is why most business-related crimes (and other non-business-related) are tried before judges.

To finish with, the new **Article 304 *bis* of the Criminal Code** (which has been introduced by **Organic Law 1/2015**) governs the crime of irregular financing of political parties and penalises those persons who receive donations or contributions intended for a political party, federation, coalition or voter group in violation of **Article 5.1 of Organic Law 8/2007, of July 4** on political party financing.

Such crime also entails the criminal liability of the legal entity (**Article 304 *bis* 5**).

Overview of enforcement activity and policy during the last year

For some years, enforcement action has particularly focused on the offences of corruption and bribery committed by politicians or within political parties. Judges have increased their attention to this matter as, during previous years, many politicians have been investigated and prosecuted all over the national territory.

This trend is likely to continue as many significant cases, genuine networks of corruption, are still under investigation and several others are coming out almost on a monthly basis.

One of the main problems the courts are facing during the investigations is the large number of persons involved, the complex web of national or international transactions and the long periods over which the illegal acts took place. All these obstacles make criminal investigations last for many years.

A very renowned political corruption case, for which proceedings were initiated by the National High Court (*Audiencia Nacional*) in 2017, is *Operación Lezo*. The investigation was led by the Anticorruption Prosecution Office and the special division of the Civil Guard (UCO) regarding the misappropriation of public funds from the public entity Canal de Isabel II by several individuals related to the PP political party in Madrid. It is foreseeable that the investigation will last several years, as there are more than 50 defendants that have been summoned by the court, some of them remaining in pre-trial retention.

Linked to *Operación Lezo* is the *Mercasa* case (public company), in which managers have allegedly paid commissions in Angola, Panama and the Dominican Republic to win important contracts and business in these countries. At the moment, there are at least 11 defendants in this case and the crimes under investigation are bribery, corruption in international economic transactions, money laundering and criminal association. Some of the defendants are currently in pre-trial retention.

Moreover, the *Defex* (public company) case is also related to *Mercasa*, since this company would have paid €20,000,000 to Guillerme Taveira Pinto (investigated in the *Defex* case and with an arrest warrant) to help Mercasa do business in Angola.

In June 2017, with regards to another very well-known corruption case in Spain, *Operación Guateque*, an unexpected judgment of acquittal was delivered by the Regional High Court of Madrid (*Audiencia Provincial de Madrid*) after 10 years of criminal proceedings. All 30 accused, 17 public officials among them, were absolved of charges by the court since the evidence obtained by the Civil Guard against the accused was considered null and void. The Public Prosecutor announced that he will appeal that decision before the Supreme Court.

Finally, with regards to the crime of corruption in sports, in the so-called "*Operación Soulé*", courts are investigating, among other crimes, the irregular commissions allegedly received by the former President of the Spanish Football Federation (RFEF), his family and the managers of such entity. The initial damage caused to the RFEF has been estimated at €45m.

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

Under Spanish legislation, there is no recognition of the term "facilitation payment", nor specific provisions that address the regulation of hospitalities or gifts; however, there are sectorial codes that provide recommendations for companies in this regard.

Now, after criminal liability of legal persons came into force in 2010, companies have been progressively implementing policies that regulate what types of gifts, hospitalities

or invitations should be accepted or rejected by employees, directors or managers of a company, as well as the maximum monetary value those gifts should have.

Such policies play an important role in the compliance programmes of legal entities as to the prevention of corruption and bribery, both public and private, in day-to-day business.

Gifts and commercial invitations on a modest scale are widespread in Spain as a means of reinforcing business relations and relations with clients. Offering or accepting meals or small gifts might have been appropriate under certain circumstances in the past, but not any more.

For this reason and because corruption in business is now an offence under the **Spanish Criminal Code**, companies have started regulating the requirements gifts and hospitalities would need to meet to avoid future criminal liabilities.

Thus, in accordance with usage and general recommendations, a gift, hospitality or favour should comply, at least, with the following requirements:

- be for the purposes of commercial courtesy or kindness;
- be a commonly accepted practice in Spain and the sector concerned as a sign of gratitude;
- be in accordance with ethical business rules;
- be voluntary;
- not in cash or a similar form;
- not concerning a benefit or advantage, which is wrongful and unjustified; and
- not received from or given to a public official or authority.

Regarding the maximum values the gifts or hospitalities should have, it is not yet very clear how much is considered adequate, as the amounts have been progressively decreasing every year. Lately, some companies are considering amounts yearly and not per item or they are even banning any kind or gift or hospitality, no matter the value.

Notwithstanding the above, it is common among legal entities to not exceed the following values, although these trends are now changing:

- €50 for a meal invite or entertainment event ticket;
- €1,000 for a seminary or a course (no business trips, no five-star hotels, no family members included, etc.); and
- €60 for a gift, favour or hospitality.

Please note that the value of €150 for a gift was established in the EU Parliament Code as a maximum for its members back in 2011.

Moreover, as gifts or hospitalities to public officials or authorities are a more delicate issue, they should be banned at any time to avoid any future misinterpretations and the risks associated with it.

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

In our criminal system, there is no obligation of self-reporting business crimes, but according to the recent reform of the **Criminal Code**, doing so could have a positive impact on legal entities in terms of mitigating or exonerating (**Article 31 *bis* 2 and Article 31 *quater***) their criminal liability, as is detailed in the section on 'Corporate liability for bribery and corruption offences' below.

Consequently, the **Spanish Penal Code** provides legal entities with the free choice of whether to self-report on any alleged criminal conduct which has occurred within their organisation before a criminal proceeding is brought before court for those same acts.

Notwithstanding, if they take a proactive approach and report the crime, they will be rewarded with an attenuating circumstance that will reduce the penalty.

Regarding the whistle-blowing channels through which the legal entities may have notice of the commission of an offence, there is a particularity in the Spanish legislation which may differ from other countries.

Whistle-blowing channels are an essential part of the compliance programmes that entities should implement in order to ascertain the effectiveness of the criminal prevention model. It has been widely discussed since the reform of the **Criminal Code** came into force in 2010 whether whistle-blowers could maintain their anonymity when denouncing irregular acts through the existing channels.

As magistrates and courts have still not voiced their opinion in this matter, there are no case-law parameters that can be applied.

Nevertheless, we strongly recommend that companies encourage the confidentiality of the data and information provided by whistle-blowers and also the possibility for maintaining the anonymity of the latter. In case they choose to be anonymous, they would need to submit sufficient evidence to guarantee the accuracy, correctness and completeness of the information provided, as well as the reliability of the allegations contained therein.

Furthermore, the employees should be well-informed about the processing of their data in the system and the legal entity should guarantee the strict confidentiality of the individual's data in this regard.

Additionally, there is no such thing as plea bargaining or deferred plea agreements under Spanish criminal law. As judicial investigations are led, conducted and agreed by Examining Magistrate's Courts, not by Prosecutors as in other foreign jurisdictions, it is very difficult for such agreements to be implemented in our legal system.

During the several years prior to the reform of the **Criminal Procedural Act** in 2015, it was a common legal debate and proposal whether to introduce a modification in the Spanish criminal proceedings to confer the Prosecutor the competence to effectively lead the investigation and not just to take over the accusation, as it has always been.

If this model had succeeded, it would have meant the introduction in our legal system of the opportunity principle, so that Prosecutors could have had the competence to enter into that kind of agreement.

Despite not having in Spain plea bargaining or deferred plea agreements, the plea of guilty established in our system is in some ways similar, since it always entails a prior negotiation between the prosecution and the defence.

Thus, a guilty plea is a means to conclude the proceedings, which implies the acceptance by the accused of the offences, of the legal classification thereof and of the civil and criminal liability sought in return for penalty reductions.

With regard to Abbreviated Criminal Proceedings – the process to be followed in case of bribery and corruption – **Article 787 of the Criminal Procedural Act** (*Ley de Enjuiciamiento Criminal*) provides that the court will deliver a judgment accepting a plea of guilty if the sentence does not exceed six years and if the following requirements are met: the offence has been correctly classified; the sentence is admissible on the basis of such classification; and the accused voluntarily accepts and knows the consequences.

A plea of guilty may be presented at three different times: in the actual pleadings of the defence; in a new joint indictment signed by the prosecutors and the accused; and at the start of the sessions of the hearing, before the examination of evidence.

When the accused is a legal entity, the plea of guilty must be presented by its especially appointed representative, provided that such representative has a special power of attorney.

Finally, it should be noted that whenever an illegal or irregular action is serious enough to be considered an offence and therefore is regulated under the **Spanish Penal Code**, courts and judges will follow the criminal prosecution rather than the civil one.

Therefore, as bribery and any kind of corruption of public officials and private persons are considered offences and not civil irregularities, courts will always prosecute the offenders criminally.

Overview of cross-border issues

The principle of universal justice, set forth in **Article 23 of the Organic Law of the Judiciary** (**Organic Law 1/2014 of March 13**), has undergone several reforms over the years that changed from an absolute and wide perspective of the principle to the restrictive perspective we know today.

As a general rule, the application of the criminal law of the nation must remain within the limits of its territory, the principle of universal justice being an exception to such rule.

Thus, regarding the extraterritorial prosecution of private corruption and economic international transactions, **Article 23.4.n** provides that the Spanish jurisdiction shall be competent to prosecute such crimes committed by Spanish individuals or foreigners outside national boundaries under the following conditions:

1. the criminal proceedings have been brought against a Spanish individual;
2. the criminal proceedings have been brought against a foreigner who resides in Spain;
3. the crime has been committed by the manager, administrator, employee or collaborator of a commercial organisation, or of a company, association, foundation or organisation that has its headquarters or registered office in Spain; or
4. that the crime was committed by a legal person, company, organisation, groups or any other kind of entity or groups of people that have its headquarters or registered office in Spain.

Further conditioning factors are provided by **Article 23.5**, by virtue of which crimes regulated in the list above will not be prosecuted in Spain when:

1. an international court has initiated proceedings for the investigation and prosecution of such crime; or
2. criminal proceedings were initiated by a court of the state where criminal acts were committed or in the state of the nationality of the offender, whenever:
   a) the offender is not in the Spanish territory; or
   b) proceedings were initiated for his extradition to the place where the criminal acts were committed, or to the place of the victims' nationality, or to put him at the disposal of an international court for prosecution.

Nevertheless, the provisions of this article shall not apply when the state that should investigate is not willing to do so or cannot pursue the investigation.

And so, even though the list of crimes that can be prosecuted extraterritorially has increased considerably over the decades, there are many limitations to allow for extraterritorial enforcement and only when every condition provided by law is met, would this be possible.

In addition to the above, the following European legal mechanisms for International Legal Assistance apply:

a) The Convention on Mutual Assistance in Criminal Matters of April 20, 1959, as amended by the Schengen Agreement, and the European Convention on Judicial Assistance of May 29, 2000.
b) The European Arrest Warrant regulated in the EU Council Framework Decision of June 13, 2002 and in the Spanish European Arrest Warrant Act 3/2003. The National Court (*Audiencia Nacional*) has a 24-hour service to process European Arrest Warrants.

Likewise, the International Cooperation Unit of the Spanish Public Prosecutor's Office is responsible for the supervision and enforcement, where applicable, of the letters rogatory addressed to, or issued by, the Spanish Public Prosecutor's Office.

Thus, this unit deals with any matter relating to:

a) **EJN (European Judicial Network)**: The role of such network is to improve, even further, judicial cooperation between the Member States of the European Union, in particular in efforts to combat the most serious forms of crime. In Spain, the national contacts in this regard are the Ministry of Justice, the General Council of the Judiciary (CGPJ) and the Public Prosecutor's Office.
b) **IberRED (Ibero-American Network for International Legal Cooperation)**: Like its European counterpart, its role basically comprises the establishing of a structure to enable mutual judicial assistance by means of a network of contacts belonging to the Central Authorities of the Ministries of Justice, judges and prosecutors with responsibilities in the area of international cooperation.
c) **Eurojust**: This is the EU body responsible for judicial cooperation.

Corporate liability for bribery and corruption offences

One of the main developments of the **Organic Law 5/2010 of June 22** was the introduction – for the first time in our criminal law system – of corporate criminal liability in **Article 31 *bis***.

This provision has been amended by means of **Organic Law 1/2015** to make "*a technical improvement in the regulation of the criminal liability of legal persons, which was introduced into Spanish legislation by Organic Law 5/2010 of 22 June. The purpose of the improvement is to outline properly the contents of 'due control', inasmuch as criminal liability may be based on failure to exercise due control*".

Thus, the new wording of the above-mentioned **Article 31 *bis*** (in force since July 1, 2015) makes corporate entities liable as follows:

1. *For the offences committed for and on behalf of them and to their direct or indirect benefit, by their legal representatives or by those persons who, acting individually or as members of a body of the legal entity, are authorised to take decisions on behalf of the legal entity or have organisational or management powers therein.*
2. *For the offences committed, in the performance of corporate duties and for and on behalf of them and to their direct or indirect benefit, by those persons who, being subject to the authority of the persons referred to in the foregoing paragraph, have been able to carry out the offences as a result of the failure by the latter to fulfil their duties of supervision, monitoring and control of the activity of the former, bearing in mind the specific circumstances of the case.*

As a result of these provisions, legal entities may be held to be criminally liable as a result of the actions of another, both vicariously and objectively in the first instance described, and on the grounds of fault in the supervision of its employees ("*culpa in vigilando*") or negligence, in the second instance, and must therefore ensure that they have suitable

corporate compliance programmes in place that provide for the possibility of investigation of any internal wrongdoing.

In other words, the new amendment expressly acknowledges that a legal entity may be exempted from criminal liability if it has a corporate compliance programme for the prevention of crime.

The provisions set forth in **Article 31 *bis* 2 of the Penal Code** allow legal persons to be exempt from criminal liability under the following conditions:

1. When the Board of Directors, prior to the perpetration of the crime, adopted and implemented an organisational, management and control model suitable to prevent offences of the type committed.
2. Moreover, the supervision of the proper functioning of the model is entrusted to a supervisory body with independent powers of initiative and control.
3. The individual authors of the crime have fraudulently eluded the organisation and prevention model.
4. The supervision body has not omitted or neglected its monitoring, supervision and control duties.

In order to help legal companies implement the adequate procedures to prevent their criminal liability, **Article 31 *bis* 5** sets the requirements to be met for an effectual, effective corporate compliance programme (one which is fit to qualify the legal person for exemption from criminal liability in the future), namely:

1. to identify activities which may be a risk for the commission of crimes that need to be prevented;
2. to establish protocols and procedures which may specify the process of forming the corporate will to take and implement decisions;
3. to have appropriate financial management models to prevent the commission of the crimes identified;
4. to impose the obligation to report any potential risks or noncompliant activities to the supervision body;
5. to establish a disciplinary system to sanction any violation of the model; and
6. to perform a periodical verification of the model or its future amendments when violations of the model are revealed or if changes occur in the organisation, in the control structure, or in the activities performed by the legal entity.

As noted, the provisions set out in **Article 31 *bis* 2** and **Article 31 *bis* 5** should be read together in order to effectively implement a compliance programme. Not only companies have to take into account what matters should be regulated or included in their programmes, but also they need to keep track on the supervision of their programmes once they are in force.

In addition, criminal liability of legal persons can be mitigated in the circumstances set out in **Article 31 *quater***:

- disclosure of the offence to the authorities prior to knowing that criminal proceedings have been brought against them;
- cooperation by providing evidence to the investigation that is new and decisive for shedding light on the criminal liability;
- reparation or mitigation of any damage caused by the offence prior to the criminal trial; or
- prior to trial, taking effective measures to prevent and detect any possible offences that could be committed in the future using the resources of the legal entity.

All the previous circumstances can be used by legal entities as a means of defence before the courts, but the exemption from criminal liability will only occur if the company has established an appropriate corporate compliance programme.

Thus, if a company does not comply with the legal requirements and is found criminally liable for the offence of bribery of government officials, the penalties to be imposed for failing to prevent the commission of the offence could be any of the following (**Article 427 *bis***):

a) Two to five years' fine (based on a daily rate), or a fine of from triple to quintuple the benefit obtained when the amount resulting was higher if the offence committed by the natural person has a penalty of imprisonment of more than five years.
b) One to three years' fine, or a fine of from double to quadruple the benefit obtained when the amount resulting was higher if the offence committed by the natural person has a penalty of imprisonment of more than two years and it is not included in the previous assumption.
c) Six months to two years' fine, or a fine of from double to triple the benefit obtained if the amount resulting was higher, in the remaining cases.

Furthermore, if a legal entity is found criminally liable for the crimes of private corruption (**Articles 286 *bis, ter, quater***) the penalties provided in **Article 288** are:

a) Two to five years' fine, or a fine of from triple to quintuple the benefit obtained or that could have been obtained when the amount resulting was higher if the offence committed by the natural person has a penalty of imprisonment of more than two years.
b) Six to two years' fine, or a fine of up to the double of the benefit obtained or that could have been obtained when the amount resulting was higher in the rest of the cases.

Additionally, according to the rules set out in **Article 66 *bis***, judges and courts can also impose the penalties provided in **letters b) to g) of Article 33.7**; that is to say:

- dissolution of the legal person;
- cessation of its activities for a period not exceeding five years;
- closure of the company's establishments for a period not exceeding five years;
- prohibition to carry out activities in which the offence was committed, favoured, or carried out. This prohibition could be temporary or permanent. If it is temporary, the period cannot exceed 15 years;
- a ban on access to public assistance or subsidies, for contracting with Public Administrations or enjoying tax or social security benefits and incentives for a period not exceeding 15 years; and
- judicial intervention to safeguard the rights of employees or creditors for the time needed, but not exceeding five years.

At the start of 2016, a pioneering Supreme Court sentence confirming the criminal liability of a corporation was delivered on February 29 **(STS 154/2016)**. This ruling provided some guidelines for legal entities to comply with law and norms through the implementation of models of prevention and control according to **Article 31 *bis* of the Criminal Code** in order for them to avoid penalties.

Despite the fact that almost seven years have passed since the criminal liability of legal persons came into force in Spain, not one has yet received a corporate sentence for bribery or corruption offences.

Proposed reforms / The year ahead

During the several years prior to the reform of the Criminal Procedural Act it was a common legal debate and proposal whether to introduce a modification in the Spanish criminal

proceedings to confer the Prosecutor the competence to effectively lead the investigation and not just to take over the accusation, as it has always been.

If this model had succeeded, it would have meant the introduction in our legal system of the opportunity principle.

At the end of the year 2016, José Manuel Maza was appointed as the new Chief Public Prosecutor and he has always favoured Public Prosecutors leading criminal investigations in Spain. Following his recent declarations in the press, it is likely that we will see a new proposal in this line in the coming year.

Since the **Spanish Criminal Code** has been recently reformed by the **Act 1/2015** of March 30, there are no new developments in sight for the next year.

Notwithstanding, internal investigations are gradually making inroads in Spain as the legal entities are taking the full and correct implementation of their compliance programmes to avoid or mitigate future penalties as a consequence of internal wrongdoings more seriously.

To date, there are eight judgments from the Supreme Court regarding the criminal liability of legal persons. In all cases, none of the companies had a compliance programme implemented, compliance officers, a Code of Ethics, etc.

Starting in the year 2016, the pioneering Supreme Court sentence confirming the criminal liability of a corporation was delivered on February 29 (**STS 154/2016**). The ruling provided some guidelines for legal entities to comply with the law and norms through the implementation of models of prevention and control according to **Article 31 *bis* of the Criminal Code** in order for them to avoid penalties.

There are two judgments from the Supreme Court on the criminal liability of legal persons: on March 16, 2016 (**STS 221/2016**) for property embezzlement; and on June 13, 2016 (**STS 516/2016**) for crimes against the environment, ruling that the legal person in question could not be criminally responsible because the illegal acts took place before the reform of the Criminal Code.

The rulings of the Spanish Supreme Court **STS 154/2016** and **221/2016** warned about the future conflicts of interest that may arise between accused natural persons (that represent a legal person) and legal persons who are represented in court by the same counsel, which may cause a breach of the right to defence of the legal entity.

Without prejudice to the court affirming that there is no general answer for this question, some possible formulae used in other systems are offered in case conflicts of such kind arise; for instance: the judicial appointment of a "legal/public defender" of the company; and the assignment of the company's defence to the compliance officer, etc.

Another matter analysed in such ruling is the possibility of annulment of the trial when the right to defence of the legal entity is breached for being represented by the natural person who is also accused individually in the same criminal proceedings.

The following rulings from the Supreme Court did not shed light on interpreting the criminal liability of legal persons. For instance, **STS 740/2016 of October 6**, **STS 4728/206 of November 3** and **STS 31/2017 of January 26** where the companies could not be held responsible and were just declared vicariously civilly liable, and **STS 121/2017 of February 23** which acquitted the company from a crime against workers' rights as the conviction of a legal person for such offence is not possible according to the **Penal Code**.

Now, after the 2015 reform, the provisions being clearer in terms of the implementation of compliance programmes, the role of compliance officers and also internal investigations, it is likely we will have more rulings from superior courts.

And despite these past rulings being enlightening with regard to the interpretation of the law, we still have a long way to go and a lot of questions to solve, such as: the regime for whistle-blowers; attorney client-privileges that may apply during internal investigations; the impact of collaboration with the authorities; the personal liability of compliance officers for not fulfilling their duties; conflicts of interest between legal and natural persons; and the application, in practice, of mitigating and exonerating circumstances, etc.

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Switzerland

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Introduction

In the 2016 "Corruption Perception Index" of Transparency International, Switzerland ranked 5th out of 176 countries. 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 the militia system 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 60 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 recent study, "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 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). This includes employees of state-owned or controlled legal entities.

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.

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 1,080,000 (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.

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. The arguably most prominent such case in 2016 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 a former external IT project manager (who 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.

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 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 the 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 and was sufficient to give rise to the OAG's 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 a number of countries it operates in. 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 30m.

Another noteworthy aspect is that since September 2015, Swiss law enforcement has a new instrument to help combat corruption. The web-based platform www.fightingcorruption.ch enables anyone with information on possible acts of corruption to report their suspicions anonymously to the police. Law enforcement agencies hope the website will provide them with a new investigative approach to fight corruption at the national and international level. The new reporting system was put into operation by the Federal Office of Police (fedpol) on behalf of the OAG.

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 about a dozen cases altogether. In a recent decision, the Federal Criminal Court held in September 2015 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 100 Swiss francs 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 Swiss Post (the national postal company), has recently been criticised publicly because it gave journalists at a press conference credit of 100 Swiss francs 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 which they granted in the previous year to professionals (primarily physicians and pharmacists) as well as healthcare organisations (in particular hospitals and research institutes).

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.

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 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 effects. 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 below section 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 5m 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, 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 2.5m and a compensatory claim of CHF 36.4m 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 (Sections 7(2) and (5)(b) 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 an 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.

A prominent recent example regarding corporate liability were the OAG's criminal investigations being conducted since summer 2015 into the Odebrecht conglomerate based in Brazil. Odebrecht, who decided to co-operate with the law-enforcement agencies, was found guilty in Switzerland under Article 102 SCC and fined CHF 4.5m. By sequestration and determination of a corresponding compensation claim, Odebrecht, who decided to co-operate with the law-enforcement agencies, was further obligated in Switzerland to refund proceeds from crimes in the amount of CHF 200m (in addition to the amount of $1.8bn 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 are being conducted on the grounds of suspicion of criminal mismanagement and of 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 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*.

Besides these enacted reforms, further amendments have been discussed but no action was deemed necessary by the Swiss Federal Council. The following two, discussed but declined, amendments seem noteworthy.

First, the introduction of a specific offence of "trading in influence" (abuse of real or supposed influence with a view to obtaining an undue advantage) was discussed but eventually declined. It was argued that a specific offence is not required as the conduct is already covered by the bribery provisions in place. This does not always hold true. If the intermediary is not a public official and abuses his influence on a public official without giving or promising an undue advantage, the conduct is not penalised under Swiss law.

Second, it was discussed whether the scope of bribery of foreign public officials should be extended and also cover cases in which the foreign public official does not breach the law or a duty. In particular, it was argued that so-called "facilitation payments" to foreign public officials are currently not within the scope of the SCC. However, the Swiss Federal Council argued that an adaption of the offence is not necessary as, according to the Federal Council, facilitation payments could already be penalised under the current provision if construed broadly.

The coming years will show the first effects, if any, of the reform of private sector bribery.

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Brief overview of the law and enforcement regime

Under the Taiwan legal regime, there are two types of bribery, depending on whether the bribees are civil servants or not: corruption and bribery of civil servants; and commercial bribery among private enterprises. Regarding the first type of bribery, the Criminal Code and the Anti-Corruption Act prescribe punishments on civil servants accepting bribes and deter bribers' illegal conduct. The penalties ensure integrity and impartiality in civil servants' performance of official duties in order to maintain the public's trust in governmental acts. The Integrity and Ethics Directions for Civil Servants are established by the administrative authority to govern civil servants taking gifts or attendance of banquets, influence peddling, attendance of events, and taking of part-time jobs. With regard to commercial bribery, Taiwan currently does not have an exclusive law governing commercial bribery and treats it as breach of trust that is punishable in accordance with the Criminal Code of Taiwan and the Securities and Exchange Act provisions governing breach of trust.

Bribery of officials

If a civil servant demands, promises or accepts a bribe in the performance of his/her official duties, he/she may be considered as having committed a crime of taking a bribe in an act falling under official duties or a crime of taking a bribe in breach of official duties.

Acts in breach of civil servants' official duties

(1) Statutory penalties on civil servants taking such bribes:

A. Paragraph 1, Article 122 of the Criminal Code provides that a civil servant or an arbitrator who demands, agrees to accept, or accepts a bribe or other improper benefit for a breach of his/her official duties shall be punished with imprisonment for not less than three years and not more than 10 years, and in addition thereto, a fine of not more than NT$210,000 (approximately US$6,563) may be imposed.

B. Paragraph 2, Article 122 of the Criminal Code provides that a civil servant who commits a breach of his/her official duties for taking a bribe or other improper benefit shall be punished with imprisonment for life or imprisonment for not less than five years, and in addition thereto, a fine not more than NT$300,000 (approximately US$9,375) may be imposed.

C. According to Subparagraph 5, Paragraph 1, Article 4 of the Anti-Corruption Act, any person who demands, promises or takes bribes or other unjust enrichment by acts in breach of official duties shall be punished by imprisonment for life or a term not less than 10 years and may also be punished by a fine of not more than NT$100,000,000 (approximately US$3,125,000).

(2) Statutory penalties on bribing citizens:

A. Paragraph 3, Article 122 of the Criminal Code provides that a person who offers, promises, or gives a bribe or other unjust enrichment to a civil servant or an arbitrator for a breach of his/her official duties shall be punished with imprisonment for not more than three years; in addition thereto, a fine of not more than NT$90,000 (approximately US$2,813) may be imposed, provided that if such person surrenders himself/herself for trial, his/her punishment may be reduced or exempted, and if such person confesses during investigation or trial, his/her punishment may be reduced.

B. Paragraph 1, Article 11 of the Anti-Corruption Act provides that any person who tenders a bribe or other unjust enrichment, promises to give anything of value or gives anything of value to a person subject to the Act in return for that person's breach of his/her official duties shall be punished with imprisonment for a term not more than seven years and not less than one year and may also be punished with a fine of not more than NT$3,000,000 (approximately US$93,750).

Acts committed without breaching civil servants' official duties

(1) Statutory penalties on civil servants taking bribes:

A. Paragraph 1, Article 121 of the Criminal Code provides that a civil servant or an arbitrator who demands, agrees to accept, or accepts a bribe or other unjust enrichment in performance of his/her official duties shall be punished with imprisonment for not more than seven years, and in addition thereto, a fine of not more than NT$150,000 (approximately US$4,688) may be imposed.

B. According to Subparagraph 3, Paragraph 1, Article 5 of the Anti-Corruption Act, any person who demands, promises to take or taking bribes or other unjust enrichment for an act that falls under his/her official duties shall be punished with imprisonment for a term not less than seven years and may also be punished with a fine not more than NT$60 million (approximately US$1,875,000).

(2) Statutory penalties on bribing citizens:

If a citizen's offer, or promise or delivery of a bribe to a civil servant does not cause the civil servant to breach his/her official duties, such offer, or promise or delivery of a bribe should not be deemed a punishable crime of offering bribes under the Criminal Code. In order to effectively deter the custom of giving bribes in red packets, ensure that the government operates impartially, and foster the public's trust in the government, a paragraph was added to Article 11 of the Anti-Corruption Act in June 2011 to specify that citizens offering, promising or delivering bribes or other unjust enrichment to civil servants in return for their acts fall under their official duties shall be punished with imprisonment for a term of less than three years, detention, and *in lieu* thereof or in addition thereto, a fine of not more than NT$500,000 (approximately US$15,625). Under the added provision, commencing on July 1, 2011, citizens who offer, promise or deliver bribes to civil servants are subject to criminal punishment even if such acts do not cause the civil servants to breach their official duties.

(3) As the Criminal Code is a general law for criminal offences, liabilities and penalties, while the Anti-Corruption Act is a special law which specifically provides for corruption acts committed by civil servants, if a civil servant or bribee concurrently violates both the Criminal Code and the Anti-Corruption Act, the Anti-Corruption Act shall apply to such violations first under the rule that special laws prevail over general laws.

Although terms such as "acts falling under official duties", "demanding/offering bribes", "promising bribes" and "bribe and unjust enrichment" are specified and defined similarly in the above-mentioned provisions regarding bribery in each of the Criminal Code and the Anti-Corruption Act, for the same offence, the punishment under the two laws are quite different. In general, the punishment under the Anti-Corruption Act is more severe than that under the Criminal Code for the same offence. Hence, the Anti-Corruption Act provides for the mechanism of commutation of sentences for certain offences (such as the offences of bribery in breach of the civil servant's official duties or bribery without breaching the civil servant's official duties as mentioned above), if the violations are minor. Bribery is considered minor thereunder if the value of the property or unjust enrichment promised, acquired or sought is less than NT$50,000 (approximately US$1,563).

Analysis of the main elements which constitute an offence of corruption

(1) Acts falling under official duties
Civil servants will not be considered to be breaching their official duties when they do acts that they should or may do within the scope of their official duties. A civil servant will be deemed to be breaching his/her official duties if he/she fails to do an act he/she should have done or does an act he/she should not have done, or does an act beyond the scope of his/her authority or discretion. However, as Taiwanese courts' opinions on the scopes of civil servants' official duties are divided, their judgments on such cases may differ. Therefore, defendants in similar cases might be found guilty or not guilty.

(2) Demanding bribes or offering bribes
A civil servant is considered as demanding a bribe if he/she demands that a respondent deliver a bribe or any unjust enrichment. A person is considered as offering a bribe if he/she expresses willingness to deliver a bribe or any unjust enrichment to a civil servant in exchange for the latter's act against or within the scope of his/her official duties. A person will be deemed as having demanded or offered a bribe as long as he/she expresses his/her intention to do so, regardless of whether a promise has been made to deliver the bribe or undertake a certain act.

(3) Promising a bribe
A bribe is considered as having been promised when a civil servant and a bribee have agreed that a payment will be delivered between them.

(4) Bribe and unjust enrichment
A bribe refers to money or property whose monetary worth is calculable. Unjust enrichment means tangible or intangible benefits sufficient to meet people's needs or satisfy their desires such as exemption from debts, invitations to banquets, or offers of sex services.

(5) Payment of consideration
Even though no prevailing law of Taiwan specifies that payment of a consideration constitutes an element of bribery, from the literal interpretation of the applicable provisions, it is generally considered and affirmed by Taiwan courts that payment of a consideration should be one of the key elements which constitute the bribery offence. Whether a payment or a benefit received by the civil servant may deemed as a consideration or whether a consideration has been paid should be decided depending upon the contents of the civil servant's official duties, the relationship between the deliverer and recipient of the bribe, the type and the value of the bribe, and the time and the occasion the bribe is delivered. As determination of the existence of a consideration involves subjective issues, it is usually difficult for the court to decide such issues

objectively. Hence, whether there is a consideration or whether a consideration has been paid is usually a key issue in the parties' arguments and defences in legal proceedings.

(6) Any unjust enrichment a civil servant possesses from taking a bribe shall be confiscated in accordance with the law, regardless of whether the bribe is delivered as demanded by the civil servant or voluntarily delivered by the bribee.

Further, under the Anti-Corruption Act, if a civil servant has assets from unknown sources, he/she may commit an offence thereunder. Pursuant to Article 6-1 of the Anti-Corruption Act, if a civil servant who is suspected of corruption or bribery fails to reasonably explain, gives no explanation about, or falsely explains an irregular and conspicuous increase in his/her assets when compared with his/her income, he/she will be subject to imprisonment of not more than five years and *in lieu* thereof, or in addition thereto, a fine equal to the value of the assets with unknown sources.

Commercial bribery

Criminal liability

Unlike the corruption of civil servants, which is governed by many laws such as those cited above under the Taiwan legal regime, malpractice and bribery committed by business enterprises are subject only to the provisions of the Criminal Code regarding the offence of breach of trust and the Securities and Exchange Act regarding the offence of special breach of trust.

(1) Criminal Code provisions regarding the offence of breach of trust:

Article 342 of the Criminal Code provides that a person who manages the affairs of another with an intent to take an illegal benefit for himself/herself or a third person or harm the interests of his/her principal and acts in breach of his/her duties and thereby causes loss to the property or other interests of the principal shall be sentenced to imprisonment of not more than five years or detention, and *in lieu* thereof, or in addition thereto, a fine of not more than NT$15,000,000 (approximately US$468,750) may be imposed. Hence, the key elements of a breach of trust is that (1) the person managing the affairs of another must have an **intent** to take an illegal benefit for himself/herself or a third party, or to harm the interests of his/her principal, and (2) accordingly, he/she acts in breach of his/her duties. A person is considered as having acted in breach of his/her duties to a third party if he/she breaches his/her obligation to manage the affairs that third party has commissioned him/her to manage.

Whether a breach of duties is committed should be decided according to the applicable provisions of law or the terms of the contract between the parties as well as objective facts and the circumstances of each individual case.

(2) Special breach of trust under the Securities and Exchange Act:

Where a publicly issuing company is involved in a breach of trust, the Securities and Exchange Act provisions regarding special breach of trust rather than that under the Criminal Code shall apply.

Subparagraph 3, Paragraph 1, Article 171 of the Securities and Exchange Act provides that a person who has committed the following offence shall be punished with imprisonment for not less than three years and not more than 10 years, and in addition thereto, a fine of not less than NT$10 million (approximately US$312,500) and not more than NT$200 million (approximately US$6,250,000) may be imposed: "[...] (3) A director, supervisor, or managerial officer of an issuer under this Act who, with intent to procure a benefit for himself/herself or for a third person, acts in breach of his/her duties or misappropriates company assets, thus causing damage of NT$5 million (approximately US$156,250)or more to the company." The elements that constitute

the above offence are similar to those of a breach of trust under the Criminal Code, except for the persons committing such breach, the amount of damages, and the levels of punishment.

In addition, where a person commits a special breach of trust and gains over NT$100 million (approximately US$3,125,000) from his/her crime, the punishment to be imposed on him/her shall be increased.

Civil liability

(1) Kickbacks taken by employees of enterprises:

A. Besides being criminally responsible, under the Civil Code of Taiwan ("Civil Code"), employees taking kickbacks may also be found as having breached their duties of care as good administrators. Such employees should also be liable for compensation for any damage resulting from their negligence in the performance of the affairs entrusted to them, or from their acts beyond their authority.

B. Pursuant to the provisions of the Civil Code relating to tort, a person who, intentionally or negligently, has wrongfully damaged the rights of another, is bound to compensate him/her for any injury arising therefrom. Further, if several persons have wrongfully damaged the rights of another jointly, they are jointly liable for the injury arising therefrom. For example, if an employee of an enterprise takes kickbacks and procures products for the enterprise at prices higher than the market costs of such products, which affect the profits of the enterprise and infringe the enterprise's right to make its own decisions to secure lower prices through price comparison, then such employee shall be considered as having committed the tort under the Civil Code, and the employees and the manufacturers implicated should be jointly liable for compensation for the damage caused by their torts.

(2) Manufacturers offering kickbacks to employees of enterprises:

A. Besides being criminally responsible, manufacturers who offer kickbacks to employees of enterprises should also be held liable for compensation for the damage resulting from joint torts according to the provisions governing torts and joint torts under the Civil Code.

B. If a company competes for business opportunities by offering kickbacks to employees of an enterprise or commits any deceptive or obviously unfair act that is likely to undermine market order, the company may be deemed as having violated the prohibition of unfair competition under the Fair Trade Act, and the enterprise may claim damages from the company.

Overview of enforcement activity and policy during the past three years

Two high-profile bribery cases occurring in the past three years in Taiwan were the bribery of the former legislative secretary-general ("Mr. L") and the bribery of the former council speaker of a northern city of Taiwan ("Mr. H").

1. Bribes taken by the former legislative secretary-general, Mr. L:

Mr. L was suspected of taking bribes because, as the legislative secretary-general, he exploited his authority to make decisions on the Legislative Yuan's contracts on procurement of computer hardware and software to pocket kickbacks of NT$30 million (approximately US$937,500) in total on several occasions from the vendor winning the contracts. Hence, the prosecutor indicted Mr. L and the vendor for committing the offence of taking kickbacks, the offence of taking bribes against official duties and the offence of having assets of unknown sources under the Anti-Corruption Act. After the

case had been tried by the Taiwanese court of first instance, the court rendered a judgment in May of this year (2017), under which Mr. L was sentenced to 16 years in prison for the offence of taking kickbacks and the offence of having assets from unknown sources under the Anti-Corruption Act. Mr. L was also deprived of his citizen's rights (i.e., loss of qualifications for being a public official and becoming a candidate for public office) for six years. The proceeds of crime, totalling NT$275,686,920 (approximately US$9,075,981), will be confiscated. The case is now before the Taiwanese court of second instance.

2. Bribes taken by the former council speaker of a northern city of Taiwan, Mr. H:
   Mr. H was prosecuted for two bribery cases. The prosecutor held that Mr. H capitalised on his post as city council speaker to interfere with construction companies' operations and demand bribes from them. Those construction companies delivered bribes to Mr. H, in the hope that their construction projects could move forward. The court of first instance acquitted Mr. H and the representative of each of the two construction companies. The case was then appealed to the appellate court (i.e., Taiwan High Court). One of the representatives of the two construction companies is still being tried by the appellate court (i.e., Taiwan High Court); the other has been acquitted by the appellate court and is now being tried by the Supreme Court.

Two high-profile cases concerning kickbacks taken by company staff in Taiwan in the last two years are in respect of a rubber tire company ("Tire Co.") in 2014 and a plastics company ("Plastics Co.") in 2015.

1. The 2014 Tire Co. kickback case:
   The manager of the Material and Procurement Department of the Tire Co. exploited his post to demand kickbacks of over NT$500 million (approximately US$15,625,000) in total from suppliers of raw materials and customs brokers. The prosecutor indicted him for special breach of trust in violation of certain provisions of the Securities and Exchange Act, under which the punishment should be increased. Subsequently, the court of first instance sentenced him to five years in prison and fined him NT$15 million (approximately US$468,750), and the judgment has been final and conclusive.
2. The 2015 Plastics Co. senior officer's kickback case:
   When handling a construction project in China in his capacity as the head of the engineering department of Plastics Co., a senior engineer of Plastics Co. demanded NT$10 million (approximately US$312,500) in kickbacks from a supplier. The prosecutor indicted him for breach of trust under the Criminal Code. After his case had been tried by the court of first instance, the court rendered a judgment in June of this year (2017), under which the senior engineer of Plastics Co. was sentenced to two years and eight months in prison for breach of trust under the Criminal Code, and the proceeds of NT$7,500,000 (approximately US$246,910) are to be confiscated by the court. This case is now being tried before the appellate court (i.e., the Taiwan High Court).

   The taking of illegal kickbacks by employees of an enterprise can be debilitating to the enterprise. That is why some people urge the government to enact a special law exclusively governing offering bribes to employees of enterprises. Despite this, Taiwan has not yet enacted a law governing enterprises' bribery; according to past practice, such cases would normally be closely investigated as soon as they come to light. Further, although Taiwan is not a member state of the United Nations, in order to effectively prevent malpractice or bribery in enterprises, and in response to relevant foreign legislation, Taiwan's Legislative Yuan passed the Act to Implement United

Nations Convention against Corruption on May 20, 2015. Such Act came into effect on December 9, 2015. On the basis of such Act, current laws will be reviewed so as to improve relevant provisions of laws which govern commercial bribery.

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

Taiwan law prohibits civil servants from receiving facilitation or "grease" payments. Article 16 of the Civil Servant Work Act of Taiwan prohibits civil servants from receiving any kind of gifts in relation to the matters they have handled, and on top of that, civil servants who receive grease payments would be subject to imprisonment for a term of no less than seven years and/or a fine of no more than NT$60 million (approximately US$1,875,000) under the Anti-Corruption Act. The term "civil servants" under the Criminal Code is defined as persons who:

- serve in the central or local governmental agencies in accordance with the law and are empowered by the law to exercise certain authoritative powers;
- engage in public affairs in accordance with the law and are empowered by the law to exercise certain authoritative powers; or
- are entrusted by central or local government agencies to serve for public affairs under the authority of these agencies.

The Anti-Corruption Act also punishes people who offered grease payments or other improper benefits to civil servants even when there is no breach of official duties by such civil servants. Violators are subject to imprisonment for a term of less than three years, detention, and/or a fine of no more than NT$500,000 (approximately US$15,625).

Regarding offering a bribe without causing a breach of official duties:

- People who offer grease payments to civil servants of a foreign nation, the People's Republic of China ("PRC"), Hong Kong, Macao in cross-border trade, investment or other business activities shall also be punished in accordance with the above provisions.
- If the offering of grease payments is committed outside the territory of Taiwan, the offender will be dealt with according to the above provisions regardless of whether the offence is punishable or not under the laws of the land where the crime is committed.
- For a person who has violated the provisions, the penalty shall be mitigated if the grease payments do not exceed NT$50,000 (approximately US$1,563).
- For a person who has committed the offence specified in the abovementioned provisions, the penalty shall be exempted if he voluntarily turns himself in for an offence not yet discovered, and the penalty shall be reduced or exempted if a person confesses his guilt during the investigation or trial.

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

The public prosecutor's office is the main government agency that conducts bribery investigation, prosecution, and enforcement of criminal judgments. The police force, the Investigation Bureau and the Agency Against Corruption ("AAC") of the Ministry of Justice will assist the public prosecutors in investigating bribery cases. If the bribery offender's offence is petty, the public prosecutor's office may adopt deferred prosecution or plea bargaining. Bribery cases are enforced in criminal prosecution; there is no civil procedure to enforce bribery case against civil servants. However, civil procedures relating to tort may apply to a person in commercial bribery cases.

Process for deferred prosecution and plea bargaining

In bribery cases, deferred prosecution and plea bargaining only apply to minor offences or misdemeanours such as offering bribery, where the minimum principal punishment may be imprisonment for less than three years; therefore, it does not apply to civil servants accepting bribes. (Such bribery cases of a minor offence or misdemeanour nature are hereinafter referred to as "Minor Bribery".)

The prosecutor may defer prosecution against a defendant when he considers it proper and the crimes committed do not involve one of the offences for which the death penalty or life sentence might be imposed or for which the minimum principal punishment may be imprisonment for a period of more than three years. If a prosecutor makes the decision to defer the prosecution, the defendant may be ordered to perform or comply with certain matters, such as making an apology to the victim, making a written statement of repentance, making a payment to the victim of an appropriate sum as compensation for property or non-property damages or performing 40 to 240 hours of community service for a government agency or non-profit, public welfare institution designated by the prosecutor, etc.

Once a Minor Bribery case has been prosecuted by a prosecutor or applied for a summary judgment, after consulting with the victim's opinion, before the close of oral arguments in the court of first instance or before the summary judgment, the prosecutor may act on his/her own discretion or upon request by the defendant, his/her agent or attorney, which has been approved by the court, to negotiate the following matters outside the trial procedure; once both parties involved reach an agreement and the defendant pleads guilty, the prosecutor may request the court to make a judgment pursuant to the bargaining process:

1. The defendant accepts the scope of the sentence or accepts the sentence to be placed under probation.
2. The defendant shall apologise to the victim.
3. The defendant shall pay a certain amount of compensation.
4. The defendant shall pay a certain amount to the government treasury, a certain percentage of which may be appropriated by the prosecutor's office to certain non-profit, public welfare organisations or local autonomous organisations.

A defendant may withdraw the bargaining agreement at any time before the completion of the aforesaid procedures. Where a defendant violates his/her agreement with the prosecutor, the prosecutor may revoke the opportunity for a plea bargain.

Process for self-reporting

In principle, self-reporting on an offence not yet discovered is a mitigating factor to be considered by a judge in determining a criminal sentence. Under the Criminal Code, if a person voluntarily submits himself for trial for an offence not yet discovered, the punishment **may** be reduced, unless otherwise provided by Criminal Code or other relevant law. For example, pursuant to Paragraph 3, Article 122 of the Criminal Code, for a person who offers bribery to a civil servant or an arbitrator for a breach of official duties by the civil servant or arbitrator, such person's penalty **shall** be reduced or exempted if he/she voluntarily turns himself/herself in for the offence not yet discovered.

Considering the difficulty in police investigations as these briberies often involve a high level of privacy, and to encourage bribery case offenders to hand themselves in and confess, the Anti-Corruption Act sets out reduced penalty provisions for self-reporting, which are applicable as follows:

- For a public official who takes bribery and voluntarily turns himself in for an offence not yet discovered, the penalty is reduced or exempted if he surrendered all the unlawful

gains. If this has led to the uncovering of other principal offenders or accomplices, the penalty is exempted.
- For a public official who takes bribery and confesses to a crime during the investigation, the penalty is reduced if he/she surrendered all the unlawful gains. If this has led to the uncovering of other principal offenders or accomplices, the penalty is reduced or exempted.
- For a person who offers bribery, the penalty shall be exempted if he/she voluntarily turns himself in for an offence not yet discovered.
- For a person who offers bribery, the penalty may be reduced or exempted if he/she confesses his/her guilt during the investigation or trial.

Process for whistle-blowers

Detecting possible corruption offences relies heavily on information provided by whistle-blowers. The Anti-Corruption Informant Rewards and Protection Regulation of Taiwan provides for protection and confidentiality for whistle-blowers in reporting acts of corruption. The identities, reports form, statement transcripts, and other information relating to persons reporting corruption are kept confidential by the authority receiving the report, and are not entered into investigation files; when necessary, the provisions of the Witness Protection Act, which offers protection for witnesses who testify in criminal cases, may be applied to protect informants, so that people will feel confident in exposing illegalities, knowing that their identities and personal safety will be ensured.

Furthermore, to encourage the public to stand up and report crimes of corruption, the Anti-Corruption Informant Rewards and Protection Regulation provides rewards for any whistle-blower who informs the authorities of a corruptive case, and the amount of rewards depends on the severity of a sentence a convicted person receives (between NT$300,000 (approximately US$9,375) and NT$10 million (approximately US$312,500)). The more severe the sentence a convicted person receives, the higher amount of money a whistle-blower will be rewarded.

Overview of cross-border issues

There are no regulations affected by overseas bribery and corruption law.

Corporate liability for bribery and corruption offences

In Taiwan, as aforesaid, anti-bribery and anti-corruption practices are mainly governed by the Criminal Code and the Anti-Corruption Act; except for very limited cases (which do not include bribery and corruption cases), neither the Anti-Corruption Act nor the Criminal Code imposes criminal liability on juristic persons, and therefore only individual(s) may be subject to criminal punishment. A juristic person cannot be found liable for bribery and corruption offences.

Proposed reforms / The year ahead

Besides regulations governing corruption and bribery of civil servants, legislators were urged to enact a Commercial Anti-Bribery Act regarding liability for commercial bribery acts in the private sector. The draft Commercial Anti-Bribery Act was under discussion but put on hold since May 2014. There is no indication about when this legislation will be passed.

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Brief overview of the law and enforcement regime

Bribery, which is regulated under article 252 of the Turkish Penal Code ("TPC"), is a crime that can be committed only by certain persons. Accordingly, this crime can only be committed mutually, involving at least one public official and one civilian. Any benefit, advantage, money or gift that is offered and/or rendered to a public official for a favour to be done in relation to the duty of the public official constitutes bribery. Those committing bribery are sentenced to four to 12 years' imprisonment, save for aggravating and mitigating circumstances.

Corruption, on the other hand, cannot be defined as a typical crime, but rather it can be defined as a category comprising of a number of crimes such as embezzlement, malversation, bribery, misconduct, bid-rigging and manipulation of tender contracts, money laundering, fraud, fraudulent bankruptcy, insider trading, terrorism financing and forgery.

In that regard, the relevant legislation is listed as follows:

- Turkish Penal Code No. 5237.
- Turkish Penal Procedure Law No. 5271.
- Law No. 5326 on Misdemeanours.
- Law No. 5411 on Banking.
- Law No. 3628 on Asset Declaration and Fighting Against Bribery and Corruption.
- Regulation No. 90/748 on Asset Declaration.
- Law No. 657 on Civil Servants.
- Law No. 4734 on Public Tenders.
- Law No. 5549 on the Prevention of Laundering of Crime Revenues.
- Law on Establishment of the Public Officials Ethics Board and Amendments to Some Laws.
- Regulation on Ethical Behaviour Principles of Public Officials.
- Law No. 6415 on Prevention of Terrorism Financing.
- Regulation on Program of Compliance with Obligations Regarding Prevention of Laundering of Crime Revenues and Terrorism Financing.
- Law No. 6362 on Capital Markets.
- Anti-Smuggling Law No. 5607.
- Law No. 3568 on Independent Accountant Financial Advisers and Certified Public Accountants.

As to enforcement bodies, there is only one agency which conducts criminal investigations: public prosecutors. The prosecution office where the crime is committed will have jurisdiction over the criminal matter in principle. Upon finalisation of the investigation,

in case the prosecutor reaches the conclusion that gathered evidence constitutes sufficient suspicion as to the commitment of a crime, he issues an indictment and requests a public lawsuit be filed before the criminal courts.

The Turkish criminal court system has a three-tiered judicial system, which is comprised of the Criminal Courts of First Instance, the Regional Appeal Courts and the Turkish Court of Cassation.

In the first tier, there are three types of courts: criminal peace judgeships; the criminal courts of general jurisdiction; and serious crimes courts.

In respect of bribery and corruption, the court with jurisdiction shall vary on the grounds of the imprisonment term set forth for the crime in question. In that regard, if an aggravated form of a crime is committed, the serious crimes court would hear the case as they have the power to judge forgery of official documents, aggravated fraud, fraudulent bankruptcy and all crimes with a prison term of more than 10 years. Trials of other crimes that do not fall within the former will be heard by the criminal court of general jurisdiction which has the power to judge all cases that are outside criminal peace judgeships' and serious crimes courts' competence.

Overview of enforcement activity and policy during the last year

Recently, investigation of corruption in administrative and judicial bodies of the government is of utmost importance for Turkey in the post-coup period. Numerous official and confidential investigations are being carried out across the country, led by a dynamic circulation of public officials. Seemingly, such trend will continue for a while and newly appointed public officials will pay attention to avoiding any corruption more than ever.

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

With aspirations to provide a wide range of prevention measures, Turkey has regulated issues such as payment facilitation payments and hospitality under the Law on Civil Servants ("LCS"). Article 29 of the LCS stipulates that it is prohibited for civil servants to:

- request gifts directly or by means of an intermediary;
- accept gifts with the purpose of taking any advantage even while not exercising their duties; or
- ask their principals for a monetary loan or to accept a monetary loan from them.

Paragraph 2 of the same article further represented a legal basis for the creation of a Public Officials Ethics Board ("Ethics Board") and entitled the Ethics Board to determine the scope of "prohibition to accept gifts" and to request a list of the gifts received by public officials, who are at least of general manager level or equivalent, at the end of every calendar year, when necessary.

In 2004, the Ethics Board was created through the Law on Establishment of the Public Officials Ethics Board and Amendments to Some Laws, and secondary legislation "Regulation on Ethical Behaviour Principles of Public Officials" ("Ethics Regulation") has followed, setting out the gifts and benefits falling outside the scope of the prohibition on accepting gifts. Accordingly, the following shall not be regarded as prohibited as per article 15 of the Ethics Regulation:

- gifts donated to institutions or received on the condition that they are allocated to public service, registered with the inventory list of the relevant public institution and announced to the public, which shall not affect the legal conduct of the transactions;

- books, journals, articles, cassettes, calendars, CDs or similar material;
- rewards and gifts received within public contests, campaigns or events;
- souvenirs given in public conferences, symposiums, forums, panels, meals, receptions and similar events;
- advertisement and craft products distributed to everyone for promotion and having symbolic value; and
- credits taken by financial institutions on market conditions.

Moreover, the same article reiterates the gifts which fall in the scope of prohibition on accepting gifts as follows:

- welcoming, parting or celebration gifts, cheques for scholarships, travel and free accommodation and gift cards received from those that have a business, service or any relationship based on self-interest;
- transactions made with unreasonable prices while purchasing, selling or leasing a moveable/immovable good or service;
- any kind of gift such as goods, clothing, accessories or food received from service utilisers; and
- loans or credits taken from those that have a business or service relationship with a related institution.

It is worth mentioning the scope of the term "public official" while explaining the Ethics Rules determined for them. "Public official" is defined in article 6 of the TPC as a "[p]erson who constantly, periodically or temporarily engages in carrying out public oriented activities by being adopted, elected or any other way whatsoever".

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

The legislator has imposed many duties on companies, certain individuals and public and private institutions and their officials and/or employees to be able to track suspicious or illegal conduct before the commission of any crime. These can be regarded as precautionary measures and are regulated under separate pieces of legislation.

According to Law No. 5549 on the Prevention of Laundering of Crime Revenues, the Financial Crimes Investigation Board ("FCIB") has a duty to develop policies with respect to money laundering and assess suspicious transactions. Law No. 5549 has also imposed obligations on companies and individuals that are engaged in specific business areas to identify the counter-party to transactions, to notify suspicious transactions and disclose information and documents to FCIB, and to keep documents, company books and records for eight years. In the case that FCIB determines any findings as to the commitment of any crime, it shall inform the public prosecutor with jurisdiction in line with the Turkish Penal Procedure Law.

Law No. 3628 on Asset Declaration and Fighting Against Bribery and Corruption and the Regulation on Asset Declaration aim to determine unjustified benefits gained illegally or immorally, or expenditures disproportionate to the relevant person's social life. Those falling within the scope of the legislation mentioned above are obliged to notify their immovables, money and other negotiable instruments, gold and jewellery, rights, receivables and revenues. In the case that an unjustified benefit is determined, it shall be notified to the public prosecutor with jurisdiction in line with the Turkish Penal Procedure Law.

As to general investigation and enforcement procedures, please refer to the first section of this chapter.

Overview of cross-border issues

The following are the international agreements to which Turkey is a signatory or which have been ratified by Turkey:

- The United Nations Convention against Corruption.
- The United Nations Convention against Transnational Organized Crime.
- The OECD Convention.
- The OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.
- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.
- The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.
- Council of Europe, Criminal Law Convention on Corruption.
- Council of Europe, Civil Law on Corruption.

In addition, thanks to extraterritorial applications of the US Foreign Corrupt Practices Act ("FCPA") and the UK Bribery Act 2011, multinational companies prefer to establish anti-bribery compliance systems based on such foreign legislation. Although Turkey has a Regulation on the Program of Compliance with Obligations Regarding the Prevention of Laundering of Crime Revenues and Terrorism Financing, this only applies to banks, insurance companies, capital markets and brokerage firms. For this reason, multinational companies and subsidiaries of US and UK companies give priority to US- and UK-based legislation along with local requirements.

Corporate liability for bribery and corruption offences

Corporate criminal liability is recognised under Turkish law. According to article 43/A of the Turkish Misdemeanour Law, a person who is an organ or representative or acts within the operation of the legal entity is liable if he commits one of the following crimes:

- manipulating tenders as defined in article 235 of the TPC;
- bribery as defined in article 252 of the TPC;
- money laundering as defined in article 282 of the TPC;
- embezzlement as defined in article 160 of the Law on Banking;
- smuggling as defined in the Anti-Smuggling Law; and
- financing terrorism as defined in article 8 of the Anti-Terrorism Law.

For the benefit of the legal entity, a fine of up to approx. $500,000 will be imposed on the legal entity for each crime by the court which has jurisdiction to hear the criminal case of the individual who committed the crimes above. Additionally, according to article 60 of the TPC, certain security measures could be imposed on an entity whose employee is found guilty of a crime. Similarly, proceeds of crime which are in the possession of the entity are seized.

Proposed reforms / The year ahead

Following the enactment of Circular No. 2016/10 on Increasing the Transparency and Strengthening the Fight Against Corruption ("Circular") by the Turkish Parliament on 30 April 2016, Turkey is in the process of implementing the Action Plan annexed thereto, being valid during the period between 2016 and 2019.

Compared with the former Action Plan which was valid for the period between 2010 and 2014, the new Action Plan contains certain improvements, including the establishment of a Single Window System in Custom Services, legislative developments for institutions with public capital with regards to governance, and determination of ethical rules for members of the judiciary.

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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 combatting 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 combatting 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. However, recently there have been discussions among some members of parliament about the need to make its application extraterritorial, in particular to prohibit corruption of foreign Officials. 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 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 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 the 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, 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 performance of the 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.

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;
- unlawful enrichment; and
- unlawful influencing of Officials performing state duties.

Penalties for individuals convicted of corruption offences

Depending on the degree and type of a particular crime, 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; and
- 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 liable for corruption shall be listed in the Unified Register of Individuals Liable for Committing Corruption Offences within three

days of the coming into force of a respective judgment, 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.

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**"), investigation of the abovementioned corruption offences falls within the competence of the Ministry of Internal Affairs of Ukraine, the Prosecutor's Office of Ukraine and the Security Service of Ukraine.

The National 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 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.

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.

In 2016–2017, 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) the Methodical Recommendations Related to Preventing and Regulating the Conflict of Interest in Activities of Persons Authorized to Perform State or Local Government Functions and Related Individuals (Decision No. 2 dated 14 July 2016); (ii) the Model Anti-Corruption Program for Legal Entities (Decision No. 75 dated 2 March 2017); and (iii) the Procedure for Informing the Anti-Corruption Agency on Opening a Foreign Currency Bank Account Abroad (Decision No. 20 dated 6 September 2016).

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 2017, the number of corruption-related criminal proceedings increased. However, there were many instances when the sentence was too mild as compared, for instance, to the amount of unjustified benefits received by the Official. Ukrainian courts also seem to avoid imprisoning Officials found guilty in corruption crimes, punishing them with a fine or another milder sanction.

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, gifts 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 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.

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 the generally recognised ideas for 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 individuals on the date of a particular gift acceptance (currently constituting €55). 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 €110).

The above 'group of persons' notion is a recently introduced amendment. Therefore, there is no official or any 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). This is supported by Section 5.2 of the Methodical Recommendations

Related to Preventing and Regulating the Conflict of Interest in Activities of Persons Authorized to Perform State of Local Government Functions and Related Individuals approved by Decision No. 2 of the Anti-Corruption Agency dated 14 July 2016, under which an invitation for coffee or dinner and other hospitality widely used for establishing/maintaining good business relationships and strengthening working relationship are considered as gifts subject to restrictions imposed by Article 23 of the Anti-Corruption Law. 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 as 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:

- 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.

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 Article 8 provides that foreigners who do not permanently reside in Ukraine can be prosecuted in Ukraine under the Criminal Code if they commit 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 case 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 U.S. and Ukraine on Mutual Legal Assistance in Criminal Matters, effective as of 27 February 2001, requires Ukrainian government bodies to cooperate with the U.S. authorised

agencies by providing legal assistance to the U.S. 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 U.S. agencies for a potential witness (including an Official) to testify before a U.S. 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 is currently investigating possible money laundering arising from suspicions of corruption in Ukraine.[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 the matters within the Anti-Corruption Agency's authority. Moreover, the Anti-Corruption Bureau is entitled to conclude agreements with foreign and international law enforcement bodies on cooperation in the matters within its competence and 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 U.S. or UK companies) are aware of the existence of the FCPA and the UKBA and their effect on U.S. 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 96³ 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 in 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 €2,770 to €41,530), 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 activities of legal entities by dedicating its entire Section X to this issue. In particular, it requires Ukrainian companies to ensure developing and implementing adequate measures for preventing 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):

- 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) on the instances of spurring into committing a corruption offence related to the company's activities, as well as about actual commitment 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 international best practices. However, the Ukrainian anti-corruption legislative, regulatory and law enforcement environment still needs significant improvement to fully meet the international standards.

In general, many anti-corruption legislative initiatives introduced in 2015–2016 were implemented during the last year, and most of the national anti-corruption bodies have now been formed.

It is expected that the year ahead will be marked by the following:

- Ukrainian anti-corruption legislation will continue to change (e.g., two bills aimed at increasing transparency and publicity in activities on NGOs have been recently initiated by President Poroshenko and submitted to the parliament).
- Various national bodies tasked with preventing and fighting corruption will start to cooperate and this cooperation will bring long-awaited results.

- Significant and policy-shaping cases can be prosecuted/initiated and awarded punishments will be adequate to the gravity of a particular corruption/corruption-related office.
- All state bodies will adopt their anti-corruption compliance programmes.
- Serious compliance initiatives (launching/amending anti-corruption compliance programmes, assessing corruption risks, conducting internal compliance investigations, etc.) of Ukrainian companies can take place.

* * *

Endnotes

1. Corrupt payment ('*niðкyn*', 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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Svitlana has over 20 years of professional experience in Ukraine and the U.S., advising clients on a wide range of sophisticated issues in the area of anti-corruption/anti-bribery legislation and compliance. She is known for her state-of-the-art, business-oriented and user-friendly work in this area. Dr Kheda is an internationally recognised expert in anti-corruption/anti-bribery compliance. She speaks and publishes extensively (in Ukraine and abroad) on the specifics of the Ukrainian anti-corruption legislative and regulatory environment. Dr Kheda is a member of the Society of Corporate Compliance and Ethics (USA) and regularly attends FCPA/UKBA training in the U.S. and Europe. Svitlana advises the Ukrainian parliamentary committee on preventing and fighting corruption and is an expert on anti-corruption legislation of the PolitEyes project on assessment and defence of legislative initiatives.

Most recently, Dr Kheda was recognised among the leading lawyers by *Best Lawyers International 2018*. She is also recommended as one of the top lawyers in Ukraine by *Chambers Europe 2017*, *Ukrainian Law Firms 2017*, and *Client's Choice: TOP-100 Lawyers in Ukraine 2017*.

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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.

There have been few cases prosecuted under the Act so far, the most notable of which we address below. The powers contained within the Act to prosecute corporate entities have been used in only four cases and none of those cases went to trial. We expect to see the number of cases prosecuted under the Act to increase as time progresses when more offending will presumably be alleged to have taken place on or after 1 July 2011, but it is too soon to tell when we will see a contested trial in respect of the strict liability offence.

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. 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 new and 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 a person with the intention of obtaining 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 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 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.[8]

Accordingly, 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 there is sufficient evidence to provide a realistic prospect of conviction, and 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 can face an unlimited fine. In addition to any fine and/or 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 sentencing against 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 has been placed upon deterrent sentencing as a means of enforcing the Bribery 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).[9] The Guidelines state that the level of fine will be determined by reference to the culpability and harm caused by the offending corporation. Examples of high culpability are:

- corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others);

- corruption of local or national government officials or ministers; and
- corruption of officials performing a law enforcement role.

An example of lesser culpability will be where some effort has been made to put bribery prevention measures in place but insufficient to amount to a defence (this applies only to the offence under s. 7 of the Act).

Harm should be represented by a financial sum calculated as the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under s. 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery. The fine 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, aggravating or mitigating factors can be used to decrease or increase the figure. 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* [2014] UKSC 45), the Supreme Court decided that bribes and secret commissions are held on trust by an agent for his principal.

Overview of enforcement activity and policy during the past two years

Prosecutions of individuals

There remain few examples where there has been a successful prosecution of individuals for offences under the Act. Of those prosecutions that have taken place, only one has been as a result of a large-scale investigation by the SFO. As time progresses and more matters are charged under the new Act, this may well change.

The CPS has prosecuted individuals for several discrete acts which amounted to offences under the Act where the bribes concerned related to sums of money amounting to a few thousand pounds or less.

The SFO successfully prosecuted individuals for offences under the Act in December 2014. They secured sentences of 28 years in total for three men. The prosecution focused on the selling and promotion of Sustainable Agro Energy ("**SAE**") investment products based on "green biofuel" Jatropha tree plantations in Cambodia. The green biofuel products were sold to UK investors who invested primarily via self-invested pension plans ("**SIPPS**"). These investors were deliberately misled into believing that SAE owned land in Cambodia, that the land was planted with Jatropha trees and that there was an insurance policy in place to protect investors if the crops failed. When handing down the sentence, HHJ Beddoe

described the fraud as a "*thickening quagmire of dishonesty... there were more than 250 victims of relatively modest means some of whom had lost all of their life savings and their homes*". The judge added that the bribery was an aggravating feature.[10]

In addition to these three prosecutions under the Act, the SFO has an taken aggressive enforcement action under the pre-existing legislation. In September 2017, six current and former employees of F.H. Bertling Ltd, as well as 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 $20m. 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 April and May 2015, the SFO brought charges under the pre-existing legislation against Alstom Network UK and two of its employees relating to alleged offences of corruption concerning the supply of trains to the Budapest Metro. A contempt of court order prevents the publication of further information. It can, however, be noted that several other trials are being brought forward in multiple jurisdictions, including the U.S. In another case, four individuals were convicted in June 2014 of conspiracy to commit corruption and were sentenced in August 2014 to periods of imprisonment ranging from a 16-month suspended sentence to four years for their respective roles in the Innospec corruption case. Innospec itself was fined $12.7m in March 2010. In his sentencing remarks, the judge commented that "*corruption in this company was endemic, institutionalised and ingrained... but despite being a separate legal entity it is not an automated machine; decisions are made by human minds*". These cases demonstrate that the SFO has the ability and intent to prosecute under pre-existing bribery legislation, and the SFO has recently reiterated its "appetite to take on new cases... if the evidence leads that way". Whether or not those convictions and sentences occur as a result of the new Act has far more to do with when the alleged offending took place.

Prosecutions of commercial organisations

Since 2015, four corporations have been prosecuted for offences under the Act. The key reason for this is the new strict liability offence. The new strict liability offence of failing to prevent bribery is 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?

- 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 above defence is yet to be tested. Only four prosecutions have been instituted for the strict liability offence and in all four cases the corporations involved admitted liability.[11] The four cases are discussed below. It remains to be seen how these questions will be addressed in a prosecution, although the wording of the section 7 offence means that the onus of establishing "adequate procedures" will be on the company as defendant to the proceedings. 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.

It should also be noted that, due to the recent publicity surrounding deferred prosecution agreements ("**DPAs**"), many corporations are keen to institute a 'clean break' from previous corporate wrongdoing. Whereas an individual facing a long prison term may raise a defence, a corporation cannot face the same type of sanction. Accordingly, corporations may be more likely to take a risk-weighted view (and will no doubt factor in the costs of defending the company in a long, drawn-out trial) and may decide to admit liability so as to reduce the financial impact. An admission of liability has the most profound impact on sentencing over and above all other factors and arguably enables a corporate to gain some certainty and control over the situation. Given this, it may be a long time before the statutory 'adequate procedures' defence is tested.

The four prosecutions for the strict liability offence that have been opened are as follows:

- **Standard Bank** – November 2015. This was the first prosecution opened for the strict liability offence which was concluded by way of the first DPA (see below 'Hot topics' section for more details on DPAs).
- **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. The individuals alleged to have been involved are, according to the SFO, still under investigation.[12]
- **'XYZ' Limited** – In July 2016, XYZ Limited (referred to in this way due to the name of the company not having been published as a trial of individuals is pending) entered into a DPA (see the below 'Hot topics' section for more details on DPAs).
- **Rolls-Royce** – In January 2017, Rolls-Royce entered into a DPA to suspend an indictment which included, amongst others offences, two counts of failure to prevent bribery carried out by its employees or intermediaries (see 'Hot topics' below).

Previous corporate prosecutions and civil settlements

Although the Act came into force on 1 July 2011, the UK had secured a number of corporate convictions prior to that date. Indeed, matters may still fall to be prosecuted under the pre-existing law for offences committed prior to 1 July 2011. In 2009, Mabey & Johnson, a

bridge-building company, was the first corporate prosecution, convicted for paying bribes in Iraq, Jamaica and Ghana (three of its directors and officers were later prosecuted in February 2011). This prosecution was closely followed by Innospec (a fuel additives company which paid bribes in Indonesia and Iraq) and BAE Systems in 2010. It should be noted that BAE Systems was only convicted of keeping inadequate accounting records in the UK as part of a plea settlement reached, giving rise to some criticism of the SFO (there was also a conviction in the US).

There have also been a number of civil settlements, including those with Balfour Beatty, AMEC, Oxford University Press and M. W. Kellogg, where CROs of £2.25m, just under £5m, £1.9m and £7m respectively were agreed with the companies concerned. The approach of the SFO in resolving a number of potential corporate prosecutions by way of civil settlement has been criticised in some quarters. The OECD Bribery Working Group in its 2012 report criticised the UK Government not for the fact of its use of civil settlements *per se*, but rather because of the lack of transparency surrounding its decisions to adopt the civil settlement route rather than prosecution. As a result, we can expect to see much greater scrutiny of civil settlements in the future. Regardless of whether the trend for civil settlements with companies continues, it is anticipated that the individuals involved in bribery cases will still be prosecuted.

The recent position, however, of the current SFO leadership is that it is less inclined to use the civil settlement process than was the case under the previous regime. This is consistent with the approach taken in recent years by other UK prosecutorial agencies, with dual civil and criminal powers, such as the Financial Conduct Authority ("**FCA**").

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 need to be reported to 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 or Prudential Regulatory Authority ("**PRA**"), as the case may be (previously the Financial Services Authority ("**FSA**")). 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. For example, the FCA took enforcement action against the companies Aon Limited, Willis Limited, JLT Speciality Limited and most recently, Besso Limited for failing to take reasonable care in establishing effective systems and controls for countering the risk of bribery and corruption, in relation to payments made to third party overseas representatives. The FCA fined AON £5.25m in 2009, Willis was fined just under £7m in 2011, JLT Speciality Limited paid over £1.8m to the FCA in December 2013, and Besso Limited was fined £315,000 in March 2014.

The FCA has undertaken a number of thematic reviews into different sectors of the financial services industry. It started with insurance brokers, then the investment banks, and at the end of 2013 the FCA published the findings of its thematic review into the activities of asset managers. The FCA has expressed great disappointment that the financial services industry as a whole has failed to learn the lessons of others, as it had identified similar themes

throughout each of these thematic reviews. The most significant failings relate to the due diligence of agents (both from an anti-money laundering and anti-bribery perspective), as described in further detail below.

In May 2014, the British Bankers Association ("**BBA**") published new guidance to assist the banking sector in complying with the Act, again demonstrating that the Act is being viewed seriously by the financial sector.

There are also indications that Her Majesty's Revenue and Customs ("**HMRC**") is using the 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.

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. For example, in the case of Depuy International Limited, a company designing orthopaedic and neurosurgery devices, the SFO obtained a CRO for £4.829m in April 2011, in recognition of the company's unlawful conduct in relation to the sale of orthopaedic products in Greece between 1998 and 2006. This case demonstrated cooperation between international enforcement agencies, as the SFO launched its investigation following a referral from the US Department of Justice (as the case involved payments from Depuy International Limited (a UK entity) to intermediaries for the purpose of making corrupt payments to Greek medical professionals) and worked closely with both the Department of Justice and the US Securities and Exchange Commission ("**SEC**"). More recently, the investigation into the corruption allegations against GlaxoSmithKline by Chinese authorities has been bolstered by investigations by the SFO and the US Department of Justice.

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, Hong Kong and other EU Member States. On 15 January 2016 the treaty between the UK and China on Mutual Assistance in Criminal Matters entered into force. On 4 April 2016, an equivalent treaty entered into force between the UK and Kazakhstan.

Hot topics

Three areas in particular have led to much debate in the UK: facilitation payments; gifts and entertainment; and due diligence of agents and third parties.

Facilitation payments

Facilitation payments are illegal under the Act. This is not a new offence, as facilitation payments (or so-called "grease" payments, whereby a modest sum of money or relatively small gifts are paid or given to government employees in order to encourage the recipient to exercise a function which he should be doing anyway) have always been contrary to UK law. Typical examples are: payments to customs officials to prevent or mitigate delay in

passing goods through customs; or payments to secure licences, permits, etc. In outlawing facilitation payments, the UK takes a different approach from the US (see the US chapter in this book), with the UK's position in fact being in alignment with the law of most other countries around the world.

One common misconception is that facilitation payments must be modest in amount, and there is a significant risk that larger individual payments might not easily be characterised as "facilitation payments". It does not matter that there is no intent to corrupt the government official in question, provided that the payment is made in order to "influence" the official, or is made with the intention of obtaining or retaining business or an advantage in the conduct of business. If so, an offence is committed under the Act. The SFO guidance on facilitation payments was withdrawn in October 2012 and replaced with a new statement of policy, which removed any reference there had been in the previous guidance to acknowledging that it would take time to eradicate facilitation payments in certain countries.

In essence, the new SFO policy statement represents a hardening of the SFO's stance in relation to facilitation payments.

In May 2013, however, press reports in the UK indicated that there was a move to encourage the UK Government to soften the law in relation to facilitation payments, as it was causing an unnecessary burden on small and medium-sized enterprises. The Confederation of British Industries indicated that it supports this approach, but it remains to be seen whether there will indeed be any relaxation of the law in this regard. It is the authors' current view that any relaxation of the law, particularly in relation to businesses of a certain size, is unlikely in the near future.

Gifts and hospitality

Another issue which has caused much consternation since the coming into force of the Act relates to gifts and hospitality. In many respects there has been a disproportionate emphasis by companies on their gifts and entertainment policy. Cash gifts and other gifts, entertainments, or other advantages of a lavish and substantial nature, could potentially lead to allegations of bribery. The SFO is, however, keen to ensure that the emphasis of the requirements around gifts and entertainment is not overstated. David Green QC, the current Director of the SFO, said in October 2012 that the SFO was interested in the cases that were of the most serious nature, where it was in the public interest for the SFO to prosecute. "We are not the Serious Champagne Office," he said, thereby giving a stark indication of the likely level of interest the SFO would pay to corporate hospitality. This is consistent with the approach taken by the Ministry of Justice in its guidance that was issued prior to the implementation of the Act, whereby it was made clear that it was not the Government's intention to stamp out all forms of entertainment and hospitality.

It is clear that companies should have in place appropriate policies and procedures for gifts, entertainment and hospitality, but that this should not be to the detriment of any focus on other forms of potential bribery and corruption. There are much more significant risk areas for most companies.

Due diligence of agents and other third parties

It is submitted that the greatest area of risk for many companies operating across borders lies in the use of agents or other third parties to win business abroad. This is particularly so in the context of dealings with foreign governments (and where the threshold test, as discussed above, is much lower). The level and extent of appropriate due diligence is often

difficult to determine, and represents a necessary but sometimes intrusive exercise. It is important to ensure that such due diligence is undertaken at a sufficiently early stage in the process, and that the results of the process are properly scrutinised. Most of the UK and US FCPA enforcement actions to date have related to bribery where an agent or other third party was involved.

Whistleblowing

The UK Government took action through the Enterprise and Regulatory Reform Act 2013 ("**ERRA**") to strengthen whistleblowing protections. The ERRA received Royal Assent on 25 April 2013 and makes an explicit requirement that all disclosures must be in the public interest, in order to be protected by the Public Interest Disclosure Act 1998. Given this new public interest test, the previous legal requirement that a disclosure had to be made in 'good faith' was removed. These two provisions were effective from 25 June 2013.

Under the ERRA, co-workers and other agents of an employer are to be made personally liable if they subject a worker to bad treatment or victimisation because they have made a protected disclosure. In addition, employers will be vicariously liable for these actions, unless they can demonstrate that they have taken 'all reasonable steps' to prevent their workers from acting in this way. Given that fear of reprisals is a major barrier to people who wish to raise concerns, this will be a significant improvement.

In July 2013, the UK Government published a *Call for Evidence* to assess the existing protections and consider if further changes are required to the Whistleblowing Framework.[13] In December 2014, HM Government issued a *UK Anti-Corruption Plan* in which it stated that there was a need to support those who help to identify and disrupt corruption, and that the recent *Call for Evidence* consultation had highlighted support to introduce financial incentives for whistle-blowers in cases of bribery and corruption. For firms regulated by the FCA and the PRA, new rules relating to whistleblowers came into force by September 2016 which include requirements for certain firms to appoint a "whistleblowers' champion", and put in place internal whistleblowing arrangements to deal with disclosures at every level within an organisation. At the 2016 Anti-Corruption Summit, the UK Government committed to "providing effective protections for whistleblowers", and reviewing the effectiveness of recent legislative changes in this area. We have yet to see whether the Government's promise of greater protection and incentives for whistleblowers will come to fruition.

The future of the SFO

During the course of 2017, wide press coverage was given about the Prime Minister, Theresa May's, intention to abolish the SFO and transfer its powers to the National Crime Agency. The undoubted success of the SFO, both in economic and conviction-rate terms, as well as the outcome of the 2017 general election, mean that such plans appear to have been rejected, at least for the foreseeable future. In his sixth and last annual speech, the current Director of the SFO, David Green QC, highlighted how 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.[14]

David Green QC's six-year term will end in April 2018. At the time of writing, the Government has started the search for a new Director, whose term is rumoured to be five years.

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. However, since 2012, the SFO has been very keen to emphasise its role as a prosecutor, and has stated that "self-reporting is no guarantee that a prosecution will not follow". At most, it will be a public interest factor tending against prosecution, as explained in the Joint Guidance on Corporate Prosecutions. However, the SFO has also recently stated that the self-report can also be the single most important factor in a decision not to prosecute.

In recent speeches, the SFO has reiterated its stance on self-reporting; that is that it cannot accept such reports at face value, and that it will need to conduct its own independent investigation, especially in cases where the company in question denies any wrongdoing. It is for this reason that the SFO encourages companies to report early and to agree with the SFO whether, and if so, on what terms they might commission an investigation.

Despite the SFO's comments, however, the current regime for corporate self-reporting is uncertain. The success of a self-reporting regime will depend on whether there is sufficient incentivisation to do so or, indeed, sufficient adverse consequences from not doing so. 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 should take specialist advice on the potential consequences, as well as the process.

The SFO favours DPA agreements (discussed in more detail below) because if the terms of the agreement are not met and the DPA is terminated, prosecution will follow. For companies, however, the outcome of a self-report and the possibility of obtaining a DPA regime is an uncertain landscape. The most notable DPA to date, in the case of Rolls-Royce, indicated that a DPA is not automatically barred by the lack of a self-report, but the company will simply be at a "disadvantage" and exceptional cooperation might be needed 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 unreasonably requiring total waivers of privilege over certain documents), the DPA will be withdrawn without much hesitation.

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 committed no wrongdoing don't lose their jobs. If, in law, it would be very difficult for the SFO to satisfy a 'directing mind' test to convict a company of a substantive offence, but the corporation admits wrongdoing against the backdrop of such a charge, it is difficult to see how that charge could be tested later.

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) on a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information; or (ii) on a prosecution for some other offence where in giving evidence where a person makes a statement inconsistent with the material.

All of the above serves to make the self-reporting option less certain, less controlled, more intrusive and less worthwhile for many corporations.

Commercial pressure

The Act has received such publicity in the UK that most commercial organisations have been quick to put in place procedures to combat the risk of bribery and corruption. Anti-bribery compliance is now much more readily seen as an item on the board agenda. The extent to which compliance failings will in fact lead to prosecution or other action by the law enforcement authorities remains to be seen. The SFO has access to additional funding from the Government where necessary, but nonetheless it is expected that funding will always present something of an issue, as will the SFO's own resources. That is not to say that it would be safe to rely on the assumption that the SFO would not have the funds and resources to investigate or prosecute a particular case. It does, however, mean that there will have to be some reliance on the corporate world policing itself and, in particular, making self-reporting work. The SFO cannot be expected to investigate every allegation, and the senior management of companies which uncover acts of suspected corruption need to be able to consider sensibly whether it is in the company's interests to report their suspicions to the SFO.

Witness accounts and legal privilege

The SFO has taken an increasingly aggressive approach to claims to legal professional privilege. It has stated that its interest is focused on facts, as inherent in accurate and complete first accounts of witnesses spoken to as part of corporate investigations, and encourages companies to consult SFO investigators before questioning important witnesses.

The SFO has made it clear that companies should be prepared to waive legal privilege in appropriate cases, stating that an assertion of legal privilege over witness accounts is unhelpful and impossible to reconcile with an assertion of a company's willingness to cooperate. A company's decision to waive legal privilege will be seen as an obvious sign of cooperation, but if a company has a well-founded claim to privilege and opts to uphold privilege, then this will not be held against it. However, the SFO has proved that it is prepared to litigate in cases where it finds claims of privilege to be false or exaggerated, as demonstrated by the recent case of (subject to a pending appeal at the time of writing) *SFO v Eurasion Natural Resources Limited* [2017] EWHC 2017 (QB). The judgment in *ENRC v SFO* has far-reaching implications for legal professional privilege, particularly in the context of internal investigations. In that case the Court held that neither litigation nor legal advice privilege attached to documents, including interview notes and factual updates, created and used by the plaintiff's lawyers. Whilst the judgment is more detailed than can be given justice here, two points stand out for the purpose of corporate self-reporting in internal investigations; ENRC's claim for legal advice privilege failed for a number of reasons which included failure in meeting the dominant purpose test. The Court considered that the fact that ENRC intended to show the majority of the work product of its internal investigations to the SFO was fatal to its claim for litigation privilege. Additionally, its claim for legal advice privilege failed because legal advice privilege attaches only to communications between a lawyer and those individuals within a client entity who are authorised to obtain legal advice on that entity's behalf**.**

Plea agreements

English law does permit plea agreements in relation to criminal proceedings in certain restricted circumstances. In relation to offences under the Act, the rules are those as set out in the Consolidated Criminal Practice Direction: Pleas of Guilty in the Crown Court; and the

Attorney-General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud. Significantly, the judge will always have complete discretion regarding what sentence is eventually given, which raises the question of how useful the settlement can actually be between the SFO and the defendant. The first case where the SFO used a plea agreement was in Mabey & Johnson, followed by Innospec and BAE Systems; however, the judiciary has been critical of such agreements, particularly in the latter two cases. In BAE Systems, given that the deal was structured so unusually (for BAE to pay the people of Tanzania £30m minus any fine imposed by the court), undue pressure was probably placed on the court to minimise any fine it imposed.

Deferred Prosecution Agreements

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. Since DPAs came into force, the courts have imposed them in four cases. The oversight of DPAs remains strict, with all four cases being dealt with exclusively by the President of Queen's Bench Division, Sir Brian Leveson.

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 and the implementation of training and compliance programmes. An important, but not necessarily indispensable, factor in agreeing a DPA appears to be a self-report from the company under investigation, which meets the standards expected by the SFO. An absence of self-reporting might not be fatal, but will require an exceptional level of cooperation on the part of the company.

Once negotiations have begun in relation to a DPA, the Director of the SFO or the DPP (as the case may be) must apply to the Crown Court. The Court will need to agree 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 may be in private, with a further hearing in open court if the judge determines that the DPA is appropriate. 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 can apply to the court, who can determine if 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 will need to 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 judiciary: one indication from recent case

law (*R v Dougall*) suggests that the judiciary will not necessarily welcome leniency that goes beyond what is offered for an early guilty plea. A further related consideration is how, in practice, the judiciary will react to agreements which have been negotiated outside of the court system by the SFO or CPS rather than through the usual sentencing process. In *R v Innospec* (2010), Lord Justice Thomas was reluctant to approve the global settlement reached by US and UK authorities in connection with bribing government officials in Indonesia, stating that the imposition of a sentence except for minor offences is a matter for the judiciary.

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 and the SFO has recently re-emphasised 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. Recent guidance by the SFO has also given increased clarity as to what constitutes genuine cooperation, which refers to: (i) bringing new information to the regulator within a reasonable period of the incident being uncovered; (ii) allowing access to first-hand witness accounts by waiving legal professional privilege; and (iii) proper cooperation with the SFO case controller. The SFO has stated that such cooperation will be judged by actions, not words. The Sentencing Guidelines Council issued a statement in January 2014 in which they noted that "*while a DPA is not a criminal conviction and so the Sentencing Council cannot produce a guideline for them, the guidance can be used to inform the level of financial penalty that forms part of a DPA, which should be broadly comparable to the likely fine that would be imposed following a conviction after a guilty plea*".[15] The Definitive Guidelines on Fraud, Bribery and Money Laundering Offences are, therefore, to be referred to by judges operating the DPA scheme but will not yet be used in courts to sentence organisations that have been successfully prosecuted. Accordingly, it appears that the onerous and deterrent sentencing regime that applies to corporate offenders under the bribery sentencing guidelines will also apply to DPAs.

It is not yet known how DPAs will interact with ongoing investigations by overseas regulators, and it remains to be seen how this discretionary tool will be used by prosecutors in practice.

The four DPAs that have been approved by the court are set out below. They apply to different sized corporations in different circumstances and, accordingly, the terms of the DPAs differ significantly. There is not yet enough of a body of DPAs to draw any firm conclusions – they appear to have been agreed to be workable in the specific cases based on a) the offending, b) the amount of assistance provided to the SFO, c) the state of the corporation who is agreeing to the DPA, and d) the level of reform the company demonstrates.

- **Standard Bank** – Standard Bank plc was charged with failure to prevent bribery in respect of a $6 million payment that was made by a Tanzanian sister company of Standard Bank to a local partner in Tanzania. The aim of making the payment was to have members of the Tanzanian Government favour Standard Bank's proposal to work on a private placement to be carried out on behalf of the Government. The fees on the transaction amounted to $8.4 million and were shared between Standard Bank and Standard Bank's Tanzanian sister company. Standard Bank did not enter a formal guilty plea to the charge, it having agreed to enter into a DPA. However, as part of that process, Standard Bank admitted the alleged conduct in a statement of facts agreed with the SFO.

Under the terms imposed by the DPA, Standard Bank was obliged to cooperate fully and honestly with the SFO (including any other domestic or foreign agency or authority) on all matters arising out of the indictment. In addition, Standard Bank was to disclose to the SFO (including other agencies as directed by the SFO) any information in respect of its activities and those of its present and former directors, employees, agents, consultants, contractors and sub-contractors relating to the indictment. A wide-ranging set of financial penalties were also imposed on Standard Bank. The terms of the DPA provided that Standard Bank: (i) pay compensation to the Government of the United Republic of Tanzania in an amount of US$6,000,000 (plus interest of US$1,046,196.58; (ii) disgorge profits and pay to the SFO an amount of US$8,400,000; (iii) pay a financial penalty to the SFO in the amount of US$16.8 million; and (iv) pay the SFO's costs in relation to the investigation totalling £330,000. The SFO also required Standard Bank to undertake an independent review of its existing internal controls, policies and procedures relating to its compliance with the Act.

- **XYZ Limited** – The indictment alleged offending both pre and post the Act. It was alleged that during the period 2004–2012, XYZ Limited was involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions. Intermediary agents within a particular jurisdiction would offer and place bribes with those officials who exerted influence or control over the awarding of the contracts; this was done on behalf of XYZ's employees and ultimately the company itself. In the period 2004–2013, a total of £17.24 million was paid to XYZ Limited on 28 implicated contracts on which bribes were offered. An admission of wrongdoing was made by the company in respect of the allegations, which included an admission of the strict liability offence.
  The terms of the DPA stated that no protection against prosecution would be available to any present or former director, employee or agent for conduct prior to the date of the DPA. The SFO also imposed a provision allowing for prosecution to follow if XYZ Limited provided information to the SFO which it ought to have known was misleading, inaccurate or incomplete. Similar to the DPA terms imposed on Standard Bank, XYZ Limited were required to: (i) disgorge profits and pay to the SFO an amount of £6,201,085; (ii) pay a financial penalty to the SFO an amount of £352,000; (iii) ensure past and future cooperation with the SFO in all matters relating to the indictment; and (iv) review, maintain and report on the organisation's existing compliance programme to the SFO. In this instance, it is also worth noting the reasons why the SFO recommended a substantial 50% reduction on the financial penalties. In its assessment of the overall financial penalty to be imposed on XYZ Limited, the SFO had to decide on whether to impose a severe financial penalty on XYZ Limited (which in all certainty would lead to its bankruptcy) or a lesser penalty which may not represent a sufficient deterrent for any future indictments. The SFO considered the mitigating and aggravating factors pertaining to the indictment and concluded that the total penalty should equate to the disgorgement of the gross profits (£6,201,085) and the financial penalty (£352,000). In this matter, the court imposed a reduction greater than the usual 50% on the basis that it "could be appropriate not least to encourage others how to conduct themselves when confronting criminality as XYZ has".[16]
- **Rolls-Royce** – The third DPA is the largest economically and follows the most extensive single investigation ever carried out by the SFO. The indictment, suspended for the term of the DPA, covers 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery across seven jurisdictions: Indonesia; Thailand; India; Russia; Nigeria; China; and Malaysia. The conduct spans three decades and involves Rolls-Royce's

Civil and Defence Aerospace businesses and its former Energy business and relates to the sale of aero engines, energy systems and related services. The terms of the DPA[17] provided for: (i) total payments of £497,252,645 plus interest and reimbursement of the SFO's costs in full (a total discount on the potential penalty of 50%); (ii) past and future cooperation with the relevant authorities in all matters arising from the indictment (including the ongoing investigations into the conduct of the individuals); and (iii) completing a compliance programme concerning anti-bribery and corruption compliance. Rolls-Royce has also reached a DPA with the US DOJ and a Leniency Agreement with Brazil's Ministério, costing the company US$170 million and US$25 million respectively.

In contrast with the other DPAs granted so far, in this instance Rolls-Royce did not voluntarily self-report to the SFO. It did so only after the SFO was tipped-off by a whistleblower on the internet and approached Rolls-Royce for comment in 2012. The fact that an investigation was not triggered by a self-report would usually be "highly relevant"[18] toward judicial approval of the DPA under the interests of justice test. Nonetheless, the extent of the cooperation provided by the company persuaded Sir Leveson that he should not distinguish between Rolls-Royce's assistance and that of those who have self-reported from the outset.[19] This is notwithstanding the fact that he considered the offences to be "the most serious breaches of the criminal law in the areas of bribery and corruption". The court noted that this level of cooperation uncovered more wrongdoing than otherwise would have been possible and justified a 50% discount on the potential penalty.

Two other factors informed the court's approval of the DPA. Firstly, a genuine change in corporate management and culture, including a new board and executives who "could have not done more to address the issues". Secondly, the fact that a conviction would disbar Rolls-Royce from participation in public procurement contracts around the world: the court's estimate was that at least 15% of Rolls-Royce's order book would be automatically disbarred and another 15% would be under discretionary disbarment.

- **Tesco** – The fourth DPA granted by the SFO, obtained judicial approval on 10 April 2017, relates to false accounting practices by Tesco PLC's subsidiary, Tesco Stores Limited, between February 2014 and September 2014. As part of the conditions of the DPA, Tesco PLC agreed to total payments of £235 million, which includes £129 million financial penalty under the DPA, £85 million for the FCA compensation scheme, plus related costs.[20]

  Tesco PLC noted that it has fully cooperated with the investigation and undertaken an extensive programme of change to leadership, structures, financial controls, partnerships with suppliers, and the way the business buys and sells. The terms of the DPA remain unpublished under a contempt of court order so as not to prejudice the ongoing trial of three executives involved in conduct of Tesco Stores Limited's business.

The distinct nature of each agreement analysed above and the absence definitive rules regarding DPAs creates uncertainty for businesses and practitioners. In light of the paucity of DPAs, to date only a few threads can be safely identified:

1. a comprehensive reform of the company was a key element in all DPAs handed down so far;
2. the Rolls-Royce DPA indicated that neither (i) the seriousness of misconduct, nor (ii) the absence of self-reporting will necessarily be fatal towards the granting of a DPA; and
3. the impact of DPAs agreed by a company on the individuals involved in the wrongdoing (and, possibly, their fair trial) should be considered.

Effect of DPAs on individual defendants

One issue arises in relation to the naming of individuals in the DPA itself or in the Statement of Facts agreed by the corporate. In Standard Chartered, certain individuals, who had no right to intervene at court, were named and criticised. This creates a real risk of reputational damage and is at odds with the position taken by the FCA in relation to its notices. In *FCA v Macris*[21] 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.

Another concern for individuals in the context of DPAs is whether evidence 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.[22] 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. There are often no safeguards in place to ensure the right of legal representation or the right to silence for employees going into an internal interview. Furthermore, the Statement of Facts, which further down the line could prejudice an individual's case, is agreed by the company with no right given to the individuals involved to put forward an alternative version of events.

Current and proposed reforms

There has been considerable development since 2010 in relation to the UK enforcement of bribery and corruption, both domestically and overseas. Now we expect to see a period of consolidation and testing of these new laws, policies and procedures. By the time this book reaches its next edition, we expect to be able to report on a number of corporate prosecutions under the Act and on several further DPAs.

The UK Government and the SFO's current Director are enthused by the strict liability corporate offence of failing to prevent bribery – so much so that in the Criminal Finances Act 2017, the Government has introduced the new corporate offence of failure to prevent the criminal facilitation of tax evasion which, effective from 30 September 2017, will be a strict liability offence much in the same way as section 7 of the Bribery Act 2010. For the avoidance of doubt, the new offence is also eligible for entry into a DPA.[23]

Further serious consideration is being given to expanding these offences to one of "failing to prevent financial crime". This would expand the current offences to one which counters not only bribery, corruption and tax evasion, but also fraud, money laundering, insider trading and economic sanctions, amongst others. It is not, however, expected that any such proposal will be put before the UK Parliament in the immediate future.

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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. Proceedings for an offence under the Bribery Act 2010 may also be instituted with the consent of the Director of Revenue and Customs Prosecutions.
9. Sentencing Council Definitive Guideline, Fraud, Bribery and Money Laundering Offences, 1 October 2014, p.49.
10. http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/city-directors-sentenced-to-28-years-in-total-for-23m-green-biofuel-fraud.aspx.
11. 'Admission of liability' is a phrase used to cover both a guilty plea and where a corporation has admitted wrongdoing in the context of an agreed 'Statement of Facts' that is submitted to the court as part of a process to enter into a DPA.
12. https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/.
13. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212076/bis-13-953-whistleblowing-framework-call-for-evidence.pdf.
14. https://www.sfo.gov.uk/2017/09/04/cambridge-symposium-2017/.
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Overview

The Foreign Corrupt Practices Act ("FCPA")[1] became law in 1977 and has been enforced aggressively for many years. It is the US Government's primary tool in combating overseas bribery and corruption. The Department of Justice ("DOJ") has jurisdiction over criminal prosecutions, while the Securities and Exchange Commission ("SEC") is empowered to bring civil enforcement actions. The FCPA has a broad geographical reach and creates significant exposure for both companies and individuals. While the US Government had a record enforcement year in 2016 under the leadership of President Obama, enforcement of the FCPA remains a "critical" focus of the DOJ under the leadership of President Trump. In a recent speech, Attorney General Jeff Sessions stated that the DOJ will "continue to strongly enforce the FCPA and other anti-corruption laws".[2]

Notably, many of the most high-profile FCPA prosecutions have been against non-US companies. For instance, the record-breaking Siemens (Germany) case in 2008 led to $800m in fines in the United States alone. More recently, in 2015, Alstom (France) paid a criminal fine of over $750m for FCPA violations, and in 2016, Teva Pharmaceutical (Israel) paid $519m (including a $283m criminal fine) for FCPA violations. The government has also shown sustained interest in taking action against individuals and has increasingly touted its cooperation with non-US authorities in investigating and prosecuting cases.

While both prosecutions and civil enforcement actions have been on the rise, many aspects of the FCPA are still relatively untested in court because defendants tend to enter pleas and/or to settle civilly with the government, often entering into a Deferred Prosecution Agreement ("DPA") or Non-Prosecution Agreement ("NPA") rather than risking a larger fine or criminal conviction. Due to the increasingly real prospect of imprisonment for bribery offences, individuals are often more willing than corporations to test government theories in court; as a result, the current government focus on prosecuting individuals may yield more litigation and therefore more case law from judges interpreting the FCPA's provisions. Thus far, however, the evolution of the FCPA has emerged largely from the government's views, reflected in the cases it chooses to bring, in advisory opinions it occasionally issues, and in the 120-page Guidance jointly issued by the DOJ and SEC in late 2012.[3] Subsequently, in September 2015, the DOJ issued a policy memorandum signed by former Deputy Attorney General Sally Yates, the so-called Yates Memorandum, regarding the prosecution of individuals in corporate fraud cases that impacts how companies and enforcement officials assess voluntary disclosure and cooperation. And in April 2016, building on the Yates Memorandum, the DOJ announced a one-year pilot program, which was extended for an additional year in March 2017,[4] designed to encourage companies to voluntarily disclose FCPA violations. The pilot program is notable primarily because

it sets forth explicit requirements regarding disclosures, cooperation and remediation that companies must meet in order to receive full credit for mitigation of potential penalties. As of June 2017, the DOJ has publicly issued seven declinations pursuant to the pilot program.

As demonstrated by record-breaking enforcement actions in 2016, global enforcement remains robust. For example, in December 2016, Odebrecht S.A. (Brazil) and its petrochemical subsidiary Braskem S.A. initially agreed to pay a combined $3.5bn penalty, the largest bribery settlement of all time, to Brazilian, Swiss, and US authorities. (Based on mutual agreement of the parties and the court, the global penalty was reduced to $2.6bn in May 2017, and the portion of the global penalty owed to the United States was reduced from $260m to $93m, due to concerns over the companies' ability to stay in business while paying global penalties.[5]) At the same time, due to the foregoing pilot program, companies that voluntarily disclose violations, cooperate with the government, and remediate compliance programs to prevent recurrence are more likely than before to earn declinations or reduced penalties. One trend to monitor in connection with the pilot program and the individual enforcement focus introduced pursuant to the Yates Memorandum will be the number of individual prosecutions that occur in circumstances where companies receive a declination.

While the FCPA does not provide an absolute defence based on adequate anti-bribery procedures and due diligence, robust procedures are essential to mitigating FCPA exposure. If the US Government becomes aware of potential red flags or suspicious payments by a corporation, it will look for real, substantial and sustained compliance efforts, including a strong anti-corruption message from the top. Companies subject to the FCPA also should carefully consider whether to self-report violations in order to maximize the chance of a favorable resolution with the government. Even self-reporting and swift action against individuals involved in any bribery, however, cannot necessarily shield a company from liability and from potentially significant penalties.[6]

Basic elements of the FCPA

Bribery provision

No "issuer" (an entity whose shares are publicly traded on a US exchange, including most American Depository Receipts ("ADRs"), or any officer, director, employee or agent of such an entity) or "domestic concern" (US person, or officer, director, employee or agent of a US person) may *corruptly* pay, offer, authorize, or promise to pay money or *anything of value* to a *foreign government official*, candidate for office, or political party, in order to secure an *improper advantage* and to assist in *obtaining or retaining business*.

Additionally, no person, regardless of geography, may pay or offer a bribe if any act in furtherance of the bribe occurs within the territory of the United States. 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 in that activity to FCPA liability. In 2013, a federal judge in New York agreed with the government that sending an email that passes through US servers could be enough of a connection to the United States to enable the government to bring an FCPA suit against a participant in a bribery scheme concerning an issuer of ADRs that otherwise occurred entirely outside of the United States.[7]

As a result, both individuals and corporations have FCPA exposure. The FCPA covers, for instance, all US citizens regardless of location, foreign subsidiaries of US entities, US parents (which may be liable for the actions of their foreign subsidiaries), foreign entities traded on US exchanges, and indeed any non-US company or national that causes an act to be done within the United States by any person acting as an agent of the non-US person.

Importantly, a principal can be liable for the actions of an agent even if the principal merely turns a blind eye to the high risk of a bribe and does not have actual knowledge of corrupt activity.

Facilitation payments exception

The bribery provision contains an exception for "facilitating or expediting payments" made in furtherance of routine governmental action. This exception is interpreted narrowly by enforcement authorities and the exception only applies when a payment is made to further "routine governmental action" that involves non-discretionary acts. According to guidance released by regulatory authorities, examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office. Importantly, anti-bribery laws in certain jurisdictions, including the United Kingdom, do not permit facilitation payments. Given the narrowness of the exception under the FCPA and the prohibition on facilitation payments in some jurisdictions, it is a global best practice to prohibit such payments.

Hospitality

The FCPA does not prevent companies from *bona fide* business promotion expenses, including legitimate hospitality for government officials. Some "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".[8] Large or extravagant gifts (e.g., watches, cash, exotic travel, etc.), however, are more likely to be considered to have been given with an improper purpose.

Accounting provisions

In addition to being subject to the FCPA's bribery provisions, an "issuer" must also maintain its books and records in "reasonable detail" to "accurately and fairly reflect the transactions and dispositions of [the company's] assets", and maintain adequate internal controls. 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 in many cases higher, penalties. The issuer's responsibility to ensure accurate books and records extends to the books and records of subsidiaries and affiliates that the issuer controls. If the issuer owns less than 50% of a subsidiary or affiliate, however, the issuer must only use its "best efforts" to cause the subsidiary or affiliate to maintain adequate accounting controls.[9] In practice, the "books and records" provision has led to many of the largest FCPA fines. Individuals can also be held civilly or criminally liable for participating in such violations. Companies may also fall foul of this provision even if not all of the elements of a bribery offence, as described above, have been met. For instance, if a corporation allowed a third-party agent to make corrupt payments to another person, but it was doubtful whether that person was a "foreign government official", the corporation could still face FCPA prosecution under the books and records provision of the FCPA if the company's books and records characterized such payments in a misleading way; for instance, recording them as consulting fees.

Scope of prohibitions and risk

In assessing the FCPA's reach, corporations and individuals must focus on the wide range

of activities that could fall under the law. For instance, providing a "thing of value" is not confined to paying a monetary bribe. Rather, the FCPA prohibits corruptly providing any benefit, such as:

- travel and lodging not directly related to business activities (e.g., providing for a detour to a tourist destination or paying expenses for a government official's family members);
- providing excessive gifts and entertainment;
- hiring a government official's relative; or
- making a charitable contribution, even to a *bona fide* charity, if that contribution benefits a foreign official or is part of a *quid pro quo*.

Similarly, one of the areas of greatest risk to corporations, especially those that operate in countries known for widespread corruption, is the activity of agents. A corporation can be liable for actions taken by their agents (including consultants, joint venture partners, distributors, "finders" or vendors) if the corporation authorizes, has knowledge of, or turns a blind eye to corrupt payments by such agents. To combat exposure for such "deliberate ignorance" of bribery, a company must be alert to potential red flags in establishing a relationship with a third-party agent; for instance:

- a government official recommends the third party;
- the third party has previously engaged in illegal or suspicious activities;
- the third party has little relevant experience, or is not listed or known to people within the industry;
- the third party seeks unusual payment arrangements, unusually high commissions, or success fees dependent on favorable government action; or
- the third party is a charity (even *bona fide*) affiliated with a foreign government or official(s).

Key issues in investigation, decision-making, and enforcement procedures

While we cannot cover all FCPA enforcement developments in this space, we highlight a few that present the greatest potential for further development in the near future.

Record-breaking enforcement of FCPA violations

The SEC and DOJ have continued to aggressively bring enforcement actions against companies and individuals for FCPA violations. In 2016, the US Government brought a record total of 53 enforcement actions (32 by the SEC, and 21 by the DOJ). As of June 30, 2017, the US Government has brought 18 total actions (6 by the SEC and 12 by the DOJ), nearly matching the 20 total actions brought during the entirety of 2015. It is worth noting, however, that the majority of the enforcement actions settled in 2017 were filed in January pursuant to investigations that commenced under the Obama administration.

International law enforcement cooperation a new norm

Three recent record-breaking enforcement actions demonstrate that international law enforcement cooperation is a new norm in anti-corruption enforcement. Such cooperation increasingly is bringing about "double jeopardy" risks – penalties in multiple jurisdictions for the same conduct – in connection with anti-corruption settlements.

In February 2016, VimpelCom Ltd. agreed to pay nearly $400m to the DOJ and SEC (the eighth-largest FCPA settlement to date) to settle charges related to bribes paid to an Uzbek government official to facilitate market entry and secure preferential treatment in Uzbekistan.[10] VimpelCom also agreed to retain an independent compliance monitor for three years and to pay a separate penalty of nearly $400m to Dutch regulators. In addition to the charges against VimpelCom, the DOJ's Kleptocracy Asset Recovery Initiative also

brought complaints seeking forfeiture of $850m in allegedly tainted funds connected to the Uzbek bribe recipient held in European bank accounts. In June, the DOJ obtained orders to seize assets held in certain European countries, demonstrating the parallel avenues used by the US Government to target funds connected to corrupt activities.

In December 2016, as discussed above, Odebrecht S.A. ("Odebrecht") and its subsidiary Braskem S.A. ("Braskem") initially reached a combined $3.5bn criminal and civil settlement, the largest global anti-corruption settlement in history, with Brazilian, Swiss, and US authorities. As discussed above, this penalty was later reduced to a global penalty of $2.6bn due to concerns over the companies' ability to pay.[11] The charging documents allege that from 2001 to 2016, Odebrecht's "Division of Structured Operations" paid approximately $800m in bribes in connection with over 100 infrastructure projects around the world to receive benefits of approximately $3.3bn.[12] With respect to Braskem, the charging documents allege that from 2002 to 2014, Braskem paid approximately a quarter-billion dollars into Odebrecht's "Division of Structured Operations" and Odebrecht allegedly used these funds to secure benefits of approximately a half-billion dollars. In connection with SEC/DOJ resolutions, Odebrecht agreed to the imposition of a three-year corporate compliance monitor. In addition to substantial corporate penalties in Brazil, in March 2016, Odebrecht's CEO, Marcelo Odebrecht, was sentenced to 19 years in prison for violations of various laws, including anti-corruption laws.[13]

In January 2017, Rolls-Royce plc agreed to pay $800m in penalties to the DOJ, the United Kingdom's Serious Fraud Office (SFO), and Brazil's Ministério Público Federal (MPF) to settle charges related to bribes paid to officials at state-owned oil companies in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq. Rolls-Royce entered into DPAs with both the DOJ and the SFO. In the DPA with the DOJ, in which Rolls-Royce was assessed a criminal penalty of approximately $195.5m, Rolls-Royce admitted that between 2000 and 2013, it paid $35m in bribes through third party agents. It further agreed to provide the DOJ with annual reports regarding the "remediation and implementation of [its] compliance measures".[14] In its DPA with the SFO, Rolls-Royce admitted that its improper conduct extended back to 1989 and agreed to pay a fine of approximately $605m. Finally, in its leniency agreement with Rolls-Royce, the MPF levied a $25m penalty. Since conduct underlying this penalty overlapped with the conduct that resulted in the DOJ penalty, Rolls-Royce received a credit of approximately $25m from the DOJ. (The SEC was not involved because Rolls-Royce is not a listed company in the United States.)

Renewal of corporate monitorship

Also of note, in January 2017, the SEC and DOJ for the first time entered into a joint FCPA resolution with a company for conduct stemming from violations of compliance obligations in prior FCPA settlements. Specifically, Zimmer Biomet, an Indiana-based medical device company, admitted that it violated its 2012 agreements with the DOJ and SEC by continuing to use a third-party distributor who was known to have paid bribes to Brazilian officials notwithstanding the fact that Biomet (Zimmer Holdings acquired Biomet in June 2015)[15] had agreed to stop using that distributor in the 2012 agreements. Interestingly, the government did not allege that Zimmer Biomet violated the FCPA's anti-bribery provisions. Instead, the government alleged that Zimmer Biomet's actions violated the FCPA's books and records provisions. For these violations and for allowing its Mexican subsidiary to pay bribes to Mexican customs officials, Zimmer Biomet was assessed a $17.4m criminal penalty by the DOJ and a $6.5m civil penalty by the SEC. In addition, the SEC ordered Zimmer Biomet to pay $6.5m in disgorgement. Finally, Zimmer Biomet, which had been

under the supervision of an independent corporate monitor since 2012, agreed to retain such a monitor for an additional three years.

DOJ FCPA enforcement plan and voluntary disclosure "pilot program"

In April 2016, the DOJ released a memorandum setting forth a year-long pilot program for FCPA investigations; this pilot program was subsequently renewed for an additional year in March 2017.[16] Most notably, the DOJ pilot program intended to encourage self-reporting of FCPA violations.[17] As discussed above, the DOJ's pilot program builds upon the Yates Memorandum's goal of enhancing the DOJ's effort to leverage its resources to identify culpable individuals in corporate cases. The DOJ also announced a significant increase in resources dedicated to FCPA enforcement (adding 10 new prosecutors and additional investigators) as well as the strengthening of DOJ's coordination with international law enforcement counterparts through increased sharing of leads, documents and witnesses in cross-border investigations.

The pilot program is notable because for the first time the DOJ explicitly set forth standards for when companies may be eligible for reduction of penalties in FCPA enforcement actions. In the past, similar considerations have been used by the DOJ in assessing potential mitigation, but the pilot program formalizes the position of the DOJ in this regard. Under the pilot program, the DOJ identified three primary requirements that must be fulfilled in order for companies to receive full mitigation credit: (1) appropriate voluntary disclosures of FCPA violations; (2) full cooperation with a government's subsequent investigation; and (3) proper remediation measures. The FCPA-specific guidance is intended to be considered in conjunction with general criminal mitigation factors identified in the DOJ's Principles of Federal Prosecution of Business Organizations and the United Sentencing Guidelines.

The main requirements for companies seeking to receive credit under the pilot program are:

- To receive credit for voluntarily disclosing FCPA violations, a company must disclose all relevant facts known to it (including regarding individuals involved in the conduct at issue) prior to "an imminent threat of disclosure or government investigation" "within a reasonably prompt time after becoming aware of the offense".
- To receive credit for cooperating with a DOJ investigation, the company must provide "proactive cooperation" by disclosing all relevant facts (even when not specifically asked to do so) along with the sources of such information, including relevant witnesses and documents. Emphasis is placed on disclosing information about individuals involved in the conduct under investigation, consistent with the requirements of the September 2015 "Yates Memorandum" which emphasized the DOJ's priority on holding individuals accountable for criminal conduct (more on this below).
- Finally, to receive credit for remediation under the pilot program, a company must timely and appropriately implement or enhance its compliance program (including by disciplining employees and taking other measures to reduce the risk of future violations) and disgorge all profits resulting from the FCPA violations.

If a company satisfies these three required elements, the DOJ: (1) may reduce the fine up to 50% below the low end of the US Sentencing Guidelines fine range (significant because prior to the program, the general discount for cooperation has been only 25% below the low end); (2) generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program; and (3) may decline to press charges altogether. Companies that fulfill some but not all of the requirements may be eligible for lesser mitigation.

The parameters of the pilot program are consistent with past SEC and DOJ enforcement guidance that provide companies with significant mitigation opportunities for cooperation

in investigations related to potential FCPA violations. The DOJ's *Principles of Federal Prosecution of Business Organizations* states that "[i]n determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors". Factors to be considered in this regard include a corporation's willingness to provide relevant information and identify relevant actors within and outside the corporation.[18] Similarly, the SEC's so-called "Seaboard report" identifies self-reporting and cooperation as factors to be considered when assessing appropriate charges and remedies.[19] In 2010, the SEC launched a formal cooperation program and issued a related policy statement setting forth a framework for evaluating cooperation in an SEC investigation, which includes factors such as the value and nature of the cooperation provided, the danger posed by the misconduct, and the cooperator's efforts to remediate the harm caused by violations.[20]

Among other requirements, in order to receive any cooperation credit under the Yates Memorandum, companies are required to focus their investigations on individuals and share findings and conclusions regarding those individuals with the US Government. The Yates Memorandum and Pilot Program have been criticized because they may increase the cost and scope of investigations and result in delays in the final resolution. It is expected that companies will have to expand the scope of investigations in order to credibly demonstrate to the DOJ that all individuals potentially involved in criminal conduct were pursued. In practice, this will require potentially significant additional time and expense. The Yates Memorandum's requirement that DOJ attorneys must justify in writing to their superiors the basis for discretionary choices to pursue or decline to pursue individual corporate officials also may result in significant delay in negotiating settlements.

Declinations under the pilot program

The DOJ has not specified the exact circumstances in which it will decline to prosecute an organization under the program, but it did identify various factors that will be considered, including the seriousness of the case, whether management was involved in the violations, the amount of profit derived from the violations and a company's general history of non-compliance.

Since the pilot program became effective in April 2016, the DOJ has publicly issued seven declinations under the program.[21] For example, on June 29, 2017 the DOJ issued a declination letter to CDM Smith, Inc. ("CDM Smith"), a Massachusetts-based engineering and construction company, which had disclosed to the DOJ that between 2011 and 2015 its Indian subsidiary and employees of its division responsible for Indian operations paid more than $1m in bribes to Indian government officials and instrumentalities thereof in order to secure contracts from the National Highways Authority of India and from local officials in the state of Goa.[22] CDM Smith agreed to pay a disgorgement of approximately $4m. For this conduct, CDM Smith was also sanctioned by the World Bank Group, though it was not debarred.[23]

Panama Papers

In April 2016, a massive amount of information (over 11 million documents) was leaked regarding the activities of a Panamanian law firm, Mossack Fonseca, which specialized in the creation and operation of offshore bank accounts and shell companies on behalf of numerous companies and individuals. Initial headlines focused on the potential implications of the leak on tax evasion and money laundering concerns. However, the DOJ and other enforcement authorities also have identified the Panama Papers as a potential source of

information for bribery investigations. The US Attorney's Office for the Southern District of New York announced that it has opened a criminal investigation regarding all matters to which the Panama Papers are relevant. While there are no public indications that any FCPA investigations or enforcement actions have resulted yet from the Panama Papers leak, FCPA enforcement actions often take years from the initiation of an investigation to a settlement, and it will be an issue to monitor as enforcement actions are announced in the years ahead.

Potential expansion in FCPA jurisdiction

While FCPA-related litigation is relatively rare, one case that warrants monitoring could have a significant impact on potential jurisdiction over non-US persons under the FCPA. In *United States v. Hoskins*, the US Government has argued that an executive of Alstom S.A. should be held liable for FCPA violations under theories of conspiracy and aiding and abetting FCPA violations.[24] Under these theories, a non-US person could be subject to criminal FCPA liability even where the defendant was not an agent of a domestic concern and did not commit acts while physically present in the United States because the individual conspired with, or aided and abetted violations by, individuals who were subject to the FCPA.

A US district court has twice rejected the government's arguments, but the government filed an appeal to the United States Court of Appeals for the Second Circuit in April 2016. If the Second Circuit affirms the district court's decisions, this would represent a limit on the government's efforts to expand the extraterritorial reach of the FCPA. In contrast, a reversal would expand potential criminal liability for FCPA violations to non-US persons who previously seemingly were not captured by the FCPA's already-broad jurisdiction. The Second Circuit heard oral arguments in this case in March 2017 and has not yet issued a ruling.

SEC disgorgement-related litigation

Contrary to the SEC's position that disgorgement is an equitable remedy without time constraints, recent federal court cases have clarified that SEC claims for disgorgement are subject to a five-year statute of limitations.[25] On June 5, 2017, in *Kokesh v. SEC*, the US Supreme Court unanimously held that 28 U.S.C § 2462 bars the SEC from obtaining disgorgement in actions brought beyond the five-year statute of limitations.[26] The Court rejected the SEC's contention that disgorgement is an equitable remedy that restores the *status quo*, and held that since disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers as a consequence of violating public laws, they represent a penalty and thus fall within the 5-year statute of limitation".[27] By limiting disgorgement to alleged anti-bribery and recordkeeping violations over the most recent five years, the ruling will constrain the SEC's leverage in settlement discussions for FCPA cases (as well as other subject areas). The case may also raise new considerations for companies/individuals contemplating whether to toll the statute of limitations.

US government guidance regarding corporate compliance programs

In February 2017, the DOJ released a new guidance document, "Evaluation of Corporate Compliance Programs", that companies may use to preview what enforcement authorities may discuss during investigations and/or settlement proceedings.[28] While helpful, the guidance primarily reinforces core standards already introduced by the Resource Guide to the FCPA and US Sentencing Guidelines. US government guidance, including the new evaluation guidance, has historically highlighted certain "hallmarks" of compliance: commitment of senior management, code of conduct/policies and procedures, resources,

autonomy/independence of compliance program, training, incentives and disciplinary measures, risk assessment processes and analytics, third party due diligence, and periodic testing/review.

In comparison to prior guidance, the new guidance places additional emphasis on certain areas. In relevant part, guidance includes approximately 120 questions that enforcement officials may ask when evaluating the effectiveness of a company's compliance program. Several of the questions call for detailed and granular information, including whether "business units/divisions" were consulted prior to the rollout of compliance procedures/policies and the company has trained individual relationship managers "about what compliance risks are and how to manage them".[29] The questions demonstrate a new emphasis on management failures of oversight, resourcing dedicated to a compliance program, and compensation/incentive structures pertaining to compliance. Among other things, the questions highlight the importance of documenting risk assessments. The document also includes questions that probe the independence and integrity of an internal investigation.

The evaluation guidance is a recent and prominent part of a DOJ "Compliance Initiative" that began with the retention of a compliance consultant, Hui Chen, in 2015. Over the past two years, Ms. Chen was seen to enhance significantly the department's compliance expertise; she recently resigned from her position in the Justice Department, citing differences with the Trump administration.[30]

Other laws and other consequences of FCPA violations

US authorities may employ a number of tools other than the FCPA to combat bribery. For instance, the Travel Act prohibits commercial bribery (bribery of a non-government official), even though the FCPA does not. Additionally, corporations may face considerable exposure as a result of civil lawsuits by customers, competitors, and even their own shareholders. US authorities have also begun to go after bribery from the "demand" side, by prosecuting allegedly corrupt foreign officials for offences such as money-laundering and wire fraud, and attempting to seize any US assets of such foreign officials. Corporations can also be debarred from federal contracts, and institutional investors may be barred from doing business with a firm that is subject to FCPA action. Other institutions, such as the World Bank, may also debar a firm for bribery violations.

The monitorships to which many corporations consent in order to resolve FCPA violations are also costly and, as the Zimmer-Biomet example discussed above demonstrates, may increase government scrutiny of other areas of the corporation's activities. The DOJ has continued to impose hybrid monitorships as a requirement of some – but not all – enforcement actions, meaning that an independent monitor was required for part, but not all, of the term of the DPA. The decision whether to impose a monitorship appears to be based on the company's ability to remediate past wrongdoing and on the severity of the company's unlawful conduct. Hybrid monitorships are more likely to be imposed where a company has substantially cooperated with an investigation and has undertaken remediation efforts, but the original conduct or the remediation efforts leave the Department of Justice with concerns. In contrast, where the original offence is considered serious and the extent of remediation is unclear or lacking, the government may insist on a monitorship throughout the term of the settlement.[13]

Additionally, as the Rolls Royce action demonstrates, US Government officials have increasingly worked closely with other governments, including the UK government, in investigating potential cross-border corruption. The DOJ announcement of the March

2017 extension of the voluntary disclosure pilot program also noted increased international cooperation efforts, and US enforcement authorities continue to emphasize the importance of, and benefits gained from, such cooperation in public statements. Notably, US officials indicated that a recent enforcement action involved assistance from 13 other jurisdictions, the largest number from which the US Government has received assistance in an FCPA matter to date. While not involving FCPA charges specifically, the DOJ's ongoing prosecution of multiple FIFA officials for alleged conspiracy to engage in racketeering (among other charges) reportedly has involved close coordination between the DOJ's Office of International Affairs and multiple governments to obtain evidence from around the globe. US authorities continue to signal that anti-corruption is a law enforcement priority, and we expect US enforcement of the FCPA to remain a prime driver of international anti-corruption efforts for years to come.

* * *

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4. Acting Assistant Attorney General Kenneth A. Blanco Speaks at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national (hereinafter Blanco ABA Remarks).
5. Brenda Pierson, US judge approves $2.6 billion fine for Odebrecht in corruption case (Apr. 17, 2017), available at http://www.reuters.com/article/us-brazil-corruption-usa-idUSKBN17J1A7; *see also USA v. Odebrecht S.A.,* US Department of Justice Memorandum (Apr. 11, 2017), available at https://www.unitedstatescourts.org/federal/nyed/394944/15-0.html.
6. *See*, for example, the April 2013 Non-Prosecution Agreements that Ralph Lauren signed with both the DOJ and the SEC. *See* US Department of Justice, *Press Release: Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Policy* (22 April 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-456.html; US Securities & Exchange Commission, *Press Release: SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct* (22 April 2013), *available at* http://www.sec.gov/news/press/2013/2013-65.htm. Though Ralph Lauren self-reported the alleged violations, which involved customs activities in Argentina, within two weeks of discovering them, and though there was no allegation of knowledge or involvement by the US parent company, Ralph Lauren paid $1.6m to resolve the claims. *See*, *e.g.*, *Former DOJ FCPA Enforcement Attorney Blasts Ralph Lauren Enforcement Action* (9 May 2013), http://www.fcpaprofessor.com/former-doj-fcpa-enforcement-attorney-blasts-ralph-lauren-enforcement-action; *Ralph Lauren Enforcement Action Commentary – Hits And Misses*

(29 April 2013), http://www.fcpaprofessor.com/ralph-lauren-enforcement-action-commentary-hits-and-misses. Government officials later stated publicly that greater indications of US involvement existed than had been spelled out in court documents.

7. *See Securities & Exchange Commission v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013). Less than two weeks later, a different federal judge in New York dismissed claims against a foreign FCPA defendant, finding that any connection to false US filings was "far too attenuated" to establish jurisdiction over the defendant. *US Securities & Exchange Commission v. Sharef*, 924 F. Supp. 2d 539, 546 (S.D.N.Y. 2013). The second court, however, did not have occasion to address the question of whether emails sent through US servers form a sufficient basis for jurisdiction.
8. *FCPA Resource Guide* at 17.
9. *FCPA Resource Guide* at 43.
10. *See* US Securities & Exchange Commission, Press Release: VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations) (Feb. 18, 2016), available at https://www.sec.gov/news/pressrelease/2016-34.html. *See also* US Department of Justice, Press Release: VimpelCom Limited and United LLC Enter into Global Foreign Bribery Resolution of More than $795 Million (Feb. 18, 2016), available at https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.
11. *See* note 5.
12. *See* Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, US Department of Justice (Dec. 21, 2016), available at https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve; *see also* Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges, US Securities & Exchange Commission (Dec. 21, 2016), available at https://www.sec.gov/news/pressrelease/2016-271.html.
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14. Rolls-Royce plc Deferred Prosecution Agreement with US Department of Justice, Dec. 20, 2016, available at https://www.justice.gov/opa/press-release/file/927221/download.
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16. Blanco ABA Remarks, *supra* note 4.
17. Individual Accountability for Corporate Wrongdoing, DOJ, September 9, 2015 (hereinafter "Yates Memorandum"), available at http://www.justice.gov/dag/file/769036/download; US Department of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (April 5, 2016) (available at https://www.justice.gov/opa/file/838386/download).
18. *See* US Department of Justice, *Principles of Federal Prosecution of Business Organizations*, US Attorney's manual Section 9-28.000, *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.
19. *See* US Securities & Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 34-44969* (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

20. *See* US Securities & Exchange Commission, *Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions*, SEC Rel. No. 34-61340 (Jan. 13, 2010), available at https://www.sec.gov/rules/policy/2010/34-61340.pdf.
21. *See* Declinations, US Department of Justice, available at https://www.justice.gov/criminal-fraud/pilot-program/declinations (last updated June 29, 2017).
22. *See* CDM Smith Inc. Declination Letter, June 21, 2017, available at https://www.justice.gov/criminal-fraud/page/file/976976/download.
23. World Bank Announces End of Fiscal Year Investigative Outcomes, World Bank, available at http://www.worldbank.org/en/news/press-release/2017/06/30/world-bank-announces-end-of-fiscal-year-investigative-outcomes (June 30, 2017).
24. *See US v. Hoskins*, Case No. 3:12-cr-00238-JBA (Connecticut) (March 16, 2016).
25. *See SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016).
26. *See Kokesh v. SEC*, No. 16-529, slip op. at 2–3 (US June 5, 2017).
27. *Id*.
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30. Former DOJ Lawyer On Prosecuting Corporate Crime Under Trump, National Public Radio (July 6, 2017), available at http://www.npr.org/2017/07/06/535732116/former-doj-lawyer-on-prosecuting-corporate-crime-under-trump.

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