ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ANAGNOSTOPOULOS
AZB & PARTNERS
BAE, KIM & LEE LLC
BAKER & PARTNERS
BCL SOLICITORS LLP
BECCAR VARELA
BLAKE, CASSELS & GRAYDON LLP
DECHERT
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MONFRINI BITTON KLEIN
MORI HAMADA & MATSUMOTO
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
PINHEIRO NETO ADVOGADOS
SHIBOLET & CO
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Appendix 1  ABOUT THE AUTHORS..........................................................................................337

Appendix 2  CONTRIBUTING LAW FIRMS’ CONTACT DETAILS...........................................357
Anti-corruption enforcement continues to be an increasingly global endeavour and this seventh edition of *The Anti-Bribery and Anti-Corruption Review* is no exception. It presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Canada, Israel and Korea.

Given the exceptionally large penalties levied last year against Odebrecht SA and Braskem SA, as well as those against Rolls-Royce Plc, Telia Company AB, and VimpelCom Limited, the size of the fines in global enforcement actions have declined somewhat year-on-year, but multinational cooperation in global enforcement has remained robust. For example, the September 2018 conclusion in the United States of an US$853.2 million settlement with Petróleo Brasileiro SA (Petrobras) entailed cooperation between Brazil’s Federal Public Ministry (MPF), the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC). Under the non-prosecution agreement with Petrobras, the DOJ and SEC will credit the amount the company pays to the MPF, with Brazil receiving 80 per cent (US$682,560,000) of the penalty. Likewise, the conclusion of an enforcement action against SBM Offshore NV, a Netherlands-based oil services company, and its US subsidiary entailed the participation of the MPF, the Netherlands Public Prosecution Service and the DOJ, each of which shared a combined worldwide criminal penalty in excess of US$478 million. Similarly, Keppel Offshore & Marine, Ltd, a Singapore-based shipping services company, and its US subsidiary entered into coordinated settlement agreements with the DOJ, MPF and Singapore’s Corrupt Practices Investigation Bureau. In an enforcement action against Paris-based Société Générale SA and its wholly owned subsidiary, the DOJ credited half the penalty assessed in connection with the bribery charges (over US$292 million) for payments to the French National Financial Prosecutor’s Office. In a related enforcement action against Maryland-based Legg Mason, Inc, the DOJ also credited amounts paid to other law enforcement authorities.

Crediting fines in this way is in keeping with the DOJ’s policy, announced in May 2018, of discouraging ‘piling on’, and encouraging coordination with other enforcement agencies in an attempt to avoid multiple penalties for the same conduct. In the FCPA context, the new policy arguably goes further than Article 4 of the Organisation for Economic Co-operation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory states with shared jurisdiction over a foreign bribery case merely to consult with each other ‘with a view to determining the most appropriate jurisdiction for prosecution’. For example, notwithstanding evidence of violations of the US Foreign Corrupt Practices Act, the DOJ closed its investigation of Güralp Systems Ltd, a UK-based manufacturer of broadband seismic instrumentation and
monitoring systems, in part owing to a parallel investigation and subsequent charges brought by the UK Serious Fraud Office (SFO).

Large-scale multinational coordination has also continued in connection with ongoing efforts to prosecute corruption in international football. Since May 2015, approximately 45 individuals have been charged in the United States alone. Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB), including the arrest of former Malaysian prime minister Najib Razak, who was charged with money laundering and various other offences, and eight former officers of the Malaysian External Intelligence Organisation, including its former chief. Hundreds of millions of dollars in assets have been seized. Following a formal request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a US$250 million luxury yacht belonging to Low Taek Jho, the Malaysian financier at the centre of the 1MDB scandal.

At an even more fundamental level, and in concert with the growing trend towards multinational cooperation in global enforcement, this past year, around the world, countries have adopted important enhancements to their anti-corruption laws. Argentina established criminal liability for domestic and foreign companies and imposed strict liability for various offences, including active domestic bribery, transnational bribery and participating in the offence of illicit enrichment of public officials. Canada implemented legislation outlawing ‘facilitation payments’, which are made to government officials to facilitate routine transactions, such as permits. In China, the Standing Committee of the National People’s Congress adopted amendments to the country’s Anti-Unfair Competition Law that specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. India passed the Prevention of Corruption (Amendment) Act, which criminalises giving an ‘undue advantage’ to a public official, establishes criminal liability for corporations and creates a specific offence penalising corporate management. Furthermore, Italy announced a new law aimed at strengthening protection for whistle-blowers, while Peru passed a law imposing criminal liability on domestic and foreign corporations.

A significant trend in legislative changes this past year was the widespread introduction of alternative forms of resolution for companies, short of criminal conviction and often referred to as deferred prosecution agreements (DPAs). Argentina, as part of its new law establishing criminal liability for domestic and foreign companies, introduced ‘effective collaboration agreements’, which allow for non- and deferred-prosecution agreements. Canada created a legal regime for ‘remediation agreements’ to resolve corporate offences under the Criminal Code and the Corruption of Foreign Public Officials Act. Singapore also introduced similar new legislation. Notably, these new DPA regimes, unlike non-prosecution agreements in the American regime, but in keeping with US DPAs and the regime in the United Kingdom, all require court approval of any proposed agreement. Additionally, in November 2017, France announced its first deferred prosecution agreement under the Sapin II Law with HSBC Private Bank (Suisse) SA, enacted in December 2016.

There have also been a number of significant developments in data protection laws that affect the conduct of international investigations, of which the EU General Data Protection Regulation (GDPR) is the most well known and impactful. In the first court ruling
concerning the application of the GDPR, a German court held that the Internet Corporation for Assigned Names and Numbers could no longer demand from a registrar of domain information data containing, among other things, the contact information for domain name registrants, administrators and technicians. Meanwhile, a number of developments affect the ability of law enforcement authorities to compel production of certain records from outside their national borders. For example, in the United States, Congress passed the Clarifying Lawful Overseas Use of Data Act (or CLOUD Act), which expressly requires email service providers to preserve and disclose to law enforcement electronic data within their possession, custody or control even when that data is located outside the United States. Following two decisions of the Court of Appeal of England and Wales, the SFO can compel production of documents held outside the United Kingdom by companies incorporated outside the United Kingdom, but the protections of ‘litigation privilege’ will still be accorded to documents produced in internal investigations. It will be interesting to see how courts and companies navigate these differing and evolving legal regimes in the year ahead.

The chapters in this book, which contain a wealth of learning about these significant developments around the world, will serve as a useful place to begin. They will help to guide practitioners and their clients when navigating the perils of corruption in the conduct of foreign and transnational business, and of related internal and government investigations. I wish to thank all the contributors for their support in producing this volume and for taking time from their practices to prepare these chapters.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2018
I INTRODUCTION

The Argentinian Criminal Code (ACC) is the main legislation governing and penalising behaviours related to bribery and corruption. The legal framework regulating domestic and foreign bribery is set out in Sections 256 to 259 of the ACC. The recently enacted Law No. 27,401 (the Corporate Criminal Liability Law) has amended the ACC and established that, as of 1 March 2018, legal entities can be criminally liable for corruption-related offences. As of that date, both individuals and legal entities can be held criminally, civilly and administratively liable for bribing foreign and domestic public officials.

Note also that before the Corporate Criminal Liability Law was enacted, corporate criminal liability had already been established in the country for other offences, such as money laundering (Sections 303 and 304 ACC), terrorist-financing offences (Section 306 ACC), insider trading (Sections 307, 308 and 313 ACC), manipulation of financial markets and misleading offers (Sections 309 and 313 ACC), financial intermediation (Sections 310 and 313 ACC), financial fraud (Sections 311 and 313 ACC), financial bribery (Sections 312 and 313 ACC), tax offences (Law No. 24,769 amended by Law No. 26,735, Section 14), customs offences (Law No. 22,415, Section 887), currency-exchange offences (Law No. 19,359, Section 2f) and antitrust offences (Law No. 27,442), and also by the law on ‘supply’ (Law No. 20,680 amended by Law No. 26,991, Section 8).

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Domestic bribery, or the bribery of an Argentinian government official is covered by Section 258 of the ACC, which establishes that any person who, personally or through an intermediary, gives or offers money or any gift for the purpose of soliciting a public official to carry out, delay or not do something in relation to his or her duties shall be punished with imprisonment of one to six years.

---

1 Maximiliano D’Auro and Manuel Beccar Varela are partners, Francisco Zavallía and Virginia Frangella are senior associates and Francisco Grosso is an associate at Beccar Varela.
2 Section 77 of the ACC provides the definition of the terms ‘public official’ and ‘public employee’ as ‘any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority’.
Furthermore, Sections 256 to 257 of the ACC establish that any public official who, personally or by means of an intermediary, receives money or any other gift, or directly or indirectly accepts the promise of these to:

a. carry out, delay or not do something in relation to his or her duties, shall be punished with imprisonment of one to six years and disqualification for life; and

b. make unlawful use of his or her influence with a public official, with the purpose of having the official carry out, delay or not do something in relation to his or her duties, shall be punished with imprisonment of one to six years and special disqualification from holding public office for life.

If money or a gift is given or offered to a public official with the purpose of soliciting the conduct described in Section 256 bis, Paragraph 2 and Section 257, as mentioned above, the punishment shall be imprisonment of two to six years. If the perpetrator is a public official, special disqualification of two to six years shall also be imposed in the first case, and disqualification of three to 10 years in the second case.

Additionally, a fine of up to 90,000 Argentinian pesos can be imposed where an offence is committed ‘with the aim of monetary gain’ (Section 22 bis ACC).

Furthermore, according to Argentinian legislation, facilitating payments are characterised as a bribery offence under the ACC. There are no safe harbours or exemptions, as ‘grease’ payments (for routine government actions) are not allowed. Pursuant to Law No. 25,188 (the Public Ethics Law), public officers are forbidden from receiving presents, gifts, donations, benefits or gratuities, whether things, services or goods, ‘as a result of their work or in the performance of their public duties’. However, the prohibition does not apply in cases of ‘courtesy gifts’ and ‘gifts offered as diplomatic practice’.

Currently, the offence of bribery does not apply to bribery between private individuals; it is only applicable when government officials and employees are involved. The exception to this concerns the recent introduction of an offence of bribery for employees or officials of financial institutions (Section 312 ACC). This provides that employees of financial institutions and entities operating in the stock exchange shall be punished from one to six years and special disqualification of up to six years if they personally, or through an intermediary, receive money or any other benefit as a condition to provide loans, finance or stock exchange transactions. A draft reform of the Criminal Code is being considered, which addresses bribery between private individuals.

In addition, under the terms of Section 173, Subsection 7 of the ACC, any person who, under the law, by authority or contract, is vested with the management, administration or care of goods or pecuniary interests belonging to another person and, with the purpose of obtaining an unlawful gain for himself or herself or a third party, or violating his or her duties, damages the interests conferred upon him or her or incurs excessive expenses to the detriment of the person he or she represents shall be punished with imprisonment of one to six years.

Finally, note that public officials can participate in commercial activities if there is no conflict of interest, as provided in the Public Ethics Law. Section 13 sets out certain activities incompatible with the exercise of public functions. However, certain public officials included in the scope of the Ministries Law3 (such as the head of the cabinet, ministers, secretaries and undersecretaries) and judges (pursuant to the National Justice Regulation, Section 8) can only engage in teaching activities during their tenure.

3 Law No. 22,520.
III ENFORCEMENT: DOMESTIC BRIBERY

The Federal Court on Criminal and Correctional Matters is the competent court in bribery and corruption matters concerning public officials at the federal level, and the national Constitution provides a special mechanism for the removal and prosecution of certain officials and judges (impeachment). Federal judges are assigned to conduct bribery and corruption investigations, and have broad powers under the Criminal Procedure Code (CPC), including requesting reports from both public and private agencies, and ordering numerous procedural and precautionary measures aimed at avoiding and preventing obstruction of investigations and the escape of criminals.

All national and provincial police forces are at the disposal of the federal judiciary as court assistants, to perform, execute and comply with its orders. The authority of a federal judge is limited geographically to Argentina. In practice, the local authorities and judiciary cooperate with overseas regulators. Certain government individuals have certain privileges and may be required to sign written reports in order not to testify as witnesses. This applies to the President and Vice President, provincial governors, mayor of the city of Buenos Aires, national and provincial ministers and legislators, members of the judiciary and provinces, diplomatic ministers and general consuls, and senior officers of the armed forces (Section 250 CPC).

There are no special procedures or guidance for investigating bribery crimes. However, the following bodies are key institutions:

a the Anti-Corruption Bureau (OA) operates under the Ministry of Justice and is governed by Decree No. 102/99, which grants it various investigative powers. The OA has certain powers under this Decree, including the ability to request information, obtain expert opinions, conduct preliminary investigations and file criminal complaints with the federal judiciary;

b the National Prosecutor’s Office for Administrative Investigations, a special division of the Public Prosecutor’s Office, investigates and promotes the investigation of crimes concerning corruption and administrative irregularities; and

c the Office of the Prosecutor for Economic Crime and Money Laundering (PROCELAC), a unit within the Attorney General’s Office (AGO), is designed to combat money laundering and other economic crimes. PROCELAC has six operational areas: money laundering and terrorist financing; economic and banking fraud; capital markets; tax crimes and smuggling; crimes against public administration; and bankruptcy.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Bribery of a foreign public official4 is covered by Section 258 bis of the ACC, which sets out a punishment of imprisonment of one to six years and special disqualification for life from the exercise of any public office for any person who offers or gives a public official from a foreign state or from an international public organisation, personally or through an intermediary, money or any object of value or other benefits, such as gifts, favours or promises, for:

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4 The definition of ‘foreign public official’ or public official of any territorial entity recognised by Argentina is provided in Section 258 bis of the ACC as ‘any person who has been designated or elected to perform a public function, in any of its levels or territorial divisions of government, or in any class of a body, agency or public company in which the foreign state exercises a direct or indirect influence’.
that person’s own benefit or for the benefit of a third party; and

the purpose of having that official undertake or not undertake an act related to his or her office or to use the influence derived from the office he or she holds in an economic, financial or commercial transaction.

V CRIMINAL LIABILITY OF LEGAL ENTITIES

Legal entities are criminally liable for certain offences provided for in the ACC. Under the Corporate Criminal Liability Law, which amended the ACC as of 1 March 2018, legal entities are criminally liable for the following offences:

- bribery and improper lobbying, whether national or international;
- prohibited transactions for public officials;
- illegal exactions;
- illegal enrichment of public officials and employees; and
- aggravated offences of counterfeiting of balance sheets.

The Corporate Criminal Liability Law stipulates that legal entities will be criminally liable for the offences provided in the Law ‘that have been carried out, directly or indirectly, with their intervention or in their behalf, interest or benefit’. Under this Law, criminal punishment for legal entities can include:

- a fine of two to five times ‘the undue benefit obtained [by the legal entity] or that could have been obtained’;
- total or partial suspension of activities, which in no case shall exceed 10 years;
- suspension of participation in public tenders, invitations to public works, services or in any other activity linked to the state, which in no case may exceed 10 years;
- dissolution and liquidation of the legal entity when it was created for the sole purpose of the commission of the crime, or when criminal acts constitute the main activity of the entity;
- loss or suspension of state benefits; and
- publication of an extract from the conviction at the expense of the legal entity.

Additionally, the law also sets out independence-of-action criteria, subject to which legal entities may be convicted even if it is not possible to identify or convict the individual involved in the crime, provided that the circumstances of the case establish that the crime could not have been committed without the knowledge of the authorities of the legal entity.

Notwithstanding the above, a legal entity can be exempted from penalties and administrative responsibility for having committed offences provided for in the Corporate Criminal Liability Law. To be exempted, the entity would have to:

- spontaneously self-report the relevant offence as a result of internal detection and investigation;
- have established, before the facts under investigation occurred, a proper control and supervision system; and
- return the undue benefit obtained through the offence.

Note that the law requires that these grounds are met simultaneously. If they are not, then the occurrence of one or more of them may still be held as grounds to be taken into consideration for penalty adjustment.
Also, in relation to item (b) above, companies are not legally required to implement any specific anti-corruption control policies or procedures, except when entering into certain contracts with the federal government. Notwithstanding this, the Corporate Criminal Liability Law encourages and stipulates the possibility of legal entities implementing compliance programmes. These must consist in actions, mechanisms and internal proceedings for the promotion of integrity, supervision and control focused on the prevention, detection and correction of irregularities and unlawful acts (a compliance programme). These are of material importance considering that one of the requisites for a legal entity to be granted an exemption from the penalties provided in the Corporate Criminal Liability Law is the existence of an adequate compliance programme.

This Law includes among other things, plea bargains in anti-corruption investigations. In this regard, Section 16 of the Corporate Criminal Liability Law describes a new mechanism known as an effective cooperation agreement (ECA). The AGO and a legal entity can enter into an ECA, whereby the entity is obliged to cooperate through the disclosure of information or precise, useful and verifiable data for the clarification of facts, identification of authors or participants, and recovery of the proceeds of the crime.

In doing this, the entity would have to comply with certain conditions established in the Corporate Criminal Liability Law, as described below. An ECA can be signed at any time before the accused is summoned for trial. The negotiation between the entity and the AGO, and also the information that is exchanged in the framework of the negotiation until the approval of the agreement, must be strictly confidential and a breach would constitute a crime. Under the law, an ECA must be conditional upon the following to be valid:

1. payment of an amount equivalent to half of the minimum fine applicable;
2. restitution of the proceeds of the crime; and
3. the surrender to the state of the assets that would presumably be confiscated following a conviction.

There are also the following optional conditions:

1. repair of damage;
2. rendering of a determined service in favour of the community;
3. application of disciplinary measures against those who have participated in the criminal act; and
4. implementation of an integrity programme or of improvements to the existing programme.

The ECA must be signed by the legal representative of the entity, the defence counsel and the representative of the AGO, and must be submitted to the judge, who evaluates the legality or reasonability of the agreed conditions and decides whether to sustain or overrule the ECA. If the ECA does not succeed or is overruled by the judge, the entity’s information and supporting evidence from the negotiation would be returned, including all copies of documents. The use of this information and documentation for the determination of liability of the entity would be banned, unless the AGO had independent knowledge of it or could have obtained such knowledge in the course of an existing investigation prior to the agreement.

Under Decree No. 277/2018, any public works contract requiring ministry-level approval requires the relevant legal entity to certify it has an existing compliance programme in place to mitigate the risk of bribery and corruption.
Lastly, Argentinian law prohibits bribery payments through intermediaries or third parties: the offence of bribery of a foreign public official may be committed either directly or indirectly (Section 258 bis ACC). In addition, Section 45 of the ACC stipulates that the following would be subject to the same penalty as that imposed on the perpetrator: (1) a person who takes part in the commission of a criminal act; (2) a person who provides assistance or cooperation without which the offence could not have been committed; and (3) a person who directly abets another to commit a criminal act. Pursuant to Section 46, the following are punishable with a reduced penalty (by one-third to one-half): (1) a person who cooperates in the commission of a criminal act in ways other than those mentioned in Section 45 of the ACC; and (2) a person who gives assistance because of a previous promise.

VI ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The main pieces of legislation requiring accurate corporate books and records, effective internal company controls and periodic financial statements or external auditing are the following:

a the Argentinian Civil and Commercial Code, Sections 320 to 327;
b the Business Associations Law and the Financial Administration Law,\(^6\) regarding state-owned companies;
c the Stock Market Law,\(^7\);
d the regulations issued by the National Securities Commission (CNV); and
e the regulations issued by local commercial registries.

Further to the books and record-keeping regulations stated above, the CNV, commercial registries and professional associations can impose administrative and disciplinary sanctions on wrongdoers.

In addition, as well as dealing with the bribery offence itself, Section 300(2) of the ACC stipulates a sanction of imprisonment of six months to two years for the founder, director, trustee, liquidator or receiver of a corporation or cooperative or of any other legal person who knowingly publishes, certifies or authorises either a false or incomplete inventory, balance sheet, profit-and-loss account or related reports on any event material to the assessment of the company’s financial position, whatever the purpose sought.

Law No. 25,246 was enacted in 2000 to regulate for the first time both criminal money laundering and terrorism-financing offences within the scope of anti-money laundering provisions and the ACC. This Law has been amended several times, most importantly in 2011 by Law No. 26,683, which, as well as several changes to anti-money laundering provisions, added a new chapter to the ACC called ‘Crimes against the Economic and Financial Order’, which includes money laundering, among other financial crimes.

As regards money laundering, Section 303 of the ACC states that the offence of money laundering shall be committed when a person: ‘converts, transfers, administrates, sells, encumbers, disguises or in any other way introduces into the market assets which proceed from a criminally illicit act, with the possible consequence that the original or subsequent assets acquire the appearance of having legal origin’.

\(^6\) Law No. 19,550 and Law No. 24,156 respectively.
\(^7\) Law No. 26,831.
This Section also penalises the person who receives money or other assets from the commission of a crime to use them in any of the above-mentioned transactions.

Section 304 of the ACC, in turn, stipulates specific sanctions for cases in which money laundering was committed on behalf of, with the intervention of or for the benefit of a legal entity.

As for anti-money laundering, Law No. 25,246, as amended, sets out a list of ‘compelled subjects’ (which includes both public and private entities, as well as natural persons) that are obliged, among other duties, to report suspicious activity to the Financial Information Unit (FIU). They must also adhere to know-your-customer and no-tipping-off obligations.

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The following are notable cases mentioned in the 2014 OECD Working Group Report: River Dredging; Power Project (Philippines); Undeclared Cash (Venezuela); Gas Plant (Bolivia); Inter-American Development Bank Debarment (Honduras); Oil Refinery (Brazil); Agribusiness Firms (Venezuela); Grain Export (Venezuela); Military Horses (Bolivia); Oil Sector Construction (Brazil). The Tax Collection (Guatemala) and Electricity Transmission (Brazil) cases, among others, are also mentioned in the 2017 OECD Working Group Report.

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Argentina is signatory to the following international conventions:

a the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1993 (approved by Law No. 24,072);

b the Inter-American Convention against Corruption of 1997 (approved by Law No. 24,759);

c the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) of 2000 (approved by Law No. 25,319);

d the United Nations Convention against Transnational Organized Crime of 2002 (approved by Law No. 25,632); and

e the United Nations Convention against Corruption (UNCAC) of 2006 (approved by Law No. 26,097).

Furthermore, Argentina is a full member of both the Financial Action Task Force and the Financial Action Task Force of Latin America. In addition, the FIU is a member of the Egmont Group.

IX LEGISLATIVE DEVELOPMENTS

In August 2018, the House of Senators preliminarily approved a bill on the extinction of domain, which is still pending confirmation from the House of Representatives. The term ‘extinction of domain’ refers to the seizure by the state of criminally attained assets. This law aims to dismantle corruption and illicit wealth in Argentina by targeting funds and assets gained illegally through a catalogue of crimes related to drug trafficking, terrorism, human trafficking, corruption, money laundering and financing of terrorism.
Furthermore, the current administration is also sponsoring a new public ethics law, which would entail several changes to the current system; this law is aimed at preventing public officials from taking advantage of public office to make a profit personally or through family members.

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Regarding criminal law and criminal procedural law, criminal cases must be subject to criminal prosecution and cannot be resolved through settlements or plea agreements, as in the United States. According to Section 71 of the ACC, prosecutors are not allowed discretion other than that permitted by criminal procedural law. In this regard, Section 431 bis of the CPC provides for abbreviated trials in cases where the prosecution and defence reach an agreement about guilt and sentence at the beginning of the oral trial phase, provided that the requested penalty does not exceed six years’ imprisonment, and the defence accepts the charges and agrees to conduct the proceedings in this manner.

This is similar to the leniency programme established by Law No. 27,304, which sanctions, among other things, plea bargains in anti-corruption investigations. The defendant cannot avoid trial but the sentence of imprisonment may be reduced by up to 15 years.

It is stated in Section 76 bis of the ACC that suspension of trial testing may be requested by anybody convicted of a crime prosecutable ex officio with imprisonment for a maximum of three years. The request for the suspension of trial does not imply the confession of the crime or admission of the defendant’s civil liability.

However, whistle-blower reports of potential illegal conduct to government authorities are not common. There is no specific protection and the authorities do not yet provide incentive programmes for whistle-blowers to come forward. However, despite the lack of specific regulations, many companies have established mechanisms, as well as hotlines, to allow whistle-blowing.

The CNV’s regulations require that issuing companies set up a corporate governance code, which should encourage business ethics within the company. The corporate governance code should include, among other things, the description of reporting mechanisms for employees, whether via personal or electronic means, ‘ensuring that information transmitted meets high standards of confidentiality and integrity’. The CNV’s regulations do not require protection from retaliation.

However, a legal system of witness protection is available, which is regulated by the National Programme for Witness and Suspect Protection created by Law No. 25,764. The system is intended for the protection of witnesses and defendants who have made an outstanding contribution to a judicial investigation under federal jurisdiction and are therefore in a risky situation. This may include investigations into: (1) drug trafficking; (2) kidnapping and terrorism; (3) crimes against humanity committed between 1976 and 1983; and (4) human trafficking.

This system does not reduce penalties, except in the case of crimes regulated by the Law of Narcotics No. 23,737, where cooperation can reduce penalties by up to one-half of the minimum, or even exempt the defendant from penalties when, during the conduct or before the start of the proceedings, the defendant either: (1) reveals the identity of the participants in the crime; or (2) provides information enabling the authorities to seize drugs, raw materials
and other objects of the crime. In addition, Law No. 25,241 sets out reduction of penalties for whomever contributes to the investigation of terrorist actions and money laundering (committed by individuals other than public officers).

Witness protection is more limited than whistle-blower protection as it does not offer protection from workplace reprisals. The Labour Contract Law addresses unjust dismissal but not other forms of reprisal.

Moreover, according to the General Regime for Public Procurement and its Regulation (approved by means of Decree No. 1023/2001 and Decree No. 1030/2016 respectively) the following persons cannot enter into contracts with, among others, the public administration:

- **a** bidders or offerors who have been convicted for the commission of intentional crimes – these are disqualified for a period that is twice the length of the sentence imposed for their crimes;
- **b** companies that have been convicted abroad of bribery or transnational bribery practices under the terms of the OECD Convention – these are ineligible for a period that is twice the length of the imposed sentence; and
- **c** individuals or legal entities included on the lists of debarred persons of the World Bank or the Inter-American Development Bank as a result of corrupt practices referred to in the OECD Convention – these are ineligible for as long as they are included on the lists.

Other examples of laws affecting the response to corruption in Argentina are the recently issued Decree No. 1246/2016, which explicitly prohibits the deductibility of bribes in the Argentinian Income Tax Law, and the Decrees Nos. 201 and 202 of 2017, regarding conflicts of interest with public officials.

**XI COMPLIANCE**

Pursuant to the Corporate Criminal Liability Law, companies are not legally required to implement any specific anti-corruption control policies or procedures, except when entering into certain contracts with the federal government, in which case the existence of a compliance programme is a condition of eligibility. In all other cases, the Law encourages companies to implement a compliance programme appropriate to the specific risks of the activities performed by the company, its size and its economic capacity, and which must contain at least the following elements:

- **a** a code of ethics or conduct, or the existence of compliance policies and procedures applicable to every director, manager and employee (regardless of the position held or functions discharged) and that guides the planning and enforcement of their duties or tasks in a manner that prevents the commission of crimes under the Corporate Criminal Liability Law;
- **b** specific rules and procedures for preventing unlawful acts within the scope of public tenders, in the execution of administrative contracts or in any other interaction with the public sector; and
- **c** the performance of regular compliance programme training for directors, managers and employees.

Furthermore, the Corporate Criminal Liability Law also provides guidelines as to the elements that constitute a robust compliance programme, although implementation of such
a programme remains strictly optional: (1) periodic risk analysis and consequent amendment of the programme; (2) evident and clear support for the programme by top management; (3) internal reporting channels open to third parties and promoted appropriately; (4) a policy protecting whistle-blowers from retaliation; (5) an internal investigation mechanism that respects the rights of those under investigation and imposes sanctions for violations of the code of ethics; (6) background checks on relevant third parties or business partners, including suppliers, distributors, service providers, agents and intermediaries, when contracting their services; (7) due diligence during M&A transactions, to evaluate potential illegal actions or vulnerabilities in the legal entities involved; (8) continuous monitoring and evaluation of the compliance programme’s effectiveness; (9) an internal compliance officer in charge of developing, coordinating and supervising the compliance programme; and (10) compliance with the regulations applicable to these programmes issued by the federal, provincial, municipal or communal authorities with legal oversight over the activities developed by the legal entity.

In principle, judges and courts should consider the aggravating or mitigating circumstances specifically related to each case. They should take into account: (1) the nature of the unlawful action, the means used to execute it and the extent of damage and danger caused; and (2) the age, education, customs and the previous behaviour of the defendants, the motives that led them to commit the crimes, the degree of participation, whether they are recidivists, personal circumstances and the circumstances of time, place, manner and occasion to determine the threat posed by the individual.

In contrast to the Corporate Criminal Liability Law, anti-money laundering legislation requires covered institutions to implement anti-money laundering and counterterrorist financing compliance programmes containing measures and policies to prevent money laundering and terrorism financing according to specific resolutions for each class of compelled subjects (including both public and private entities, as well as natural persons), which, among other duties, are obliged to inform the FIU of suspicious operations.

As regards anti-money laundering and criminal tax law, Sections 304 and 313 of the ACC and Section 14 of the Criminal Tax Law stipulate that judges may grade these punishments taking into account failures to comply with internal rules and procedures; lack of vigilance over the activity of perpetrators and accomplices; the extent of the harm caused; the amount of money involved in the perpetration of the crime; and the size, nature and economic capacity of the legal person. In addition, the punishments in Subsection 2 (temporary or total suspension of activities) and Subsection 4 (cancellation of the legal entity) should not be imposed if the actions were indispensable to keep the entity or public works or a specific service operational.

Notwithstanding this, the existence of a compliance programme could serve as a defence against criminal charges or mitigate the penalty, depending on the particular circumstances of the case.

XII OUTLOOK AND CONCLUSIONS

In December 2015, the Argentinian government changed. The new administration has promised to make the fight against corruption one of its main political goals. In addition, legal persons and their officers and directors are subject to increased scrutiny and prosecution by Argentinian regulators and law enforcement agencies empowered to investigate and prosecute corporate wrongdoing.
As of March 2018, a criminal liability regime for legal entities has been enacted, which has settled an outstanding debt Argentina had in relation to its anti-corruption legislation. Furthermore, there has been a renewed effort for the prosecution of corruption cases, mostly linked to the former administration, and with a particularly effective use of plea-bargaining.

Against this backdrop of renewed efforts to tackle corruption, a huge scandal has emerged, named the ‘notebook scandal’ by the press, and believed to be the Argentinian equivalent of Brazil’s Operation Car Wash. Among other matters, it involves bribery payments to high-ranking public officials under the Kirchner administration for the award of public construction works contracts. Because of its magnitude and the effective use of plea-bargaining by both former senior public officials and owners, directors and managers of high-profile companies, the investigation and its possible outcome are unprecedented in terms of scale and potential impact.

Given these developments, it will be interesting to monitor the implementation and enforcement of the new corporate criminal liability regime for legal entities and the outcome of the ongoing high-stake judicial proceedings, all of which have potentially ground-breaking implications for the anti-corruption environment in Argentina.
Chapter 2

AUSTRALIA

Robert R Wyld and Andreas Piesiewicz

I  INTRODUCTION

On 18 October 1999, Australia ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention). As a result of Australia adopting the Anti-Bribery Convention, the Criminal Code Act 1995 (Cth) (the Criminal Code) was amended to prohibit bribery of a foreign public official. Domestic bribery against the Commonwealth and foreign bribery offences are both contained in the Criminal Code.

Since 1999, Australia has taken numerous steps towards meeting its obligations under the Anti-Bribery Convention by:

a  criminalising the bribery and corruption of foreign public officials;

b  enacting specific legislation arising out of the inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme in 2006;

c  throughout 2016 and 2017, proposing to substantially strengthen the provisions of the Criminal Code, including the provision of a new strict liability corporate offence of failing to prevent foreign bribery and enhanced whistle-blower protection laws; and

d  adopting other United Nations conventions against corruption, money laundering and organised criminal activity.

Australia is also an active participant in the Asia-Pacific region, encouraging and funding anti-corruption initiatives.

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1 Robert R Wyld is a consultant and Andreas Piesiewicz is a partner at Johnson Winter & Slattery.
2 Chapter 4 Division 70 of the Criminal Code Act 1995 (Cth).
3 The domestic bribery provisions are found in Part 7.6 of the Criminal Code.
4 The International Trade Integrity Act 2007 (Cth).
5 The Cole Inquiry, as it is known, was a royal commission. Australian governments establish royal commissions to inquire into and report on matters of public concern.
6 Australia signed the UN Convention against Corruption on 9 December 2003 and ratified the Convention on 7 December 2005.
7 Australia is a founding member of the Financial Action Task Force on Anti-Money Laundering and Counter-Terrorist Financing.
8 Australia ratified the UN Convention against Transnational Organized Crime on 27 May 2004.
9 Australia has played an active role in the Asia Development Bank OECD Anti-Corruption Initiative for the Asia and Pacific region since October 2003, and in November 2004 endorsed the Asia-Pacific Economic Cooperation (APEC) Santiago Commitment to Fight Corruption and Ensure Transparency and the APEC Course of Action on Fighting Corruption and Ensuring Transparency.
In October 2012, the OECD Working Group released its Phase 3 report on Australia’s implementation of the Anti-Bribery Convention. The OECD considered Australia’s enforcement of its foreign bribery laws to be ‘extremely low’, with just one investigation leading to criminal prosecutions despite there being 28 foreign bribery referrals to the Australian Federal Police (AFP) over 13 years (21 of which were closed without charge). The OECD Working Group made various recommendations to improve Australia’s efforts in combating foreign bribery.

In April 2015, the OECD published a follow-up report on Australia’s response to the Phase 3 report. The OECD highlighted specific areas where Australia had made progress in its efforts to combat foreign bribery, including:

- establishing an interagency National Fraud and Anti-Corruption Centre led by the AFP with involvement from the Australian Tax Office (ATO), Australian Securities and Investments Commission (ASIC), Australian Criminal Intelligence Commission (ACIC), Australian Customs and Border Protection Service, and the Department of Foreign Affairs and Trade (DFAT), among others;
- closer involvement of the AFP Asset Confiscation Taskforce in foreign bribery investigations to target proceeds of crime;
- a restructuring of the Office of the Commonwealth Director of Public Prosecutions (CDPP) to allocate more resources to prosecute foreign bribery offences;
- improved public sector whistle-blower protections; and
- heightened awareness being promoted by Australia that foreign bribery will not be tolerated and all suspicious conduct will be thoroughly investigated.

In December 2017, the OECD published its Phase 4 Report on Australia under the Anti-Bribery Convention. The OECD noted that Australia had 19 ongoing foreign bribery investigations and 13 foreign bribery referrals under evaluation for investigation. While the OCED was generally positive in terms of Australia’s overall performance and, noting the proposed legislative reforms (see below), the OECD identified a number of areas where Australia’s activity could be improved, including:

- focusing on money laundering risks in Australia’s real estate sector;
- improving private sector whistle-blower protections;
- ensuring adequate resources are allocated to the AFP and the CDPP to investigate and enforce Australia’s foreign bribery laws;
- proactively charging companies with criminal offences for foreign bribery, false accounting, money laundering and tax offences; and
- encouraging small to medium-sized businesses to develop adequate internal controls and robust compliance programmes to prevent and detect foreign bribery.

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10 This was subject to a further oral update to the OECD, outlined in the Attorney General’s inter-agency submission to the Senate Economics References Committee dated September 2015.
11 On 1 July 2016, the Australian Crime Commission Amendment (National Policing Information) Act 2016 amended the Australian Crime Commission Act to merge the CrimTrac functions into the ACIC, so there is a nationally coordinated police information and criminal intelligence agency.
12 In December 2014, the Attorney General’s Department published an online training module on foreign bribery, at www.agd.gov.au.
13 See https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf.
Throughout late 2017 and 2018, there have been significant proposals for legislative reform in the area of foreign bribery in Australia. These proposed reforms include the following:

a in December 2017, the CDPP published its Best Practice Guidelines for the Self-Reporting by Companies of Serious Crimes and the factors to be considered by the Director in determining whether to offer a deferred prosecution agreement (DPA) to a company;¹⁴

b in March 2018, the Australian Senate supported various amendments to the Criminal Code (set out in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017) to streamline the foreign bribery offence together with the introduction of a strict liability corporate offence of failing to prevent foreign bribery and the introduction of a DPA scheme for certain Commonwealth serious offences;¹⁵

c in March 2018, the Senate approved substantial reforms to Australia’s private sector whistle-blower protection laws (subject to certain amendments recommended by the Senate set out in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017;¹⁶ and

d in March 2018, the Senate published its Report on Australia’s Foreign Bribery Laws (the Foreign Bribery Report), which made it clear that it was of critical importance to ensure Australia has an effective system to combat foreign bribery whereby individuals and companies are held to account for their actions (as Australia had, for a number of years, been ‘missing in action’).¹⁷

Regrettably because of the politics of changing prime ministers and the lack of policy direction, these reforms appear to have languished. It is hoped the Australian government regains a sense of policy direction and implements these proposed reforms without delay.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Domestic bribery law and its elements

Domestic bribery laws in Australia can be classified as follows:

a laws prohibiting bribery involving Commonwealth and foreign public officials;

b laws prohibiting bribery involving state government public officials; and

c laws prohibiting bribery involving local government public officials.

There are no specific commercial bribery laws in Australia, although various state laws are wide enough to capture bribery conduct.

Sections 141 and 142 of the Criminal Code deal with offences relating to domestic bribery of a Commonwealth public official. These divisions deal with the offences of giving

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a bribe\(^{18}\) or corrupting benefit\(^{19}\) receiving a bribe\(^{20}\) or corrupting benefit\(^{21}\) and abuse of public office.\(^{22}\) For the offences of giving or receiving a corrupting benefit, it is immaterial whether the benefit is in the nature of a reward.\(^{23}\)

**ii  Prohibitions on paying and receiving bribes**

Each of the five states and two territories in Australia has a Crimes Act, a Criminal Code or local government legislation that regulates the conduct of state and local government public officials. All jurisdictions (including the Commonwealth) prohibit the direct and indirect payment or offer of a bribe to a public official and the receipt or acceptance of a bribe by a public official. The Criminal Code contains the criminal offences relevant to Commonwealth public officials.\(^{24}\)

**iii  Definition of public official**

Australian law defines various public officials. The Criminal Code widely defines ‘Commonwealth public official’ and ‘public official’, and is wide enough to encompass Commonwealth government-owned or controlled companies.

**iv  Public officials’ participation in commercial activities**

Public officials are able to participate in commercial activities while serving as a public official provided that their involvement in those commercial activities does not adversely affect the honest and independent exercise of their official functions.\(^{25}\)

Public officials will usually be required to disclose their personal interests. For instance, members of the Commonwealth and state parliaments are required to provide to the Registrar of Members’ Interests a statement of their registrable interests. This includes the interests of a spouse and any dependent children.

**v  Gifts and gratuities, travel, meals and entertainment restrictions**

It is legally permissible to provide gifts and gratuities to public officials that do not breach the law or the Australian Public Service Code of Conduct. However, the provision of a gift or gratuity may in some circumstances amount to a bribe where it relates to a decision requiring the exercise of a discretion\(^{26}\) that gives rise to a perceived or an actual conflict of interest.

Each parliament has a system of public registers where assets and liabilities, gifts and gratuities over a nominated value must be declared.\(^{27}\)

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\(^{18}\) Section 141.1(1) of the Criminal Code.

\(^{19}\) Section 142.1(1) of the Criminal Code.

\(^{20}\) Section 141.1(3) of the Criminal Code.

\(^{21}\) Section 142.1(3) of the Criminal Code.

\(^{22}\) Section 142.2 of the Criminal Code.

\(^{23}\) Section 142.1(4) of the Criminal Code.

\(^{24}\) Sections 141 and 142 of the Criminal Code.

\(^{25}\) See for example, Section 8 of the Independent Commission against Corruption Act 1988 (NSW).

\(^{26}\) See Australian Public Service Code of Conduct, Section 4.12 – Gifts and Benefits.

\(^{27}\) The details are set out in the Commonwealth Parliament Register of Members’ Interests, applicable to each politician and family members (spouse or partner and children).
vi Political contributions

It is legal for foreign citizens and foreign companies to make political contributions to a political candidate or a political party in Australia.

There has been considerable discussion at the federal level in Australia about reforming the political donation process. The reform proposals have, in particular, focused on ‘foreign’ donations. In November 2011 the Australian government introduced a Political Donations Bill28 into the Senate, which proposed to make unlawful the receipt of a donation of foreign property by political parties and candidates.29 It also proposed to make it unlawful, in some situations, for associated entities and people incurring political expenditure to receive a donation of foreign property.30 This Bill lapsed on 13 November 2013, with no current political interest evident in resuscitating it.

In early 2018, the Australian Parliament introduced the Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017.31 This scheme introduces registration obligations for persons or entities who have arrangements with, or undertake certain activities on behalf of, foreign principals. It is intended to provide transparency for the Australian government and the Australian public about the forms and sources of foreign influence in Australia. While foreign actors are free to promote their interests in Australia’s free and open society, the government considers that it must be done in a lawful, open and transparent way. While the government has been publicly coy about which foreign entity the scheme is directed at, in public commentary it is clear it is directed towards China and the role of Chinese influence in Australia (apparently irrespective of the influence that a range of other countries also seek to exercise).

Some states have already moved to ban political donations from foreign sources.32 In New South Wales (NSW) it is unlawful for a party, elected member, group, and candidate or third-party campaigner to accept a political donation from an individual who is not enrolled to vote in local government, state or Commonwealth elections.33

vii Private commercial bribery

Australian Commonwealth laws do not expressly prohibit the payment or receipt of bribes in private commercial arrangements. The Criminal Code only applies to conduct involving domestic Commonwealth public officials or foreign public officials. If, however, a bribe or other improper behaviour occurs that is directed towards securing a commercial benefit, various domestic criminal and civil laws may give rise to a liability on the company and individuals engaged in the conduct. For domestic laws, the New South Wales Crimes Act 1900 contains relevant offences.34

28 Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth).
29 This Bill has not passed the Senate.
32 The Queensland Parliament passed legislation in 2008 that bans donations of foreign property.
33 Section 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW).
34 See Sections 249A to 249J, Crimes Act 1900 (NSW).
viii Penalties

If a person is found guilty of the offence of giving or receiving a bribe involving a Commonwealth public official, the maximum penalty is five years’ imprisonment.\(^{35}\) Offences for bribery under state laws, using NSW as an example, are in respect of corrupt commissions or rewards, making them offences as against the payer and the payee, with sentences up to a maximum of seven years’ imprisonment.\(^{36}\) Local government officials may face the sanction of dismissal if the NSW Independent Commission against Corruption (ICAC) makes a finding of ‘serious corrupt conduct’ against a council officer.\(^{37}\) If such a finding is made, the ICAC may refer their conduct to the NSW Director of Public Prosecutions (DPP) for consideration of criminal prosecution.

III ENFORCEMENT: DOMESTIC BRIBERY

Each Australian state has a form of independent anti-corruption commission. The remit of these commissions is to investigate corruption as it concerns state or local government officials and public assets or money relevant to the state. There is, however, no Commonwealth anti-corruption commission. Commonwealth politicians of all persuasions see no need for an inquisitorial body to investigate them; perhaps hardly surprising, yet this attitude reflects poorly on reality. Rather, the Commonwealth has a patchwork of regulatory or supervisory agencies. In the first instance, the relevant entity conducts its own investigation. If the incident is more serious, the AFP is called in pursuant to a referral and if charges arise, they are conducted by the CDPP. More broadly, the Commonwealth Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, is responsible for preventing, detecting and investigating serious and systemic corruption issues in a limited number of prescribed Australian government law enforcement agencies.\(^{38}\)

As an example of state-based anti-corruption work, the NSW ICAC is an independent anti-corruption agency that was established by the NSW government in 1988.\(^{39}\) The ICAC’s jurisdiction extends to all NSW public sector agencies (except for the NSW Police Force) and to those performing public official functions. While the ICAC investigates public sector corruption, it has no power to prosecute. That power lies with the NSW DPP for state offences and the CDPP for Commonwealth offences. While the ICAC might make findings of corruption or other criminality, its findings are based on evidence secured under compulsive powers and such evidence is inadmissible against the witness giving the evidence in any subsequent civil or criminal proceeding. Thus, the DPP has to establish its own admissible evidence to proceed with any prosecution.

One of the ICAC’s functions is to investigate and expose corrupt conduct in the NSW public sector. During 2015, the ICAC made headlines when various public officials that were the subject of investigations challenged the scope of the ICAC’s powers.

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35 Sections 142.1 and 142.2 create offences against the bribe payer and the bribe giver.
36 Section 249B Crimes Act 1900 (NSW).
37 Chapter 14, Local Government Act 1993 (NSW).
38 These agencies are the Australian Border Force; the ACIC; the AFP (including ACT Policing); the Australian Transaction Reports and Analysis Centre (AUSTRAC); the ACIC; prescribed aspects of the Department of Agriculture; the Department of Immigration and Border Protection; and the former National Crime Authority.
In August 2015, the NSW government announced its response to an independent review of the function and powers of the ICAC as a result of the ICAC’s ultimately unsuccessful and aborted investigation into the conduct of a serving senior Crown Prosecutor and rulings by the High Court of Australia40 where the Court held that the ICAC could not investigate cases in which a private citizen adversely affected the functions of an honest public official.

The NSW government has amended the ICAC Act to:

- limit the ICAC’s jurisdiction to making findings ‘only in the case of serious corrupt conduct’;
- permit the ICAC to investigate the conduct of non-public officials in limited circumstances (such as collusive tendering, fraud in relation to applications for mining licences and dishonestly benefiting from the payment of public funds); and
- permit the ICAC to examine breaches of donation and lobbying laws.

In July 2016, the NSW DPP successfully prosecuted a former NSW politician for the common law offence of wilful misconduct in public office, as a result of corruption findings made by the ICAC. The Supreme Court sentenced the offender to imprisonment for a term of five years with a non-parole period of three years, upheld on appeal.41 Other politicians and individuals have been charged as the result of similar investigations conducted by ICAC.42

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Introduction

The primary source of criminal liability for foreign bribery is set out in the Criminal Code. Secondary grounds of liability are founded in the Criminal Code (for Commonwealth offences) and on domestic Australian criminal law, assuming some conduct occurs within Australia or there otherwise exists a jurisdictional basis to prosecute an individual or a corporation in Australia.

The following statutes create potential secondary liability:

- dealing in proceeds or instruments of crime is an offence giving rise to proceedings under the Proceeds of Crime Act 2002 (Cth);
- obstruction of justice under the Crimes Act 1914 (Cth);
- where public funds are used for bribery or corruption, offences for improperly dealing with public money are covered by the Financial Management and Accountability Act 1997 (Cth) and the Commonwealth Authorities and Companies Act 1997 (Cth);
- liability for a breach of duty by a director or officer of a corporation is contained in the Corporations Act 2001 (Cth) (the Corporations Act); and
- general Commonwealth and state criminal law for domestic criminal offences.

42 R v. Macdonald; R v. Maitland [2017] NSWSC 337 with the sentencing judgment at [2017] NSWSC 638 where defendant Macdonald was imprisoned for 10 years with a non-parole period of seven years, and defendant Maitland was imprisoned for six years with a non-parole period of four years.
Foreign bribery law and its elements

The offence of bribing a foreign public official is contained in Part 4, Section 70 of the Criminal Code.

Section 70.2 states that a person is guilty of the offence of bribing a foreign public official if the person:

a. provides, or causes to be provided, a benefit to another person;
b. offers or promises to provide a benefit to another person; or
c. causes an offer or a promise of the provision of a benefit to be made to another person and:
   • the benefit is not legitimately due to the other person; and
   • the person does so with the intention of influencing a foreign public official in the exercise of the official’s duties as a foreign public official to obtain or retain business or obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage.

A benefit is broadly interpreted and includes any advantage. It is not limited to property or money and can be a non-tangible inducement.

The prosecutor is not required to establish the intention (on the part of an accused person) to influence a ‘particular’ foreign official. As many bribery cases involve payments through intermediaries and third parties, this provision assists the prosecutor.

Section 11.2 of the Criminal Code (which extends criminal liability) has been amended to insert “knowingly concerned” as an additional form of liability. A number of criminal appellate judgments have highlighted the vacuum in the criminal law that courts believe Parliament did not intend by the absence of ‘knowingly concerned’ as a ground of secondary criminal liability. It means that persons who are knowingly and intentionally involved in the commission of an offence (against any Commonwealth laws where offences traditionally involve other or secondary persons) will be liable for the primary offence.

In December 2017, the Attorney General published the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, reflecting substantial proposed reforms to the foreign bribery offence. While these reforms have widespread support, at the time of writing they have yet to be enacted. The key parts of the reforms are as follows:

a. repeal the existing Section 70.2 foreign bribery offence as enacted;
b. create a new foreign bribery offence covering intentional conduct constituting the bribing of a foreign public official;
c. replacing the concept of ‘not legitimately due’ in the foreign bribery offence with the concept of ‘improperly influencing’ a foreign public official (although some commentators consider that the concept of ‘dishonesty’ should be used rather than ‘improperly influencing’);
d. making it clear that the prosecution need not establish the improper influence of a particular official to obtain or retain business or that the business or advantage was in fact obtained or retained; and

e. the penalties for the proposed new intentional offence remain the same

Definition of foreign public official

The term ‘foreign public official’ is defined to capture a wide range of public officials, including those persons officially employed by a foreign government and those persons who perform work...
for a foreign government body, or who hold themselves out to be an authorised intermediary of an official or who are part of a ‘foreign public enterprise’ that acts (formally or informally) in accordance with the directions, instructions or wishes of a government of a foreign country.

iv Gifts and gratuities, travel, meals and entertainment restrictions

The Criminal Code does not prohibit or regulate the provision of gifts, gratuities, travel, hospitality or entertainment. However, the definition of a benefit under Section 70.1 of the Criminal Code includes any advantage, which may mean that the provision of excessive gifts, gratuities, travel, meals or entertainment could amount to a bribe. There is no guidance in Australia on what constitutes an acceptable gift or level of corporate hospitality.

The key considerations for assessing whether a gift, travel and other corporate hospitality are likely to constitute a benefit under the Criminal Code and potentially amount to a bribe will involve a number of factors:

a whether the payment is reasonable in all the circumstances;
b whether the payment was proportionate to and for a clearly identified business purpose;
c how the payment was documented;
d the amount and frequency of the payment; and
e the motive in connection with the payment, gift or offer of hospitality.

v Facilitating payments

Australian law permits facilitation payments to ‘expedite or secure’ the ‘performance of a routine government action’. 43 This is despite the OECD’s view that Australia should actively discourage all facilitation payments.

A payment is a facilitation payment so long as the following conditions are satisfied: 44

a the value of the benefit is of a minor nature;
b the person’s conduct is undertaken for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
c as soon as practicable after the conduct, the person makes and signs a record of the conduct, and any of the following subparagraphs applies:
   • the person has retained that record at all relevant times;
   • that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction; and
   • a prosecution for the offence is instituted more than seven years after the conduct occurred.

In November 2011, the Australian government published a Public Consultation Paper seeking submissions on a number of aspects of Australia’s anti-bribery laws. 45 In particular, the Paper sought to review whether the facilitation payments defence should be abolished. The consultation was conducted between November 2011 and February 2012. The

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43 Section 70.4 of the Criminal Code.
44 Section 70.4(1) of the Criminal Code.
45 A copy of the paper is no longer accessible on the government website; however, a copy can be sourced by performing a Google search for ‘Facilitation Payment Australia Public Consultation Paper’.
Attorney General’s website states that the ‘government will take into consideration all the submissions received when determining the next steps to be taken in relation to the issues raised in the consultation paper’.

46 In the Foreign Bribery Report, the Senate considered and rejected all the arguments advanced in support of facilitation payments and made the following recommendations:

A facilitation payment is not materially different from a small bribe and therefore should not be recognised as a defence to a foreign bribery offence in Australia. It is apparent to the committee that there is a need for a clear distinction between bribery and corruption on the one hand, and ethical conduct on the other. The committee considers that removal of the defence will make clear that all forms of bribery and corruption are wrong. The committee believes that retaining the facilitation payment defence is inconsistent with Australia’s wider anti-bribery efforts and accepts that allowing facilitation payments muddies the waters and risks encouraging a culture of expediency to achieve results. In the committee’s opinion, abolishing the facilitation payments defence will convey a strong and consistent policy message that corporations should not stimulate markets for bribery, irrespective of their size, and whether or not such payments to foreign public officials are considered to be mandatory. In this context, it is apparent to the committee that removing the facilitation payment defence will better position Australian companies in the international market.

The international tide is moving against facilitation payments and, while Australia has been slow to grapple with this issue, the views of the Senate carry considerable weight and the Australian government should take prompt steps to abolish the facilitation payment defence to the foreign bribery offence. Further, some companies have acted independently of legislative requirements to do so, in particular those that have been the subject of foreign bribery-related allegations and investigations in recent years. For example, CIMIC Group Limited (CIMIC) issued a revised Code of Conduct in August 2015, which provides:

The Group prohibits, and has zero tolerance for, all forms of bribery and corruption. You must obey all relevant laws and regulations, and must not participate in any arrangement which gives any person an improper benefit in return for an unfair advantage to any party, directly or through an intermediary. This includes facilitation payments . . . even if allowed under local laws or customs.

vi Payments through third parties or intermediaries

The foreign bribery offence established in Section 70.2 of the Criminal Code can capture payments of bribes made through third parties, such as agents, consultants, joint venture partners and intermediaries. An intermediary or third party may be liable for the primary foreign bribery offence under the Criminal Code or for secondary liability if his or her conduct amounted to a conspiracy or the third party or intermediary otherwise aided, abetted, counselled or procured the commission of the offence. A person may be found guilty even if the principal offender has not been prosecuted or found guilty.

vii Individual and corporate liability

The Criminal Code applies liability to individuals and corporations for bribery of a foreign public official.

To establish corporate liability for offences committed prior to 14 December 2001, the prosecution must prove that full discretion had been delegated to an individual to act independently of the board or any superiors with respect to the subject matter that included the relevant act that constituted the offence in a manner that binds the company.\(^{48}\)

A prosecutor must establish that at the time the relevant act occurred, an officer or officers of the corporation whose knowledge may be imputed to the company possessed the knowledge or information giving rise to the offence.

For offences that took place after 14 December 2001, Part 2.5 of the Criminal Code applies, setting out a statutory regime for the imputing of knowledge of individual officers to a corporation. The corporation may be found guilty of any offence, including one punishable by imprisonment. Since 2001, no company has been prosecuted under these provisions for any bribery offence.\(^{49}\)

The terms of corporate criminal responsibility are contained in Sections 12.1 to 12.6 of the Criminal Code. In summary, these provisions:

a set out important definitions of ‘board of directors’, ‘corporate culture’ and ‘high managerial agent’;

b create criminal liability on a corporation by attributing the knowledge and conduct of a person to the corporation;

c attribute negligence to a corporation by reference to the corporation’s conduct as a whole;

d provide a mistake-of-fact defence that is of limited application; and

e make a company potentially criminally liable for a bad corporate culture (one that condones or tolerates breaches of the law).

A corporation has an available defence to the question of whether any relevant knowledge or intention possessed by a high managerial agent (as opposed to the board of directors) is to be imputed to it, if the corporation had itself exercised due diligence to prevent the conduct occurring that constituted the offence.\(^{50}\)

As stated in Section IV.ii, in December 2017, in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, the Attorney General proposed the creation of

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\(^{48}\) In *Krakowski v. Eurolinx Properties Pty Ltd* [1995] HCA 68 at [38] the High Court of Australia held that you accumulate the knowledge of all ‘attributable’ persons of the corporation to ascertain the knowledge of the company. To focus simply on the knowledge of one person as being the knowledge of a corporation is artificial and does not reflect the combined knowledge of a range of individuals within a corporation.

\(^{49}\) In the *Securency* banknote-printing prosecution, it was reported in the media that the companies involved in the conduct were to plead guilty. Details of their pleas and sentences are suppressed by reason of non-publication orders made by the Supreme Court of Victoria.

\(^{50}\) Section 12.3(3) of the Criminal Code.
a new corporate offence of failing to prevent foreign bribery. This is largely modelled on the Section 7 offence under the UK Bribery Act but with some differences. The key features of the proposed new offence are as follows:

- a company commits an offence if an ‘associate’ undertakes conduct in or out of Australia that constitutes an offence of intentional bribery of a foreign public official (as proposed under the Criminal Code);
- the associate acts for the profit or gain of the company; and
- absolute liability applies unless the company can prove that it had ‘adequate procedures’ in place to prevent such conduct occurring.

The definition of an associate is broad – it includes any employee, agent or contractor of a company, and entity that is a subsidiary of or is controlled by the company (within the meaning defined in the Corporations Act) and who otherwise ‘performs services for or on behalf of the company’. The proposed new offence requires the Minister of Justice to publish a guidance on what will be regarded as adequate procedures. While nothing has yet been published, it is expected the guidance is likely to reflect the UK guidance under the Bribery Act or be otherwise included as factors the CDPP takes into account under the Commonwealth Prosecution Policy in determining whether to commence or continue a prosecution. The effect of this proposed offence cannot be underestimated in Australia – it has the effect of piercing the corporate veil and making a company that might have regarded itself as immune from offshore conduct directly and strictly liable if the statutory test is satisfied, and if someone acting on its behalf, for its gain, acted in a manner that constituted the offence of bribery of a foreign public official.

**viii Civil and criminal enforcement**

The Criminal Code does not give rise to any civil enforcement of Australia’s foreign bribery laws.

The secondary grounds of liability that might arise include the following:

- civil penalty prosecutions commenced by ASIC under the Corporations Act for conduct in contravention of common law or statutory duties owed by a director or officer to the corporation;
- prosecutions by ASIC for a corporation failing to comply with record-keeping rules or by the Commonwealth or state DPPs for having, creating or using false or misleading records or false or reckless use of an accounting document; and
- prosecutions by the ATO for contraventions of the taxation laws in relation to the misstatement of income (and non-statement of monies that may have been paid or received illegally).

A corporation may face a class action claim by shareholders, although class action claims are currently by no means certain in their outcome in Australia, where any drop in shareholder value may depend upon a variety of factors (not necessarily any alleged improper or illegal conduct). Complicating any civil class action claims arising out of foreign bribery is the complexity of identifying the correct victim and giving standing for the ‘victim’ to seek to

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recover losses. Nonetheless, class action claims have been filed. For example, a shareholders’
class action has been filed against CIMIC in respect of its alleged failure to disclose material
allegations of foreign bribery in Iraq in accordance with continuous disclosure laws, and
a consequent decline in CIMIC’s share price when those allegations were subsequently revealed.

ASIC can also bring criminal proceedings against a director or officer of a corporation
under Section 184 of the Corporations Act where it alleges that the director or officer acted
recklessly or intentionally dishonestly in failing to discharge their powers and duties, or
otherwise did not act in good faith in the best interests of the corporation or acted for an
improper purpose. Liability on a criminal basis for having acted dishonestly is hard to prove.52
Any foreign bribery or corruption is likely to be inconsistent with a director’s common law and
statutory duties.53 The Australian government is looking to introduce more substantial false
accounting offences, to be introduced into Parliament in late 2015 or early 2016.

The state criminal law can also be used to prosecute individuals, particularly where
 corporate records are falsified. In The Queen v. Ellery,54 the former chief financial officer of
Securency (as part of the ongoing Securency banknote-printing bribery prosecutions) pleaded
guilty and was sentenced on one count of false accounting contrary to Section 83(1)(a) of
the Crimes Act 1958 (Vic). In passing sentence, the Court made the following important
observations, in the context of Mr Ellery’s circumstances:

Unlike most cases of false accounting, you did not offend for the personal financial gain of yourself or
a closely-related person or company . . . and the primary motive behind your offending was to assist
your employer in its commercial activities, by assisting it to gain the benefit of future contracts . . .
I also accept that you were acting within the culture which seems to have developed within Securency,
whereby staff were discouraged from examining too closely the use of, and payment arrangements for,
overseas agents. Secrecy, and a denial of responsibility for wrongdoing, also seems to have been a part
of the corporate culture at Securency at that time.

The fact remains that you were Securency’s chief financial officer, responsible for authorising and
making payments. You were also a company secretary. You occupied positions of importance within
a subsidiary of Australia’s central bank. Your offending involved a serious and dishonest breach of
trust. It was done in order to disguise the true nature of the transaction from the board and the owners
of Securency. Notwithstanding the lack of personal financial gain, and the relatively modest amount
involved, I assess your offending as being in the mid-range of false-accounting offences.

52 See ASIC v. Hellicar [2012] HCA 17 and Shafron v. ASIC [2012] HCA 18 as examples; and on criminal
liability see ASIC v. Fortescue Metals Group Ltd (No. 5) [2010] FCA 1586 and the High Court of Australia

53 ASIC v. Lindberg [2012] VSC 332 – the Supreme Court of Victoria banned the former Australian Wheat
Board Ltd (AWB Ltd) managing director from managing a corporation until 14 September 2014 for
breaching his duties by failing to inform the AWB Ltd board about certain matters. In ASIC v. Flugge
& Geary [2016] VSC 779, the Supreme Court of Victoria found the former AWB Ltd chairman acted
in breach of his duties (with knowledge of the kickback scheme funnelling funds to the former Iraq
government in breach of UN sanctions) and in the sentencing judgment, ASIC v. Flugge [2017] VSC 117,
disqualified him from managing a company for five years and fined him A$50,000.

ix Agency enforcement

Australia’s approach to the enforcement of foreign bribery laws relies on the joint efforts of various enforcement, administrative and prosecution agencies. The investigation of criminal offences against Commonwealth laws, including foreign bribery offences, is carried out by the AFP. The CDPP is the statutory prosecutorial agency, which does not investigate but independently prosecutes criminal offences against the Commonwealth. The ACIC is a statutory authority with secret, inquisitorial and compulsive powers to combat serious and organised crime (which includes conduct amounting to bribery or corrupting a foreign public official). The AFP and the ACIC often work together in investigating bribery and corruption and the CDPP can be involved in assessing the evidence to determine if a prosecution can or should be undertaken. However, there are limits to how far the ACIC can use its compulsive statutory powers where seeking to investigate and compulsorily examine a target to be charged with offences, and in sharing information so gathered with police forces.

The National Fraud and Anti-Corruption Centre (FAC) established and hosted by the AFP draws upon multi-agency skills and experience. The FAC is designed to review serious and complex fraud and corruption referrals to ensure they are directed to the relevant law enforcement agency for action and are investigated with all the resources available to the Commonwealth agencies.

In determining whether to pursue (or continue) a prosecution for foreign bribery, the CDPP must satisfy itself of a dual threshold test:

\[a\] that there is sufficient evidence to prosecute the case (and there are reasonable prospects of securing a conviction); and

\[b\] it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

The Prosecution Policy of the Commonwealth (Prosecution Policy) also provides guidelines to assist the CDPP in deciding whether to prosecute a person for foreign bribery offences. While the Prosecution Policy applies for all Commonwealth criminal prosecutions, in foreign bribery cases, the CDPP has directed that the prosecutor must not be influenced by

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55 Section 4(1) defines ‘serious and organised crime’ broadly and is likely to capture conduct that constitutes the bribery or corruption of foreign public officials (as ‘similar conduct’ to the bribery and corruption of Commonwealth officials specifically referred to in Section 4(1)).

56 The High Court of Australia has cautioned the ACIC (and State Crime Commissions) about how its statutory powers can be exercised and about the disclosure of information obtained by it under compulsive powers to police agencies, in circumstances where a target is to be or in fact has been charged with offences that are the subject of an investigation and that may impact on the accused receiving a fair trial; see X7 v. Australian Crime Commission [2013] HCA 29 and Lee v. The Queen [2014] 20. This was reinforced in Strickland (a Pseudonym) & Ors v. Commonwealth DPP [2018] HCA 53, where the High Court unanimously held, on 8 November 2018, that the ACIC had acted unlawfully in examining defendants under its statutory powers, while a majority held that the dissemination of the illegally obtained information to the AFP and the CDPP with the forensic disadvantage and prejudice to fair trials were incurable. The Court permanently stayed the proceedings.


58 Annexure A to the ‘Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process.'
considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved. This is consistent with Article 5 of the Anti-Bribery Convention, although there is no Australian law to this effect.

The implementation of these principles has been the subject of certain, now well-publicised, orders made by the Supreme Court of Victoria in the high-profile Reserve Bank of Australia Securency banknote printing bribery prosecution.59

In June 2014, the Australian government, through DFAT, obtained suppression orders seeking to protect the identity of various Asian political figures from being named as alleged participants in the Securency bribery scandal in circumstances where those individuals were not charged with any offence. The DFAT notice informing the Court of its application for a suppression order stated that its purpose was ‘to prevent damage to Australia’s international relations that may be caused by the publication of material that may damage the reputation of specified individuals who are not the subject of charges in these proceedings’. The individuals concerned did not themselves seek to apply for any orders from the Court.

In June 2015, the Court revisited its initial orders on the application of the Australian media. After hearing argument, the Court discharged the initial suppression orders.60 While the Court was critical of WikiLeaks for publishing the June 2014 orders and the media for inaccurate reporting of the effect of those orders, the Court was not persuaded to maintain the suppression orders. The Court made it clear that the strong public interest in the public knowing about the Securency case and what did or did not happen had to be balanced with the countervailing public interest considerations concerning protecting the administration of justice and Australia’s national security – matters that DFAT bore the onus of establishing, which it failed to do.

In late January and February 2017, two officers of Leighton Holdings faced charges arising out of a long-standing investigation into the conduct of the company in relation to Middle East construction contracts. Peter Gregg, a former Leighton chief financial officer, has been charged with two counts of contravening Section 1307(1) of the Corporations Act 2001, with ASIC alleging that Mr Gregg, as an officer of Leighton Holdings Ltd, engaged in conduct that resulted in the falsification of the company’s books. Russell John Waugh has also been charged in relation to his alleged role in aiding and abetting one of the alleged contraventions of Mr Gregg. At the time of writing, the prosecutions are before the District Court of New South Wales for a jury trial estimated to last six weeks.

In July 2017, Mamdouh Elomar, 62, his brother Ibrahim, 60, and businessman John Jousif, 46, pleaded guilty in the New South Wales Supreme Court to certain foreign bribery conduct that occurred between July 2014 and February 2015. At a previous hearing during 2016, the men faced allegations that they paid a US$1 million bribe to a foreign official to win contracts for their construction company Lifese in Iraq. A sentencing hearing will occur in late 2017 or early 2018.

59 The Securency prosecutions are listed for trial to commence before the Supreme Court of Victoria in late January 2018.

In May 2018, Sinclair Knight Merz (now Jacobs Australia) and several individuals were charged with an alleged conspiracy to offer bribes to foreign public officials in the Philippines and Vietnam so that aid-funded project contracts would be awarded to the company.\textsuperscript{61} The prosecution continues.

In September 2018, Mozammuil G Bhojani, a director of Radiance International Pty Ltd, was charged with an alleged conspiracy to bribe foreign public officials in Nauru in relation to an Australian government contract to build housing for refugees on Nauru, with payments allegedly made to obtain phosphate at certain prices for export.\textsuperscript{62} The prosecution continues.

The other principal government agencies that may be involved in conduct giving rise to potential foreign bribery offences include:

- ASIC, which is an independent government body that regulates Australia’s corporate markets and financial services to protect investors and consumers;
- the ATO, which ensures proper compliance with Australia’s Commonwealth revenue laws;
- the Australian Competition and Consumer Commission, which regulates compliance with Australia’s competition, fair trading and consumer protection legislation, including its criminal cartel laws; and
- AUSTRAC, which works with Australian industries and businesses to ensure compliance with anti-money laundering and counterterrorism financing laws.\textsuperscript{63}

\section{Defences}

There are essentially three defences to a prosecution under Section 70.2 of the Criminal Code. First, if the conduct occurs wholly in a foreign country, the conduct is lawful in that foreign country and permitted by a written law of that foreign country.\textsuperscript{64} Second, if a payment is a facilitation payment.\textsuperscript{65} Third, corporate criminal liability may not be imposed on a corporation if it can demonstrate that it exercised due diligence to prevent the conduct, authorisation or permission created or given by a board or a high managerial agent.\textsuperscript{66} There is no judicial authority in Australia considering these defences.

\begin{itemize}
\item \textsuperscript{61} See https://www.theguardian.com/australia-news/2018/jul/14/sinclair-knight-merz-foreign-bribery-case-sparks-call-for-greater-police-resources.
\item \textsuperscript{62} See http://www.abc.net.au/news/2018-09-17/company-linked-to-alleged-nauru-bribery-received-2.5m-from-aus/10258152.
\item \textsuperscript{63} AUSTRAC has not brought any proceedings concerning foreign bribery. However, in early 2017 it prosecuted Tabcorp Ltd for breaches of Australia’s anti-money laundering laws and secured an agreed settlement of A$49 million. In August 2017, AUSTRAC commenced highly publicised civil penalty proceedings against the Commonwealth Bank of Australia, alleging systemic breaches of anti-money laundering laws over several years by the Bank associated with the use of smart automated teller machines and the non-reporting of suspicious transactions. The Bank is facing investigation by a number of foreign agencies and the matter is continuing before the Federal Court of Australia. In June 2018, the Bank settled the prosecution for civil penalties for the sum of AU$700 million.
\item \textsuperscript{64} Section 70.3, Criminal Code.
\item \textsuperscript{65} Section 70.4, Criminal Code.
\item \textsuperscript{66} Section 12.3(3), Criminal Code.
\end{itemize}
Leniency

In Australia, there is no transparent regime to encourage self-reporting of potential foreign bribery or other criminal offences. There is no legal obligation in Australia to report a crime, save for in NSW.67

There are certain factors to take into account in deciding whether to self-report a case of foreign bribery to the AFP. These include the following:

a the AFP has a discretion whether to charge a potential offender;
b the CDPP may grant an undertaking (letters of comfort or, more rarely, an indemnity) to a person not to use voluntary evidence against person A to secure testimony from person A to convict person B, and the grounds upon which an undertaking might be given are set out in the Director of Public Prosecutions Act 1983 (Cth)68 and the Prosecution Policy;
c the AFP and the CDPP may offer and accept an ‘induced statement’ from an individual on the basis that the individual is not a target but a witness of fact and what the witness says in the statement cannot be used against him or her in any subsequent civil or criminal proceedings;
d if a corporation voluntarily discloses potential offences and cooperates and can demonstrate the ‘right culture’, the AFP and the CDPP may be persuaded to accept a plea of guilty to lesser charges; and
e if an offender offers voluntary cooperation in the absence of an undertaking, the extent of the cooperation can operate as a discount on sentence upon any conviction being recorded by a court.69

Companies are encouraged by the AFP to self-report potential offences to it. Once the AFP has conducted an investigation and referred the matter to the CDPP, the CDPP will then determine, with regard to the Prosecution Policy, whether to pursue a prosecution. However, if the AFP and CDPP form the opinion that offences have been committed, any resolution is usually predicated upon a guilty plea (to one or more agreed offences) and sentencing by the court. At the end of the day, it is the corporation’s decision whether to ‘roll the dice’ and report or not report. The consequences of self-reporting, or not doing so, can be unpredictable.

Plea-bargaining

There are no procedures in Australia similar to the self-reporting or plea regime in the United States or in the United Kingdom. There is no process or policy guidance to resolve investigations through court-approved settlement agreements (deferred or non-prosecution agreements) or for the authorities to pursue civil rather than criminal penalties against companies or individuals.

67 Section 316 of the Crimes Act 1900 (NSW) provides that if a person has committed a serious indictable offence, and another person who knows or believes that the offence has been committed and that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender, and fails without reasonable excuse to bring that information to the attention of a member of the police force or other appropriate authority, that other person is liable to imprisonment for two years.
68 Sections 9(6), 9(6B) and 9(6D) of the Director of Public Prosecutions Act 1983 (Cth).
69 Section 21E of the Crimes Act 1914 (Cth).
The difficulty with plea-bargaining in Australia is that the High Court of Australia has ruled that it is impermissible for a prosecutor to engage in a process of agreeing to sentences and supporting them before the Court. In *Barbaro v. The Queen*, *Zirilli v. The Queen*, the High Court limited the prosecutor’s role in terms of recommendations as to the sentencing of an offender, in these terms:

Even in a case where the judge does give some preliminary indication of the proposed sentence, the role and duty of the prosecution remains the duty which has been indicated earlier in these reasons: to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall.

The High Court has made it clear, as have other appellate courts, that the sentencing task remains that of the sentencing judge and that judge alone. A prosecutor can do no more than opine on sentencing principles, not on what a sentence or a range of sentences should be. This is not conducive to encouraging corporations to self-report a potentially serious criminal offence, with the result that it, in effect, flips a coin and leaves its unknown and uncertain fate in the hands of first the AFP, second the CDPP and, ultimately, the court. Certainty, or at least a clearly structured and transparent procedure, is likely to be a greater incentive for corporations to voluntarily self-report potential offences.

In March 2016, the Attorney General issued a consultation paper seeking comment on whether a form of a Commonwealth DPA scheme should be introduced into Australia and if so, to what offences it should apply. The vast majority of submissions called for a scheme to be introduced, modelled on the UK scheme, applying to a range of financial crime offences. In December 2017, the Attorney General published a model DPA scheme. Key features of the scheme include the following:

- it will apply to nominated serious Commonwealth criminal offences, with these to be assessed after two years;

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70 [2014] HCA 2 at [39].
71 Wong *v. The Queen* (2001) 207 CLR 584 at 611; [2001] HCA 64 at [75]; *Barbaro* at [41]; *R v. MacNeil-Brown* (2008) 20 VR 677 at 711 [1320] per Buchanan JA, 716 [147] per Kellam JA; *CMB v. Attorney-General for NSW* (2015) 89 ALJR 407, where the prosecution may submit that an identified sentence (by the trial judge) is manifestly inadequate, so avoiding appealable error by the trial judge.

72 Courts and Crime Act 2013, Schedule 17.
73 The offences are those identified in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 and are contraventions of identified criminal offences under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), the Autonomous Sanctions Act 2011 (Cth), the Charter of the United Nations Act 1945 (Cth), the Criminal Code and the Corporations Act.
b a decision whether to offer to negotiate a DPA will be at the discretion of the CDPP, following guidance published on the factors for the prosecutor to take into account in exercising the discretion (see the CDPP’s Best Practice Guidelines for the Self-Reporting by Companies of Serious Crimes, in Section I above);

c a DPA will contain various mandatory terms, including a potential ‘admission of criminal liability’ and a wide variety of orders covering fines, disgorgement of profit and compensation;

d a DPA will, if agreed to, be reviewed by a ‘retired judge’, with the courts playing no role in the DPA scheme (for constitutional reasons) and if approved, will be published with the supporting reasons;


e monitors might be appointed to provide independent oversight of a DPA; and


f breaches of a DPA are likely, if material, to trigger the commencement of criminal proceedings.

There was widespread support for the introduction of the proposed DPA scheme, particularly in light of the proposed new corporate offence of failing to prevent foreign bribery. It is anticipated these reforms, if and when they are passed, will make the voluntary disclosure of potential criminal conduct more likely and, for companies, will provide them with added (but not guaranteed) certainty in how a matter might progress.

xiii Prosecution of foreign companies

The jurisdiction of all Australia’s laws is territorial. If any extraterritorial operation of legislation is to apply, it must be clearly stated and, insofar as Commonwealth law is concerned, constitutionally valid.

To establish jurisdiction over conduct constituting the offence of bribing or corrupting a foreign public official (assuming the elements of Section 70.2 can be established and subject to any defence), the following must exist:

a the conduct giving rise to the alleged offence occurred wholly or partly in Australia or on board an Australian aircraft or an Australian ship;

b where the conduct occurred wholly outside Australia, at the time of the alleged offence, the person was an Australian citizen or a resident of Australia, or was a corporation incorporated pursuant to the laws of Australia; and

c if the conduct occurred wholly outside Australia and the relevant person is a resident but not a citizen of Australia, the Commonwealth Attorney General must provide written consent for any proceeding.

While Australia’s foreign bribery laws in Section 70.2 of the Criminal Code must in a general sense have a territorial or jurisdictional link to Australia, Australia’s criminal law of conspiracy can extend to foreigners even if those foreigners have no apparent presence in or association with Australia. The crime of conspiracy is a crime of duration, a continuing offence that lasts as long as it is being performed as against parties to the conspiracy wherever they may be
located. It is enough that certain conspirators are present in the jurisdiction (Australia) and the conduct was wholly or partly performed in the jurisdiction (Australia) even though others are not present and engaged in no conduct in the jurisdiction.

xiv Penalties

On 4 February 2010, the Australian Parliament passed the Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010, which amended the Criminal Code by substantially increasing the financial penalties for foreign bribery offences. This was amended in late December 2012 by increasing the value of penalty units by which the amount of a fine is calculated for a contravention of a Commonwealth offence. The most recent increase is effective from 31 July 2015 and, from July 2018, the increase in penalty units will occur every three years, indexed to increases in the Australian Consumer Price Index.

For a foreign bribery offence committed after 1 July 2017, the maximum penalties that may be imposed upon a conviction include:

a for an individual:
- imprisonment of up to 10 years;
- a fine of up to 10,000 penalty units (the value of one penalty unit is currently A$210, therefore the maximum fine is currently A$2.1 million); or
- both imprisonment and a fine; and

b for a corporation, the greatest of the following:
- a fine up to 100,000 penalty units (or A$21 million);
- if the court can determine the value of the benefit obtained directly or indirectly and that is reasonably attributable to the offending conduct, three times the value of the benefit; or
- if the court cannot determine the value of the benefit, then 10 per cent of the annual turnover of the corporation during the 12-month period ending at the end of the month in which the conduct constituting the offence occurred (which is described in the legislation as the turnover period).

Where a person acquires profit from illegal or criminal conduct, that profit, or other assets obtained as a result of the illegal conduct, can be subject to restraint and forfeiture pursuant to the Proceeds of Crime Act 2002 (Cth). The AFP Asset Confiscation Taskforce has responsibility for proceeds-of-crime proceedings independently of the CDPP.

74 See Section 11.5 of the Criminal Code; Truong v. R [2004] HCA 10 at [35]; Savvas v. The Queen [1995] HCA 29; applied in Agius v. R [2011] NSWCCA 119 at [29], upheld on appeal by Johnson JA at [46]; the prosecution need not prove the exact time of the formation of the conspiracy agreement or the act that marked its inception, see Saffron v. R (1988) 17 NSWLR 395 at 436–437 and R v. Hory Mokbel (Ruling No. 2) [2009] VSC 547 at [17], approved in R v. Agius at [61]. In Gerakileys v. R [1984] HCA, the High Court of Australia made it clear that all parties to an agreement need to be aware of its scope, based on their knowledge and awareness of the overall objective of the (unlawful conspiracy) agreement.


76 The value of penalty units will be automatically increased every three years based on the consumer price index. This will start from 1 July 2020.
In March 2014, ASIC published its Report No. 387 entitled ‘Penalties for corporate wrongdoing’, which considered the penalties available to ASIC and whether they were proportionate and consistent with those for comparable wrongdoing in selected overseas jurisdictions. The key findings of the Report were as follows:

\( a \) ASIC rated effective enforcement as critical to achieving its strategic priorities of fair and efficient financial markets with a range of penalties designed to deter contravention and promote greater compliance; and

\( b \) in relation to imprisonment and fines open to ASIC to seek through litigation:

- the maximum fines are broadly consistent with other comparable jurisdictions save for the United States;
- other jurisdictions have greater flexibility to impose higher non-criminal fines;
- other jurisdictions can seek the disgorgement of profit generated by the wrongdoing; and
- within Australian legislation, there are examples where non-criminal fines can be imposed at a much higher amount than those available to ASIC.

In October 2017, the ASIC Enforcement Review Taskforce published a consultation paper entitled ‘Strengthening Penalties for Corporate and Financial Sector Misconduct’, which proposes substantially greater penalties to be available to it for corporate wrongdoing, including much larger fines and imprisonment for serious offences for up to 10 years. While ASIC made it clear that it will pursue the sanctions and remedies best suited to each case on its merits, ASIC will continue to target individuals as it was only through ‘scaring the hell out of people’ faced with imprisonment that ASIC believed commercial behaviour might, in fact, change. As a result of a Royal Commission held throughout 2018 into Australia’s banking, finance, insurance and superannuation sectors, the Australian government announced a substantial increase in various corporate penalties for entities breaching existing financial sector laws, particularly where reporting obligations on breaches of the law were concerned. These new offences include imprisonment of up to 10 years for individuals. While the current Australian government long resisted the need for such a commission, adopting the finance sector view of ‘We’re OK – it’s just a few bad apples,’ the Commission’s interim report put paid to that argument, identifying serious and systemic misconduct driven by greed and profit at the expense of customers and consumers across the board.\(^77\) A final report is due to be published by February 2019.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

Until March 2016, there were no specific Commonwealth laws regulating record-keeping entries concerning corrupt conduct or bribery, except for the requirements to keep certain records of facilitation payments.

From 1 March 2016, Section 490 of the Criminal Code introduced the offences of false⁷⁸ or reckless⁷⁹ dealings with accounting documents. While these offences are complicated in their structure, a person commits an offence if:

a he or she makes alters, destroys or conceals an ‘accounting document’⁸⁰ or fails to make or alter such a document that a person is under a duty, under a law of Australia, to make or alter; or

b he or she intended (or was reckless as to the consequences) that the conduct facilitated, concealed or disguised the occurrence of one or more of the following:

• the person receiving a benefit that is not legitimately due to the person;
• the person giving a benefit that is not legitimately due to the recipient or intended recipient of the benefit;
• another person receiving or giving such a benefit; or
• loss to another person that is not legitimately incurred by the other person; and

c certain factual threshold criteria exist.⁸¹

The penalties per offence for an intentional dealing with an accounting document are as follows, distinguishing between the intentional and reckless offences:

a for the intentional offence:

• for an individual, imprisonment of not more than 10 years or a fine of not more than 10,000 penalty units (currently A$2.1 million) or both; and
• for a corporation, a fine of not more than the greatest of (1) 100,000 penalty units (currently A$21 million); (2) three times the value of the benefit attributable to the conduct; or (3) if the value of the benefit cannot be determined by the court, 10 per cent of the annual turnover of the corporation; and

b for the reckless offence:

• for an individual, imprisonment of not more than five years or a fine of not more than 5,000 penalty units (currently A$1.05 million) or both; and
• for a corporation, a fine of not more than the greatest of (1) 50,000 penalty units (currently A$10.5 million); (2) three times the value of the benefit attributable to the conduct; or (3) if the value of the benefit cannot be determined by the court, 10 per cent of the annual turnover of the corporation.

While these offences use the terminology of the foreign bribery offence (in Section 70.2 of the Criminal Code), they are not limited to foreign bribery offences or transactions involving foreign bribery. They apply to any offence involving the intentional or reckless use (or misuse) of an accounting document in any financial transaction. When Parliament enacted these offences, it made it clear that they should apply generally and indeed, ASIC and the AFP have indicated they will consider them as general offences to be assessed whenever circumstances warrant it.

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⁷⁸ Section 490.1, Criminal Code.
⁷⁹ Section 490.2, Criminal Code.
⁸⁰ Defined in the Criminal Code Dictionary to mean (1) any account; (2) any record or document made or required for any accounting purpose; or (3) any register under the Corporations Act 2001, or any financial report or financial records within the meaning of that Act.
⁸¹ Section 490.1(2), Criminal Code.
There remain various Australian laws and regulations that impose general obligations on corporations to maintain true and accurate books and records, and financial statement disclosures, and otherwise to ensure that the books and records are not false or misleading in any material way. The laws and regulations include:

- the Criminal Code;
- the Corporations Act (see Sections 286, 1307 and 1309);
- the Australian Securities and Investment Commission Act 2001 (Cth);
- the Australian Securities Exchange (ASX) Listing Rules (the Listing Rules); and
- state criminal law legislation.

ii Disclosure of violations or irregularities

Under the continuous disclosure obligation in the Listing Rules, once a listed or public entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities, the entity must immediately disclose that information to inform the market.82 The Listing Rules also impose obligations on listed entities to make periodic disclosures, including, for an annual report, the extent to which the corporation has followed the best-practice recommendations set by the ASX Corporate Governance Council.83

If a corporation engages in foreign bribery and that conduct is sufficiently widespread or serious so that it materially affects the share price, the corporation and directors may be exposed to potential investigation and prosecution by ASIC and class action securities litigation by aggrieved investors.84

iii Prosecution under financial record-keeping legislation

There is the potential for prosecutions for foreign bribery to flow from financial and record-keeping legislation, particularly under the offences of false or reckless dealing with accounting documents in Section 490 of the Criminal Code (see above). Companies are required to maintain accurate records that oblige them to account for and explain payments made by the company. In the event of an accounting irregularity, an auditor would be required to report the irregularity to the board. To date, save for the ongoing Leighton Holdings prosecutions against Messrs Gregg and Waugh (see Section IV.ix), there has been no prosecution for any record-keeping offences relating to foreign bribery.

82 Listing Rule 3.1, and on continuous disclosure obligations, see Grant-Taylor v. Babcock & Brown Ltd (in liquidation) [2016] FCAFC 60 at [95].
83 In addition to the disclosure obligations in Chapters 3 and 4 of the Listing Rules, mining entities also have additional reporting requirements under Chapter 5.
84 There are an increasing number of securities class actions in Australia, but none as yet have proceeded to judgment. The most recent cases are Camping Warehouse Australia Pty Ltd v. Downer EDI Limited [2014] VSC 357 and Caason Investments Pty Ltd v. Cao [2014] FCA 1410 where the courts noted that a plea of fraud on the market for reliance and damages cannot be said to have no reasonable prospects of success. These cases are often concerned with the complexity of damages and the recoverability of direct or indirect losses, and how investors or classes of investors have to prove their losses (individually or collectively, applying the ‘fraud on the market’ concept).
iv Sanctions for record-keeping violations

Penalties for record-keeping violations are civil and criminal in nature and include pecuniary penalties (fines), imprisonment and disqualification.

v Tax deductibility of domestic or foreign bribes

As part of its compliance activities, the ATO focuses on bribes and facilitation payments to ensure that only legitimate business expenses are claimed as deductions.85

The Income Tax Assessment Act 1997 (Cth) (ITAA) denies taxpayers a deduction for bribes paid to domestic or foreign public officials.86 A facilitation payment made to a foreign public official may be tax deductible.87 The ITAA requires that records be kept for all transactions and that those records are adequate to explain the transactions.88 If inaccurate, false or misleading statements are made in an income tax return (concerning the taxpayer’s entitlements), serious fines and potential imprisonment exist under the tax laws and the Criminal Code.

vi Money laundering laws and regulations

Australia has enacted laws to prohibit money laundering and the use of the proceeds of crime to finance terrorism.89 These laws cover financial services, gambling services and bullion dealing, and other professionals or businesses that provide ‘designated services’ (described as ‘reporting entities’).90 Obligations are imposed on such entities to undertake appropriate customer due diligence, report suspicious transactions, keep certain records and establish and maintain anti-money laundering programmes. In addition, Part 10.2 of the Criminal Code creates criminal offences for money laundering (where a person deals with money or other property that is the proceeds of or an instrument of crime).91

During 2017, amendments came into effect to the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1).92 The Rules imposed new know-your-customer and customer due-diligence obligations on relevant reporting entities. The impact of these changes can be summarised as follows:

a risk assessment procedures should be amended to include details of the purpose of a transaction and of who is ultimately funding or benefitting from the transaction and the source of the funds;

b enhanced due diligence on all parties, direct and indirect, to a transaction, understanding a customer and its management structure and the role of customer managers and representatives;

85 ‘ATO Bribes and facilitation payments: A guide to managing your tax obligations’.
86 See Section 26.52 (foreign public officials) and 26.53 (public officials).
87 Section 26.52(4) and (5).
88 Section 262A of the ITAA.
89 Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and the AML/CTF Rules.
90 Section 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
91 Sections 400.3 (amounts over A$1 million), 400.4 (amounts over A$100,000), 400.5 (amounts over A$50,000), 400.6 (amounts over A$10,000), 400.7 (amounts over A$1,000), 400.8 (money or property of any value) and 400.9 (dealing with property reasonably suspected of being proceeds of crime) of the Criminal Code create the offences depending upon the monetary value of the offending transaction.


c new criteria for the identification of ‘politically exposed persons’, including classifying them as domestic or foreign, high or low risk and applying enhanced criteria to existing due diligence processes; and

d a greater focus on reviewing and updating customer records.

While AUSTRAC has traditionally been reluctant to prosecute companies for civil penalty proceedings for breaches of Australia’s anti-money laundering laws, the recent settlements of civil penalty proceedings against Tabcorp Ltd (for an agreed penalty of AU$49 million) and the Commonwealth Bank of Australia (for an agreed penalty of AU$700 million), with the prospect of substantial fines, may signal a more robust approach by the regulator to anti-money laundering offences.

During April 2015, the Financial Action Task Force released its Mutual Evaluation Report of Australia. It noted that Australia was perceived as an attractive destination for foreign proceeds of crime, and the real estate sector was seen as high-risk (highlighted by the OECD Phase 4 Report on Australia). This is an area of increasing focus for the AFP’s Criminal Assets Confiscation Taskforce, working together with international investigation agencies to track the flow of the proceeds of crime and restrain and obtain forfeiture of such proceeds or property to the Commonwealth under the Proceeds of Crime Act 2002 (Cth).

vii Prosecution under money laundering laws

Payments made as bribes or for the purpose of corrupting foreign public officials may constitute money laundering by, in effect, disguising the illegal origin of criminal profits, so allowing criminals access to and the use of the proceeds of crime. No prosecutions have occurred to date for money laundering relating to foreign bribery.

viii Sanctions for money laundering violations

Penalties for money laundering offences range, per offence, from fines of 10 penalty units ($1,700) and six months’ imprisonment to fines of 1,500 penalty units ($255,000) and 25 years’ imprisonment. In conjunction with the Commonwealth revenue laws, outstanding or avoided tax may also become due with serious penalties (up to 75 per cent of the primary tax) and interest.

ix Disclosure of suspicious transactions

Businesses that are a reporting entity or are otherwise providing a designated service or that involve a transfer of cash or an international funds transfer (such as the provision of financial or loan services) under Australia’s anti-money laundering and counter-terrorism financing laws are obliged to report the suspicious matter within either 24 hours or three days, depending on the nature of the matter, to the regulatory authority, AUSTRAC. Serious penalties can be imposed for the non-reporting of suspicious transactions.

93 Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Tabcorp Limited [2017] FCA 1296.


95 Section 41 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Australia has still had very few criminal prosecutions for foreign bribery since 1999. The first was commenced in 2011 in connection with the two subsidiaries of Australia’s central bank, the Reserve Bank of Australia (RBA).

In July 2011, subsidiaries of the RBA, Securency International Pty Ltd (Securency), a provider of polymer banknotes, and Note Printing Australia Pty Ltd (NPA), a printer of polymer banknotes, and several senior executives were alleged to have paid or conspired to have paid bribes to foreign public officials in several countries to secure valuable polymer banknote printing contracts. The AFP charged the companies and various individuals with foreign bribery offences as part of the Securency investigation. The committal hearing concluded, some individuals were discharged and the CDPP presented a number of indictments directly to the Supreme Court of Victoria. The proceedings are yet to be listed for trial and are subject to various legal applications before the High Court of Australia. Otherwise, all information about these prosecutions is suppressed pursuant to various non-publication orders.

In 2012, the former chief financial officer of Securency was sentenced to six months’ imprisonment, wholly suspended for two years, on one count (with a guilty plea) of false accounting contrary to Section 83(1)(a) of the Crimes Act 1958 (Vic) in relation to the approval of an invoice for a payment of approximately AU$75,000 to a Malaysian intermediary based on ‘marketing services’ that in fact were not provided and the court held that Mr Ellery knew they had not been provided.

The second case commenced in February 2015 against three principals of a construction company, Lifese Pty Ltd, which specialised in construction projects in the Middle East.

The charges were for the offence of conspiracy to bribe a foreign public official to win construction contracts in Iraq. The sum of A$1,035,000 was given to an intermediary to facilitate the award of lucrative construction contracts for the company, which was under considerable financial pressure with very little work.

In June 2017, the accused pleaded guilty and, on 27 September 2017, each of the accused was sentenced to four years’ imprisonment (with parole after two years), with fines for two of the accused of A$250,000 each.

In sentencing, the court made it clear that the victim was the nation state (Iraq) whose public officials were to receive a private benefit.

The court also was strongly of the view that the sentence should include an element of denunciation and that bribery of an official ‘can never be excused, much less justified, on the basis of a business imperative’.

96 Securency is a joint venture between the RBA and Innovia Films, a UK-based supplier of polypropylene films. The RBA has now sold its interest in Securency to Innovia and is no longer a shareholder in Securency.
97 NPA is wholly owned by the RBA.
VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Australia is a signatory to numerous international anti-corruption conventions.

In 1997 Australia became a signatory to the Anti-Bribery Convention, which precipitated the amendments to the Criminal Code prohibiting the bribing of a foreign public official.

Since then, Australia has become a party to:

- the United Nations Convention against Corruption (the UN Convention), which was signed in 2003 and ratified in 2005. Australia has sought to implement the mandatory requirements contained in the UN Convention and additionally some of the non-mandatory requirements prescribed in the articles of the UN Convention;\(^{100}\) and


Additionally, Australia has had significant involvement in local Asia-Pacific initiatives, including the Asia-Pacific Economic Cooperation (APEC) Anti-Corruption Working Group. Australia led the development of the APEC Code of Conduct for Business, a guide to help combat corruption in the region.\(^{101}\) Australia is also an active member of the OECD Working Group on Bribery in International Business Transactions.

In May 2013, the AFP, along with the US Federal Bureau of Investigation, the Royal Canadian Mounted Police and the UK City of London Police Overseas Anti-Corruption Unit, signed a memorandum of understanding establishing an International Foreign Bribery Taskforce to combat foreign bribery. It is expected that the Taskforce will enable these countries to work collaboratively to strengthen investigations into foreign bribery crimes; share knowledge, skills methodology and investigative techniques; and exchange information and best-practice techniques. It is likely that the Taskforce assisted in generating the evidentiary foundation for charges laid by Britain’s Serious Fraud Office in May 2018 against Ziad Akle and Basil al-Jarah in connection with an alleged ‘conspiracy to give corrupt payments to secure the award of a contract worth US$733 million to Leighton Contractors Singapore PTE Ltd [a CIMIC Group entity] for a project to build two oil pipelines in southern Iraq’.

VIII LEGISLATIVE DEVELOPMENTS

In December 2014, the Commonwealth Attorney General’s Department published an online learning module on foreign bribery. The module provides advice to government and industry on Australia’s anti-bribery policy, the relevant laws and their application and steps that can be taken to encourage compliance.

On 1 March 2016, the new false and reckless dealing with accounting documents offences were enacted and became law.

On 9 September 2016, the government published a revised Commonwealth Fraud Control Policy to apply to all non-corporate Commonwealth entities.\(^{102}\)

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100 See www.ag.gov.au for a discussion about Australia’s international anti-corruption obligations.
102 The Fraud Control Policy exists to ensure non-corporate Commonwealth entities discharge their responsibilities under the Public Governance, Performance and Accountability Act 2013 (Cth).
In March 2018, the Australian Senate supported proposed reforms to Australia's foreign bribery offences (noted above) and the introduction of a Commonwealth DPA scheme.

In March 2018, the Australian Senate supported substantial reforms to private sector whistle-blower reforms.

In March 2018, the Australian Senate published its much-anticipated Foreign Bribery Report on Australia's foreign bribery laws. The Report supported the proposed legislative reforms and also called for adequate resources to be ensured for authorities to investigate and prosecute offenders, and for the abolition of the facilitation payment defence to a foreign bribery charge.

It is hoped that, despite the political upheaval in the Australian government and the change in leadership, these reforms will be followed through and introduced without further delay.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Other laws in Australia that, although not directly dealing with foreign bribery and corruption, are relevant to this area include the following.

i Privilege

Legal professional privilege is a substantive legal right and protects confidential communications between a lawyer and a client (or a third party) created for the dominant purpose of seeking or giving legal advice, or that were created in connection with anticipated or actual litigation. Communications that facilitate a crime or fraud are not protected by this privilege. Legal professional privilege is respected by authorities and can be properly maintained by a client unless the client's conduct has waived the privilege, expressly or by conduct inconsistent with the confidence inherent in a privileged communication.

ii Privacy or data protection

Privacy of information and data, particularly data concerning ‘personal information’ of or concerning an individual, are subject to protection under the Privacy Act 1988 (Cth) and the Australian Privacy Principles (APPs). The APPs outline how most Australian and Norfolk Island government agencies, all private sector and not-for-profit organisations with an annual turnover of more than A$3 million, all private health service providers and some small businesses (collectively, APP entities) must handle, use and manage personal information. The APPs cover:

a the open and transparent management of personal information;
b an individual having the option of transacting anonymously or using a pseudonym where practicable;
c the collection of solicited personal information and receipt of unsolicited personal information, including giving notice about collection;
d how personal information can be used and disclosed (including overseas);
e maintaining the quality of personal information;

103 AWB Limited v. Cole (No. 5) [2006] FCA 1234 at 211.
104 See Mann v. Carnell [1999] HCA 66; 201 CLR 1; 168 ALR 86; 74 ALJR 378.
keeping personal information secure; and
the right of individuals to access and correct their personal information.

In terms of general data protection, increasing inroads are being made to permit government agencies increased access to data in the name of ‘national security’. In July 2014, the National Security Legislation Amendment Act (No. 1) 2014 was passed. The Act updates the powers of the Australian Security Intelligence Organisation (ASIO) to access data on computer networks.

The Act sets out a raft of changes to the manner in which Australia’s intelligence organisations can search and access computer-related data. The Act contains an expanded definition of what constitutes a computer, so that it now captures all or part of one or more computers, computer systems or computer networks. This allows access to a network or series of computers under, for example, one warrant to enhance surveillance processes.

Other changes focus on responding to technological advances, for example, allowing ASIO to deal with encrypted computers and to disrupt technology designed to alert a target of any covert monitoring, to grant immunity to ASIO officers involved in special operations and punishing any publication about any facts concerning a terrorism investigation. For private companies, Schedule 4 to the Act provides a mandate for ‘cooperation’ between ASIO and the private sector, said to reflect existing practices used by ASIO in gathering covert evidence. The Act requires telecommunication companies to retain metadata information on calls and internet use, and reverses the onus of proof if persons travel to certain countries or regions declared by the government to be ‘terror-related war zones’.

The retention of metadata is not new and, indeed, a legislative scheme for its retention already exists. Chapter 3 of the Telecommunications (Interception and Access) Act 1979 (Cth) allows agencies to ask communications companies to preserve data or retain it on an ongoing basis, without having to store the data of every Australian. An agency does not even need a warrant to issue a preservation notice. We are left to assume that there may be practical difficulties as to why this mechanism is not good enough for our law enforcement agencies. Perhaps the answer lies in the fact that crimes may go undetected for months or years and agencies want the opportunity to trawl through historical electronic data.

iii Official or state secrets
There is no official secrets statute in Australia in the form adopted in the United Kingdom. There are criminal offences applying to any present or former Commonwealth officer (a public servant) who publishes or communicates, except to some person to whom he or she is authorised to publish or communicate it, any fact or document that comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and that it is his or her duty not to disclose.106 Other Commonwealth and state statutes create specific regimes for non-disclosure in certain circumstances.

iv Whistle-blowing protection
In Australia, there has been no national scheme to promote or encourage whistle-blowers to come forward and report wrongdoing. Most whistle-blowing protections are specific to Commonwealth and state government departments, private organisations and statutes

106 Section 70 Crimes Act 1914 (Cth) with the penalty fixed at two years’ imprisonment.
limited to certain types of offences and officials. While some private and many public sector organisations require employees to report illegal conduct, failing which they may face disciplinary sanctions ranging from a caution to dismissal, there is no mandatory reporting obligation to promote a culture of reporting illegal or improper conduct as there is in the United States.

The Public Interest Disclosure Act 2013 created a public interest disclosure scheme that is designed to promote the integrity and accountability of the Commonwealth public sector, encourage and facilitate the making of public interest disclosures by public officials, ensure that public officials who make disclosures are supported and protected from adverse consequences relating to the disclosure, and that disclosures are properly investigated and dealt with. While the Act has been criticised for limiting its reach to the Australian public sector, it is a positive acknowledgment that more is required to proactively protect those who report potentially serious crime.

On 26 June 2014, the Senate Economics References Committee released its report into the ongoing review of ASIC. The Committee made a number of key recommendations:

- that ASIC establish an ‘Office of the Whistle-Blower’;
- that existing laws should be extended to cover anonymous disclosures;
- that the good-faith requirement for protected disclosures under the Corporations Act 2001 (Cth) be repealed; and
- that the government explore options to incentivise whistle-blowers through a reward-based system (as currently exists in the United States under the Securities Exchange Act).

In the past, while the former chairman of ASIC has publicly stated that he does not favour a scheme that rewards whistle-blowers, believing that a reward will in some way corrupt the value of the evidence and undermine a whistle-blower’s credibility, he changed his views to accept that ‘compensating’ whistle-blowers for any losses they suffer by reason of blowing the whistle should be seriously considered.

On 21 April 2016, the Economics References Committee published an Issues Paper: ‘Corporate whistleblowing in Australia: ending corporate Australia’s cultures of silence’. The Paper identifies a range of issues affecting whistle-blowers, particularly in the private sector, noting that Australia’s laws were behind many other countries, and that no person should be forced to decide between exposing corporate fraud and misconduct and protecting his or her career and broader well-being. What comes of this review remains to be seen. It is a welcome

107 See, for example, Part 9.4AAA Corporations Act 2001 (Cth), which provides protection to an employee disclosing a possible contravention of the Corporations Act; state disclosure laws, for example the Public Interest Disclosure Act 1994 (NSW), which applies only to public officials; and the Independent Commission Against Corruption Act 1988 (NSW), which allows the Commission to investigate public and private corruption so long as it is connected with the exercise of a public office or function or the misuse of information acquired by the official in his or her capacity that results in a benefit to any person.

108 See the report of Professor A J Brown to the Australian Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, 4 October 2012 at pp. 4 and 5 at www.aph.gov.au/hansard.

109 Section 6.

initiative, yet Australian governments of all political hues appear remarkably reluctant to put in place real and meaningful whistle-blower protections in the private sector (including appropriate rights to seek compensation for any losses incurred by a whistle-blower).

During 2017, the JP Committee held substantial hearings to consider reforms to the whistle-blower protections in the private and not-for-profit sectors. The JP Committee received over 70 submissions with all but one calling for substantial reform.

In December 2017, the Australian Senate published its report, which supported the proposed draft bill to reform Australia’s private sector whistle-blower protections. These proposals included the following:

- **a** a broad coverage of protections across the private sector in one statute;
- **b** a broad definition of ‘disclosable conduct’ to include a breach or potential breach, of any Commonwealth, state or territory law;
- **c** a broad definition of a whistle-blower, to include former and current employees (including certain family members) or those providing services to an entity;
- **d** a tiered approach to reporting, involving internal, regulatory and, in appropriate circumstances, external disclosure (e.g., to members of the Australian Parliament or the media);
- **e** the provision for anonymous disclosures;
- **f** removal of the threshold criteria that a whistle-blower has to act in good faith; and
- **g** enhanced provisions for compensation and victimisation remedies to be available to whistle-blowers, supervised by a court.

These proposals received the unanimous support across the political divide. The proposed bill was supported by the Senate review subject to some amendments. As of 1 October 2018, an amended bill has yet to be published by the government.

**v Blocking statutes**

There are no blocking statutes in Australia that are designed to prevent the flow of information to a foreign entity. Where an Australian regulator seeks access to or the exchange of information with foreign regulators, then, subject to the regulator’s underlying statutory powers, it usually enters into a memorandum of understanding to permit inter-agency exchanges of information. Australia also has mutual assistance statutes to facilitate the formal exchange of information.\(^{111}\)

Australia’s privacy laws play a role if information that is personal information protected from disclosure within Australia should be or is disclosed outside Australia. The APP 8 and Section 16C of the Privacy Act 1998 (Cth) create a framework for the cross-border disclosure of personal information. The framework generally requires an APP entity\(^{112}\) to ensure that an overseas recipient will handle an individual’s personal information in accordance with the APPs, and makes the APP entity accountable if the overseas recipient mishandles the information. This reflects a central objective of the Privacy Act, of facilitating the free flow of information across national borders while ensuring that the privacy of individuals is respected.\(^{113}\)

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111 Mutual Assistance in Criminal Matters Act 1987 (Cth).
112 An APP entity can be an agency or organisation that as part of its business collects or handles personal information concerning individuals,
113 Section 2A(f) Privacy Act 1988 (Cth).
vi  Public procurement

One of the areas where the OECD expressed concern in its April 2015 follow-up report on Australia’s efforts to combat foreign bribery was in relation to the lack of action by the Australian government in relation to transparent debarment policies for all Commonwealth procurement agencies where a tendering party has been suspected of, charged with or convicted of a foreign bribery offence.

In Australia, there are procurement policies for the Commonwealth and each state government. The Commonwealth Procurement Rules 2014 deal primarily with the process of securing and issuing procurement contracts. It is silent on any sanctions save to note that non-compliance with the ‘resources management framework, including in relation to procurement’ may attract criminal, civil or administrative remedies under the Public Service Act 1999 (Cth) and the Crimes Act 1914 (Cth).

An effective debarment regime applying to all Commonwealth and state government agencies and contracts for all public procurement works, with meaningful sanctions, is necessary to bring Australia into line with the extensive debarment procedures operated by the United States and multilateral agencies such as the World Bank and, regionally, the Asian Development Bank.

X  COMPLIANCE

Compliance plans or policies designed to combat bribery and corruption are entirely a matter for private and public organisations. The existence of a compliance plan may amount to a defence to foreign bribery depending on the circumstances.

If a person is convicted of a federal offence, Section 16A of the Crimes Act 1914 (Cth) sets out factors that a court would take into account in sentencing a person. The existence of a compliance plan is not a factor that the court must take into account, but it is within a court’s overall sentencing discretion.


XI  OUTLOOK AND CONCLUSIONS

Australia appears to be demonstrating significant and material changes over the past few years, following the severe criticisms made by the OECD in October 2012. These reforms have significantly increased over late 2017 and throughout 2018. The AFP, ASIC and other agencies now operate in a much more streamlined and focused manner. While real budgets for investigating serious financial crime remain limited compared with, for example, resources available to the ATO to target companies for not paying the tax the ATO believes they should be paying, complex foreign bribery cases are still taking a long time – some say too long – to investigate or prosecute. This is no doubt owing to the complexity of the conduct, the criminal
offences and finite resources. Australia has tended to adopt a reactive response to foreign bribery efforts and adopted knee-jerk reactions when criticised by international organisations for its tardy efforts. However, its past behaviour should not diminish the significant level of positive reforms that have emerged from the government and Parliament more generally over the past 12 to 18 months. The test, of course, remains to enact the reforms and then to proactively enforce them with proper resources allocated to the investigators and prosecutors.

Some topics remain to be addressed in Australia in relation to foreign bribery. These include:

a. implementation of the Foreign Bribery Report on Australia’s foreign bribery laws;
b. ongoing material resourcing for the AFP to investigate, and the CDPP to prosecute, serious financial crime, including foreign bribery;
c. enacting the proposed reforms to private sector whistle-blower protection laws;
d. enacting the proposed reforms to Section 70 of the Criminal Code, including the introduction of the corporate offence of failing to prevent foreign bribery;
e. abolishing the facilitation payment defence in Section 70.4 of the Criminal Code;
f. introducing the model Commonwealth DPA scheme for serious Commonwealth financial offences; and
g. giving effect to changes to the Commonwealth Prosecution Policy to reflect the amended offences and the model DPA scheme to promote self-reporting of potential criminal conduct.

Whether these reforms achieve the desired effect of changing corporate and individual conduct remains to be seen. All the reforms in the world will have little impact in the boardroom if they are not followed through with robust, public enforcement. That still remains the biggest challenge in Australia tackling bribery and corruption.
Chapter 3

BRAZIL

Ricardo Pagliari Levy and Heloisa Figueiredo Ferraz de Andrade Vianna

I  INTRODUCTION

Corruption has been one of the hottest topics on the Brazilian agenda for the past few years for a number of reasons.

The country has been going through a deep political crisis, which stems from the involvement of several politicians in corruption scandals, aggravated by an economic recession from which Brazil is very slowly starting to recover. After former president Dilma Rousseff’s impeachment by Congress in 2016, Michel Temer, former vice president, was brought to power.

President Temer has been at the centre of a corruption scandal involving alleged payment of bribes by the world’s largest meatpacking company, Brazilian JBS. President Temer was indicted on corruption-related allegations by the Prosecutor General of the federal Public Prosecutor’s Office twice in three months. Both indictments were rejected by Congress (which has to approve the hearing of an indictment against the President). The 2018 presidential elections in October are highly anticipated.

However, the Brazilian legal framework has been enriched in recent years and public authorities have been conducting several high-profile investigations, notably Operation Car Wash, which has uncovered the largest corruption scandal in Brazilian history.2

This situation reflects the fact that although Brazil has one of the top 10 largest gross domestic revenues in the world as of 2017 (currently ranking eighth),3 it still ranks 96th out of 176 countries in Transparency International’s Corruption Perceptions Index.4

Against this backdrop, it is important to shed light on the main developments in anti-corruption matters in Brazil.

II  DOMESTIC BRIBERY: LEGAL FRAMEWORK

The payment and receipt of bribes has been prohibited in Brazil at least since the creation of the 1830 Criminal Code.5 Nowadays, the Brazilian legal framework is far more complex,
framing acts of corruption and bribery not only as crimes, but also as civil and administrative offences. Nevertheless, the framework is limited to corruption and bribery in the public sector, as there are no legal provisions in Brazil penalising private commercial bribery.

Also, both individuals and companies can be held liable for bribery of a public official in civil and administrative spheres, but criminal liability itself is limited to individuals.

The Brazilian legal system considers criminal liability as personal and non-transferable, thus being imposed only on the individual who has in any way contributed to a crime either by action (i.e., committing a criminal action) or by omission (i.e., remaining silent or refraining from action despite it being within the powers or duty of the individual to prevent the crime). Therefore, with a very limited exception pertaining to environmental crimes, there is no corporate criminal liability under Brazilian law.

The current legal framework is mainly composed of:

- a. Legislative Decree No. 2,848 of 1940 (the Criminal Code); 6
- b. Law No. 8,666 of 1993 (the Public Procurement Law); 7
- c. Law No. 8,429 of 1992 (the Administrative Misconduct Law); 8
- d. Law No. 12,846 of 2013 (the Anti-Corruption Law); 9 and
- e. Decree No. 8,420 of 2015 (the Anti-Corruption Decree). 10

### i. Criminal Code

Criminal liability for corruption and bribery acts in Brazil is mainly governed by the Criminal Code, which sets out the crimes committed by public officials and private persons against the public administration.

For criminal law purposes, a public official is anyone who, even if temporarily or without compensation, holds a position, an employment or a function within a public entity or agency, or state-owned or mixed-capital company, or works for a company hired to provide services or perform activities germane to the public administration.

Passive or active bribery is a corruption crime defined by the Criminal Code, which prescribes two to 12 years of imprisonment and a fine for:

- a. any public official who directly or indirectly requests or receives an improper advantage, or accepts the promise of such an advantage, for himself or herself or others, even if this occurs outside the function of the official’s office or before the office has been assumed; and
- b. any private person who offers or promises an improper advantage to a public official to induce the latter to perform, omit or delay any official act.

Influence peddling is also penalised under the Criminal Code, which establishes two to five years of imprisonment and a fine for anyone who requests, requires, charges or obtains, for his or herself or others, an advantage or promise of advantage, under the pretext of influencing an act committed by a public official in the exercise of his or her function.

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ii Public Procurement Law

The Public Procurement Law establishes criminal liability for specific acts of corruption committed during a public tender procedure or during the performance of a public contract, such as:

- illegally waiving a public tender procedure;
- frustrating or committing fraud against the competitive character of a tender procedure; and
- modifying the contract to benefit the private party without good cause.

Anyone who commits any of these offences is subject to up to six years of imprisonment and a fine of up to 5 per cent of the amount of the public contract involved.

The Public Procurement Law also imposes the following civil and administrative penalties on companies and individuals for acts of corruption during the performance of public contracts:

- warning;
- civil fine;
- termination of contract;
- temporary prohibition from participating in public tenders and from entering into public contracts (debarment) for up to two years; and
- declaration of permanent unsuitability to participate in public tenders.

iii Administrative Misconduct Law

The Administrative Misconduct Law sets out the sanctions applicable to public officials for misconduct detrimental to the Brazilian public administration.

In line with the Criminal Code, the definition of ‘public official’ set by the Administrative Misconduct Law for civil and administrative purposes is also quite broad. The definition encompasses any person who exercises, even temporarily or without compensation, by election, appointment, designation, contracting or any other form of investiture or bond, a mandate, position, job or office in any federal, state and municipal governments, independent agencies, regulatory agencies, state-owned or mixed-capital companies, or entities in whose assets or annual revenues the public treasury holds or has an interest of more than 50 per cent.

The Administrative Misconduct Law also applies to anyone who, whether a public official or not, induces or takes part in an act of misconduct or else benefits directly or indirectly from such an act.

In other words, the Administrative Misconduct Law may be – and is in fact – applied not only to public officials, but also to private persons or private companies interacting with the public sector that may benefit directly or indirectly from the acts in question. However, prosecution of such persons or companies under the Administrative Misconduct Law only occurs when public officials are also involved.

The said acts of misconduct penalised under the Administrative Misconduct Law may be framed as those acts: (1) entailing unjust enrichment; (2) causing losses to the public treasury; or (3) running against the principles of the public administration.

The Administrative Misconduct Law prohibits public officials from receiving, directly or indirectly (through third parties such as agents and distributors), for themselves or for third parties, money, assets, properties or any other economic advantage in the form of a commission, percentage, bonus or gift from whomever may be favoured by nonfeasance, malfeasance or misfeasance in office.
Therefore, facilitating (or ‘grease’) payments are also forbidden. For instance, public officials must not facilitate the acquisition, exchange or lease of assets or properties, or the contracting of services, by public entities other than at market prices.

In relation to this, codes of ethical conduct forbid public officials from receiving any gifts, transportation, accommodation, meals and entertainment, except: (1) those from foreign authorities in protocol cases where there is reciprocity; (2) those with no commercial value; and (3) those distributed by entities as a courtesy, advertisement or during special events or holidays that do not exceed a token value of 100 reais.

As for penalties, the Administrative Misconduct Law provides that those liable for acts of misconduct are subject to the following sanctions:

- full redress of the damage;
- confiscation of assets or values embezzled from the public treasury, if any;
- dismissal from public service;
- suspension of political rights for a period of three to 10 years;
- payment of a fine;
- debarment; and
- prohibition against receiving benefits or tax or credit incentives, directly or indirectly, even if by the intermediary of a company of which the offenders are majority shareholders, for a period of three to 10 years.

iv Anti-Corruption Law and Anti-Corruption Decree

The Anti-Corruption Law establishes corporate civil and administrative liability for injurious acts contrary to the Brazilian or foreign public administrations.

This Law, enacted on 1 August 2013, originates from a bill submitted to Congress by the executive branch and is aimed both at fulfilling international commitments assumed by Brazil upon ratification of various anti-corruption treaties, as well as at meeting the population's growing demand for more effective mechanisms to fight corruption at the public administration level.

Legal entities are liable for wrongful acts against government agencies when the acts are carried out in the interest of or for the benefit of the entities.

Wrongful acts are defined as those committed against national or foreign public assets, against public administration principles, or against international commitments assumed by Brazil.

The Anti-Corruption Law provides for a strict liability regime, meaning that the legal entity is accountable even if the wrongdoings are attributable to a sole employee or service provider who acted despite the company's compliance procedures or without the company's knowledge.

Companies belonging to the same economic group, consortium members or joint-venture partners are held jointly and severally liable for wrongful acts under the Brazilian Anti-Corruption Law. Such joint and several liability, however, is limited to payment of fines and to full redress of damage.

According to the Anti-Corruption Decree, which regulates the Anti-Corruption Law, the acts treated as administrative offences in the Public Procurement Law or in other statutes regulating public contracts, if also regarded as violations of the Anti-Corruption Law, will...

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be jointly investigated in an administrative proceeding as prescribed in the Anti-Corruption Decree. This provision is relevant because the existing laws clearly overlap – both the Administrative Misconduct Law and Public Procurement Law, for instance, have provisions leading to blacklistng.

Companies in breach of anti-corruption and anti-bribery provisions are subject to heavy penalties, some of which are imposed through administrative proceedings and others solely via court channels.

The administrative penalties set out in the Anti-Corruption Law include fines and publication of the sentence in the media, and these are imposed at the end of the administrative proceeding initiated and decided by the highest authority of each body or entity of the executive, legislative and judiciary branches against which the wrongful act was committed. A conflict of interest may arise from this rule of jurisdiction as the highest authority of a public entity may also be under investigation.

The administrative fine ranges from 0.1 per cent to 20 per cent of the gross revenues in the fiscal year before that in which the administrative proceeding was initiated, minus taxes; in no event will the fine be less than the advantage obtained, where it is possible for it to be estimated. This fine is subject to a cap: penalties will not be greater than the lowest value between (1) either 20 per cent of the gross revenue of the company in the past fiscal year, minus taxes, or (2) three times the benefit intended or obtained through the illegal act.

The Anti-Corruption Decree sets standards for the calculation of these fines, which take aggravating and mitigating factors into consideration. Each factor translates into a percentage of gross revenues (less taxes) in the fiscal year before that in which the administrative proceeding was instated.

A legal entity’s cooperation with investigations and the existence of compliance programmes do not preclude the imposition of sanctions but are taken into consideration when punishment is meted out.

A fine or other penalties imposed under the Law do not release the offenders (entities or individuals) from the obligation to fully redress the damage caused by the wrongful act.

In addition to the administrative penalties (fine and publication of the sentence in the media), the Anti-Corruption Law lists the following penalties that can be imposed only at the end of a court action, brought by the aggrieved public administration entity or by the Public Prosecutor’s Office:

a. confiscation of assets, rights or values representing an advantage or profit directly or indirectly obtained by way of the wrongful act, with due regard for the rights attributable to the injured party or to third parties acting in good faith;

b. suspension or partial shutdown of activities;

c. compulsory dissolution of the company; and

d. prohibition from receiving incentives, subsidies, grants, donations or loans from public bodies or entities and from public financial institutions or publicly controlled institutions, for a period of one to five years.

Under Brazilian law, neither companies nor individuals are compelled to disclose wrongdoing to public authorities. This privilege against self-incrimination\(^\text{12}\) applies in all spheres (criminal, administrative and civil).

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\(^\text{12}\) Article 5, LXXIII of the Brazilian Federal Constitution and Article 186 of the Criminal Code.
Nevertheless, voluntary disclosure of wrongdoing (say, under a leniency programme) may help obtain a waiver or reduction of sanctions. To qualify for a leniency programme, the company must be the first to express its willingness to cooperate, cease and admit its participation in the wrongdoing, and fully cooperate with investigations.

Leniency negotiations are kept confidential until a settlement is reached. In practice, however, leaks are frequent. A potential self-reporting does not provide immunity for employees and companies that participated in the wrongdoing within the same economic group. The effects of a leniency programme, however, may be extended to them, provided that they take part in the leniency agreement itself.

A company reaching a leniency agreement with authorities under the Anti-Corruption Law may enjoy one or more of the following benefits:

a) exemption from public disclosure of the sentence;
b) waiver of the prohibition from receiving incentives, subsidies, subventions, donations or loans from public entities;
c) reduction by up to two-thirds of the fine, which could originally reach up to 20 per cent of the company's annual gross revenues; and
d) waiver or reduction of the debarment sanction.

The leniency agreement covers only the facts described there. Should new facts surface during investigations or the applicant fail to report all relevant facts, the authorities may open new investigations into those facts.

As currently worded, the Anti-Corruption Law does not expressly provide for total remission of its penalties under a leniency programme.

III ENFORCEMENT: DOMESTIC BRIBERY

i Operation Car Wash

Operation Car Wash is an investigation being carried out by the Federal Police and the federal Public Prosecutor's Office, which was publicly unveiled in March 2014. Initially a money laundering probe into a currency exchange company located in a petrol station, it has evolved to investigate acts of corruption at oil giant Petrobras.

The scheme involved cartel behaviour, bid rigging and illegal increase in profits by bribing some Petrobras executives in exchange for improper advantages. Those bribery acts took the form of sham services agreements executed between construction companies and companies owned by those Petrobras executives (or other pass-through companies). Political contributions to political groups involved in the bribery scheme are also under scrutiny.

Cooperation and exchange of sensitive information between Brazilian and foreign authorities have also been crucial to the success of investigations (e.g., Swiss authorities provided important information on bank accounts held by Brazilians under investigation), as several of those under investigation used offshore bank accounts to hide money obtained illegally through bribery.

See Section VIII regarding Provisional Measure No. 703 of 2015.
Investigative measures to uncover this multimillion money laundering scheme have ranged from the enforcement of hundreds of search and seizure warrants to temporary and preventive arrest and compulsory deposition. The operation is the largest corruption and money laundering investigation Brazil has ever had.

Although currently no actions have been filed in relation to Operation Car Wash on the basis of the Anti-Corruption Law, actions have been filed by the Public Prosecutor’s Office and the Attorney General’s Office for violations of the Administrative Misconduct Law. These actions have yet to be heard by the courts, but certain of the demands of prosecutors in the complaints filed provide useful guidance on the approach adopted by the authorities.

One such notable demand by prosecutors is for the suspension from participation in public tenders and execution of public contracts, and blacklisting, of companies that fall within the same economic group of offenders under the Administrative Misconduct Law. Authorities have included as co-defendants companies within the same economic group and same field of activity as the actual offenders, claiming that these companies also incurred benefits from the illegal acts committed. The authorities have therefore sought to establish the joint and several liability of these companies – although the Administrative Misconduct Law makes no such provision regarding liability. (This provision, however, is found under the Anti-Corruption Law). As the courts have yet to deal with these complaints, there is currently no case law to provide guidance on the extent of the application of such joint and several liability. In any case, it has become increasingly common for prosecutors to seek this outcome, which has probably been ‘borrowed’ from the concept found in the Anti-Corruption Law.

ii SBM leniency agreement

On 15 July 2016, it was publicly announced\(^{14}\) that SBM Offshore, a Dutch oil services company, entered into a leniency agreement with four Brazilian authorities: the Ministry of Transparency and Comptroller General’s Office (the Comptroller General’s Office), the Attorney General’s Office, the federal Public Prosecutor’s Office, and Brazilian state-controlled oil giant Petrobras.

This was the first time a leniency agreement was signed by both administrative and criminal enforcers under the Brazilian Anti-Corruption Law. The deal resolved allegations that SBM had won contracts by bribing officials at Petrobras between 1996 and 2012.

As part of the deal, SBM was to hand over US$328 million to Petrobras, of which US$149 million was by way of a fine and US$179 million was to be offset against payments under existing contracts between the companies. A further US$13.6 million was to be paid to the Comptroller General’s Office and to the anti-money laundering authority – the Council for Financial Activities Control. In consideration, SBM would not be debarred and would be allowed to bid for new contracts with Petrobras, which would in turn refrain from suing for damages.

However, on 1 September 2016 one of the high chambers of the federal Public Prosecutor’s Office refused to recognise the leniency agreement as signed.

The SBM leniency agreement showed that such settlements are possible in Brazil between federal prosecutors and administrative anti-corruption authorities. It also exposed, however, that leniency agreements on corruption matters are quite difficult to negotiate, as

some of the authorities conducting investigations, such as the federal Public Prosecutor’s Office, may have access to confidential information that cannot be shared with other public bodies. On the basis of such confidential information, some authorities may be unwilling to enter into leniency agreements but, even so, cannot disclose the reasons for their refusal.15

This gridlock arose from the current legal framework in Brazil: as several public administration bodies have concurrent authority to investigate acts of corruption, for any leniency agreement to be ‘bulletproof’, it must involve all these bodies, otherwise the private persons and companies may remain subject to investigations and lawsuits by any of the public bodies kept out of the settlement talks. The previous non-recognition of the SBM leniency agreement did little to provide assurances regarding the legal certainty of leniency programme negotiations.

Nevertheless, on 26 July 2018, SBM executed a leniency agreement with the Comptroller General’s Office, the Attorney General’s Office and Petrobras, undertaking the commitment to pay approximately US$148 million, of which approximately US$71 million is a civil fine and approximately US$77 million is compensation for alleged damage, to be paid within 90 days. Under the leniency agreement, the authorities committed to terminate all investigations into SBM and refrain from initiating new proceedings under applicable anti-corruption laws. SBM is also allowed to participate in Petrobras tenders.

Also, the leniency agreement provides for a reduction of 95 per cent in future performance bonus payments related to lease-and-operate contracts, representing an agreed nominal value of approximately US$180 million over the period 2016 to 2030, of which US$41 million relating to historical bonus payments (from 2016 to signature date) is to be paid within 90 days of the signing of the leniency agreement. The future bonus payments (from signature date to 2030) represent a net present value of approximately US$110 million, as further compensation for alleged damage.

Furthermore, on 1 September 2018, SBM also entered into an agreement allowing the company to reach a final settlement with the federal Public Prosecutor’s Office. As with the previous agreement, executed in 2016, the agreement with the Public Prosecutor’s Office is subject to approval by the fifth high chamber of the federal Public Prosecutor’s Office. The comments made by the same high chamber in 2016 (when it did not approve the agreement) were addressed in the new document.

Under this agreement, the Public Prosecutor’s Office commits to refrain from initiating new proceedings under applicable anti-corruption laws, and will jointly request with SBM that the court close the ongoing administrative misconduct lawsuit filed in 2017, including the associated provisional measure to secure payment of potential damages. As for SBM, in addition to the amounts agreed in the leniency agreement with the Comptroller General’s Office, the Attorney General’s Office and Petrobras, a fine of approximately US$48 million was also imposed, to be paid to Petrobras in instalments.

Thus, with both agreements, SBM aims to close its legacy issues in Brazil.

iii Supreme Federal Court decision on political contributions

The Supreme Federal Court declared on 17 September 2015 that political contributions from domestic or foreign companies to political parties or candidates are unconstitutional.

Thus, the 2016 local elections solely relied on public funding (especially government-funded television and radio advertisements), contributions from individuals and resources from the Political Parties Fund.

Although expectations on individual contributions were high, the 2016 local elections showed that there was difficulty in individual engagement in making contributions, mostly owing to the fact that (1) these types of contributions are not a habit in Brazilian culture (which they are in the United States, for example), and (2) the political crisis aggravated public distrust of politicians. Consequently, the 2016 local elections were much more subdued than in previous years. The ban on contributions from companies also privileged richer candidates, who invested in their own campaigns by means of self-funding. The 2018 election campaigns are moving along the same lines.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Both the Criminal Code and Anti-Corruption Law impose liability for acts against foreign public administrations.

In terms of criminal liability, the Criminal Code has specific provisions regarding both active bribery and influence peddling in international business transactions.

Active bribery in international business transactions is a crime by which anyone directly or indirectly promises, offers or gives an improper advantage to a foreign public agent or a third party, to influence him or her to practise, omit or delay an official act related to an international business transaction. The established penalties are one to eight years of imprisonment and a fine.

As for influence peddling, the Criminal Code sets two to five years of imprisonment and a fine for anyone who requests, demands or obtains, for himself or herself or for another, a promise of advantage or benefit, under the pretext of influencing an act to be performed by a foreign public official in connection with an international business transaction.

Furthermore, the Anti-Corruption Law provides for corporate civil and administrative liability for injurious acts contrary to foreign public administrations, including acts of corruption and bribery. In general, all statutory provisions concerning domestic wrongdoing extend to foreign bribery as well. The main difference between the two lies in the fact that the Comptroller General’s Office – and not the highest authority of the public entity aggrieved by the wrongful act – has exclusive jurisdiction to initiate and conduct the administrative proceeding through which the acts against foreign public bodies will be investigated.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The Brazilian anti-corruption legal framework does not punish money laundering or wrongdoing related to financial record-keeping. Liability for these activities is only established by specific laws, such as the Tax Crimes Law16 and the Anti-Money Laundering Law.17

Frauds involving financial record-keeping are considered crimes under the Tax Crimes Law and are punishable by up to five years of imprisonment and fines.

16 www.planalto.gov.br/ccivil_03/leis/L8137.htm.
17 www.planalto.gov.br/ccivil_03/leis/L9613compilado.htm.
Money laundering is described as the act of concealing or dissimulating the true nature, origin, location, availability, transaction or ownership of assets, rights or valuables directly or indirectly arising from criminal offences. This crime is punishable by three to 10 years of imprisonment and a fine.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Despite the existence of legal provisions on criminal and civil liability for foreign bribery acts, there are no reports of their application as of yet. This lack of precedent may be due not only to the fact that this legal framework is still quite new, especially concerning civil and administrative liability (enacted by means of the Anti-Corruption Law in 2013), but also because the Brazilian authorities have focused on fighting domestic bribery.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Brazil has so far ratified several conventions related to anti-corruption, including:

- the Organisation for Economic Co-operation and Development Anti-Bribery Convention, ratified on 24 August 2000 and enacted by Decree No. 3,678 on 30 November 2000;
- the Inter-American Convention against Corruption, enacted by Decree No. 4,410 on 7 October 2002;
- the United Nations Convention against Transnational Organized Crime, ratified on 29 January 2004 and enacted by Decree No. 5,015 on 12 March 2004; and

Brazil has also signed cooperation agreements with other countries to fight corruption and bribery. Brazil and Switzerland entered into a cooperation agreement on 12 May 2004, enacted by Legislative Decree No. 300 on 13 July 2006. Brazil also entered into a technical cooperation agreement with India and South Africa during the second annual India-Brazil-South Africa Dialogue Forum on 17 October 2007, with the purposes of fighting commercial fraud, money laundering and other illicit international trade activities.

The international commitments undertaken by Brazil have mostly been fulfilled with the enactment of the Anti-Corruption Law and through the considerable efforts of the Brazilian authorities (such as the Comptroller General’s Office) in recent years.

VIII LEGISLATIVE DEVELOPMENTS

i Leniency agreements provisional measure

Provisional Measure No. 703\(^{18}\) was issued on 18 December 2015 by the Executive Branch to implement several changes to the Anti-Corruption Law, especially with regard to voluntary disclosure and leniency agreements. However, it was not converted into law by the National Congress, which led to its expiration on 29 May 2016.

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The main changes introduced by the Provisional Measure, now no longer in effect, were the following much less stringent requirements for leniency agreements:

- **a** companies would be able to submit an application after the commencement of administrative investigations. Conversely, however, a company was likely to be granted lesser benefits if applying at a later stage;
- **b** the application for leniency would no longer require an acknowledgement of guilt;
- **c** other companies could also engage in voluntary disclosure after the first company had done so, if they were in a position to cooperate with the authorities;
- **d** the first applicant would be exempted from fines based on the company’s gross revenues, whereas fines imposed on other applicants would still be reduced by two-thirds;
- **e** companies would be released from the debarment sanction provided in the Public Procurement Law;
- **f** leniency agreements would also: (1) cover wrongdoing committed before the Anti-Corruption Law entered into force (29 January 2014); (2) prevent indemnity claims; and (3) preclude prosecution regarding the facts covered in the agreement if the Public Prosecutor’s Office were to take part in negotiations;
- **g** the parties would be able to agree on a payment plan regarding the compensation for damage; and
- **h** pending investigations would be suspended at the time the company applied for leniency, and dismissed in the event of an agreement being signed.

Bills to modify provisions regarding leniency agreements and others of the Anti-Corruption Law are currently under discussion in the National Congress.

### ii Public Companies Law

In the wake of corruption scandals involving state-owned companies such as Petrobras, the Brazilian National Congress enacted the Public Companies Law¹⁹ and the President enacted Decree No. 8,945 of 27 December 2016,²⁰ which regulates the Public Companies Law. The Law and Decree establish specific rules that government-owned and government-controlled companies, as well as their subsidiaries at the federal, state and municipal levels, must follow in terms of corporate governance, public tenders and contracts, compliance and supervision by public control bodies. These companies were obliged to adapt to the new provisions of the Public Companies Law by the end of June 2018.

### IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

The Law on Access to Information²¹ establishes that all public entities and private entities receiving public resources must disclose online all information of public interest, particularly institutional, financial and budgetary data, except those ranked as classified, secret and top secret.

The Conflict of Interest Law²² is applicable to high-ranking officials from the federal public administration with access to sensitive information. If an official subject to this Law

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makes improper use of sensitive information, exercises private activities that may conflict with his or her public function, or acts as an informal consultant for private persons or companies, the penalties set out in the Administrative Misconduct Law will apply.

X COMPLIANCE

i Compliance programmes

The Anti-Corruption Decree provides generic standards for evaluation of compliance programmes implemented by corporate entities. The compliance programme must be structured, applied and updated according to the specific characteristics and risks of those activities carried out by each corporate entity, and it must evolve constantly to ensure its effectiveness and to avoid the company being exposed to corruption.

If a company is subject to the administrative sanctions prescribed in the Anti-Corruption Law, its compliance programme may be taken into consideration to reduce the administrative fine.

In evaluating the effectiveness of a compliance programme and considering it as a mitigating factor, the public authorities will consider the company’s profile and the tenor of its compliance programme.

To that end, the Brazilian Comptroller General’s Office has issued Ordinance No. 909 of 7 April 2015 setting guidelines for companies to develop the reports on which public authorities will rely when considering a reduction in the administrative fine under the Anti-Corruption Decree.

The company must prove its allegations and ensure that reported information is accurate, complete and organised, which may be evidenced by means of official documents, electronic mail, letters, declarations, correspondence, memoranda, minutes of meetings, reports, manuals, computer printouts and screenshots, audiovisual and sound records, photographs, purchase orders, invoices, accounting records or other documents, preferably in digital media.

XI OUTLOOK AND CONCLUSIONS

The Brazilian legal framework has been enriched over the past few years, but its application and enforcement are still in the early stages.

Recent developments in corruption investigations, such as Operation Car Wash, have, however, raised hopes across the country that the fight against corruption and bribery may pay off. Brazilian authorities have been working to keep up with growing demands from both the international community and Brazilian society in this regard.

The fight against corruption continues unabated, even in the light of the economic and political crisis. Furthermore, there seems to be an ongoing change in the corporate culture as a whole, as anti-corruption precautions are routinely being taken by both multinational and local companies doing business in Brazil.
Chapter 4

CANADA

Mark Morrison and Michael Dixon

I INTRODUCTION

This chapter addresses the legislative framework and enforcement trends with respect to domestic and foreign bribery laws in Canada. In Canada, domestic bribery and corruption offences are set out in the Criminal Code, while foreign bribery offences are set out in the Corruption of Foreign Public Officials Act (CFPOA). Canadian enforcement of anti-bribery laws has lagged behind its southern neighbours. Recently, the federal government of Canada has undertaken several legislative changes that may alter the enforcement environment in Canada. These changes, discussed throughout this chapter, include the introduction of a Canadian deferred prosecution agreement regime (known as a remediation agreement regime), the repeal of the facilitation payment exemption under the CFPOA, and forthcoming changes to Canada's debarment regime (the Integrity Regime). Despite this flurry of legislative activity, the effect of these changes remains to be seen.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Sections 121 through 123 of the Criminal Code prohibit the improper provision of benefits to Canadian government officials and employees. Section 426 of the Criminal Code criminalises private sector bribery.

i Offences involving bribery and corruption of Canadian government officials

Section 121(1)(a) of the Criminal Code prohibits the offering or giving of a benefit to a federal or provincial government official, or any member of his or her family, that creates a quid pro quo arrangement. An official that accepts such a benefit also commits an offence under this section. The purpose of this Section is to prevent exchanging benefits for influence in government and deter overt forms of domestic corruption.

Section 121(1)(b) prohibits giving a benefit to a federal or provincial government official in the course of business dealings between an accused and government. Section 121(1)(c) criminalises the receipt of such a benefit. The purpose of Sections 121(1)(b) and (c) is to preserve the appearance of integrity, rather than integrity itself. Unlike Section 121(1)(a),

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2 RSC 1985, c C-46.
3 SC 1998, c 34.
these offences do not require a quid pro quo arrangement. Also, written pre-approval from the head of the branch of government conducting business with an accused is a complete defence to Section 121(b) and (c) offences.

For the purpose of Sections 121(1)(a) through (c), government officials include employees or officials of: (1) federal and provincial governments; (2) government-controlled corporations; and (3) municipalities acting as agents of the federal or provincial crown.

Section 122 of the Criminal Code prohibits corruption of public officials in positions of trust. This Section criminalises using a public office for a purpose other than the public good if the misconduct arises to a serious and marked departure from the standard of responsibility and conduct expected of an individual in the accused’s position of public trust. Under this section, public officials are not limited to federal or provincial government officials and include any person in a position of duty, trust, or authority, particularly if that person is in a corporation or the public service. Canadian courts have held that officials of First Nations bands are public officials for the purpose of Section 122.4

Section 123 of the Criminal Code functions the same way as Section 121(1)(a), but applies to municipal government officials.

ii What constitutes a benefit under the Criminal Code

Domestic bribery offences under the Criminal Code capture more than cash payments. Sections 121 and 123 of the Criminal Code each prohibit the payment or receipt of a ‘loan, commission, reward, advantage, or benefit of any kind.’ In R v. Hinchey,5 the Supreme Court of Canada defined a ‘benefit’ under the Criminal Code as anything that amounts to a ‘material or tangible gain’. The Supreme Court also set out factors to determine whether something is a ‘material or tangible gain’, including the: (1) relationship between the parties; (2) history of reciprocal arrangements between the parties; and (3) size or scope of the benefit.6 Other Canadian courts have expanded these factors to include, in part, the: (1) manner in which the gift was bestowed; (2) nature of the provider’s dealings with government; and (3) state of mind of the provider and receiver.7

Canadian courts have not identified a specific value threshold for what constitutes a benefit, but have identified specific items that do, or do not, constitute ‘material or tangible gains’. Canadian courts have found that hockey tickets,8 extravagant meals, gift cards over C$500, and payment for travel represent a material gain, but items such as infrequent and moderately priced meals, coffee, and low value promotional items do not.

iii Private corruption

Section 426 of the Criminal Code criminalises the provision or receipt of secret payments or benefits to or by an agent, including an employee, as consideration for actions related to the affairs or business of an agent’s principal, including an employer. There are two separate offences contained in Section 426: (1) a donor offence, committed by a third party providing a benefit; and (2) an agent/recipient offence, committed by an agent receiving a benefit.

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4 R v. Yellow Old Woman, 2003 ABCA 342.
6 ibid.
8 R v. ACS Public Sector Solutions Inc., 2007 ABPC 315: Allen Prov J held that hockey tickets valued at over C$100 could constitute a ‘material and tangible gain’ for the purposes of the Criminal Code.
These offences can be committed independently and do not require the donor and recipient to act in concert. Secrecy is a crucial element for this offence. There is no offence if an agent makes adequate and timely disclosure of the benefit to his or her principal.

iv Organisational liability

Pursuant to Section 22.2 of the Criminal Code, Canadian organisations can be party to offences committed by their ‘senior officers’ if the senior officer intended, in part, to benefit the organisation by committing the offence. An organisation can also be criminally liable if a senior officer: (1) commits an offence themselves; (2) directs other representatives of the organisation to commit an offence; or (3) fails to take all reasonable steps to prevent another representative of the organisation from committing an offence the senior officer knew would be committed.

A ‘senior officer’ is defined broadly by the Criminal Code and includes any representative that plays an important role establishing an organisation’s policies or manages an important aspect of the organisation’s activities, including directors, chief executive officers, and chief financial officers.9 Canadian courts have found that even a general manager can be considered a ‘senior officer’ and create criminal liability for an organisation.10

v Liability of directors, officers, and employees

Under Section 21 of the Criminal Code, an organisation’s directors, officers or employees may be charged as a party to an offence that the organisation itself has been charged with. A party to an offence under the Criminal Code includes anyone that commits an offence, or assists or encourages the commission of an offence. There is no strict or automatic liability for directors, officers or employees of organisations guilty of bribery. Instead, directors, officers or employees will only be guilty of a bribery offence committed by the organisation if they participated in or encouraged the commission of it.

vi Penalties

Conviction under Sections 121 through 123, and 426 of the Criminal Code are punishable by up to five years in prison for individuals and unlimited fines for organisations. There are no limitation periods for indictable offences in Canada11 and an accused can be charged for numerous offences related to a single act. Further, the Criminal Code prohibits the retention of proceeds of crime and a convicted organisation may be ordered to forfeit all proceeds – not just profits – related to a conviction.

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9 Criminal Code, Section 2: Definition for ‘senior officer’.
11 Sections 121, 122, 123, and 426 of the Criminal Code and all CFPOA offences are indictable offences. Only less serious, summary offences have a limitations period, set out in Section 786(2) of the Criminal Code.
III ENFORCEMENT: DOMESTIC BRIbery

Historically, there was limited enforcement of Sections 121 through 123 and 426 of the Criminal Code. In concert with a global effort to decrease bribery and corruption, Canadian enforcement authorities have increased enforcement of Canada’s domestic bribery offences. Some examples include:

i Jacques Corriveau

In November 2016, Jacques Corriveau was convicted of forgery, laundering proceeds of a crime, and of an offence under Section 121(3) of the Criminal Code for receiving C$7 million of kickbacks related to the Liberal Sponsorship Scandal as an organiser for the Liberal Party of Canada. He was sentenced to four years’ imprisonment and fined C$1.4 million.

ii Michael Applebaum

In March 2017, Michael Applebaum, the interim mayor of Montreal, was convicted of violating several sections of the Criminal Code, including Sections 121(1)(a), 122 and 123 for accepting payments from real estate developers and engineering firms in return for favours and political influence while mayor of a central borough in Montreal. Mr Applebaum was sentenced to one year in prison and two years’ probation.

IV FOREIGN BRIbery: LEGAL FRAMEWORK

i CFPOA

Like the United States Foreign Corrupt Practices Act (FCPA), the CFPOA criminalises the provision of benefits to foreign public officials in consideration for, or to induce, any act or omission to be undertaken by an official in connection with their duties. Benefits provided through, or received by, third-party representatives with the ultimate goal of influencing a foreign public official are also prohibited by the CFPOA.

Under the CFPOA, a foreign public official includes any person that holds a legislative, administrative or judicial position, or performs a public duty or function for a foreign state. This includes employees of foreign boards, commissions or organisations established to perform a duty or function on behalf of a foreign state. The CFPOA is likely to consider employees of state-owned or controlled companies to be foreign public officials.

ii Jurisdiction

Prior to amendments to the CFPOA passed in 2013 (the 2013 Amendments), the CFPOA only applied to misconduct with a ‘real and substantial’ connection to Canada. This limited Canada’s ability to enforce the CFPOA because some portion of the initiation or commission of the offence had to occur within Canada. The 2013 Amendments deem all acts of Canadian

12 As amended, 15 USC Section 78dd-1, et seq.
13 CFPOA, Section 3(1).
14 ibid.
15 ibid., Section 2: Definition for ‘foreign public official’.
citizens, permanent residents, corporations, societies, firms or partnerships to be acts within Canada for the purposes of the CFPOA. As a result, Canadian citizens and companies are subject to worldwide regulation under the CFPOA.

Canadian enforcement authorities can only enforce violations of the CFPOA committed by foreign citizens or entities if Canadian courts have jurisdiction over both the offence and the accused. To have jurisdiction over an offence committed by a foreign accused outside of Canada, the offence must have a 'real and substantial' link to Canada. To gain jurisdiction over a foreign accused, a Canadian court must be able to 'lay hands' on him, her or it. Canadian enforcement authorities gain jurisdiction over a foreign accused individual if he or she is subject to extradition or enters Canada. Canadian courts gain jurisdiction over a foreign organisation if its manager, secretary or other senior officer (discussed above), or the manager, secretary or other senior officer of one of its branches, enters Canada.

iii Defences
Section 3(3) of the CFPOA sets out two defences for bribing a public official: (1) if the benefit provided is permitted or required under the laws of the foreign state or organisation for which the official acts; or (2) if the benefit was provided to pay reasonable expenses incurred in good faith by or on behalf of a foreign public official and the expenses were incurred related to promote products and services at the accused to execute or perform a contract between the accused and the foreign entity the official represents. To rely on this defence, an accused must show the loan, reward, advantage or benefit was a reasonable expense incurred in good faith.

On 31 October 2017, the Canadian government repealed the facilitation payment exemption contained in the CFPOA. As such, facilitation payments are no longer permissible under Canadian law.

iv Organisational liability
Section 22.2 of the Criminal Code, discussed in Section II.iv, is applicable to CFPOA offences.

v Penalties
Conviction of bribing a public official under the CFPOA is punishable by up to 14 years’ imprisonment for individuals and unlimited fines for organisations. Courts can also impose additional, onerous probationary terms on convicted companies, including a third party compliance monitor.

17 CFPOA, Section 5.
18 R v. Libman, [1985] 2 SCR 178. As set out above, this test applied to all CFPOA violations prior to the 2013 Amendments.
19 Criminal Code, Section 703.2.
20 CFPOA, Section 3(2).
V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i CFPOA books and records offence

Pursuant to Section 4 of the CFPOA, it is an offence to establish or maintain secret accounts, make unrecorded transactions, record non-existent expenditures, mislabel liabilities, knowingly use false documents, or intentionally destroy accounting records before the law permits, for the purpose of hiding bribery.

The books and records offence under the CFPOA has had a less significant impact on the Canadian enforcement landscape than its FCPA counterpart because it is enforced criminally, not civilly. The Canadian books and records offence also requires an underlying act of bribery.

ii Money laundering/proceeds of a crime

The Criminal Code and Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)21 safeguard against money laundering in Canada. The Criminal Code prohibits both the transfer and possession of money or property obtained through the commission of an offence, including bribery and corruption offences under the Criminal Code and CFPOA.22 The PCMLTFA imposes strict regulations on entities, such as financial institutions, that are likely to be used as intermediaries to facilitate money laundering. These regulations include requirements related to record-keeping, client identification, ongoing monitoring, and reporting suspicious transactions.

iii Extractive Sector Transparency Measures Act

The Extractive Sector Transparency Measures Act (ESTMA)23 imposes additional reporting obligations on entities engaged in the commercial development of oil, gas or minerals. Entities engaged in these activities must comply with ESTMA’s reporting requirements (Reporting Entities) if they are listed on a stock exchange in Canada, or have a place of business in Canada, do business in Canada, or have assets in Canada, and if they also meet at least two of the following size criteria, in two of their most recent financial years:

a. C$20 million in assets;
b. C$40 million in revenue; or
c. employ an average of at least 250 employees.24

Reporting Entities are required to report payments made to foreign and domestic governments, government-owned or controlled entities, quasi-government entities that exercise a government a government function, and employees or officials that belong to these organisations.25 As of 1 June 2017, Reporting Entities must also report payments made to indigenous governments in Canada.26 Indigenous governments may include any

21 SC 2000, c 17.
22 Criminal Code, Sections 354 through 355.5.
23 SC 2014, c 39.
24 ibid., Section 2: definition for 'entity' and Section 8.
25 ibid., Section 9.
26 ibid., Section 29.
indigenous group or organisation that exercises or performs a power, duty or function of government, independently or in concert with other groups, such as a band council, chief, treaty association, tribal council or Chief’s council.

ESTMA requires payments related to specific categories be reported, such as taxes, royalties, fees (including rental fees, regulatory charges, or fees related to licences, permits and concessions) and bonuses.\(^{27}\) Reporting is only necessary if the total annual payments made in relation to a single category eclipse C$100,000. A director, officer, independent auditor or accountant must attest to the truth, accuracy and completeness of information contained in an ESTMA report.\(^{28}\)

Failure to report a required payment is an offence under ESTMA.\(^{29}\) Additionally, an attempt to structure any payment, or other financial obligation, to avoid reporting requirements is an offence under ESTMA.\(^{30}\) Entities and directors otherwise guilty of an offence under ESTMA can avoid conviction by establishing that all reasonably prudent measures were taken to ensure an offence was not committed.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

i Introduction of remediation agreements
Recently, the federal government introduced amendments to the Criminal Code to allow for and regulate a remediation agreement regime (Remediation Regime) that is substantively similar to the deferred prosecution agreement (DPA) regime in the United Kingdom. The introduction of the Remediation Regime is a significant step in modernising Canadian enforcement for bribery and corruption related offences, and is discussed in Section VIII.

ii Integrity Regime
In 2015, Canada introduced a new Integrity Regime that debars entities associated with corruption-related offences from contracting with the federal government, including mandatory five- to ten-year debarment periods for entities convicted or discharged (or with a board member that has been convicted or discharged) of an offence under Sections 121 and 426 of the Criminal Code and any offence under the CFPOA. Under the Integrity Regime, simply being charged with a corruption-related offence can result in an 18-month debarment period.

In March 2018, Public Services and Procurement Canada (PSPC) announced that the federal government will enhance the Integrity Regime by 1 January 2019. These changes may relax mandatory debarment consequences and bring the Integrity Regime in step with the Remediation Regime. These enhancements are also discussed in Section VIII.

iii Historic enforcement
The CFPOA is enforced by the Royal Canadian Mounted Police (RCMP) and prosecuted by the Public Prosecution Service of Canada. To date, there have been a number of significant prosecutions under the CFPOA. Between 2011 and 2013, two oil and gas companies

\(^{27}\) ibid., Section 2: Definition for ‘payee’.
\(^{28}\) ibid., Section 9(4).
\(^{29}\) ibid., Section 24(1).
\(^{30}\) ibid., Sections 24(2) and (3).
were fined a combined C$19.85 million for improper payments and benefits provided to government officials from Bangladesh and Chad, respectively. Also in 2013, an individual named Nazir Karigar was sentenced to three years’ imprisonment for improper payments made to representatives of Air India, a government-owned company. Mr Karigar’s most recent appeal was dismissed in 2017.

In 2012 and 2013, three executives of a Canadian engineering firm, a former Bangladeshi minister, and a Bangladeshi-Canadian citizen were charged with bribery offences under the CFPOA in connection with a contract for consultancy services related to a US$3 million construction project in Bangladesh. In 2014, the prosecution of the former Bangladeshi minister was stayed because he lacked a direct connection to Canada,31 and in 2015, charges against one executive were stayed when he agreed to cooperate with authorities.

The remaining accused were acquitted in 2017 after Justice Nordheimer of the Ontario Superior Court ordered crucial wiretap evidence be excluded. Evidence collected by wiretap is only admissible in Canada if the wiretap was authorised by court order. Courts will authorise a wiretap if enforcement authority personnel swear an affidavit setting out why they believe an offence was committed, as well as reasonable grounds to believe a wiretap will provide evidence of the commission of the offence.32 Additionally, a court must be satisfied a wiretap is necessary and in the best interests of the administration of justice.33 In this case, Justice Nordheimer found the wiretap used by the RCMP was improperly authorised because it was ordered based on little more than hearsay and rumours, provided by sources that were not credible. As a result, Justice Nordheimer excluded the evidence collected by the wiretap. The prosecution’s case relied heavily on this wiretap evidence and the accused were acquitted upon its exclusion.

iv Ongoing investigations

Between 2014 and 2015, a Canadian engineering firm was charged with bribery offences under the CFPOA, along with two of its subsidiaries and two of its former executives. Preliminary inquiries for these charges were originally scheduled for September 2018, but have been postponed.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

i Canada’s progress with the OECD Anti-Bribery Convention


This year, Transparency International’s report indicated that Canadian enforcement levels had regressed from ‘Moderate’ to ‘Limited’ because Canadian enforcement authorities had only commenced four foreign bribery prosecutions between 2014 and 2017. According

31 Chowdhury v, Canada, 2014 ONSC 2635.
32 Criminal Code, Sections 185 and 186.
33 ibid., Section 186.
to the report, systemic challenges still hamper the enforcement of white-collar offences in Canada. On Transparency International’s scale, ‘Moderate’ and ‘Limited’ enforcement indicate stages of progress, but are not considered sufficient deterrence of bribery and corruption.

ii Wallace and the importance of international cooperation

Before the executives discussed above were acquitted by Justice Nordheimer (see Section VI.iii), an accused brought an application in that case to compel records and testimony from the anti-corruption/anti-fraud investigative unit of the World Bank Group, known as the Integrity Vice Presidency of the World Bank (INT). INT had conducted an investigation into whistle-blower complaints related to the accused and provided the results of that investigation and supporting documents to the RCMP. The RCMP relied upon these materials to obtain a wiretap authorisation, later found to be improper by Justice Nordheimer. The trial judge ordered the documents be produced and INT personnel testify. The World Bank Group appealed.

The Supreme Court unanimously overturned the trial judge’s decision holding that the World Bank was protected from being compelled to provide records or testify by multilateral agreements, ratified by Canadian legislation and orders in council.34 Also in Wallace, the Supreme Court affirmed that worldwide cooperation was required to fight corruption, which the court found often transcended borders and was a significant obstacle to international development.

VIII LEGISLATIVE DEVELOPMENTS

i Canada’s Remediation Regime

After engaging in public consultations on corporate wrongdoing, PSPC announced that the federal government would amend the Criminal Code to permit and govern the Remediation Regime. Remediation agreements, like DPAs, are agreements between an accused organisation and a prosecutor, whereby a prosecutor agrees to suspend prosecution of an accused in exchange for cooperation and compliance with a number of conditions. The Remediation Regime came into force on 19 September 2018, but is available for offences alleged to have been committed prior to coming into force.

Only prosecutors can initiate a negotiation for a remediation agreement. Before a prosecutor may enter into negotiations with an accused organisation, the prosecutor must be of the opinion that there is a reasonable prospect of conviction for the underlying offence, the offence did not result in serious bodily harm, death or injury, the offence was not committed for or with a criminal organisation or terrorist group, and negotiating a remediation agreement is in the public interest and appropriate in the circumstances.35 The Attorney General must also consent to negotiations.36

A prosecutor must consider certain factors when determining if a remediation agreement is in the public interest and appropriate in the circumstances, including whether

35 Criminal Code, Section 715.32(1).
36 ibid.
an organisation has taken disciplinary action against culpable individuals and whether an organisation has taken remedial action. \(^{37}\) Self-reporting is not required to be eligible for a remediation agreement; however, it is a factor a prosecutor must consider. \(^{38}\)

Remediation agreements must include certain terms, including a statement of facts, an admission of responsibility by the accused, and ongoing commitments to identify culpable individuals, cooperate with any resulting investigation, forfeit any benefit obtained from improper conduct, and pay a fine and victim surcharge for each offence. \(^{39}\)

Remediation agreements are subject to court approval in Canada. A court must approve a remediation agreement if it is in the public interest and the terms of the remediation agreement are fair, reasonable and proportionate to the corresponding offence. \(^{40}\) Like any other court order in Canada, remediation agreements are published by the courts, except in limited circumstances, such as where it is necessary to protect the identities of victims or the integrity of an ongoing investigation. It remains to be seen how restrictive Canadian courts will be with respect to publishing remediation agreements and their details.

After court approval, criminal proceedings are stayed until the accused completes or violates its remediation agreement. If an accused complies with a remediation agreement, a court will permanently stay the charges against the organisation. If an accused violates its remediation agreement, the prosecution may resume conventional prosecution against the organisation. \(^{41}\)

The introduction of the Remediation Regime in Canada may allow for efficient and proportionate resolution of corporate misconduct; incentivised compliance through certain, predictable outcomes and procedures for self-reporting, reparations and remediation; and increased enforcement against individuals directly engaged in illegal conduct.

In addition to avoiding a criminal investigation, trial or conviction, the introduction of remediation agreements provides a significant incentive for organisations that conduct business with government. Because changes resolved by remediation agreement may not result in mandatory debarment, organisations may be especially motivated to self-report, cooperate and remediate to maximise their opportunity to obtain a remediation agreement.

While Canada has not historically had a culture of self-reporting, in part due to the lack of certainty and absence of sufficient incentives for self-reporting, the availability of a non-criminal resolution option created by the Remediation Regime could lead to increased self-reporting, resolutions and enforcement in Canada.

### ii Integrity Regime update

In line with its public consultation regarding the Remediation Regime, PSPC also sought feedback regarding Canada’s Integrity Regime. On 27 March 2018, PSPC announced that the federal government will enhance the Integrity Regime, effective 1 January 2019. According to a press release issued by the PSPC, the Integrity Regime will be amended to increase flexibility for debarment decisions and expand the types of offences that can lead to debarment, including labour and environmental offences.

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37 ibid., Section 715.32(2).
38 ibid., Section 715.32(2)(a).
39 ibid., Section 715.34(1).
40 ibid., Section 715.37(6).
41 ibid., Section 715.37(7).
Facilitation payments

The federal government repealed the facilitation payment exemption contained in the CFPOA on 31 October 2017, creating an important difference between the CFPOA and the FCPA, which allows for facilitation payments. Organisations with FCPA compliance programmes and Canadian operations should consider prohibiting facilitation payments to ensure compliance with both the FCPA and CFPOA.

OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

It is vital to understand Canadian nuances related to privilege when conducting an internal investigation or defending bribery or corruption allegations. A complete overview of the law of privilege in Canada is beyond the scope of this chapter; however, involving counsel early in any investigation process is a good first step to protect privileged records related to, and developed in conjunction with, an investigation or defence.

It is also important that organisations understand whistle-blower protections in Canada. Section 425.1 of the Criminal Code prohibits any act or threat against an employee intended to discourage reporting to authorities, or any act or threat of retaliation against an employee that has provided information to authorities. Directing an employee not to cooperate with authorities, as well as demotions, terminations and other actions with adverse effects on employment, are offences under Section 425.1.

COMPLIANCE

To ensure compliance with the Criminal Code and CFPOA, organisations should implement and maintain compliance programmes tailored to their unique bribery and corruption risks. Although the CFPOA does not require compliance programmes, case law indicates that a robust compliance programme may be considered a mitigating factor in the event of a bribery prosecution. Guidance documents from other jurisdictions, such as the US and UK provide useful commentary related to effective compliance programmes that apply broadly in Canada; however, compliance in Canada would be improved by a formal guidance for the Criminal Code and CFPOA, issued by enforcement authorities.

OUTLOOK AND CONCLUSIONS

While the Canadian legal framework related to domestic and foreign bribery remains largely unchanged, the recent legislative changes related to enforcement and resolution discussed throughout this chapter are significant developments. These changes have increased the number of tools available to Canadian enforcement authorities; however, how and when these tools will be implemented and used remains an open question.

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44 Bribery Act: Guidance on adequate procedures facilitation payments and business expenditure, the Serious Fraud Office (2012).
INTRODUCTION

For some time, the People’s Republic of China (China) has been perceived as a jurisdiction with high levels of corruption. This is evident from China’s ranking on Transparency International’s Corruption Perceptions Index (CPI), where it ranks 77th out of 180 countries and territories. Under President Xi Jinping, China is, however, taking major strides to combat corruption and change this perception. Investigations of corrupt officials have intensified and extend beyond China’s borders to repatriate former officials who have fled the country with their ill-gotten assets. In addition, China’s authorities increasingly target bribe givers in commercial transactions. Enforcement actions include administrative enforcement on a local level as well as criminal prosecutions, such as the highly publicised case brought against the Chinese subsidiary of a multinational life sciences company that resulted in a record-breaking fine in the amount of 3 billion yuan. Along with aggressive enforcement against corruption, China has also updated its laws to keep up with evolving patterns of corruption and associated compliance risks. Following the updates to the bribery provisions in the Criminal Law, which took effect in 2015, amendments to the Anti-Unfair Competition Law (AUCL) were promulgated in November 2017, governing, inter alia, administrative offences of commercial bribery. It remains to be seen whether these concerted efforts will, over time, improve the perceived level of corruption in China and its ranking on the CPI.

DOMESTIC BRIBERY: LEGAL FRAMEWORK

The relevant provisions on domestic bribery can mainly be found in two laws: the AUCL, which makes commercial bribery an administrative offence (see Section II.vi) and the Criminal Law, which governs commercial bribery and bribery of government officials. Under these laws, both the giving and the receiving of a bribe constitute a violation of the applicable laws.

Definition of a bribe

The definition of what constitutes a bribe in the relevant laws is very wide and has been broadened and clarified through judicial interpretations. The latest of these interpretations, the ‘Interpretation of Several Issues Concerning the Application of Law in Handling Criminal
Cases Related to Graft and Bribery’ (the Interpretation) was issued by the Supreme People’s Court and Supreme People’s Procuratorate on 18 April 2016 and sets out in Article 12 that a bribe can consist of money, goods, proprietary interests consisting of benefits the value of which can be calculated in money (including, for example, house renovation, the release of a debt), and tangible benefits such as memberships or travel that requires payment. Article 13 of the Interpretation further clarifies that bribes given after the fact are also illegal (i.e., if an official receives a bribe after he or she has performed his or her duties and provides the bribe giver with an illegal benefit).

ii Bribery of government officials
Under the Criminal Law, which was revised in 2017, it is an offence to offer a bribe to a government official and for a government official to receive a bribe. Under Article 389 of the Criminal Law, any person offering a bribe to a government official for the purpose of securing improper benefits commits an offence. Article 390A further clarifies that it is also an offence to offer bribes to a former government official and close relatives of or other persons closely related to a government official (former or current). The term ‘close relatives’ is defined in the PRC Criminal Procedure Law to include spouses, parents, children, and natural siblings, and is applicable to the Criminal Law. Article 393 extends the liability for bribing government officials to entities. Finally, if the bribe is directly offered to the relevant government department or organ (or to a state-owned enterprise, company, public institution, etc.) to obtain improper benefits, the offerer (regardless of whether a person or an entity – and if an entity, its directly responsible managerial person or other directly responsible persons) commits an offence under Article 391. As for the recipients, it is an offence under Article 385 for any government official to take advantage of his or her position and extort money or property from another party or to illegally accept money or property in exchange for benefits for that party. Article 163 confirms that Article 385 also applies to employees in public service at state-owned enterprises or other state-owned units. According to Article 387, it is also an offence for any government entity or department or state-owned enterprise to extort or illegally accept money or property from any party in exchange for securing benefits for that party. In such cases, the persons at the government entities who are in charge or directly responsible for the relevant conduct will be held liable.

iii Definition of government official
Article 93 of the Criminal Law defines a government official as a person providing ‘public service’ in government organs. Staff in state-owned enterprises and institutions, and even persons assigned to non-state-owned enterprises and institutions, can be regarded as government officials if they perform public service. The Circular of the Supreme People’s Court on Printing and Distributing the Summary of Symposium Minutes on Trial of Economic Criminal Cases by Courts Nationwide confirms that public service entails functions such as the supervision, leadership and management of government organs and government assets; public service generally does not include activities of a technical or commercial nature. As such, a case-by-case assessment is needed to decide whether a particular staff member of a government organ or state-owned enterprise is a government official, depending on the title or position of the person but also on the conduct and functions that person exercises.
iv Gifts, travel, meals and entertainment

Given the very broad scope of the term ‘bribery’ under the Criminal Law (and the AUCL as well), any gift, travel, meal or entertainment that has a value that can be calculated in money could constitute a bribe (if there is any causal link to a business benefit for the bribe giver). Industry groups such as the China Association of Enterprises with Foreign Investment R&D-Based Pharmaceutical Association Committee (RDPAC), to which many foreign-invested life-science companies in China belong, have set out strict rules (the RDPAC Code). While these rules do not have the binding force of laws, they nevertheless provide guidance. In the 2017 version of the RDPAC Code, the giving of gifts to healthcare professionals is prohibited for RDPAC members. Members are only allowed to provide healthcare professionals with promotional aids of minimal value (i.e., below 100 yuan in value). In addition, such promotional aids have to be related to the work of the healthcare professional who receives the same (e.g., notepads or inexpensive pens).

v Political contributions

The Criminal Law and the AUCL do not specifically deal with political contributions. Given the broad scope of the term ‘bribery’ under the applicable laws, any contribution to an office holder that is made on a quid pro quo basis is likely to be considered a bribe.

vi Commercial bribery

Both the Criminal Law and the AUCL cover commercial bribery. Under Article 7 of the AUCL, it is an administrative offence for business operators to give bribes in the form of money or property (or through other means) for the purpose of seeking transaction opportunities or a competitive edge. It is also an administrative offence to offer a secret commission (i.e., a commission that is not properly recorded in the parties’ books and records). The term ‘bribe’ is defined broadly in the AUCL and can include anything from payments in cash to other means such as offering trips or entertainment. According to Article 2 of the Interim Provisions on Prohibiting Commercial Bribery, the term ‘property’ refers to cash and physical objects, including property given to the other party in a transaction under the guise of promotional expenses, publicity fees, sponsorships, reimbursements, research fees, labour fees, consulting fees, commission or other payments or disbursements. ‘Other means’ include benefits other than money or property, such as overseas and domestic travel.

On 4 November 2017, at the 30th meeting of the Standing Committee of the 12th National People’s Congress, the revised AUCL (the AUCL) was promulgated and entered into force as of 1 January 2018. While the AUCL does not provide a precise definition of what constitutes commercial bribery, under Article 7, business operators are prohibited from giving a bribe to the staff of a transaction counterparty, a third party (whether an individual or an entity) who is entrusted by the counterparty to conduct relevant matters, or any individual or entity that is in the position or has the power to influence the transaction. Business operators are, however, not prohibited from offering discounts to the counterparty or paying commissions to an intermediary if the discounts or commissions are properly recorded in the books of both the offerer and the offeree. Finally, Article 7 of the AUCL confirms that an employer is liable for the bribery acts of its employees, unless the employer can prove that the act of the employee is irrelevant to seeking a transaction opportunity or competitive edge for the business employer.

If bribes given in commercial transactions reach a certain threshold, the relevant authorities enforcing the AUCL (usually local administrations of industry and commerce
(AICs)) can transfer the case to the prosecution. According to Article 164 of the Criminal Law, an individual or an entity commits an offence if it gives money or property in a relatively large amount to a company, enterprise or organisation for the purpose of seeking improper benefits. Correspondingly, Article 163 makes it an offence for any employee of any company to abuse his or her position and demand money and property in exchange for providing benefits for any person or entity. The term 'in a relatively large amount' in Article 164 sets the threshold for criminal prosecution and has been defined in the Interpretation as a minimum of 20,000 yuan if the specified circumstances exist, or a minimum of 60,000 yuan if the specified circumstances do not exist.4

vii Defences

China’s laws do not set out any specific defences against the application of the relevant anti-bribery laws. According to Article 390 of the Criminal Law, if a bribe giver confesses voluntarily before his or her prosecution, he or she may receive a lighter (or be exempted from) punishment, if the circumstances of the alleged offence are relatively minor, he or she plays a critical role in resolving a major case, or he or she performs any other meritorious service. The Interpretation clarified that a ‘critical role in resolving a major case’ means actively providing clues to the investigation that are not known by the case-handling authority, confessing the facts surrounding the offer of bribes, providing facts that assist the authorities with collating evidence in the case and providing facts that enable the authorities to track down the offenders and recover the bribes. As such, the requirements for leniency under applicable Chinese law are relatively high and require proactive cooperation from the suspect. The authorities will not give any credit for disclosure of any facts already known to them.

viii Penalties

The Criminal Law and the AUCL set out the following applicable penalties.

**Penalties for commercial bribery**

Under the AUCL, any business operator who bribes in selling or purchasing commodities will be subject to an administrative fine within the range of 100,000 yuan to 3 million yuan depending on the actual circumstances of the case, and confiscation of the illegal earnings,

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3 Such specified circumstances include: (1) bribing three persons or above; (2) using illegally obtained funds for a bribe; (3) seeking promotion or adjustments in position through bribing; (4) bribing state officials responsible for food, medicine, production safety, environment protection, etc., or with other supervision and management responsibilities, and implementing illegal activities; (5) bribing judicial officers and interfering with judicial fairness; and (6) causing economic loss amounting to between 500,000 yuan and 1 million yuan. See Article 7 and Article 11 (paragraph 3) of the Interpretation.

4 Note that these thresholds have been applicable and in effect since 18 April 2016 in accordance with the Interpretation. So far as commercial bribes are concerned, the Interpretation does not differentiate between the threshold for commercial bribes given by individuals versus that given by entities (which existed in the previous Supreme People’s Procuratorate and Ministry of Public Security Interpretation dated 7 May 2010 (the 2010 Interpretation). Under the 2010 Interpretation, the threshold for criminal investigation for giving commercial bribes by individuals was 10,000 yuan, and 200,000 yuan when given by entities. It is unclear whether the threshold for entities giving commercial bribes shall be governed by the Interpretation or the 2010 Interpretation.
if any (see Article 19 of the AUCL). These administrative penalties also apply to any entity or individual who accepts a bribe when purchasing or selling commodities (Article 9 of the Interim Provisions on Prohibiting Commercial Bribery).

If the threshold for criminal prosecution is reached, the statutory penalties under Articles 163 and 164 of the Criminal Law will apply on conviction, and the court will determine the penalty based on the amount of the bribes involved. In particular:

- for bribe recipients, the sentence is imprisonment for less than five years if the case involves a relatively large bribe (i.e., over 60,000 yuan), and imprisonment of over five years and possible forfeiture of assets for cases involving very large bribes (i.e., bribes over 1 million yuan); and
- for bribe givers, the sentence range is imprisonment of not more than three years in addition to a criminal fine if the amount of the bribe given is relatively large (i.e., over 60,000 yuan), and imprisonment of three to 10 years plus a criminal fine for cases involving a very large bribe (i.e., over 2 million yuan). In addition, if the bribe giver is an entity, a criminal fine shall be imposed on the entity and the personnel in charge, and other directly liable persons, shall be punished as individual bribe givers in accordance with the thresholds set out above.

**Penalties for bribery of government officials**

The Criminal Law provides the following statutory penalty ranges for official bribe givers and recipients.

For bribe givers under Article 390, the statutory penalty ranges from a fixed-term imprisonment of less than five years plus a fine to life imprisonment plus a fine or forfeiture of property. For bribe givers under Article 390A (bribes given to close relatives or other persons close to the current or former government officials), the statutory penalty ranges from less than three years’ imprisonment and a criminal fine to 10 years’ imprisonment and a criminal fine. If the bribe is given by an entity, a fine will be imposed on the entity and the personnel involved could be sentenced to a fixed term of imprisonment of less than three years and a fine. For bribe givers who bribe governmental or public organisations under Article 391, the individual bribe givers can be sentenced to less than three years of imprisonment, plus a fine. If the bribe is given by an entity, a fine will be imposed on the entity, and the personnel involved could be sentenced to a fixed term of imprisonment of less than three years and a fine. Finally, under Article 393, an entity that gives a bribe to government officials in the form of rebate or handling fees could be subject to a fine, and responsible personnel could

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5 Note that the new AUCL has deleted the provision relating to accepting commercial bribes. There has not been any interpretation as to whether or not the administrative penalty for accepting commercial bribes has now been repealed under the new AUCL.

6 See Article 11 (paragraph 1) of the Interpretation: the starting points for the circumstances of ‘relatively large amount’ and ‘substantial amount’ with respect to the crime shall be two times and five times, respectively, of the corresponding standards for the amount involved in the crime of accepting bribes as prescribed in Article 1 and 2 of the Interpretation (i.e., a relatively large amount being not less than 30,000 yuan; and a substantial amount being not less than 200,000 yuan).

7 See Article 11 (paragraph 3) of the Interpretation: the starting points for the circumstances of relatively large amount and substantial amount with respect to the crime of offering bribes shall be two times of the standards for amount involved as prescribed in Article 7 and Article 8(1) of the Interpretation (i.e., a relatively large amount being not less than 30,000 yuan; and substantial amount being not less than 1 million yuan).
receive prison sentences of up to five years and a fine. For these cases, the ultimate penalty is decided by a range of factors, including the seriousness of the circumstances and the amount of the bribe.

For recipients who are government officials under Articles 385 and 388, the statutory penalty ranges from a fixed term of imprisonment of less than three years to life imprisonment or death, plus criminal fines or confiscation of property, depending on, inter alia, the monetary amounts involved and the seriousness of the circumstances. If the bribe recipient is a governmental or public organisation, the organisation may be subject to a criminal fine, and the personnel in charge and other directly liable persons may receive prison terms of less than five years according to Article 387. Finally, for bribe recipients who are close relatives of or other persons close to current or former government officials, the statutory penalty under Article 388A ranges from a fixed term of imprisonment of less than three years and a fine to a fixed term of imprisonment of at least seven years, plus criminal fines or confiscation of property.

III ENFORCEMENT: DOMESTIC BRIBERY

China’s anti-graft campaign has been ongoing for some time, but since President Xi Jinping took office in late 2012, the fight against corruption has been one of the most important political agenda items for the Chinese government. Since then, the focus has broadened from almost exclusively targeting bribe recipients and official bribery (i.e., government officials who misuse their public office) to increasingly pursuing bribe givers and commercial bribery as well.

For official bribery, the Central Commission for Discipline Inspection (CCDI) leads the enforcement efforts. The CCDI is the main internal control authority of the Communist Party of China, and its jurisdiction covers responsibility for investigations into cases involving breaches of party discipline and state law (including, for example, corruption) by party members (which de facto means all high-ranking government officials). According to the Report of the CCDI submitted to and approved by the 19th National Congress of the Communist Party on 24 October 2017, since the 18th National Congress (November 2012), approximately 12,186,000 complaints had been received, with 1,545,000 cases established, 1,537,000 individuals penalised and 58,000 individuals transferred for criminal prosecution on corruption-related charges. Another important aspect of CCDI’s work in fighting corruption has been its tracing of corruption proceeds, and the securing of repatriation of absconded criminals. The CCDI Report stated that 3,453 absconded criminals were repatriated from more than 90 countries, with proceeds of crime of 9.51 billion yuan recovered.

The Chinese government has also pledged to further strengthen its international anti-corruption cooperation efforts by pushing forward the establishment of anti-corruption cooperation mechanisms with the United Nations, G20, Asia-Pacific Economic Cooperation, Shanghai Cooperation Organisation, the BRICS, etc. For example, the CCDI established the G20 Research Centre on Persons Sought for Corruption and Asset Recovery on Anti-Corruption, and coordinated the establishment of the APEC Anti-Corruption Enforcement Cooperation Network. China further established bilateral enforcement cooperation mechanisms with countries such as the United States, the United Kingdom, Canada, Australia and New Zealand to build channels for joint investigations, fast repatriation and asset tracing. China further reached consensus in anti-corruption efforts with various African countries in September 2018 in the Forum on China-Africa Cooperation.
At the 13th National People’s Congress held in March 2018, the National Supervisory Commission was formed in accordance with the Chinese Constitution and with the newly passed Supervision Law. It is the highest supervisory organ in China, focusing primarily on anti-corruption matters, and it reports on its work to the National People’s Congress (NPC) and the Standing Committee of the NPC. The National Supervisory Commission replaces the Supervision Department and the National Corruption Prevention Bureau under the State Council. The main roles of the National Supervisory Commission and the supervisory commissions at the corresponding local-government level include exercising supervisory powers over all public officers exercising public powers, investigating duty-related illegal activities and duty-related crimes, constructing a clean government and launching anti-corruption campaigns.

The National Supervisory Commission will enjoy expanded jurisdiction over all public personnel who exercise public power, including party members, NPC members, public servants, judges, people’s procuratorates, village officials, state-owned enterprise personnel, personnel in public education, research, culture, medicine and hygiene, etc., and any other persons exercising public duties. The National Supervisory Commission further coordinates international exchange and cooperation with other countries, regions or international organisations on anti-corruption. The National Supervisory Commission and the CCDI operate from the same office building, with the Commission focusing on supervisory powers while the CCDI focuses on disciplinary inspection.

In parallel with the enforcement against government officials, investigations against bribe givers have increased. In particular, with the amount of potential fines now having been increased up to 3 million yuan (up from 200,000 yuan) under the recently amended AUCL, it is expected that local AICs will be more proactive in enforcing the AUCL and its provisions on commercial bribery against bribe givers. It is reported that, in April 2018, a local AIC imposed a fine of 100,000 yuan on a furniture and renovation store and confiscated illegally obtained assets of 103,413.08 yuan under the AUCL on finding that the store had paid secret commission to three interior designers who referred clients to the store. In another case, in June 2018, a local AIC imposed a fine of 100,000 yuan on a business operator for paying bribes of 30,385.30 yuan disguised as ‘introduction fees’ and ‘sales commission’ (which were not disclosed in the business operator’s books and records) to travel agencies, drivers and tourist guides when they brought tourists to visit the business operator.

Prominently among criminal commercial bribery cases, the Chinese subsidiary of the multinational life-science company GlaxoSmithKline PLC (GSK) was investigated for bribery of government officials, hospitals and doctors for the purpose of, \textit{inter alia}, obtaining or retaining sales of GSK’s drugs at the relevant medical institutions. Ultimately, because of the amount of the alleged bribes (around 3 billion yuan), GSK was prosecuted for commercial bribery and, in a decision issued in September 2014 by the Changsha Intermediate People’s Court, fined 3 billion yuan. Five of GSK’s executives in China (including the former head of China operations) were also convicted and sentenced to suspended jail terms of up to four years. As of August 2018, there have been no other reported prosecutions of a similar magnitude, but the number of enforcement actions brought by local AICs, as well as the new limits of the potential fines that may be imposed, suggests that Chinese authorities continue to be vigilant in their enforcement against bribery and corruption.
IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law and its elements
Since the Eighth Amendment of the Criminal Law, effective as of 1 May 2011, Article 164 of the Criminal Law, which governs commercial bribery, has been extended to include the bribery of foreign officials. Under the amended Article 164, any individual or entity that bribes a foreign official or an official of an international public organisation with property for the purpose of an improper commercial benefit will be guilty of an offence. Notably, this article applies to Chinese nationals and Chinese companies but not to foreign companies. In addition, the specific term ‘improper commercial benefit’ indicates that the focus of this offence is on commercial transactions or benefits that are obtained through the bribery of a foreign official and is of a more limited scope than the more general term ‘improper benefit’, which applies to other bribery offences under the Criminal Law.

ii Definition of foreign public official
The terms ‘foreign official’ or ‘official of an international public organisation’ are not defined in the Criminal Law.

iii Gifts, travel, meals and entertainment
The term ‘property’ in Article 164 is not defined in the Criminal Law. However, the wide interpretation of property provided in the Interpretation, including all sorts of tangible benefits, also applies to Article 164 (see Section II.i).

iv Facilitation payments and payments through intermediaries
Article 164 does not specifically address facilitation payments or payments made through intermediaries. Generally speaking, the Criminal Law does not exclude liability for facilitation payments. For the other bribery provisions, the Criminal Law does include liability when payments are made through intermediaries.

v Enforcement
Like most crimes under the Criminal Law (including the domestic bribery offences), foreign bribery is investigated by the public security bureau and prosecuted by the public procuratorate.

vi Leniency and plea-bargaining
According to Article 164(4) of the Criminal Law, a bribe giver who voluntarily confesses (before any criminal investigation commences) may be granted a lesser penalty or may be exempt from punishment. Under the Chinese Criminal Procedure Law, there are no specific rules on plea-bargaining, nor is there any specific practice to that effect in criminal proceedings.

vii Prosecution of foreign companies
Foreign companies do not fall within the scope of Article 164. However, sino-foreign joint ventures or wholly foreign-owned enterprises that are based in China could fall under Article 164 (and the other bribery provisions that would apply to Chinese companies).
viii Penalties
According to Article 164(1) of the Criminal Law, a bribe giver can be fined and sentenced to imprisonment of up to three years, and from three to 10 years if the amount of the bribe is very large.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations
The anti-bribery laws do not set out any particular requirements for the keeping of financial records, but Article 7 of the AUCL makes it an offence to give a secret off-the-books commission to a party in commercial transactions (i.e., a commission or rebate that is not properly recorded as such in the company’s books). This suggests that the improper keeping of financial records could lead to scrutiny under the AUCL.

Outside the AUCL, the requirements of truthful and complete bookkeeping are specifically set out in national laws, including the Company Law and the Accounting Law.

The Company Law as amended in 2013 sets out some general standards for companies in relation to the keeping of financial records and, inter alia, requires companies to establish finance and accounting systems, prepare annual financial accounting reports to be audited by an accounting firm, and provide accurate and complete accounting vouchers, accounting books, financial accounting reports and other accounting information to their auditor. Under Article 202 of the Company Law, where a company makes false records or conceals important facts on financial accounting reports, the person in charge and other personnel who are directly responsible shall be liable for a fine ranging from 30,000 yuan to 300,000 yuan.

The Accounting Law also provides that all commercial transactions taking place shall be accurately and completely recorded and calculated in the account books set up by companies, and any violation of the law could result in administrative sanctions or even criminal penalties. For administrative sanctions, Article 43 of the Accounting Law provides that forgery or alteration of an accounting document or accounting book or preparation of a false financial accounting statement can lead to a fine ranging from not less than 5,000 yuan to not more than 100,000 yuan imposed on the company, and a fine within the range of 3,000 yuan to 50,000 yuan on the person in charge and other persons directly responsible.

China’s bribery laws do not require self-disclosure of violations and irregularities in financial bookkeeping. However, there are provisions under the relevant laws governing the accounting requirements for companies that require, inter alia, accounting staff to report irregularities in the books and records. There are no reported cases where the authorities have relied upon the aforesaid financial record-keeping laws and regulations in their prosecution of bribery-related conduct.

ii Tax deductibility of domestic or foreign bribes
Although there are no explicit provisions regarding the tax deductibility of bribes in current China tax laws and regulations – following the annulment in 2010 of the Measures for Pre-tax Deductions from Income Tax for Enterprises, which explicitly demanded that illegal expenditure such as bribes shall not be deducted from the taxable income – the Corporate Income Tax Law and its implementation regulations require that expenses not directly related or unreasonable in relation to income shall not be deducted when computing taxable income.
iii Money laundering laws and regulations

As a contracting state to the United Nations Convention against Corruption (UNCAC), the United Nations Convention against Transnational Organized Crime and the International Convention for the Suppression of the Financing of Terrorism since the early 2000s, China has become increasingly active in cracking down on money laundering. As part of its fight against money laundering, China amended the Criminal Law to include the crime of money laundering, and promulgated the Anti-Money Laundering Law (AML) in 2006.

Under the Criminal Law (as amended) money laundering is defined to involve disguising or concealing the source and nature of proceeds obtained from seven specified categories of predicate offences (including corruption and bribery). In particular, Article 191 of the Criminal Law provides that any individual or organisation could be held liable if they undertake any of the following conduct for the purpose of covering up or concealing funds obtained from the predicate offences:

a providing any capital account;
b assisting the transfer of property into cash, financial instruments or negotiable securities;
c assisting the transfer of capital by means of transfer accounts or any other means of settlement;
d assisting the remittance of funds overseas; and
e disguising or concealing the origin or nature of any crime-related income or the proceeds generated therefrom by any other means.

Additionally, any income or proceeds generated from such conduct can be confiscated and the person responsible can be sentenced to a prison term of up to 10 years and a criminal fine of up to 20 per cent of the amount laundered.

The AML broadly regulates the activities of organisations and individuals through financial institutions and some specified non-financial institutions in China. The responsible authority is the People's Bank of China (PBOC), which, through internal anti-money laundering departments of financial institutions, leads the implementation of several major rules, namely:

a customer identification and risk rating;
b retention of customer information and transaction records; and
c reporting of high-value transactions and suspicious transactions.

The AML also authorises the PBOC to cooperate with foreign governments and relevant international organisations by exchanging information and materials for the purposes of enforcement based on principles of equality and reciprocity.

The AML sets out administrative offences for financial institutions and responsible employees for, inter alia, failing to comply with the above rules. The penalties for the institutions range from disciplinary work to disqualification and administrative fines of up to 5 million yuan. Employees of financial institutions can be subject to an administrative fine of up to 500,000 yuan. The AML does not, however, provide any administrative penalty for individual customers of the financial institutions.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

While China has been very active in hunting down and repatriating Chinese nationals who have committed bribery offences in China and fled China to escape enforcement, it has so
far not demonstrated the same appetite for bringing Chinese nationals who have committed bribery offences overseas to justice. So far, no cases have been reported for foreign official bribery under Article 164.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

China is a member of the UNCAC, which it ratified in 2006. In fulfilling its obligations under the UNCAC, China, among other things, amended the Criminal Law in 2011 and has extended the scope of Article 164 to cover bribery of foreign officials. China is also a member of the United Nations Convention against Transnational Organized Crime and the Financial Action Task Force.

China is not a member of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

VIII LEGISLATIVE DEVELOPMENTS

Over the past few years China has been very active in continuing to develop its anti-bribery legislation both through amendments of the law and through judicial interpretations that provide guidance on the application of the law and the definition of certain terms within it. With the bribery provisions of the Criminal Law having been amended in 2015, the AUCL is another important piece of anti-bribery legislation that has been updated. The changes were promulgated on 4 November 2017, and the laws entered into effect on 1 January 2018 (see Section II.vi).

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Privilege

The concept of attorney–client privilege, as in common law countries, does not exist in China. In particular in government investigations, this means that there is no right per se to exclude communication between a client and his or her lawyers from production to the authorities. In particular, in cross-jurisdictional investigations involving authorities in China and overseas, this creates risks, as privileged documents that are not protected in China and were disclosed to local authorities may be part of information that is shared as part of cooperation agreements such as the mutual legal assistance agreement between the United States and China. Overseas authorities may therefore get access to documents that would otherwise be protected by attorney–client privilege in their jurisdictions.

While the concept of attorney–client privilege does not exist in China, the Law of the People’s Republic of China on Lawyers provides in Article 38 that lawyers are required to keep information they obtain in the course of their representation of clients confidential. Similarly, the Criminal Procedure Law under Article 46 gives a criminal defence lawyer the right to keep client information confidential. Under both laws a broad exception is provided for information that endangers national security, public security or the personal security of other parties. It is also unclear, how effective the confidentiality protection under these laws is in corruption investigations, which could, for example, involve dawn raids.
ii  Data protection

Despite China not having a specific data privacy law, personal data have to be handled with care in compliance investigations. A number of rules and guidelines deal with the protection of personal data. The Cybersecurity Law, which came into force on 1 June 2017, states that the provider of any network product or service that collects the personal information of users shall obtain the users’ consent and comply with the relevant laws and administrative regulations. The Guidelines for Personal Information Protection with Public and Commercial Information Systems (the Guidelines) are the most applicable to internal or government investigations and require the disclosure of (potentially private) data of individuals or third parties or employees. Under the Guidelines, personal information is protected generally and express consent is required prior to the collection and handling of any personal sensitive information (Article 5.2.3) and prior to the transfer of any personal information overseas (Article 5.4.5). The term ‘personal information’ is defined broadly to include data that can be processed by an information system in relation to a specific natural person and that can identify that person alone or in combination with other information. The term ‘information system’ includes any computer and supporting network that ‘can collect, process, store, transmit and retrieve information’. Personal information is further classified into ‘personal sensitive information’ (information that if leaked or modified would have an ‘adverse effect’ on the subject; for example, ID card numbers, mobile telephone numbers, race, political viewpoints, religion, genes and fingerprints) and ‘personal general information’ (personal information other than sensitive personal information). The Guidelines do not have the force of law and do not contain any specific penalties for any failure to comply. However, any company that holds personal data (whether of its employees or of third parties) on its computer system will be a ‘Personal Information Administrator’ and will be expected to comply with the Guidelines. Compliance with the Guidelines may also be considered by judicial and regulatory authorities in determining other legal rights and obligations, including the obligation on employers under Article 13 of the Employment Services and Management Regulations to keep confidential the personal data of its employees.

iii  State secrets

A high-risk area in compliance investigations is the handling of (potential) state secret information. The Guarding State Secrets Law defines state secrets as ‘matters that have a vital bearing on state security and national interests and are determined according to legal procedures, and that are entrusted to a limited number of people for a given period of time’ and prohibits acts such as illegal acquisition, unsecure transfer through the internet or export of state secrets out of China. In addition to the broad definition referred to above, the Guarding State Secrets Law also includes a catch-all provision that defines state secrets as ‘[o]ther matters that are classified as state secrets by the National Administration for Protection of State Secrets’. Given the broad and vague definition of what constitutes state secrets, it is crucial to assess collated data in compliance investigations prior to any transfer to unauthorised third parties or abroad for the potential existence of state secret data as the Guarding State Secrets Law creates criminal responsibility (including imprisonment on conviction) for individuals involved in acts prohibited under the Law.

iv  Whistle-blowing

China’s laws include broad protection for whistle-blowers: many laws, including the Criminal Procedure Law of China, include rules encouraging and protecting whistle-blowers. More
specifically, the People’s Procuratorate, China’s authority for prosecution and investigation, issued the Work Rules on Whistle-blowing, which set out in detail when and how whistle-blowers need to be protected by the authorities, and also include provisions on whistle-blowing rewards to encourage whistle-blowers to come forward. Various authorities, including the CCDI and local level AICs, provide whistle-blower hotlines for that purpose, and, in practice, many of the authorities’ investigations into corruption allegations are now based on information obtained from whistle-blowers. As such, it is important for companies operating in China, and in particular when compliance investigations are conducted, to provide proper internal channels for receiving and managing whistle-blower allegations and to have adequate whistle-blower policies in place.

X COMPLIANCE

China’s bribery laws do not provide any guidance on compliance programmes and procedures. Companies, therefore, also cannot rely on the existence of an effective compliance programme to defend themselves against allegations of corruption. When investigating corruption allegations, local authorities have a wide discretion as to how to apply the relevant laws. As part of their considerations, the authorities may take the existence of (effective) compliance programmes into account when assessing whether alleged corruption conduct may persist or would have been properly dealt with via internal channels at the affected companies. Given the increased enforcement and the recent focus on commercial bribery, rigorous compliance programmes that incorporate the local anti-bribery laws of China and are tailored to the specific compliance risks in China are indispensable for companies to ensure a compliant operation of their business in China, and to minimise exposure to compliance risks and the threat of enforcement.

XI OUTLOOK AND CONCLUSIONS

China’s anti-bribery laws have evolved and cover a large range of bribery and corruption offences. In addition, China’s Supreme People’s Court and the Supreme People’s Procuratorate have been very active in publishing interpretations that extend and explain the broad scope of the anti-bribery laws. The well-developed anti-bribery laws go hand in hand with an increase in anti-bribery enforcement. Under President Xi Jinping, China’s anti-graft campaign has further intensified not only to track down corrupt officials, but also to pursue the bribe givers, for both official and commercial bribery. The large number of bribery and corruption cases and enforcement actions suggest that corruption remains a major issue in China and that China has a long way to go to improve the public’s perception of its success in fighting the problem. This is also evident from China’s position right in the middle of Transparency International’s CPI, which ranks China 77 out of 180 countries. As such, it remains important for companies operating in China to have strict compliance policies and programmes in place and to monitor closely the regulatory and enforcement developments to assess the compliance risks of business operations in China.
Chapter 6

ECUADOR

Javier Robalino Orellana and Mareva Orozco

I INTRODUCTION

Ecuador is a Latin American jurisdiction where bribes and facilitating payments are often perceived as permissible. Consequently, corruption is undoubtedly acknowledged as a national problem. Despite constitutional provisions, the adoption of international treaties and the existence of dedicated institutions, enforcing anti-corruption laws remains a big challenge. The Law for the Prevention of Money Laundering and the Financing of Crimes and Resolution No. SCVS-DSC-2018-0029 issued by the Superintendence of Companies, along with the Comprehensive Organic Criminal Code (the Criminal Code), in effect as of 2014, provide enforcement stakeholders with all the necessary tools for investigating and processing corrupt schemes nationwide.

The Ecuadorian Constitution, enacted on 20 October 2008, establishes that one of the primary duties of the state is guaranteeing its citizens the right to a culture of peace and security that is integral to life in a democratic society free of corruption. Likewise, it is also constitutionally recognised as a duty of Ecuadorian citizens to report and combat corruption. Furthermore, citizens are empowered to remove public officials from office in the event that they are charged with corruption. Similarly, the ‘fifth branch’ of government – the transparency and social control branch, and in particular the Council for Citizen Participation and Social Control (CPCCS) – is in charge of fighting corruption, investigating corruption complaints and protecting whistle-blowers, among other tasks.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Domestic bribery laws and their elements

The Constitution and the Criminal Code are the primary pieces of legislation criminalising corruption-related crimes. Thus, the Constitution sets out prohibition and liability warnings to public officials when performing their duties, as well as when handling public goods and resources. The aim is to prevent them from being involved in bribery, extortion, influence peddling, embezzlement and unlawful enrichment. In turn, the Criminal Code thoroughly details the provisions for bribery-related crimes, crimes against the public administration, liable subjects, criminal behaviours and aggravating factors. Other laws such as the Organic

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1 Javier Robalino Orellana and Mareva Orozco is an associate, at Ferrere. The authors would like to thank Ernesto Velasco for his contribution to this chapter.

2 Constitution, Article 233.
Law on Public Service, the Public Procurement Law, the Organic Law on the Transparency and Social Control Branch and the Organic Law on the Council for Citizen Participation and Social Control also contribute anti-bribery elements.

ii Prohibitions on payment and reception

Bribery elements include the delivery, transfer, offer or promise of an undue payment, benefit, donation, gift or anything of value with the intent of provoking a positive result, omission, facilitation, conditioning or delay of an official action. In other words, a bribe induces, or intends to induce, an alteration of the normal course of administrative or public diligences and processes, or rewards improper performance. Facilitating payments are not allowed. A third party may perform or ease the illicit or improper benefit. Sanctions may be imposed on either the accepting party (public official) or the offering party (individual).3

Pursuant to Ecuadorian criminal law (the Criminal Code), corporate liability does not apply to bribery-related crimes. Therefore, liability is strictly applicable to natural persons and does not apply to domestic or foreign companies. The question of whether to include corporate liability in Ecuadorian criminal law is much debated, but there is currently no formal project on this matter.

iii Other corruption-related crimes

The key element of extortion is the abuse of power of a public official or individuals acting under state authority on behalf of a public institution. The crime consists of ordering or demanding the delivery of rights, quotas, contributions, income, interests, salaries or gratification in their favour. A third party or private individual may carry out the extortion, and when it involves violence or threats the penalty is higher.4

Regarding trafficking of influence, also known as influence peddling, this crime happens when a public official or individuals acting under state authority on behalf of a public institution influence other public officials to achieve a favourable result, either for their own benefit or in favour of a third party. The circumstances are aggravated when the ultimate intention is to favour private individuals to illegally obtain a public contract award or another kind of business with a state entity. The mere offer of performing trafficking of influence is already deemed a crime. Any individual can be liable for trafficking of influence; that is to say, a third party may act on behalf of or inappropriately using the name of people acting under state authority.5

Embezzlement consists of a public official or individuals acting under state authority on behalf of a public institution, who for their own benefit or on behalf of third parties appropriate, abuse or arbitrarily use public property. This includes real estate, money, securities or any other goods or documents under their control.6

Illicit enrichment for public officials or individuals acting under state authority on behalf of a public institution applies to those who have an unjustified increase in assets. The benefit could be under their name or a third party. The enrichment may not only consist of increased assets, but also payment or extinction of debts.7

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3 Criminal Code, Article 280.
4 id. Article 281.
5 id. Articles 285 and 286.
6 id. Article 278.
7 id. Article 279.
iv  Definition of public official

Public officials are defined at the constitutional level as ‘all persons who, in any way or under any form of work, provide services or hold a position, post or office in the public sector’.\(^8\) The Organic Law on Public Service, which was enacted two years after the Constitution, has the same definition for a public official, but clarifies that public service workers are regulated under the Labour Code.

In general, all people related to the public sector are considered public officials, including elected officials, the President, mayors, etc. Thus, the public sector encompasses the executive, legislative, judicial, electoral, transparency and social control branches, municipalities, and entities created by the Constitution, law or municipalities to exercise state powers or the provision of public services.\(^9\)

With regard to employees of state-owned companies or public companies, Article 3 of the Organic Law on Public Service, in accordance with Article 18 of the Organic Law on Public Companies, also defines them as public officials; the same is true for employees of the public companies’ subsidiaries.

v  Public officials’ participation in commercial activities

The general rule is that public officials are free to participate in commercial activities provided they are not related to their official functions, or if no specific legal ban exists. A public official may not maintain direct or indirect commercial, corporate or financial links with taxpayers or contractors if the public official has to deal with them as part of his or her normal duties.\(^10\)

In this sense, the Public Procurement Law provides a specific ban on bidding by a contracting entity when a public official participates in the bid or has direct influence over it. The ban applies to close relatives too, even by means of corporate structures. The public procurement rules strictly prohibit the president, vice president, ministers, members of congress, majors and other authorities (including their close relatives) from entering into any public contract.\(^11\)

Judiciary branch public officials, who are also lawyers, cannot practise law privately. No judiciary official can have a second job in the private or the non-judicial public sector.

vi  Gifts and gratuities, travel, meals and entertainment restrictions

Specific regulations on gifts and hospitality are vague. Public officials are not allowed to request, accept or receive any gifts, money, rewards or privileges. The basis for whether a public official receives an administrative sanction or whether they are subject to being charged for criminalised bribery is the intention behind the gift request or acceptance. In other words, if a gift delivery takes place without the objective of getting a specific benefit or reward in exchange, then it could only lead the public official to an administrative sanction, holding the private individual harmless. On the contrary, a bribery-focused gift delivery may lead to criminal liability for all individuals involved.\(^12\)

\(^8\) Constitution, Article 229.
\(^9\) Constitution, Article 225.
\(^10\) Organic Law on Public Service, Article 24(i).
\(^11\) Public Procurement Law, Articles 62 and 63.
\(^12\) Organic Law on Public Service, Article 24(k).
The only parameter regarding the valuation of a gift is established for gifts received from public authorities during official events in Ecuador or overseas. If the value of the good exceeds the value of a monthly minimum wage, this gift must become part of the inventory of the public institution to which the public official belongs.

vii Political contributions

Private sector contributions permitted to political campaigns are limited to Ecuadorian citizens and foreigners residing in the country. Private sector contributions must be delivered within the legal limits established for the specific election season.14

viii Private commercial bribery

Civil law protects abusive relationships between private parties, which could include fiduciary or trust breaches, as well as commercial civil collusion. These wrongdoings are subject to legal claims before civil courts. Compensation may include damages, provided the action is not considered a crime, such as commercial or civil fraud.

The Companies Law, which regulates corporations and other legal entities, forbids them to act against the law, public policy and good behaviour. This means that, ultimately, corporations should meet constitutional standards with regards to anti-corruption.

The Labour Code regulates employees in the private sector. It establishes that an employer is prohibited from demanding or requesting any money or benefit from a worker or employee in exchange for obtaining a position or for any other reason.15

ix Penalties

Having referenced the specific penalties, it is worth noting that because of the severity of the offence, the bribery, embezzlement, extortion and illicit enrichment of a public official does not have a statute of limitations. This is because it is considered a crime against the state. The absence of a statute of limitations applies to both the indictment and the handing down of the sentence. Finally, it is provided that a trial may take place without the accused party being present.16

Pursuant to the Criminal Code, corruption-related crimes are subject to the following prison sentences:

- a bribery: between one and five years, and if the bribery led to another crime, up to seven years;17
- b extortion: from three to five years, and if it involves violence or threats, up to seven years;18
- c trafficking of influence or influence peddling: three to five years, and if it was committed to illegally obtain business with a public entity, up to five years;19
- d embezzlement: 10 to 13 years;20 and

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13 Equivalent to US$386 for 2018.
14 Organic Electoral Law, Democracy Code, Article 216.
15 Labour Code, Article 44(d).
16 Constitution, Article 233, and Criminal Code, Article 16.
17 Criminal Code, Article 280.
18 id. Article 281.
19 id. Articles 285 and 286.
20 id. Article 278.
illicit enrichment of a public official: this depends on the enrichment value, calculated based on the monthly minimum wage.\textsuperscript{21} Up to 200 times the monthly minimum wage – from three to five years; between 200 and 400 – five to seven years; and over 400 – up to 10 years.\textsuperscript{22}

The Organic Law on Public Service clearly establishes a prohibition on acting as a public official for those who have been convicted of embezzlement, bribery, extortion or illicit enrichment and, in general, for those who, acting under state authority, have been convicted of a crime related to their services. This Law also establishes that getting convicted of the above-mentioned crimes is cause for being removed from office.\textsuperscript{23}

Accordingly, Article 77 of the Organic Code of the Judiciary Branch bans individuals convicted of corruption-related crimes from holding a position in the judiciary. Moreover, Article 57 states that for someone to apply for a position within the judiciary, they must issue a sworn statement declaring that they have not been convicted of a corruption-related crime.

Finally, there is another penalty established in Article 113 of the Constitution, which bans those who have been convicted of bribery, illicit enrichment or embezzlement from running as a candidate for public office.

III ENFORCEMENT: DOMESTIC BRIBERY

Domestic bribery crimes are pursued by the State Prosecutor’s Office, which receives collaboration from supporting entities such as the CPCCS and the State Comptroller’s Office. These two, jointly with the Ombudsman Office and the superintendencies, are part of the Transparency and Social Control Branch.\textsuperscript{24}

The State Comptroller’s Office is entitled to audit, oversee and control actions of public entities and officials, as well as private entities and officials handling public resources. It is also entitled to impose sanctions, remove public officials from office and report findings that may lead to a criminal investigation to the State Prosecutor’s Office.\textsuperscript{25}

The Financial and Economic Analysis Unit is a key stakeholder in corruption-related crime enforcement. Complementarily, corruption crimes are investigated and processed based on peer entities’ reports, international cooperation, investigative journalism (local and foreign) and citizen complaints.

Ecuador has been experiencing what appears to be the longest period of corruption in its history; notable cases include the Petroecuador case (see Section III.i) and the Odebrecht case, with several public figures indicted in Ecuador according to local criminal procedure (see Section III.ii).

Another recent corruption scandal involves former Minister of Social and Economic Inclusion Ivan Espinel (in custody since 22 September 2018), who is being investigated by the

\textsuperscript{21} Equivalent to US$366 for 2016.  
\textsuperscript{22} Criminal Code, Article 279.  
\textsuperscript{23} Organic Law on Public Service, Articles 10 and 48.  
\textsuperscript{24} Organic Law on the Transparency and Social Control Branch, Article 5.  
\textsuperscript{25} Organic Law on the State Comptroller’s Office, Articles 2, 3, 4, 5 and 31.
Office of the State Prosecutor General (the State Prosecutor’s Office) for money laundering and embezzlement. The alleged illegal earnings could amount to up to US$770,000. If found guilty, the former minister faces a maximum penalty of 13 years in prison.26

i Oil sector scandal

The alleged corruption-related crimes involved Petroecuador, the state-owned oil company that has full administrative autonomy to manage all phases of exploration, exploitation activities and commercialisation. Public procurement legislation allows a state-owned company to directly award contracts for all types of works, goods and services when these are necessary for performing its core business activities. Theoretically, the direct awarding does not have a cap or other limitation.27

Petroecuador’s main refinery, located in Esmeraldas, entered into a comprehensive restrengthening and maintenance phase, initially budgeting for approximately US$180 million. Based on the ability to directly award contracts, the refining unit awarded over 400 contracts between 2008 and 2016. These were allegedly overpriced and resulted in several modifications to the scope of work and term extensions. The State Comptroller announced that the audit comprises a spent budget of US$2.2 billion.28

Although several journalists and activists denounced alleged irregularities, it was not until the Panama Papers disclosure that the authorities acted. In May 2016, the first person to be arrested for investigation purposes and indicted was Álex Bravo, former Petroecuador general manager, who previously acted as refining manager and has worked for the company since 2006. Initial findings showed he owned several offshore companies and was investigated for influence peddling, allegedly by awarding contracts to companies linked to his close relatives. He was later charged for illicit enrichment.29

In June 2016, the State Prosecutor’s Office requested from the Financial and Economic Analysis Unit a report that was drafted with international cooperation and was presented in August 2016. Findings show several unusual money transfers from Esmeraldas refinery contractors to close relatives and friends of Álex Bravo. The mentioned offshore entities include a company that is linked to former Hydrocarbons Minister, Petroecuador general manager and refining manager, Carlos Pareja.30

In August 2016 a second indictment was initiated on the grounds of the alleged existence of a whole bribery scheme. The prosecution initiated the investigation based on the Álex Bravo investigation. Likewise, the prosecutor initially linked some local contractors who allegedly made improper payments to bank accounts linked to public officials. It was not until early October 2016 that the Vice President and the President’s Secretary of Legal Affairs

27 Public Procurement Law, Article 2 and Regulations on the Public Procurement Law, Article 104.
28 See www.contraloria.gob.ec/CentralMedios/PrensaDia/13243.
made public statements. The two key points of the press conference were that Álex Bravo would accept the bribery charges and request a quick trial to get a reduced sentence, and that the prosecutor should indict Carlos Pareja. In the middle of the ongoing investigations, Carlos Pareja and other potential participants in the scheme left the country, several weeks before the announcement.31 Carlos Pareja then returned to Ecuador and turned himself in.

On 21 October 2016, the prosecutor of the Crimes against the Public Administration Unit presented the investigation findings to a criminal judge. The outcome of this public hearing consisted of the indictment of 17 people. Arrest orders were issued against nine people, including Carlos Pareja and Álex Bravo. The other eight indicted individuals were forbidden to leave the country and were subpoenaed to appear before the judge three times a week. Later that day, the Prosecutor’s Office, along with the Ecuadorian police, executed several seizures of real estate properties owned by Carlos Pareja, Álex Bravo and others.32

On 15 February 2017, 10 people, including Carlos Pareja and Álex Bravo were found guilty of bribery and sentenced to five years’ imprisonment and a fine of US$4,500 each. Another six people were declared accomplices and sentenced to two and a half years’ imprisonment and a fine of US$3,750. In addition, those convicted as the main perpetrators are obligated to pay a total of US$25 million in damages.33 Two businessmen were found not guilty. Additional convictions for related crimes and several appeals have been taking place during 2018.34

This case has produced cross-border consequences: in the United States, several former Petroecuador executives and individuals related to contractors have been convicted of money laundering offences under the Foreign Corrupt Practices Act.35

**ii Odebrecht**

Since Operation Car Wash began, most of the anti-corruption compliance stakeholders focused on Odebrecht’s dealings in the countries in which the company was a contractor. In addition, the December 2016 plea agreement with the DOJ made important data regarding alleged bribery across Latin America, including Ecuador, publicly available. A summary of the criminal procedure is as follows:

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31 Based on media reports: www.elcomercio.com/actualidad/alexismera-carlosparejayanuzzelli-millon- dolares-cuenta.html; and www.lahora.com.ec/index.php/noticias/show/1101990246/-1/Carlos_Pareja_Yanuzzelli cual%3B3_y_del_pa%3ADs햏sion Una semana.html#.WA0jKxArL6Y.


33 Based on media reports: www.eltelegrafo.com.ec/noticias/judicial/13/caso-petroecuador-10-sentenciado s-a-5-anos-de-prision-y-a-pagar-reparacion-por-25-millones.


b  3 August 2017: President Lenin Moreno withdraws Vice President Jorge Glas’s main functions.

c  5 August 2017: Odebrecht whistle-blower names Jorge Glas in the bribery schemes.

d  9 August 2017: Jorge Glas appears before the State Prosecutor’s Office.

e  25 August 2017: the National Assembly authorises criminal prosecution of Jorge Glas.

f  29 August 2017: criminal judge agrees to indict Jorge Glas and 11 other people, and bans him from leaving Ecuador.

g  23 September 2017: Jorge Glas appears again before the State Prosecutor’s Office and provides information regarding his uncle’s involvement.

h  26 September 2017: Odebrecht whistle-blower details Jorge Glas’s and his uncle’s bribery payments.

i  2 October 2017: the State Prosecutor requests pretrial detention for Jorge Glas and his uncle, which is granted and both are taken into custody.

j  23 October 2017: forensic investigations confirm Jorge Glas’s involvement.

k  8 November 2017: the State Prosecutor’s Office indicts Jorge Glas.  

l  13 December 2017: Jorge Glas is convicted of illicit association and sentenced to six years’ imprisonment.

m  5 March 2018: congressman César Montufar files a formal complaint against former President Rafael Correa within this case.

n  11 September 2018: the State Prosecutor’s Office initiates an organised-crime investigation against former President Rafael Correa, former Vice President Jorge Glas, former President’s Secretary of Legal Affairs Alexis Mera, former Minister of Internal Affairs José Serrano, former State Prosecutors Galo Chiriboga and Carlos Baca, former State Comptroller Carlos Pólit and former State Attorney General Diego García.  

### Attempt to establish corporate liability

In 2015, a bribery case attracted public attention because of two unusual circumstances. First, a congresswoman was involved and was arrested on the day of the annual presidential speech outside Congress. Second, the prosecutor initially indicted the subsidiary of a Spanish company for bribery.

A US$23 million public contract for the provision of water pipes was awarded to the company. The award was linked to an US$800,000 bribe that was requested by both the congresswoman and the contracting entity, and paid by the legal representative of the company awarded the contract. The final judgment handed down a three-year sentence for the three accused parties. Given that there is no corporate liability for bribery crimes, the court dismissed the charges against the company itself.  

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38 Based on media reports: https://www.elcomercio.com/actualidad/asambleista-alianzapais-detenido-corrupcion.html.
IV FOREIGN BRIbery: LEGAAL FRAMEWORK

Ecuador has not enacted specific provisions with regard to foreign bribery. Nevertheless, the Criminal Code establishes that crimes committed overseas may be subject to Ecuadorian law if the crime has consequences in Ecuador; if the crime is committed by a public official while on duty and the crime has not been prosecuted in the other jurisdiction; or if the crime affected international conventions, provided that no prosecution has started in the other jurisdiction.39

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations and disclosure of violations or irregularities

The Companies Law establishes that all corporate entities under the control of the Superintendence of Companies must keep accurate books and records. Entities must also maintain effective internal controls, issue periodical financial statements and, in some cases, have external auditing. Accounting must be maintained in Spanish and according to Superintendence regulations, the law and the International Financial Reporting Standards. It is not required that companies, their legal representatives or employees disclose violations or irregularities on their books or in records.40

As for banks and other financial institutions, the Monetary and Financial Organic Code requires them to keep accurate books and records. The regulations governing financial institution do not require regulated entities to disclose violations or irregularities on their books or in records.41

ii Prosecution and sanctions under financial record-keeping violations

Civil penalties

Pursuant to Article 457 of the Companies Law, corporate entities are subject to fines equivalent to 12 monthly minimum wages.42 As for financial institutions, not complying with the accounting, financial or internal audit regulations is a serious infringement. Likewise, if case documents or information regarding the entity’s status are partial or totally false or hidden, this could be considered a very serious infringement. Sanctions for serious infringements could be up to 0.005 per cent of the entity’s assets, and for very serious infringements up to 0.01 per cent.43

Criminal penalties

Where civil penalties are disregarded, any wrongdoing can be reported to the State Prosecutor’s Office for investigation under criminal legislation. Although there are no specific sanctions

39 Criminal Code, Article 14.
40 Companies Law, Articles 289, 290 and 293.
42 Equivalent to US$375 for 2017.
43 Monetary and Financial Organic Code, Articles 261(12), 262(3) and (4) and 264(1) and (2).
for failures regarding bookkeeping and records, the Criminal Code establishes sanctions when these are related to tax fraud. If accounting books and records are altered or destroyed, or there is double accounting, a prison sentence of one to three years may be imposed.44

iii  Tax deductibility of domestic or foreign bribes
Tax legislation does not consider a bribe-related payment a deductible expense or cost.

iv  Money laundering laws and regulations
The main regulations are contained in the Law for the Prevention of Money Laundering and the Financing of Crimes, its regulations, the Financial and Economic Analysis Unit guidelines, Resolution No. SCVS-DSC-2018-0029 issued by the Superintendence of Companies and the Criminal Code. The anti-money laundering rules mainly set out reporting duties for financial institutions and other obligated entities (such as stock exchanges and brokerage companies; trust fund administrators; car, ship and plane dealers; and money transfer, real estate and construction companies) conducting transactions between other industries.45

v  Prosecution under money laundering laws
Money laundering provisions and the Financial and Economic Analysis Unit contribute directly to prosecuting corruption-related crimes. One of the main purposes of the Unit is to report to the State Prosecutor’s Office on suspicious transactions and produce reports if specifically requested. As stated in Section III, this Unit’s report became a key element for initiating a major bribery case.

vi  Sanctions for money laundering violations
Article 317 of the Criminal Code provides that a prison sentence for money laundering should be determined according to the amount involved in the crime and in relation to some other parameters, such as:

a  if it involves less than 100 monthly minimum wages: from one to three years;
b  if there was no criminal association: from five to seven years;
c  when the amount is between 100 and 200 monthly minimum wages, when there was criminal association but without using corporate structures, when using financial institutions or insurance companies, public entities or positions: from seven to 10 years; and
d  if it exceeds 200 monthly minimum wages, when the criminal association included corporate structures, when using public entities or positions: between 10 and 13 years.

For all cases, a fine will be imposed that is equivalent to twice the amount subject to the infringement.47

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44 Criminal Code, Article 298.
45 Law for the Prevention of Money Laundering and the Financing of Crimes, Articles 4 and 5.
46 Equivalent to US$386 for 2017.
47 Criminal Code, Article 317.
vii Disclosure of suspicious transactions

Article 356 of the Monetary and Financial Organic Code mandates that if control authorities, shareholders, administrators or employees of a financial institution learn of a crime linked to the entity’s activity, they must report it immediately to the State Prosecutor’s Office. Accordingly, financial institutions are required to notify the Financial and Economic Analysis Unit of unusual and unjustified transactions within four days of the compliance committee learning about the operation. Furthermore, other obligated entities and any citizen that learns about an unusual, unjustified or suspicious transaction must inform the authorities.48

VI INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The Constitution’s provisions are at the top of the legal hierarchy in Ecuador. These are followed by international treaties, agreements and conventions, organic laws, regular laws and secondary legislation. When Ecuador ratifies an international convention, it is automatically incorporated into the legal framework.49

The Organisation for Economic Co-operation and Development Anti-Bribery Convention is the only major anti-corruption convention that Ecuador is not a signatory to. It is a part of the Andean Plan of Action Against Corruption, enacted by way of Andean Community Decision 668.50

Ecuador signed the United Nations Convention Against Corruption (UNCAC) and ratified it without any reservations on 28 November 2005. The UNCAC is the main international regulation on foreign bribery, including the definition of a foreign public official. Even though Article 16 of the UNCAC encourages state parties to adopt the legislative measures mentioned above, Ecuador has not adopted them in its local legislation.51

The United Nations Convention against Transnational Organised Crime was signed by Ecuador on 13 December 2000 and ratified on 17 September 2002. The country made reservations with regard to Articles 10 and 35, paragraph 2. The first reservation points out that the concept of criminal liability of legal persons is not currently embodied in Ecuadorian legislation. When legislation progresses in this area, this reservation will be withdrawn. The second reservation relates to the settlement of disputes.52

Finally, Ecuador is one of the original signatories of the Inter-American Convention Against Corruption (IACAC). It was ratified by the Ecuadorian Congress on 29 March 1996. As of 26 May 2009, the CPCCS was appointed as the central authority for the IACAC.53

VII LEGISLATIVE DEVELOPMENTS

During the past three years there has been the expectation that a single law would be enacted to combat corruption, and which would be named the Anti-Corruption Law.

49 Constitution, Articles 417 and 425.
In fact, there have been several bills seeking to reform not only the Criminal Code, but also the Public Procurement law; the State Comptroller’s Office is also in need of reform. The problem is that the initiatives are diverse and often politically influenced. For instance, in early September 2018, President Moreno vetoed a bill already approved by the National Assembly, which had been promoted by congressmen aligned to former President Correa. The President of the National Assembly is unsuccessfully promoting an asset recovery bill and there are at least other three bills under way.

Simultaneously with the above-mentioned veto, and with a view to finding a national consensus, President Moreno sent a proposal to the National Assembly for an Anti-Corruption Law that focuses on waiving prosecutions for first-time offenders who disclose corrupt activities and assist with asset recovery. Under this Anti-Corruption Law, whistle-blowers would be able to get protection and benefits for the first time. This Law is expected to be enacted by the end of the year.

VIII COMPLIANCE

There are no legal provisions with respect to compliance programmes, although, under the Criminal Code, there are two mitigating circumstances that could contribute towards a positive outcome for a defendant:

a voluntary disclosure before the justice authorities; and

b effective collaboration with the investigation of a criminal infringement. 54

Consequently, under the guidelines of a compliance programme, disclosure or cooperation could take place throughout the case, opening the door to beneficial treatment, such as a reduced sentence.

Over the past decade, corporate compliance has gained the attention of business people and corporate counsel in Ecuador. This mostly originates from the influence of multinational corporations operating in the country. Compliance programmes, training for third parties and compliance clauses are becoming familiar to local businesses. Therefore, the private sector, with proper legal guidance, is expected to contribute significantly to a culture of compliance, which will help it to take hold.

IX OUTLOOK AND CONCLUSIONS

Ecuadorian legislation has the tools to punish and prevent bribery, but there are still plenty of steps towards generating substantial improvements. Anti-corruption regulations are spread throughout different statutes. The benefits of enacting specific anti-corruption legislation may include boosting citizens’ awareness and increased commitment from enforcement institutions. Such legislation could include regulations on compliance programmes and effective first-tier administrative oversight. Considering that Ecuador has signed and ratified relevant international conventions, legislation on foreign bribery would also be needed.

As of September 2018, the country has been experiencing a substantial change in its political environment, with a transitional CPCCS leading changes to authorities and promoting the fight against corruption.

54 Criminal Code, Article 45(5) and (6).
The current State Prosecutor’s Office is carrying out cases with considerably less political interference than was the case for previous State Prosecutors. Former high-profile public officials of the majority party (which is now divided following the 2017 elections) are being indicted and convicted. It is clear that previously there was a proliferation of prosecutions simply because of social pressure as a result of the Panama Papers findings and plea agreements in other jurisdictions that revealed wrongdoings in Ecuador. In addition, audits have revealed undeniably excessive prices being charged, delays in executing infrastructure contracts after building work had commenced, and disproportionate gaps between the income and assets of officials, their close relatives and confidants, all of which have invited public condemnation.
I INTRODUCTION

The criminal law in England and Wales in relation to bribery and corruption is made up of an assortment of statutory provisions that apply depending on when the relevant conduct took place.

Historically, the principal anti-bribery and corruption provisions in England and Wales were contained in two antiquated statutes: the Public Bodies Corrupt Practices Act 1889 (the 1889 Act) and the Prevention of Corruption Act 1906 (the 1906 Act). It was not until 14 February 2002, however, that the offences in these statutes were given specific extraterritorial effect. The law changed again, on 1 July 2011, when the Bribery Act 2010 (the 2010 Act) came into force. The 2010 Act was heralded as one of the toughest anti-bribery and corruption regimes in the world, particularly as regards its extended extraterritorial reach and provision for strict corporate criminal liability.

More recently, the Crime and Courts Act 2013 (the 2013 Act) has introduced a scheme of deferred prosecution agreements (DPAs) for corporations accused of various offences, including bribery. The scheme is designed to apply to conduct that takes place either before or after its commencement on 24 February 2014. At the time of writing, three such agreements have been concluded in connection with bribery offences. Guidance on sentencing of business crime, including bribery and corporate fines, came into force for individuals and organisations sentenced on or after 1 October 2014.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i The Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906

The 1889 Act and the 1906 Act continue to apply to conduct occurring before 1 July 2011.

The offences

The 1889 Act relates specifically to the corruption of public bodies and creates an offence for a person corruptly to give, promise or offer (or to receive or solicit) any advantage whatsoever...
to any person, whether for their or another’s benefit, as an inducement to or reward for or otherwise on account of any servant of a public body doing or forbearing from doing something in respect of the public body’s activities. No agency is involved as the public servant performs the public body’s business as principal. If the payment is made or received as an inducement for that public servant to do or forbear from doing something then the payment is corrupt. The maximum sentence is seven years’ imprisonment (for individuals) or an unlimited fine or both.

A public body is defined in Section 7 of the 1889 Act and in Section 4(2) of the Prevention of Corruption Act 1916 as including local and public authorities of all descriptions. The definition does not include those operating on behalf of the Crown, who do so as agents of the Crown and not as public officers in their own right.

The 1906 Act provided for a similar prohibition (with the same maximum sentence) as the 1889 Act, with the critical distinction being that the bribe must have been made to an agent as an inducement or reward for doing or forbearing to do something in relation to his or her principal’s affairs. The activity of the principal and his or her state of knowledge therefore becomes relevant. The term ‘agent’ may cover any person who is employed by or who acts for another. The 1906 Act therefore applies to commercial bribery as well as bribery of Crown agents, who are expressly included by virtue of Section 1(3) of the 1906 Act.

**Liability of companies**

The liability of a corporation for the above (and most other) offences can be established only by implementing the ‘identification doctrine’. In other words, the prosecution must establish that the company’s ‘directing mind’ – a senior individual, usually a director, who could be said to embody the company in his or her actions – committed the offence him or herself; then, that director’s guilt would be ‘attributed’ to the company. The difficulty encountered in proving such liability in practice provided part of the impetus for the changes to the law in the 2010 Act, including the new strict liability offence applicable to ‘commercial organisations’ of failing to prevent bribery.

**ii The Bribery Act 2010**

The 2010 Act applies to conduct occurring on or after 1 July 2011. The 2010 Act reformulates the offences relating to bribing another person (Section 1) and being bribed (Section 2), and creates a specific offence of bribery of foreign public officials (Section 6). The principal distinguishing feature of the new 2010 Act, however, is the creation of a strict liability offence relating to the failure of commercial organisations to prevent bribery (Section 7). The maximum sentence for each offence is 10 years’ imprisonment (for individuals) or an unlimited fine, or both.3

**The general offences**

The offence of bribing another person (Section 1) is committed where a person directly or indirectly offers, promises or gives a financial or other advantage to another person and (1) he or she intends the advantage to either induce a person to ‘perform improperly’ a relevant function or activity or to reward a person for such improper performance; or (2) he or she knows or believes that the acceptance of the advantage would itself constitute the improper performance.

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3 The Bribery Act 2010, Section 11.
performance of a relevant function or activity. In either case, it does not matter whether the person to whom the advantage is offered, promised or given is the same person who is to perform, or has performed, the function or activity concerned.

The term ‘relevant function or activity’ is defined very broadly in Section 3 of the 2010 Act to include any function of a public nature, any activity connected with a business (i.e., trade or profession) or performed in the course of a person’s employment and any activity performed by or on behalf of a body of persons. To qualify, however, the person performing the function or activity must either be expected to perform it in good faith or impartially, or he or she must be in a position of trust by virtue of performing it.

The term ‘improper performance’ is defined in Section 4 of the 2010 Act as the performance of a relevant function or activity in breach of a relevant expectation. The term ‘relevant expectation’ means the expectations arising from the conditions mentioned in Section 3 of the 2010 Act: good faith, impartiality or any expectation arising from the position of trust. For bribery that takes place overseas or in respect of overseas persons (addressed further below), the expectation is what a reasonable person in the United Kingdom would expect and should therefore disregard any local custom or practice unless it is permitted or required by the applicable written law.

The offence of being bribed (Section 2) is committed where a person (R) requests, agrees to receive or accepts a financial or other advantage: (1) intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person); (2) when the request, agreement or acceptance is itself improper; (3) as a reward for such improper performance (whether by R or another); or (4) where the improper performance is undertaken in anticipation of, or in consequence of, the request, agreement to receive or acceptance of the advantage. In all cases, it does not matter whether the request, agreement to receive or acceptance is made directly or through a third party. Nor does it matter whether R (or the person who performs the function or activity) knows or believes that the performance of the function or activity is improper.

Individuals may be liable for the general offences according to the normal rules of criminal liability. In addition, however, the 2010 Act addresses the liability of senior officers for bribery offences committed by companies. If a company commits one of the general offences (or an offence under Section 6, addressed below) and it is proved that the offence was committed with the ‘consent or connivance’ of a director, manager or corporate secretary (or other similar officer), then the senior officer can also be prosecuted for the offence.\(^4\)

**Liability of companies**

As with the law applicable to conduct that took place prior to 1 July 2011, both individuals and companies (via the identification doctrine) may be liable for the general offences in the 2010 Act (or for an offence under Section 6 of the 2010 Act, addressed below).

In addition, the 2010 Act has introduced a new strict liability offence for relevant commercial organisations where they fail to prevent bribes being paid on their behalf (Section 7). The offence is committed where a person ‘associated’ with the organisation bribes another person within the meaning of Section 1 or Section 6 of the 2010 Act intending to obtain or retain business or an advantage in the conduct of business. A ‘relevant commercial organisation’ means a corporation or a partnership that carries on a business or part of

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\(^4\) The Bribery Act 2010, Section 14.
a business in any part of the United Kingdom. An ‘associated person’ means anyone who performs services for the organisation or on its behalf and may therefore include employees, agents, suppliers, contractors and joint venture partners.5

While the Section 7 offence is one of strict liability, the 2010 Act provides a defence if the organisation can prove that it had in place ‘adequate procedures’ designed to prevent persons associated with it from paying the bribe. The 2010 Act does not define adequate procedures; however, the Ministry of Justice (MOJ) has published guidance for commercial organisations on implementing adequate procedures to prevent bribery. Rather than adopting a prescriptive, one-size-fits-all approach, it incorporates flexibility by being based on six core principles:

- **Proportionate procedures:** maintaining bribery prevention policies that are proportionate to the nature, scale and complexity of the organisation’s activities, as well as to the risks that it faces.
- **Top level commitment:** ensuring that senior management establishes a culture across the organisation in which bribery is unacceptable, which may include top-level communication of the organisation’s anti-bribery stance and being involved in the development of bribery prevention policies.
- **Risk assessment:** conducting periodic, informed and documented assessments of the internal and external risks of bribery in the relevant business sector and market.
- **Due diligence:** applying due diligence procedures that are proportionate to the risks faced by the organisation; since an organisation’s employees are associated persons, appropriate due diligence may become part of recruitment and HR procedures.
- **Communication and training:** ensuring that bribery prevention policies are understood and embedded throughout the organisation through education and awareness.
- **Monitoring and review:** putting in place auditing and financial controls that are sensitive to bribery, including consideration of obtaining external verification of the effectiveness of an organisation’s anti-bribery procedures.

The MOJ guidance includes a number of illustrative case studies. Ultimately, however, the question of whether an organisation has adequate procedures will turn on the particular facts of the case. There also remains the larger ambiguity of what constitutes a bribe. There is no exception in the 2010 Act for facilitation payments and much has been made of the threat to corporate hospitality. That said, the guidance attempts to reassure businesses that the 2010 Act ‘is not intended to prohibit reasonable and proportionate hospitality and promotional or other similar expenditure intended for these purposes’.

### III ENFORCEMENT: DOMESTIC BRIBERY

The investigation of bribery offences may be conducted by any police force in the United Kingdom, but in the context of large-scale commercial bribery often falls to the National Crime Agency (NCA) or the Serious Fraud Office (SFO). The latter has powers to compel the provision of information or documents and can apply to the courts for warrants to search

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5 The Bribery Act 2010, Section 8.
premises and seize documents. The prosecuting agencies include the Crown Prosecution Service (CPS) (which handles any prosecution arising from an NCA or other police investigation in England and Wales) and the SFO.

Other sanctions available to the authorities in addition or as alternatives to the criminal law include inviting the courts to make a confiscation order following conviction or a civil recovery order (CRO) in respect of the proceeds of criminal conduct. Specified prosecutors can offer immunity from prosecution or a statement to assist mitigation to an individual who assists an investigation.

The Director of the SFO and the Director of Public Prosecutions (for the CPS) published prosecutors’ guidance on the 2010 Act on 30 March 2011, which included some discussion of the factors that would be deemed relevant to whether a corporation against which there is sufficient evidence is prosecuted for bribery (domestic or foreign), or subjected to a CRO, or neither.

At the time of writing, the first few investigations, prosecutions and convictions under the 2010 Act have started to make their way through the system. A handful of individuals have been convicted, including several who paid bribes to obtain contracts for work at royal palaces. In 2018, a company called Skansen Interiors Limited became the first to be convicted of the corporate offence under Section 7 of the 2010 Act after a trial, having self-reported the payment of bribes to a (domestic) customer by its managing director, who was then dismissed. Although the jury rejected its argument that its procedures were adequate, the judge imposed only a nominal penalty in the form of an absolute discharge (there being no other practical alternative, given that Skansen was by then insolvent). The lesson from the case (which was prosecuted by the CPS, not the SFO) – that a self-report does not guarantee that a company will be treated leniently – clearly has the potential to be counterproductive from a law enforcement point of view.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i The Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906

Traditionally, English criminal courts had jurisdiction only in respect of offences committed in England and Wales. Since 4 September 1998, however, conspiracies in England and Wales to commit offences overseas have been triable in England and Wales (Section 1A of the Criminal Law Act 1977). Nonetheless, it initially remained arguable whether this provision applied to the 1889 and 1906 Acts. The position was put beyond doubt by the enactment of Section 109 of the Anti-Terrorism, Crime and Security Act 2001, on 14 February 2002, which extended the territorial reach of the 1889 and 1906 Acts to substantive corruption

6 The Criminal Justice Act 1987, Section 2.
9 The Serious Organised Crime and Police Act 2005, Sections 71 to 73.
10 ‘The Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions’ (see www.sfo.org.uk).
offences committed overseas by UK-incorporated companies or UK nationals. More recently, the Court of Appeal has ruled that bribery of a foreign official was an offence under the 1906 Act even prior to the 2001 Act.\(^{11}\)

**ii The Bribery Act 2010**

The 2010 Act expanded significantly the territorial scope of the pre-existing bribery offences. First, a specific offence of bribery of a foreign public official was created; and, second, the range of individuals and entities who may be liable under the 2010 Act for offences committed overseas has been expanded, in particular as regards the new offence of failing to prevent bribery.

A foreign public official (FPO) is defined as an individual who holds or exercises a public function outside the United Kingdom and includes an official of a public international organisation such as the World Bank. The offence of bribing an FPO (Section 6) is committed where a person offers, promises or gives a bribe to an FPO, or another person at his or her request, intending to influence the FPO in his or her capacity as an FPO and to obtain or retain business or an advantage in the conduct of business. Notably, there is no requirement that the FPO should act improperly. The only exception is where the FPO is expressly permitted by the written law to receive the offer, promise or gift. The maximum sentence is 10 years’ imprisonment (for individuals) and an unlimited fine.\(^{12}\)

As with the old law, the new general offences under Sections 1 and 2 and, axiomatically, the new specific offence of bribing an FPO, may be committed abroad. The test is whether the person committing the offence has a ‘close connection with the United Kingdom’. The definition of this term has expanded the scope of persons who may be liable in England and Wales for acts committed overseas; in summary, those persons include a British national or person ordinarily resident in the United Kingdom, a body incorporated in the United Kingdom or a Scottish partnership.\(^{13}\)

Furthermore, the scope of entities that may be liable under the new failing to prevent bribery offence (Section 7) is very wide: they include commercial organisations based or incorporated overseas in circumstances where the organisation carries on a business, or part of a business, in part of the United Kingdom. While the MOJ has indicated that a ‘common-sense approach’ should be taken in interpreting this provision such that a company with no ‘demonstrable business presence in the United Kingdom’ ought not to be caught by the provision, the SFO has expressed an intention to interpret it widely. Therefore, arguably, a permanent physical presence in the United Kingdom together with trading activity taking place in the United Kingdom will be sufficient.

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\(^{11}\) *R v. AIL, GH and RH* [2016] EWCA Crim 2.

\(^{12}\) The Bribery Act 2010, Section 11.

\(^{13}\) The Bribery Act 2010, Section 12.
V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The commission of bribery offences often also entails ancillary offences such as false accounting,14 money laundering,15 and failure by a company to keep adequate records.16

Under the Theft Act 1968, a person (including a company) is guilty of false accounting if he or she dishonestly, with a view to gain or cause loss, destroys, defaces, conceals or falsifies any account, record or document required for an accounting purpose, or where he or she produces or makes use of any such account, etc. knowing it is or may be misleading, false or deceptive in a material particular.

Under the Proceeds of Crime Act 2002, it is, in general terms, an offence to deal with ‘criminal property’ (i.e., property that constitutes or represents a person’s benefit from criminal conduct and the alleged offender knows or suspects that this is the case). These provisions can be particularly relevant at the point at which a company becomes aware that funds have potentially been derived as a result of bribery within its organisation. In these circumstances, the company may have to report its suspicions to the authorities to avoid committing a money laundering offence. Additionally, companies in the regulated sector (such as financial services companies, accountants and some lawyers), have a duty to report knowledge or suspicion of money laundering and may, if they do not, commit offences as a result of breaches of anti-money laundering regulations.17

The various Companies Acts create numerous offences, including failure to keep adequate accounting records, making false statements to an auditor and fraudulent trading (where a person is knowingly party to the carrying on of a business for any fraudulent purpose). These offences have, historically, been utilised as an alternative to a prosecution for a substantive corruption offence (see, for example, the guilty plea by BAE Systems PLC in December 2010 in respect of allegations of overseas corruption).

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The enforcement of foreign bribery is generally conducted by the SFO. Historically, however, criminal enforcement in England and Wales against companies for foreign bribery has been rare, mainly because of the inherent difficulty in attributing liability and obtaining foreign evidence. As a result, in the past decade or so, the SFO has sought to encourage companies to self-report their wrongdoing and cooperate with their investigation. In so doing, the SFO initially made use of new tools at its disposal, in particular its powers to enter into settlements by way of CROs as an alternative to prosecution.

Between 2008 and 2012, the SFO, under its then director, Richard Alderman, entered into numerous consensual civil settlements with companies accused of being involved in foreign bribery. They included: Balfour Beatty (£2.25 million) in 2008; AMEC (£4.95 million) in 2009; MW Kellogg (£7 million) in 2009; DePuy International (£4.829 million) in 2011; Macmillan Publishers (£11 million) in 2011; and Oxford Publishing Limited (£1.89 million) in July 2012.

14 The Theft Act 1968, Section 17.
16 The Companies Act 2006, Section 387.

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Notwithstanding the apparent success of Mr Alderman’s strategy (in 2011–2012, for example, the SFO obtained three CROs and recovered £50.2 million in connection with criminal conduct – a large figure for the United Kingdom, albeit low in comparison to the level of funds recovered routinely in the United States), the SFO’s approach did not meet with universal acclaim. Particular criticism was made by the now Lord Chief Justice of England and Wales, Sir John Thomas, in the 2010 case of R v. Innospec Ltd.

A new director of the SFO, David Green QC, was appointed on 23 April 2012 and signalled a less consensual, more traditional prosecutorial approach, more in keeping with the above comments than his predecessor. Guidance on self-reporting, which was understood by many to imply that a corporation that self-reported could safely consider itself at a low risk of prosecution, was withdrawn on 9 October 2012.18

The SFO under Mr Green obtained convictions under the 2010 Act (in a case primarily concerning fraud, with connections to Cambodia), as well as the first conviction, after a contested trial, of a corporate entity for foreign bribery (Smith and Ouzman, a printing company prosecuted under the pre-2010 law), the first conviction of a corporate entity for failing to prevent bribery under Section 7 of the 2010 Act (the Sweett Group PLC, which pleaded guilty in December 2015 and was sentenced and ordered to pay £2.25 million in February 2016), and three deferred prosecution agreements in relation to bribery (see Section VIII.i).

Nevertheless, enforcement of the UK bribery laws continues to be the subject of increasing scrutiny. An Organisation for Economic Co-operation and Development (OECD) report on 23 March 2017 noted various concerns about its progress in this area, in particular the high concentration in Scotland of companies operating in corruption-sensitive sectors, and the need for engagement with the Crown dependencies and overseas territories.19

The Conservative Party’s controversial manifesto pledge to fold the SFO into the NCA was not followed up in the Queen’s Speech for the 2017–2018 legislative programme. Instead, a new National Economic Crime Centre has been created, with the aim of coordinating the approach of the various UK agencies tasked with fighting bribery and other economic crime, and with the power to direct the SFO to carry out particular investigations.20

Lisa Osofsky, a former Federal Bureau of Investigation counsel, took over as the SFO’s latest director in August 2018.21 She inherits a number of ongoing investigations, including those concerned with Airbus, ENRC, GlaxoSmithKline, Rolls-Royce, UnaOil, and Watchstone (formerly Quindell). In a speech to the annual Cambridge International Symposium on Economic Crime, she signalled her intention to use her experience to help the agency work more collaboratively with the private sector and with other law enforcement authorities.22

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19 See the OECD website.
VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The United Kingdom is a signatory to:

a. the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;

b. the Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the EU;

c. the Council of Europe’s Criminal Law Convention on Corruption;

d. the UN Convention against Corruption; and

e. the UN Convention against Transnational Organised Crime.

The United Kingdom has, however, set its face firmly against the establishment of a European Public Prosecutor’s Office. At the time of writing, the impact on bribery enforcement of the United Kingdom’s pending exit from the EU is unclear.

VIII LEGISLATIVE DEVELOPMENTS

i. Deferred prosecution agreements

The 2013 Act created a scheme of DPAs for corporations accused of various offences, including bribery. The scheme applies to conduct before or after its commencement on 24 February 2014.

The 2013 Act provides that a DPA is an agreement between a designated prosecutor (e.g., the SFO) and a person (meaning a corporate, partnership or unincorporated association, but not an individual) suspected of a specified offence (including the bribery offences considered above, as well as false accounting and money laundering). Under a DPA, the organisation agrees to comply with the requirements imposed on it by the agreement, and the prosecutor agrees that, upon approval of the DPA by the court, proceedings will be instituted but suspended until the DPA expires or is breached. A DPA must contain a statement of facts relating to the alleged offence, which may (but need not) include admissions of guilt. The requirements of a DPA may include, but are not limited to requirements to pay a financial penalty, compensation, or a charitable donation, or to disgorge profits; to implement or amend a compliance programme; to cooperate in any investigation relating to the alleged offence; and to pay the prosecutor’s reasonable costs. The amount of any financial penalty must be broadly comparable to the fine that would have been imposed on conviction after a guilty plea. The sole criterion in the 2013 Act for whether a case is suitable for a DPA is that a judge thinks it is ‘in the interests of justice’. (He or she will then go on to decide whether the terms proposed for the particular DPA are ‘fair, reasonable and proportionate’.)

The 2013 Act required a Code on DPAs to be issued giving relevant guidance to prosecutors. Published on 11 February 2014, the Code suggests guidance for when a prosecutor might ‘invite’ an organisation to agree to enter into a DPA. The first stage is to assess whether there is either a realistic prospect of conviction (the usual evidential test for a prosecutor) or ‘at least a reasonable suspicion’ that the organisation has committed the offence. The second stage is to assess whether the public interest would be properly served by a DPA as opposed to a prosecution. The factors the Code suggests are relevant in deciding...
that this test is satisfied include a ‘genuinely proactive approach’ by the organisation and an ‘effective corporate compliance programme’. Self-reporting will help, though in itself it will not be determinative.

The process starts with a formal letter from the SFO and moves through ‘transparent’ negotiations, subject to undertakings about confidentiality and caveats about subsequent use of the information provided. The parties then draw up a ‘statement of facts’ and a set of proposed terms to present to the court. If the DPA is breached then the organisation may be prosecuted for the original offence, but only if the full evidential and public interest tests are satisfied. The statement of facts will be admissible in evidence, which will be particularly relevant if the organisation has admitted the offence (though it is not required to do so).24

At the time of writing, three DPAs have been concluded in respect of offences of failing to prevent bribery under Section 7 of the 2010 Act. The first, in November 2015, was with Standard Bank PLC, involving payment of financial orders of US$25.2 million and compensation of a further US$7 million to the government of Tanzania, as well as an agreement by the company to cooperate fully with the SFO and to be subject to an independent review of its existing anti-bribery and corruption controls, policies and procedures, and to implement the reviewer’s recommendations. The second, in July 2016, was with a company that has not yet been named (pending the conclusion of proceedings against individuals), referred to as XYZ, and involved financial orders of £6,553,085, comprising a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. XYZ also agreed to continue to cooperate fully with the SFO and to provide a report addressing all third-party intermediary transactions, and the completion and effectiveness of its existing anti-bribery and corruption controls, policies and procedures within 12 months of the DPA and every 12 months for its duration.

The third DPA, and by far the largest and most significant, was in January 2017 and concerned the engineering giant Rolls-Royce, which admitted its involvement in systematic corrupt practices over nearly 30 years, in seven countries and involving three business sectors. It agreed to pay financial penalties amounting to £497.25 million (plus interest), as well as the SFO’s costs of £13 million, and to take various remedial measures, rather than face prosecution. Notably however, it achieved this despite the fact that the investigation was triggered by an external source and not by self-reporting. In his judgment, Sir Brian Leveson (who has presided over all the DPAs so far concluded), stressed the extent of the cooperation the company had provided to the SFO throughout the investigation, including the disclosure of matters that would not otherwise have been discovered, as a key reason why the case warranted a DPA rather than prosecution. Nevertheless there has been some criticism of the case, with Corruption Watch describing it as ‘proof that the UK is not willing to prosecute a large, politically connected company’.25

**ii Sentencing Council guidelines**

The United Kingdom’s Sentencing Council has published guidelines on sentencing of various business crimes, including bribery, which entered into force for individuals and organisations sentenced on or after 1 October 2014.

In the absence of previous guidelines or established sentencing practice for organisations convicted of financial crimes, the Council took into account (among other things) the

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regulatory and civil penalty regimes used by bodies such as the Financial Conduct Authority, civil and criminal penalties in other jurisdictions (notably the United States) and the sentencing guidelines for corporations produced by the US Sentencing Commission.

The Council prescribes a process that involves assessing the amount obtained (or loss avoided) or intended to be obtained (or avoided), and says that 'for offences under the Bribery Act, the appropriate figure will normally be the gross profit from the contract', although for the corporate offence of failing to prevent bribery ‘an alternative measure . . . may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery’. It goes on to suggest that in the absence of clear evidence the court may use a figure of ‘10–20 per cent of the relevant revenue derived from the product or business area to which the offence relates [during] the period of the offending’.

The next step of the process determines the multiplier within the category range (between 20 and 400 per cent) by reference to various aggravating and mitigating factors. The court may then adjust the fine to fulfil ‘the objectives of punishment, deterrence and removal of gain’, and to take into account ‘the value, worth or available means of the offender’ and the impact of the fine on the ‘employment of staff, service users, customers and [the] local economy (but not shareholders)’ and (if relevant) the ‘performance of a public or charitable function’. The remaining steps consider other factors that would indicate a reduction (such as assistance to the prosecution); reduction for guilty pleas; ancillary orders; the ‘totality principle’ (whether the total sentence is just and proportionate); and the duty to give reasons.26

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Allegations of bribery may involve numerous other legal issues, including the potential for civil claims and employment disputes, freezing of assets, possible debarment from participating in public contracts in the European Union, and potential breaches of regulatory provisions. A few points should be noted in the specific context of England and Wales.

First, with respect to potential civil claims, the privilege against self-incrimination does not apply in cases of fraud (which the courts have held includes bribery), 27 so that a person suspected of bribery who is required to provide information in the context of a civil claim may be forced to give evidence that incriminates him or her (although it may not then be used as evidence in criminal proceedings).

Second, with respect to employment disputes, individual suspects who are questioned as part of an external or internal investigation into suspected bribery offences in the United Kingdom increasingly find themselves engaged in disputes over the provisions of a relevant insurance policy that may entitle them to reimbursement of their legal fees. This is particularly significant in an environment in which the availability of publicly funded legal services is increasingly restricted and there are severe controls on defendants’ ability to use restrained assets to pay for their defence.

Third, the UK authorities have a number of options to freeze assets on the basis that they may represent the proceeds of crime, including bribery, and these have recently been increased by provisions of the Criminal Finances Act 2017 (the 2017 Act). These options include restraining the assets of someone subject to criminal investigation, to ensure they

26 ‘Fraud, Bribery and Money Laundering Offences: Definitive Guideline’ (see www.sentencingcouncil.org.uk).
would be available to satisfy a confiscation order at the end of criminal proceedings,\textsuperscript{28} and freezing assets pending proceedings for civil recovery.\textsuperscript{29} A subset of the latter category allows seized quantities of cash to be detained and forfeited in summary proceedings, which the 2017 Act has expanded to cover various categories of personal property (such as artwork and jewellery) and funds held in bank accounts.\textsuperscript{30} The 2017 Act also introduced Unexplained Wealth Orders (UWOs), under which a person can be ordered to explain an interest in a specified property and how it was obtained, or face a presumption that it represents the proceeds of crime.\textsuperscript{31} Importantly for foreign bribery cases, a UWO can be made against a foreign politician where an interest in a property appears inconsistent with the politician’s known sources of wealth.\textsuperscript{32} The first UWO was obtained in July 2018, and survived a challenge from the respondent (the wife of an allegedly corrupt foreign official).\textsuperscript{33} The 2017 Act also extended the period for which bank accounts can remain blocked following a report of suspicious activity and before any freezing order is sought.\textsuperscript{34}

\section{Compliance}

Efforts to embed compliance regimes in companies designed to reduce the risk of various offences (substantive bribery offences, ancillary offences, and others) are an increasing feature of the anti-bribery landscape in the United Kingdom. The 2010 Act encourages commercial organisations to put in place adequate procedures to prevent bribery offences as a means of ensuring a defence to potential allegations of failing to prevent bribery under Section 7 of the 2010 Act. The existence of an effective compliance programme might also be a factor in favour of not prosecuting a company, and perhaps agreeing to a DPA instead.

Meanwhile, as referenced above, the regime aimed at detecting and preventing money laundering offences under the Proceeds of Crime Act 2002 creates requirements (for financial institutions and others in the regulated sector) and incentives (for anyone at risk of committing a money laundering offence) to report their suspicions of acquisitive crime, including bribery. The lodging of reports under this regime is increasingly the trigger for criminal investigations, and must be borne in mind whenever bribery issues emerge as part of the tactical considerations on whether to self-report. In short, whenever accountants, auditors, banks, or even transactional solicitors suspect an offence has been committed by their client, there is a reasonable likelihood that they will report that suspicion to the authorities. The regulatory requirements on and reputational issues for the United Kingdom’s financial institutions, which are under severe pressure to institute risk-averse systems for detecting financial crime, can only serve to increase that likelihood.

\textsuperscript{28} The Proceeds of Crime Act 2002, Section 41.
\textsuperscript{29} The Proceeds of Crime Act 2002, Section 245A.
\textsuperscript{30} The Proceeds of Crime Act 2002, Part 5, Chapters 3, 3A and 3B.
\textsuperscript{31} The Proceeds of Crime Act 2002, Sections 396A to 396U.
\textsuperscript{32} The Proceeds of Crime Act 2002, Section 362B (3) and (4)(a).
\textsuperscript{34} The Proceeds of Crime Act 2002, Section 336A.
XI  OUTLOOK AND CONCLUSIONS

The United Kingdom’s response to bribery remains in a period of transition, and not only because there are still extant investigations that engage the 1889 and 1906 Acts as well as those that engage the 2010 Act. A tension has existed for some time between the need to display a tough attitude towards enforcing anti-bribery laws, and the pragmatic reality (particularly given the limited resources of the SFO, and the difficulties in proving liability in some cases) that the interests of justice may in fact be best served by a settlement between prosecutor and suspect (particularly a corporate suspect). CROs may now be out of favour, but DPAs in practice seem to be performing a similar function. Nevertheless, even these measures will need to be backed up with a credible threat of prosecution, conviction and severe sentencing if they can reasonably be expected to have some bite as a deterrent and a punishment for corrupt behaviour.
I  INTRODUCTION

In recent years France has made numerous efforts to strengthen anti-corruption enforcement. In addition to a significant increase in the number of prosecutions of corporations for corruption offences, December 2016 saw the entry into force of the Sapin II Law (named after the Law’s main proponent, French Minister of Finance Michel Sapin), which aims to align French anti-corruption law with aspects of US and UK corruption enforcement practice. The Law comes as a response to the criticisms made in October 2014 by the Organisation for Economic Co-operation and Development (OECD) Working Group on Corruption, which considered France’s timid efforts to combat corruption to have fallen short of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention). More recently, the French Parliament passed the Bill on Confidence in Democratic Life, which aims to promote transparency and ethics in French politics, and prevent conflicts of interest among members of Parliament.

II  DOMESTIC BRIBERY: LEGAL FRAMEWORK

i  Domestic bribery law

Both active and passive corruption of domestic officials are criminal offences under French law. Corruption is defined as the act of either soliciting or agreeing to a bribe to induce a public official to act or refrain from acting in relation to the performance of the duties of his or her position, function or mandate. The offence is committed by the act of soliciting or agreeing to a bribe regardless of whether the bribe is actually paid. Neither is it relevant to the commission of the offence whether the public official actually performs the requested act.

The offering of or agreeing to the bribe can be direct or indirect, which means that corruption can be committed through intermediaries such as agents, consulting firms, distributors or a subsidiary. In such cases, both the person commissioning the bribe and the intermediary will be held liable for corruption, either jointly responsible or as accomplices.

The public official need not be the person who enjoys the advantage given to induce his or her behaviour. The scope of the offence covers all cases in which the public official receives an advantage or benefit for a third party. There is no requirement for a particular type of connection between the public official and a third-party beneficiary. For instance, agreeing to confer a benefit on a political party falls within the scope of the offence.

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1 Antonin Lévy is a partner and Ophélia Claude is a senior associate at Hogan Lovells (Paris) LLP.
2 Article 432-11 and Article 433-1 of the French Criminal Code.
French law also makes it a criminal offence to solicit or agree to a bribe to abuse influence with the view to granting the obtainment of distinctions, employment, contracts or any other favourable decision from a public authority or the government. This offence is referred to as ‘influence peddling’.

ii Definition of public officials

Under Article 432-11 and Article 433-1 of the French Criminal Code, a ‘public official’ is defined as ‘any representative of a public authority or any person exercising a public function or holding an elected office’.

The term ‘representative of a public authority’ refers to any person belonging to a legislative, executive or administrative organ, such as civil servants, ministers, police officers and officers of the tax administration. Persons belonging to a judicial organ are not included in the definition of public officials, as French law has created a separate offence of corruption of persons holding a judicial office.

The phrase ‘any person exercising a public function’ encompasses any person who has been entrusted with a public function independently of any public body. This means that where the state delegates an activity of public interest to a state-owned or state-controlled company, employees of the company fall within the scope of the definition of public officials (e.g., employees of a state-owned public railway company).

‘Persons holding an elected office’ refers to any person who was elected to a public office, including members of Parliament and local elected representatives.

iii Gifts and gratuities

The anti-corruption provisions mention any ‘offers, promises, donations, gifts or any other advantage’; the French Court of Cassation has given a broad interpretation of this phrase when interpreting the offence of corruption of public officials, taking the view, for instance, that offering meals once or twice a month to a public official amounted to corruption. Consequently, any type of gifts or gratuities that may have value could potentially fall within the scope of the anti-corruption provisions, including travel, meals and entertainment.

Gifts and gratuities will incur criminal liability if the advantage is ‘undue’ (i.e., when it is not authorised by any laws or case law).

There are no statutory provisions restricting gifts, travel, meals or entertainment to public officials. Gifts and gratuities are generally governed by codes of ethics. While the Code of Ethics of the French National Assembly and the Code of Ethics of the Senate do not prohibit gifts and gratuities, members of Parliament are required to report any gift, donations, travel, meals and invitations when the value of each exceeds €150.

On 20 April 2016, Law No. 2016-483 was enacted on the ethics, rights and obligations of civil servants, imposing a duty on civil servants to avoid conflicts of interest. Under this Law, civil servants must disclose any potential conflicts of interest to their managers and

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3 Article 433-1 of the French Criminal Code.
4 Article 434-9 of the French Criminal Code.
5 Crim., 2 December 2009, No. 08-88043.
abstain from taking part in acts falling within the scope of their function that could give rise to a conflict of interest.\(^6\) The Law does not contain any specific provisions regarding gifts and gratuities.

iv Public official participation in commercial activities

Pursuant to Law No. 2016-483 of 20 April 2016, civil servants are not allowed to create and manage a company, they cannot be part of management bodies of a company, they cannot give advice or act as an expert in cases involving a public entity, they cannot have interest in companies subject to the supervision of the administrative authority in which they work and they cannot combine two full-time jobs.\(^7\)

Persons holding an elected office are allowed to participate in commercial activities insofar as they do not give rise to a conflict of interest. Members of Parliament are therefore not allowed to hold managerial functions in a state-owned or state-controlled company. Neither are they allowed to hold managerial functions in a company that receives public subsidies from a public administration. While lawyers who hold an elected office may continue practising, they cannot act as counsel in a case involving a public entity.

v Private commercial bribery

Passive and active private commercial bribery are also offences under French law.\(^8\) The constituent elements of commercial bribery are the same as for corruption of public officials except where it concerns anyone who is not a public official (managers, employees, independent agents). The bribe must be solicited or agreed to with a view to carrying out or abstaining from carrying out any act within the scope of the duties of the person's position or facilitated by his or her position, in violation of his or her legal, contractual and professional obligations.

vi Corporate liability

Under French law, corporations may incur criminal liability for acts of corruption committed by management bodies (i.e., boards of directors), legal representatives (i.e., senior managers such as directors and CEOs) or employees given a specific power to represent the company, whenever they are acting on its behalf, even if they are breaching corporate policy.

vii Penalties

Corruption of public officials and influence peddling are punished by:

\(a\) a prison sentence of up to 10 years as well as a fine of up to €1 million, which can be increased to twice the value of the assets to which the offence relates for individuals; and

\(b\) a fine up to €5 million, which can be increased up to 10 times the value of the assets to which the offence relates for legal entities.

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\(^6\) Article 25 \textit{bis}, Law No. 2016-483 dated 20 April 2016 on the ethics, rights and obligations of civil servants.

\(^7\) Article 25 \textit{septies-I}, Law No. 2016-483 dated 20 April 2016 on the ethics, rights and obligations of civil servants.

\(^8\) Article 445-1 of the French Criminal Code.
Private corruption is punished by:

\(a\) a prison sentence of up to five years as well as a fine of up to €500,000, which can be increased to twice the value of the assets to which the offence relates for individuals; and

\(b\) a fine of up to €2.5 million, which can be increased up to 10 times the value of the assets to which the offence relates for legal entities.

Ancillary penalties, such as confiscation of the proceeds of the crime, confiscation of all property whose legal origin cannot be demonstrated, and disbarment from public procurement, may also be imposed.\(^9\)

### III  ENFORCEMENT: DOMESTIC BRIBERY

A new prosecution department, the office of the National Financial Prosecutor (PNF), was created in February 2014. The role of the PNF is to investigate financial and economic crimes, including corruption. The office is composed of 15 specialised prosecutors and four specialised assistants. In October 2016, the PNF stated that the office was investigating 360 cases, 45 per cent of which deal with breach of probity (23 of them involve acts of corruption committed by public officials).\(^10\)

According to the 2017 report published by the French Anti-Corruption Agency (AFA), in 2016, 758 investigations were initiated in France regarding corruption and related offences. In 2016, 253 convictions were rendered by French courts in cases on corruption and related offences. Of those convictions, 67 per cent resulted in a prison sentence, of which 78 per cent were suspended sentences. In 2016, 70 confiscation measures were ordered by French courts.

Following the entry into force of the Sapin II Law, the public prosecutor’s office and companies can now enter into a settlement similar to a ‘deferred prosecution agreement’ in cases of corruption and related offences. This settlement mechanism, known as a ‘judicial public-interest agreement’ (CJIP),\(^11\) was used for the first time in a domestic bribery case in February and May 2018. Three companies agreed to pay fines of €800,000, €2.71 million and

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\(^9\) Ancillary penalties applicable to legal entities are (1) dissolution, where the legal entity was created to commit a first-level crime (punishable by more than 10 years' imprisonment for individuals) or, where it was diverted from its commercial purposes to commit a crime, a sentence of imprisonment of three years or more; (2) prohibition from exercising, directly or indirectly, one or more social or professional activities, either permanently or for a maximum of five years; (3) placement under judicial supervision for a maximum of five years; (4) permanent closure, or closure for up to five years, of one or more of the company establishments used to commit the offences concerned; (5) disbarment from public procurements, either permanently or for a maximum of five years; (6) prohibition from making a public appeal for funds, either permanently or for a maximum of five years; (7) prohibition from drawing cheques (except those allowing the withdrawal of funds by the drawer from the drawee, or certified cheques) and prohibition from using payment cards, for a maximum of five years; (8) confiscation of property used or intended for the commission of the offence, or of resulting property, or of all property whose legal origin cannot be demonstrated whenever the offence is punishable by a prison sentence of at least five years, which is the case for corruption; and (9) the posting of a public notice of the decision, or dissemination of the decision in the media.

\(^10\) Parliamentary Information report No. 4457 written by Sandrine Mazetier and Jean Luc Warsmann.

\(^11\) Convention judiciaire d’intérêt public.
€420,000 respectively and to implement anti-corruption programmes under the supervision of the AFA, the regulatory supervisory body created under the Sapin II Law to supervise the implementation of compliance programmes within French companies.

### IV FOREIGN BRIBERY: LEGAL FRAMEWORK

#### i Corruption of foreign public officials

Following the ratification of the OECD Anti-Bribery Convention in 1999, Parliament created the offence of corruption of foreign public officials in June 2000.

Article 435-1 and Article 435-3 of the French Criminal Code define corruption of foreign public officials in the same manner as corruption of domestic public officials:

- **a** it is committed by the act of soliciting or agreeing to offers, promises, donations, gifts or any other advantage;
- **b** the term ‘foreign public official’ is defined as any person who holds public authority, exercises a public function or holds an elected office, in a foreign country or in an international organisation;
- **c** the offence can be committed directly or through intermediaries; and
- **d** the advantage given to the foreign public official must be undue, although in the case of corruption of foreign public officials the question of whether the benefit is undue is a matter for the law of the victim state to determine.

While official Commentary 9 to the OECD Anti-Bribery Convention opens to state parties the possibility of excluding small facilitation payments from the scope of the offence, French law prohibits any type of facilitation payment.

#### ii Prosecution of foreign companies

Foreign companies can be prosecuted in France when at least one of the constituent elements of the offence took place in France. This means that foreign companies can be prosecuted whenever the bribe was offered or accepted in France or when the bribe was paid in a bank account opened in France. French authorities make a broad interpretation of these criteria and generally consider the transfer of funds via a French bank account sufficient to establish jurisdiction.

In two recent decisions, the Paris first instance court found there was sufficient grounds to establish the jurisdiction of French courts because a company’s board of directors had taken the decision in France to allow the signature of a consultancy contract with a company whose role was to give bribes to foreign public officials.

#### iii Penalties

Corruption of foreign public officials is punished by:

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12 The Law authorising the ratification of the OECD Anti-Bribery Convention was passed on 27 May 1999.
a prison sentence of up to 10 years as well as a fine of up to €1 million, which can be increased up to twice the value of the assets to which the offence relates for individuals; and

a fine of up to €5 million, which can be increased up to 10 times the value of the assets to which the offence relates for legal entities.

Ancillary penalties, such as confiscation of the proceeds of the crime, confiscation of all property whose legal origin cannot be demonstrated, and disbarment from public procurement, may also be imposed.15

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

Financial records are subject to a vast array of laws and regulations, which can be summed up as a mandatory truthfulness of records, but none of these rules are expressly related to anti-corruption. Notably, under French law, there is neither a duty to self-report nor a duty to report specific violations of anti-bribery law.

In tax matters, it has been judged by the French Council of State that when the tax administration is able to establish that certain sums have been paid as bribes to public agents, a strict rule of non-deductibility applies.16

The offence most widely prosecuted in financial record-keeping matters is the presentation of untruthful accounts; indeed, in business corporations, managers have the obligation to regularly present to shareholders or partners and, for certain corporations, to publish accounts that are truthful and exact, under penalty of a prison sentence of up to five years and a fine of up to €375,000 (€1.875 million for corporations).17

Moreover, when the corporation is publicly listed, this offence can be combined with the offence of publishing false or deceptive information, punishable by a prison sentence of up to five years and a fine of up to €100 million, which can be increased by up to 10 times the benefit of the offence.18

Finally, under French law, external auditors have a duty to report to the public prosecutor not only any dishonest accounts, but also any suspected criminal offence they encounter in the course of their work. Failure to report these is subject to criminal sanctions.

ii Money laundering

Pursuant to Article 324-1 of the French Criminal Code, money laundering is defined as (1) the act of facilitating the false justification of the origin of property or income that derive directly or indirectly from an offence, or (2) the act of assisting in the investment, concealment or conversion of the direct or indirect proceeds of an offence.

15 See footnote 9.
16 Council of State, 4 February 2015, No. 364708.
17 Articles 241-3 and 242-6 Section 2 of the French Code of Commerce.
18 Article 465-3-2 of the French Financial and Monetary Code.
While no conviction for the predicate offence is necessary for a person to be prosecuted or convicted of a money laundering offence, the public prosecutor’s office must prove all the constituent elements of the predicate offence. Predicate offences extend to acts committed abroad.\(^{19}\)

Since 2013, the Criminal Code has contained a rebuttable presumption that goods or income derived from transactions for which there is no apparent justification constitute the proceeds of an offence.\(^{20}\) To seek the application of this provision, the public prosecutor’s office must demonstrate that given its technical, legal or financial circumstances the transaction has no justification other than the concealment of the illicit origin of goods or income.

The constitution of the requisite intent to launder money is twofold: knowledge that the goods or income are the proceeds of a crime, and intent to participate in the commission of the offence. Intent is generally inferred from actual participation in the offence with knowledge of the illicit nature of the origin of the goods or income.

Money laundering is punished by a prison sentence of up to five years and a fine of up to €375,000 for individuals and €1.875 million for corporations.\(^{21}\) Ancillary penalties, such as confiscation of the proceeds of the crime, confiscation of all property whose legal origin cannot be demonstrated, and disbarment from public procurement, may also be imposed.

Prosecutions for money laundering are generally associated with criminal tax evasion cases. Money laundering is rarely used to prosecute bribery-related conduct.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Historically, companies have been prosecuted for bribery offences less frequently than natural persons. The OECD is placing considerable pressure on the French authorities to change this trend. On 9 February 2012, the Minister of Justice issued national criminal policy orientations stating that prosecutions for corruption of foreign public officials should be targeting companies whose commercial strategy is based on illegal conduct. The OECD Phase 3 Report on France, dated October 2014, shows that the French prosecutor’s office has significantly increased prosecution of companies since 2012.

On 14 March 2018, the Court of Cassation upheld the conviction rendered by the Paris Court of Appeal on account of corruption of foreign public officials in the Oil-for-Food case. Not only is this decision the first conviction of companies for corruption of foreign public officials, the Court of Cassation also made important findings regarding the definition of the elements of the offence. The Court of Cassation confirmed that payments made to a state in violation of a UN Security Council resolution amounted to bribery since in the case of corruption of foreign public officials it is not a requirement that the public official benefit personally from the bribe.

\(^{19}\) Crim., 9 December 2015, No. 15-83.204.

\(^{20}\) Article 324-1-1 of the French Criminal Code.

\(^{21}\) Article 324-1 of the French Criminal Code. The offence is punishable by a prison sentence of up to 10 years and a fine of up to €750,000 for individuals and €1.875 million for corporations when (1) money laundering was committed by a professional during the course of his or her professional activities; or (2) money laundering was committed as part of an organised group. The fine may be increased to half of the value of the assets that were laundered. Moreover, if the maximum imprisonment of the predicate offence exceeds the above-mentioned sentence, this maximum applies to the money laundering offence. Ancillary penalties, such as confiscation of the proceeds of the crime, confiscation of all property whose legal origin cannot be demonstrated, and disbarment from public procurement, may also be imposed.
On 25 October 2017, Teodorin Obiang, the Vice President of Equatorial Guinea, was convicted by the Paris first instance tribunal and sentenced to a three-year suspended prison sentence for money laundering, misuse of public assets, breach of trust, and corruption. This is the first time an acting foreign public official has been convicted in France for corruption committed in the official’s own country.

On 24 May 2018, the French bank Société Générale concluded a CJIP settlement with the PNF on account of corruption of foreign public officials in Libya. As part of the settlement, Société Générale agreed to pay a €250,150,755 fine and to be subject to monitoring by the AFA for two years.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

France is party to:

\( a \) the United Nations Convention against Corruption, which entered into force on 14 December 2005;

\( b \) the United Nations Convention against Transnational Organized Crime, which entered into force on 29 September 2003;

\( c \) the OECD Anti-Bribery Convention, which entered into force on 15 February 1999;

\( d \) the Council of Europe Criminal Law Convention on Corruption; and

\( e \) the Council of Europe Civil Law Convention on Corruption.

In October 2014, the OECD Working Group on Bribery published the Phase 3 Report on France. While the OECD Working Group recognised that France had made significant reforms, such as the establishment of the PNF, protection of whistle-blowers and an increasing number of sentences for corruption offences, it considered France to be insufficiently compliant with the OECD Anti-Bribery Convention. The Working Group has requested that France persist in prosecuting the offence of foreign bribery. While acknowledging that 24 new cases have been opened since October 2012, the Working Group stated that it remained concerned by the lack of proactivity on the part of the authorities in cases that involve French companies in established facts or allegations regarding foreign bribery.

In a report published on 28 September 2017, the Council of Europe Group of States against Corruption (GRECO) concluded that to date France has implemented (or dealt with in a satisfactory manner) a total of 12 of the 17 recommendations contained in the Third Evaluation Round report. The five pending recommendations have been partly implemented.

VIII LEGISLATIVE DEVELOPMENTS

i The Sapin II Law

The Sapin II Law on transparency, anti-corruption and modernisation of public life entered into force on 9 December 2016.

As this Law contains numerous provisions significantly changing the French anti-corruption landscape, its specificities are dealt with in this section; however, its main features can be summarised as follows:
France

a the creation of a national anti-corruption agency, with powers encompassing both advice and monitoring, support of French competent authorities, and injunctions and financial sanctions;22

b this agency is also in charge of monitoring the implementation and enforcement of the French Blocking Statute (see Section IX.iii);

c an array of measures protecting whistle-blowers (see Section IX.i);

d the obligation for companies of a certain size to implement a tailored compliance programme under penalty of financial sanctions, and the option for criminal courts to order a convicted company, as a complementary criminal penalty, to implement such a programme and to ensure specific monitoring (see Section X);

e the creation of a national register of lobbyists; and

f the creation of the CJIP (see Section III) – a French version of the US and UK deferred prosecution agreement, a mechanism that allows the prosecutor’s office to enter into a deal with individuals and companies. The CJIP allows companies to enter into a deal with the public prosecutor without any admission of guilt when they are suspected of corruption of both domestic and foreign public officials. The deal can result in a fine of up to 30 per cent of an average of the annual turnover of a company over the past three years. The CJIP entails an obligation for the company to implement an internal compliance programme lasting up to three years. The CJIP must be approved by the public prosecutor and the judge during a public hearing, and its content is made public.

ii Bill on Confidence in Democratic Life

On 9 August 2017, Parliament definitively voted in favour of the Bill on Confidence in Democratic Life. The Bill includes several measures that aim to enhance the transparency of political life, probity requirements and exemplarity of elected officials, the confidence of voters in their representatives and revamping party financing.

The main provisions include:

a declaration of interests and activities for the presidential candidate;

b creation of an ancillary penalty of ineligibility, which is not mandatory and is left to the criminal tribunal’s discretion;23 and

c prohibition for members of the government, members of Parliament and executive function holders at the local level to hire or appoint a person with whom he or she has a family relationship.

iii Extra-financial performance disclosure statement

On 1 August 2017, a new framework for the disclosure of non-financial information by large companies entered into force in France following the implementation of Directive 2014/95/EU, also known as the corporate and social responsibility directive.24

The extra-financial performance disclosure statement must now provide an overview of the company’s activities, including a reference to its business model, a presentation of

22 Decree No. 2017-329 of 14 March 2017 relating to the AFA.
23 Decision No. 2017-752 DC 8 September 2017.
the non-financial risks it faces, a description of the policies implemented to limit these risks and the results of these policies. Additional information may be provided when considered relevant by the company.

iv Statute of limitations

On 27 February 2017, Parliament enacted Law No. 2017-242, which significantly extends the statute of limitations for all criminal matters. The limitation period for offences punishable by a prison sentence of up to 10 years (offences) was increased from three years to six years, and the limitation period for offences punishable by a prison sentence of at least 10 years (crimes) was increased from 10 years to 20 years.

The Law also clarifies the rules regarding the calculation of the limitation period. The starting point is the day on which the infringement is committed unless it is ‘concealed’ or ‘hidden’. In such cases, the starting point is the day on which the ‘offence has become apparent and has been observed under conditions permitting the opening of an investigation’. However, the limitation period cannot exceed 12 years for offences and 30 years for crimes.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Whistle-blowing

The Sapin II Law broadened the protection afforded to whistle-blowers from acts of retaliation by employers. Under this Law, the term ‘whistle-blower’ is defined as any employee who reports, in good faith, any criminal offences that he or she may discover in the course of the discharge of his or her function. The Law provides protection to whistle-blowers in the event that they are subject to demotions, sanctions, pay cuts, reclassification, professional transfers and hindrances to their professional career development.

One of the stated aims of the Sapin II Law is to enhance the protection of whistle-blowers. The Law creates a broad definition of whistle-blowers by extending the protection to any person who reports any criminal conduct, gross regulatory breaches or breaches of law of which he or she has personal knowledge. The proposed definition is therefore not limited to criminal misconduct discovered in the course of the whistle-blowers’ discharge of their professional function.

Under the Law, whistle-blowers are required to inform their managers, then a public authority and, only as a last resort, public media. Any abusive reports (i.e., reports made in bad faith) will incur civil liability. The Law also provides that the French ombudsman for human rights would be entitled to award the whistle-blower financial damages and help him or her face any procedural costs in the event of litigation.

ii Privilege

Under French law, the scope of privilege is limited to communications exchanged between external counsel and their clients. Privilege does not apply to in-house lawyers because they are not members of the Bar in France.

25 Article 66-5 of Law 71-1130.
The question of whether a document is protected by privilege in France is determined not by the content of the communication but by the status of the sender and the recipient of the communication. Hence, the scope of privilege extends to all matters, both advice and litigation, and covers various mediums, such as:

- legal opinions sent by external counsel to their clients;
- communication between external counsel and their clients, and between external counsel – except for correspondence identified as ‘official’;
- meeting notes and, in general, all the items contained in the external counsel’s files, including all information provided to the external counsel in the exercise of their profession;
- clients’ names and external counsels’ agendas; and
- payment of fees, and information required by statutory auditors.

Communications covered by attorney–client privilege cannot be seized during a criminal investigation, nor can they be admitted into evidence unless the communication shows that the attorney participated in the commission of an offence.

### iii Blocking Statute

France’s 1968 Blocking Statute criminalises the act of seeking to obtain or communicate certain categories of documents or information intended to be used as evidence in foreign judicial or administrative proceedings. The range of types of document falling within the scope of the Blocking Statute is very broad, covering any information or documents of an economic, commercial, industrial, financial or technical nature.

The Blocking Statute’s primary objective is to protect French companies against sweeping foreign discovery rules and to force foreign countries to use instead the legal cooperation regime created by the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. However, since its adoption in 1968, the Blocking Statute has resulted in only one conviction.26

### X COMPLIANCE

Until the entry into force of the compliance provisions of the Sapin II Law on 1 June 2017, compliance programmes were uncommon in France, consisting mainly in guides published by the main employers’ union, AFEP-MEDEF, and dealing with corporate governance and corporate responsibility (internal corporate balance of power, environment, workers and minorities’ rights). Compliance was neither a defence nor a mitigating circumstance under criminal and administrative statutes. A clear distinction was made between regulated sectors (e.g., banking, financial products and insurance), which were subject to specific rules by relevant administrative authorities under penalty of financial sanctions, and unregulated sectors, which were not subject to any preemptive control but only to administrative and criminal sanctions whenever a violation of criminal law occurred.

Under the Sapin II Law (see Section VIII), companies headquartered in France with over 500 employees (consolidated), and whose turnover (consolidated) is above €100 million, must implement measures aimed at detecting and preventing corruption. The measures

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26 Crim., 12 December 2007, No. 07-83228.
required as part of the company compliance programme include a code of conduct, risk mapping, a whistle-blowing mechanism, a third-party due diligence procedure, relevant accounting controls specific to risks of corruption, and disciplinary sanctions for employees who fail to comply with these measures. Failure to implement a sufficient and effective compliance programme can incur administrative fines of up to €1 million for corporations and up to €200,000 for individuals.

Under the Sapin II Law, the AFA was empowered to supervise the implementation of company compliance programmes and was given broad investigative powers: it can request any documents it deems relevant from public entities and companies, and conduct on-site audits. The AFA also has the power to impose administrative fines on non-compliant companies. On 17 October 2017, the AFA sent audit notifications to five large companies. These audits are still ongoing. To date, no fines have been imposed by the AFA.

XI OUTLOOK AND CONCLUSIONS
The recent laws and prosecutions show that corruption continues to be of topical interest and is a highly important issue. The Sapin II Law has had a significant impact on the anti-corruption enforcement landscape in France, forcing companies to implement strict anti-corruption compliance measures in all business areas.
I INTRODUCTION

‘Corruption is authority plus monopoly minus transparency’ (Unknown). The perception that lies at the heart of this quote exposes corruption as a widespread, persistent and ever shifting challenge for society as a whole. Although the anti-corruption efforts undertaken by societies nationally are not accurately measurable, the general awareness of corruption is worth tracking. The Corruption Perceptions Index, published by Transparency International since 1995, shows that the corruption-free state is still considered a utopia. Germany, although it usually ranks remarkably well in comparison with some, has for the past 10 years scored only around 80 points out of a possible 100. In some respects, the fight against corruption can be likened to tilting at windmills, and we have observed that, in an effort to gain the upper hand, throughout Germany prosecution authorities have tended to pursue white-collar crime more frequently and have adopted a tougher stance. This is only logical, taking into account the huge damage that is suffered every year as a consequence of this crime. The International Monetary Fund estimates the damage resulting from bribery at up to US$2 trillion per year worldwide.\(^2\) Given how understaffed law enforcement authorities are, the fight against corruption appears to be an uphill battle, but legislation has extended and increased the scope of criminal liability for corruption in the past few years. This has considerably intensified the pressure on all parties involved. Most recently, the criminalisation of data-protection-right infringements has received lots of attention, and this is very likely to improve data transparency within companies. Furthermore, a gradual privatisation of the criminal prosecution process (e.g., compliance management, internal investigations, self-disclosure) is taking place. Self-regulation in the economic sector is about to become the most important pillar when it comes to triggering the prosecution of white-collar crime.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Overview

Under German law, the German Criminal Code (StGB) categorises three different forms of bribery and corruption, which are addressed by the following anti-bribery provisions:

\[a\]

Sections 299 to 302 – bribery in business dealings and the health sector;

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1 Sabine Stetter is managing partner and Stephan Ludwig is managing legal assistant at stetter Rechtsanwälte.

2 IMF Staff Discussion Note, Corruption: Costs and Mitigation Strategies, May 2016, referring to a publication by Kaufmann.
Sections 331 to 337 – bribery of public officials; and
Sections 108b to 108e – bribery in connection with elections.

Within these three areas, the law makes a distinction between active and passive bribery. The former is where the party supplies the payment or benefit, while the latter is the illegal receipt of the payment or benefit.

One important aspect of the StGB is the low threshold that is applied specifically to public officials, which increases the chances of criminal liability. This was put in place in an attempt to stop public officials being targeted for bribery. Nevertheless in all three areas cited above it is essential to prove that the parties agreed to enter into an illegal transaction.

A moot point is that the legislature has targeted anti-corruption in the public sector, but the exact scope of the term ‘public official’ is difficult to define. However, Section 11(1) No. 2 of the StGB attempts to include anyone who serves the state or can be defined as an extended arm of the state, so that state activities outsourced to companies can be governed by the code.

ii Gifts and gratuities
The StGB does not just apply to illegal financial inducements but extends to all forms of gifts, gratuities and invitations that the recipient is perceived to benefit from. Again, there is little tolerance regarding the actions of public officials (Sections 331 and 332 of the StGB) so that even hospitality of low value may incur criminal liability. The private sector is afforded some leniency in this respect.

In some cases, where gifts and gratuities are deemed socially acceptable, the law will take a slightly more relaxed stance. This causes some uncertainty as there is no official guideline that specifically addresses what constitutes ‘socially acceptable’ – €30 is seen as a threshold; beyond this, when inviting executives to cultural events, up to €100 is often considered adequate. Invitations to international sports events, such as football matches or the Olympic Games, may justify even greater amounts. However, the higher the amount, the more important the specific circumstances that will be thoroughly analysed by the jurisdiction (e.g., invitations extended to politicians during the FIFA World Cup 2006 in Germany). As this is, essentially, a judgement call that results in individual interpretation, many companies’ compliance regulations err on the side of caution by establishing a blanket prohibition on the giving and receiving of small gratuities.

Following the recent legislative reform, even socially acceptable benefits may be considered to satisfy the specific requirements, provided there is a benefit-motivated breach of duty within the meaning of Section 299 Paragraph 1, No. 2 StGB. Therefore, setting a general zero-tolerance limit in internal compliance guidelines is advisable.

iii Electoral bribery
Section 108e of the StGB governs the corruption and bribery of members of parliament. In addition to buying and selling votes, it is a criminal offence to propose, promise or grant any benefit or inducement to any member of a parliamentary assembly, municipal council, European Parliament, legislature of a foreign country, or indeed an assembly of
an international organisation, and to influence a member to vote for or against or abstain on a measure. Section 108e also incorporates passive bribery, where a member accepts an illegal inducement. Critics claim that these regulations were introduced too late and are not practical, since it is particularly difficult to prove the fact of ‘acting on behalf of or on the instructions of the benefactor’. In fact, although introduced in autumn 2014, the regulation has yet to lead to a significant number of investigations or even conviction of high-ranking officials.

However, in constructing Section 108e it has been recognised that many aspects of legislative work may be inhibited, as parliamentary proceedings involve a certain ‘trading’ of support to achieve consensus. As a result, an important stipulation has been added to the Section: for criminal sanctions to be applied, any giving or receiving of a benefit must be deemed ‘unjustified’. The Section accommodates recognised parliamentary custom and practice, as well as party donations that are permissible under administrative and electoral law.

With regard to donations for members of parliament and political parties, there are general limitations, such as the prohibition of anonymous donations of more than €500, the requirement of a notification to the President of the Bundestag in cases of donations of more than €5,000 and for publication of donations of more than €10,000.

### III ENFORCEMENT: DOMESTIC BRIBERY

#### i Institutional framework

The federal law relating to bribery and corruption in Germany applies across all 16 states. This universal application has some quirks as the actual enforcement of the law is the responsibility of the organs of the individual states. As a result, there is a somewhat piecemeal approach to enforcement. Some federal states have instituted units that have a specific focus on issues relating to the prosecution of white-collar crime.

In recent times, since the legislative reform became effective, additional specialised prosecution departments have been formed in some federal states, to follow up criminal offences in the healthcare sector in particular and to intensify the fight against corruption in this field. There are 115 regional courts in Germany and each one has its own prosecution office, which means there is a degree of uncertainty in relation to bribery and corruption proceedings. Prosecutors’ offices have divergent attitudes when it comes to what should be prosecuted and courts sometimes take conflicting views on the application of the law. It is therefore harder to make an objective assessment on the most likely outcome of a prosecution when considering all 16 states.

#### ii Plea-bargaining

German law does not have an established practice of plea-bargaining as such. Nonetheless, because of recent decisions emanating from the Federal Constitutional Court and the Federal Court of Justice, the practice of plea-bargaining has been put in the public eye. Owing to the occurrence of different negotiated bargains and the absence of a specific set of guidelines to regulate their establishment, the German government provided a set of rules in 2009 in Section 257c of the German Code of Criminal Procedure (StPO) to ensure the process has a degree of commonality.

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5 LobbyControl, Lobbyreport 2017, p. 35.
Fundamental to the rules is the stipulation that the court must receive a proposal, on the basis of which an agreement will be settled between the court, prosecution and defence. This agreement avoids any reference to an admission of guilt or innocence. Rather, the emphasis of the agreement is upon the criminal sanction to be applied to the defendant and under such an agreement it is normal to obtain a confession from the defendant. Section 257c of the StPO states that all discussions and resulting negotiations are to be set down for the public record. However, a number of first instance courts have been ignoring this new requirement, causing the higher courts to rule that where the requisite transparency is missing a concluded plea bargain would be illegal even though it has been effectively agreed by all sides.6 In its ruling of March 2013, the Constitutional Court further held that culpability or guilt is still not founded solely on confession. The confession is one part of the forensic process and has to be consistent with all other evidence placed before the court. Following that, in more recent rulings, the courts went to further lengths to clarify what constitutes a valid plea bargain under Section 257c of the StPO.7

To avoid the rather extensive stipulations of Section 257c of the StPO, the court at first instance has the option to take part in the procedure adopted under Section 153a of the StPO in agreement with the prosecutor and the accused. This is a special procedure where a case does not actually come to trial but rather is settled using other means, subject to the satisfaction of the authorities. This is usually in the form of restitution or payment of an agreed sum of money to the treasury or a non-profit organisation to conclude the proceedings. The latter is an established procedure, usually in relation to more minor offences, but it did acquire a certain notoriety when bribery proceedings against a British Formula 1 racing official were concluded in this way through the payment of an agreed sum. In this case it was quite a considerable amount (approximately €88 million), although this did not constitute a financial penalty or crime, or indeed judgment of criminal culpability. It is not only the scale of the payment that has provoked a discussion on the applicability of Section 153a, but also the anomalies in justice that the procedure might throw up. A bank official who accepted a payment made by the accused was punished with a lengthy prison sentence. Even though the court case was concluded more than four years ago it is still omnipresent and, in current discussions, serves as a prime example for concerns about this kind of arrangement during a trial.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

The scope of application of the German anti-bribery statutes was extended, especially on the European level, with effect from 26 November 2015. EU office holders, such as officials or civil servants of EU institutions, as well as other parties that carry out EU duties, are now explicitly covered under Section 11 paragraph 1, No. 2a StGB.

Substantial parts of the previously applicable EU Bribery Act and the Act on Combating International Bribery have to exist at the same time.

6 Federal Constitutional Court, judgment of 19 March 2013, 2 BvR 2628/10 et al.
V  ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

As in all developed nations, Germany imposes stringent requirements for accounting and financial reporting, which have been set up to preserve the confidence and security of equity holders. Higher demands are made on publicly listed companies. Accounting checks and auditing are conducted on a more stringent basis by public authorities and commercial auditors. Section 200 of the German Fiscal Code empowers the tax authorities to carry out thorough investigations and compels taxpayers to keep accurate and reliable accounts of commercial transactions. Poor bookkeeping and inaccurate ledgers, as well as funds that appear to have been inappropriately allocated or potentially employed for the purposes of corruption, arouse suspicion. Section 266 of the StGB provides that illegal allocation, potential use or actual use of funds for the purposes of corruption is a breach of trust against the company and its shareholders.

The criminalisation of money laundering is governed by Section 261 of the StGB. Concealing the origin of payments or the location of money and other assets originating from another predicate offence is a criminal offence itself. The predicate offences are often felonies (i.e., offences that are punishable by a custodial sentence of more than one year); however, certain listed offences may constitute a predicate offence for the purposes of the provision, such as fraud and embezzlement, as long as these acts were performed commercially or were committed by a criminal organisation. Based on the recommendations of the Financial Action Task Force and the Organisation for Economic Co-operation and Development (OECD), and with effect from the end of 2015, Section 261 StGB was tightened to penalise self-laundering to an even greater extent.

Money laundering is punishable by a prison sentence of three months to five years. Only in special circumstances may a fine be imposed as the sanction. It should be noted that even gross negligence with regard to the knowledge or ignorance of where the money or object originated from is sufficient to satisfy the specific requirements of Section 261(5) of the StGB.

On 26 June 2017 the legislature implemented the Fourth European Money Laundering Directive. The practical consequences are immense: a crucial threshold was lowered from €15,000 to €10,000, leading to a significant increase in potential money laundering transactions. In addition, there is a new transparency register that discloses the economic beneficiaries of, for example, legal entities or trusts. Broader duties were established for companies and members of the liberal professions to maintain money laundering risk management. Accordingly, there now exists an independent central authority to cope with suspect notifications that can act quickly, prohibit transactions and freeze bank accounts at short notice. The number of money laundering notifications is expected to increase rapidly owing to the extended application of the law together with a low degree of suspicion triggering the obligation to notify. Moreover, companies receiving corrupt money into their payment accounts run the risk of contaminating the entire account, thus qualifying every account activity as a potential act of money laundering.

VI  ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

It is a challenge to collect evidence for any bribery that has been committed on foreign soil. Likewise, when the keeping of proper records is lax it is difficult to defend against such a charge. In some developing countries only a bare minimum of record-keeping is
undertaken, and in those circumstances where sham invoices have been used or dubious service agreements concluded, the burden of proof is placed on defendants to validate their business purpose and to demonstrate the legitimacy of their transactions.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

As a member of the Group of States against Corruption that was set up by the Council of Europe in 1999, Germany is part of the international community that monitors states’ compliance with anti-corruption standards. Furthermore, Germany is a signatory to the following international treaties on anti-corruption:

- the OECD Anti-Bribery Convention;
- the United Nations Convention against Corruption;
- the United Nations Convention against Transnational Organized Crime; and
- the Council of Europe Criminal Law Convention on Corruption.

At the European level, the European Anti-Fraud Office (OLAF) is of particular importance. This body, among other things, is responsible for combating corruption within EU institutions and offices, and has been highly successful. Between 2009 and 2017, it concluded more than 2,000 investigations. In 2017 alone, OLAF recommended the recovery of over €3 billion to the EU budget. At the same time, OLAF was able to reduce the average duration per case to only 17.6 months, the lowest figure since its establishment, which is remarkable given the complexity and cross-border nature of the investigations.

VIII LEGISLATIVE DEVELOPMENTS

i Corruption in healthcare

The practice of pharmaceutical companies (particularly through their sales teams) of giving out complementary gifts and benefits to private practice doctors, by way of medical devices, junkets or other forms of award, has been under scrutiny for a considerable length of time. In March 2012, the Federal Supreme Court ruled that the provisions governing corruption did not extend to the aforementioned practice. The legislative authority, therefore, responded and introduced Sections 299a and 299b of the StGB, which have been in force since June 2016, governing bribery and corruption in the healthcare sector. The purposes of these are twofold: first, to provide regulations that will ensure fair competition in the healthcare sector, and second, to maintain patients’ confidence in decisions made by medical practitioners. This involves not only private medical practitioners, but also other professional healthcare service providers, such as dentists, pharmacists, psychotherapists and nurses. Numerous cooperative practices – as used in the past by pharmaceutical companies and medical professionals, for example – became illegal with this change in the law. Consequently, the courts will have to determine where the exact borderline between legal and illegal cooperation can be drawn over the coming years. So far, there has been no decision by the Federal Supreme Court that further clarifies the new provisions. Nevertheless, several investigation proceedings are pending and might lead to higher court decisions. Investigations seem to develop slightly more slowly than other corruption investigations. One reason might be that phone tapping would be an unlawful determination method in view of the particular relationship of trust between doctor and patient.
Another issue that has been under scrutiny recently is the practice of politicians and senior public officials transferring to rewarding positions in the private sector. Although this occurs relatively infrequently in Germany, instances where top politicians and secretaries of state have moved into senior positions in business have been widely reported in the press and subsequently frowned upon. As a result, new legislation was introduced, which entered into force in July 2015. It stipulates a transition period of between 12 and 18 months before current and previous members of the government who wish to move out of public service can take up positions in the commercial or private sectors. Current or previous members are also obligated to notify the government about their intentions to move elsewhere. This provides the government with the option of disallowing the request, thereby leading to considerations of monetary compensation should an official be denied approval to take up a post.

The law provides that in the first instance an independent panel should review the position change and pass on its recommendation to the government. Recently, the former Federal Minister for Foreign Affairs Sigmar Gabriel made it into the headlines, because of his intention to become a member of the administrative board of a major European train manufacturer. The panel agreed to his plans on the understanding that he would adhere to the required grace period of 12 months. Critics argue that the period should be much longer, especially if, as in the case of former minister Gabriel, the duties of the former government official are related to the economic activities of the future employer.

iii Reform of private sector bribery offences

In the course of combating corruption in Germany an amendment entered into force on 26 November 2015, modifying the central provision for corruption (Section 299 StGB). By changing both the content and the scope of its application, the provision has been extended significantly. A key innovation was the introduction of the ‘employer model’, on the basis of which it is a criminal act to offer, promise or grant (and the same for passive bribery) an employee or agent of an enterprise a benefit for himself or herself or another ‘for violating his duties vis-à-vis the enterprise’ while procuring goods or commercial services.

The new approach is particularly relevant in terms of practical application in that now even socially acceptable gifts and invitations – which in itself provides a reasonable scope – can be criminally relevant, where offered or otherwise expressed to induce or in part motivate the carrying out of breaches of duty. Furthermore, lawmakers extended the area of applicability of German law with regard to the bribery and corruption of German and European officials. In this respect, German law can now apply, irrespective of the crime location and, under certain circumstances, irrespective of the nationality of the offender. Notably, by extending the application of Sections 331 and 333 StGB in relation to accepting or granting an advantage, the formerly unpunished payment of ‘accelerated fees’ or bribes to European officials is now punishable. In the light of these changes in the law, numerous companies and institutions have fundamentally revised their compliance policies.

iv Corporate criminal liability

As yet, the principle of corporate criminal liability does not exist under German law. German law provides for corporate liability from the aspect of administrative law rather than criminal law. This is constituted under the Administrative Offences Act (OWiG) and considers corporate liability upon company leadership for gross negligence or wilful misconduct if they disregard their duty to prevent their employees engaging in criminal activity (Sections 30 and
Financial penalties can be significant, assets can be seized and accounts for profit made. For example, in the aftermath of ‘Dieselgate’, Volkswagen had to pay €1 billion to the federal state of Lower Saxony (this amount consisted of the maximum financial penalty of €5 million plus a confiscation amount of €995 million).

However, the options that German law currently provides are exploited differently by the public prosecutors responsible. In practice, there is a certain legal inequality throughout the country, which is therefore open to criticism. In the coalition agreement, the current administration states that regulation of corporate criminal liability is considered a priority for this legislative term. The sanctions are intended to be turnover-oriented and shall be accompanied by legislation governing internal investigations and public release of the investigation findings. This has stimulated debate and there is currently growing interest in drafts that already exist for such legislation.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

In the context of the implementation of the Fourth European Money Laundering Directive, EU Member States are required to introduce dedicated central authorities to control financial transactions. Germany has built up a Financial Intelligence Unit (FIU) reporting to the Ministry of Finance, which commenced operations on 1 July 2017. The Unit collects and analyses suspect notifications about financial transactions associated with money laundering or terrorist financing, but to date, the FIU has struggled to meet expectations, because of the very high number of cases, technical difficulties and limited staff.

In addition, on 1 July 2017 a law entered into force reforming the criminal rules on disgorgement. Disgorgement is designed to enable public authorities to effectively confiscate undue profits. As German law does not provide punitive damages, disgorgement is one of the major deterrents against white-collar crime. This law addresses gaps concerning disgorgement and aims at improving the authorities’ abilities to act by reducing bureaucratic barriers.

X COMPLIANCE

i Corruption structures

The following two types of corruption are generally identified: situational corruption and structural corruption.8 Situational corruption occurs primarily in single cases where the participants often do not know each other and where the benefits attained are of relatively low value. Often this type of corruption is not planned and does not repeat itself. However, structural corruption is distinguished by its planned method, high degree of organisation and occurrence on a repeat basis. Indeed, the development over a long period of corrupt relationships that ultimately include numerous companies and individuals is not uncommon.

In Germany, known cases almost exclusively concern structural corruption. According to the federal status index of the German Federal Office of Criminal Investigation, in 2016 about 20 per cent of criminal connections between givers and receivers lasted for more than two years.9 In 66 per cent of all known cases receivers were public officials. Today,

8 See Bannenberg, Handbuch des Wirtschafts- und Steuerstrafrechts (2014), Chapter 14, point 7.
criminal investigation authorities are reliant on corporations’ own compliance systems and whistle-blowing. In 2016, almost half of all legal proceedings in this regard were instigated on the basis of the receipt of such information.

ii Public enterprises

For publicly owned companies, compliance procedures are of particular importance, as they often operate in commercial areas in which there is little or no competition; for example, water supply, healthcare establishments and public transport companies. On the one hand, there is naturally a latent risk of abuse with types of monopoly position, while on the other hand, public companies can easily find themselves victims of price-fixing when the market for the services to be purchased is very small. Additionally, when there is a compliance offence then there is a further dimension of damage, namely the resultant political fallout. To take account of these risks, the Public Corporate Governance Codex (PCGK), which also contains compliance principles, was instituted in 2009. This Codex, containing a number of recommendations and proposals, was introduced at a federal level and reflects the current statutory position. Furthermore, while no new ‘hard law’ was actually introduced, the impact of these guidelines has been considerable. As is shown by the German Corporate Governance Code (which is the Code in the commercial sector that corresponds to the PCGK), most companies strive to follow the recommendations as this is a reflection of how a company sees itself, and the improved public image and fulfilment of these requirements constitute a form of quality seal. Additionally, the comply-or-explain principle applies to the Code regulations, so companies that do not follow the Code’s recommendations must disclose their variances annually and justify them accordingly. The political dimension is particularly pertinent when public companies are found to be at fault, and the importance of the PCGK should not be underestimated. Equally, the juxtaposition of parallel codes generated at the federal, state and municipal levels merits important consideration, as these are often very different from each other and can vary greatly in detail.10

XI Outlook and Conclusions

Corruption is difficult to pin down, especially when it comes to hard facts about improvement or deterioration, but in terms of efforts undertaken to fight corruption, the trend appears to be very positive. To date, 97 per cent of companies with more than 10,000 employees have implemented a compliance management system (CMS), and most companies identify the fight against corruption as one of the main purposes of their CMS.11 This surely is in the best interest of the company, and particularly so as the Federal Supreme Court has ruled that the implementation and effectiveness of a CMS can be lent weight by courts, leading to harsher or reduced sentences.12 Of course, companies and law enforcement authorities have to ask themselves how, for example, a scandal such as Dieselgate could remain undetected for

12 Federal Supreme Court, decision of 9 May 2017, 1 StR 265/16.
so long despite the existence of compliance programmes concerned with internal technical auditing and encouraging whistle-blowers to contact ombudspersons, and there is certainly room for improvement.

The importance of data protection as part of a company’s CMS has also grown and is still growing rapidly. Data protection has to be taken very seriously and treated like every other aspect of compliance to avoid substantial fines. In one further sign of the notable trend towards the privatisation of criminal prosecutions, regular ‘employee screenings’ are becoming standard in those business areas susceptible to corruption. Today, we have probably already arrived at the point where legislators, prosecutors and companies share equal responsibility for getting to the bottom of structural corruption.
I INTRODUCTION

Investigation of corruption and bribery represents an important part of the prosecuting and investigating authorities’ activity in Greece. The use of international and domestic legal instruments against corruption, bribery and money laundering has significantly improved the efficiency of prosecution in such cases.

The latest legislative amendments have made a series of changes to the way that cases of corruption are prosecuted and investigated. There has also been an important legislative update with a view to unification and consolidation of various provisions in special legislation, and these changes have been included in the Greek Criminal Code (GCC). In addition, steps have been taken to encourage involved persons to disclose information in return for lenient treatment and protect material witnesses from possible liability or prosecution with respect to the facts they expose to the authorities (handling of privileged information, defamation liability, etc.).

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Bribery is prohibited under Greek law. Gifts, benefits, payments or favourable conduct linked with the duties of a public official are criminal offences.

A public official is a person who is assigned public duties either permanently or occasionally and may be working in any service within the public sector. Mayors and managers of public or semi-public organisations are also categorised as public officials.

In principle, public officials are not allowed to be involved in commercial activities. The Code of Conduct for public servants allows some types of activity outside the service following special permission as long as this activity does not interfere with or contradict the official’s duties.

The basic elements of bribery as a criminal act are described in the GCC in Articles 235 (passive bribery) and 236 (active bribery). These provisions deal with bribery of (domestic and foreign) public officials. The punishable act of bribery is understood as the request or receipt directly or indirectly through third persons in favour of oneself or others of benefits of any nature, or accepting a promise of such benefits to act or omit to act in the future or for acts that have already been performed or omitted to be performed, with regard to public duties or contrary to these duties. The wording of the text is broad enough to cover

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1 Ilias G Anagnostopoulos is the managing partner and Jerina (Gerasimoula) Zapanti is an attorney-at-law at Anagnostopoulos.
most types of questionable transactions with public officials. It should be noted that the provisions on passive bribery are not applicable to acts within the scope of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention), which provides only for acts of active bribery.

There is also a special provision in Article 237 of the GCC on bribing a judge. The punishable act is described as the request or receipt of gifts or benefits to conduct or decide a case in favour of or against someone.

The above provisions (Articles 235, 236, 237 of the GCC) are applicable to acts of bribery related to both domestic and foreign public officials by virtue of the newly amended Article 263a of the GCC, which has included all foreign public officials included in international instruments ratified by Greece.

Private commercial bribery is prohibited by Article 237B of the GCC. Private commercial bribery is the acceptance or receipt directly or indirectly of any benefit during the exercise of a commercial activity in breach of their duties or the giving or offering of benefits directly or indirectly to a person in the private sector for the purposes of acting or omitting to act in breach of their duties.

Special legislation on funding of political parties (Law 3023/2002) provides for the requirements and restrictions in making payments, contributions or donations to political parties or candidates. Individuals who do not have Greek nationality are not allowed to make donations and contributions to Greek political parties (although this prohibition does not apply to foreign legal entities).

Penalties for acts of bribery depend on the seriousness of the offence. If the act (passive or active bribery) is characterised as a misdemeanour, it is punishable with imprisonment (of at least one year and up to five years) and pecuniary sanctions. Pecuniary sanctions in the event of a misdemeanour range between €5,000 and €50,000. If the act of passive bribery is committed by a person by profession or habitually and the benefit or gain is of high value (thus characterised as a felony), it is punishable with a sentence of incarceration of up to 10 years and pecuniary sanctions ranging from €10,000 to €100,000. If the act of passive bribery is committed by an official in breach of his or her duties (felony), the act is punishable with incarceration for up to 10 years and pecuniary sanctions ranging from €15,000 to €150,000. If the act of passive bribery is committed in breach of duty and habitually or the gain or benefit is of high value, it is punishable with incarceration of up to 15 years and pecuniary sanctions ranging from €15,000 to €150,000.

As regards active bribery, if the act is a misdemeanour, it is punishable with imprisonment of one to five years and pecuniary sanctions ranging between €5,000 and €50,000. If the act of active bribery is related to an official’s act in breach of his or her duties, the act is punishable with incarceration for up to 10 years and pecuniary sanctions ranging between €15,000 and €150,000. Bribery in the private sector is always considered a misdemeanour, punishable with a sentence of imprisonment from one year to five years.

Legal entities that have gained or benefited from acts of active and passive bribery are liable. Sanctions against them are fines, temporary or permanent suspension of activity, prohibition from exercising specific activities, temporary or permanent ban from public tenders, etc.

Acts of passive or active bribery against the financial interests of the state are considered an aggravating factor, thus the penalty may be 20 years’ imprisonment or even a life sentence.
In general, gifts, travel expenses and gratuities may be considered suspicious; however, most private corporations dealing with the public sector have set quantitative and qualitative thresholds for these types of interaction.

III  ENFORCEMENT: DOMESTIC BRIBERY

The Prosecutor’s Office is the authority that initiates criminal proceedings in all cases. The role of anti-corruption and anti-bribery prosecutor – a special prosecutorial authority – has also been established. This prosecutor is based in the Court of Appeal of Athens and is responsible for coordinating all investigations dealing with bribery and corruption offences. The offences are investigated by a group of judges (as stipulated by Law 4022/2011) who are assigned exclusively to bribery and corruption cases, and who utilise all information that can be retrieved by the Financial and Economic Crime Unit (FECU), the Hellenic Financial Intelligence Unit (FIU), etc. In addition, there are special provisions and proceedings aimed at shortening the time needed to conclude investigations and refer such cases to trial. The current legal framework gives the prosecutor for acts of bribery and corruption, as well as the investigating judges of Law 4022/2011, extensive powers in terms of gathering evidence and seizing of property, and almost unlimited access to privileged information (tax records, bank records, stock market transactions, etc.).

IV  FOREIGN BRIBERY: LEGAL FRAMEWORK

With Law 3560/2007, Greece ratified the Council of Europe Criminal Convention on Corruption. The latest legislative amendments have included foreign officials in the provisions of active and passive bribery applicable to Greek public officials as well. According to the amended article of the GCC, which gives the definition of a public official (Article 263, Paragraphs 2a and 3):

2. For application of articles 235 par. 1 and 2 (note: passive bribery) and 236 (note: active bribery) public officials are also considered to be:
   - officers or other employees in any contractual status of every public international or transnational organisation of which Greece is a member as well as every person empowered by such an organisation to act on its behalf;
   - members of parliamentary assemblies of international or transnational organisations of which Greece is a member;
   - all persons exercising judicial duties or arbitration duties for international courts whose jurisdiction is recognised by Greece;
   - any person acting as an officer or in service of a foreign country, including judges, jurors and arbitrators; and
   - members of the parliament and local governments’ assemblies of foreign states.

3. For application of article 237 (note: bribery of a judge) judges are also considered to be the members of the European Court of Justice and the European Court of Auditors.

The provisions on gifts, travel expenses, gratuities, etc. with regard to foreign officials are no different from those applicable to domestic public officials. There are no specific provisions on what can be considered acceptable. Each case is considered individually based on common
experience, custom, other characteristics of the transaction (e.g., long-term cooperation), etc. Money laundering provisions may apply if payments are linked to questionable conduct (e.g., proceeds of a criminal act).

Facilitating payments are prohibited directly or indirectly. The wording of Articles 235 and 236 of the GCC on passive and active bribery respectively cover gifts or financial benefits given in a direct or indirect way in favour of the perpetrator or others. There is special reference to intermediaries to a bribe; thus intermediaries and third parties may be held equally criminally liable for bribery or corruption. All payments and expenses must be duly justified and relevant documentation must be kept with the tax records of the company, otherwise the payments might be considered questionable (gifts, benefits, etc.). Furthermore, these types of payments may raise questions as to their validity with respect to tax regulations and tax criminal law (especially in relation to Article 66 of the Taxation Code on registration of a fictitious or false transaction in tax records).

Only natural persons may be held criminally liable under Greek law. Legal entities may not be held criminally liable. However, after ratification of the OECD Anti-Bribery Convention with Law 2656/1998 and other international instruments as well as all updating relevant legal framework in respect to money laundering, specific provisions on sanctions against legal entities that benefit from acts of bribery of foreign public officials are in force. These sanctions take the form of administrative fines. As legislation on matters of bribery and corruption continued to evolve (in 2007 and 2008 with the ratification of the main conventions against corruption) it has become standard to include corporate liability (legal entity) for acts of bribery, usually in the form of administrative sanctions. There are also provisions for debarment from public tenders, suspension of participation in subsidies programmes, etc. The main criterion for imposing these penalties is the gaining of benefits, gifts or privileges through the acts of the individuals that may be held liable for a criminal act and subject to traditional penal punishments (e.g., imprisonment), and it covers all acts, whether they are acts of the main perpetrators or intermediaries or instigators.

Greece is also a party to the Council of Europe Civil Law Convention on Corruption (Law 2957/2001). By virtue of the relevant provisions, an individual or a legal entity may exercise its rights in accordance with Greek civil law and seek compensation or request the annulment of an agreement that has been the result of an act of bribery and also ask for protection of civil servants from disciplinary punishments because they reported corrupt practices to higher officials.

Corruption cases are investigated by the investigating judges of Law 4022/2011, when conducting a main investigation. In the first stages of preliminary inquiries, the prosecutor for acts of corruption conducts a preliminary inquiry and may request the assistance of any enforcement agency such as the FECU or the Hellenic FIU (the authority investigating money laundering acts). The latter gathers information on suspicious transactions or sudden changes in the financial status of individuals and entities, etc. The FIU is not entitled to act as an investigating authority. It collects evidence or information on suspicious transactions or possible misconduct and forwards this information to the Prosecutor’s Office for further actions. There is also a provision for a special office of experts that will assist the prosecutor in his or her work. The prosecutor against bribery and corruption performs all necessary preliminary investigations (including questioning of witnesses or suspects, audits, gathering of information from financial records, cooperation with foreign authorities through mutual assistance proceedings).
The amended Article 263B of the GCC provides for leniency measures applicable to perpetrators of active and passive bribery, and bribery in the private sector. Depending on the type of contribution to the exposure of acts of corruption by the perpetrator or accessory to the acts, and depending on the quality of information given and the procedural stage at which this information is provided to the authorities (e.g., before or after criminal proceedings have opened), individuals disclosing vital information are eligible either to receive a lesser sentence (which could be as low as one to three years – which is not serviceable) or to be granted a suspension of criminal proceedings against them by virtue of a decision of the indicting chamber. Moreover, perpetrators of both active and passive bribery, as well as those participating in the laundering of the bribes, may benefit from leniency measures if they offer evidence of participation in these offences by acting or former ministers.

As regards legal entities, there is no general provision for leniency but such provision can be found in special laws (e.g., in relation to cartel offences). In any event, exposing corrupt practices may serve as mitigating circumstances in the course of the administrative procedure that imposes a fine on the company.

Greek law does not include general rules on plea-bargaining procedures. This is partly due to the status of the prosecutor, who is not considered to be a party to the proceedings but has the obligation to gather both incriminating and exonerating evidence for the suspects. The defendant may plead guilty (wholly or in part) on his or her own initiative if he or she considers this to be a good defence strategy, or deny the charges against him or her. The defendant does not have the right to a nolo contendere plea.

There is no legal basis for prosecuting foreign companies for bribery of foreign officials as there is no criminal liability of a legal entity (only liability in the form of administrative fines and penalties, civil sanctions, etc.). The Prosecutor’s Office may decide to open proceedings against individuals working with foreign companies provided that there is some connection either with domestic public officials (e.g., a foreign company bribing Greek officials) or intermediaries, accessories, etc. that have acted in Greece, and their conduct facilitated bribes to foreign or domestic public officials.

The basic penalties for violation of foreign bribery law – with respect to individuals – are the same as bribery of domestic public officials and range from imprisonment for up to five years (for misdemeanours) to imprisonment for up to 10 or 15 years (for felonies).

Sanctions against legal entities that have gained or benefited from acts of corruption are fines, temporary or permanent suspension of activity, prohibition from exercising specific activities, temporary or permanent ban from public tenders, etc.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

Companies (and individuals if applicable) are required to register all transactions with their books following certain rules, which aim to make all transactions readily and duly traceable. The basic set of laws and regulations regarding proper registration of transactions are the Code of Registration of Tax Records, the Code of Taxation and the Law on Money Laundering (Law 4557/2018, which made amendments to anti-money laundering legislation to comply with EU Directive 2015/849). In addition, the Administration (i.e., the Ministry of Finance) and other regulating authorities such as the Bank of Greece periodically circulate sets of guidelines on compliance issues. As a general rule, corporations have the obligation to file financial statements with the Revenue Service annually and publish their balance sheets.
every year, after external auditing has taken place. Auditors, internal or external, have the obligation to certify that what is stated in the company’s books is accurate to the best of their knowledge and properly registered. This is signified by the fact that the auditors co-sign the annual financial statements.

Major reforms have taken place in tax legislation, which have affected financial record-keeping. In addition, the competent tax authorities have undergone restructuring to enable speedy and efficient review of entities’ and individuals’ financial records.

There is no explicit provision for disclosing of violations of anti-bribery legislation. Specific provisions do exist in money laundering regulations (for certain categories of individuals and entities), compliance and internal audit control for exposing or reporting irregularities related to financial records’ irregular registration or suspicious transactions. It is not always clear to individuals who is under a legal obligation to monitor transparency standards and corporate ethics, and to what extent, and under what circumstances they must come forward and report internal (corporate) irregularities or failure to comply with set rules and regulations to the authorities. The Ministry of Finance is circulating various guidelines with regard to record-keeping and money laundering detection, primarily to chartered accountants and auditors. These guidelines detail the obligations for these professionals to report acts of tax evasion and money laundering if they come across these practices while performing their duties. Corporate tax and financial records are proof that a transaction is properly registered and is not related to questionable conduct of any type. Improper registrations, differences between registration and payments, insufficient documentation or failure to indicate the reason the transaction was executed may initiate an investigation by the competent authorities. It is not unusual to find indications of improper payments (and payments related to acts of corruption) by performing a thorough search in tax registrations. During an audit all transactions are examined for their validity and are cross-referenced to bank account records and supporting documents. A financial audit by the authorities may lead to the collection of evidence from other jurisdictions, disclosure of unknown or unregistered assets, etc. Evidence from the financial records of a company may contribute to the opening of a case of corruption or even provide evidence on transactions related to such a case. Tax offences and violations are prosecuted separately from any criminal case of corruption.

Transactions related to bribes would be characterised as fictitious (i.e., registration and reason for payment do not correspond). Such a transaction would also be suspicious under money laundering laws and regulations. Sanctions for tax violation include annulment of the book registers (resulting in recalculation of the company’s income as if the registered transactions did not exist), fines and imprisonment of individuals with managerial duties for up to 10 years (for amounts over €200,000). The state may freeze assets pending resolution of the taxation dispute to avoid future loss through being unable to collect the fines.

Bribes are transactions prohibited by law and as such they cannot be registered with the company’s financial records.

The main elements of anti-money laundering law are a definition of the acts of money laundering; a description of the predicate offences, the proceeds of which fall within the scope of money laundering regulations; the jurisdiction of law enforcement agencies to apply the law; a list of the natural persons and institutions covered by law; provisions for asset freezing, search, confiscation and seizures; administrative and criminal sanctions; and coordination of all money laundering-related functions of competent authorities.

Bribery (active and passive) of domestic and foreign public officials is a predicate offence according to the Greek legislation on money laundering. Bribery of foreign officials is a predicate offence in relation to the provisions of the OECD Anti-Bribery Convention, the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, and the Convention on the Protection of the European Communities’ Financial Interests.

Sanctions for acts of money laundering depend on the severity of the act, who has committed the act and under what circumstances, and, on some occasions, the type of predicate offence. Natural persons are faced with imprisonment and a fine. Legal entities face penalties such as a fine with temporary suspension of activities or debarment from public tenders. For predicate offences that are misdemeanours, the money laundering act is punishable with imprisonment of at least one year (maximum sentence five years) and a fine ranging from €10,000 to €500,000. For predicate offences that are felonies, imprisonment (of individuals) ranges from five to 10 years. A fine is also imposed ranging from €20,000 to €1 million. If the convicted person was an employee of an ‘obliged entity’, the range of the fine is between €30,000 and €1.5 million. If the convicted person is involved in acts of money laundering by way of profession or has committed acts of money laundering repeatedly or within an organised crime or terrorist group, the act is punishable with imprisonment of at least 10 years and up to 20 years, and a fine ranging from €50,000 to €2 million.

Money laundering legislation and procedures – especially information gathered by the Hellenic FIU – has proved to be a very useful tool in exposing cases of corruption and bribery of public officials. In practice, both acts (predicate offence and money laundering act) are prosecuted together unless the predicate offence may not be prosecuted because of the statute of limitations, in which case the money laundering act is prosecuted independently.

All covered institutions and individuals are required to report without delay suspicious transactions for amounts over €15,000 to the FIU. There is also a specific provision for increased due diligence on politically exposed persons, their associates and their kin for the purposes of verifying in the best possible way the sources of their money or assets.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There are currently no high-profile cases of bribery of foreign officials under investigation. The legal provisions in Law 3560/2007 (as currently in force) give the prosecuting authorities (the Prosecutor’s Office and the FECU) many powers to bring such cases, not only locally, but also internationally, with the use of mutual assistance procedures extending these powers to other jurisdictions.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Greece has signed and ratified all major conventions on combating corruption both on an international and European level. With Laws 2656/1998, 3560/2007, 3666/2008 and
3875/2010, Greece has ratified the OECD Anti-Bribery Convention, the Criminal Law Convention on Corruption (by the Council of Europe), the UN Convention on Combating Corruption and the UN Convention against Transnational Organized Crime. In addition, Greece is a signatory to the Convention on the protection of the European Communities’ financial interests (Law 2803/2000) and the Convention against Corruption (involving officials of the European Communities or officials of Member States of the European Union, Law 2802/2000). The provisions of these conventions are applied in combination with the basic legislation on bribery and corruption (as depicted in the GCC). With the exception of the OECD Anti-Bribery Convention (which deals with active bribery only), all other international instruments apply in cases of active and passive bribery alike. All provisions on bribery and corruption are usually combined with the application of anti-money laundering legislation, especially at the stage of detection, investigation and evidence gathering.

VIII LEGISLATIVE DEVELOPMENTS

There has been a systematic effort to speed up and facilitate investigation and trial of cases of corruption through changes to various aspects of both criminal and civil law. Some of these changes have proven not completely compatible with existing criminal and civil procedures; thus, several issues have arisen in practice. Legal amendments were made for the purposes of prosecuting and investigating corrupt acts following a different set of procedural rules, which on the one hand enable the authorities to prosecute and investigate corruption cases more efficiently, but on the other hand have given rise to criticism and scepticism about the impact of these provisions on defendants’ procedural rights and long-established investigation practices in relation to privileged information, bank secrecy, etc. Along with the core anti-corruption legislation (GCC provisions combined with the provisions of Law 4022/2011), amendments were also made to the anti-money laundering legislation and legislation against financial and economic crimes (especially tax evasion and tax fraud). All these amendments have given the supervising prosecuting authorities extensive powers not only to gather information and investigate on suspicion of misconduct but also to freeze and confiscate all types of assets.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Certain categories of officials or public figures (politicians, government officials, high-ranking public officers, etc.) have an obligation to file statements of personal wealth (Law 3213/2003). These annual statements aim at detecting sudden or unjustified changes in the financial status of these individuals, which may signal possible corrupt practices. Article 4 of Law 3213/2003 stipulates that an individual who takes advantage of his or her capacity or position to obtain undue profits or advantages is punishable with imprisonment and a pecuniary sentence (tariffs vary according to the seriousness of the act).

Acts that may be considered acts of corruption may also be punishable under specific legislation (funding of trade unions, crimes against the state, etc.). Where this is the case, these other offences may be prosecuted separately, regardless of possible prosecution on the basis of corruption legislation, or they may not be prosecuted at all (e.g., when the other crime is of less importance or is punishable only in the absence of a prosecution for a more serious crime).
Law 4412/2016 has integrated EU Directives 2014/24/EU and 2014/25/EU setting rules in relation to public tenders. Among the provisions of the Law is the exclusion of financial operators from participation in procurement procedures if there has been a conviction for acts of bribery.

X  COMPLIANCE

A comprehensive compliance programme may be very effective in detecting and exposing corruption acts in all kinds of financial and economic activities. Although connected primarily to anti-money laundering legislation, the latest guidelines from supervising and regulating authorities make special reference to acts of bribery and suggest ways of adjusting compliance programmes to the requirements of anti-corruption legislation. Guidelines have been given to all financial institutions (through the Bank of Greece or the Hellenic Capital Market Commission) and certain categories of professionals such as lawyers and notaries (through their associations). The Ministry of Finance also circulates guidelines on compliance programmes on a regular basis.

While any compliance programme, no matter how sophisticated, may fail to detect a bribery scheme at the outset, it may, nonetheless, be the means for exposing such a scheme. Although not expressly stated in the relevant provisions, the existence of a comprehensive compliance programme may help a company or corporation reduce the risk of strict penalties, and may even provide a means to avoid administrative or regulatory fines.

XI  OUTLOOK AND CONCLUSIONS

The office of the anti-corruption prosecutor is actively pursuing cases of corruption involving public officials. The Prosecutor’s Office has proceeded with targeted investigations into corrupt practices within the public sector, especially in the health sector (pharmaceuticals and hospital costs) and in the construction field (infrastructure projects realised through public tenders). The Prosecutor’s Office has made extensive use of the instruments provided by law (i.e., the resources of the FECU, Financial Police and FIU) to detect money, assets and changes in the financial status of individuals under investigation, as well as the processing of large volumes of data seized during dawn raids. On some occasions, however, use of measures such as searches and confiscations may become disproportionate to the scope of the investigation. This is especially so in circumstances where assets have been frozen and remain frozen for long periods, even in cases where the progress of the investigation does not indicate a direct link between the frozen assets and the acts under investigation.
HONG KONG

Kareena Teh

I INTRODUCTION

Hong Kong has a long and successful history of fighting corruption, evident in the recent high-profile convictions of the former Chief Secretary for Administration of the Hong Kong Government Rafael Hui Si-yan and former Chief Executive Donald Tsang Yam-kuen. Hong Kong’s bribery laws date back to as early as 1898, when bribery was first made an offence under the Misdemeanours Punishment Ordinance (MPO) enacted in 1898, and then in the Prevention of Corruption Ordinance, which replaced the MPO in 1948. Since 1971, the main anti-corruption legislation in Hong Kong has been the Prevention of Bribery Ordinance, Chapter 201 (POBO), which targets both official and commercial bribery. The POBO is enforced by the Independent Commission Against Corruption (ICAC), an independent body established in 1974, just a few years after the POBO came into force. The ICAC is accountable only to Hong Kong’s Chief Executive, led by a Commissioner who is directly appointed by the Chief Executive, and as of the end of 2017, it has a force of 1,386 employees or officers. It has been and remains an integral part of Hong Kong’s fight against corruption and is one of the main reasons that Hong Kong enjoys a reputation as one of the least corrupt places globally (currently ranked 13 out of 180 countries on Transparency International’s 2017 Corruption Perceptions Index).

II DOMESTIC BRIbery: LEGAL FRAMEWORK

i Definition of a bribe

The POBO does not, despite its name (Prevention of Bribery Ordinance), include in its enumerated offences the term ‘bribe’, nor does it define it. Instead, it proscribes the offering, soliciting or accepting of an advantage, which is defined in Section 2 to cover:

a any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;

b any office, employment or contract;

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1 Kareena Teh is a partner at Dechert. The author would like to thank Crystal Chan, who was a trainee with Dechert, for her assistance with this chapter.
3 See Article 57 of the Basic Law of the Hong Kong Special Administrative Region.
any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

any other service or favour (other than entertainment; see Section II.iv);

the exercise of or forbearance from the exercise of any right or any power or duty; and

any offer, undertaking or promise, whether conditional or unconditional, of any advantage as set out in (a) to (e).

The offences

The POBO includes a range of offences governing both the public and the private sector:

Under Section 3 of the POBO it is an offence for prescribed officers (see further explanation in Section II.iii) to solicit or accept an advantage without the general or special permission of the Chief Executive.

Under Section 4 of the POBO it is an offence to offer an advantage (without lawful authority or reasonable excuse) to a public servant or the Chief Executive for the performance of an act (or for abstaining from the performance of an act) in their official capacity or to influence the transaction of any business with a public body. It is also an offence under Section 4 of the POBO for any such public servant or the Chief Executive to solicit or accept such an advantage.

Under Section 5 of the POBO it is an offence to offer an advantage (without lawful authority or reasonable excuse) to a public servant or the Chief Executive for assistance in influencing the promotion, execution or procurement of any contract with a public body or the payment of moneys provided in such a contract. It is also an offence for a public servant or the Chief Executive to solicit or accept an advantage under the same circumstances.

Under Section 6 of the POBO it is an offence for any person (without lawful authority or reasonable excuse) to offer, solicit or accept an advantage as a reward for the withdrawal of a tender for any contract with a public body.

Under Section 7 of the POBO it is an offence for any person (without lawful authority or reasonable excuse) to offer, solicit or accept an advantage as a reward for refraining from bidding at any auction conducted by or on behalf of any public body.

Under Section 8 of the POBO it is an offence for any person (without lawful authority or reasonable excuse) to offer an advantage to any prescribed officer of the government or public servant employed by such a public body while having dealings with the government or public bodies.

Section 9 of the POBO covers bribery of agents and is most commonly relied on by the ICAC in its enforcement of the POBO because of its broad scope. Under Section 9 it is an offence to offer to an agent (without lawful authority or reasonable excuse), and for the agent to solicit or accept (without lawful authority or reasonable excuse), an advantage for doing (or forbearing to do) any act or showing favour or disfavour to any person in relation to the business of that agent’s principal. Because of the broad nature of the term ‘agent’, Section 9 of the POBO applies to the bribery of public officials (where it functions as a catch-all clause for the specific conduct that is not already covered by Sections 3 to 8) as well as to commercial bribery (see further explanation in Section II.x).

Under Section 10 of the POBO it is an offence for prescribed officers and the Chief Executive (current or former) to maintain a standard of living or be in control of pecuniary resources or property that is disproportionate with their present or past emoluments and that cannot be satisfactorily explained.
For all the POBO offences it is irrelevant whether the improper conduct (for which the advantage was offered, solicited or provided) was undertaken or not – according to Section 11 of the POBO, it is not a defence to liability under the POBO that the recipient of the bribe had no power or right to undertake the relevant conduct, never intended to undertake the relevant conduct or did not undertake the relevant conduct: liability arises so long as the recipient of the bribe believed that the bribe was given as an inducement for his or her undertaking the requested conduct.

In addition to the various POBO offences, there is also the common law offence of misconduct in public office that applies where a public official deliberately misconducts himself or herself in relation to his or her public office without any reasonable excuse. The misconduct has to be serious for charges to be laid.

### Public officials

Public officials under the POBO are divided into three distinct categories:

- Prescribed officers who according to Section 2(1) of the POBO include mainly persons holding an office of emolument in government, officials of the Monetary Authority, members of the ICAC, judicial officers and the Chairman of the Public Service Commission in Hong Kong.
- Public servants who according to Section 2(1) of the POBO include prescribed officers and employees of public bodies in Hong Kong.
- The Chief Executive of Hong Kong.

While Sections 4, 5 and 8 of the POBO have a wider scope and apply to public servants, Sections 3 and 10 are more specific and apply only to prescribed officers. Further, Sections 3 and 8 of the POBO currently do not apply to the Chief Executive. This loophole was identified by the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests in its report issued in May 2012. As of August 2018, the government still does not have a specific date for introducing the amendment bill on POBO, as it is still studying the relevant constitutional and legal requirements, and operational issues in extending the application of Sections 3 and 8 to the Chief Executive.

### Gifts, travel, meals and entertainment

The definition of advantage under the POBO is very wide and covers gifts and travel. In addition, there is no *de minimis* exception excluding payments or gifts of small amounts. As such, any gift or payment for travel for any agent (whether private counterparties or public officials) could lead to exposure under the POBO because of the wide scope of the applicable provisions (e.g., Section 9 of the POBO).

The POBO does, however, provide a narrow exception that excludes entertainment from the scope of advantage, but the definition of entertainment under the POBO is narrow and applies only to ‘the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time’. As such, the term ‘advantage’ under the POBO does not apply to entertainment that is provided together with meals or drinks (e.g., music). There are, however, several government

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guidelines that require civil servants to avoid ‘lavish, or unreasonably generous or frequent entertainment, or any entertainment that is likely to give rise to any potential or real conflict of interest, put the officers in an obligatory position in the discharge of their duties, compromise their impartiality or judgement, or bring them or the public service into disrepute bearing in mind public perception’. For politically appointed officials, similar guidelines provide that such officials should not accept entertainment of an excessive nature that could lead to embarrassment for the official in the discharge of his or her functions or that may bring the official and the public service into disrepute.

More specifically for gifts, officials are also subject to guidelines beyond the scope of the POBO. Politically appointed officials are, for example, required to retain a register of any ‘gift, advantage, payment, sponsorship (including financial sponsorships and sponsored visits) or material benefit received by them or their spouses’ that in any way relates to their office. In addition, specifically for prescribed officers, the Acceptance of Advantages (Chief Executive’s Permission) Notice 2010 provides a narrow exception for gifts: prescribed officers can receive low value gifts on specific occasions such as weddings (up to HK$1,500) and on any other occasion (up to HK$250) provided that the person making the gift has no official dealings with the prescribed officer or his or her department.

Political contributions are not directly covered by the POBO. In a recent high-profile case, the former Chief Secretary for Administration in Hong Kong, Rafael Hui Si-yan (the second highest office after the Chief Executive in Hong Kong’s government hierarchy), the co-chair of a leading property developer and two other individuals associated with him were convicted of bribery and received long jail terms for a number of payments made by the property developer to Hui and Hui’s rent-free use of an apartment belonging to the property developer, despite the fact that Hui was not expected to perform any particular act in exchange and only to remain favourably disposed to the property developer. This case shows that the relevant power or duty of the officer or the office will affect the seriousness of misconduct in public office. Since Hui had an important political role in the Hong Kong government, his behaviour will attract higher scrutiny from the enforcement authorities in Hong Kong.

More specifically for donations made to candidates during elections, the Elections (Corrupt and Illegal Conduct) Ordinance, Chapter 554 (E(CIC)O) includes a number of provisions that govern, inter alia, the proper use of election donations and the requirement for receipts to be issued for election donations of more than HK$1,000 and the requirement to disclose all election donations (including copies of the receipts issued) to the appropriate authority.


vi Payments through third parties or intermediaries
Bribes paid through third parties or intermediaries can expose the ultimate bribe-giver to liability under the POBO. Additionally, reaching an agreement with third parties or intermediaries to pay a bribe can also expose the ultimate bribe-giver and the third parties or intermediaries to a charge of conspiracy under Section 159A of the Crimes Ordinance, Chapter 200, so long as the bribe that is the subject of the conspiracy is triable in Hong Kong.

vii Individual and corporate liability
The POBO offence provisions apply to all persons, which under the definition in Section 3 of the Interpretation and General Clauses Ordinance, Chapter 1 includes both natural persons as well as public bodies and bodies of persons, corporate or unincorporated. As such, individuals and companies can be prosecuted for bribery. In the recent past, however, prosecutions of companies have been extremely rare. Instead, Hong Kong’s bribery enforcement has largely focused on the prosecution of individuals.

viii Enforcement
The ICAC is the main government agency responsible for investigating bribery-related cases and enforcing the POBO and the common law offence of misconduct in public office. Following the ICAC’s investigations, the Secretary of Justice has to give consent before a suspect who is being investigated by the ICAC can be prosecuted (Section 31(1) of the POBO).

ix Leniency and plea-bargaining
Hong Kong anti-bribery laws do not contain any specific provisions on leniency or plea-bargaining. Generally, under the Prosecution Code, a suspect who cooperates with the prosecution will ordinarily receive a discount on the sentence reflecting the nature and extent of the cooperation offered to the prosecution and, in exceptional circumstances, a witness may be offered immunity from prosecution.

Under the Prosecution Code, plea negotiations and agreements are possible and usually involve the defence inviting the prosecution to resolve a matter by agreeing to the accused pleading guilty to fewer or lesser charges than those already laid. Negotiated pleas will, however, not be accepted in Hong Kong if the accused maintains his or her innocence to the charge.

x Commercial bribery
As set out above, Section 9 of the POBO (advantages being offered to or accepted by an agent in relation to the business of that agent’s principal) applies to both public and private sector bribery because of the broad nature of the term ‘agent’. As such, Section 9 of the POBO functions as the main provision in the POBO for the prosecution of commercial bribery in private transactions.

xi Defences
The Sections 4 to 9 offence provisions under the POBO include a defence: an accused may have a statutory defence if he or she can prove (on the balance of probabilities) that he or she had a ‘lawful authority or reasonable excuse’ for making the offer or accepting an advantage. Such lawful authority could, for example, be permission for the acceptance of the advantage...
by the public body that a prescribed officer is employed by (Section 4(3) of the POBO) or by the agent’s principal (Section 9(4) of the POBO). Such permission has to be obtained in writing and has to be given either before the advantage is offered or accepted or as soon as reasonably possible thereafter if prior permission could not be obtained.

xii Penalties
The offence in Section 3 of the POBO is a summary offence and carries a maximum prison term of one year and a maximum fine of HK$100,000. All the other bribery offences under the POBO are indictable offences and (upon indictment) carry a maximum prison sentence of 10 years (Sections 5, 6 and 10) and seven years for all other offences. The maximum fine for a Section 10 offence (upon indictment) is HK$1 million. All other offences carry a maximum fine of HK$500,000 (upon indictment). Additionally, offenders can be ordered to disgorge the advantage received (or a sum not exceeding the value of the unexplained property for Section 10 of the POBO), and subject to mandatory confiscation and restitution orders under Section 12 of the POBO. Such confiscation or restitution orders can be enforced in the same manner as a civil judgment of the High Court.

An offender who has been convicted of the common law offence of misconduct in public office can be sentenced to a maximum prison term of seven years and a fine under Section 101I(1) of the Criminal Procedure Ordinance (Chapter 221).

III ENFORCEMENT: DOMESTIC BRIBERY
The ICAC is very active in its enforcement of the POBO. In recent years, there have been several high-profile official bribery investigations and prosecutions that received a lot of media attention. These included several cases involving high-ranking former government officials, such as the case against the former Chief Secretary for Administration, Rafael Hui Si-yan, and the former Chief Executive, Donald Tsang Yam-kuen, the two highest-ranking posts within the Hong Kong government.

Former Chief Secretary for Administration Hui was convicted and sentenced to a jail term of more than seven years for payments and the rent-free use of an apartment that Hui accepted from companies and intermediaries connected with a Hong Kong property developer. When receiving those advantages, Hui was not expected to undertake any specific act for the property developer, but rather was expected to remain favourably disposed towards the property developer in his capacity as the second-highest-ranking government official at that time. Together with Hui, the co-chairman of the property developer and two other persons were also sentenced to long jail terms. Hui and the other persons who were convicted had their appeals unanimously dismissed by the Court of Final Appeal in June 2017.

Former Chief Executive Tsang was charged in October 2015 with two counts of misconduct in public office. Tsang is alleged to have failed to declare his interest in a luxury residential unit in Shenzhen, the People’s Republic of China (China) owned by the majority shareholder of a radio station at the time when the government was considering and approving the radio station’s various licences. Tsang is also alleged to have referred an interior designer for consideration for nomination for a government award when the interior designer was...
working on the luxury residential unit in Shenzhen. In October 2016, the prosecution, with the High Court’s leave, amended the charges laid to include an additional count of ‘accepting an advantage’ under the POBO in his capacity as Chief Executive (at the relevant times). The additional charge alleged that Tsang accepted an advantage in the form of the refurbishment and redecoration of the same luxury residential unit in Shenzhen in exchange for performing an act as Chief Executive (i.e., giving his approval for the radio station’s licences and the appointment of the radio station’s director and board chair). In February 2017, Tsang was found guilty on one count of misconduct in public office and sentenced to 20 months’ imprisonment (reduced from 30 months for his good character and contributions to Hong Kong) in the Court of First Instance. Tsang has filed an appeal against his conviction and sentence. Tsang faced a retrial in the Court of First Instance on the charge of bribery (on which the jury failed to reach a decision at the first trial) in September 2017. The new jury were unable to reach a verdict and the charge was ordered to be left on the Court file, marked not to be proceeded with without the leave of the Court. Regarding the appeal against conviction and sentence for the offence of misconduct in public office, the hearing took place in April 2018 and judgment was handed down on 20 July. The appeal against conviction was refused, but the sentence of imprisonment was reduced from 20 months to 12 months. Tsang’s bid for leave to appeal to the Court of Final Appeal was refused by the Court of Appeal on 31 August 2018.

The ICAC has also been actively investigating and taking enforcement action against commercial bribery. In July 2017, a former assistant project manager of an engineering company pleaded guilty to two charges of conspiracy and was sentenced to 24 months’ imprisonment for accepting illegal rebates of approximately HK$430,000 for recommending refurbishing works to two electrical engineering firms, contrary to Section 9(1)(a) of the POBO and Section 159A of the Crimes Ordinance. In June 2017, a renovation worker pleaded guilty and was sentenced to two months’ imprisonment for offering HK$23,500 to the chairman of the incorporated owners of a residential building for assigning a total of 31 minor repair works to him.

Recently, the ICAC’s enforcement efforts have also focused on the financial services industry. In December 2017, the ICAC and the Securities and Futures Commission joined forces to raid offices and premises, and thereafter arrested three senior executives of a listed financial adviser for suspected corruption. Trading of shares in the listed company was halted and will remain suspended until further notice. In July 2017, the director of a manufacturing company was convicted and sentenced to four months’ imprisonment for offering a bribe of 9,999 yuan twice to an assistant manager of a bank to open a bank account for his company. In July 2016, the ICAC charged a former bank manager of an international bank with conspiring with customers to accept bribes totalling 2.7 million yuan for handling the accounts of the companies maintained with the bank that were controlled by or associated with the customers, contrary to Section 9(1)(a) of the POBO. In another case, a bank customer was sentenced to a six-month jail term for attempting to bribe a bank manager of an international bank with a gift of perfume to facilitate the opening of a bank account for his company. In all these cases, the banks involved had rendered full assistance to the ICAC. Following similar investigations by the US authorities, the ICAC has also investigated the hiring practices of a large a multinational banking and financial services company in relation to the hiring of relatives of public officials or business owners in Hong Kong and China.
As part of the ICAC’s investigations, the former head of the China investment banking department of the financial services company was arrested. There have been no publicly available updates about the ICAC’s investigations since the arrest.

**IV FOREIGN BRIbery: LEGAL FRAMEWORK**

i Foreign bribery law and its elements

Hong Kong does not have a separate legal regime governing foreign bribery. Rather the POBO provisions set out above are applied to address foreign bribery as well as domestic bribery. Recent cases have, however, established that there is very little scope to apply the POBO provision to foreign bribery.

Section 4 of the POBO is the only provision in the POBO that expressly extends the scope of the POBO beyond the borders of Hong Kong by specifying that it is an offence to offer an advantage to a public servant or the Chief Executive or for them to solicit or accept an advantage ‘in Hong Kong or elsewhere’. However, as Section 4 of the POBO only applies to Hong Kong public servants or the Chief Executive (and not to foreign officials of places outside Hong Kong), it would be an offence if a bribe was paid to a Hong Kong public official in Macao but not an offence if a bribe was paid to a Macanese public official.

In addition, Section 9 of the POBO that governs bribery of agents in relation to the business of that agent’s principal has been successfully applied to bribery of foreign officials. The courts have held\(^{14}\) that the broad term ‘agents’ includes foreign public officials if they are bribed in relation to their duties as officials of a foreign government or administration. However, as Section 9 (unlike Section 4) does not include the words ‘in Hong Kong or elsewhere’ when describing the conduct of offering, soliciting or accepting a bribe, the relevant conduct of offering, soliciting or accepting the bribe has to occur in Hong Kong. This means that, while technically Section 9 of the POBO can apply to the bribery of foreign public officials, it only does so if the relevant conduct takes place in Hong Kong (i.e., if the foreign official travels to Hong Kong and the bribe is offered, solicited or paid to the foreign official while he or she is in Hong Kong).

ii Definition of foreign public official

The POBO does not refer to foreign public officials and does not have a definition of foreign public officials. As set out above, the courts have interpreted the broad term ‘agent’ in Section 9 of the POBO to include foreign public officials, and it is now possible for charges to be laid for bribing foreign officials in relation to their principal’s affairs (i.e., their duties as an official of a foreign government or administration) as long as they are bribed in Hong Kong. Otherwise there is no other specific definition of a foreign official under the POBO. The broad scope of the term ‘agent’ under Section 9 of the POBO would also apply to an employee of a state-owned enterprise if he or she is bribed (in Hong Kong) in relation to the business of that state-owned enterprise.

iii Gifts, travel, meals and entertainment
The definition of what constitutes an advantage in the limited circumstances where the POBO applies extraterritorially or to foreign public officials is identical to the definition of an advantage for domestic bribery (see Section II.iv).

iv Facilitation payments
The POBO does not include a facilitation-payments exception nor any de minimis exception. As such, payments of any amount that are made to a foreign public official in relation to his or her duties as an official of a foreign government or administration (including to expedite a routine government action) may constitute an offence under the POBO (as long as the payments are made while the foreign public official is in Hong Kong).

v Payments through third parties or intermediaries
Bribes paid through third parties or intermediaries can expose the ultimate bribe-giver to liability under the POBO or for conspiracy to bribe in foreign bribery cases in the same way as domestic bribery cases. For conspiracy to bribe a foreign official, however, the bribe has to be offered or made in Hong Kong.

vi Prosecution of foreign companies
Foreign companies based in Hong Kong can be prosecuted in the same way that local Hong Kong companies can for bribes made in Hong Kong (whether to Hong Kong or foreign public officials and commercial counterparties) and overseas (to Hong Kong public officials) within the limited scope of Section 4 of the POBO. However, as noted above, Hong Kong’s anti-bribery laws are generally enforced against individuals, and the prosecution of companies is very rare.

vii Penalties
Penalties for foreign bribery are identical to the penalties set out for domestic bribery in Section II.xii.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations
The POBO does not specifically include a requirement for companies to maintain proper books and accounts. Section 9(3) of the POBO, however, proscribes and makes it an offence for an agent, with the intent to defraud his or her principal, to use any receipt, account or other document that contains any statement that is false or erroneous or defective in any material particular.

Outside the POBO, there is a general requirement for Hong Kong companies to keep accounting records that are sufficient to explain the company’s transactions and disclose with reasonable accuracy the company’s financial position and performance (Section 373(2) of the Companies Ordinance (Chapter 622)). Failure to comply with this general provision may lead to a fine or at worst to imprisonment of up to 12 months for a director of the company (if the relevant offence was committed wilfully).
ii  Tax deductibility of bribes
The tax deductibility of bribes is not addressed in the applicable laws of Hong Kong. However, given that bribery is a criminal offence, and bribes are proceeds of crime, bribes would not be deductible as a legitimate business expense in Hong Kong.

iii  Money laundering laws and regulations
The Organized and Serious Crimes Ordinance, Chapter 455 (OSCO) is the primary legislation addressing the crime of money laundering. It is an offence under Section 25 of the OSCO to deal with property ‘knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person’s proceeds of an indictable offence’. Section 25 of the OSCO applies to proceeds from bribery offences under the POBO as the relevant offences in the POBO are indictable offences. An offence under Section 25 of the OSCO can lead to a fine of up to HK$5 million and imprisonment for up to 14 years upon conviction on indictment.

While there is no duty under the POBO to report bribery offences, the OSCO imposes a positive duty to report knowledge or suspicion of proceeds of bribery and other indictable offences. Under Section 25A of the OSCO, any person who knows or suspects that any property directly or indirectly represents proceeds of an indictable offence shall as soon as possible disclose that knowledge or suspicion to the relevant authorities, such as the Joint Financial Intelligence Unit and the Hong Kong police.

Between 2017 and 2018, the Hong Kong government moved forward with various anti-money laundering and counterterrorist-financing enhancement measures. These included updating the legal and regulatory framework, reinforcing the adoption of a risk-based approach in preventive and supervisory measures, stepping up efforts to restrain and confiscate crime proceeds, and strengthening international cooperation. Notably, four pieces of primary legislation were enacted to address identified risks, namely the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance 2018, the Companies (Amendment) Ordinance 2018, the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2018, and the Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Ordinance.

VI  ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES
As set out above, the application of the POBO to foreign bribery is very limited. As such, there have only been a few cases that either involve a foreign public official or the extraterritorial application of the POBO.

The first case confirmed that the definition of an agent in Section 9 of the POBO is wide enough to cover a public official from a place outside Hong Kong. In that case, which ultimately went on appeal to the Court of Final Appeal,15 Hong Kong’s highest appellate court, the chair of a Hong Kong company had conspired with others to offer in Hong Kong advantages to a public official of a place outside Hong Kong as a reward for that public official’s assistance in the company’s business ventures in that place outside Hong Kong. The Court of Final Appeal held that an offence under Section 9 of the POBO is constituted

where an advantage is offered in Hong Kong, even if the recipient of the advantage is a public official of a place outside Hong Kong and the act or forbearance concerned is in relation to his or her public duties in that place outside Hong Kong. Further, a conspiracy under Section 159A of the Crimes Ordinance was also constituted as the main offence (i.e., the giving of the advantage under Section 9 of the POBO was triable in Hong Kong).

In a similar case a few years later, the Court of Final Appeal confirmed that despite the application of Section 9 of the POBO to foreign public officials, the scope of Section 9 nevertheless remained limited to conduct that is undertaken in Hong Kong: this second case involved the offering of a bribe to a foreign official of Macao. The Hong Kong Court of Final Appeal\(^\text{16}\) (confirming the decision of the Court of Appeal\(^\text{17}\)) held that if the relevant conduct (i.e., the offer of the bribe) was made outside Hong Kong, there would be no triable offence in Hong Kong as Section 9 does not apply extraterritorially. In that case, two individuals planned to bribe a Macao official to obtain or retain contracts for a waste management company controlled by them in Macao. While the planning of the bribery took place in Hong Kong, the ultimate offer was made outside Hong Kong. The Court of Appeal reversed the initial conviction of the two individuals, holding that the offer of the bribe had to be communicated to the intended recipient for the offer to be completed. As the offer was communicated outside Hong Kong, no triable offence under Section 9 of the POBO was constituted. In turn, the planning of the bribe that was undertaken in Hong Kong, was also not triable in Hong Kong as a conspiracy charge under Section 159A of the Crimes Ordinance requires that the underlying offence that is the subject of the conspiracy is a triable offence in Hong Kong.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Hong Kong is subject to the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. While it is not a member of either, they were extended to it by China, which is a member. Hong Kong is a member of the Financial Action Task Force. Neither Hong Kong nor China are members of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

VIII LEGISLATIVE DEVELOPMENTS

Currently, the main issue that has been identified by the government and will need to be addressed is a loophole in the POBO that excludes the Chief Executive from the application of some of the provisions in the POBO. Sections 3 and 8 of the POBO, while applicable to public officials under the political appointment system and civil servants, do not apply to the Chief Executive. While this loophole was picked up in a report presented to the government in 2012,\(^\text{18}\) as of August 2018, no steps have yet been taken to amend the POBO accordingly.

\(^\text{16}\) Hong Kong Court of Final Appeal, HKSAR v. Lionel John Krieger, [2014] HKEC 1323.
\(^\text{17}\) Hong Kong Court of Appeal, HKSAR v. Lionel John Krieger & Tam Ping Cheong James, [2013] HKCU 2898.
IX  OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

There are a number of laws and legal principles that are important when dealing with corruption cases in Hong Kong.

i  Legal professional privilege

Legal professional privilege is recognised and protected by the Basic Law\(^{19}\) and the common law. Legal professional privilege consists of legal advice privilege that covers communication between lawyers and their clients for the purpose of obtaining and giving of legal advice, and litigation privilege that covers communication between lawyers and their clients and certain third parties for the dominant purpose of existing or contemplated litigation. Section 15 of the POBO expressly recognises that protection and provides that legally privileged information, documents, etc., are protected from disclosure. Legal professional privilege is frequently invoked and used to protect the relevant categories of documents from production to the authorities in corruption investigations.

ii  Data protection

Hong Kong has strict data protection laws. These laws are found in the Personal Data Privacy Ordinance, Chapter 486 (PDPO) and are enforced by the Office of the Privacy Commissioner for Personal Data and the police. The PDPO defines personal data very broadly to cover any data relating directly or indirectly to a living individual in an accessible or processable form that can be used to ascertain the identity of that person. The PDPO includes six Data Protection Principles,\(^{20}\) which set out, *inter alia*, how personal data can be collected, retained, used and disclosed. Because of the wide-reaching protection afforded to personal data by the PDPO, specific attention has to be given to issues such as access and disclosure of personal data in corruption investigations.

iii  Whistle-blowing

Informers who provide information to the ICAC are protected. Under Section 30A of the POBO, the name and address of an informer have to be kept confidential and any documents that may lead to disclosure of the informer’s identity have to be redacted prior to disclosure in civil or criminal proceedings. In addition, ICAC informers can receive witness protection under the Witness Protection Ordinance, Chapter 564, including protection for personal safety or well-being.

X  COMPLIANCE

The POBO does not set out any mandatory requirements or best practices for corporate compliance programmes; nor does it have defences or offer leniency for effective corporate compliance programmes. The ICAC does, however, offer consultancy services on corporate compliance programmes through its Hong Kong Business Ethics Development Centre.

Due to the participation of Hong Kong businesses in China’s Belt and Road Initiative, which is often found in high-risk countries, the ICAC has set up a dedicated unit to provide

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19 Article 35 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.

20 See Schedule 1 of the PDPO.
corruption prevention advisory services to Hong Kong businesses looking for opportunities in the Belt and Road countries, as well as to provide training services to anti-corruption agencies in those countries within the framework of the United Nations Convention against Corruption.

Companies in Hong Kong are generally sophisticated and have implemented comprehensive compliance programmes in conjunction with applicable local laws and, because of the cross-border nature of the operations of many Hong Kong companies, with the laws of other jurisdictions such as China, the United States and the United Kingdom.

XI OUTLOOK AND CONCLUSIONS

Hong Kong has a good reputation and is known as one of the least-corrupt jurisdictions in the world. Its reputation is partly based on its effective anti-corruption laws and on active enforcement of the relevant laws by the authorities, most notably, the ICAC. Hong Kong’s public perception has suffered, though, in recent years most notably because of several high-profile investigations that revealed corruption at the highest levels of the government. With the conviction of a majority of those accused, it remains to be seen whether a further tightening of the applicable laws and an increase in enforcement activity will be required for Hong Kong and its government to rebuild the trust of its citizens and outside investors.
I INTRODUCTION

India has a federal form of government together with a strong emphasis on local self-government. At all levels, the government and government-owned enterprises play a key role in the Indian economy – in addition to performing sovereign functions, the government has a large commercial footprint in several sectors, including defence, education, civil aviation, railways (a near monopoly), infrastructure and healthcare. Consequently, conducting business in India necessarily requires interactions with the government in its various forms. Further, a number of Indian laws that impact businesses often provide for government functionaries having considerable discretion. All these factors may make government interaction time-consuming and uncertain.

Although India has fairly stringent anti-corruption laws, there was a belief in some quarters (particularly outside India) that corruption is a widely accepted practice in India; however, this notion has no legal or cultural basis, and corruption, although not uncommon, is not considered socially acceptable. In fact, the political and social climate in India in recent years has been pervaded by a strong public sentiment against corruption in government, with growing awareness among Indians of the cost of corruption. Following a public outcry in 2011 upon the discovery of certain high-profile instances of corruption, there has been heightened public interest and a media spotlight on the issue of corruption.

This has resulted in the adoption of several additional 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), strengthening laws relating to prosecution of bribe-givers, facilitators and influence peddlers, and the enactment of a laws to expand the scope of existing laws governing money laundering and benami (i.e., proxy) transactions and to target those in possession of undisclosed income (whether in India or abroad) and accused persons absconding from prosecution. Most importantly, Indian authorities have become more aggressive in enforcing anti-corruption laws in India, aided by close scrutiny by Indian courts.

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DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Regulation of public bribery

The primary anti-corruption legislation in India is the Prevention of Corruption Act 1988 (PCA), which criminalises, among other things, the taking and giving of ‘undue advantage’ to ‘public servants’. Both individuals and companies are liable to be punished for an offence under the PCA.

The PCA states that an undue advantage is any gratification (not limited to being pecuniary in nature or estimable in money) other than the legal remuneration that a public servant is permitted to receive either from the government or any other organisation served by the public servant. Further, the term ‘public servant’ has been defined broadly 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 assistance. In *CBI v. Ramesh Gelli & Ors*, the Supreme Court of India held that pursuant to certain provisions of Indian banking law, employees of banks (whether public or private) are also considered public servants under the PCA.

The offences under the PCA include: (1) public servants obtaining any undue advantage with the intention of, or as a reward for, improperly or dishonestly performing or causing performance of a public duty; (2) public servants obtaining any undue advantage without (or for inadequate) consideration from a person concerned in proceedings or business transacted either by the public servant or by any of the public servant’s superiors; (3) criminal misconduct by a public servant (which included possession of disproportionate assets); and (4) commission of any subsequent offence after being convicted previously under the PCA.

The PCA also targets the conduct of influence peddlers or intermediaries by criminalising the act of taking any undue advantage to cause the improper or dishonest performance of a public duty. Until recently, bribe-givers were brought within the ambit of the PCA through the offence of ‘abetment’ of the offences mentioned above. However, legislative changes to the PCA in 2018 have expressly targeted bribe-givers by criminalising the act of providing or promising to provide a bribe to any person (regardless of whether that person is a public servant) to induce or reward a public servant to improperly or dishonestly perform public duty. The bribe-giver may also be charged with ‘criminal conspiracy’ to commit offences under the PCA.

The penalties for various offences under the PCA include imprisonment ranging from six months to 10 years, or a fine, or both. Further, recent legislative changes to the PCA have also introduced provisions pertaining to attachment and confiscation of property procured by way of an offence under the PCA. It is not inconceivable for investigating authorities to allege that any advantage received by a bribe-giver through the bribery (which is an offence under the PCA) could also be subject to attachment and confiscation, and not just the property of the public servants in question. The PCA also provides for a time frame of two years within which courts must endeavour to complete the trial, subject to an extension of a maximum of four years.

The PCA clarifies that any attempt by a public servant to obtain or accept any undue advantage is enough to constitute an offence under the PCA, irrespective of whether the public servant carried out his or her official duty improperly or dishonestly. An attempt to

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2 *CBI v. Ramesh Gelli & Ors*, 2016 (3) SCC 788.
give or receive a bribe is sufficient to attract liability under the PCA, and actual payment or receipt of bribes is not necessary. It is immaterial whether the bribe has been obtained for a public servant’s own benefit or the benefit of any other person, either directly or through any other person. Offences under the PCA are investigated either by the Central Bureau of Investigation (CBI) (in the case of offences involving allegations against functionaries of the central government) or by anti-corruption branches of the state police. Trials of PCA matters are conducted before special courts. Note that the prior sanction of the government is required for the initiation of prosecution of public servants under the PCA. However, this safe harbour applies only to proceedings against serving and retired public servants, and not against persons accused of giving bribes.

The PCA provides for immunity for a person accused of providing undue advantage if that person has been compelled to give the undue advantage and is willing to report the matter to the law enforcement authority or investigation agency within seven days of the date of giving the undue advantage.

ii Regulation of foreign contributions

The Foreign Contribution Regulation Act 2010 (FCRA) prohibits the acceptance of foreign hospitality or contributions from foreign sources by persons including government servants, employees of any other body owned or controlled by the government, judges, legislators, political parties or their office-bearers, except with the permission of the central government. The term ‘foreign source’ is defined widely and includes foreign companies, other foreign entities, a foreign trust or foundation, or a foreign citizen. Non-governmental organisations (including charities) receiving contributions from a foreign source are required to be registered under the FCRA and to report contributions. Violation of the FCRA is punishable with imprisonment of up to five years or a fine, or both.

iii Regulation of public servants

Public servants are regulated by the terms of the service rules applicable to them. For instance, persons in the service of the central government are governed by the Civil Services (Conduct) Rules 1964 and the All India Services (Conduct) Rules 1968 (the Service Rules). The Service Rules restrict a public servant from receiving gifts (including travel, accommodation, meals, entertainment or other pecuniary advantage) exceeding specified thresholds (which depends on the grade and seniority of the public servant); however, a casual meal, a casual lift or other social hospitality is permitted. The Service Rules also state that public servants may not accept lavish or frequent hospitality from commercial organisations or persons having official dealings with them. However, unlike the Service Rules, the PCA does not provide for any de minimis thresholds for gifts, meals, entertainment or hospitality, and therefore organisations need to be extremely cautious when dealing with Indian public servants.

The Service Rules also prohibit public servants from engaging in any trade, business, or other employment; holding an elective office; canvassing for a candidate for an elective office or in support of any business; participating, except in the discharge of official duties, in the registration, promotion or management of any bank, company or cooperative society for commercial purposes; and participating in any sponsored private media programme. Further, speculation by public servants in any stocks, shares or other investments is prohibited, except occasional investments in securities made through registered brokers and provided this is undertaken with prior government approval. However, participation in honorary social or charitable work, work of literary, artistic or scientific character, amateur sports or in the
formation of associations for these purposes are outside the scope of ‘commercial activities’ in the Service Rules. Under Section 168 of the Indian Penal Code 1860, it is an offence for a public servant to engage in any kind of trade, business, profession or occupation if prohibited from doing so. Therefore, a public servant may also be criminally liable for engaging in prohibited commercial activities. However, persons employed by the government on a contract or temporary basis are generally permitted to engage in other activities; for example, senior doctors consulting at government hospitals and lawyers engaged by the state.

iv Regulation of private bribery
There are no laws that specifically prohibit private commercial bribery in India, although organisations may have internal codes of conduct that prohibit it. Further, India’s legislation governing companies, the Companies Act 2013 (the Companies Act), has introduced stringent provisions pertaining to fraud, which has been defined to include ‘any act, omission, concealment of any fact or abuse of position committed by any person . . . with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person’. Acts of private bribery (and concealment thereof) could be considered to constitute a fraud on the company, which is punishable with imprisonment ranging from six months to 10 years, or a fine (depending on the amount involved in the fraud), or both. The Companies Act also obliges auditors, cost accountants and company secretaries to report any suspected fraud to the central government. Listed companies and certain types of private companies are mandated to establish a vigilance mechanism for reporting concerns and to provide safeguards for whistle-blowers.

III ENFORCEMENT: DOMESTIC BRIBERY
India has witnessed a sharp rise in prosecutions for corruption-related offences in recent years, with law enforcement agencies and the judiciary aggressively enforcing the PCA. Particulars of some high-profile corruption-related proceedings in India are set out below. Since India does not publish public updates with regard to matters under investigation or pending trial, most publishable information is available from media sources and a few publicly reported judicial decisions concerning certain ancillary proceedings:

i 2G spectrum scam
This case concerned the allotment of telecoms bandwidth spectrum by the government to several small and unknown telecoms players at giveaway prices. Soon after, the spectrum was sold to larger telecoms players at a very high premium. A report by the Comptroller and Auditor General of India (CAG) estimated the loss to the public exchequer at 1,760 billion rupees. In 2011, the CBI, after investigating the matter, initiated proceedings against the telecoms minister A Raja, senior bureaucrats, the companies awarded the spectrum and their key officials, alleging offences under the PCA and the Indian Penal Code 1860. Later, M K Kanimozhi, a member of Parliament, was added as an accused. In 2012, the Supreme Court passed an order cancelling the impugned licences and directed that the spectrum be re-allotted by auction process. On 21 December 2017, a special court constituted to conduct the trial in the matter acquitted the accused. The CBI subsequently filed an appeal against the acquittal before the High Court of Delhi. As of September 2018, the appeal is pending.
ii  **Punjab National Bank scam**

A diamond business has recently been accused of defrauding the Punjab National Bank of 114,000 million rupees through the family members, companies and partnership firms of the persons operating the business. The complaint by the Punjab National Bank to the CBI reveals that the fraud had been perpetrated for years through collusion between bank officials and the accused persons along with their affiliates, and involved the issuance of bank guarantees to overseas branches of other Indian lenders, on behalf of the accused and their affiliates. These guarantees were allegedly used to raise buyer’s credit for the accused persons’ firms to pay for imports and various other purposes. The CBI has filed two charge sheets against the accused, who include bank officials, alleging various offences under the Indian Penal Code 1860, the PCA and the Prevention of Money Laundering Act 2002 (PMLA). The two main accused are reported to have fled the country.

iii  **Action against shell companies**

The government is also tightening the noose around sham or shell companies used as a veil to conduct various illicit tax evasion and money laundering activities. In 2017–2018, the Ministry of Corporate Affairs struck off as many as 226,166 shell companies and partnership firms. The government has also made efforts to ensure that neither directors nor any other authorised signatories can access the accounts of such a deregistered company other than for specified purposes until the company is restored. The drive to identify and deregister shell companies has continued in 2018–2019, with a total of 225,910 notices being issued to suspected shell companies. As of August 2018, about 50,000 shell companies have already been deregistered.

IV  **FOREIGN BRIBERY: LEGAL FRAMEWORK**

India does not currently have a law prohibiting bribery of foreign public officials (although it is arguable that this may constitute fraud under the Companies Act). The Prevention of Bribery of Foreign Public Officials and Officials of Public Interest Organisations Bill 2011 was introduced in Parliament, but it did not receive parliamentary assent and consequently lapsed.

V  **ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING**

The PCA does not impose record-keeping obligations. However, the Companies Act, the PMLA and Indian tax laws impose certain record-keeping obligations.

i  **Obligations under company law**

The Companies Act requires that companies maintain books and financial statements in accordance with prescribed accounting standards and that give a true and fair view of the state of the company’s affairs. The financial statements of a company must be signed on behalf of its board of directors and presented to the shareholders along with the report of the external auditors. These must be accompanied by a directors’ report, which must include a ‘directors’ responsibility statement’, stating, *inter alia*, that the directors have selected and applied accounting policies and made prudent judgements to give a true and fair view of the company’s affairs, and that they have taken proper and sufficient care in maintaining
adequate accounting records. Where any person knowingly makes a materially false statement in, or knowingly omits a material fact from, a return, report, certificate, financial statement, prospectus, statement or other document, that person is liable for the same punishment as prescribed for fraud (i.e., imprisonment ranging from six months to 10 years, or a fine, or both).

The Companies Act also grants the Registrar of Companies and the central government broad powers to call for further documents and information, or order inspections and enquiries into companies’ affairs (with the ability to conduct searches and carry out seizures if authorised by a court). Further, the Companies Act imposes stringent obligations on auditors with regard to performance of their duties and reporting of suspected frauds.

ii Money laundering laws

The PMLA criminalises money laundering, which is defined to mean directly or indirectly attempting to indulge in, or knowingly assist, or be involved in, a process or activity connected with the proceeds of crime (including their concealment, possession, acquisition or use) and in projecting or claiming that tainted property is untainted. The term ‘proceeds of crime’ refers to any property derived or obtained, directly or indirectly, by a person as a result of certain identified crimes that are considered predicate offences for the application of the PMLA. Money laundering is punishable with imprisonment ranging from three to seven years and a fine.

Legislative changes to the PMLA in 2018 have included fraud under the Companies Act as one of the identified crimes that will attract the application of the PMLA. As a result, any property derived or obtained through fraud will be considered proceeds of crime under the PMLA. Unlike the PCA, under the Companies Act fraud is not linked only to bribery of public servants but covers a much wider ambit.

The PMLA imposes obligations upon banking companies, financial institutions and intermediaries (such as brokers, money changers and casino operators) to maintain records of transactions and of their clients’ identities, to furnish these records to the central government and to report suspicious transactions and transactions exceeding a specified value. No civil or criminal proceedings may be initiated against the reporting entity for divulging records of transactions in accordance with the PMLA. Failure to comply with these obligations is punishable with steep fines. Further, banks, financial institutions and other intermediaries may become liable to prosecution if they were aware of the commission of a predicate offence, knowingly became recipients of the proceeds of crime and projected that those proceeds were untainted property. Therefore, while the exercise of diligence is not a complete defence under the PMLA, it may help demonstrate that an entity had no knowledge of the commission of a predicate offence.

Separately, the Reserve Bank of India and the Securities Exchange Board of India have also issued guidelines to entities regulated by them (such as banks, financial institutions and market intermediaries), specifying ‘know-your-customer’ requirements and other anti-money laundering measures. These guidelines include norms governing the establishing of customers’ identities, risk-based categorisation of customers, client due diligence (including enhanced measures for high-risk customers), procedures for conducting various types of transactions (including cross-border transactions) and reporting of transactions to India’s Financial Intelligence Unit.
iii Tax laws

The prevalence of corruption in India has led to the growth of a parallel economy consisting of the undisclosed income of politicians, public servants and private individuals. Wilfully attempting to evade any tax payable under the Income Tax Act 1961 is a criminal offence carrying a penalty of imprisonment ranging from three months to seven years and a fine. However, a substantial part of India’s undisclosed wealth is kept in tax havens abroad, and a raft of recent legislative changes has sought to address this. Indian residents are now required to disclose their foreign assets to the Indian tax authorities and, under the new Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 (the Black Money Act), penal taxes have been imposed on undisclosed foreign income and assets, and additional criminal liabilities have been introduced for non-disclosure of foreign assets and wilful attempts to evade taxes.

Notably, expenses incurred in respect of any activity that is prohibited by law or constitutes an offence are not deductible under Indian tax laws. Accordingly, bribe-giving entities may be in breach of tax laws if they claim deductions against illicit payments (or if such payments are disguised as legitimate deductions).

Although Indian authorities have historically not relied on record-keeping provisions to prosecute corruption-related conduct, the introduction of stringent provisions relating to fraud, tax evasion and money laundering in recent years is indicative of a growing trend towards the use of financial sanctions to address corruption. In our view, these provisions will become increasingly important elements of India’s fight against corruption.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

As mentioned above, India does not have a law prohibiting bribery of foreign public officials at present.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

India has ratified the United Nations Convention against Corruption (UNCAC) and the United Nations Convention on Transnational Organized Crime, both of which mandate the criminalisation of corruption and bribery of public officials. Under Indian law, obligations under treaties become binding domestically only upon the enactment of a law to this effect by the legislature. Therefore in 2018 legislative changes were introduced to the PCA to align it with India’s international obligations under UNCAC.

India is also a member of the Financial Action Task Force, which aims to develop national and international policies to prevent money laundering and terrorism financing arising out of, inter alia, bribery.

India is also a signatory to the Convention on Mutual Administrative Assistance in Tax Matters and has agreed to implement the Common Reporting Standard for automatic exchange of tax and financial information. This is expected to aid the government in its efforts to target undisclosed income and assets of Indian citizens (whether in India or abroad).
VIII LEGISLATIVE DEVELOPMENTS

i Amendments to the PCA

While key provisions of the PCA have already been mentioned above, significant amendments to the PCA in 2018 include the requirement to seek prior approval of the central government, state government or the relevant government authority in whose employment an offending public servant is alleged to have committed an offence under the PCA. The relevant government or authority is required to convey its decision within three months. This does not apply to public servants who are caught in the act of committing an offence under the PCA. The intent of this amendment is to protect bona fide acts carried out by public servants discharging their public functions.

Further, any form of facilitation payment has now been expressly prohibited, and the implementation of ‘adequate procedures’ in the form of a prescriptive anti-corruption compliance programme in the private sector has now been permitted as a valid defence for commercial organisations. Guidelines for such anti-corruption compliance programmes are yet to be notified by the central government.

ii Black Money Act

As mentioned above, to target illicit and undisclosed income, the Indian legislature enacted the Black Money Act in 2016. This Act imposes penal taxes on undisclosed foreign income and assets, and additional criminal liabilities have been introduced for non-disclosure of foreign assets and wilful attempts to evade taxes. The Black Money Act also provided for a short period of leniency before it came into force, during which citizens could declare their undisclosed foreign assets by paying tax and any related penalties, thereby avoiding the more stringent liabilities (including imprisonment) prescribed under the Act.

iii Amendments to the Prevention of Money Laundering Act 2002 by the Finance Act 2018

The PMLA was amended by the Finance Act 2018 with effect from 19 April 2018 to allow enforcement agencies to proceed against property equivalent in value to tainted property held outside India. The amendment has also included an extension of the period of attachment of property when the attachment proceedings have been stayed on court orders, a period of 90 days for investigation by the enforcement directorate before initiation of prosecution, and mandatory guidelines on the disclosure of information on violations of other laws.

A crucial amendment to the extant law is that courts can, during the pendency of the trial and in a prescribed manner, restore the whole or part of a property to a legitimate claimant who may have suffered a quantifiable loss as a consequence of the offence of money laundering, instead of doing so only at the conclusion of the trial.

iv Fugitive Economic Offenders Act

The Fugitive Economic Offenders Act 2018 (FEOA) was enacted on 31 July 2018. The FEOA targets fugitive economic offenders against whom an arrest warrant has been issued for certain predicate economic offences involving 1,000 million rupees or more and who have left the country to avoid criminal prosecution, or are abroad and refuse to return to the country to face criminal prosecution. In line with legislative intent to consolidate the country’s anti-corruption and anti-money laundering legal framework, the key predicate economic offences under the FEOA cover cheating and counterfeiting under the Indian
Penal Code 1860, offences under the PCA, offences under the PMLA, corporate fraud under the Companies Act, *benami* transactions and tax evasion. The FEOA comes in the light of increasing procedural and legal difficulties under the existing civil and criminal framework in deterring economic offenders from fleeing the country to avoid trial.

**IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

In addition to the laws discussed above, the following bodies and laws form part of the Indian anti-corruption regime.

i

**CAG**

The CAG is an office created under the Constitution of India that is responsible for auditing all income and expenses of the central and state governments of India, all bodies or authorities substantially financed by the government, and all government companies and corporations. Observations, inconsistencies and irregularities noted by the CAG have led to the discovery of several instances of corruption and, although the CAG has no investigative or prosecutorial powers, it acts as a watchdog against corruption. Reports by the CAG have been used by citizens to approach the judiciary in ‘public interest litigation’, seeking the courts to direct law enforcement agencies to investigate and probe suspected instances of corruption.

ii

**Central Vigilance Commission Act 2003**

This Act establishes the Central Vigilance Commission, which is the primary agency to enquire into or cause enquiries to be conducted into offences alleged to have been committed under the PCA, and which is responsible for advising, planning, executing, reviewing and reforming vigilance operations in central government organisations. It exercises supervision over the CBI in relation to PCA-related investigations and reviews the progress made in such cases.

iii

**Lokpal and Lokayuktas Act 2013**

This law was enacted against the background of concerns that India’s investigatory authorities were not sufficiently independent of government influence to police corruption within the government. It creates the offices of independent ombudsmen at the central and state levels to investigate and prosecute cases of corruption by public officials (including ministers). The legislation also obligates public servants to furnish information annually in relation to their and their families’ assets. However, the office of the Lokpal (the ombudsman at the federal level) is currently vacant.

iv

**Whistle-Blowers Protection Act 2011**

This legislation aims to establish a mechanism to safeguard persons who report an act of corruption or wilful misuse of power by a public authority. The identity of the complainant must be mandatorily protected (subject to certain exceptions) and any disclosure to the contrary is punishable with imprisonment and a fine.

v

**Serious Fraud Investigation Office**

The Serious Fraud Investigation Office (SFIO) has been set up under the Companies Act to detect, investigate and prosecute white-collar crime and fraud. The Companies Act provides
that the central government may, in certain circumstances, order the SFIO to investigate the affairs of a company. The SFIO has been given wide powers to conduct inspections, discover documents, search and seize evidence, etc., in the course of investigations. The government has also recently notified certain additional sections of the Companies Act, which give the SFIO powers to arrest a person who the SFIO has reason to believe has been guilty of specified offences under the Companies Act (including offences relating to fraud).

vi Liability of corporations and their officers

India recognises the principle of corporate criminal liability, and the Supreme Court has, in *Iridium India Telecom Ltd v. Motorola Incorporated & Ors*[^3^], held that *mens rea* may be attributed to companies on the principle of the ‘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, and control its affairs, would be attributable to the company). The Court stated that to attribute the *mens rea* of a person or body of persons to a company, it would be 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 the authorities to succeed in holding a company criminally liable (including under the PCA), they would have to demonstrate that the element of *mens rea* of the relevant employees or agents of the corporation can be attributed to the company in accordance with the test set out above. This test may allow companies to defend themselves against potential liabilities resulting from the actions of a rogue employee on the grounds that the employee does not represent the directing mind and will of the company and hence the *mens rea* of the employee cannot be imputed to the company. In practice, however, Indian authorities typically always charge an employer company with the offence, along with the individual employee.

The PCA and the FCRA recognise the principle of corporate criminal liability. The PCA expressly states that if an offence is committed by a commercial organisation, the organisation shall be liable to a fine if any person ‘associated with the commercial organisation’ provides any illegal gratification intended at obtaining or retaining business, or advantage in the conduct of business, for the organisation. A person is considered to be associated with a commercial organisation if the person provides services on behalf of the organisation. This is a question of fact and not just the relationship between the person and the organisation – and the person could be acting as an employee, agent or subsidiary of the organisation. Hence, an employee of the commercial organisation is deemed to have performed services for the organisation.

Another issue of concern is liability of senior management or company directors for offences committed by the company. In *Sunil Bharti Mittal v. Central Bureau of Investigation*[^4^], the Supreme Court held that there is no vicarious criminal liability unless a statute specifically provides so and that, accordingly, the acts of a company cannot be attributed and imputed to persons (including directors) merely on the premise that those persons represent the directing mind and will of the company. 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.

[^4^]: *Sunil Bharti Mittal v. Central Bureau of Investigation*, 2015 (4) SCC 60.
Recent legislative changes to the PCA have now incorporated vicarious criminal liability. These provisions state that if any offence is committed by a commercial organisation, the directors, managers, secretaries and any other officers with whose consent and connivance the offence has been proved to have been committed shall be liable to penalties.

vii Reporting obligations
There is no express obligation under Indian law to self-report offences under the PCA. However a reporting obligation imposed upon statutory functionaries of bodies corporate, such as auditors, may be triggered if the act also qualifies for reporting under the Companies 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.

viii Privilege
The Evidence Act 1872 recognises that certain communications between an attorney and a client are privileged as a rule of evidence and privileged communications cannot be used as evidence against the client in a trial. It is, however, important that in specific situations, Indian legal advice be sought when evaluating the availability of privilege. Further, it is advisable that any experts, investigators or auditors be appointed at the request of and through Indian lawyers, to be able to claim privilege in relation to any work product prepared by the experts, investigators or auditors.

ix Data privacy concerns
Under Indian law, a company is generally permitted to collect and review electronic data stored on its servers or electronic equipment. Nevertheless, it is preferable that this be expressly provided in an organisation’s policy manuals. The Information Technology Act 2000 and the rules issued thereunder regulate the collection, storage, use and disclosure of sensitive personal information (SPI), which is defined to include information such as passwords, financial information, medical records and biometric information, and, accordingly, employees should be cautioned against storing any SPI on official servers or devices and informed that any stored SPI may be reviewed by the organisation. Further, data from an employee's personal electronic devices should only be obtained with the employee’s prior written consent. Although generally restricted, disclosure of SPI to government authorities for the purpose of verification of identity, or for prevention, detection, investigation, prosecution and punishment of offences, is permitted. Therefore, if authorities request an organisation to provide specified information (stating the purpose of seeking the information), the organisation may be required to share the information, even if the data constitute SPI.

x Employment
Subject to the terms of employment, employers are generally permitted to terminate the services of an employee for cause, provided the employee is given notice of the accusations

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5 CBI v. Ramesh Gelli & Ors, 2016 (3) SCC 788.
against him or her and is afforded a fair hearing by the employer. However, if an employee qualifies as a ‘workman’ under Indian law, he or she would be afforded certain protections under law and the process for termination would be more cumbersome. Caution must be exercised in engaging with workmen or labour unions, as unions in India exercise considerable influence and clout.

X.COMPLIANCE

Although guidelines by the central government with respect to implementation of adequate procedures in the form of a robust anti-corruption compliance programme are yet to be notified, an effective compliance programme would generally consist of: (1) comprehensive compliance policies, which prescribe clear rules regarding provision of gifts, meals, entertainment and hospitality, and conduct with counterparties; (2) frequent compliance training for all employees (and particularly at the lower levels of the organisational pyramid) to reinforce and reiterate the compliance policies and practices of the organisations; (3) conducting due diligence of vendors and counterparties prior to transacting; (4) strong financial controls, with effective restrictions on cash payments, reimbursements and payments to parties other than the contractual counterparty; and (5) a robust monitoring and reporting mechanism that seeks to identify and mitigate compliance risks, and encourages whistle-blowers to come forward with disclosures.

Further, as discussed in the section on private commercial bribery, Indian law imposes a fiduciary duty on statutory functionaries of bodies corporate, such as directors and auditors, to monitor and report fraudulent transactions.

XI.OUTLOOK AND CONCLUSIONS

Law enforcement agencies have over the past years continued to pursue aggressively bribery and corruption investigations. Aggressive law enforcement, however, is required to stand the test of constitutionality in India. Although the recent trend in courts has tended to favour enforcement agencies rather than accused persons, it is quite likely that courts will be called upon to strike a balance between empowering law enforcement agencies and protecting the constitutional rights of accused persons.

The aggressive attitude of law enforcers is reflected in (among other instances) the willingness of the agencies to engage private specialists such as forensic auditors to provide input on specific aspects of the investigation; and in the increasing use of technology by agencies. Both the use of private specialists and the use of technology often raise questions regarding the legality of the investigation. We expect these trends in investigations to continue and Indian courts to be confronted with questions on the legality of the techniques involved.

In India, multiple agencies with similar powers are often competent to investigate a single set of facts from different angles, but all in relation to a single underlying act. 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. This would mean that agencies, including the CBI, the Directorate of Enforcement (ED) (which investigates PMLA offences) and the SFIO, could all exercise their powers simultaneously. Although the
Companies Act provides for precedence to be given to the investigation conducted by the SFIO, this position remains untested. In practice, a person subject to an investigation is often required to comply with identical demands from multiple agencies.

In February 2011, the Supreme Court issued an order directing that no court (other than it and the special court trying the offences) interfere with any aspect of the 2G spectrum trial. The effect of the matter has been to exclude the plenary jurisdiction of high courts under the Constitution of India and the Code of Criminal Procedure to review the functioning of law enforcement agencies. While the intention appears to have been to reduce opportunities for procedural delays, it is said that such an order may deny accused persons recourse to constitutional remedies. Further, the scope of what constitutes the 2G matter has never been strictly defined by the Supreme Court. Agencies such as the CBI and the ED have gradually expanded their investigations to include other transactions that may often have only a remote connection with the original 2G scam. Persons accused in this case contest this categorisation by the law enforcement agencies. It is expected that the Supreme Court will be asked to clarify its position on the ouster of the jurisdiction of other courts.

The anti-bribery and anti-corruption landscape in India has seen rapid changes in the recent past and we expect this trend to continue. Compliance professionals, including defence and prosecution lawyers, will need to keep abreast of a number of legislative, judicial, commercial and technological developments to stay competitive.

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6 Section 212(3) of the Companies Act.
I INTRODUCTION

As a member of the Organisation for Economic Co-operation and Development (OECD), the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), observer of the Financial Action Task Force, and signatory to several important international treaties, the state of Israel has been keen to demonstrate its adherence to robust enforcement of anti-corruption and anti-bribery prohibition, as can be demonstrated by the rise in the number of criminal proceedings undertaken by the Israeli authorities involving Israeli public officials or Israeli companies in this regard.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Prohibition on paying and receiving bribes

Sections 290–297 of the Penal Law 1977 (the Penal Law) set out the bribery offences prosecutable in Israel.

Sections 290–291 prohibit the payment of bribes to, or their receipt by, domestic public officials. Section 290 criminalises the acceptance of the bribe by the domestic public official and Section 291 targets individuals or legal persons providing such bribes to promote their business activities or to gain any other advantage.

Section 295 criminalises the brokering of bribery. It states that a broker of a bribe, or even a broker who received monetary or monetary-equivalent consideration, to induce a public official (or foreign public official) to give undue preference or to practise discrimination (even if no consideration was passed to the public official) shall be treated as if the broker took a bribe.

Section 295 further prohibits an individual or legal person who exerts significant influence over the election of candidates to the roles of Prime Minister, minister, deputy minister, a member of parliament or the head of a municipal authority from accepting money, monetary equivalent, a service, or any other benefit, to directly or indirectly motivate such a candidate.

Sections 293–294 expand the definition of conduct that shall be deemed bribery. These include:

- any offer or promise of a bribe, even when ultimately rejected or refused;
- solicitation of bribery;
c payments deemed to be bribes whether they are monetary or monetary equivalent (i.e., cash, monetary value, service or other benefit);
d the payment or receipt of bribes to facilitate passive or active conduct, to cause one to cease performing a certain act, or for the purpose of expediting or alternatively delaying a certain act;
e bribes offered for a specific act or for general favouritism;
f direct or indirect bribes, such that each link in a brokering chain may be criminally liable;
g inducements deemed to be bribes if they are provided or received to cause a public official to deviate from his or her official roles, and also even if they are only intended to trigger the fulfilment of a non-discretionary act;
h bribes involving candidates for public roles who have yet to be elected, or where elected, yet to be nominated; and
i bribes involving public officials serving on a temporary or permanent basis, or appointed for a general or specific issue, and whether the public official fulfils his or her public functions for consideration or on a voluntary basis.

ii Definition of a domestic public official

Section 34 of the Penal Law provides a general definition of a public official, which includes any individual employed by the state of Israel or any of its municipal authorities, religious councils, state-owned companies and other government-affiliated organisations, arbitrators and directors in governmental companies, and soldiers. Section 290 of the Penal Law further expands this definition to include employees of corporate bodies that provide services to the public.

This broadened definition is used with respect to Sections 290–297 and has been interpreted by the Israeli courts in a broader manner still, such that employees of a gas and oil infrastructure company in which the Israeli government had a minority share, a guard employed by a private contractor that provided security services for a governmental office, employees of privately owned banks, or a private citizen committing fraud and breach of trust conjointly with a public employee have all been deemed public officials.

iii Public officials’ participation in commercial activities

The participation in commercial activities by public officials in Israel is subject to several limitations.

Rules on conflicts of interest limit a public official’s ability to engage in commercial activities where the engagement causes a conflict of interest between the official’s official capacities and the engagement. These include the Rules for the Prevention of Conflicts of Interests by Ministers and Deputy Ministers, the Rules for the Prevention of Conflicts of Interests of Elected Officials in the Local Authorities, and the decisions adopted by the Israeli parliament’s ethics committee.

The Government Service Regulations (the Regulations) prohibit public employees from engaging in ‘private work’ outside their official positions without obtaining a special permit, or if the engagement may lead to a conflict of interest.

With respect to parliament members, Section 13A of the Knesset Members Immunity, Rights and Duties Law 1951 (the Knesset Members Law) stipulates that a member of parliament shall not engage for monetary or other consideration, directly or indirectly, in any additional business or activity. The Knesset Members Law further prohibits a member of parliament from engaging in any additional business or activity, even when not conducted
for any consideration where, among other things, the engagement may potentially lead to a conflict of interest between the additional engagement and the member of parliament’s official role and duties.

iv Gifts and gratuities, travel, meals and entertainment restrictions
The primary statutory framework governing the receipt of gifts by Israeli public officials is the Public Service (Gifts) Law 1979 (the Gifts Law), which stipulates that any ‘gift’ accepted, whether in Israel or abroad, by an Israeli ‘public servant’ or his or her spouse or child, shall be the property of the state of Israel.

Pursuant to the Gifts Law, a gift is the provision of property, service or other benefit with no element of consideration.

There are two exceptions to the above. First, the public servant may apply for permission to keep a gift, provided he or she pays its monetary value to the treasury of the state of Israel. Second, the following categories of gifts may be kept by a public servant:

a gifts of reasonable and small value;
b gifts provided by a fellow public servants; or
c gifts provided as an award for the public servant’s public achievements.

In addition, other acts of legislation include similar limitations with respect to elected public officials, such as members of parliament or ministers.

Lastly, the Civil Service Regulations, applicable to all individuals employed by the state of Israel, prohibit state employees from receiving any gift provided to them in their official capacity. All state employees must register all gifts with the relevant ministerial committee, which then determines whether the gift is of ‘small value’ and can be kept by the employee. The Regulations define a gift of small value as any gift not exceeding the value of 300 Israeli new shekels, provided it is not a cash gift.

v Political contributions
The financing of political parties and candidates is predominantly provided by the state of Israel. Pursuant to the Party Financing Law 1973, a political party or list may only accept political contributions for the purpose of financing a parliamentary election campaign from an individual with voting rights in Israel. Political contributions provided by a corporation (Israeli or foreign) or by foreign citizens or foreign residents are prohibited. Similar provisions are included in the Local Authorities Law (Funding of Elections) 1993 with respect to local elections.

vi Private commercial bribery
Under Israeli law, private commercial bribery is not criminalised therefore the exchange of gifts, services or other benefits between private entities shall not be considered illegal, provided the exchange does not constitute any other established criminal offence, such as corporate embezzlement, or cause a breach of corporate fiduciary duties.

vii Penalties
A public official or any intermediary who received a bribe shall face an imprisonment term of up to 10 years or a fine the higher of 1.13 million Israeli new shekels or the equivalent of four times the value of the benefit obtained through the bribery.

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An individual providing a bribe to a public official shall face a similar fine or imprisonment of up to seven years.

Corporate bodies providing a bribe may face fines of the higher of 2.26 million Israeli new shekels or the equivalent of four times the value of the benefit obtained as a result of the bribery.

In addition, Section 297 enables the Israeli courts to confiscate the value of the bribe exchanged and the benefits derived from the bribe, and to pay this to the state treasury.

The actual definition of how to calculate the value of the benefit obtained as a result of the bribery is not defined in the law and has yet to be clearly defined by case law.

III  ENFORCEMENT: DOMESTIC BRIBERY

Several high-profile corruption and bribery cases have been prosecuted in Israel in recent years.

In 2015, former prime minister Ehud Olmert was convicted of charges of bribery for accepting a bribe of 60,000 Israeli new shekels while mayor of Jerusalem and later as the minister of economy and industry, from the shareholder of Hazera Ltd, in exchange for the promotion of the company’s real estate project in Jerusalem. As part of this affair, Uri Lupolianski, a high-ranking public official in Jerusalem municipality, was convicted on charges of bribery because of payments made on behalf of Hazera under the guise of donations to a non-governmental organisation established by Lupolianski and to a religious institution managed by his son.

Olmert was further convicted on accounts of fraud, breach of trust and tax evasion because of his systematic failure to report political contributions transferred to him in the ‘Talansky Affair’. Following his conviction in both affairs, Olmert was sentenced to a prison term of 27 months.

In June 2018, a high-ranking official of the Yisrael Beiteinu party was convicted of accepting a bribe of at least 425,000 Israeli new shekels and requesting a bribe of at least 880,000 Israeli new shekels, and was sentenced to a prison term of seven years, a fine and confiscation. These charges resulted from a broader corruption and bribery affair involving numerous high-ranking individuals in the Yisrael Beiteinu party, whose criminal proceedings are still under way.

Other ongoing criminal investigations pertain to the current Prime Minister Benjamin Netanyahu. These span the alleged receipt by Netanyahu of benefits and gifts worth 1 million Israeli new shekels from businessmen over a long period, the alleged solicitation of a bribe in the form of favourable coverage by a major media outlet in Israel in exchange for the promotion of a law favourable to the media outlet, alleged corruption-related charges involving both Netanyahu’s cousin and one of Netanyahu’s close acquaintances, and alleged assistance in the promotion of regulatory approvals for Bezeq Ltd (a public Israeli telecommunication company) amounting to hundreds of millions of shekels in exchange for positive media coverage for Netanyahu and his family by the Walla news website, a subsidiary of Bezeq.

IV  FOREIGN BRIBERY: LEGAL FRAMEWORK

i  Foreign bribery law and its elements

In 2008, the Penal Law was amended to include Section 291A, which proscribes the provision of bribery to a foreign public official.
This Section is conjointly read with Sections 290–297 such that the provision of a bribe to a foreign public official by an individual or legal person for the purpose of obtaining, guaranteeing or promoting any business activity or other advantage pertaining to a business activity shall be treated as if the bribery had been provided to a domestic public official.

An indictment under Section 291A may only be filed with the written approval of the Israeli Attorney General, as is the case with all extraterritorial indictments under Israeli law.

ii Definition of foreign public official

A ‘foreign public official’ is defined under Section 291 as:

a any employee of a ‘foreign state’ or an individual that holds public office or fulfils a public function on behalf of a foreign state (be that in the judiciary, or legislative or executive branch);

b any individual who holds public office or fulfils a public function on behalf of a public body established or controlled (directly or indirectly) by a foreign state; or

c an employee of an ‘international public organisation’ or any individual who holds public office or fulfils a public function on behalf of the organisation.

A foreign state also encompasses any governing unit in that foreign state (e.g., on a local, district or national level), as well as any political entity that is not considered a state, including the Palestinian National Authority.

An international public organisation is an organisation established by two or more countries, or by organisations established by two or more countries.

iii Gifts and gratuities, travel, meals and entertainment restrictions

It is legally permissible to provide gifts or gratuities to foreign public officials, provided these do not amount to bribery under Section 291A.

Obviously in any such case there may be local laws applicable to the foreign official that prohibit receipt of such gifts, and violation of these laws may be deemed by Israeli authorities to be evidence, or part of the evidence, of a gift violating Section 291A.

iv Facilitating payments

Facilitation payments would most likely be deemed bribery under Section 291A, as Section 293(7) of the Penal Law clearly deems a payment to a public official to be a bribe – even for a non-discretionary act.

v Payments through third parties or intermediaries

Because Section 291A is to be read conjointly with Sections 290–297, which criminalise the provision of bribery of public officials by intermediaries, the payment to foreign public officials through third parties is likewise prohibited.

vi Individuals and corporate liability

Both individuals and legal persons may be held criminally liable for bribery of a domestic or foreign public official in accordance with the general legal accountability of corporate bodies under Israeli law.

A body corporate may be held criminally liable with respect to strict liability offences for actions undertaken by any of its officers, employees or agents, where the actions were
carried out as part of the performance of a corporate function. With respect to offences that require criminal intent or negligence, it must be further demonstrated that an individual’s own criminal intention and actions may be identified as the criminal intention and acts of the body corporate itself, especially in view of the position, authority or responsibilities of that individual in the body corporate’s management. In its response to the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Israel (the Phase 3 Report), the state of Israel clarified that when concluding whether the corporate body should be held criminally liable with respect to criminal intent or negligence offences, the Israeli courts would apply, on an ad hoc basis, a flexible test that focuses on the functional role the offending individual carried out in the corporate body.

vii Civil and criminal enforcement

With respect to the provision of bribery to a foreign public official, Israeli law currently includes criminal enforcement only. With respect to publicly traded companies, however, the act itself can in certain situations amount to a violation of certain civil securities regulations, which would relate to the bribes only indirectly, with no direct civil liability for bribery.

Various publicly traded Israeli companies that have been penalised or been under investigation for foreign bribery have had derivative suits or class actions filed against them because of these acts (e.g., Teva, Shikun u’ Binui).

viii Agency enforcement

Investigations pertaining to the Section 291A prohibition on provision of bribery to foreign public officials are conducted by the national unit for fraud investigations (a police department operating under the special Lahav 433 task force investigating all corruption- and bribery-related cases in Israel) and would routinely involve the participation of prosecutors from the Taxation and Economics Department of the Tel Aviv District Attorney’s Office. If money laundering aspects are also investigated, the Israel Money Laundering and Terror Financing Prohibition Authority may be involved as well to a certain extent. For publicly traded companies, the Israel Securities Authority would most probably also be involved.

ix Defences

A defendant in proceedings involving charges brought under the Section 290A prohibition on the provision of bribery to foreign public officials may use those general defences available to any defendant in criminal proceedings under the Penal Law, such as self-defence, duress or necessity (Sections 34J–34L), and Israeli law does not prescribe any unique defences with respect to foreign bribery.

In the Phase 3 Report, various anonymous members of the Israeli judiciary stated that compliance by a corporation with a robust anti-corruption compliance programme may be deemed sufficient to eliminate corporate criminal liability for acts committed by its employees.

x Leniency

Under Israeli law, no established legal mechanism exists that allows companies to self-report or cooperate with the enforcement authorities in return for reduced penalties or other forms
of leniency. Nevertheless, the prosecution in Israel may consider such self-reporting or cooperation at its broader prosecutorial discretion when deciding whether to file a criminal charge and with respect to sentencing.

xi Plea-bargaining

At any stage during the criminal proceeding (i.e., from the point at which the indictment is filed until sentencing), the prosecution and defendant may enter into a plea agreement, subject to the conditions set in the relevant case law and the specific guidelines issued by the State Attorney in this regard (these guidelines apply to all plea bargains and are not specific to the offence of bribery). On the basis of a plea agreement, certain charges may be omitted from the indictment and the defendant shall serve a reduced sentence. Such a plea agreement requires the approval of the court to enter into force, and once so approved annuls the need to conduct a full criminal trial. In addition, as from 2013, the prosecution and defendant may enter into a deferred prosecution agreement, but only with respect to offences that carry an imprisonment term of less than three years, and subject to other specific conditions.

A parallel route exists with respect to charges (non-bribery) brought under the Israeli Securities Law 1968 (as opposed to the Penal Law) in the form of a conditional agreement, which is essentially a deferred prosecution agreement available only with respect to such charges.

xii Prosecution of foreign companies

Foreign companies may be prosecuted in Israel for foreign bribery provided that at least some part of the foreign bribery took place within the territory of the state of Israel. According to Sections 9 and 12 of the Penal Law, the Israeli Penal Law shall be applicable with respect to any domestic offence, or to any external offence where the indictment is brought by – or with the approval of – the Israeli Attorney General.

A ‘domestic offence’ is defined as an offence conducted wholly or partially within the territory of the state of Israel, as well as any act in preparation, attempt, conspiracy or solicitation conducted outside the state of Israel so long as the offence itself was supposed to be carried out within it. An ‘external offence’ is defined as any offence that does not amount to a domestic offence.

Thus, if in the course of the provision of foreign bribery a foreign company has conducted at least part of the offence within the state of Israel (including, for example, any act of preparation, attempt or conspiracy), the foreign company may be prosecuted in Israel. In addition, charges for the provision of bribery to a foreign official may be made against the foreign company, even if the offence occurred only in part within the state of Israel, if the charges are brought by the Israeli Attorney General or with the Attorney General’s approval.

xiii Penalties

An individual or legal person providing bribery to foreign public officials shall face similar penalties as those applicable to domestic bribery.

While debarment from government contracting is not prescribed by the Penal Law, the Israeli Ministry of Defence requires that all defence exporters sign a declaration whereby they ‘declare they did not and will not be involved in the provision of bribery to a foreign public official pursuant to Article 291A of the Israel Penal Law’. This declaration constitutes
an integral part of the export licence, and a breach thereof can lead to the suspension or annulment of the licence or even removal of the offender from the approved exporters register and the denial of the right to receive export licences.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations
Certain requirements to maintain accurate corporate books and records are found in the Income Tax Ordinance 1961 (the Tax Ordinance), which stipulates that individuals and legal persons must maintain proper books and records for tax purposes.

In the specific corporate context, under the Companies Law 1999 any private Israeli company (including foreign companies registered in Israel) should maintain accurate and updated accounts and financial statements. Under the Securities Law 1968, any public company (and, under certain conditions, some private companies) must maintain similar accounting and record-keeping procedures.

ii Disclosure of violations or irregularities
Under Section 262 of the Penal Law, where a person has knowledge that a felony is about to be committed, that person is required to take reasonable acts to stop it. In addition, failure by a public company to report any violations of anti-bribery law may amount to failure to perform due disclosure, a criminal offence under the Securities Law 1968.

iii Tax deductibility of domestic or foreign bribes
In 2009 the Tax Ordinance was amended to include Section 32(16), which prescribes that cash or monetary equivalent payments shall not be tax deductible where there is reasonable ground to assume their provision constitutes an offence under any applicable law. This amendment codified the already prevailing interpretation of the Israel Tax Authority and the Israeli courts on non-deductibility of illegal payments.

iv Money laundering laws and regulations
The main source of legislation regarding prohibition on money laundering is the Prohibition on Money Laundering Law 2000 (the AML Law).

Any of the bribery offences enumerated under Sections 290–297 constitutes a predicate offence under Sections 2–3 of the AML Law.

v Sanctions for money laundering violations
The AML Law prescribes a penalty of imprisonment of up to 10 years or a fine of up to 4.52 million Israeli new shekels with respect to money laundering charges, and up to seven years’ imprisonment or a fine of up to 2.26 million Israeli new shekels with respect to the performance of a transaction involving prohibited property.

vi Disclosure of suspicious transactions
Under the AML Law, currently only banks must disclose any suspicious financial transactions potentially associated with the payment of bribes.
VI ENFORCEMENT: FOREIGN BRIbery AND ASSOCIATED OFFENCES

In December 2016, the Tel Aviv Magistrate’s Court rendered the first conviction on account of bribery of a foreign public official, on the basis of a plea agreement entered into with NIP Global (NIP), an Israeli company developing electronic systems. NIP provided bribery payments to public officials in Lesotho of approximately US$500,000 to promote its economic interests in the country. NIP was required to pay a fine of 2.25 million Israeli new shekels, was subject to a confiscation of 2.25 million Israeli new shekels, and was further made to draft and execute a compliance programme. The Court emphasised that the precedential nature of the indictment led to this lenient outcome.

In January 2018, Israeli Teva Pharmaceuticals Industries Ltd (Teva) entered into a conditional agreement with the prosecutorial authorities in Israel for violating securities laws, pursuant to which Teva admitted its involvement in the bribery of Ukrainian and Russian public officials, and in corrupt payments in Mexico, by its wholly owned foreign subsidiaries (for which it also paid a penalty of US$519 million to US authorities for violating the Foreign Corrupt Practices Act). The authorities’ recognition of Teva’s cooperation throughout the investigation was one of the considerations leading to the decision to enter into a conditional agreement with the company, rather than pursuing full criminal proceedings. Teva was required to pay a fine in the total aggregate amount of 75 million Israeli new shekels.

According to press reports, there are several ongoing investigations into foreign-bribery offences: (1) Benny Steinmetz, the beneficial owner of BSGR, and several officers of the company are under a multi-jurisdictional investigation related to their activities in Congo; and (2) Shafir Construction and its principals are under investigation regarding bribes in Romania involving top real estate transactions.

Yet another ongoing criminal investigation pertaining to foreign-bribery offences is under way with respect to high-ranking officers in Shiku u’Biniu Ltd, one of the major construction and development companies in Israel. The company’s officers have been arrested for allegedly providing bribery to public officials in Africa and Central America to win construction tenders worth hundreds of millions of dollars.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

On 7 September 2010, the state of Israel signed the Convention on the Organisation for Economic Co-operation and Development, thus completing its accession to the OECD. In addition, it is a signatory to the following international anti-corruption agreements:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations Convention against Corruption; and

VIII OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

A specific limitation that exists under the Crime Register and Rehabilitation of Offenders Law 1981 (the Crime Register Law) may limit the ability of foreign companies or individuals to perform due diligence on prospective Israeli business partners. According to the Crime Register Law, regular private entities or an individual cannot access the criminal record of another individual. The criminal record may only be provided directly by the Israeli police.
to the specific public bodies and authorities listed in the Crime Register Law, or to the individual with respect to which the criminal record pertains. It is also illegal to ask the individual to provide his or her criminal record.

Another limitation arises in the context of corporate compliance programmes. Israeli employment law broadly protects the status of trade unions, such that, in companies where employees are unionised, engagement of the relevant trade union may also be required to ensure the proper implementation of an internal compliance programme.

In addition, Israel enforces a very strict interpretation of its obstruction-of-justice rules, which may hinder the ability of a company to conduct a thorough internal investigation into a suspected bribery matter in Israel without running into difficulty with these rules.

IX COMPLIANCE

While the drafting and implementation of compliance programmes is not considered a defence under Israeli law, it may nevertheless serve as a mitigating factor when the prosecutorial authorities decide on the terms of plea or conditional agreements, as the NIP and Teva cases above demonstrate. In addition, and as was stated above, various anonymous members of the Israeli judiciary have stated that a robust anti-corruption compliance programme may in certain circumstances eliminate corporate criminal liability.

The only existing government regulation addressing the constitution of an adequate anti-corruption compliance programme may be found in the Defense Export Controls Agency guidelines, which in turn refer to the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance, issued on 18 February 2010.

X OUTLOOK AND CONCLUSIONS

The ongoing investigation into Shikun u’Binui may be a turning point with respect to corporate liability in Israel under Section 291A. This investigation has involved a review of the full business model of one of Israel’s older and more respected companies, and of respected members of Israel’s business community. Until now this offence was largely viewed as one that would mostly concern companies acting in grey areas or ‘under the radar’. Gradually, however, the understanding has been developing that enforcement of the prohibition of bribery is an issue that every company involved in international transactions has to take into account.
I INTRODUCTION

In Law No. 300/2000, Italy implemented both the 1997 EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, and the 1997 Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Since 2000, therefore, the Italian anti-corruption system has significantly extended its reach, in such a way as to include bribery of public officials of EU institutions and EU Member States and also, under certain conditions, public officials of foreign states and international organisations (such as the UN, the OECD and the European Council).

In Legislative Decree No. 231/2001, Italy introduced the notion of criminal responsibility of corporations, also applicable to bribery offences, on condition that the 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 by the law, but the matter is dealt with by a criminal court in accordance with the rules of criminal procedure, in proceedings that are ordinarily joined with the criminal proceedings against the corporations’ officers and employees. Also in this respect, therefore, as of 2001 the effectiveness of the Italian anti-corruption system has significantly increased.

Through 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. Law No. 69/2015 additionally increased the punishments for corruption offences and Legislative Decree No. 38/2017 has extended the reach of private commercial bribery by implementing the EU Framework Decision 2003/568/JHA on combating corruption in the private sector.

In the light of the above, it can certainly be stated that in the past decade the effectiveness of the Italian anti-corruption system has been significantly improved.
II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The Italian Criminal Code (ICC) provides for various bribery offences applicable to domestic public officials; the main constitutive element of these offences is always the existence of an unlawful agreement between the public official and the briber. The main bribery offences are the following.

First, the offence of ‘proper bribery’, provided for by Article 319 ICC, occurs when the public official receives money or other things of value, or accepts a promise of such things, in exchange for performing an act conflicting with the duties of his or her office, or for omitting or delaying an act of his or her office (or for having performed, omitted or delayed such an act).

Second, the offence of ‘bribery for the performance of a function’, provided for by Article 318 ICC, occurs when the public official unduly receives money or other things of value or accepts the promise of them, for him or herself or for a third party, in connection with the performance of his or her functions or powers. The reach of this offence was significantly broadened by Law No. 190/2012 to apply 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, or for generally making the public office potentially available to the briber.

Third, the offence of ‘bribery in judicial acts’, provided for by Article 319 ter ICC, occurs when the above-mentioned bribery conduct is performed to favour or damage a party in a civil, criminal or administrative proceeding.

Fourth, the offence of ‘unlawful inducement to give or promise anything of value’, provided for by Article 319 quater ICC, occurs where the public official induces someone to unlawfully give or promise to him or her or to a third party money or anything of value, by abusing his or her quality or powers. In the residual cases where the private party is not only ‘induced’, but is also ‘forced’ by the public official to give or promise a bribe, the offence entails the exclusive criminal liability of the public official and is considered an ‘extortion committed by a public official’, according to Article 317 ICC.

Finally, the offence of ‘trafficking of unlawful influence’, introduced by Law No. 190/2012 and provided for by Article 346 bis ICC, occurs in residual cases where the offences of proper bribery and bribery in judicial acts are not performed, and when anyone, by exploiting existing relations with a public official, unduly makes someone give or promise to give money or other patrimonial advantage as payment for his or her unlawful intermediation with the public official, or as consideration for the carrying out by the public official of an act conflicting with the office’s duties, or for the omission or delay of an office’s act. In conclusion, the less serious offence of ‘instigation to bribery’, provided for by Article 322 ICC, occurs where the private party makes an undue offer or promise that is not accepted by the public official, or where the public official solicits an undue promise or payment that is not carried out by the private party.

The above-mentioned bribery offences apply in relation not only to public officials, but also, with exceptions, to ‘persons in charge of a public service’ (Article 320 ICC).

According to Italian law:

- Public officials are persons ‘who perform a public function, either legislative or judicial or administrative’ (for the same criminal law purposes, ‘an administrative function is public if 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).

b Persons in charge of a public service are ‘the ones who, under any title, perform a public service’ (for the same 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, public officials includes judges and their consultants, witnesses (from the moment the judge authorises their summons), notaries public, police officers, etc., whereas persons in charge of a public service include state or public administration employees lacking the typical powers of a public authority.

Employees of state-owned or state-controlled companies are not expressly included within the legal definition, but they implicitly fall within the relevant ‘public’ categories on condition that the activity carried out is effectively governed by public law or has a public nature.

In principle, public officials cannot participate in commercial activities, as expressly stated in relation to state employees by Legislative Decree No. 3/1957 (Article 60). However, owing to the lack of a comprehensive regulation some exceptions do exist.

Italian criminal provisions do not expressly restrict the providing of gifts, meals, entertainment, etc., either to domestic or foreign officials. However, all these advantages could potentially represent the ‘undue consideration’ for a public official prohibited by Italian law (falling within the concept of ‘other things of value’ provided for in relation to bribery offences).

In particular, with respect to the offence of bribery for the performance of a function, the past consolidated case law excluded tout court criminal relevance with regard to gifts of objective ‘small value’ that could be considered as ‘commercial courtesies’ in specific cases. In contrast, in relation to proper bribery (i.e., in relation to the performance of an act conflicting with the duties of office), the very strict interpretation of the case law is that the small value of the gift never excludes, as such, criminal responsibility. The 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 (i.e., to what extent the gift represents a consideration for carrying out the act).

In addition, some Italian non-criminal regulations restrict the provision of gifts, etc., to Italian officials. As of 1 January 2008, Italian government members and their relatives are prohibited from keeping in their personal possession ‘entertainment gifts’, received on official occasions, of a value higher than €300 (Prime Ministerial Decree of 20 December 2007).

Furthermore, in accordance with Law No. 190/2012, in March 2013 the Italian government issued a new code of conduct for public administration employees, specifically aimed at preventing corruption and at ensuring compliance with public officials’ duties of impartiality and exclusive devotion to the public interest. In particular, as far as gifts and considerations are concerned, Article 4 of the code provides that public employees are forbidden from asking for or accepting gifts or other things of value (with the exception of courtesy gifts of small value) as consideration to accomplish or to have accomplished a duty of their office, either from subjects who could benefit from their decisions or from subjects that are going to be the addressees of the activity or powers related to the public office. The
prohibition applies with respect to gifts received not only from private parties, but also from other public employees. In any case, pursuant to the code, the limit on the permissible value of courtesy gifts of small value is equal to a maximum of €150, and if gifts of higher value are received, they shall be put at the disposal of the public administration.

With respect to job assignments, public employees are prohibited from accepting assignments of professional collaboration by private people who have (or have had in the previous two years) a significant economic interest in relation to decisions or activity concerning the relevant public office.

Furthermore, Article 10 of the Code holds that public employees acting as private persons in relation to other public employees may not benefit from their professional role to obtain undue things of value.

A similar prohibition against receiving gifts or hospitality of any kind, with the exception of those considered as commercial courtesies of small value, is ordinarily contained in most of the ethical codes implemented by the various state-owned or state-controlled corporations.

All the aforementioned regulations directly apply only to the recipient of the gifts or hospitality and not to the party providing the gifts or hospitality, and the sanction for violation of the regulations is limited to an internal disciplinary action.

In addition to the bribery of public officials, in 2002 an offence prohibiting private bribery was introduced, provided for by Article 2635 of the Italian Civil Code. The reach of the offence was first extended by Law No. 190/2012, and then by Legislative Decree No. 38/2017, which has implemented the EU Framework Decision 2003/568/JHA on combating corruption in the private sector.

The offence occurs where money or other undue benefits are solicited, agreed or received by directors, general managers, managers in charge of the accounting books, internal auditors and liquidators of a corporation, to carry out or omit an act in violation of the duties of their office. A criminal complaint filed by the victim is a necessary requirement, unless the crime generates a distortion of competition in the acquisition of goods or services.

Punishment is imprisonment for one to three years for both the briber and the corporate officer, which is doubled for corporations listed in Italy or in the European Union, but limited to one year and six months for ordinary employees.

The following sanctions are applicable to individuals, in relation to domestic and foreign bribery: imprisonment for six to 10 years for the offence of proper bribery; imprisonment for one to six years for the offence of bribery for the performance of a function; imprisonment for six to 12 years for the offence of bribery in judicial acts; imprisonment for six to 10 years and six months for the public official and up to three years for the private briber for the offence of unlawful inducement to give or promise anything of value; and imprisonment for one to three years for the offence of trafficking of unlawful influences.

All these sanctions can be increased by ‘aggravating circumstances’, and the confiscation of the proceeds of crime also applies in the event of conviction. In contrast, a civil settlement with the person injured, aimed at compensating damage, can qualify as a ‘mitigating circumstance’ to reduce the criminal sentence.

For the offence of instigation to bribery, the sanctions provided for proper bribery and for bribery for the performance of a function apply, are reduced by one-third.

With respect to corporations, the relevant sanctions comprise fines, confiscation and disqualifications, and the latter include the suspension or revocation of government concessions, debarment, exclusion from government financing and even prohibition from carrying on business activities (Articles 9 to 13 of Legislative Decree No. 231/2001). These
sanctions can also be applied at a pretrial stage, as interim coercive measures. In the event of conviction, confiscation of the profit or price of the offence has to be applied, including confiscation of the corporation’s assets to a value corresponding to the profit or price of the offence (Article 19 of Legislative Decree No. 231/2001). At a pretrial stage, prosecutors can request the competent judge to grant an order freezing the profit or funds related to the bribery offence (Article 45 of Legislative Decree No. 231/2001).

III  ENFORCEMENT: DOMESTIC BRIBERY

Bribery laws are enforced by public prosecutors. In the Italian legal system, public prosecutors are magistrates – not a government agency – and as judges they are independent from the executive power. According to Italian law, criminal action is compulsory and not discretionary, and it cannot be dropped by the public prosecutor (unless he or she assesses that no crime was ever committed and accordingly requests a dismissal from the competent judge; with respect to the corporate criminal responsibility, the dismissal is directly ordered by the prosecutor).

Plea-bargaining is widely used in the Italian system in relation to corruption offences. It has to be granted by the competent judge, further to the agreement of the offender with the prosecuting authorities, on condition that the punishment agreed is not higher than five years’ imprisonment. The law considers a plea bargain to be substantially equivalent to a conviction sentence (Article 444 of the Italian Code of Criminal Procedure), but according to case law the affirmation of guilt has a lower value because criminal responsibility was not proven in the course of a criminal trial.

In relation to domestic bribery offences, several investigations and prosecutions, some involving foreign companies, have been conducted by Italian authorities in recent years, including the following cases.

i  The Enipower case

This case concerns an investigation started in 2003 by the Milan prosecutor’s office for the alleged payment of bribes by several private parties to officers of the companies Enipower SpA and Snamprogetti SpA (controlled by the state-owned company Eni) to obtain public contracts. Most of the defendants, individuals and companies have already been sentenced following court decisions or have entered into a plea bargain with court authorisation.

ii  The Siemens AG case

This case started in connection with the Enipower case mentioned above, and concerned the alleged payment of bribes by Siemens officers to Enipower officers to obtain public contracts. The great significance of the case is that, in April 2004, the Court of Milan applied for the first time the provisions on corporate criminal responsibility to a foreign corporation, including the use of interim coercive measures at pretrial stage (Siemens was prohibited from entering into contracts with the Italian public administration for one year). The conviction of Siemens AG and of its officers was subsequently confirmed at the trial stage by the Court of Milan.

iii  The G8 case

This case concerns allegations of corruption against government members and public officials in connection with the adjudication of public tenders regarding restructuring and building projects in connection with the G8 summit held in Italy in June 2009. In October 2012, in
the main leg of the prosecution, the Rome Court of First Instance sentenced both the public officials and the private parties involved to punishments ranging from two to four years' imprisonment. These convictions were then confirmed by the Rome Court of Appeal on 28 January 2015, and finally by the Court of Cassation on 10 February 2016.

iv The Lombardy region case

Appeal proceedings are currently pending in respect of top politicians and officers of the Lombardy region for allegedly having facilitated the obtaining of public healthcare funds by certain private hospitals in exchange for money or other patrimonial advantages. On 27 November 2014, the Milan Court of First Instance sentenced, in a separate relevant leg of the proceeding, the alleged intermediary of the bribe to five years' imprisonment. This conviction was then confirmed by the Milan Court of Appeal on 15 March 2017. As far as the main proceeding against the former president of the Lombardy region is concerned, on 23 December 2016 the Milan Court of First Instance, Section X, handed down a sentence of six years' imprisonment. On 19 September 2018, the Milan Court of Appeal confirmed the conviction, increasing the sentence to seven years and six months' imprisonment.

v Expo

In May 2014, the Milan prosecutor's office started an investigation in relation to the adjudication of public tenders in the context of the 2015 Universal Exposition of Milan. A relevant leg of the proceeding has already ended with the main defendants accepting a plea bargain granted by the judge of the preliminary hearing. The most severe sentence imposed was three years and four months' imprisonment. In another leg of the proceeding, on 19 July 2016, the Milan Court of First Instance sentenced a relevant public official to two years and two months' imprisonment. Appellate proceedings are currently pending.

vi Mose

In 2014, the Venice prosecutor's office started an investigation against top politicians of the Veneto region and businessmen for corruption relating to public funds used for the 'Mose' project, a huge dam aimed at protecting Venice from the high tide. On 16 October 2014, a relevant leg of the proceeding ended with 19 defendants accepting a plea bargain granted by the judge of the preliminary hearing. The most severe sentence imposed was two years and 10 months' imprisonment and a €2.6 million confiscation order. In another leg of the proceeding, the trial of first instance started in 2015 and ended on 15 September 2017 with four convictions (inter alia, the former Minister of the Environment was sentenced to four years' imprisonment), but also with the acquittal of the former Mayor of Venice. Appellate proceedings are currently pending.

vii Mafia Capitale

In 2014, the Rome prosecutor's office started investigations against top politicians of the municipality of Rome and businessmen for corruption and conspiracy 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). In December 2014, 44 people were arrested. The trial started in 2015 and ended on 20 July 2017 with
41 convictions issued by the Rome Court of First Instance. In September 2018, the Rome Court of Appeal confirmed most of the convictions (and it considered the aggravating circumstances relating to mafia to be well-founded).

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Pursuant to Article 322 bis (Paragraphs 1 and 2) ICC the bribery offences originally applicable for domestic public officials (see Section II) are extended to apply to public officials of EU institutions and EU Member States, and to the private briber.

Furthermore, Article 322 bis (Paragraph 2) ICC extends the application of the aforementioned domestic bribery offences to cover public officials of foreign states and international organisations (such as the UN, the OECD and the European Council), with the following two significant limitations:

a only active corruption is punished (i.e., only the private briber, on the understanding that foreign public officials will be punished according to the laws of the relevant jurisdiction); and

b application is conditional on the act being committed to obtain an undue advantage in international economic transactions or with the purpose of obtaining or maintaining an economic or financial activity (the conduct prohibited by the latter part of this limitation was added by Law No. 116/2009, implementing the UN Convention against Corruption of 2003).

As previously mentioned, as of 2000, under Article 322 bis ICC, the reach of bribery offences has been significantly broadened in that it is now immaterial whether the functions of the official who receives or is offered a consideration have no connection to Italy. However, in relation to such offences, Italy has not established a general ‘extraterritorial’ jurisdiction. In fact, the governing principle on the point has remained that of territoriality, according to which Italian courts have jurisdiction only on bribery offences that are considered to have been committed within the Italian territory: namely, when at least a segment of the prohibited conduct (i.e., the decision to pay a bribe abroad), or its actuation, takes place in Italy. This principle suffers a derogation in favour of the extraterritorial jurisdiction only to a very limited extent, and under stringent requirements (presence in Italy of the suspect, request of the Italian Minister of Justice, unsuccessful extradition proceeding, etc.; see Articles 9 and 10 ICC).

With respect to the definition of foreign public officials (i.e., officials of EU Member States, of foreign states and of international organisations), Italian law makes express reference to the persons who, within these states and organisations, ‘perform functions or activities equivalent to those of public officials and of persons in charge of a public service’ (Article 322 bis, Paragraphs 1 and 2, ICC). In other words, Italian criminal law extends to them the same definitions already provided for domestic officials, explained in Section II. As far as officials of EU institutions are concerned, Italian law provides for an express listing of the relevant categories (including members of the European Commission, Parliament and Court of Justice, and officials of related institutions; Article 322 bis, Paragraph 1, ICC).

The regime regarding gifts and gratuities is the same as that applicable to domestic bribery, already explained in Section II. Facilitating payments are prohibited by Italian law. Payments amounting to bribery offences (described in Section II) are prohibited whether they are carried out directly or indirectly, through intermediaries or third parties. In the
Both individuals and corporations can be held liable for bribery of a foreign official. With respect to the responsibility of individuals, see Section II. As of 2001, as mentioned in Section I, prosecutions can also be brought against both Italian and foreign corporations for bribery offences (Article 25 of Legislative Decree No. 231/2001). For a corporation to be held responsible, 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 that are usually joined with the criminal proceedings against the corporations’ officers or employees. Where the bribery offence is committed by an employee, the corporation can avoid liability by proving to have implemented an effective compliance programme 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 an effective compliance programme does not suffice and the corporation’s 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).

As explained in Section III, bribery laws are enforced by public prosecutors. In the Italian legal system, public prosecutors are magistrates – not a government agency – and as judges they are independent from the executive power. Under certain conditions, plea-bargaining with prosecuting authorities is recognised by Italian law (see Section III). In the Italian system, there is no formal mechanism for companies to disclose violations in exchange for lesser penalties. However, a certain degree of cooperation with the prosecuting authorities before trial (in terms of removal of the officers or members of the body allegedly responsible for the unlawful conduct, implementation of compliance programmes aimed at preventing the same type of offences, compensation for damage, etc.) can have a significant impact in reducing the pretrial and final sanctions applied to the corporation.

The penalties applicable to individuals and corporations in relation to foreign bribery are the same as those applicable to domestic bribery, explained in Section II.

As far as civil enforcement is concerned, Italy ratified the Council of Europe Civil Law Convention on Corruption of 4 November 1999 in Law No. 112/2012, which entered into force on 28 July 2012. Therefore, current Italian legislation on this point (especially on the aspects of civil liability and compensation of damage deriving from corruption) can be considered to be in compliance with international standards.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The relevant provisions on bookkeeping, auditing, etc., are contained in the Italian Civil Code of 1942. Article 2423 of the Civil Code provides that balance sheets of limited liability companies have to be drawn up with transparency and have to represent in a true and fair view the patrimonial and financial situation of the company and the economic result of the financial period. Articles 2423 bis to 2429 of the Civil Code provide the criteria to be followed for the drafting of the balance sheet, and the tasks to be accomplished by the board of directors and by the internal auditors on this point.

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The duty to appoint internal auditors, and their tasks, are provided by Article 2397 et seq. of the Civil Code. In particular, according to Article 2403 of the Civil Code, the internal auditors control compliance with the law, with by-laws and with the principles of fair administration, and in particular they control the adequacy of the organisational, administrative and accounting structure adopted by the company and its concrete functioning. The duty to appoint a firm to audit the internal control on accounting is provided for by Article 2409 bis et seq. of the Civil Code.

With respect to listed companies, Italian law provides for more stringent internal and external company controls.

Companies have no obligation to disclose violations of anti-bribery laws or associated accounting irregularities. Internal and external auditors have a duty to signal any relevant violations, and they are responsible for damages in the event of non-compliance.

In the 1990s, investigations of company accounts were largely used as a tool to discover bribery payments, and the offence of false accounting was often charged jointly with that of domestic bribery. Legislative Decree No. 61/2002 has amended the definition of false accounting offences, largely reducing their sphere of application. Law No. 69/2015, which entered into force on 14 June 2015, has again broadened the definition and reach of these offences, so they can now be used again.

In the event that the payment of bribes does amount to a false accounting offence, with respect to listed companies Italian law provides the punishment of imprisonment for three to eight years (Article 2622 of the Civil Code) and, with respect to non-listed companies, the punishment of imprisonment for one to five years (Article 2621 of the Civil Code).

Italian law prohibits the tax deductibility of both domestic and foreign bribes.

Money laundering legislation is very effective in the Italian system, in terms of both criminal and administrative sanctions.

In particular, the statute of the criminal offence of money laundering is provided for by Article 648 bis ICC, which punishes with four to 12 years’ imprisonment anybody who, with knowledge and intent, substitutes or transfers money, goods or other things of value deriving from an intentional crime, or carries out, in relation to that benefit, any transactions in such a way as to obfuscate the identification of its criminal provenance. Domestic and foreign bribery, therefore, represent predicate offences for the criminal offence of money laundering.

Until January 2015, charging the offence of money laundering was conditional upon the offender not having participated in the predicate offence (i.e., had the offender participated in the predicate offence, he or she would be responsible only for that offence); this condition is no longer required under the new regime, under which ‘self-money laundering’ is also punishable.

In addition to the extremely severe prison sentence mentioned above, the law provides for the compulsory confiscation of the relevant money or goods in the event of conviction (and the related possibility of freezing them at a pretrial stage).

Furthermore, the administrative provisions on anti-money laundering are very effective under Italian law. They are now contained in Legislative Decree No. 90 of 25 May 2017, which implemented the Fourth Anti-Money Laundering Directive 2015/849/EU in Italy.

In essence, this legislation imposes on relevant ‘categories of subjects’ (financial intermediaries, professionals, etc.) certain anti-money laundering obligations, the most significant of which are the following:

a. ‘customer due diligence’ obligations, which mainly consist of the following activities:
• identifying the customer and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source;
• identifying the beneficial owner and verifying his or her identity;
• obtaining information on the purpose and the intended nature of the business relationship or professional service; and
• conducting ongoing monitoring in the course of the business relationship or professional service;

b record-keeping obligations; and
c reporting obligations: according to Articles 35 to 42 of the above-mentioned Legislative Decree No. 90/2017, the ‘relevant subjects’ have to disclose to competent authorities (the Financial Intelligence Unit) ‘suspicious transactions’ relating to money laundering and terrorist financing. Failure to disclose a suspicious transaction does not amount to a criminal offence, but it is penalised by the imposition of fines and other administrative sanctions (Articles 58 to 61 of the Legislative Decree). The Financial Intelligence Unit can impose the suspension of the relevant suspicious transactions on financial intermediaries.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Several investigations and prosecutions for foreign bribery offences have been conducted by Italian authorities in recent years, the most significant of which are the following.

i The Oil-for-Food programme
On 10 March 2009, in respect of the mismanagement of the Oil-for-Food programme, the Milan Court of First Instance sentenced three Italian individuals, acting directly or indirectly for an Italian oil company, to two years’ imprisonment for the offence of foreign bribery on the assumption that they paid bribes to a state-owned Iraqi company. On 15 April 2010 the Milan Court of Appeal acquitted all co-defendants because the charges were time-barred.

ii The Nigeria Bonny Island case
This case concerns an investigation conducted by the Milan prosecutor’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, Japanese company JGC and French company Technip), and allegedly consisting of significant payments to Nigerian public officials between 1994 and 2004 to win gas supply contracts. On 17 November 2009, the Milan judge for the preliminary investigations rejected the prosecutors’ application to apply a pretrial ‘interim measure’ prohibiting Eni SpA and Saipem SpA 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 5 April 2012 because of the time bar. In contrast, in July 2013, Saipem SpA was sentenced by the Milan Court of First Instance to a fine of €600,000 and to confiscation of €24.5 million. In February 2015, the conviction of Saipem SpA was confirmed by the Milan Court of Appeal, and in February 2016 the Court of Cassation issued the final judgment convicting Saipem SpA.
iii  The Finmeccanica–AgustaWestland case

This case concerns an investigation conducted by the prosecutor'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 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 International Ltd entered into a plea bargain with the prosecutor's office. In October 2014, the Milan Court of First Instance acquitted on the merits the top executives of both companies in relation to the bribery offences, but sentenced them to approximately two years' imprisonment for the offence of tax fraud. In April 2016, the Milan Court of Appeal overturned the acquittal of the two executives and sentenced them to four and four and a half years' imprisonment respectively. These convictions were then quashed by the Court of Cassation on 16 December 2016 and, in the subsequent appellate trial, the Milan Court of Appeal acquitted both defendants in January 2017.

iv  Pending trials

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

a  with respect to Nigeria, in November 2013, the Milan Prosecutor's Office started a new criminal investigation into the company Eni SpA, its top managers and Italian and foreign individuals for the alleged offence of bribery of Nigerian public officials, for the granting in 2011 of an oil-prospecting licence for an oil field in Nigerian offshore territorial waters by the Nigerian government to the subsidiaries of Eni and Shell. Over the course of 2016, the foreign company Shell and its managers were added as suspects to the investigation, and at the end of 2017 all suspects were committed to trial. The trial started in summer 2018 and it is currently pending before the Milan Court of First Instance, while two defendants who opted for a summary trial were sentenced to four years’ imprisonment in September 2018; and

b  with respect to Algeria, several years ago the Milan Prosecutor's office started a criminal investigation into the companies Eni SpA and Saipem SpA, some of their top managers and foreign agents for the alleged offence of bribery of Algerian public officials, for the adjudication of several tenders in Algeria in 2007–2010. The trial before the Milan Court of First Instance ended in September 2018 with the acquittal of Eni SpA and its top managers, and with the conviction of Saipem SpA and its top managers and agents, who were given sentences ranging from four years and one month’s imprisonment to five years and six months’ imprisonment, plus confiscation of €197 million as proceeds of crime. Appellate proceedings are likely to start in the course of 2019.

VII  INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Italy is a signatory to the following European and international conventions with relevance for anti-corruption purposes:

a  European Union:
• the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, Brussels, 26 May 1997 (ratified by Law No. 300/2000, entered into force on 26 October 2000);

b Council of Europe:
• the Criminal Law Convention on Corruption, Strasbourg, 27 January 1999 (ratified by Law No. 110/2012, entered into force on 27 July 2012); and
• the Civil Law Convention on Corruption, Strasbourg, 4 November 1999 (ratified by Law No. 112/2012, entered into force on 28 July 2012); and

c international:
• the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997 (ratified by Law No. 300/2000, entered into force on 26 October 2000);
• the UN Convention against Transnational Organized Crime, New York, 15 November 2000 (ratified by Law No. 146/2006, entered into force on 12 April 2006); and

Italy actively participates with the OECD Working Group on Bribery and with the Council of Europe’s Group of States against Corruption, whose recommendations were recently mostly implemented by Italy.

VIII LEGISLATIVE DEVELOPMENTS

As mentioned above, in the past decade the effectiveness of the Italian anti-corruption system has significantly improved as a result of reforms that have extended the reach of bribery offences to include public officials of foreign states (Law No. 300/2000) and corporations (Legislative Decree No. 231/2001), and that address private corruption (especially Law No. 190/2012 and Legislative Decree No. 38/2017).

In particular, Law No. 190/2012, concerning ‘Provisions for the prevention and repression of corruption and illegality in the public administration’, is the result of several bills that had been pending in Parliament for a few years, and it was aimed at improving the efficiency and deterrence of the Italian anti-bribery system, and at complying with the higher standards requested at international level, by the OECD in particular.

In addition to the criminal aspects, a crucial aim of Law No. 190/2012 was to introduce into the public administration new compliance procedures to improve transparency in the decision-making process, to avoid conflicts of interest in relations with private parties, to increase accountability of public officials and ultimately to remove at source the causes of corruption.

Law Decree No. 90 of 24 June 2014 has attributed significant new powers to the National Anti-Corruption Authority (ANAC) in an effort to counteract bribery conduct by providing effective coordination and exchange of information between that body and the various prosecutor’s offices investigating cases of corruption, as well as providing the ANAC with effective powers of supervision over relevant public tenders.
IX  COMPLIANCE

As explained in Section IV, compliance programmes have a crucial role under Italian law for excluding or mitigating corporate responsibility. In particular, where a bribery offence is committed by an employee, the corporation can avoid liability by proving to have implemented an effective compliance programme designed to prevent the commission of such an offence (Article 7 of Legislative Decree No. 231/2001). On the other hand, where a bribery offence is committed by senior managers, the implementation of an effective compliance programme does not suffice, and the corporation’s 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).

X  OUTLOOK AND CONCLUSIONS

As explained in Sections I and VIII, the Italian anti-corruption system has greatly improved, in particular with the extension of the reach of corruption offences to include foreign public officials and the responsibility of corporations.

Furthermore, Law No. 190/2012 has additionally improved the effectiveness of the anti-corruption system by introducing new bribery offences, increasing punishments for existing offences and, more generally, enlarging the sphere of responsibility for private parties involved in bribery.

Law No. 69/2015 has additionally increased the punishments for corruption offences and Legislative Decree No. 38/2017 has extended the reach of private commercial bribery, by implementing the EU Framework Decision 2003/568/JHA on combating corruption in the private sector.

The significant powers given to the ANAC in 2014 was an additional concrete step in the right direction.
I INTRODUCTION

Japan is ranked 20th on the 2017 Corruption Perceptions Index published by Transparency International and is perceived as a relatively ‘clean’ country in terms of bribery and corruption. However, bribery and corruption issues continuously arise, both domestically and internationally. As Japanese companies have increased their business activities outside Japan in recent years, anti-corruption compliance relating to dealings with foreign officials has become a serious issue for Japanese companies, and it is one of the most important topics for the legal community in Japan.

In Japan, both domestic and foreign bribery are regulated. The Criminal Code (CC) regulates domestic bribery of public officials and the Unfair Competition Prevention Law (UCPL) regulates bribery of foreign public officials. Private commercial bribery is not generally regulated, but there are laws that regulate private commercial bribery in specific circumstances, as discussed in Section II.iii. The Political Funds Control Act (PFCA) provides restrictions on political contributions.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Bribery of public officials

Article 198 of the CC prohibits giving, offering or promising bribes to public officials in connection with their duties.

Under Article 7(1) of the CC, public officials are defined as ‘national or local government officials, members of an assembly or committee, or other employees engaged in performance of public duties in accordance with laws and regulations’. Not only current public officials, but persons who have resigned as public officials or who will become public officials are subject to the CC if they are bribed in relation to their duties. Additionally, officials or employees of certain special entities, such as the Bank of Japan, are deemed to be public officials in terms of bribery under the CC. In addition to the CC, there are other laws that have bribery provisions concerning officials and employees of certain entities; for example, certain railway companies in Japan are still state-owned and there are related regulations that have their own anti-bribery provisions.

Although there is no definition of ‘bribery’, any benefit could be bribery. In accordance with precedent cases, the provision of certain gifts or benefits could be deemed to be merely a ‘social courtesy’ if the gifts or benefits are not provided in connection with a public official’s
duties; however, there is no clear safe-harbour guideline or rule. Having said that, the National Public Service Ethics Act (NPSEA) and other relevant guidelines described below serve as useful guidelines when analysing these issues in practice.

Under the CC, a public official who accepts, solicits or promises to accept a bribe in connection with his or her duties shall generally be punished by imprisonment for not more than five years. The criminal penalties may vary depending on the nature of the bribery, including the manner of accepting the bribe; for example, exercising influence over other public officials' performance of their duties because of the bribe, rather than the bribe-taking public official modifying his or her own performance. A person who gives, offers or promises to give a bribe to a public official shall be punished by imprisonment for a maximum of three years or a fine that does not exceed ¥2.5 million. The relevant bribery provisions of the CC only apply to individual persons and do not apply to entities, such as companies.

ii Ethics for national government officials
The NPSEA and the National Public Service Ethics Code (the Ethics Code) apply to regular national public officials to maintain ethics and secure fairness in the execution of duties.

While the NPSEA provides various obligations applicable to national public officials, one of the main obligations requires quarterly reporting of any gift, entertainment or other benefit of more than ¥5,000 in value. Those reports must be submitted to the head of the relevant ministry and include the amount of the gift and the name of the provider of the gift.

The Ethics Code provides more practical regulations and guidelines for public officials. It generally prohibits national public officials from accepting gifts from specific stakeholders; for example, those who conduct businesses subject to licences or permissions or those who obtain subsidies, if granting such licences, permissions or subsidies is within the scope of the public officials’ duties. The government has published various guidelines and Q&As on case studies in relation to the NPSEA and the Ethics Code, which are useful for companies as practical guides analysing the risks of communications or relations with public officials.

iii Private commercial bribery
Private commercial bribery is not generally regulated. However, there are laws that regulate private commercial bribery in specific circumstances. For example, under Article 967(2) of the Companies Act (CA), providing certain benefits to persons such as company board members in connection with their duties is prohibited. Private commercial bribery could also constitute other categories of crime, such as breach of trust under Article 247 of the CC, depending on the facts and circumstances.

iv Political contributions by foreign citizens or foreign companies
The PFCA prohibits certain political contributions from foreigners.

Article 22-5 of the PFCA prohibits political contributions from (1) foreign persons, (2) foreign entities, or (3) associations or any other organisations of which the majority of the members are foreign persons or entities, with the exception of Japanese entities that have been listed on a Japanese stock exchange consecutively for five years or more.

The above rule prohibits the receipt of foreign-sourced political contributions and penalises the recipient, but it does not penalise the foreigners who make the political contributions.
III ENFORCEMENT: DOMESTIC BRIBERY

i Enforcement of domestic anti-bribery laws
There have been a number of domestic bribery cases at both the national and local government level. Most recently, in 2018, senior government officials of the Ministry of Education, Culture, Sports, Science and Technology were arrested and indicted on a charge of accepting bribes.

ii Extraterritorial application of the CC
The CC applies to anyone who commits bribery (including foreigners) within the territory of Japan. It is also applicable to Japanese public officials who receive bribes outside the territory of Japan. Prior to 2017, the CC was not applicable to those who gave bribes outside the territory of Japan, but it has since been amended in relation to this applicability and now includes Japanese nationals.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law and its elements
Foreign bribery is prohibited by Article 18(1) of the UCPL. Japan amended the UCPL in 1998 to criminalise bribery of foreign public officials and to implement the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).

Article 18(1) of the UCPL provides:

No person shall give, or offer or promise to give, any money or other benefit, to a foreign public official, in order to have the foreign public official act or refrain from acting in relation to the performance of official duties, or in order to have the foreign public official use his/her position to influence another foreign public official to act or refrain from acting in relation to the performance of official duties, in order to obtain wrongful gains in business with regard to international commercial transactions.

‘International commercial transaction’ means the act of economic activity beyond national borders such as trade and foreign investment, and ‘international’ means (1) an international relationship exists between the parties to the commercial transaction, or (2) an international relationship exists for the business activity in question. ‘Acting in relation to the performance of official duties’ includes not only any acts within the scope of official authority of the foreign public official, but also any acts closely connected to his or her official duties.

ii Definition of foreign public official
Article 18(2) of the UCPL provides that the following five categories of persons fall under the definition of ‘foreign public official’:

a a person who engages in public services for a national or local foreign government;
b a person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest;
c a person who engages in the affairs of an enterprise of which the majority of voting shares or capital subscription that exceeds 50 per cent of that enterprise’s total issued voting shares or total amount of capital subscription is directly owned by a national or local government of a foreign state, or of which the majority of officers (meaning
directors, auditors, council members, inspectors, liquidators and other persons engaged in the management of the business) are appointed or designated by a national or local foreign government, and to which special rights and interests are granted by the national or local foreign government for performance of its business, or a person specified by a cabinet order as an equivalent person;

d a person who engages in public services for an international organisation (which means an international organisation constituted by governments or intergovernmental international organisations); or

e a person who, under the authority of a foreign state or local government of a foreign state or an international organisation, engages in affairs that have been delegated by that state or organisation.

iii Gifts and gratuities, travel, meals and entertainment restrictions

It is prohibited to offer or promise to give any money or other benefits to a foreign public official to obtain wrongful gain in business. ‘Gain in business’ is interpreted to include any tangible or intangible economic value or any other advantage in a general sense that a business operator can gain from the business. Therefore, offering gifts and gratuities, travel, meals and entertainment (collectively, gifts) to a foreign public official can be prohibited if it is considered to have the purpose of obtaining wrongful gain in business. The Guidelines issued by the METI and revised on 30 July 2015 (the METI Guidelines) provide useful guidance on what kind of gifts are allowed under the UCPL. They provide that some gifts in a small amount can be regarded as being purely for the purpose of socialising or for fostering understanding of the company’s products or services and are therefore allowed depending on the timing, type of item, amount of money, frequency or other factors. Specific examples that may be considered as not obtaining wrongful gain in business include: providing appropriate refreshments or basic food and drink at a business meeting; riding with a foreign public official in a company car when it is necessary to visit the company’s office because of transportation conditions; or providing an appropriate seasonal gift of low cost in accordance with social customs.2

iv Facilitation payments

There is no provision in the UCPL that clearly allows small facilitation payments. Therefore, bribery of foreign public officials will not be exempted from punishment just because the bribe is a small facilitation payment. The METI Guidelines recognise that there are cases, for instance in customs procedures, where, despite the fact that all the necessary procedures under local laws have been observed, there will still be delays or other unreasonably disadvantageous discriminatory treatment by the local government until money or goods are provided to the local government officials. However, the METI Guidelines state that providing money or goods in such cases, even for the purpose of avoiding discriminatory disadvantageous treatment, is likely to be considered as giving money or other benefits to obtain a wrongful gain in business.3

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Penalties and others

**Penalties**

Under Article 21(2) of the UCPL, a natural person who bribes a foreign public official shall be subject to imprisonment for a period not exceeding five years or a fine not exceeding ¥5 million. In addition, the UCPL provides for ‘dual criminal liabilities’, such that if a representative, agent, employee or any other staff member of an entity has committed a violation in connection with the operation of the said entity, a fine not exceeding ¥300 million will be imposed on that entity.

**Territorial jurisdiction and prosecution of foreign companies**

The UCPL adopts the principle of territorial jurisdiction. Therefore, if any elements constituting the offence have been committed in Japan, or the result of the offence has occurred in Japan, regardless of the nationality of the offender, the act will be subject to punishment as bribery of a foreign public official. In addition, the principle of nationality is also adopted. Therefore, a Japanese person who commits offences outside Japan could still be subject to punishment.

**Plea-bargaining and leniency**

With effect from 1 June 2018, Japan has introduced a plea-bargaining system. Suspects and criminal defendants can avoid indictment or obtain lighter sentences if they cooperate to provide evidence for the crimes committed by others (not crimes committed by themselves). On 20 July 2018, Mitsubishi Hitachi Power Systems, Ltd released a press release stating that the company itself had applied to use this system in relation to a violation of the UCPL by their former officers regarding the construction of a thermal power plant in Thailand. This is the first reported case of the use of the plea-bargaining system.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Basic regulations on financial record-keeping

General rules on financial record-keeping are provided in the CA. Article 432 provides that a joint-stock company (KK)\(^4\) is obliged to prepare accurate account books in a timely manner pursuant to the applicable ordinance of the Ministry of Justice, which stipulates detailed regulations on the preparation of account books, and must also retain the account books and important materials regarding its business for 10 years from the time of the closing of the account books. A KK is required to prepare financial statements and business reports at the end of every fiscal year. The financial statements must be approved at the annual shareholders’ meeting and the contents of the business reports must be reported at the annual shareholders’ meeting by the directors in accordance with Article 438 of the CA. Article 440 of the CA also provides that a KK must issue a public notice of its balance sheet (or, for a large company, its balance sheet and profit and loss statement), without delay after the conclusion of the annual shareholders’ meeting pursuant to the provisions of the applicable ordinance of the Ministry of Justice, unless it has an obligation to file a securities report with the relevant local finance

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\(^4\) Kabushiki kaisha.
bureau under the Financial Instruments and Exchange Act (FIEA). A foreign company that is registered in Japan (that is the same type of company as a KK or is closest to it in kind) is also obligated, under Article 819 of the CA, to issue a public notice of its balance sheet or equivalent without delay after the conclusion of the annual shareholders’ meeting, or other similar procedures, unless it has an obligation to file a securities report under the FIEA.

ii      Act on Prevention of Transfer of Criminal Proceeds

Article 4 of the Act on Prevention of Transfer of Criminal Proceeds (APTCP) provides that specified business operators (SBOs) such as (1) financial institutions (including banks, insurance companies, securities companies, money lenders and money exchange operators) and (2) real estate agents and other business operators listed in Article 2 of the APTCP must verify customer identification for certain types of transactions listed in Article 7 of the ordinance of the APTCP, and certain types of suspicious transactions. Information required to be confirmed by SBOs includes:

a  customer identification data;
b  purpose of conducting the transaction;
c  occupation and nature of business; and
d  when the customer is a juridical person, if there is a person specified by an ordinance of the competent ministries as a person in a relationship that may allow that person to have substantial control of the business of the juridical person (the substantial controller), the customer identification data of that person.

If the transaction is made with an entity, SBOs are obligated to verify identification of both the entity itself and the natural person who is in charge of the transaction. In such cases, the SBO must also verify that the personnel in charge are duly authorised by the entity to conduct the transaction. Furthermore, should the SBO find that the transactions are suspicious and involve possible identity theft, transactions with residents in specific countries or transactions with foreign ‘politically exposed persons’, it must separately obtain additional documents to identify the customer or to confirm the substantial controller through documents such as the shareholders’ list or annual securities reports. If it is a suspicious transaction through which more than ¥2 million is transferred, the asset and income status of the customer must be confirmed by the SBO.

The SBO must also prepare and retain certain records of confirmation and of the transaction (Articles 6 and 7 of the APTCP). The SBO is also obligated to submit a report to the relevant administrative agency on suspicious transactions that may involve money laundering or criminal proceeds under Article 8 of the APTCP.

To strengthen anti-money laundering regulations, the APTCP was amended in 2014 and most parts of this amendment became effective on 1 October 2016. The amended APTCP and the relevant ordinance require SBOs to examine and judge, in accordance with the specific criteria, whether each individual transaction triggers the submission of a suspicious-transaction report. In addition, the amended APTCP and the relevant ordinance provide that SBOs are required to make efforts to (1) provide their employees with educational training regarding the verification of customer identification; (2) establish and maintain internal rules for these verification procedures; and (3) appoint an administrator of the verification procedures.
iii Foreign Exchange and Foreign Trade Act
Under Article 18 of the Foreign Exchange and Foreign Trade Act (FEFTA), banks are required to confirm customer identification data by means of a driver’s licence or other means specified by the ordinance of the Ministry of Finance when conducting a foreign exchange transaction (excluding those pertaining to small payments or payments specified by the Cabinet Order) and to prepare a record of the identification data immediately and retain the record for seven years. Customer identification data to be confirmed by banks include name, domicile or residence and date of birth for a natural person, and corporate name and location of the principal office for an entity. Confirmation of identification data of the natural person who is in charge of the transaction is also required for an entity.

iv Tax deductibility
It is prohibited to claim expenditure for bribes to public officials or foreign public officials as a deductible expense under the relevant regulations regarding corporation and income taxes.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES
There have been only four enforcement cases involving foreign bribery since Japan first incorporated the crime of foreign bribery into the UCPL in 1998.

i Bribery of public officials of the Philippines
The first case, which occurred in March 2007, involved the giving of improper benefits to Philippine public officials. Two Japanese employees who had been seconded to a local subsidiary of a Japanese company in the Philippines gave a set of golf clubs and other gifts (worth about ¥800,000) to certain executive officers of the National Bureau of Investigation of the Philippines (NBI) upon their visit to Japan, to promptly conclude a service contract on a project that the NBI was planning. Both employees were punished, by fines of ¥500,000 and ¥200,000 respectively.

ii Bribery of a public official of Vietnam
The second case, for which the Tokyo District Court rendered decisions in January and March 2009, concerned the giving of improper benefits to a Vietnamese public official. Four employees of Pacific Consultants International (PCI), a construction consultancy company, gave money on two occasions, about US$600,000 and US$220,000 each, to an executive officer mainly to express their gratitude for receipt of an order for the consultancy business related to a major road construction project in Ho Chi Minh City in Vietnam. The four employees were each punished by imprisonment of between one and a half years and two and a half years, and PCI was punished with a fine of ¥70 million. This is the first case where an entity was punished pursuant to the dual criminal liabilities provision under the UCPL.

iii Bribery of a public official of China
The third case concerned the giving of improper benefits to a public official of China. A former senior executive of Futaba Industrial Co, Ltd (Futaba), a car parts maker, committed foreign bribery under the UCPL by paying a local government official of Guangdong province in China around HK$30,000 and giving a gift of a women’s handbag in mid December 2007.
to persuade authorities to overlook an irregularity at the plant of a subsidiary of Futaba and not report it to the relevant state agency. The former senior executive was punished with a fine of ¥500,000.

iv Bribery of public officials of Indonesia, Vietnam and Uzbekistan

The fourth case is the largest and has been widely reported in Japan. This is a case for which the Tokyo District Court issued a decision on 2 February 2015, concerning the railway consulting firm Japan Transportation Consultants Inc (JTC) and three former executives who paid bribes to foreign public officials in several countries.

The former executives paid a total of around ¥70 million from December 2009 to February 2014 to several officials of Vietnam Railways, a Vietnamese public corporation in Vietnam, to win consulting contracts with favourable conditions related to the Hanoi City Urban Railway Construction Project (Line 1), which was funded by the Japan International Cooperation Agency (JICA) through Japan’s Official Development Assistance (ODA). For a similar purpose, they paid a total of around ¥20 million (in Japanese yen and Indonesian rupiah) from October 2010 to December 2013 to several Indonesian governmental officials in connection with railway projects in Indonesia, and also paid a total of around US$720,000 from August 2012 to July 2013 to several officials of Uzbekistan’s public railway corporation in connection with a railway project in Uzbekistan, all of which were funded by JICA through ODA. The former executives were each punished by imprisonment of two to three years with probation of three to four years, and JTC was fined ¥90 million.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

i OECD Anti-Bribery Convention

Japan ratified the OECD Anti-Bribery Convention in 1998 and enacted implementing legislation criminalising acts of bribery of foreign public officials by amending the UCPL, which came into force on 15 February 1999.

ii The United Nations Convention against Corruption


iii The United Nations Convention against Transnational Organized Crime


VIII LEGISLATIVE DEVELOPMENTS

i OECD recommendations

The OECD Working Group on Bribery in International Transactions has continuously requested that Japan strengthen its efforts to fight bribery by Japanese companies in their foreign business activities, and to implement the Convention on Combating the Bribery
of Foreign Public Officials in International Business Transactions. In its press release dated 30 June 2016, the OECD criticised Japan for only having prosecuted four cases of foreign bribery since 1999, when the UCPL was amended to make it an offence to bribe foreign public officials to obtain advantages in international business. According to the release, the Working Group has repeatedly urged Japan to amend the Anti-Organised Crime Law so that companies and individuals convicted of bribing foreign public officials cannot keep their illegal proceeds, including by laundering them, as required by the OECD Convention. It has also recommended 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 companies. The Japanese government, in response, expressed its commitment to the global fight against corruption and explained the development of its efforts to implement the recommendations of the Working Group when a high-level OECD mission visited Tokyo to discuss these issues with prominent Japanese representatives at the end of June 2016.

ii METI Guidelines
As stated above, the METI revised its Guidelines, which are the guidelines regarding bribery of foreign public officials in international business transactions under the UCPL, to support Japanese companies’ overseas business expansion. The new METI Guidelines were released on 30 July 2015. This is not new legislation, but the revision clarifies legal interpretations as follows:

a The interpretation of elements including the ‘purpose of obtaining or retaining improper business advantages’ is clarified to avoid excessively shrinking operating activities and to prevent foreign bribery that uses social occasions as a shield to hide behind.

b Demand for bribes from foreign public officials must be rejected as a rule even if Japanese companies face cases in which they would be forced or extorted to pay bribes to avoid unreasonable and discriminatory treatment by foreign public officials when, for example, passing through customs.

c If Japanese companies offer congratulatory small gifts, business entertainment and travel expenses just for the sake of building relationships and a better understanding of their products, this behaviour may not amount to bribery.

iii Japanese Federation of Bar Associations Guidelines
On 15 July 2016, the Japanese Federation of Bar Associations (JFBA) issued new guidelines on compliance with foreign bribery regulations. These Guidelines provide best-practice recommendations to ensure compliance with Japan’s foreign anti-bribery rules and to manage risks related to potential bribery.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Confidentiality obligation and privilege
There are no concepts of ‘attorney–client privilege’ or ‘work product doctrine’ in Japan. The Attorneys Act provides that attorneys admitted in Japan and foreign-law attorneys registered in Japan have the right and obligation to maintain confidentiality of any facts that they may have learned of in the course of performing their professional duties as an attorney. Under the Code of Attorney Ethics created by the JFBA, if an attorney violates the confidentiality obligation, he or she may be disciplined by the JFBA. Attorneys can refuse to testify or produce documents in civil and criminal court procedures regarding facts relating to the
confidential information of others obtained in the course of their duties, but if confidentiality is waived by the client or the person who has the right to keep the information confidential, the lawyer may no longer assert the right. These protections in the court proceedings are available not only to attorneys, but also to other professionals, such as doctors, dentists, birthing assistants, patent attorneys, notaries and persons engaged in a religious occupation who have a statutory duty of confidentiality.

ii Whistle-blower protection

The Whistle-Blower Protection Act (WPA), which was enacted in 2004 and came into effect in April 2006, provides civil rules on voidance or prohibition of dismissal or other disadvantageous treatment, to protect employees who engage in whistle-blowing. More than 400 laws are covered by the WPA, including the CC, CA, FIEA, UCPL, FEFTA and the Act on the Protection of Personal Information.

X COMPLIANCE

The METI Guidelines, revised on 30 July 2015, describe 'good practices' as to how Japanese companies as enterprise groups, including their subsidiaries, should strengthen their internal control systems for preparing, recording and auditing internal company regulations against risky actions to prevent and combat foreign bribery. These good practices include the following:

a Japanese companies that conduct overseas business operations under the CA, the UCPL and overseas laws and regulations should organise and operate an internal control system focused on ethics and compliance (internal control system) for the prevention of bribery of foreign public officials.

b As for the establishment and operation of internal control systems, it is recommended that Japanese companies should organise and operate a focused internal control system taking a 'risk-based approach', or considering the risks associated with the relevant target countries, business fields and types of activity, while the corporate directors have considerable discretion regarding their own internal control systems.

c In particular, the revision emphasises the importance of subsidiaries and sub-subsidiaries, many of which have not completely managed their risks, and the necessity of support from parent companies.

d It is recommended that Japanese companies prepare an internal review system to organise, record and audit appropriate approval processes for risky operations such as hiring local agents, acquiring local companies and conducting business entertainment.

XI OUTLOOK AND CONCLUSIONS

Anti-bribery compliance has become one of the most important and challenging issues for the Japanese legal community. We have seen rapid developments in legislation and practices in this area over the past several years, and we expect to see more corruption prosecutions in the future because of the pressure from the OECD and other countries. As a result, we expect rapid development of the practices in this area, including those in relation to anti-corruption compliance programmes, whistle-blowing practices and risk and crisis management in the event of actual corruption incidents.
I INTRODUCTION

Jersey has criminalised bribery and corruption both domestically and internationally. Prior to the introduction of the Corruption (Jersey) Law 2006 (the Corruption Law), the offences of bribery and corruption had been dealt with by the customary (common) law and certain statutory offences, but the offences lacked clarity and there were few convictions. Following a number of international initiatives (such as the 1997 Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Transactions), the government introduced a new statute – the Corruption Law – which was intended to combat bribery and corruption in line with the international conventions. Although Jersey is a jurisdiction in its own right (distinct from England and Wales), the UK Bribery Act 2010 (the Bribery Act) is also considered in this chapter as it has the potential to have extraterritorial reach in Jersey and has done much to shape practice and approach in Jersey.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i The Corruption Law

The Corruption Law was introduced as a comprehensive and self-contained measure to deal with corruption both locally and internationally. The existing statutory offences and any common law offences (which were unclear in scope) were abolished. In their place three principal offences were introduced.

Corruption concerning a public body

It is an offence to give or receive any ‘advantage’ as an inducement for anyone working within a public body to do or omit to do something. Therefore both the briber and person being bribed have committed an offence. A public body is defined to include the government of Jersey, any company in which it is a principal shareholder, and the Jersey Financial Services Commission (the financial services regulator). The law also extends to equivalent bodies beyond Jersey (see below).
Corrupt transactions with agents
It is an offence for an agent to accept or give an advantage as an inducement for doing any act or omission regarding the affairs of the principal, or for showing favour or disfavour regarding the affairs of the principal.

Corruption by public officials
This offence is aimed at what is essentially abuse of public office. The targets are the officers and employees of a public body, which extends to companies that are principally state-owned within or outside Jersey. It is an offence for a public official to do or not to do something in relation to his or her post, with a view to gaining an advantage for either himself, or herself, or another. This would cover situations such as where a public officer uses his or her power to grant or withhold a licence or permission, to benefit himself or herself or another improperly. This sort of activity would not otherwise be covered because there is often no element of bribery in such situations. The person may act on their own, for their own personal benefit, whether in a financial form or otherwise and without the involvement of anyone else.

Certain features are common to each of the offences and there is no reference to bribes. Instead, the term ‘advantage’ is used, which extends the possibilities of inducement to encompass both monetary and non-monetary advantages (including, for example, job offer, forbearance from enforcing a right). Legal persons are caught so that companies as well as individuals can face prosecution and, in the case of offences by a corporation, culpable officers can also be prosecuted. The act must take place ‘corruptly’, a term that is not defined in the statute and that the courts will need to interpret in a common-sense manner and with regard to any case law or guidance on the term in Jersey, the United Kingdom or pursuant to the relevant international conventions. The maximum penalties are 10 years’ imprisonment or an unlimited fine or both, and in each case these penalties are designed as a deterrent.

ii Prohibitions on paying and receiving
Bribes are criminalised where they involve public officials or agents. These terms are widely drafted as set out below.

The Corruption Law gives an extended meaning to the word ‘agent’. The expression covers both private and public sectors and includes employees. It is an offence for an agent to accept or obtain corruptly any inducement or reward for doing or not doing anything or showing or not showing any favour or disfavour to a person in relation to the business or affairs of the agent’s principal. It is not necessary that the agent benefits personally from the inducement or reward.

The term ‘public body’ is widely drafted and includes equivalents in other jurisdictions. It is an offence for any member, officer or employee of a public body to give (or promise) or receive (or solicit) any advantage as an inducement or reward for anyone working at a public body to do or not do something. The person soliciting or receiving the inducement or reward need not necessarily be the member, officer or employee of the public body and the person giving or offering the inducement or reward need not necessarily be the person who will benefit from the member, officer or employee’s act or omission.

There is extended jurisdiction in respect of any offence under the Corruption Law. First, the offence may be prosecuted in Jersey even though some of the acts constituting the offence are committed outside Jersey. Second, an offence may be prosecuted in Jersey
if a national of the United Kingdom resident in Jersey, a company established in Jersey or a Jersey limited liability partnership does an act outside Jersey that, if done on the island, would constitute the offence.

### iii  Definition of public official

Broadly, the definition of a public official covers all those holding any form of office with any public nexus. The full definition is given in Article 4 of the Corruption Law and includes judges, members, officers and employees of public bodies, members of the police, the Auditor General, the Data Protection Authority and any other person exercising a public function for Jersey or for any public agency or public enterprise belonging to Jersey.

A public body is defined to include ‘any company in which the States of Jersey are the principal shareholder, and any subsidiary of such a company’.

### iv  Public officials’ participation in commercial activities

There is no blanket prohibition against public officials taking part in commercial activities. Members of some public bodies, some crown advocates (the Jersey equivalent of public prosecutors), members of the youth court and members of the honorary police force are allowed to engage in commercial activity. However, commercial activity has been considered incompatible with offices to which appointment is made by the Crown or the Bailiff (the Bailiff is Jersey’s Chief Justice and president of the Jersey Court of Appeal). The following officers are, therefore, prohibited by statute from having, within or without Jersey, other paid employment, or any public or other office: the Bailiff and the Deputy Bailiff; the Attorney General and the Solicitor General; the Viscount and the Deputy Viscount; the Judicial Greffier and the Deputy Judicial Greffier (these are all judicial or legal roles).

### v  Gifts and gratuities, travel, meals and entertainment restrictions

Gifts and gratuities, travel, meals and entertainment would all be likely to fall within the definition of advantage provided by the Corruption Law but would not give rise to a criminal offence unless given or received for the illicit purpose stipulated by the Corruption Law. As a matter of practice almost every public body in Jersey has stringent rules prohibiting the receipt of anything other than the most minor gifts, and even those have to be scrupulously recorded and the record made available for inspection. A Commissioner for Standards may investigate the conduct of elected members of the government.

### vi  Political contributions

Jersey does not have political parties in the traditional sense. The Corruption Law would not prevent contributions to the campaign of a candidate for political election provided it was not made for a prohibited purpose under the Law.

### vii  Private commercial bribery

Article 6 of the Corruption Law makes it an offence for an agent to corruptly engage in any of the relevant transactions to the prejudice of the agent’s principal. This, therefore, criminalises the use of bribes in the private sector. By way of example, if an employee of a company commissioning building services received an advantage to award the contract to a particular construction company, then the employee would commit an offence.
It follows that the recipient does not have to be in a specific public position. Both the ‘taking’ and ‘receiving’ offences, subject to available defences, apply within a business to those with even constructive knowledge of a bribe. Individuals seeking to ignore the realities by simply looking the other way are at personal risk, as is the company itself under the corporate offence provisions.

viii Penalties
The maximum penalties for infringement of the statute are 10 years’ imprisonment or an unlimited fine or both.

III ENFORCEMENT: DOMESTIC BRIBERY
There have been no reported cases under the Corruption Law. This does not appear to be as a result of lack of enforcement or political will (offences of money laundering are routinely prosecuted, including where the proceeds relate to bribery (see Section V.v and vi)) but perhaps a reflection of the type of businesses predominant in Jersey – highly regulated banks, trust companies and funds – which do not typically operate in developing jurisdictions but may end up inadvertently holding the proceeds of corruption. It should also be noted that Jersey is a small island. Even in the United Kingdom, which has a significantly larger population, prosecutions under the Bribery Act are rare.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK
i Foreign bribery law and its elements
The Jersey government has, in common with the wider international community, recognised the risks posed by bribery and corruption on good governance, standards in public life and a properly regulated private business sector. Jersey has recognised that the increasingly globalised nature of the problem has prompted the United Nations (UN), OECD, International Monetary Fund (IMF), World Bank, European Union, Council of Europe and International Chamber of Commerce to mount initiatives to improve standards of governance and combat corruption. Along with many other jurisdictions, including the United Kingdom and other EU Member States, Jersey has revised its anti-corruption legislation to be able to satisfy international conventions and demonstrate commitment to take a firm stand against corruption in all areas.

This is particularly so in view of the need to take effective action against corruption in international organisations and in relation to overseas governments and companies. The Jersey authorities have regarded it as of great importance that the island should not be seen as a weak link in this international effort and, to that end, the Corruption Law was introduced to enable Jersey to play a full part in international efforts to combat the problem and, at the same time, modernise and expand the scope of its domestic protections.

ii Definition of foreign public official
The definition of an agent includes foreign public officials (including a member of the government of any other country); a member of any parliament; a member of the European Parliament or the Court of Auditors of the European Union; a member of the Commission of the European Union; a public prosecutor; a judge of a court or tribunal in any other country...
or established under international agreement; a member or employee of an international establishment; a person employed by or acting on behalf of the public administration of any other country; a person appointed to hold an administrative office, whether regional or national, in any other country; a person exercising a public function, whether regional or national, for another country or for any public agency or public enterprise of another country; or an official or agent of a public international organisation.

State-owned or controlled companies are subject to the provisions of the Corruption Law by virtue of Article 3, whereby any such company that exists in a country or territory outside Jersey is within the meaning of ‘public body’ for the purposes of the Law.

It is immaterial that the principal’s affairs or the agent’s functions do not have a connection to Jersey. The effect of the provision is to ensure that bribery of agents, of foreign public officials and agents of foreign principals is made a criminal offence in Jersey provided that any of the acts alleged to constitute the offence took place in Jersey or the act is committed by a Jersey resident, Jersey company or limited liability partnership whether done in Jersey or elsewhere.

iii Gifts and gratuities, travel, meals and entertainment restrictions
There is no distinction with the domestic position described in Section II.iv – in other words, gifts and gratuities, travel, meals and entertainment restrictions would all be likely to fall within the definition of advantage in the Corruption Law, but would not give rise to a criminal offence unless given or received for a corrupt purpose.

iv Facilitating payments
It is important to recognise that the Corruption Law does not set out prescriptive procedures describing, for example, a model regime with full guidance. Rather, the Law establishes principles and it is for those potentially affected by it to consider what is acceptable.

It is recognised that facilitation payments are a particular problem for businesses that operate in some developing countries. However, the Jersey authorities do not consider they can take the approach of implementing anti-bribery and anti-corruption provisions but then creating exclusions for facilitation payments in certain jurisdictions. Not only would such an approach undermine the Law, but it would almost certainly give rise to reporting obligations under the existing proceeds-of-crime legislation. As the law stands, facilitation payments, however small, are, in principle, prohibited.

v Individual and corporate liability
Individuals, companies and limited liability partnerships can be held criminally liable for breaches of the Corruption Law.

vi Civil and criminal enforcement
The Corruption Law is a criminal statute. There are, however, civil remedies for corruption similar to those in the United Kingdom; for example, by the use of remedial constructive trusts, claims for dishonest assistance and knowing receipt, and other related civil fraud causes of action.
vii Agency enforcement
The Corruption Law forms part of Jersey’s criminal law and so would be investigated by the States of Jersey Police. Prosecution would be by the Attorney General, whose consent is required for the institution of proceedings under the statute.

viii Defences
No specific statutory defences are provided; there is no equivalent in Jersey of the adequate-procedures defence in the UK Bribery Act.

ix Plea-bargaining
Plea-bargaining is not officially available in Jersey although, in practice, a defendant may offer to plead guilty to a lesser offence than the one originally charged. The prosecution may agree to this to avoid the expense and uncertainty of a trial. The defendant’s sentence is likely to be lower both because of the lesser offence and credit for pleading guilty.

x Leniency
There are no provisions for plea-bargaining, deferred prosecutions or similar. However, self-reporting and subsequent cooperation, including a guilty plea, would be likely to provide powerful mitigation to reduce the penalties from the level at which they otherwise would have been.

xi Prosecution of foreign companies
As to territorial jurisdiction, a central feature is that a UK national or Jersey company or limited liability partnership can be prosecuted in Jersey for acts done entirely outside Jersey, if they would have constituted an offence under the Corruption Law; moreover, a prosecution can take place in Jersey if any constituent part of the offence charged took place there. With regard to a public body’s offences, the bodies or officials involved can be located anywhere; and in the case of a public agency’s offences, it does not matter if the principal’s affairs are conducted and located outside Jersey.

xii Penalties
As mentioned in Section II.i, the penalties for violation of Jersey’s foreign bribery provisions are 10 years’ imprisonment or an unlimited fine or both. There is no specific provision debarring a person convicted of bribery offences from tendering for public contracts but it is highly likely that it would be taken into account as a relevant factor and that a public contract would not readily be granted to a body with a bribery-related conviction.

xiii UK Bribery Act
The Bribery Act received significant publicity when it was enacted, particularly in relation to the ‘corporate offence’ (see below). It was designed to replace the piecemeal corruption offences that existed in the United Kingdom prior to the Act. Like the Corruption Law, the Bribery Act was introduced partly to enable the United Kingdom to comply with its obligations under the various international conventions.
In brief, it created two general offences of bribing another person and being bribed; as well as a discrete offence of bribery of a foreign public official. The offences apply to companies as well as individuals. They are punishable by imprisonment of up to 10 years or a fine or both.

The Bribery Act also created a new corporate offence of failure by a commercial organisation to prevent a bribe being paid on its behalf by a person or persons associated with the commercial organisation, with the intention of obtaining or retaining business, or an advantage in the conduct of business, for the commercial organisation. Such persons could include its employees, agents, joint venture partners, subsidiaries and even (potentially) independent contractors and suppliers. It is a strict liability offence, punishable by an unlimited fine. There is no equivalent in the Corruption Law.

It is a defence for the commercial organisation to prove that it had adequate procedures in place designed to prevent persons associated with it from undertaking bribery in this way. The UK government has issued guidelines setting out the type of policies and procedures a commercial organisation should adopt, including due diligence on service providers and risk assessment. The policies should be proportionate to the bribery risks the entity faces and to the nature, scale and complexity of its activities. They should be clear, practical, accessible, effectively implemented (e.g., through training) and properly enforced. Senior management involvement is considered critical.

As with the Corruption Law, the Bribery Act has extraterritorial impact. The UK courts can prosecute offences committed outside the United Kingdom where the person committing them has a 'close connection' with the United Kingdom, by virtue of being a British national or ordinarily resident in the United Kingdom or a body incorporated in the United Kingdom. Further, in relation to the corporate offence, provided the commercial organisation is incorporated in the United Kingdom, or carries on a business or part of a business in the United Kingdom, then the UK courts will have jurisdiction. There is a close connection between Jersey and the United Kingdom – many Jersey residents are British nationals and many companies carry on part of their business in the United Kingdom. Accordingly the risk of prosecution of a Jersey resident or company under the Bribery Act is relatively high. For these reasons, it is advisable for Jersey companies to have policies and procedures in place that comply with the Bribery Act (notwithstanding the lack of a specific corporate offence under the Corruption Law).

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations
The Companies (Jersey) Law 1991 has the usual requirements regarding record-keeping and accounts. These are similar to those in the United Kingdom and include the requirement to keep adequate accounting records. Failure to do so is an offence.

There are additional record-keeping requirements for regulated financial services providers.

ii Disclosure of violations or irregularities
There is a general right not to self-incriminate so companies are not required to disclose violations of anti-bribery laws. However, as considered in Section IV.x, self-reporting may be advisable to minimise the possible penalties. Further, regulated companies (banks, funds and
other financial services providers) have the obligation to file suspicious activity reports if they have any concerns that financial crime has taken place. Financial crime includes bribery and corruption offences.

iii  Prosecution under financial record-keeping legislation
There has been no reported case of prosecution under financial record-keeping legislation although it is a theoretical possibility. If no records were made of bribes paid by a company then the adequate accounting records provisions would have been breached. The penalties are, however, relatively low (a maximum £10,000 fine).

iv  Tax deductibility of domestic or foreign bribes
It is inconceivable that the payment of bribes would be regarded by the Jersey tax authorities as a deductible business expense.

v  Money laundering laws and regulations
The Proceeds of Crime (Jersey) Law 1999 (the 1999 Law) governs money laundering and is a comprehensive statute (comparable to UK legislation). It penalises:

- assisting another to retain the proceeds of crime;
- acquisition, possession or use of the proceeds of crime;
- failing to disclose knowledge or suspicion of money laundering;
- tipping off; and
- concealing or transferring the proceeds of crime to avoid prosecution or a confiscation order.

It is therefore possible to use the money laundering legislation to recover the proceeds of bribery and corruption. No actual conviction of bribery needs to have been obtained in Jersey or elsewhere provided there is sufficient evidence of criminal conduct that would have constituted an offence in Jersey (regardless of whether it took place there), punishable with a minimum term of one year’s imprisonment (a Schedule 1 offence).

The recent case of First Trust Management Ltd v. AG2 concerned an application to lift a saisie (the Jersey equivalent of a restraint order) imposed under the 1999 Law, at the request of the United States, resulting from illegal lobster harvesting in South Africa. The court considered whether bribery of fishery control officers in South Africa would have amounted to an offence under the Corruption Law if committed in Jersey. The court opined that it would, which would amount to a Schedule 1 offence (punishable by more than one year’s imprisonment), which is necessary for the imposition of a saisie under the 1999 Law. The lobsters could be regarded as the proceeds of the bribery for the purposes of the 1999 Law. That the lobsters were also the proceeds of the crime of overfishing, punishable only by a fine and not a Schedule 1 offence under the 1999 Law, did not alter the Schedule 1 status for the purposes of this application.

vi  Prosecution under money laundering laws
There have been various convictions in relation to money laundering offences. The conduct in those cases has generally predated the Corruption Law. Accordingly, the prosecution relied

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on establishing the customary law offences of fraud but the cases demonstrate that this is an effective route to prosecute corruption in Jersey and other offshore jurisdictions where the proceeds of corruption that took place in a foreign state may have ended up. The fact that the Corruption Law is now in force, with its wide extraterritorial effect, means it will be easier to establish that the conduct complained of would be an offence if tried in Jersey. An example is *AG v. Windward Trading Limited.*

Windward Trading Limited, a Jersey registered company, pleaded guilty to four counts of money laundering before the Royal Court of Jersey. The Royal Court imposed a confiscation order of £3,281,897.40 and US$540,330.69, thereby stripping the company of all its assets. Windward admitted to laundering the proceeds of corruption between 29 July 1999 and 19 October 2001. The corrupt activities took place in Kenya where Windward’s beneficial owner, Samuel Gichuru, was resident. During the period on the indictment, Mr Gichuru was also the chief executive of Kenya Power and Lighting Company, the Kenyan government’s electricity utility company. It awarded valuable contracts to a number of engineering and energy companies worldwide that all made corrupt payments to Windward.

vii Sanctions for money laundering violations

The penalties for money laundering violations are 14 years’ imprisonment or an unlimited fine or both.

viii Disclosure of suspicious transactions

Non-disclosure of suspicious financial transactions is generally criminalised by the Proceeds of Crime (Jersey) Law 1999. Regulated entities are under a strict obligation to file suspicious activity reports (see Section V.ii).

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There has not yet been any foreign-bribery activity under the Corruption Law (see Section III).

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The increasingly globalised nature of bribery and corruption has prompted the UN, OECD, IMF, World Bank, European Union, Council of Europe and International Chamber of Commerce to mount initiatives to improve standards of governance and combat corruption. The Jersey government actively monitors developments in this area and the Council of Europe Convention on Corruption 1999 and the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions 1997 were direct influences on the Corruption Law.

VIII LEGISLATIVE DEVELOPMENTS

There are currently no proposed developments or amendments to the Corruption Law or to bribery and corruption laws more generally.
IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

There are no significant laws in Jersey dealing with corruption other than those set out above. Jersey does not, for example, have any whistle-blower legislation.

X COMPLIANCE

As mentioned in Section IV.viii, the Corruption Law does not set out an adequate procedures or other statutory defence. The Jersey government has not issued any guidance notes under the Corruption Law, but it is likely that adherence to the guidance issued by the Ministry of Justice and the Serious Fraud Office at the time the Bribery Act was introduced would be regarded as sound and relevant. Most Jersey companies will have guidelines in place in relation to corporate hospitality and gifts based on the UK guidance, not least because of the extraterritorial reach of the Bribery Act (as outlined in Section IV.xiii).

XI OUTLOOK AND CONCLUSIONS

The enactment of the Corruption Law has injected certainty into the potential prosecution of corruption and bribery offences in Jersey – a shift from the uncertain customary law position. Jersey is a major financial centre and, unfortunately, corrupt foreign officials, oligarchs and businesses may target such centres if they do not have adequate controls in place. As the Home Affairs Committee said when the draft legislation was being considered:

Growing recognition, on the international stage, of the threat to good governance, standards in public life and a properly regulated private business sector, posed by bribery and corruption has prompted moves by various international bodies to begin to try to raise standards generally, a process in which one of the first steps is to ensure that countries have in place adequate legislative provisions to deal with such offences.4

Jersey has recognised the need to drive the anti-corruption agenda and has put in place the legislative framework to pursue anti-corruption and bribery prosecutions both domestically and as part of multi-jurisdictional investigations in conjunction with other regulators. As noted above, there have been no prosecutions to date under the Corruption Law but it will be interesting to review the situation in a few years’ time as investigations come to fruition.

I  INTRODUCTION

The Republic of Korea (Korea) has witnessed fast growth over a short period, which has mostly been led by the state. Nonetheless, Korea still holds strongly to its Confucian traditions, which occasionally results in conflicts between modern transparency and traditional loyalty, and any consideration of Korea’s regulation of corruption should take account of these particular characteristics.

II  DOMESTIC BRIBERY: LEGAL FRAMEWORK

i  Overview

Korea has taken various preventative measures to address the corruption of its public officials. First, there are laws governing the ethics of public officials, such as the State Public Officials Act and the Public Service Ethics Act. Article 61 of the State Public Officials Act provides that no public official may give or receive directly or indirectly any reward, donation or hospitality in connection with his or her duties, imposing a duty of integrity on public officials. In addition, the Public Service Ethics Act requires senior public officials to register their property (Article 3) and the registered property to be disclosed for a certain period (Article 10). If a public official who is subject to a registration obligation retires, he or she is restricted from being employed by entities related to his or her duty (Article 17).

Further, there are rules and regulations punishing corrupt practices, such as domestic bribery and overseas bribery, in the private sector as well as in the public sector. The most basic law governing corruption is the Criminal Act. The Act on Aggravated Punishment of Specific Economic Crimes and the Act on Aggravated Punishment of Specific Crimes expands the scope for crimes that are punishable under the Criminal Act. In addition, the Improper Solicitation and Graft Act supplements the Criminal Act in respect of punishment of corruption in the public sector. The Pharmaceutical Affairs Act, the Medical Devices Act and the Medical Service Act supplement the Criminal Act and govern corrupt practices in the private sector that are not subject to punishment under the Criminal Act.
ii Prohibitions on paying and receiving bribes

Prohibition of bribery under the Criminal Act

The Criminal Act prohibits the following forms of bribery:

a a public official, or a person who is to become a public official, is prohibited from receiving, demanding or promising to accept a bribe in connection with his or her duties (Article 129 of the Criminal Act);

b a public official is prohibited from causing, demanding or promising a bribe to be given to a third party on acceptance of an unjust solicitation in connection with his or her duties (Article 130 of the Criminal Act); and

c a public official is prohibited from, by taking advantage of his or her post, receiving, demanding or agreeing to receive a bribe concerning the use of the goods of office in connection with the affairs that belong to the functions of another public official (Article 132 of the Criminal Act).

A person who promises, delivers or manifests a will to deliver a bribe, as stated above, shall be punished by imprisonment for a term of not more than five years, or by a fine not exceeding 20 million won (Article 133(1) of the Criminal Act). Further, a person who delivers money and valuables to a third party for the purpose of offering bribes, or who knowingly receives money and valuables with that purpose, shall be punished by imprisonment for a term of not more than five years, or a fine of not more than 20 million won (Article 133(2) of the Criminal Act).

One of the main elements of bribery is whether the bribery is relevant to a public official’s duties. In the case of giving money and valuables to public officials, whether the act can be classified as bribery depends on whether the act is carried out in relation to a public official’s duties.

Prohibition of bribery under the Improper Solicitation and Graft Act

The corrupt practices of a public official that are not regulated by the Criminal Act are regulated by the Improper Solicitation and Graft Act (the Graft Act).

The scope of application of the Graft Act includes public officials, persons who are regarded as public officials, public service-related organisations, employees of public institutions, employees of schools, officers and employees of educational foundations, officers and employees of the press, spouses of a public official and private persons performing public service (public officials) (Article 2).

Moreover, the Graft Act has a joint penalty provision. If a representative of a person involved in the administration of Korean law, also known as a juridical person, or an organisation or an agent, an employee or any other worker employed by a person or an organisation involved in the administration of Korean law, or an organisation or an individual involved in the administration of law improperly solicits or offers money, valuables or any other form of benefit in connection with the affairs of a juridical person, the organisation or the individual, not only shall the violator be punished, but the juridical person, the organisation or the individual shall also be subject to a fine or an administrative fine. It is provided, however, that if the juridical person, the organisation or the individual did not act negligently and paid due attention to and supervised the relevant affairs of the perpetrator to prevent a violation, that person shall be not be punished (Article 24). A juridical person must therefore establish and maintain an effective compliance programme.
The acts prohibited by the Graft Act can be roughly classified into the improper solicitation of a public official, and the giving and receiving of bribes with respect to a public official, particulars of which are given below.

**Prohibition of improper solicitation**

The Graft Act prohibits the improper solicitation of a public official. Article 5(1) of the Graft Act provides that no person shall make any of the listed improper solicitations to any public official performing his or her duties, directly or through a third party, and it lists 14 prohibited acts, including the improper solicitation of permits and approvals. However, Article 5(2) of the Graft Act lists seven acts that do not fall into the category of improper solicitation and these acts are deemed not to be in violation of social norms. A person in breach of the Graft Act shall be subject to a fine of up to 30 million won (Article 23).

**Prohibition of giving and receiving of bribes:**

The Graft Act prohibits a public official from receiving money and valuables of a value greater than a specified amount. As previously stated, if a person gives money or valuables to a public official, the public official is punished under the Criminal Act only when he or she is bribed in relation to his or her duties. However, pursuant to the Graft Act, if the amount given to a public official is greater than the permitted amount, the public official is punished even when the bribe is not in relation to his or her duties as a public official. This is a distinguishing feature of Korean corruption law. Further, no public official shall accept, request, or promise to receive any money, valuables or any other form of benefit exceeding a value of 1 million won at a time, or 3 million won in a fiscal year from the same person, regardless of the pretext or whether the benefit is connected to his or her duties (Article 8(1)). No public official shall, in connection with his or her duties, accept, request, or promise to receive any money, valuables or any other form of benefit regardless of whether the money, valuables or any other form of benefit are given as part of any consideration (Article 8(2)). Public officials who violate these provisions shall be subject to imprisonment for a term of not more than three years or a fine not exceeding 30 million won (Article 22(1)).

**iii Definition of a public official**

According to case law, a public official under the Criminal Act is a person who is engaged in the affairs of the state, the affairs of local autonomous entities or an equivalent public corporation as defined by law, and whose duties are not limited to simple mechanical and physical duties (Supreme Court Judgment 96Do1703, 13 June 1997). The scope of what constitutes a public official under the Criminal Act is expanded by specific acts. Under the Act on the Aggravated Punishment of Specific Crimes (the Aggravated Punishment Act), the officers of organisations or entities specified in Article 4 of the Aggravated Punishment Act and Article 2 of its Enforcement Decree are recognised as public officials. In addition, pursuant to Article 53 of the Act on the Management of Public Institutions, a person who serves as an executive officer or an employee of a public corporation or quasi-governmental institution designated by the Minister of Strategy and Finance shall be deemed to be a public official in respect of bribery provisions. Moreover, Article 83 of the Local Public Enterprises Act, Article 134 of the Act on the Improvement of Urban Areas and Residential Environments, Article 84 of the Construction Technology Promotion Act and Article 104 of the Broadcasting Act also have provisions that dictate what persons should be considered a public official for the purposes of the Acts.
iv  Restricted gifts, gratuities, travel, meals and entertainment
The Supreme Court held that the benefit, the subject matter of a crime of bribery, includes not only the proprietary benefits of money, goods, etc., but also any and all types of tangible or intangible benefits (Supreme Court Judgment 2002Do3539, 26 November 2002). Specifically, the provision of an opportunity to participate in speculative business, the sale of an apartment or a house in which a premium is added to the value, the provision of sexual favours, the joint guarantee of debt, or an act disposing of land even where the land has not been disposed of for a long period are considered a benefit in the context of a bribe.

v  Private commercial bribery
Korea also regulates bribes in the private sector. This section will consider the circumstances in which bribes in the private sector are regulated in accordance with applicable Korean laws.

Receiving or giving bribes by breach of trust under the Criminal Act
Pursuant to Article 357 of the Criminal Act, if a person administering another person's business receives property or obtains pecuniary advantage from a third party, or aids and abets a third person to receive property or obtain pecuniary advantage, in response to an improper solicitation concerning his or her duty, that person shall be punished by imprisonment for a term of not more than five years, or by a fine not exceeding 10 million won. A person who gives property or a pecuniary advantage shall be punished by imprisonment for a term of not more than two years, or by a fine not exceeding 5 million won.

Influence peddling
The Criminal Act punishes a public official's acceptance of a bribe given for the official's 'good offices' in respect of another official's duties, but specific acts such as the Aggravated Punishment Act (Article 3) and the Attorney-at-Law Act (Article 111) also punish civilians if they commit influence peddling to influence a public official in connection with that public official's duties. Further, the definition of a public official includes those who are considered a public official in accordance with the provisions of the Attorney-at-Law Act; however, a person who gives money or valuables, etc. for solicitation shall not be punished.

Violation of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes
The Act on the Aggravated Punishment, etc. of Specific Economic Crimes (the Act) punishes the corrupt practices of officers and employees of financial institutions. The practices that are subject to punishment and the legal principle of punishment under the Act are the same as those for bribery under the Act. That is, the acceptance of bribes by officers and employees of a financial company (Article 5(1) of the Act), a third party's acceptance of bribes (Article 5(2) of the Act), acceptance of bribes for good offices (Article 5(3) of the Act), provision of bribes to officers and employees of a financial company (Article 6(1) of the Act), delivery of bribes (Article 6(2) of the Act) are all subject to punishment. Under the Act, the severity of punishment depends on the value of the bribe received or given (Article 5(4) and the goods, valuables and benefits furnished in commission of the crime shall be confiscated or collected (Article 10).
Limitation on rebates under the Pharmaceutical Affairs Act, the Medical Devices Act and the Medical Service Act

It is prohibited for a pharmaceutical company, a wholesale dealer of medicine and any medical device company to provide money, goods, benefits, labour, hospitality or any other rebate that gives economic benefit for the purpose of promoting sales. In particular, Korea applies a dual punishment system, punishing both the person who gives a rebate and the person who receives the rebate.

The laws relating to medical services are stipulated in the Medical Service Act. The relevant enactments pertaining to pharmaceutical affairs are governed by the Pharmaceutical Affairs Act. The laws relating to medical devices are set out in the Medical Device Act and the Rules on Maintenance of Distribution and Sales Order of Medical Devices.

vi Penalties

The person who receives or offers a bribe shall be subject to a term of imprisonment or a fine (Articles 129–133 of the Criminal Act). The severity of the punishment set out in Article 2 of the Aggravated Punishment Act increases where the value of the bribe received by a person exceeds an amount of more than 30 million won, 50 million won or 100 million won. That notwithstanding, the person who offers the bribe is subject to the same punishment irrespective of the value of the bribe. The bribes or money or valuables that are to be offered as a bribe shall be confiscated or collected (Article 134 of the Criminal Act).

III ENFORCEMENT: DOMESTIC BRIBERY

A senior public prosecutor, 'A', was arrested on charges of bribery, which included the acquisition of 8,537 shares in Nexon Japan that amounted to 850 million won, from 'B', the founding representative of Nexon. This was the first case in the history of the Public Prosecutors’ Office in which a current senior public prosecutor had been arrested and charged, and as a result it had a deep impact on Korean society. The lower court held that A was guilty of all the charges; however, on appeal the Supreme Court held that it was difficult to conclude that the bribes had been given as a form of compensation for A’s services and referred the case to the Seoul High Court of Appeals, where the Seoul High Court of Appeals concluded that A was not guilty of bribery.

In a different case, a prosecutor was prosecuted and found guilty for the receipt of bribes. In this case the prosecutor had a sexual relationship with a suspect in a case that the prosecutor was investigating. The prosecutor had had similar sexual relations with another female suspect who had been summonsed on a charge of theft. Two days after the suspect had been summonsed, the prosecutor took the suspect to a motel and engaged in sexual relations with the suspect. The court held that the prosecutor’s sexual relations constituted the enjoyment of hospitality in relation to his duties and the prosecutor was sentenced to imprisonment for a term of two years.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law and its elements

The law regulating overseas bribery is the Act on Combating Bribery of Foreign Public Officials in International Business Transactions (the International Bribery Prevention Act).
Pursuant to the International Bribery Prevention Act, any person who has promised, given, or expressed his or her intent to give a bribe to a foreign public official, in relation to any international business transaction and with the intent of obtaining any improper advantage for that transaction, shall be punished by a term of imprisonment of not more than five years, or by a fine not exceeding 20 million won (Article 3(1)).

The International Bribery Prevention Act punishes a person who gives a bribe, but it does not punish an international public official who receives a bribe, nor does it regulate bribery in the private sector.

**ii  Definition of foreign public official**

A foreign public official includes:

- any person holding legislative, administrative or judicial office in a foreign government, whether appointed or elected;
- any person conducting public affairs delegated by a foreign government;
- any person holding office in a public organisation or public agency established by any law; and
- any executive officer or employee of an enterprise in which a foreign government has invested in excess of 50 percent of its paid-up share capital, or over which a foreign government has *de facto* control as regards all aspects of its management, such as decision-making on important business operations and the appointment and removal of executive officers (Article 2).

**iii  Facilitating payments**

Where payment is permitted or demanded pursuant to any applicable law of the country to which a foreign public official belongs (Article 3(2)1), the public official shall not be punished pursuant to the Act.

**iv  Penalties**

An offender under the International Bribery Prevention Act shall be punished by imprisonment for a term of not more than five years or by a fine not exceeding 20 million won (Article 3), and any bribe given shall be confiscated (Article 5).

**v  Prosecution of foreign companies**

The Domestic Bribery Act has no joint punishment provision, and thus a corporation is not held responsible. This is in contrast to the provisions of the Graft Act, which has a joint punishment provision. The International Bribery Prevention Act has a joint punishment provision and thus if a representative, agent, employer or employee of a corporation commits a violation of Article 3(1) of the International Bribery Prevention Act in connection with his or her duties to the corporation, the offender as well as the corporation, shall be punished by a fine of not more than 1 billion won (Article 4); however, a corporation may be excused from the punishment when it is held not to have been negligent in taking due care and in supervising the relevant duties of its officers to prevent such a violation.
V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Money laundering laws and regulations
Money laundering is regulated by the Act on Regulation and Punishment of Concealment of Criminal Proceeds, which includes the act of concealing the proceeds of crime or disguising criminal proceeds that are connected with specific crimes as legitimate proceeds.

The Act on Regulation and Punishment of Concealment of Criminal Proceeds punishes the following:

a a person who disguises the acquisition or disposition of criminal proceeds;

b a person who disguises the origin of criminal proceeds; and

c a person who conceals criminal proceeds for the purpose of encouraging specific crimes or disguising criminal proceeds as legitimately acquired (Article 3(1)).

A person who violates the Act on Regulation and Punishment of Concealment of Criminal Proceeds is imprisoned for a term of not more than five years, or fined an amount not exceeding 30 million won. Moreover, a person who knowingly accepts the proceeds or crime shall be punished by imprisonment for a term of not more than three years, or by a fine not exceeding 20 million won (Article 4).

ii Financial record-keeping laws and regulations
The crime of money laundering cannot only be regulated by the imposition of an obligation to report proceeds that are acknowledged to be proceeds of crime. In this regard, suspicious financial transactions should be traced in advance as a preventative measure. The Act on Regulation and Punishment of Concealment of Criminal Proceeds and the Act on Reporting and Using Specified Financial Transaction Information impose an obligation on a financial institution to report financial transactions that are suspicious and could be considered a product of money laundering, and financial transactions that are in excess of 20 million won.

In particular, if there is a reasonable ground to suspect that the proceeds received from a financial transaction are illegal, or that the counterparty of a financial transaction conducts money laundering, a financial institution is required to report its suspicions to the head of the Korea Financial Intelligence Unit (Article 4). Financial companies are required to report to the head of the Korea Financial Intelligence Unit within 30 days of the date in which they intend to pay, or to receive the proceeds from the counterparty in an amount of more than 20 million won (Article 4-2).

VI ENFORCEMENT: FOREIGN BriBERY AND ASSOCIATED OFFENCES
There has not yet been an accumulation of investigations or court proceedings in Korea that deal with cases involving foreign bribery. However, recently there was a decision of the Seoul High Court of Appeals (Judgment 2012No865, 2685 on 1 February 2013) relating to the scope of a foreign public official under the International Bribery Prevention Act. This judgment considered whether the Korean branch manager of Eastern Airlines fell within the scope of a foreign public official under Article 2 of the International Bribery Prevention Act. The High Court of Appeals found the manager not guilty of bribery on the grounds that although there were many materials to support Eastern Airlines as a corporation in which the Chinese government contributed capital in excess of 50 per cent of the paid-up share of
capital, and exercised substantial control with respect to the decision of material projects or the appointment and dismissal of officers, and it was not a corporation that competed with other private enterprises on an equal basis without taking benefits of preferential subsidies or other advantages, the claim was not supported by substantive evidence or data, and therefore, it was difficult to find without any reasonable doubt that Eastern Airlines was a corporation falling within the scope of a foreign public official.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

i Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

To have each country commence a domestic action for the criminal punishment of persons that offer bribes to foreign public officials, the Organisation for Economic Co-operation and Development board adopted, in May 1997, the Recommendation of Amendment of Prevention of Bribery in International Commercial Transactions. In response, at a domestic level, Korea enacted the Act on Combating Bribery of Foreign Public Officials in International Business Transactions in 1998, and which entered into force in February 1999.

ii United Nations Convention against Corruption

Korea signed the UN Convention against Corruption on 12 December 2003. On 27 March 2008, Korea filed a letter of ratification with the Secretary General of the UN and the Convention came into effect in Korea on 26 April 2008. At the same time, the Act on Special Cases Concerning the Confiscation and Return of Property Acquired through Corrupt Practices came into effect in line with the provisions of the Convention.

iii United Nations’ Convention against Transnational Organized Crime

The United Nations’ Convention against Transnational Organized Crime (UNTOC) was adopted by the UN General Assembly on 15 November 2000 as a countermeasure to transnational organised crime. Korea signed UNTOC and three supplementary protocols between 2000 and 2001. However, it took a long time for Korea to join UNTOC, as Korea needed to finalise the enactment for UNTOC’s implementation. In April 2013, Korea amended its Criminal Act to meet the standards of UNTOC and its supplementary protocols. On 29 May 2015, Korea obtained ratification of the Convention from the National Assembly, and on 5 November 2015 Korea deposited a letter of ratification with UN and joined UNTOC as the 186th Member State. The extradition of criminals and mutual assistance in criminal matters became possible utilising UNTOC. Member States of UNTOC are also able to establish mutual cooperation systems in the area of international criminal law.

VIII LEGISLATIVE DEVELOPMENTS

i The process of enactment of the Graft Act

From a practical perspective in Korea, where a public official has received money, valuables or improper solicitations, this is rarely punished since it is difficult to reveal the connection between the receipt of the benefit and the official’s duties or whether the benefit was given for a favour. To tackle the issue, in June 2011, Kim Young-Ran, the Chairman of the National
Commission on the Rights of the People at that time, proposed a bill to prohibit public officials from seeking and soliciting personal benefits, and on 16 August 2012, the National Commission on the Rights of the People issued a bill for the Graft Act. On 5 August 2013, the Bill for the Prohibition of Illegitimate Prohibition and Conflict of Interest of Public Officials was submitted and on 7 January 2015, the National Policy Committee decided to include private schools and media employees within the scope and subject of sanctions. The bill passed the plenary session of the Korean National Assembly on 3 March 2015. However, many organisations complained about the provisions of the resultant Graft Act and the Korea Bar Association filed a constitutional appeal with the Constitutional Court challenging the constitutionality of the Graft Act. On 2 March 2015, the Graft Act was promulgated and on 28 July 2016, the Constitutional Court held that the Graft Act was constitutional and it came into effect as of 30 November 2016.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Protection of whistle-blowers

The legal provisions relating to whistle-blowers in Korea are contained in the Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission (the Anti-Corruption Commission Act) and the Protection of Public Interest Reporters Act. Whistle-blowing in the public domain is governed by the Anti-Corruption Commission Act and whistle-blowing in the private sector is governed by the Protection of Public Interest Reporters Act.

First, in the context of whistle-blowing in the public sector, anyone who becomes aware of the corrupt behaviour of public officials or employees of public institutions can report to the National Commission on the Rights of the People in accordance with the Anti-Corruption Commission Act (Article 55). Whistle-blowers are guaranteed their position in their organisation (Article 62). If whistle-blowers are discriminated against with regard to their position or working conditions on the grounds of their whistle-blowing, the relevant organisation shall be subject to a fine of not more than 10 million won (Article 91). In addition, the identity of whistle-blowers must be kept confidential so that their identities are not exposed (Article 64); in the case of a violation, a person shall be subject to imprisonment for a term of up to three years or a fine of up to 30 million won (Article 88). Whistle-blowers may also request personal protection (Article 64-2).

In the private sector, whistle-blowers are protected by the Protection of Public Interest Reporters Act. If any person acknowledges that a violation of public interest has occurred or is likely to occur, the person may report to the representative of his or her organisation, the investigation agency and the National Commission on the Rights of the People (Article 6). This Act also provides for a confidentiality obligation so that the identity of a whistle-blower is not disclosed (Article 12). A breach of this confidentiality provision results in imprisonment for a term of not more than five years, or fines of not more than 50 million won (Article 30). If a person takes any disadvantageous actions against a whistle-blower with regard to a whistle-blower’s position, the person will be punished by imprisonment for a term of up to three years or fined a sum below 30 million won. If a person interferes with a whistle-blower or induces the retraction of a whistle-blower’s report, that person will be punished by imprisonment for a term of up to one year or a fine of up to 10 million won (Article 30).
X COMPLIANCE

The operation of a compliance programme can be significant, in particular where the International Bribery Prevention Act and the Graft Act apply. The International Bribery Prevention Act stipulates that not only the actors who committed bribery, but also the company to which the actors belong, shall be criminally punished by fines (Article 4), and exceptionally releases a company from criminal punishment where the company has used reasonable care and supervision to prevent bribery violations (proviso clause, Article 4). The Graft Act also has a provision for exceptional release from criminal punishment where a corporation, organisation or an individual has used due care and supervision to prevent a violation (Article 24). The fact that a company has been operating an effective compliance programme can increase the likelihood that this exception will be applied.

XI OUTLOOK AND CONCLUSIONS

When the Graft Act came into effect in 2016, Korean society became interested in anti-corruption and anti-bribery measures and as a consequence many problems have been addressed. The fact that many companies in Korea are adopting compliance programmes to prevent bribery and corruption shows that awareness of anti-corruption and anti-bribery is being raised.

As we have discussed, Korea is punishing both domestic bribery and international bribery, and the country punishes bribery not only in the public domain, but also in the private sector. In addition, the introduction of the Graft Act prohibits those who have social influence, such as public officials, journalists and school personnel, from taking or giving money or valuables, irrespective of whether the money or valuables are given in relation to their duties. Further, Korea regulates various other anti-corruption practices and has introduced new anti-corruption and anti-bribery systems and measures at a rapid pace, including in its attempts to legislate conflict prevention regulations. It is expected that Korean society will become more transparent as these systems develop and improve.
I INTRODUCTION

The 14th Malaysian general election, held on 9 May 2018, marked a historic moment for Malaysia. The coalition of opposition political parties calling themselves ‘Pakatan Harapan’ (Pact of Hope) created a political tsunami when it swept to victory, dislodging the unbroken hold on government of the incumbent ruling coalition, ‘Barisan National’ (National Front), which had been in power for over six decades since independence in 1957.

A major factor of Pakatan Harapan’s victory – which brought back former Malaysian strongman Dr Mahathir Mohamad as the country’s seventh Prime Minister – was its reformist, anti-corruption agenda, which resonated with a nation shocked by the alleged involvement of the incumbent, Prime Minister Najib Razak, in the multibillion-dollar 1Malaysia Development Berhad (1MDB) corruption scandal. The Malaysian electorate was enraged by the then government’s dirty tactics to deregister Dr Mahathir’s party, Parti Pribumi Bersatu Malaysia, just days before voting day. The High Court has since ruled that the deregistration was illegal.

Since its election victory, the new Malaysian government has continued to aggressively pursue its anti-corruption agenda through the establishment of the Special Cabinet Committee on Anti-Corruption (JKKMAR) and the Governance, Integrity and Anti-Corruption Centre (GIACC); the formulation of the National Anti-Corruption Plan; and the reopening of

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investigations into the 1MDB scandal, which have recently led to criminal charges being brought against former Prime Minister Najib Razak. By 2030, Malaysia aims to be one of the top 10 cleanest nations in the world.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Legislation on corruption

A number of pieces of legislation in Malaysia deal with corruption:

a) Penal Code (FMS Chapter 45) (Revised in 1997 as Act 574);
b) Prevention of Corruption Ordinance 1950 (repealed);
c) Election Offences Act 1954 (Act 5);
d) Prevention of Corruption Act 1961 (Act 57) (repealed);
e) Customs Act 1967 (Act 235) (Revised 1980);
f) Emergency (Essential Powers Ordinance) 1970;
g) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613);
h) Anti-Corruption Act 1997 (Act 575) (repealed); and

The Malaysian Anti-Corruption Commission Act 2009 (the MACC Act 2009), which repealed the Anti-Corruption Act 1997, is the principal legislation dealing with corruption. Malaysia's aspiration to combat corruption can be seen from the succession of anti-corruption laws that were passed prior to and after independence. Over the years, more progressive laws were passed to combat corruption, both in the public and private sectors, to cover extensive corruption in its multiple forms.

ii Malaysian Anti-Corruption Commission Act 2009 (Act 694)

Precedent court cases have described corruption as the provision of corrupt gratification as an inducement or reward for a person to act or forbear to act in a manner contrary to his or her office or position. The word 'corrupt' was explained by the Malaysian courts as 'doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions' and 'purposely doing an act which the law forbids'.

The courts elaborated that: 'Corrupt is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the ambit of the section. (In that case.) The real point is whether there is soliciting of a political donation with a corrupt intention.'

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6 See footnote 2.
7 Section 16 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
8 See Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2) [1977] 1 MLJ 15.
The MACC Act 2009 has the principal objective of promoting the integrity and accountability of public and private sector administration by constituting an independent and accountable anti-corruption body; and educating the public at large about corruption and its effects.

The MACC Act 2009 has expanded the definition of gratification to cover the following many corrupt acts:

- money, donation, gift, loan, fee, reward, valuable security, property or interest in property (being property of any description whether movable or immovable), financial benefit or any other similar advantage;
- any office, dignity, employment, contract of employment or services, or agreement to give employment or render services in any capacity;
- any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- any forbearance to demand any money or money’s worth or valuable thing;
- any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f). 9

**Offences**

The MACC Act 2009 deals with the offences of corruption in multiple forms that include acceptance of gratification and the following:

- Bribery of an officer of a public body: it is an offence to offer to an officer of a public body or for an officer of a public body to solicit or accept any gratification as an inducement or a reward for:
  - any vote at any public body meeting either for or against any measure, resolution or question;
  - performance or non-performance or aiding in procurement or to expedite, delay, hinder or prevent the performance of any official act;
  - procurement or prevention of passing of vote or procurement of any contract or advantage in favour of any person; or
  - granting or forbearing any favour or disfavour. 10

It is an offence for officers of a public body to use their office or position for any gratification, whether for themselves, their relatives or associates. 11

- Corrupt gratification by an agent: it is an offence for an agent to corruptly accept, obtain, agree to accept or attempt to obtain from any person or for any person to give, agree to give or offer any gratification to any agent as an inducement or a reward for:
  - doing, forbearing to do, for having done or for having forborne to do any act in relation to his or her principal’s affairs or business; or

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9 Section 3 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
10 Section 21 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
• showing or forbearing to show favour or disfavour to any person in relation to his or her principal's affairs.\textsuperscript{12}

c Deception of principal by an agent: it is an offence to give an agent or for an agent to use any account or document (when he or she has reason to believe the statement contains false or erroneous or defective material or information) to deceive or mislead the principal.\textsuperscript{13}

d Procurement of withdrawal of tender: it is an offence to:
\begin{itemize}
  \item offer any gratification to any person who has made a tender for a contract (with intention to obtain from any public body a contract for work or service or supply of any goods) as an inducement or a reward for a withdrawal of a tender; or
  \item solicit or accept any gratification as an inducement or a reward for a withdrawal of a tender.\textsuperscript{14}
\end{itemize}

e Attempts, preparations, abetments and criminal conspiracy to commit offences: it is equally an offence for any person to attempt or to do any act preparatory to or in furtherance of the commission of any offence or abet or engage in a criminal conspiracy to commit any offence under the MACC Act 2009.\textsuperscript{15}

f Failure to report bribery is an offence: any person who is aware of bribery transactions shall make a report to the Malaysian Anti-Corruption Commission (MACC) or the police. Failure to make a report constitutes an offence punishable by a fine not exceeding 10,000 ringgit or imprisonment not exceeding two years, or both.\textsuperscript{16}

\textbf{Statutory presumption of corruption}

Once gratification is proved to have been offered or received, it shall be presumed that the gratification is a corrupt gratification as an inducement or a reward for or on account of the matters unless the contrary is proved.\textsuperscript{17} The burden then shifts to the accused to show, on the balance of probability, that the gratification was not received or given corruptly.\textsuperscript{18}

\textbf{Penalty}

Corruption is punishable by imprisonment not exceeding 20 years and a fine of not less than five times the sum or value of the gratification that is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or 10,000 ringgit, whichever is higher.\textsuperscript{19}

\textbf{Plea-bargaining}

In 2012, the Criminal Procedure Code (Act 593) was amended to allow for plea-bargaining. An accused person may make an application for plea-bargaining in the court in which the

\begin{itemize}
  \item Section 17 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
  \item Section 18 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
  \item Section 20 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
  \item Section 28 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
  \item Section 25 Malaysian Anti-Corruption Commission Act 2009 (Act 694); See also \textit{Md Ezam Md Daimon v. Amona Building Management Services Sdn Bhd} [2011] 2 ILR 69.
  \item Section 50 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
  \item Section 24 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
\end{itemize}
offence is to be tried.\textsuperscript{20} It is not yet clear whether the Public Prosecutor will accede to any request for plea-bargaining in corruption cases. The process for plea-bargaining will require the accused person to agree on a disposition with the prosecution, and the court shall find the accused guilty on the charge and sentence the accused to not more than half of the maximum punishment of imprisonment provided under the law for the offence for which the accused has been convicted.\textsuperscript{21}

**Public officer**

The express objective of the MACC Act 2009 is to eradicate corruption in the public sector by having a very wide definition of a public officer:

\begin{quote}
Public officer or officer of a public body means any person who is a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds.\textsuperscript{22}
\end{quote}

Previously, the High Court, the Court of Appeal and the Federal Court had ruled that the Prime Minister of Malaysia is not a public officer.\textsuperscript{23} This had created widespread public disaffection and suspicion that the courts were complicit in covering up the 1MDB financial scandal, whereas the US Department of Justice (DOJ) court papers had made clear reference to a top-ranking official named ‘Malaysian Official 1’ as being the former Prime Minister and various other suspects as people associated with him.\textsuperscript{24} The newly appointed Attorney General is now seeking to review the earlier court decisions in impending prosecutions against the former Prime Minister.\textsuperscript{25}

iii **Penal Code (Act 574)**

The Malaysian Penal Code makes it an offence for a public servant to obtain any gift from a person involved in any proceeding or business transacted by him or her.\textsuperscript{26} A public servant commits an offence if he or she accepts any gratification other than his or her legal remuneration in respect of an official act.\textsuperscript{27} Taking a gratification by corrupt or illegal means to influence a public servant\textsuperscript{28} or taking gratification for the exercise of personal influence with a public servant\textsuperscript{29} is also an offence.

\textsuperscript{20} Section 172C of the Criminal Procedure Code (Revised 1999) Act 593.
\textsuperscript{21} Section 172D of the Criminal Procedure Code (Revised 1999) Act 593.
\textsuperscript{22} Section 3 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
\textsuperscript{26} Section 165 Penal Code (Act 574).
\textsuperscript{27} Section 161 Penal Code (Act 574).
\textsuperscript{28} Section 162 Penal Code (Act 574).
\textsuperscript{29} Section 163 Penal Code (Act 574).
iv  
Emergency (Essential Powers) Ordinance No. 22/1970

Provisions for corruption in relation to members of the administration is provided under the Emergency (Essential Powers) Ordinance No. 22/1970, which defines ‘corrupt practice’ as any act done by any member of the administration or any member of Parliament or state legislative assembly member or any public officer who uses his or her public office for his or her pecuniary or other advantage. A member of a state legislative assembly is also forbidden to engage in any trade, business or profession that he or she oversees. He or she also cannot take part in any decision of the state executive council relating to any trade, business or profession he or she is engaged in or take part in any decision likely to affect his or her pecuniary interest therein.30

III  
ENFORCEMENT: DOMESTIC BRIBERY

A specialised law enforcement body was established in the form of the Anti-Corruption Agency (ACA), which was then upgraded and became the MACC, established under the purview of the MACC Act 2009. The MACC superseded the ACA as the sole body managing cases related to corruption and having the foremost role in anti-corruption initiatives nationwide.

The MACC has extensive powers to investigate corruption and may order any person to appear before it to be examined. In addition, officers of the MACC are empowered by the MACC Act 2009 to have powers and immunity similar to that afforded to police officers in the performance of their duties; for example, powers of search and seizure of property.

The MACC has also been accorded powers of enforcement pursuant to 25 other pieces of legislation, which include the areas of banking and financial transactions,31 company or society dealings and transactions,32 customs and smuggling activities,33 income tax,34 prison and government supplies35 and election offences.36

The MACC has also been given administrative powers to recommend disciplinary actions against public officials under various government directives and circulars, namely:

a  
Public Officers (Conduct and Discipline) Regulations 1993;

b  
Service Circular No. 12 of 1967 (Anti-Corruption Agency Director’s Investigation Report);

c  
Service Circular No. 17 of 1975 (National Investigation Bureau Investigation Report);

d  
Confidential General Circular No. 1 of 1984 (Investigation of Corruption Cases against Government Departments);

e  
Confidential General Circular No. 1 of 1985 (Integrity Vetting by Anti-Corruption Agency Malaysia); and

f  
other Service Circulars currently enforced.

30 Section 2 Emergency (Essential Powers) Ordinance No. 22/1970.
31 Section 134 Financial Services Act 2013 (Act 758); Section 88 Central Bank of Malaysia Act 2009 (Act 701).
32 Section 537 Companies Act 2016 (Act 777); Section 46 Societies Act 1966 (Act 235).
33 Section 137 Customs Act 1967 (Act 235).
34 Section 118 Income Tax 1967 (Act 53).
36 Section 10 Election Offences Act 1954 (Act 5).
Section 7 of the MACC Act 2009 lists the functions of the MACC as follows:

a. to receive and consider any report of the commission of an offence under this Act and to investigate such reports;

b. to detect and investigate any suspected offence or attempt or conspiracy to commit any offence under the MACC Act 2009;

c. to examine the practices, systems and procedures of public bodies to facilitate the discovery of offences under the MACC Act 2009;

d. to instruct, advise and assist any person on ways in which corruption may be eliminated;

e. to advise heads of public bodies of any change in practices, systems or procedures to reduce the likelihood of the occurrence of corruption;

f. to educate the public against corruption; and

g. to enlist and foster public support against corruption.

Section 30 of the MACC Act 2009 sets out the powers of the MACC to examine persons as follows:

a. order any person to be interviewed in relation to any matter that may assist in the investigation into the offence;

b. order any person, to produce any book, document, records, accounts or computerised data, or any certified copy thereof, or any other article that may assist in the investigation into the offence;

c. order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information as may assist in the investigation into the offence, within the time specified; and

d. order any person to have his or her handwriting or voice sample taken.

In the case of Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor, the Federal Court, which is the apex court in Malaysia, ruled that the MACC may issue a notice under Section 30(1)(a) of the MACC Act 2009 to the lawyer representing an accused person and such notices cannot be challenged in court. This decision has been criticised as it adversely affects the accused’s right to be defended by a lawyer of his or her choice since the lawyer may be called as a witness for the prosecution.

As a counterbalance to prevent any abuse of the wide powers granted to its officers, the MACC Act 2009 prescribes the establishment of five different internal watchdog bodies:

a. Anti-Corruption Advisory Board;

b. Special Committee on Corruption;

c. Complaints Committee;

d. Operations Review Panel; and

e. Consultation and Corruption Prevention Panel.

Some of the powers vested in the MACC have been the subject of public criticism. Following the death of a witness while in MACC custody, a challenge was mounted against the MACC for interrogating witnesses beyond normal business hours. However, in the case of Datuk Seri

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38 See further details at teohbenghock.org.
Ahmad Said Hamdan v. Tan Boon Wah [2010] 6 CLJ 142, the Court of Appeal held that there is no restriction for the MACC to interrogate witnesses only during office hours. The Court of Appeal went on to hold that the ordinary meaning of the words ‘from day to day’ must be ‘continuously or without interruption from one 24-hour day to another’. There are also concerns about the removal of the right to remain silent, right against self-incrimination or spousal incrimination, spousal privileged communication and right of access to legal representation. These have yet to be subjected to constitutional challenges.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Extraterritorial jurisdiction

The MACC Act 2009 also provides for extraterritorial jurisdiction where offences of corruption committed outside Malaysia by citizens and permanent residents of Malaysia may be dealt with as if these were committed in Malaysia.

Any proceedings against any person under Section 66 of the MACC Act 2009 that would be a bar to subsequent proceedings against that person for the same offence if the offence was committed in Malaysia shall be a bar to further proceedings against him or her under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.

Further, it is also an offence to conceal, deal, use, hold or receive gratification or ill-gotten assets outside Malaysia, which is punishable by a fine not exceeding 50,000 ringgit or imprisonment not exceeding seven years, or both.

ii Foreign public officials

The MACC Act 2009 provides for corruption in relation to foreign public officials.

A ‘foreign public official’ is defined to include:

a any person who holds a legislative, executive, administrative or judicial office of a foreign country whether appointed or elected;

b any person who exercises a public function for a foreign country, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign country; and

c any person who is authorised by a public international organisation to act on behalf of that organisation.

It is an offence for any person (by himself or herself or with others) to give, promise, offer, agree to give or offer to any foreign public official or for a foreign public official to solicit, accept, obtain, agree to accept or attempt to obtain any gratification as an inducement or a reward for, or otherwise on account of, the foreign public official for:

a using his or her position to influence any act or decision of the foreign state or public international organisation;

40 Ibid.
41 Section 66 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
44 Section 3 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
performing, having done, having forborne to do, abstaining from performing, aiding in procuring, expediting, delaying, hindering or preventing the performance of any of his or her official duties; or

c aiding in procuring or preventing the granting of any contract for the benefit of any person.\textsuperscript{45}

\vspace{6pt}

\textbf{V \ ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING}

The provisions under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) (AMLATFPUA) commonly provides for the tracing of corruption proceeds and ill-gotten money for other criminal activities.

The Malaysian business community recently became aware of the disconcerting fact that the Second Schedule of the AMLATFPUA allows the Act to be used in respect of offences under 44 other statutes, including goods and services tax, tax, Inland Revenue cases and also offences under the Companies Act, Malaysian Palm Oil Board Act and Trade Description Act.\textsuperscript{46} There was public controversy when the bank accounts of numerous business tycoons were frozen or seized by the Inland Revenue Board.\textsuperscript{47} There was widespread criticism that the AMLATFPUA had been abused, especially when the tycoons caught in the dragnet were said to be close to the opposition parties.

The AMLATFPUA is extraterritorial as it applies to any property, whether it is situated in or outside Malaysia.\textsuperscript{48}

Money laundering is the act of engaging in a transaction involving proceeds of an unlawful activity; acquiring or disguising proceeds of any unlawful activity; impeding the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity, where the person knows that the property is the proceed from any unlawful activity; or the person without reasonable excuse fails to take reasonable steps to ascertain whether the property is the proceed from any unlawful activity.\textsuperscript{49}

The ‘proceeds of unlawful activity’ are defined as any property obtained by any person as a result of any unlawful activity, and unlawful activity means any activity that is related to any serious offence or any foreign serious offence.\textsuperscript{50} A list of serious offences is provided in the Second Schedule of the AMLATFPUA.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{45} Section 22 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
\item\textsuperscript{46} Second Schedule Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).
\item\textsuperscript{48} Section 2(2) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).
\item\textsuperscript{49} Section 3 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).
\item\textsuperscript{50} ibid.
\end{itemize}
\end{footnotesize}
Furthermore, ‘property’ is defined to include corporeal or incorporeal, movable or immovable, tangible or intangible assets, however acquired, or electronic or digital legal documents or instruments in any form, including bank credits, traveller’s cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.\(^{51}\)

The offence of money laundering is punishable by a fine not exceeding 5 million ringgit or imprisonment not exceeding five years, or both.\(^{52}\)

A person may still be convicted for money laundering regardless of whether there is a conviction of the principal serious offence or foreign serious offence.\(^{53}\)

### Reporting institution

The central bank of Malaysia, the Bank Negara Malaysia (BNM), has also issued several guidelines to facilitate the tracing and combating of money laundering and financing of terrorism activities:

- **a** Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Banking and Deposit-Taking Institutions (Sector 1);
- **b** Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Insurance and Takaful (Sector 2);
- **c** Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money Services Business (Sector 3);
- **d** Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Electronic Money and Non-Bank Affiliated Charge and Credit Card (Sector 4);
- **e** Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Designated Non-Financial Businesses and Professions (DNFBPs) and Other Non-Financial Sectors (Sector 5); and
- **f** Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6).\(^{54}\)

To facilitate the tracing of proceeds of unlawful activities, various parties are deemed as ‘reporting institutions’; these include individuals, corporations, their branches and subsidiaries outside Malaysia, money lenders, pawnbrokers, trust companies and professionals such as accountants, advocates and solicitors, valuers, appraisers and estate agents.\(^{55}\)

The reporting institution is required to promptly submit a suspicious-transaction report to the Financial Intelligence and Enforcement Department of BNM when the reporting institution suspects or has reason to suspect that a transaction appears unusual, has no clear

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\(^{51}\) Ibid.

\(^{52}\) Section 4 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).


\(^{54}\) All the Guidelines can be downloaded at http://amlcft.bnm.gov.my/AMLcft07.html.

economic purpose, appears illegal, involves proceeds from an unlawful activity, or indicates
that the customer is involved in money laundering or terrorism financing.\(^5^6\) Non-compliance
with the reporting obligations attract civil and criminal penalties.\(^5^7\)

Reporting institutions that fail or refuse to comply with the guidelines or directions by
and agreements with BNM shall be liable to a fine not exceeding 100,000 ringgit.\(^5^8\)

Failure to ensure compliance with the reporting obligations to implement any action
plan will attract a fine not exceeding 100,000 ringgit or imprisonment not exceeding six
months, or both. A continuing offence will attract a further fine not exceeding 1,000 ringgit
for each day during which the offence continues after conviction.\(^5^9\)

To encourage submission of suspicious-transaction reports, the AMLATFPUA affords
protection and immunity from civil, criminal or disciplinary action to any person who makes
such a report.\(^6^0\)

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to the MACC Annual Report 2016, in relation to foreign bribery, the MACC has
worked closely with foreign anti-corruption enforcement agencies such as the Anti-Corruption
Bureau of Brunei Darussalam, the Corrupt Practices Investigation Bureau of Singapore,
the National Anti-Corruption Commission of Thailand, the Government Inspectorate of
Vietnam, the Anti-Corruption Directorate with the Prosecutor General of the Republic of
Azerbaijan, and the Fiji Independent Commission Against Corruption.\(^6^1\)

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Malaysia became a signatory of the United Nations Convention against Corruption on
9 December 2003 and successfully ratified it on 24 September 2008.\(^6^2\)

In addition to its obligation under the UN Convention, Malaysia is a member of:

\textit{a} the Asian Development Bank/Organisation for Economic Co-operation and
Development Anti-Corruption Action Plan for Asia and the Pacific;\(^6^3\)

\(^5^6\) Sections 14 and 5(2) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful
Activities Act 2001 (Act 613). See also Paragraph 24.1.1 Anti-Money Laundering and Counter Financing
of Terrorism (AML/CFT) – Money Services Business (Sector 3). The suspicious-transaction report forms
can be downloaded at http://amlcft.bnm.gov.my/AMLCFT05a.html.

\(^5^7\) Paragraph 26.1, Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money
Services Business (Sector 3).

\(^5^8\) Section 66E(5) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities
Act 2001 (Act 613).

\(^5^9\) Section 22 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act
2001 (Act 613).

\(^6^0\) Section 24(1) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act
2001 (Act 613).


\(^6^2\) ‘United Nations Convention against Corruption Signature and Ratification Status as of
treaties/CAC/signatories.html.

\(^6^3\) ‘Member countries and economies’, ADB/OECD Anti-Corruption Initiative for Asia-Pacific. Retrieved at
b the Asia/Pacific Group on Money Laundering; and
c the International Anti-Corruption Agency based in Laxenburg, Austria.

VIII LEGISLATIVE DEVELOPMENTS

On 7 August 2017, the Court of Appeal declared unconstitutional the provisions of Section 62 of the MACC Act 2009, which require accused persons to disclose their defence statements to the prosecution before the beginning of the trial, as this impedes the accused’s rights to a fair trial.

i Malaysian Anti-Corruption Commission (Amendment) Act 2018 (Act A1567)

On 4 May 2018, the Malaysian Anti-Corruption Commission (Amendment) Act 2018 (the MACC Amendment Act 2018) was published in the Gazette. However, at the time of writing, it has not yet come into force.

The MACC Amendment Act 2018 introduces Section 17A, which provides that a commercial organisation is deemed to commit an offence if any person associated with the commercial organisation corruptly gives, agrees to give, promises or offers to any person any gratification to obtain or retain business or advantage for the organisation. Under this amendment, corporations and commercial firms’ shareholders, boards of directors or management may be held responsible for an offence committed by the company.

A commercial organisation that commits an offence under Section 17A shall on conviction be liable to a fine of not less than 10 times the sum or value of the gratification that is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or a fine of 1 million ringgit, whichever is higher, or imprisonment for a term not exceeding 20 years, or both.

Section 17A of the MACC Amendment Act 2018 also introduces statutory defences for the MACC Act 2009 for the first time:

a under Section 17A(3), where an offence is committed by a commercial organisation, a person who is its director, controller, officer or partner or who is concerned in the management of its affairs can escape liability if he or she is able to prove that the offence was committed without his or her consent or connivance and that he or she exercised due diligence to prevent the commission of the offence; and

b under Section 17A(4), if charged with an offence under Section 17A(1), a commercial organisation may, as a defence, prove that it had in place adequate procedures designed to prevent persons associated with the organisation from undertaking the conduct that is the subject of the offence.

Section 30 of the MACC Amendment Act 2018 has been amended with the deletion of Subsection (7). Following this deletion, a person who discloses any information or

produces any book, document, record, account, computerised data or article pursuant to Subsections 30(1), (2) and (3) of the MACC Act 2009 is no longer immune from any prosecution, proceedings or claims.

The MACC Amendment Act 2018 also introduces Section 41A, which enables any document or copy of the document obtained by the MACC to be admissible as evidence in any proceedings under the MACC Act 2009.

In addition, the MACC Act 2009 is amended to substitute the word ‘bank’ with ‘financial institution’. This amendment effectively updates and widens the scope of the MACC Act 2009 to include all the institutions under the relevant laws. Prior to the amendment, the definition of a financial institution was confined to a person carrying on any banking or finance company business as defined in the Banking and Financial Institutions Act 1989, which has been repealed by the Financial Services Act 2013.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Disclosure and privilege

Pursuant to Section 126 of the Evidence Act 1950, Malaysian law recognises the concept of legal professional privilege, which protects confidential communications between an advocate and solicitor and his or her client. No advocate is permitted, unless with the client’s express consent, to disclose any communication made to him or her in the course and for the purpose of his or her employment by or on behalf of a client, or to state the contents or condition of any document with which he or she has become acquainted in the course and for the purpose of professional employment, or to disclose any advice given to the client in the course and for the purpose of that employment.67

However, this privilege and protection is overridden by the MACC Act 2009, which provides that, notwithstanding any other written law, an order from a judge of the High Court can compel an advocate and solicitor to disclose information available to him or her in respect of any transaction or dealing relating to any property that is liable to seizure under the MACC Act 2009.68 However, an advocate or solicitor is not required to comply with any such order to the extent that compliance would disclose any privileged information or communication that came into his or her knowledge for the purpose of any pending proceedings.69

ii Whistle-blowing

Malaysian law gives due regard to the protection of whistle-blowers against any retaliatory action because of disclosure. It must be noted, however, that the whistle-blower is only protected from the act of disclosure of improper conduct.70 The whistle-blower cannot rely on the protection afforded to escape liability if the whistle-blower is involved in the improper conduct (i.e., the bribery transaction).

67 Section 126 Evidence Act 1950 (Act 56).
68 Section 46(1) Malaysian Anti-Corruption Commission Act 2009 (Act 694).
69 Section 46(2) Malaysian Anti-Corruption Commission Act 2009 (Act 694).
70 Section 10 Whistleblower Protection Act 2010 (Act 711).
71 Section 11 Whistleblower Protection Act 2010 (Act 711).
Under the Whistleblower Protection Act 2010, any detrimental action taken against the whistle-blower in reprisal is an offence, and the penalty could be up to 100,000 ringgit or a jail term of up to 15 years, or both.\(^2\)

This protection is further strengthened by Section 65 of the MACC Act 2009, which provides that the identity of informants or the place in which the information was given by the informant to the MACC cannot be revealed or disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.

iii Witness protection

The Witness Protection Act 2009 provides protection to witnesses, including those involved in corruption cases. The Act accommodates a protection programme\(^3\) for witnesses who fear for their safety and security during an investigation and prosecution of a corruption case.

iv Data privacy

The Personal Data Protection Act 2010 (PDPA) is Malaysia's comprehensive data protection framework and it imposes broad obligations on those who process personal data in connection with commercial transactions.\(^4\) Under the PDPA, there is a general prohibition on the disclosure of personal data without a data subject's consent.\(^5\) However, there are certain exceptions to this prohibition and these include situations where the disclosure is necessary for the purpose of preventing or detecting a crime, or for the purpose of investigations, or as required or authorised by or under any law, or by the order of a court, or where the disclosure is justified as being in the public interest in circumstances as determined by the minister.\(^6\)

In furtherance to the power to process personal data without the data subject's consent, the MACC Act 2009 provides the MACC with wide investigative powers, including the power to:

\(a\) request an affirmation or statement in writing on oath of any person under investigation of an offence under the MACC Act 2009 or any relative of that person or any other person who the authorities believe can help the investigation;\(^7\)

\(b\) require any bank or financial institution to furnish copies of all accounts, documents and records in relation to any person under investigation of an offence;\(^8\)

\(c\) intercept any communication that may contain any information that is relevant for the purpose of any investigation into an offence under the MACC Act 2009, including to detain and open any postal article, intercept any message transmitted or received by any telecommunication, and to intercept, listen to and record any conversation by any telecommunication;\(^9\) and

\(d\) subject to the limitations in the MACC Act 2009, require any person to give any information on any subject.\(^10\)

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72 Section 10(6) Whistleblower Protection Act 2010 (Act 711).
74 Preamble Personal Data Protection Act 2010 (Act 709).
75 Section 8 Personal Data Protection Act 2010 (Act 709).
76 Section 39 Personal Data Protection Act 2010 (Act 709).
77 Section 36(1)(a), (b) Malaysian Anti-Corruption Commission Act 2009 (Act 694).
79 Section 43 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
80 Section 47 Malaysian Anti-Corruption Commission Act 2009 (Act 694).
X COMPLIANCE

The MACC Act 2009 did not previously provide for the defence of having adequate compliance procedures. However, when the MACC Amendment Act 2018 enters into force, Section 17A(4) will provide a commercial organisation with the defence of having had in place adequate compliance procedures when charged with an offence under Section 17A(1) of the MACC Act 2009.

Further, the Guidelines for Giving and Receiving Gifts in the Public Service (No. 3 of 1998) permit those in public service to accept gifts:

a if the gift is declared and documented; and

b if, where the value of the gift is more than 500 ringgit, it is declared and handed over to the head of department, and the head of department decides whether to award the gift to the staff or department, or to return it to the giver.

XI OUTLOOK AND CONCLUSIONS

The electoral victory that returned Dr Mahathir Mohamad to power has enabled the Malaysian public to talk freely about the 1MDB financial scandal. The new government has publicly admitted that the whole system of government had failed\(^1\) and that Malaysia was in dire need of institutional and societal reform. This serious commitment can be seen in the formation of the Council of Eminent Persons,\(^2\) the 1MDB Special Task Force,\(^3\) the Institutional Reform Committee,\(^4\) the Special Committee on the Malaysia Agreement 1963,\(^5\) the JKKMAR, the GIACC and the National Anti-Corruption Plan.\(^6\)

The dawn of a new Malaysia brought about a realisation that the appearance of laws and institutions may just be hallowed symbols of democratic grandeur if there is no real will of the people to enforce their true purpose. Malaysia has seen the destruction brought about by a single corrupt leader who, in less than a decade, had dismantled the country’s laws and systems of government and suborned its officeholders to remove completely the substance of the checks and balances these institutions were created to provide.

While Najib Razak was in power, the Auditor General’s report, which is usually published, was classified as a secret document under the Malaysian Official Secrets Act

1972 (Act 88) to prevent public disclosure of its findings.\(^\text{87}\) He removed the director of the Special Branch and the deputy director of the Royal Malaysian Police,\(^\text{88}\) disbanded the Public Accounts Committee,\(^\text{89}\) sacked the Deputy Prime Minister and four other senior ministers,\(^\text{90}\) forced the retirement of the governor of BNM,\(^\text{91}\) and replaced the Attorney General,\(^\text{92}\) the Chief Commissioner of the MACC and his deputies\(^\text{93}\) with proxies who cleared him of any wrongdoing.\(^\text{94}\)

After Najib Razak’s removal from power, Malaysians and the world were shocked by the sheer volume of luxury items seized from the residence and premises connected to him – 576 handbags, 423 watches, 12,000 pieces of jewellery and cash amounting to 116.7 million ringgit. The total haul was valued by the police at 1.1 billion ringgit.\(^\text{95}\) In August 2018, Malaysian police seized the superyacht ‘Equanimity’, worth 1 billion ringgit and allegedly bought with embezzled funds from 1MDB.\(^\text{96}\) In June 2017, the DOJ filed several lawsuits, to seize, among other things, artwork by Pablo Picasso, Jean-Michel Basquiat and Diane Arbus, along with a 1927 Metropolis film poster by German artist Heinz Schulz-Neudamm, bought for a total of US$14.42 million; property including a Madison Park condominium in New York bought for US$4.5 million, and a penthouse, flat and offices in Mayfair bought for a total of £119 million; diamond jewellery bought for Australian model Miranda Kerr and Jho Low’s mother, Evelyn Goh, for a total of US$8.46 million; rights to the movie Dumb and Dumber and Daddy’s Home; and various shares and companies bought for a total of US$155 million.\(^\text{97}\) The magnitude of the looting in the 1MDB scandal was

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The following words of Noah Webster are particularly pertinent:

> [I]f the citizens neglect their Duty and place unprincipled men in office, the government will soon be corrupted; laws will be made, not for the public good so much as for selfish or local purposes; corrupt or incompetent men will be appointed to execute the Laws; the public revenues will be squandered on unworthy men; and the rights of the citizen will be violated or disregarded."99


Chapter 19

MEXICO

Oliver J Armas, Luis Enrique Graham and Thomas N Pieper

I INTRODUCTION

As Latin America, and the world, continues to combat corruption, Mexico does so too. The 2017 Transparency International Corruption Perceptions Index ranked Mexico 135th out of 180, and the 2016 Latin American Corruption Survey found the country to be one of the four most corrupt countries in Latin America. But Mexico is determined to improve its situation and, to this end, has implemented various new measures at both the legislative and enforcement levels.

One of the most important new measures for combating corruption and bribery was the constitutional amendment of 28 May 2015, which paved the way for the creation of the National Anti-Corruption System (NAS) and other significant changes. As detailed below, the NAS is the mechanism that coordinates the three levels of government (federal, state and municipal) to prevent, detect and punish administrative violations and acts of corruption in the private and public sectors.

On 18 July 2016, President Enrique Peña Nieto, signed the legislation that authorised the NAS. The secondary laws that this legislation created, or in some cases reformed, came into full force and effect on 19 July 2017. As discussed below, the NAS has introduced stronger mechanisms to tackle corruption and, among other things, makes it illegal to give or offer to give to a public official any type of bribe for obtaining or retaining a privilege or business advantage in the area of public procurement. It also requires that public officials declare their assets, conflicts of interest and taxes, subject to the applicable privacy laws. It allows individuals and private entities to mitigate any sanction imposed against them for bribery or corrupt activity (or both) by implementing compliance programmes, internal manuals, codes and other protocols.

Because the legislation only became effective in July of 2017, and given that the NAS is still in its implementation phase (e.g., the anti-corruption prosecutor has yet to be appointed), it is too early to see what the results of the NAS will be. Further, the effects of the

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1 Oliver J Armas and Luis Enrique Graham are partners and Thomas N Pieper is counsel at Hogan Lovells.
The authors would like to acknowledge the valuable research assistance of Julio Zugasti, associate at Hogan Lovells.
2 See www.tm.org.mx/ipc2017/. (Mexico dropped 12 places compared with the previous year.)
4 Under the current formulation of the NAS, this information will not be made publicly available as it includes personal data, which is protected from public disclosure by privacy laws.
NAS will likely be realised over the long term. However, Mexico is taking steps in the right direction and its public and private sectors are making serious efforts to reduce corruption and improve Mexico’s business environment.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Following the traditional Latin American approach, anti-corruption regulation in Mexico is considered an aspect of criminal law, and is, therefore, provided for in Mexico’s Federal Criminal Code (FCC)\(^5\) and in the criminal codes of each of the Mexican states.\(^6\) The Federal Anti-Corruption Law on Public Procurement (LFACP) was abrogated by the recent enactment of the General Law of Administrative Responsibilities (GLAR), which also contained a description of bribery acts and sanctions. The GLAR, which is part of the NAS, also came into effect on 19 July 2017.

i Prohibitions on paying and receiving money

As currently defined in the FCC, a bribe is committed when:

\(a\) a public official, either personally or through an intermediary, requests or receives money or any other gift for himself or herself or any other party, or accepts a promise, to perform or fail to perform any legal or illegal act in relation to his or her official functions; or

\(b\) a person, of his or her own volition, gives or offers money or any other gift to a public official to perform or fail to perform a legal or illegal act in relation to his or her official functions.\(^7\)

The GLAR makes it illegal to give or offer to give (directly or through a third party) a public official any type of payment or gift for obtaining or retaining a privilege or business advantage in the area of public procurement. That prohibition applies to anyone engaged in federal government contracting in Mexico (nationals, foreigners, and national and foreign companies) and includes bidders, participants in tenders, recipients of requests for proposals, suppliers, contractors, licensees and concessionaires, as well as their shareholders, partners, associates, representatives, principals, agents, attorneys in fact, brokers, handlers, managers, advisers, consultants, subcontractors or employees. In addition, similar to the prohibitions in the US Foreign Corrupt Practices Act, the GLAR prohibits Mexican individuals and companies from bribing foreign (i.e., non-Mexican) government officials. Unlike the UK Bribery Act, the GLAR does not cover commercial bribery.

As of 19 July 2017, the GLAR provides that:

Public officials will observe in the course of their employment, position or commission, the principles of discipline, legality, objectivity, professionalism, honesty, loyalty, fairness, integrity, accountability, effectiveness and efficiency governing the public service. For the effective implementation of these principles, the Public Servants shall observe the following guidelines:

\ldots

\(^5\) The NAS legislation contained in the FCC relates to: (1) corruption, (2) illegal exercise of public service, and (3) illegal use of authority, particularly in Articles 212–224.

\(^6\) Many states have adopted the federal provisions.

\(^7\) Article 222.
ii. Behave righteously without using their employment, position or commission to obtain or seek to obtain any benefit, advantage or personal advantage for third parties, or seek or accept compensation, benefits or gifts of any person or organization.\(^8\) 

In addition, the GLAR provides the following restriction concerning private parties:

*Any individual/entity that promises, offers, or gives any improper benefit listed in Article 52 of this law to one or more public servants, directly or through third parties in return for those public servants’ actions or failure to act related to their duties or those of another public servant, or abuse of their real or supposed influence with the purpose of obtaining or retaining, for himself/herself or a third party, a benefit or advantage, regardless of acceptance or receipt of benefit or for the results obtained, will be deemed to have engaged in bribery.*\(^9\)

\(\text{ii Definition of public official}\)

The Mexican Constitution defines ‘public official’ as any person who has been elected as a representative in a public election; members of the federal judiciary office and members of the judiciary office of Mexico City; and officers, employees and, in general, any person who holds a position or commission of any nature in the Federal Congress, the Mexico City Congress, the federal public administration, the public administration of Mexico City and autonomous agencies.\(^10\) As to the public officials of each of the states in Mexico, the Constitution provides that the local constitution of each state will determine who are considered public officials in that state.

The FCC considers a public official to be any person who holds a position or commission of any nature in a federal or district public administration, decentralised agency, state-owned company, state-controlled company, entity that is analogous to a state-owned company, public trust, the Federal Congress, the federal judiciary or the judiciary of the Federal District, as well as anyone who manages federal economic resources. State governors, representatives in all state congresses and justices of state courts are also covered.\(^11\)

\(\text{iii Gifts, gratuities, travel, meals or entertainment}\)

The GLAR prohibits gifts or entertainment for public officials. However, the Ministry of Public Administration (MPA) is currently preparing guidelines regarding the provision of gifts, gratuities, travel, meals or entertainment for public officials.

Notwithstanding this, President-elect Andrés Manuel López Obrador has apparently stated that during his administration gifts of up to 5,000 Mexican pesos in value provided to public officials will be allowed.

\(\text{iv Sanctions}\)

The FCC sets forth the following criminal sanctions for both domestic and foreign bribery:

\(a\) If the value of the bribe does not exceed 500 times the updated measurement unit (approximately 37,745 Mexican pesos), the term of imprisonment ranges from three

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\(^8\) Article 7.  
\(^9\) Article 66.  
\(^10\) Article 108.  
\(^11\) Article 212.
months to two years, fines range from 30 to 100 units of measurement and adjustment\textsuperscript{12} (from approximately 2,418 to 8,060 Mexican pesos), and any public officials involved may be removed from office for a period of three months to two years.

If the value of the bribe exceeds the above-mentioned threshold, the term of imprisonment is from two to 14 years, the amount of the fine ranges from 100 to 150 days of fine (from approximately 8,060 to 12,090 Mexican pesos),\textsuperscript{13} and any public official involved could be removed from office for a period of between two and 14 years.

Companies may be fined for up to approximately 80,600 Mexican pesos and, under exceptional circumstances, the court may also order the suspension of activities or dissolution of the company involved, depending on the degree of involvement and knowledge of the management regarding the bribery in the international transaction, and the damage caused or benefits obtained by the company.

The GLAR provides the following sanctions for bribery and other illegal acts: fines (up to double the amount of the ‘benefits’ obtained and, if no benefit was obtained, up to approximately US$6.4 million), exclusion from public bidding (for up to 10 years), suspension of business activities from three months to three years, dissolution of the company and compensation for damages caused to the government.

### III Enforcement: Domestic Bribery

In contrast with other countries, court files and the information concerning an investigation regarding corruption are not public in Mexico. Instead, the little information publicly available regarding the enforcement of the anti-corruption regulations and the penalties imposed on individuals or companies who commit such crimes is only published in the announcements by the MPA in the Federal Official Gazette when a company is being temporarily excluded from future bidding. However, these announcements provide only the term for which the company will be excluded from bidding, but no further information on the bribery itself or on the fine imposed.

The NAS has a public web page identifying, among other things, the private parties and public officials sanctioned for corrupt practices by the competent authorities.

### IV Foreign Bribery: Legal Framework

Currently, the FCC imposes the same sanctions for domestic and foreign bribery. Specifically, it refers to any person who, either personally or through an agent acting on his or her behalf, and with the intention of obtaining or keeping an undue advantage for himself or herself or any other person, in the development or dealing of international business transactions, offers, promises or gives money or any other gift, whether goods or services, to:

- a foreign public official, or a third party designated by him or her, to handle or abstain from handling proceedings or resolving matters related to the functions inherent to his or her office, position or commission;

\textsuperscript{12} Unidad de Medida y Actualización.

\textsuperscript{13} Under Article 29 of the FCC, the term ‘day of fine’ is considered to be the ‘daily net income of the individual who commits the crime’.
Mexico

b. a foreign public official, or a third party designated by him or her, to carry out proceedings or resolve matters outside the scope of functions of his or her office, position or commission; or
c. any person, for him or her to contact a foreign public official and request or propose to carry out proceedings or resolve matters relating to the functions inherent to the office, position or commission of that official.14

i. **Definition of foreign public official**

A foreign public official is defined in the FCC as:

\[
\text{any person holding an office, position or commission in the legislative, executive or judicial branch or in any autonomous public body in any order or level of government of a foreign state, whether designated or elected; any person in exercise of a function for a public or partially state-owned authority, government or company of a foreign country; and any official or agent of an international public entity or organisation.}
\]

ii. **Corporate liability for bribery of a foreign public official**

The FCC sets forth that when a foreign public official is bribed by an employee or a representative of a company, using means provided by the company and acting on its behalf or for its benefit, the court shall impose a fine of up to approximately 80,600 Mexican pesos and may, in certain cases and under exceptional circumstances, suspend the activities of the company or even dissolve it, depending on the degree of knowledge of the administrative bodies of the bribe and on the damage caused or benefit obtained by the company.

iii. **Civil enforcement of foreign bribery laws**

Pursuant to the FCC anyone who, acting unlawfully, causes a tort, is liable for damages. Thus, an individual or entity who sustained damages as a consequence of bribery may also seek compensation from the individual or entity that committed it.

iv. **Agency enforcement**

On a federal basis, the MPA is in charge of the administrative enforcement of anti-bribery laws. In general terms, the Attorney General’s Office through the Anti-Corruption Prosecutor will be responsible for hearing complaints made by the internal control bodies regarding conduct that may be punished as criminal, as well as to investigate and sanction them.

Since 19 July 2017, the Federal Court of Administrative Justice (FCAJ) has been in charge of resolving and sanctioning individuals, companies and public officials for corrupt practices. A specialised section of the FCAJ was created to hear cases and sanction those liable for serious offences, whether public officials or companies; however, the three judges who will compose this new FCAJ section have yet to be appointed. In accordance with the GLAR, there are different kinds of sanctionable offences; serious offences will be dealt with by the FCAJ and less serious offences by the MPA.

14 Article 222 bis of the FCC.
15 ibid.
v Prosecution of foreign companies for foreign bribery
The FCC applies to crimes that are committed abroad by Mexicans or by foreigners against Mexicans only if the crime has resulted or is intended to have effects within the Mexican territory; the offender is within the Mexican territory; the conduct is considered a crime in both Mexico and the foreign country; and the offender has not been tried in the country in which the crime was committed.16

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING
i Record-keeping laws and regulations
Various Mexican laws and regulations require accurate corporate books and records, effective internal company controls, periodic financial statements and external auditing. They include the following: the Commercial Code;17 the Federal Tax Code;18 and the Corporations Law.19

Sanctions for record-keeping violations
The Federal Tax Code imposes a term of imprisonment ranging from three months to three years for concealing, altering or destroying, totally or partially, financial records and documentation that is required to be kept by law; and for registering commercial or tax operations in two or more books or accounting systems with dissimilar content.20

Tax deductibility of domestic or foreign bribes
The Income Tax Law disallows deductions of expenses that are not ‘strictly indispensable’ for the taxpayer’s business activities.21 The Law also provides a list of non-deductible expenses.22 This list includes gifts and other courtesies, unless they are directly related to the sale of products or provision of services and are offered to all customers in a general way. Similarly, the deductibility of expenses for (the taxpayer’s) lodging, transport, meals, etc., is extremely limited (e.g., only 8.5 per cent of the amount spent on meals in restaurants is deductible, while anything spent in bars is not deductible at all). Representation costs are not deductible, nor are costs for customs agents (only the fee paid to the customs agency itself is deductible). Penalties, sanctions, etc. are also excluded.

It follows from the foregoing that bribes are not deductible under Mexican law. An unlawful payment cannot be strictly indispensable for a legal business, nor could it be a gift that is directly related to selling goods or rendering services and offered in a general way to all customers. The Tax Administration Service, in an effort to comply with the 2009 Organisation for Economic Co-operation and Development (OECD) Council Recommendation on Tax

16 Articles 2 and 4.
17 First Book, Title II, Chapter III.
18 Article 28.
19 Article 156.
20 Article 111.
21 See Articles 31 (companies) and 172 (individuals).
22 See Articles 32 (companies) and 173 (individuals).
Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, is still clarifying the language to be included in the Income Tax Law, explicitly disallowing the tax deductibility of bribes to foreign public officials.

ii Money laundering laws and regulations

The Mexican laws and regulations that prohibit money laundering include the following: the FCC; 23 the Federal Law against Organised Crime; 24 and the Federal Anti-Money Laundering Law.

Sanctions for money laundering violations

The FCC imposes a term of imprisonment ranging from five to 15 years for any person who, either personally or through an agent, purchases, sells, manages, exchanges, deposits, invests or transfers within the Mexican territory, or from the Mexican territory to abroad or vice versa, goods, funds or rights of any kind, knowing that they stem from an unlawful activity, with the purpose of concealing the source, location, destination or ownership of the goods, funds or rights, or of encouraging an unlawful activity. The same penalty applies to officers and executives of financial institutions who knowingly assist in the aforementioned conduct.

The penalty is increased by 50 per cent when the crime is committed by a public official responsible for preventing, reporting, investigating or prosecuting criminal offences. In such cases, the public official is also ineligible to run for public office for a period equal to that of the imprisonment. 25

The sanctions set out in the Federal Anti-Money Laundering Law can be of an administrative or criminal nature. Administrative sanctions are applied in cases where the company does not comply with its obligations under the Law. These obligations are imposed on companies who are active in high-risk industries, including lotteries and gambling, financial institutions, private lending, construction, precious metals trading, real estate development, money transfer, and arts and car sales. It also applies to professional service providers (such as bookkeeping, accounting, tax, financial and legal services) when they act as attorneys in fact. In essence, the law requires such companies or service providers to request certain information from their clients and to report it periodically to the authorities. In July 2014, several amendments to the Federal Anti-Money Laundering Law became effective to prevent high-risk activities. In addition, the competent authority has issued various guidelines and forms to make the regulation more effective.

The administrative sanctions imposed for violations of this law include fines or the revocation of permits, depending of the violation. The fines range from 200 to 65,000 days of fine (approximately 16,120 to 5,239,000 Mexican pesos).

The Law also subjects any person who provides false information to a high-risk company to imprisonment of up to eight years. In addition, a public official or any other individual who unlawfully uses the information obtained from the companies who are subject to this law, provides such information to a third party, or informs a third party about

23 Second Book, Title XXIII, Chapter II.
24 Article 2 No. I.
25 Article 400 bis.
an investigation being carried out, faces imprisonment of up to 10 years. The sanction is
doubled if the offender is (or was within the past two years) a public official in charge of
prosecuting or investigating crimes.

**Disclosure of suspicious transactions**
The following laws require Mexican companies and financial institutions to report suspicious
financial transactions:

- the Credit Institutions Law;
- the General Law on Credit Organisations and Related Activities;
- the Securities Law;
- the Insurance Companies Law;
- the Federal Bonding Institutions Law;
- the Retirement Savings Systems Law;
- the Savings and Loans Cooperatives Law;
- the Investment Companies Law;
- the Public Savings and Loans Law;
- the Credit Unions Law; and
- the Federal Anti-Money Laundering Law.

**VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES**

In Mexico, access to information is treated the same for cases involving foreign bribery and
cases involving domestic bribery, in that the court files and the information concerning an
investigation regarding corruption are not public. Accordingly, the little information publicly
available regarding the enforcement of the anti-corruption regulations and the penalties
imposed on individuals or companies who commit such crimes can only be found in the
announcements published by the MPA in the Federal Official Gazette when a company is
being temporarily excluded from future bidding. However, these announcements provide only
the term for which the company will be excluded from bidding, but no further information
on the bribery itself or on the fine imposed.

The NAS establishes a digital and public web page (which is still under development)
that identifies, among other things, the private parties and public officials sanctioned for
corrupt practices by the competent authorities.

**VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS**

Mexico is a signatory to the following international anti-corruption conventions:

- the OECD Anti-Bribery Convention;
- the United Nations Convention against Corruption;
- the United Nations Convention against Transnational Organized Crime; and
- the Inter-American Convention against Corruption.

Mexico is also a member of the Financial Action Task Force on Money Laundering and an
observer to the Committee of Experts on the Evaluation of Anti-Money Laundering Measures.
VIII LEGISLATIVE DEVELOPMENTS

As mentioned in Section I, on 28 May 2015, the constitutional amendment that paved the way for the creation of the NAS and other important changes to combat corruption became effective. On 18 July 2016, the legislation for the NAS was published in the Federal Official Gazette. The seven secondary laws that were created, or in some cases reformed, came into full force and effect on 19 July 2017. This anti-corruption amendment was a response to urgent public demand because of a high perceived level of corruption. For example, in the national results of Transparency International's Global Corruption Barometer (2017) survey, it was found that 51 per cent of respondents in Mexico paid a bribe when accessing public services and Buen Gobierno (2010) stated that the amount of bribes paid to obtain or facilitate processes or public services had reached 32 billion Mexican pesos. The amendment is one of the actions taken by the government in response to these concerns, in addition to the creation of the Special Prosecutor’s Office for Combating Corruption in 2014 and the LFACP, which was recently abrogated.

The NAS establishes the mechanism that coordinates the three levels of government (federal, state and municipal) to prevent, detect and punish administrative violations and acts of corruption. Moreover, the amendment emphasises that the sanctions will be imposed on persons and companies for acts of corruption, and not just on public officials. Among the most severe sanctions the amendment imposes for corruption activities are fines and disqualification from contracting with state entities. The FACJ will have the jurisdiction to judge and sanction public officials and private persons for the commission of acts of corruption.

The Special Prosecutor’s Office for Combating Corruption has been created as an autonomous body to investigate and prosecute acts of corruption.

Another novelty in the constitutional amendment is that the assets forfeiture procedure will be imposed on assets obtained by corruption or bribery. This procedure will result in the permanent loss of property for the commission of a felony.

In addition, penalties may be reduced if individuals and companies collaborate with the authorities during the investigation of corrupt practices, if the companies have business integrity or compliance programmes, or if they provide evidence that leads to a clarification of the facts relating to the corrupt practice.

Likewise, on 20 August 2015, the MPA issued the Code of Ethics for Public Officials of the Federal Government (the Code of Ethics), which emphasises the constitutional obligation of public officials to perform their activities in accordance with the values of legality, honesty, loyalty, impartiality and efficiency.

Moreover, on the same date, the MPA published the Guidelines to Promote the Integrity of Public Officials, through the Ethics and Conflicts of Interest Prevention Committee, which creates both a committee within each ministry and a federal governmental body authorised to implement the Code of Ethics, to issue non-binding recommendations to public officials who fail to comply with it and to receive reports from whistle-blowers within each office. Although these committees will not be empowered to impose sanctions against public officials that participate in acts of corruption, their creation does demonstrate the government's efforts towards eradicating corruption and bribery.

The enactment of the NAS and the entry into force of secondary regulation facilitated new mechanisms for combating bribery and other corrupt practices. Of these:
the FCC was amended and modified. The additional amended and modified codes include, among others, the crimes of corruption activities and unlawful use of authority of public officials. However, the head of the prosecution agency related to corrupt activities has yet to be appointed;

b the Federal Public Administration Organic Law for internal control was amended and modified;

c the MPA will be in charge of, among other things, coordinating and organising the internal control system and monitoring federal expenses. The MPA will also be empowered to regulate the instruments and internal control procedures for the federal public administration in accordance with the NAS; and

d the General Law of the National Anti-Corruption System was passed, which establishes, among other things, legal grounds to prevent corrupt activities and administrative offences. As long as the NAS combats corruption at the federal, local and municipal levels, it also establishes the minimum coordination mechanisms. The General Law of the National Anti-Corruption System establishes these mechanisms by regulating the organisation and function of the NAS, which comprises:\[26\]

• the members of the Coordinator Committee;
• the Citizen Participation Committee;
• the Audit National System Guiding Committee; and
• the local systems by means of their representatives.

In general terms, the General Law of the National Anti-Corruption System sets forth the principles, policies and processes for preventing, investigating and sanctioning the unlawful activities and corruption activities that may be carried out by the public and private sectors.

Currently, all the states of the Mexican federal republic have enacted local legislation to establish anti-corruption systems.

**IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

Other Mexican laws are relevant to the fight against corruption although they do not technically address it; examples include the Federal Law on Transparency and Access to Public Information, and the Federal Personal Data Protection Law.

**X COMPLIANCE**

In accordance with the GLAR, a sanction or any kind of responsibility will depend on whether and when companies implement compliance policies that require: (1) an organisation manual; (2) a code of conduct; (3) monitoring and control systems; (4) reporting services and channels; (5) training; (6) human resources policies to prevent the hiring of individuals who may be a risk to the company; and (7) mechanisms that will ensure the transparency and publicity of the organisation’s interests at all times.

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26 Article 7 of the General Law of the National Anti-Corruption System.
In that regard, in 2017 the MPA issued a Model Company Compliance Programme, which includes best practices and measures that might be taken by companies during the implementation of their surveillance, reporting, audit, training and organisation systems and mechanisms to avoid possible corrupt business practices.

XI OUTLOOK AND CONCLUSIONS

Corruption has been slowing down Mexico's economic development for a long time. According to the World Economic Forum, the annual cost of corruption equates to 9 per cent of Mexico's GDP. In view of the recent developments concerning Mexico's fight against corruption, however, it is fair to say that there are grounds for optimism.

The GLAR fills some regulatory gaps and strengthens the Mexican anti-corruption legal framework. The biggest challenge for the country concerns enforcement. The creation of the Special Prosecutor's Office for Combating Corruption, which has broad powers, is of vital importance in preventing and prosecuting corruption-related crimes, and the appointment of its head will be essential to its success. The most important aspect of the reforms and enactment of the NAS is that all levels of government, not just federal, are implementing changes. All Mexican states have now followed the government's lead and created their own local anti-corruption systems in accordance with the NAS.

Although the government bears the main responsibility in the fight against corruption, the country's private sector plays an important role as well. Companies will have to make efforts to adopt effective compliance programmes (which are not yet common in Latin America), train their employees, improve their internal controls and ensure protection of whistle-blowers. In that regard, the Model Company Compliance Programme could be an important measure for reducing corruption within the private sector.

Mexico has signed all relevant conventions against corruption, Congress has enacted the appropriate legislation and the country's political leaders have clearly expressed their commitment to enforcing it. There are reasons to believe that the country, led by the public sector and with the collaboration of the private sector, is well equipped to fight corruption. It is also wholly necessary to do so, as Mexico's economy was ranked 15th in the world in 2017.

Finally, President-elect Andrés Manuel López Obrador, speaking of his upcoming presidency, has made several statements regarding the fight against corruption. This has raised an expectation of possible changes to applicable regulations and the legal regime, and we recommend, therefore, constantly reviewing and keeping abreast of developments in this area throughout his presidency.

28 See World Development Indicators Database, World Bank (1 July 2018). Also see databank.worldbank.org/data/download/GDP.pdf.
I INTRODUCTION

Until recently, the enforcement of anti-bribery provision was low on the list of priorities of the Dutch Public Prosecution Service (PPS). It appears catch-up efforts are being made resulting in landmark convictions and settlements in recent bribery and corruption cases. The Dutch Criminal Code (DCC) includes several provisions on bribery. A distinction is made between bribery of public officials and private commercial bribery, depending on the capacity of the person being bribed. A further distinction is made between active and passive bribery. Active bribery relates to the briber’s conduct by giving a gift or a promise, or rendering or offering to render, a service. Passive bribery, on the other hand, refers to the recipient (i.e., the person being bribed or allowing himself or herself to be bribed) by accepting a gift, promise or service.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Bribery of public officials

Bribing a public official with the aim to induce him or her to perform a prohibited or unlawful act (Section 177 DCC) and bribing a public official with the aim to induce him or her to perform a permitted or lawful act (Section 177(a) DCC) are punishable offences. The decisive factor in determining whether a recipient should be punished is whether he or she knew or should reasonably have suspected that he or she was being offered a gift, promise or service to induce him or her to act or refrain from acting in a given manner, regardless of whether or not he or she acted in breach of his or her duty (Sections 362–363 DCC).

Sections 178 and 364 of the DCC provide for the penalising of bribery of judges, which includes national and international judges and arbitrators.

Public official

There is no overall definition of the term ‘public official’ in the DCC. Section 84 explicitly states that public officials include members of general representative bodies, judges and those who belong to the armed services. However, the scope of this term is much broader. The Supreme Court of the Netherlands defines a public official as ‘a person who, under the supervision and responsibility of the government, has been appointed to a function which undeniably has a public dimension to carry out some of the powers of the Kingdom or its
agencies’. This definition includes the following three criteria: (1) the function of the official is, in large part, influenced by governmental institutions, notably if the official has been appointed under the supervision and responsibility of the government; (2) the function of the official is of a public nature; and (3) the official’s tasks entail the execution of governmental tasks. It is irrelevant if this person is also considered a public official from an employment law perspective. It follows from case law that the scope of the definition of a public official should be quite wide.

Depending on the circumstances, employees working in private organisations who perform a public service will be considered public officials as well. However, persons employed by private companies with commercial objectives of which the Netherlands is the (majority) shareholder are generally not considered to be public officials, because they do not perform any portion of the government’s duties and are not appointed by the Dutch state.

**Execution of his or her duties**

To be liable for bribery, the relevant act or omission must relate to the execution of the duties of the public official, including past or future duties. The courts decide this based on case law. From case law, it follows that the official’s authority to perform or omit the act is irrelevant. The criterion is not met if the act or omission is strictly related to the official’s private life.

**Gift, promise or service**

In general, providing favours to public officials is not allowed. The Dutch provisions use the terms gift, promise and service to describe the advantage that is offered by the briber. This can involve both material and immaterial advantages. Although these favours will need to have some sort of value for the recipient, nevertheless, this could be of a non-commercial nature and may be of value only to the person who receives it.

The law does not provide definitions of culpable and non-culpable gifts. This implies that customary gifts of little value – for example, representational gifts such as a bottle of wine, a cup of coffee or a cigar – also potentially fall within the scope of the provisions on bribery. Something that is considered not to have any value at all to anyone and is completely worthless will not be regarded as a gift in any circumstances.

Business gifts are allowed under certain conditions only. It follows from several administrative regulations and codes of conduct that most public officials may accept up to €50 worth of business gifts. The precise boundaries are set by the courts through case law.

**Commercial activities**

There is no general rule preventing public officials from participating in commercial activities while serving as public officials. However, several laws prescribe that public officials are not allowed to have any ancillary functions that may be considered incompatible with the performance of their functions. Members of representative bodies and judges should keep all additional functions in a public record.

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2 Supreme Court 30 January 1911, W 9149.
4 Supreme Court 18 October 1949, NJ 1950, 126.
ii Private commercial bribery

Subsections 1 and 2 of Section 328 ter of the DCC provide for the offences of passive and active bribery of persons that are not public officials: private commercial bribery. No distinction is made between sectors of society (profit and non-profit).

Passive private commercial bribery is punishable if the employee or agent, who, in relation to an act or omission in breach of his or her duties as an official, accepts or asks for a gift, promise or service. Active private commercial bribery is punishable if the person making the gift or promise, or providing or offering a service, knows or can reasonably assume that the employee or agent, by receiving the gift, promise or service acts in breach of his or her duty. Until 2015, the criterion that needed to be met was the offering (active bribery) or accepting (passive bribery) of a gift or promise by the employee or agent that ‘in conflict with the requirements of good faith’ was concealed from the employer. The amendment was considered necessary to meet international standards. The new criterion has not yet been applied by courts.

iii Legal entities

Dutch criminal law provides that it is possible to prosecute legal entities for every kind of criminal offence. The Supreme Court held that whether or not a legal person is criminally liable for an offence has to be assessed by having regard to the special circumstances of the case, as determined by the court. Whether or not criminal liability can be attributed to a corporation depends upon the question of whether the offence can ‘reasonably’ be imputed to the legal entity. This may be the case if the (illegal) conduct took place within the scope of the legal entity. Such conduct can be considered to have taken place within the scope of the legal entity in one or more of the following circumstances: (1) the act was committed by someone who is employed by or works for the legal entity; (2) the act was part of the normal business activities of the legal entity; (3) the legal entity benefited from the act; and (4) the legal person had the power to decide whether or not the conduct took place and accepted this or similar behaviour.

iv Individual criminal liability

If the offence can be imputed to a legal entity, the persons within that entity who ‘directed’ or ‘ordered’ the prohibited conduct may be held criminally liable as well. There must be a certain level of knowledge and responsibility to act as well as an awareness of this conduct taking place or an appreciation that this conduct could occur without taking appropriate measures to prevent such an occurrence.

v Defences and leniency

For legal entities, the appropriate course for defending acts of bribery committed by its employees will usually be to contest the reasonableness of attributing the offence to the relevant legal entity. In principle, this means that a company could escape liability if it has established effective internal controls, ethics and compliance rules and if it did everything in its power to prevent the act. The existence of adequate supervision and control measures is often important to determine whether the offence was part of the normal business activities of the legal person and whether the corporation accepted the commission of the offence.

Whether a corporation has taken adequate due care will be assessed based upon statutory obligations, requirements emanating from contractual obligations, customary professional standards and other self-regulatory measures. Case law seems to be quite strict in this respect: in many cases, measures have been considered to be inadequate to prevent criminal liability.7

Dutch law does not contain a provision allowing authorities to provide leniency to self-reporting offenders. However, cooperation with the authorities, self-reporting of incidents and taking adequate measures to prevent wrongdoing generally will be taken into account by the authorities and courts in deciding whether and how to prosecute and penalise these offenders.

vi Third parties and intermediaries

If bribes to public officials are paid through third parties or intermediaries, the latter may be guilty either of participation or complicity. Participation applies when two or more persons jointly commit an offence and where a close and intentional collaboration is presumed. Complicity requires that a person provides assistance before or during the commission of a serious offence that is actually committed by another person.

Participation and complicity cannot be punished unless intent has been proved. Conditional intent (dolus eventualis) suffices as well. Anyone who fails to supervise or monitor the activities of a third party engaged to perform certain duties may, under certain circumstances, be considered an accomplice if the prosecution succeeds in proving that this person deliberately accepted the considerable possibility that the third party would commit the offence in the exercise of these duties.

vii Penalties

The punishment for active (Article 177 DCC) or passive (Article 363 DCC) bribery of a public official for individuals is a fine of up to €82,500 or six years of imprisonment, or both. Moreover, the individual may be removed from the profession he or she practised while committing the bribery. For legal entities, the maximum fine that may be imposed is €820,000, or, if this amount is not deemed appropriate, a fine of up to 10 per cent of the annual turnover of the preceding fiscal year may be imposed.

The punishment for active or passive commercial bribery for individuals is a fine of up to €82,500 or four years of imprisonment, or both. For legal entities, the maximum fine that may be imposed is €820,000, or, if this amount is not deemed appropriate, a fine of up to 10 per cent of the annual turnover of the preceding fiscal year may be imposed.

III DOMESTIC BRIBERY: ENFORCEMENT

The National Police Internal Investigations Department – which is independent from all other investigation authorities – is charged with investigating instances of public official bribery involving high-ranking officials, judges and politicians.

In other public bribery cases, the regular police forces may be charged with the investigation as well.

The National Public Prosecutor’s Office has appointed a special prosecutor in charge of coordinating bribery cases: the National Public Prosecutor on Corruption. This prosecutor has expertise in investigating and prosecuting bribery cases. Whenever necessary, he will head criminal investigations into suspicions of bribery. Local public prosecutors are authorised to prosecute cases of bribery committed within the boundaries of their own districts, but they may ask the National Public Prosecutor on Corruption for assistance. Complex bribery and corruption cases are usually handled by the Public Prosecutor’s Office for Financial, Economic and Environmental Offences, which often works in close cooperation with the Tax Authority’s Fiscal Intelligence and Investigation Service, which recently launched its own Anti-Corruption Centre.

After the completion of the police investigation or the judicial investigation, the prosecutor must decide on whether to drop the case, to reach a settlement in the case or to issue a writ of summons against the offender. Where appropriate the prosecutor may also decide to conditionally suspend prosecution. It is entirely at the public prosecutor’s discretion whether a case is brought before the court or is dropped (e.g., for lack of evidence), or settled out of court. Injured parties may, however, object to the public prosecutor’s decision not to prosecute a suspect by submitting a complaint to the court of appeal.

i  Prosecutorial guidelines
Until 2013, the PPS had the Instructions for the Investigation and Prosecution of Corruption of Public Officials in place, which outlined factors to be taken into account when deciding whether to prosecute a public official for bribery. Because the instructions have since been repealed, there are currently no official prosecutorial guidelines in place. The PPS has been criticised for not having an open and transparent policy, nor guidelines for self-reporting, disclosure and sentencing.

ii  Recent cases
In the past few years there has been an increase in prosecutions for domestic corruption offences. In the Rotterdam Port scandal, a former director of the Rotterdam Port Authority was sentenced to a partly suspended one-year prison sentence and a fine of €150,000 on account of a variety of charges, including bribery. In April 2017, the Supreme Court ruled that it is possible for a public official to commit bribery by acting in breach of a duty, which encompasses acting with integrity and neutrality, although there is no direct proof of placing an individual in a privileged position.

Klimop is the largest real estate fraud case ever to have been tried in the Netherlands. Investigations into real estate transactions for artificial prices resulted in a seven-year prison sentence for the main suspect found guilty of, among other matters, leading a criminal organisation, workplace embezzlement, forgery, money laundering and bribery. Seven co-defendants were also given prison sentences varying from three to four years. The private companies of the suspects involved in the offences were sentenced to pay fines. About €12 million in fines and €15 million in confiscation were imposed on Dutch companies involved in this case. Moreover, €135 million had to be paid to fraud victims.

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9 Supreme Court of the Netherlands 5 July 2016, ECLI:NL:HR:2016:1393.
Between 2016 and 2017, 11 suspects (including three legal entities) were convicted for bribery and fraud committed during their employment for the SNS Property Finance bank. The prison sentences imposed were up to a one-year non-suspended prison sentence and €25,000 in fines.\textsuperscript{10} Several cases were settled, with fine amounts ranging between €100,000 and €225,000. Several appeals are pending.

There have been notable convictions of public officials for bribery. One case was brought against a former provincial deputy, who was sentenced to imprisonment for two years and two months for 11 counts of (passive) bribery by the Supreme Court. He was found guilty of having received payments in return for advice and information relating to his capacity as a provincial deputy.\textsuperscript{11}

In July 2016, by verdict of the District Court of Rotterdam, a former senator was found guilty of passive bribery (among other offences).\textsuperscript{12} In his capacity as a politician, he was responsible for real estate policy. The case revolved around a long-term friendly relationship he maintained with a real estate developer, which included trips made at the expense of the latter. While both were found guilty of bribery, the Court found it necessary to limit the range of the broad definition of bribery. The appeal proceedings are currently pending.

Quite a few important cases were tried recently. The District Court of Rotterdam heard a case against a public official responsible for purchasing cars for the Ministry of Defence. Natural persons, former employees of three major players in the automotive industry, were found guilty of bribing a public official. The cases against the companies were dealt with through an out-of-court settlement. Fines in the range of €3 million up to €11 million were paid, which included the disgorgement of the proceeds of the crime.\textsuperscript{13}

The Vestia case can be considered a landmark case. The treasurer of the Vestia housing association received half of the commission the intermediary was paid by banks in relation to the purchase of derivatives. The derivative portfolio almost caused the bankruptcy of the housing association. In an agreement, the derivative portfolio was unwound against a payment of €2 million to the banks. Both the intermediary and the housing association’s treasurer were convicted and sentenced to years of imprisonment. Both were prosecuted and convicted for commercial bribery, although the housing association may well be considered as an instrumentality and the treasurer as a public official. An appeal has been lodged, so the court of appeal will shed further light on this interesting matter.

The state-owned Dutch Railways\textsuperscript{14} and several of its employees, including its chief executive officer and other natural persons, were prosecuted for commercial bribery in the context of a tender. The prosecution was declared partially inadmissible, and for the majority of the facts all defendants were acquitted. The PPS also lodged an appeal in this high-profile case, which will continue before the court of appeal.

Moreover, recent convictions have shown that there is an increasing focus on investigating instances of alleged bribery in the semi-public sector, such as housing corporations and educational institutions.

\textsuperscript{10} See, for example, District Court Midden-Nederland 20 May 2016, ECLI:NL:RBMNE:2016:3936.
\textsuperscript{11} Supreme Court of the Netherlands 14 February 2017, ECLI:NL:HR:2017:222.
\textsuperscript{12} District Court Rotterdam 12 July 2016, ECLI:NL:RBROT:2016:5272.
\textsuperscript{14} Nederlandse Spoorwegen, or NS.
Trends
In late 2016 and early 2017, several domestic bribery cases were settled. A settlement of €12 million was reached with a major Dutch importer in the automotive sector, as well as €2 million settlements with major Dutch businesses operating in this sector. These cases involved the bribery of police and Ministry of Defence officials. The individuals involved were prosecuted; their cases are ongoing.

A trend of pursuing potentially culpable – often high-ranking – individuals in bribery and corruption criminal investigations can be observed in the Netherlands. In line with this trend, individuals (including executives) are increasingly excluded from settlement agreements. These individuals are often indicted.

Moreover, authorities are increasingly calling upon companies to self-investigate potential misconduct and subsequently disclose their investigation results. Companies may have an interest in disclosing this information when negotiating a settlement agreement. However, owing to a lack of prosecutorial guidelines, the exact rewards for self-reporting cannot be determined.

In addition, investigating authorities are increasingly focusing on the ‘facilitators’ of illegal conduct, such as accountants, external auditors and financial institutions. The PPS is increasingly cooperating with the Dutch financial market regulators, the Netherlands Authority for the Financial Markets and De Nederlandsche Bank (DNB), which are increasingly involved in corruption cases involving financial institutions.

Aggrieved party’s rights
Bribery is a criminal offence and is therefore considered an unlawful act under civil law. It is possible for an injured party, including shareholders and stakeholders, to file a lawsuit to obtain full compensation for damages it may have suffered as a result of bribery. For example, if a company is not awarded a contract in a tender process because one of the other competing companies paid bribes, it may have a cause of action against the party who paid the bribe. Payments of damages are often included in a settlement agreement.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK
Dutch criminal law does not have a specific act covering foreign bribery that provides wide extraterritorial jurisdiction. Partly in response to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Dutch legislator has introduced Section 178(a) into the DCC. This article provides that persons in the public service of a foreign state or of an organisation of international law (e.g., the United Nations) are considered public officials, as provided for in Sections 177 and 363 of the DCC. It follows from this that foreign and domestic officials are treated equally and the same offences apply to both kinds of officials.

There is no definition for the term ‘foreign public official’ or any case law defining which criteria are applicable. However, based on legislative history it can be assumed that the same criteria for domestic officials will apply to foreign officials.

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The rules governing jurisdiction of the DCC provide that the (legal) persons that can be prosecuted in the Netherlands are:

a. any person who bribes a public official (foreign or domestic) from within the Netherlands;

b. a Dutch public official (not necessarily having Dutch nationality) or Dutch national bribed abroad;

c. any person bribed abroad who is in the public service of an international organisation having its seat in the Netherlands;

d. a Dutch citizen who bribery a public official – foreign or otherwise – abroad; and

e. a Dutch public official or the person in the public service of an international organisation having its seat in the Netherlands and who committed the offence of bribery abroad.

A foreign public official bribed abroad by a Dutch citizen cannot be prosecuted in the Netherlands unless that public official is in the service of an international organisation having its seat in the Netherlands or (part of) the act of bribery has been committed within the territory of the Netherlands.

**Gifts and facilitation payments**

Dutch statute does not provide criteria to distinguish between payments to foreign officials that are punishable and those that are not. Making facilitation payments is an offence under Dutch criminal law, since such payments are covered by the definitions of public and private commercial bribery in the Netherlands. When deciding whether to prosecute those who have made small facilitation payments, some of the factors previously listed by the PPS as tending against prosecution are:

a. the public official concerned was required by law to do or not do something (whichever the payment intended to achieve);

b. the amounts involved are small – either in absolute or in relative terms;

c. the payments are made to lower-tier public officials;

d. the gift is shown in the records of the business in a transparent, open manner; and

e. the initiative for the gift was taken by the foreign public official.

Because facilitation payments fall within a grey area, it is generally recommended that organisations have a clear policy on them. To minimise the risk of facilitation payments and bribery, and to create clarity, a growing number of businesses are opting for a zero-tolerance policy.

**Penalties**

The penalties for foreign bribery are the same as those mentioned above for domestic bribery cases (see Section II.vi).

**V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING**

i. **Financial record-keeping: forgery and reporting obligations**

The DCC includes several record-keeping obligations. However, no specific reference is made in these rules to the obligation to record the payment of bribes. When public prosecutors are
presented with public official or private commercial bribery, they seldom use provisions on financial record-keeping. However, it is an inherent possibility in bribery cases that there has also been a violation of these provisions.

If bribes paid by a company are covered up by false descriptions on the invoices and in the corporate books, the company may be prosecuted for the possession or the drafting of false documents within the meaning of Section 225 of the DCC. The prohibition on forgery is not an ‘accounting rule’ in the strict sense of the word, but forgery may obviously be an accessory to concealing bribery. If the bribes are very substantial compared to the overall costs and revenue of the company, this could also constitute the offence of publicising false annual accounts (Section 336 DCC).

The punishment for forgery committed by individuals is a fine of up to €82,500 or six years of imprisonment, or both. For legal entities, the maximum fine that may be imposed is €820,000, or, if this amount is not deemed appropriate, a fine of up to 10 per cent of the annual turnover of the preceding fiscal year may be imposed.

The Dutch Money Act on the Prevention of Money Laundering and Financing of Terrorism (WWFT) requires auditors, as well as credit, financial, investment and other institutions, to conduct client due diligence and inform the Financial Intelligence Unit of intended or completed unusual transactions. Transactions are considered unusual if they give rise to suspicion of a connection with money laundering or terrorism financing. Money laundering includes, among other things, the possession or the transfer of money originating from a criminal offence. As bribery is a criminal offence, the payment of a bribe may qualify as an unusual transaction.

The violation of specific provisions from the WWFT is considered a serious offence if the violation was committed with intent. Without intent it constitutes a lesser offence. The punishment for serious offences under the WWFT is a maximum of two years’ imprisonment or a maximum fine of €82,000 (for legal entities, the maximum fine is €820,000, or if this amount is not deemed appropriate, a fine of up to 10 per cent of the annual turnover). The punishment for lesser offences under the WWFT is a maximum of one and a half years’ imprisonment or a maximum fine of €20,500 (or €82,000 for legal entities).

ii Money laundering

Pursuant to Section 420 bis of the DCC, intentional money laundering is an offence, provided that at the time the offence is committed the suspect was aware of the fact that the object he or she possessed, disguised or concealed had been acquired by means of a criminal offence. Only conditional intent has to be proved (i.e., intentionally exposing oneself to the considerable likelihood that the object was acquired by means of a criminal offence). The knowledge of the suspect may be inferred from objective circumstances. Intentional money laundering is punishable with a maximum prison sentence of six years or a maximum fine of €82,000 for natural persons, or €820,000 for legal entities or a fine of up to 10 per cent of the annual turnover of the preceding fiscal year.

Habitual money laundering requires proof of intentional money laundering committed repeatedly and is punishable by virtue of Section 420 ter of the DCC. The maximum prison sentence is eight years and a maximum fine of €82,000 for natural persons or €820,000 (or a fine of up to 10 per cent of the annual turnover of the preceding fiscal year) for legal entities.

Pursuant to Section 420 quater of the DCC, the act of negligent money laundering is an offence as well. The prosecution must prove that the suspect could have reasonable suspicions of the object concerned having been acquired by means of a criminal offence. Negligent
money laundering carries a maximum prison sentence of four years and a maximum fine of €82,000 for natural persons or €820,000 (or a fine of up to 10 per cent of the annual turnover of the preceding fiscal year) for legal entities.

The offence of money laundering pertains to all assets that are the proceeds of any criminal act. The onus is on the public prosecutor to prove that the proceeds were acquired by means of a criminal activity. No proof is needed for the specific predicate offence itself and for the exact origin of the laundered proceeds. Bribes are funds acquired by means of the offence of bribery. The person accepting the bribes could therefore also be guilty of money laundering. In accordance with recent case law, it is required that in such a case an additional element has to be proven; to be punishable for money laundering, the recipient of the bribe must also have acted to conceal the criminal nature of the object.

As of January 2017, a provision regarding self-laundering was enacted under Section 420 quater of the DCC. To be held liable, the prosecution must prove that the suspect obtained or possessed an object resulting from his or her own criminal offence. Therefore, actions to conceal the criminal nature of the object are not required. Self-laundering carries a much lower penalty: a maximum prison sentence of three months and a maximum fine of €20,500 for natural persons or €82,000 for legal entities.

Financial institutions and civil law notaries are increasingly being investigated on suspicion of money laundering because bribes involved in criminal cases are often paid through their systems. In a high-profile landmark case, the Dutch bank ING Groep NV reached an out-of-court settlement with the PPS; this Dutch variety of a deferred prosecution agreement (DPA) pertains to money laundering at the bank over a long range of years, 2010–2018. On top of that, the bank acknowledged not having lived up to its duty of care in the context of know-your-client and anti-money laundering regulations. The bank agreed to pay the state an amount of €775 million.16 The settlement agreement read: ‘No individuals to be prosecuted, since responsibility and culpability for the violations involved were scattered over too many persons to hold anyone personally liable.’ The out-of-court settlement reflected a lot of the features of US DPAs.

EY was under investigation for its role as external auditor in the VimpelCom case. It was offered an out-of-court settlement, but refused. Charges will be brought and the case is likely to prove interesting when tried.17

The latter two cases demonstrate that the PPS has kept its word on paying attention to the facilitators of bribery and corruption.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Over the past few years, partly because of international pressure (see Sections VII and VIII), the government has intensified its enforcement of foreign bribery. Moreover, the extraterritorial reach of foreign laws such as the Foreign Corrupt Practices Act, the UK Bribery Act and more recently, Sapin II, has contributed to a marked increase in cross-border cooperation by the PPS.

This cooperation is evidenced by a recent major joint settlement in early 2016 between VimpelCom Ltd, a global provider of telecommunication services, and the PPS and the

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16 Settlement agreement of 3 September 2018.
17 See: ‘EY to be prosecuted in the Netherlands over VimpelCom transactions’, on 5 April 2018, Global Investigations Review.
US Department of Justice (DOJ) and Securities and Exchange Commission (SEC). The settlement amount was split evenly between the PPS and (jointly) the DOJ and SEC. With both authorities receiving US$397,500,000 this settlement has become known as the largest settlement ever made in the Netherlands. US$167,500,000 of this amount was confiscated proceeds. The PPS accused VimpelCom of paying bribes to public officials in Uzbekistan prior to and after entering the Uzbek telecommunications market in 2006. The PPS held that this enabled VimpelCom to gain a dominant position in the Uzbek telecommunications market and thus make a great deal of profit. In PPS's view those payments constituted bribery of public officials and forgery. It has been announced that the criminal investigation will be continued into several private individuals involved in criminal offences. In its press release the PPS commented that ‘the parallel action by the public authorities against corruption is proof of the international fight against corruption and that corruption does not pay off’. In the settlement the PPS further declared that VimpelCom had carried out a large number of compliance measures, reducing the risk of recurrence. Notably, for the first time in history the PPS published an account of facts.

In September 2017, the PPS, DOJ, SEC and Swedish authorities reached a joint settlement agreement of US$965 million with Telia Company, a Swedish telecommunications business. As with VimpelCom, the settlement concerns allegations of the payment of bribes to public officials in Uzbekistan in exchange for an agreement to expand Telia’s share of the country’s telecommunications market. Under the joint agreements, Telia will pay US$548 million in criminal penalties, including a US$274 million criminal penalty imposed by the PPS. Furthermore, the disgorgement order amounts to US$457 million.

Another landmark settlement was reached by the PPS in 2014 with SBM Offshore, in which the latter agreed to pay US$240 million. The settlement included a fine of US$40,000 and US$200,000 of confiscated proceeds (Article 36e DCC). The case involved alleged bribery of public officials, private commercial bribery and forgery by commercial agents in Equatorial Guinea, Angola and Brazil. In reaching a settlement, the PPS took into account that SBM Offshore had voluntarily conducted an internal investigation, based on which it reported the issue to the prosecutor. In this case, too, the PPS worked together with the US authorities.

To date, only one case of foreign bribery has been tried – in absentia – in the Netherlands, resulting in the imposition of a fine of almost €1.6 million and a disgorgement order of €123 million. This concerned a case against a private legal entity involved in the VimpelCom and Telia cases.

In 2016, the PPS was awarded ‘Emerging Enforcer of the Year’ for its recent enforcement efforts against bribery and corruption.

19 Goudriaan, ‘Nederland is een beetje corrupt en glijdt verder af’, NRC 3 March 2017.
VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The Netherlands is party to several international treaties and agreements regarding the prevention of bribery and corruption, including:

a. 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 (Brussels, 26 May 1997);

b. the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 17 December 1997);

c. the Statute of the Group of States against Corruption (Strasbourg, 5 May 1998);

d. the Criminal Law Convention on Corruption (Strasbourg, 27 January 1999) and its addition protocol (Strasbourg, 15 May 2003);

e. the Civil Law Convention on Corruption (Strasbourg, 4 November 1999); and


The instruments of the OECD, the United Nations and the European Union are of particular interest. For each instrument an organisation has been created, responsible for monitoring the implementation and enforcement of the anti-corruption instrument.

In December 2012, the OECD Working Group on Bribery concluded that the Netherlands failed to vigorously pursue foreign bribery allegations and must do more to enforce its foreign bribery laws. The OECD Working Group recommended that the Netherlands proactively investigate foreign bribery cases concerning Dutch individuals or companies, including where other jurisdictions may be involved, and to provide adequate resources to Dutch law enforcement authorities to more effectively investigate and prosecute foreign bribery. As expressed in a follow-up report in 2015, the Netherlands has implemented most of the recommendations. Of particular note was the collaboration with authorities from other countries in criminal investigations into corruption.

VIII LEGISLATIVE DEVELOPMENTS

In January 2015, the Computer Crime Act entered into force intended to prevent financial and economic crime, and to investigate and prosecute such crime more effectively. In practice, the most important change was an increase in the maximum penalties of several bribery and corruption offences, which indirectly equipped the authorities with more invasive investigation techniques. A bill currently pending in the Senate would allow authorities to hack computer systems in cases of suspicion of a serious offence, including bribery and money laundering.
IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i House for Whistleblowers Act

In 2016, in response to criticism from the OECD regarding (legal) protection of whistle-blowers,24 the House for Whistleblowers Act came into force. The Act establishes an independent administrative body (the House) and requires companies with a minimum of 50 employees to adopt a procedure with certain safeguards for dealing with whistle-blowers. Before voicing their suspicion of misconduct within the company, whistle-blowers can now contact the House for advice on how to handle their concerns.

ii Fourth EU Anti-Money Laundering Directive

In July 2017, the Fourth EU Anti-Money Laundering Directive was implemented.25 The implementation did not have a serious effect, as most measures had already been introduced in the Third EU Anti-Money Laundering Directive and in the WWFT (see Section V.i). The most important change is likely to be the introduction of an ultimate beneficial owners register. This register will contain the ultimate beneficial owners of all legal entities registered in the Netherlands. The register will be accessible to all institutions subject to the Act and to any individual or entity who can prove they have a legitimate interest in viewing the directory.

iii Political contributions

Political parties are required to disclose an overview of the contributions that exceed €4,500 per donor per calendar year. A failure to disclose may result in an administrative fine of up to €25,000.26

X COMPLIANCE

When a company is suspected of bribery, it may argue in a specific case that the company exercised due care to prevent the bribery by, for example, providing adequate procedures or other measures to prevent bribery offences. If accepted, such a defence will not automatically prevent criminal liability. Should the company still be held liable, however, such a defence will have a mitigating impact on the penalty and, if accepted, will also negate the liability of directors.

In early 2017, a brochure called ‘Doing business honestly and avoiding corruption’ was published by the International Chamber of Commerce Netherlands, in collaboration with the government.27 This brochure provides companies with (1) guidelines for doing business abroad; (2) an explanation of what bribery entails; (3) practical advice to prevent corruption; and (4) brief guidelines on how to create an integrity programme and a code of conduct.

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27 See www.rijksoverheid.nl/documenten/brochures/2017/01/19/eerlijk-zakendoen-zonder-corruptie.
In 2014, DNB published good practices to help banks and insurers fight corruption in the form of bribery or conflicts of interest. These good practices reflect the outcome of a thematic analysis performed by DNB, which showed that these sectors can do more to identify and effectively tackle corruption risks. DNB states that incidents revealing a lack of integrity that test the public’s confidence in the finance sector still occur with some regularity in the Netherlands. It is therefore essential for Dutch financial undertakings to take measures to prevent such incidents from occurring. To support banks and insurers in their efforts to combat corruption, DNB has identified good practices to fight corruption.

In 2016, the Royal Netherlands Institute of Chartered Accountants recently published a manual that outlines how to act in the event that signs of corruption are found when reviewing annual financial statements.

In general, multinational companies tend to implement anti-bribery compliance systems based on rules and guidance relating to the US Foreign Corrupt Practices Act and the UK Bribery Act 2011. Moreover, the trend towards standardisation is expected to increase with the new certification standard 37001 from the International Organization for Standardization, which specifically addresses anti-bribery in corporations.

XI OUTLOOK AND CONCLUSIONS

The number of bribery cases being investigated and prosecuted in the Netherlands is steadily increasing, leading to landmark convictions and settlements. The focus of the PPS remains on the investigation of allegations of bribery in both public and semi-public sectors. Legal entities and (high-ranking) individuals within companies, as well as politicians, are increasingly subject to criminal investigation. Simultaneously, there is a shift from solely focusing on the actors directly involved in bribery and corruption to investigating and prosecuting the facilitators of bribery and corruption. In doing so, the Netherlands is increasingly cooperating with authorities abroad, such as the DOJ.

I INTRODUCTION

Combating corruption is a policy key priority for Polish prosecuting authorities. Over the past 20 years, a range of legislation has been introduced aimed at targeting corruption both in the public and economic spheres.

In the Corruption Perceptions Index survey carried out by Transparency International in 2017, Poland was ranked 36th out of 176 countries.2

The most recent data considering official corruption and bribery can be found in the Statistical Yearbook of the Republic of Poland issued by the Central Statistical Office in December 2017. In 2005, 361 people with public functions were sentenced for acts of official corruption with final verdicts. In 2010, this figure reached 364; in 2014, it was 256; in 2015, it was only 219; and in 2016, it was 338. With regard to bribery, in 2005, 1,364 people were sentenced with final verdicts. In 2010, this figure reached 2,009; in 2015, it was 1,213 and in 2016, it was 1,228.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The Polish Criminal Code (CC) provides for the criminal liability of both the person accepting a bribe and the person offering it, in all types of corruption crimes provided for by legal provisions. Separate provisions regulate issues related to liability for official, international and business corruption.

Criminal liability for handing or promising a bribe may be imposed on each individual.3

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1 Tomasz Konopka is a partner at Soltysiński Kawecki & Szlęzak.
   a Section 1. Anyone who gives or promises to give a material or personal benefit to a person holding a public function is liable to imprisonment for between six months and eight years.
   b Section 2. If the act is of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to two years.
   c Section 3. Anyone who gives a material or personal benefit to a person holding a public function to induce him to disregard his official duties, or provides such a benefit for disregarding such duties is liable to imprisonment for between one and 10 years.
   d Section 4. Anyone who gives or promises to give a material benefit of significant value to a person holding a public function is liable to imprisonment for between two and 12 years.
   e Section 5. The penalties specified in Sections 1 to 4 also apply to anyone who gives or promises to give a material benefit to a person holding a public function in a foreign state or international organisation in connection with such duties.

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However, liability is varied depending on the function performed by the person accepting the bribe.⁴

i  Person holding a public function

In the case of a crime of 'official corruption', the person accepting the bribe is a person holding a public function (this is a notion broader than that of a 'public official'). Pursuant to Article 115, Section 19 of the CC, a person holding public functions (including a member of a local government body, employee of an organisational unit having public funds – e.g., school director, hospital director or a person managing these organisations) is a public official if their rights or duties in the scope of public activity have been defined by legal provisions. A public official is a broad category of persons covering, inter alia, the president, members of Parliament, members of the European Parliament and senators, judges, prosecutors, notaries public, bailiffs, employees of government administration, employees of local government, employees of state inspection bodies, services designated for public security, as well as persons performing active military service.

ii  Bribes

In all cases of corruption, a bribe is a material or personal benefit. Polish law does not define the minimum value of a material benefit, which is considered to be the profit gained by the person who accepts the bribe, therefore it may be an act leading to an increase in assets or a lessening of liabilities of the accepting person. Money and presents of considerable material value will always be classified as material benefits.

A personal benefit is understood to be a particular outcome desired by the person accepting the bribe, but not necessarily one that involves material gain. For example, a promotion at the workplace, making it possible to participate in an entertainment or sports event or acceptance of a job.

⁴ Article 228:

a  Section 1. Anyone who, in connection with holding a public function, accepts a material or personal benefit, or a promise thereof, is liable to imprisonment for between six months and eight years.

b  Section 2. In cases of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to two years.

c  Section 3. Anyone who, in connection with holding a public function, accepts a material or personal benefit, or a promise thereof, in return for unlawful conduct liable to imprisonment for between one and 10 years.

d  Section 4. Anyone who, in connection with his or her official capacity, makes the performance of official duties dependent upon receiving a material benefit, or a promise thereof, or who demands such a benefit, is liable to the same penalty as specified in Section 3.

e  Section 5. Anyone who, in connection with holding a public function, accepts a material benefit of considerable value, or a promise thereof, is liable to imprisonment for between two and 12 years.

f  Section 6. The penalties specified in Sections 1 to 5 also apply to anyone who, in connection with his or her public function in a foreign state or international organisation, accepts a material or personal benefit, or a promise thereof, or who demands such a benefit, or makes the performance of official duties dependent upon receiving a material benefit.
iii Acceptance of, giving or promising a benefit

Conduct that constitutes a crime is not only the giving and accepting of a material or personal benefit, but also the promise of giving such a benefit or demanding it. In cases where a person holding a public function's performance of his or her duties is made dependent upon the giving of a benefit, the CC provides more severe liability. This also applies in situations where a person holding public functions accepts a material benefit, or promise of such a benefit, which has a value in excess of 200,000 zlotys. The crime of corruption of persons holding public functions carries a penalty of imprisonment for six months to eight years or, if more severe, up to 12 years.

It is important to note that what constitutes the crime is the giving of a material benefit to someone that holds a public function because of the position that they hold; the benefit itself does not necessarily have to relate directly to that person.

The CC makes it possible for a person who has given a material benefit (which has been accepted) to avoid criminal liability if he or she informs the relevant authorities of his or her actions before the authorities become aware of the crime.

iv Influence peddling

Polish legal provisions also consider the following to be a crime: actions consisting in invoking influence in a state, local government institution or a domestic or foreign organisation that has public funds, when handling a matter in exchange for material or personal benefit or the promise of such a benefit. Similarly, giving a benefit in such a situation is a crime.5

v Corruption in business

Provisions of criminal law also provide for criminal liability in the case of corrupt conduct in business relations.6

Similar to the corruption of officials, the subject of business corruption may be material or personal benefit. Criminal conduct may consist in giving, accepting, demanding or making a promise of benefits. Both the giver and the receiver of the bribe are subject to criminal liability.

It is a crime to corrupt a person holding a managerial function in a business entity or an employee of a business entity in exchange for an abuse of the powers granted to him or her or for the non-performance of his or her duty, which may cause material damage to that entity or that may constitute an act of unfair competition or an inadmissible preferential act in favour of a buyer or recipient of goods, services or performances. If, as a result of actions taken by a corrupt manager or employee, damage is caused that is in excess of 200,000 zlotys, then the Act provides for a more severe penalty.

vi Anti-corruption Act

Corrupt conduct may be prevented by restrictions imposed on persons holding public functions linked to participation in business activity. Pursuant to the provisions of the Act of 21 August 1997,7 persons holding public functions may not be members of governing bodies

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6 Article 296(a), Sections 1 to 5 of the Criminal Code (Journal of Laws No. 1997.88.553).
in commercial law companies, or work or undertake actions on behalf of business entities if the objectivity of their role is called into question. Persons holding public functions also cannot hold more than 10 per cent of the shares in commercial companies or conduct their own business activity. In addition, they are obligated to submit asset declarations, including those that are part of marital joint ownership.

vii   Financing of political parties

The financing of political parties in Poland is based mainly on obtaining subsidies from the state budget, as well as support from individuals. The provisions of the Act on Political Parties⁸ ban political parties from obtaining financing from commercial law companies, as well as from other business entities. The Act also bans the obtaining of financial support from foreigners, as well as from individuals who do not reside in Poland, unless they are Polish citizens. Furthermore, annual support granted to a political party by an individual cannot exceed a specific amount representing 15 times the minimum wage (i.e., 31,500 zlotys).

viii   Liability of collective entities

Since 28 November 2003, the Act on Liability of Collective Entities for Acts Prohibited under Penalty has been in force, which regulates issues of quasi-criminal liability of commercial companies. This Act is applicable if a person acting in the name of a company committed one of the crimes specified in the Act, and the company gained or could have gained benefit from this act, even if this gain was non-financial.

A condition for commencing proceedings against a company is a final verdict that (1) establishes that a crime has been committed; (2) conditionally discontinues criminal proceedings; or (3) discontinues criminal proceedings by stating that despite the fact that a crime has been committed, the perpetrator cannot be punished.

Administrative corruption, corruption in business and money laundering are included in the catalogue of crimes that may cause the commencement of proceedings.

With regard to criminal proceedings, although in the strictest sense a company cannot be the accused during the course of such proceedings, it is nonetheless possible to hand down a judgment ordering a company to reinstate any benefits that were gained from a crime committed by an individual. In this case, the company becomes a quasi-party and may defend itself against liability by availing itself of certain rights to which the accused is usually entitled. An entity obliged to return benefits has the right to study the case files of the proceedings, take part in the hearing before the court, file motions to admit evidence, put questions to the witnesses and appeal unfavourable decisions and verdicts.

The Act on Liability of Collective Entities for Acts Prohibited under Penalty provides for the possibility of a judgment imposing a fine on a company of between 1,000 and 5 million zlotys (which cannot exceed 3 per cent of the revenue gained in the year in which the crime that forms the basis for liability was committed). The court will mandatorily order the forfeit of any financial benefits gained from the crime, even indirectly.

In addition, the following punishments are possible with regard to collective entities: a ban on applying for public tenders, and making public information about the judgment handed down. The collective entity might also be subject to a preventive measure in the form of a ban on mergers, divisions and transformations.

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It should be emphasised that, following practice, law enforcement bodies do not always commence proceedings in a case where there is the option of imposing a fine on a company, but the latest press releases by prosecutors of the national public prosecution office suggest a tightening up of the policy in this regard. The statistics of the Ministry of Justice show that each year only two dozen proceedings of this type are commenced. This figure is very low, especially taking into account the fact that each year over 10,000 people are sentenced for committing business crimes.

On 25 May 2018, the Ministry of Justice announced an amendment to the Act on Liability of Collective Entities for Acts Prohibited under Penalty. In September 2018, a revised version of the Act was announced. The new amendment provides significant changes. The most important is elimination of the previous requirement of final conviction of a natural person as a condition of the collective entity’s responsibility. The changes also include the extension of the catalogue of offences for which a collective entity can be held responsible, and an increase in the level of fines to between 30,000 zlotys and 30 million zlotys. The amendment introduces sanctions for taking retaliatory action against whistle-blowers, and a requirement to implement compliance procedures with regard to detecting and preventing offences (including corruption and money laundering). The amendment provides for voluntary acceptance of liability by a collective entity in certain circumstances and for the provisions of the Act to be retroactively binding in relation to some offences, including fiscal offences. Under the provisions of the new Act, foreign entities may be held responsible if a prohibited act is committed in Poland. The details of the amendments are currently pending and their planned date of entry into force is not known yet.

III ENFORCEMENT: DOMESTIC BRIBERY

Criminal proceedings in Poland in corruption cases are conducted in the form of an investigation, which means that the public prosecutor’s office conducts them. Tasks as part of the investigation may be entrusted to the police or other services appointed to combat crime.

In 2006, a special service was appointed, the Central Anti-Corruption Bureau (CBA), whose priority is to detect and prevent corruption in the public domain. The CBA conducts secret operations aimed at detecting crimes, and carries out tasks as part of criminal trials under the supervision of the prosecutor’s office. Just like other special services, the CBA has the right to carry out operations, for example, conduct observations, use bugging devices and even entrapment (controlled giving of bribes).

Many significant proceedings have been carried out by the CBA. For example, since December 2017, the CBA has been conducting proceedings involving Stanisław Kogut, a senator from PiS, the ruling party in Poland. Kogut was chairman of the board of a foundation that received many donations from firms and businessmen, and he is alleged to have made improper use of the public powers he had as a senator in exchange for the donations.

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In addition to the CBA, the Internal Security Agency (ABW) and the police hold powers to pursue crimes of corruption. The tasks of the ABW related to combating corruption include monitoring public procurement contracts that have been carried out, as well as privatisation processes, and conducting investigations into operations on the basis of materials obtained in the courts or entrusted to the ABW by the prosecutor’s office in cases of high importance for the economic security of the country. There are also special police units in operation, created to combat economic crime and corruption.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

In principle, Polish criminal law provides for criminal liability for acts that were committed in Polish territory or the effect of which took place in Poland. Criminal liability is also envisaged for crimes committed abroad by a Polish citizen. A foreigner may be held liable if the crime committed was against the interests of Poland, a Polish citizen or a Polish legal person. For a perpetrator to be held liable for a crime committed abroad, their act must be deemed a crime under the laws and regulations in force at the place where it was committed. The foregoing limitation shall not apply, however, to a crime directed against the operation of Polish public offices or economic interests of the state.

It is, therefore, possible for foreigners to be held liable under Polish criminal law for the corruption of Polish officials in spite of the fact that the crime in question was not committed in Poland.

On the other hand, Polish criminal law envisages criminal liability for the corruption of persons holding public functions in a foreign state. The mechanism of liability for this is the same as would be applied to Polish officials.

When sentencing a crime that consists in the corruption of a person holding public functions in a foreign state, it is possible to apply regulations on liability of collective entities according to the same rules that are applied in cases involving officials in Poland.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

In cases of corruption, especially business-related corruption, the crime committed is often accompanied by other crimes. Most often these are the following: money laundering, acting to the detriment of the company, appropriation, falsifying documents, keeping inaccurate (usually financial) records and filing inaccurate tax returns regarding corporate income tax and VAT.

i Obligation to report a crime

Polish law provisions do not impose a legal obligation to report a crime, apart from the most serious crimes such as murder or crimes committed against the security of the state. The possession of information concerning less serious crimes does not entail an obligation

13 Article 228, Section 5 of the Criminal Code and Article 229, Section 5 of the Criminal Code (Journal of Laws No. 1997.88.553).
to report it to the relevant authorities under the sanction of criminal liability. In some cases, however, the management board members may be held liable (both compensation liability and criminal liability) if, in spite of becoming aware of a crime that harms the entity they manage, they failed to take suitable measures (e.g., to file a notification on suspected commission of a crime). This may be deemed to be acting to the detriment of the company through failure to fulfil key obligations, and therefore a crime.

ii Financial record-keeping laws

Business entities are obligated to keep financial records and, in the case of commercial law companies, their financial records and statements are subject to mandatory examination by an independent certified auditor.

Under the Act on Certified Auditors, Audit firms and Public Supervision, a certified auditor who, in connection with a financial audit, has learnt that a public official of a foreign state or state of the European Union accepted a financial or personal benefit or accepted promises of such a benefit is required to notify the law enforcement bodies of this fact. The same obligation applies where a certified auditor has learnt of someone giving or promising to give a material or personal benefit to a person performing a public function in a foreign state or state of the European Union.

Keeping inaccurate financial records constitutes a crime under fiscal criminal law. Inaccurate financial records are understood as records containing false entries. With regard to criminal liability, under fiscal criminal law it is possible to hold a management board member liable even if financial record-keeping was not included in his or her responsibilities. Such a board member shall be subject to criminal liability for fiscal crimes committed as part of operations of the company he or she manages. Importantly, a management board member may even be subject to liability under fiscal criminal law for crimes committed at a time when he or she did not hold this position.

iii Tax deductibility of domestic or foreign bribes

It is often the case in business-related corruption that bribe funds are siphoned from the company under a fictitious (ostensible) agreement, which entails specific consequences regarding the company’s accounting system, as well as VAT and corporate income tax (CIT) settlements. Expenses transferred from a company on the basis of a fictitious agreement, partially fictitious agreement or one that does not reflect the business reality may not be taken into consideration in CIT and VAT settlements. Hence, in the case where an act of corruption using funds that represent the company’s resources is detected, a need often arises to make corrections in CIT and VAT settlements and to pay the missing tax amount. If a person avails him or herself of the possibility of voluntary rectification of the irregularities in tax settlements, the risk of criminal liability may, under certain circumstances, be avoided.

It should be noted that the fiscal authorities may carry out tax inspections at their own initiative or upon receipt of information from the law enforcement bodies conducting

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17 Article 9, Section 1 of the Act of 10 September 1999 – Fiscal Criminal Code (Journal of Laws No. 2013.186 consolidated text).
corruption-related proceedings. Tax obligations and liability under fiscal criminal law are barred by the statute of limitations after expiry of five years counting from the end of the year in which the incorrect settlement took place.

iv  Tax fraud
The regulation in the Fiscal Criminal Code concerning tax fraud is considered the specific provision of the general regulation in the CC regarding fraud.

v  Money laundering
A crime of corruption is very often accompanied by money laundering, both at the stage after the money was siphoned from the company and before the benefit was given to the beneficiary, and at the stage after the benefit was given to the beneficiary. Money laundering consists of taking actions aimed at concealing the criminal origin of funds.\footnote{Article 299 of the Criminal Code (Journal of Laws No. 1997.88.553).} In cases where money is laundered by the beneficiary of the bribe, the basic crime consists in the corruption. However, money laundering is often aimed at concealing the siphoning of the money from the company, which can constitute an appropriation of the company’s funds\footnote{Article 284, Section 2 of the Criminal Code (Journal of Laws No. 1997.88.553).} or acting to the detriment of the company.\footnote{Article 296, Sections 1 to 5 of the Criminal Code (Journal of Laws No. 1997.88.553).}

The new Act on Money Laundering and Terrorism Financing Prevention (the Money Laundering Prevention Act) entered into force in July 2018.\footnote{The Money Laundering and Terrorism Financing Prevention Act of 1 March 2018 (Journal of Laws No. 2018.723 consolidated text).} The Act was amended in line with EU legislation and recommendations of the Financial Action Task Force. Pursuant to the Act, the main responsibility of the General Inspector for Financial Information (GIIF) is to detect money laundering crimes and take preventative measures. Furthermore, under the new Act, obliged institutions, such as banks and other financial institutions, must apply the provisions of the Act. The Money Laundering Prevention Act, among other things, imposes an obligation to register transactions and convey information on transactions suspected of being related to money laundering. The Money Laundering Prevention Act also imposes an obligation to appoint a compliance officer, who is responsible for supervising the appropriate application of the Act. The officer – on behalf of the entity – conveys information about suspected offences such as money laundering, financing of terrorism and others. The Money Laundering Prevention Act also introduces a requirement to create an anonymous whistle-blowing procedure for reporting irregularities in relation to money laundering by employees. If the GIIF comes to the conclusion that a given transaction is suspicious, it may demand that the institution withhold the transaction, and may notify the prosecutor’s office. The failure of obliged institutions to fulfil statutory requirements is sanctioned with many administrative penalties.

The Money Laundering Prevention Act has also created a Central Registry of Real Beneficiaries. The Registry will enter into force in October 2019 and will be available to the public. All companies, with the exception of public companies, are obliged to report and update information about real beneficiaries. Failure to fulfil these duties is sanctioned with the imposition of high monetary penalties.
VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to statistics presented by the Ministry of Justice, in the period from 2001 to 2016, only 17 people were convicted by a final legal judgment for bribery of a foreign public official.\(^{22}\)

Recently, there have been no significant foreign bribery-related proceedings. The most recent known bribery-related proceeding involved a scandal connected with public procurement procedures for IT equipment delivered to government offices; this took place in Poland and the corrupting party was the Polish subsidiary of Hewlett-Packard. There were over 30 people suspected or accused in the case, and in June 2015 an indictment was filed against the leading suspect. On 16 February 2016, the suspect received a suspended sentence of four and a half years’ imprisonment and a fine as a result of his motion to be sentenced without a trial having been accepted by the court.

An investigation concerning the bribery offence was carried out in close collaboration with US authorities. Consequently, Hewlett-Packard entered into a settlement agreement with the United States Securities and Exchange Commission, whereby Hewlett-Packard pleaded guilty to bribing Polish public officials and undertook to pay a penalty of US$108 million.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Poland is a member of numerous international organisations whose task is to combat bribery. The country was admitted to the European Council on 26 November 1991 and is party to the Criminal Law Convention on Corruption of 27 January 1999 (this Convention started to apply on 1 April 2003). Since 1 August 2014, Poland has also been subject to the Additional Protocol to the Criminal Law Convention on Corruption.

In addition, Poland ratified the United Nations Convention against Corruption on 15 September 2006.

Since 7 November 2000, the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, drawn up in Paris on 17 December 1997, has been in force in Poland.

As a member of the European Union, the country has also implemented a range of EU legal acts on combating corruption.

VIII LEGISLATIVE DEVELOPMENTS

Recent changes to the Code of Criminal Procedure focus on adapting Polish proceedings to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. Following this change, Member States may ask – by way of a judicial decision – for actions to be carried out in another Member State; for example, to obtain evidence in a case.

Following earlier changes to criminal procedure, a ban on using illegally seized evidence was removed. In proceedings instigated on or after 15 April 2016, illegally seized evidence shall not be automatically disqualified and may be used in proceedings, unless it has been obtained in circumstances related to murder, intentional occasioning of bodily harm or deprivation of liberty committed by a public official. Rules regarding phone tapping or

\(^{22}\) isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.
bugging have also been relaxed, and evidence obtained in the course of these activities can, in practice (in fact, at the prosecutor's discretion), now be used in all criminal proceedings for the purposes for which the evidence was obtained. Furthermore, in criminal procedure, the enforcement of a judgment may now be secured through the appointment of a compulsory manager. The manager ensures the continuity of the work of the secured undertaking and provides the court or prosecutor with information relevant to the proceedings in progress. The manager draws up an inventory of the assets and property rights of the company and passes it on to the prosecutor or court.

A recent amendment to the CC concerns VAT fraud. Following the introduction of Articles 270(a) and 277(a), the forging of or tampering with an invoice in relation to circumstances influencing the amount of a tax (or other public obligation), or its refund, with a view to using the invoice as an authentic one, or using such a fake invoice, constitutes a separate offence. 'Extended confiscation' is another new institution (based on earlier changes) that has been introduced to the CC. Extended confiscation covers not only all criminally obtained benefits, but also direct and indirect returns on these benefits. At the time of sentencing for crimes from which the perpetrator gained a benefit of substantial value, property held by the perpetrator, or to which the perpetrator obtained any title in the five years prior to committing the crime, may be confiscated. This rule also applies if the perpetrator gained a material benefit from committing a crime punishable by the penalty of deprivation of liberty with an upper limit of no less than five years, and from crimes committed in an organised group or in an association whose purpose was to commit offences. The amendment to the CC also introduced the possibility of enterprise forfeiture if the perpetrator has committed a serious offence.

The Bill on Openness of Public Life was introduced in October 2017 and aims to increase social control over people exercising public functions. While it was expected that the Bill would be passed and enter into force in 2018, the most recent work done on the project was in January 2018. However, the Bill will probably enter into force within the next few months. The most important provision of this legislation is the obligation to introduce internal anti-corruption procedures, which will also apply to medium-sized enterprises and public-sector entities. Failure to carry out this duty will be punishable by a fine of up to 10 million złotys. The Bill also extends the list of people obliged to publish a personal finance statement detailing income and assets.

Moreover, the Bill introduces a new provision for whistle-blowing. People who give reliable information about the possibility of a corruption offence being committed (as defined in the CC) will be given special protection by the prosecution. Whistle-blowers will also be permitted to recover legal costs. An additional benefit is that a whistle-blower's work contract cannot be terminated without the prosecution's permission.

**IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

Other matters that could be relevant when dealing with bribery and corruption are, for example, whistle-blowing and data protection.

In Polish law, there is no general whistle-blowing regime governing how to proceed with information obtained in this manner. However, some pieces of legislation contain elements concerning whistle-blowers. For instance, under the above-mentioned new Money Laundering Prevention Act, an obliged institution is required to create an anonymous whistle-blowing procedure for reporting irregularities in relation to money laundering by employees. The
recent amendment to the Act on Liability of Collective Entities for Acts Prohibited under Penalty provides sanctions for taking retaliatory measures against whistle-blowers. Moreover the Bill on Openness of Public Life makes provision for whistle-blowers. The prosecutor grants people who give reliable information about the possible commission of corruption offences the status of whistle-blowers. This status benefits from special protections (e.g., the whistle-blower’s work contract cannot be terminated without the prosecutor’s permission, nor changed to less favourable terms). Whistle-blowers are also permitted to recover the legal costs of proceedings.

It seems to be important that a whistle-blower, as an employee, is subject to protection against retaliatory discrimination (e.g., dismissing the employee from the company). Moreover, whistle-blowers (pursuant to general rules from internal legal frameworks) are subject to the protection of Article 10 of the European Human Rights Convention, pursuant to the Strasbourg standards set out in the *Heinisch v. Germany* case. These standards provide for the need to weigh up the interests of a given entity (e.g., protection of a company’s good name) with the public interest, and the protection against sanctions afforded to a whistle-blower depends upon his or her motives, as well as the alternative means available to him or her of achieving the assumed goal of disclosing information.

When it comes to data protection in Polish law, the legal norms contained in the regulations on personal data protection and protection of privacy are found mainly in the newly introduced Personal Data Protection Act. The Act, which was applied in May 2018, was amended to adjust Polish law to the amended provisions of the General Data Protection Regulation. Data protection provisions are also found in the CC. The general rule is that the processing of data shall be permitted only when the person to whom the data belongs has given his or her consent.

X COMPLIANCE

The law does not impose a general obligation for business entities to have a compliance programme; however, some pieces of legislation do stipulate requirements in this vein. For instance, the new Money Laundering Prevention Act provides an obligation to appoint a compliance officer. The recent amendment to the Act on Liability of Collective Entities for Acts Prohibited under Penalty introduces the requirement to implement compliance procedures for detecting and preventing offences, including corruption and money laundering. The Bill on Openness of Public Life also features a requirement to introduce an internal anti-corruption procedure. The introduction of internal regulations is deemed to be management’s responsibility, since it is an element of ensuring legal security for the entity they manage. Internal regulations governing employees’ obligations are also of significance when taking appropriate measures against employees under labour law.

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XI OUTLOOK AND CONCLUSIONS

The current criminal procedure regime can be described as oriented towards prompt and inquisitorial proceedings, especially in more serious cases.

The government is now working on significant amendments to the Act on Liability of Collective Entities for Acts Prohibited under Penalty. The works on the Bill on Openness of Public Life are still pending. The current government is trying to improve crime detection and increase efforts in the fight against VAT fraud offences. Moreover, the Ministry of Justice plans to increase the severity of penalties and remove cumulative penalties, and instead of these introduce a quasi-American punishment system (with long-term penalties).

The National Public Prosecutor has issued new instructions on penalties demanded for economic crimes; for example, prosecutors should demand no less than 10 years’ imprisonment for offences that cause damage of a value exceeding 10 million zlotys. In the most recent guidelines issued by the Public Prosecutor General, prosecutors have been formally advised to always consider the principle of concurrent crimes (i.e., when an offender has committed two or more offences and the court sets one cumulative penalty for all offences, which is usually more severe than the penalty that would be given for each separate offence). From the initial stage of the proceedings, their actions should be aimed at identifying the leading perpetrators of criminal conduct. In addition, whenever possible, prosecutors should consider imposing an obligation to refrain from pursuing and exercising the relevant business activity or other preventative measures. All cases of VAT fraud should be conducted by prosecutors specialising in combating such fraud. From the initial stage of the proceedings, prosecutors and the police should determine the financial status of suspects and their property rights that may be subject to forfeiture. If the perpetrator has committed a crime under specified terms, property arrangements should take into account assets acquired by the perpetrator both during and after the offence, as well as five years prior to the crime. Property transferred at that time by the perpetrator to third parties could also be covered by forfeiture. Prosecutors should always consider the need for enterprise forfeiture. In cases where the value of the depleted or expropriated receivables exceeds 1 million zlotys and the damage has not been repaired, prosecutors should apply for the penalty of absolute deprivation of liberty.24


24
I INTRODUCTION

Although Russia was ranked 135 out of 180 countries on Transparency International’s 2016 Corruption Perceptions Index, sharing the spot with such countries as Mexico, Papua New Guinea and Paraguay, in its Third Round Evaluation Report published on 21 November 2016, the Group of States against Corruption (GRECO) considered Russian anti-corruption law to be fairly robust, as anti-bribery legislation has undergone significant development over the past years and continues to improve. However, levels of corruption and financial abuse remain abnormally high. GRECO in its latest evaluation report acknowledged that ‘there are a number of strong safeguards already in place, but, at the same time, some critical issues need urgent attention’.

Russia is a member of all the main international organisations and conventions on countering corruption and makes efforts to implement all recommendations and comply with international standards. For instance, significant amendments are being introduced into national legislation aimed at combating bribery and corruption. The Supreme Court (the highest criminal justice body in Russia) redrafted its binding commentary on public and commercial bribery. Even the president and other state officials stipulate that combating corruption is the core goal of the government in the coming years: in June 2018 President Putin approved a National Plan to Counter Corruption for 2018–2020, providing a list of measures aimed, in particular, at further improving the institutional framework for countering corruption in Russian subjects.

At the same time, a detailed analysis of the amendments to the legislation leaves significant room for concern over its workability. Similarly, actual enforcement levels do not indicate a strong trend of the government cracking down on corruption.

Separately, information on particular criminal cases is only available to a limited extent. Unlike the rulings of arbitrazh courts, which consider commercial disputes, the rulings of general jurisdiction courts dealing with criminal proceedings are not generally available on legal databases, which makes researching this topic somewhat more difficult.

1 Alexei Panich is a partner and Sergei Eremin is a senior associate at Herbert Smith Freehills CIS LLP.
3 https://rm.coe.int/16806cc128.
II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Overview of the main legislation

Russian anti-bribery legislation comprises the following statutes:

a. the Criminal Code of 1996;
b. the Anti-Corruption Law of 2008;
c. the Law on control over the spending of the state authorities of 2012;
d. the Law banning certain categories of individuals from having foreign bank accounts of 2013;
e. the Administrative Code of 2001; and

The 2008 Anti-Corruption Law sets out the general principles for fighting corruption. It provides a legal definition of ‘corruption’, which comprises active and passive bribery (including commercial bribery), misuse of public authority and other abuses of rights by an individual aimed at gaining monetary or other benefits contrary to state or public interests. This Law provides a general framework while leaving particular sanctions for corrupt activities to other pieces of legislation referred to above. One of the core ideas of this Law is transparency and control over gains made by public officials. The Law obliges certain state and municipal officials to disclose their property, income and financial obligations as well as those of their spouse and children who are minors. A separate duty exists to disclose any attempts to engage them in corruption. The Law also obliges them to disclose any conflicts between their personal interests and the public interest that may be affected.

The 2008 Anti-Corruption Law also imposes certain restrictions on the activities of officials such as receiving gifts or entertainment in connection with their official position, carrying on business activities, taking on any paid work except for teaching, science or arts, receiving remuneration for publications and presentations made in their capacity as an official, etc.

Bribery and money laundering offences are punishable under the Criminal Code. However, unlike in many other countries, in Russia only individuals can be criminally liable – legal entities cannot be. Both receiving and giving a bribe are punishable. The law provides for severe criminal sanctions (imprisonment, etc.) for individuals found guilty of these crimes.

Bribery within Russia is punishable irrespective of the nationality of the individuals involved. If bribery is committed by a Russian national outside Russia, he or she will be subject to liability under the Russian Criminal Code if there is no relevant foreign court sentence in relation to the crime. The same applies to foreign nationals who commit a crime of corruption outside Russia against the Russian state or against Russian nationals in the context of commercial bribery.

The Law on Control over the Spending of State Authorities of 2012 was widely announced as a novel anti-corruption measure aimed at reporting the earnings and spending of certain officials. While certain state and municipal officials are required to report their income, property and financial obligations (see above), not all of them are currently required to report their spending as well. This list includes high-ranking officials; for instance, officials appointed by the President, members of the board of directors of the Central Bank and officials designated by them, the Attorney General, high-ranking officials in state corporations, and judges. The reporting should cover not only the officials themselves, but also their spouses and minor children (recent amendments introduced in 2018 imposed reporting obligations on former officials as well). Although widely advertised, this Law does
not appear to be workable because of poor enforcement. As the Law only entered into force on 1 January 2017, limited jurisprudence is available: regional courts of general jurisdiction have resolved only 19 relevant cases, with 12 of these resulting in convictions. Moreover, the Law does not capture the spending of officials’ adult children and other relatives.

Another heavily promoted piece of legislation that was enacted in 2013 prohibits certain state and municipal officials, their spouses and minor children from opening and having accounts (deposits), keeping cash and valuables in foreign banks located outside the territory of Russia, and owning or using foreign financial instruments. The specified officials were required to close existing accounts (deposits) and cease any prohibited activity within three months of the law coming into force. The ban does not apply to officials who permanently hold public office outside the territory of Russia. So far, the only visible effect of this law was that several senators (members of the Federation Council, the upper chamber of the Russian parliament) retired or disposed of their offshore businesses.

In addition to criminal liability, the Civil Code of 1996 prohibits gifts exceeding 3,000 roubles being made to state officials and gifts between legal entities, and imposes civil law sanctions for violation of the above prohibitions. Special legislation (for instance, the Law on State Civil Service) provides for ways to deal with gifts received by governmental and other qualifying officials. Notably, irrespective of their value, gifts aimed at achieving corrupt goals are prohibited and may constitute criminal bribery. Whether the corrupt goal exists is a judgment that requires legal analysis on a case-by-case basis. For example, a gift provided to an official at the registration chamber with a view to facilitating the production of documents may be regarded as a bribe as the connection is pretty clear. The same gift to a high-level official on his or her birthday is unlikely to be regarded as a bribe unless it is evidently connected with his or her ‘assistance’ in a tender for a multimillion dollar contract.

The Administrative Code also provides for administrative liability (fines, injunctions, etc.) for certain misdemeanours (e.g., failure to comply with certain anti-money laundering legislative requirements (see subsection iv, below)).

Disciplinary measures may also apply to civil servants accused of corrupt practices.

**ii Definition of ‘public official’**

‘Public officials’ who may be criminally prosecuted for receiving bribes include, generally, persons who act as representatives of governmental bodies or have administrative or organisational power in governmental bodies, municipal bodies, state and municipal institutions, the army, state corporations and state companies, state and municipal unitary enterprises, joint-stock companies the controlling interest in which belongs to the Russian state, a Russian subject or a municipal body. Receiving a bribe is also punishable for individuals occupying ‘state positions’ (i.e., those established by the Russian Constitution, federal constitutional laws and federal laws for performance of the functions of governmental bodies). A similar provision relates to individuals occupying ‘Federation subject positions’. Municipal servants may be subject to criminal prosecution for bribery only in specific cases.

Unlike the Criminal Code, which gives a descriptive definition of a public official, anti-corruption legislation pursues regulatory goals and consequently provides an exact list

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5 ‘Review of case law on applications by the prosecutor’s office of the confiscation of property for the benefit of the Russian Federation in respect of which evidence of its acquisition with legitimate income has not been submitted in accordance with anti-corruption legislation’ by the Presidium of the Supreme Court of Russian Federation, dated 30 June 2017.
of persons deemed public officials. We note, however, that both definitions intersect to a significant extent. Under anti-corruption legislation, the term ‘public officials’ includes any elected or appointed official or employee in any Russian government body in the executive, legislative or judicial branches at any level of government as well as officials who perform municipal services. In the case of non-municipal officials, pursuant to the State Service Law, the Russian government maintains a listing of the categories of employees who are considered civil servants subject to that law. In specific cases the employees of state corporations, public companies and certain other non-commercial state organisations (the Central Bank and governmental funds) should also be considered as public officials.

iii Public and commercial bribery

The Criminal Code distinguishes between bribes to state officials and bribes to officers of commercial entities (public and commercial bribery). The difference is in the identity of the person receiving the bribe. In the case of commercial bribery, the recipient is a person performing management functions in a commercial or other corporate entity, such as a CEO, board member, or a person otherwise performing organisational or management functions in such entities.

The Criminal Code provides a wide range of sanctions depending on elements of the crime and the amount of the bribe, however in this chapter we will focus only on the maximum sanctions for each crime.

iv Sanctions

The commission of a crime incurs a penalty set out in the Criminal Code. Sanctions vary depending on the gravity of the crime. Court may exercise discretion in applying a penalty within the limits set by the Criminal Code.

Apart from penalties, the Criminal Code provides for the imposition of other penal measures if certain conditions are met. One such measure is confiscation. Money, benefits or property obtained through crime are confiscated if one of the listed crimes is committed (e.g., receipt of a bribe); if these items are used to finance certain crimes (e.g., terrorism); or if the assets in question belonging to the accused are used as a means to commit a crime. When a corruption-related crime is committed, money, benefits or property conferred as a bribe are to be confiscated even if the accused is exempt from liability because of special circumstances (which are discussed in more detail below). As from 2018, public officials whose employment has been terminated because of loss of credibility as a result of committing corruption-related offences are listed in a public register available on the internet.

Public bribery

Receiving bribes

The maximum sanctions for public officials receiving a bribe are as follows:

a a fine of up to 5 million roubles or of the amount equivalent to income for a period of up to five years, or up to 100 times the amount of the bribe; and

b imprisonment for up to 15 years.

These sanctions may be combined together or with disqualification for up to 15 years and may also include correctional work for up to two years and compulsory work for up to five years.

**Giving bribes**

The maximum sanction for giving bribes are as follows:

- **a** a fine of up to 4 million roubles or of the amount equivalent to income for a period of up to four years, or up to 90 times the amount of the bribe; and
- **b** imprisonment for up to 15 years.

These sanctions may be combined together or with disqualification for up to 10 years and may also include correctional work for up to two years and compulsory work for up to three years.

The giver of a bribe will be released from liability if he or she voluntarily reported the bribe to the authorities or if the bribe was extorted by the official and if he or she actively assists with case clearance or the investigation (or both).

The CEO of a company on whose behalf a bribe has been paid will only be criminally liable if he or she was personally involved in giving or concealing the bribe. The CEO will not suffer any criminal liability if he or she was not aware of the bribe.

**Bribery intermediation**

Bribery intermediation was introduced as a separate crime and is defined as direct delivery of a bribe to the receiver at the request of either the giver or receiver of a bribe, or assistance to the giver or receiver in the negotiation or performance of the agreement between them to give and receive a bribe. A proposal or promise of intermediation is also punishable.

The maximum sanctions are as follows:

- **a** a fine of up to 3 million roubles or of the amount equivalent to income for a period of up to three years, or up to 80 times the amount of the bribe; and
- **b** imprisonment for up to 12 years.

These sanctions may be combined together or with disqualification for up to seven years.

An intermediary would be released from liability if he or she actively helped to discover or prevent the crime, and voluntarily notified the authorities of the fact that he or she had acted as an intermediary for the bribery.

**Minor public bribery**

Like bribery intermediation, minor public bribery was recently introduced as a separate crime and is defined as giving or receiving a bribe personally or through an intermediary for a maximum amount of 10,000 roubles. A person found guilty of minor public bribery may be fined up to 200,000 roubles or of the amount equivalent to income of up to three months or sentenced to correctional work for up to one year or limitation of freedom for up to two years, or imprisonment for up to one year.

A person who has a criminal record for bribery or bribery intermediation is sanctioned more severely for minor bribery and may be fined up to 1 million roubles or of the amount equivalent to income for a period up to one year, or sentenced to correctional work for up to three years or limitation of freedom for up to four years, or imprisonment for up to three years.
A donor of a small bribe would be released from liability if he or she voluntarily reported the bribe to the authorities or if the bribe was extorted by the official and if he or she actively assists with case clearance or the investigation (or both).

**Exemptions and defences**

There is, however, an exemption under which a present to an official will not constitute a bribe. Providing common gifts (e.g., flowers, sweets, perfume) would not constitute a violation, and should be analysed in connection with the above-mentioned express allowance in the Civil Code for gifts of up to 3,000 roubles. In the absence of corrupt intent, and below the 3,000 roubles threshold, a gift or entertainment will fall within this exception. There is no ‘facilitating payments’ exception in Russian law.

A person that has committed public bribery has two available defences under the Criminal Code. The first defence, which applies if he or she is assisting with the prosecution of the bribery, constitutes proving that the public official insisted on receiving the bribe as a condition for the commission of a certain act (or for inaction). The second defence, which applies before initiation of criminal proceedings, constitutes the person who has given the bribe voluntarily reporting it to the authorities promptly after having given it. The first defence is most likely to arise where a facilitation payment has been made, since the situation may be connected with a refusal to perform a routine action rather than any illegal actions of the official.

**Commercial bribery**

**Giver of the bribe**

The maximum sanctions for the giver of a bribe are as follows:

- a fine of up to 2.5 million roubles or of the amount equivalent to income for a period of up to two and a half years or up to 70 times the amount of the bribe; and
- imprisonment for up to eight years.

These sanctions may be combined together or with disqualification for up to five years and may also include correctional work for up to two years and limitation of freedom for up to two years.

**Receiver of the bribe**

The maximum sanctions for the recipient are as follows:

- a fine of up to 5 million roubles or of the amount equivalent to income for a period of up to five years or up to 90 times of the bribe; and
- imprisonment for up to 12 years.

These sanctions may be combined together or with disqualification for up to six years.

**Commercial bribery intermediation**

The maximum sanctions for bribery are as follows:

- a fine of up to 1 million roubles or of the amount equivalent to income for a period of up to three years or up to 70 times the amount of the bribe; and
- imprisonment for up to seven years.

These sanctions may be combined together or with disqualification for up to six years.
Minor commercial bribery

Minor commercial bribery has been also recently introduced in the Criminal Code and its threshold is the same as for minor public bribery. A person guilty of minor commercial bribery may be fined up to 150,000 roubles or of the amount equivalent to income for a period of up to three months, or sentenced to compulsory work for up to 200 hours or correctional work for up to one year or limitation of freedom for up to one year.

As in cases of minor public bribery, if a person has a criminal record for commercial bribery or commercial bribery intermediation then sanctions are more severe: a fine of up to 500,000 roubles or of the amount equivalent to income for a period of up to six months or correctional work for up to one year or limitation of freedom for up to two years, or imprisonment for up to one year.

Defences

A person that has committed commercial bribery, including minor commercial bribery, has a defence if he or she actively helped discover or prevent the crime, and either he or she voluntarily reported the bribery to the authorities or the bribe was extorted by the official. An intermediary would also be entitled to a similar defence.

Bribery provocation

Criminal liability for bribery provocation has recently been introduced to the Criminal Code. It may arise, for example, for a person who attempts to bribe a public official or an official in a commercial organisation without their knowledge or consent with the purpose of artificially producing evidence of bribery or blackmail as a result of collaborating with law enforcement authorities trying to conduct an investigative action of doubtful legality.

Administrative liability

The Administrative Code imposes monetary sanctions on both public officials and private parties for a wide variety of minor offences that may fall under the umbrella of corrupt activities. Examples include bribing voters, customs violations, various types of non-performance of duties by public officials, failure to follow court and administrative orders, the use of false information, and public health violations. Furthermore, an offender can be subject to procedural provisional measures such as arrest, arrest of assets, and temporary prohibition of a legal entity’s activities.

As already mentioned, legal entities cannot be held criminally liable in Russia. To rectify this, in 2009 administrative liability was introduced in the form of a penalty that can be imposed on any legal entity found to have been involved in bribery.

A legal entity that benefits from a bribe given by its employee or an intermediary is subject to a fine that depends on the amount of the unlawful remuneration paid. The maximum sanction is a fine of up to 100 times the amount of the bribe, which cannot be less than 100 million roubles, plus seizure of the pay-off. In addition, the legal entity can be subject to an arrest of assets.

A legal entity has two available defences, which are generally similar to those set out in the Criminal Code. Exemption from liability would be granted to the legal entity that had committed the offence if it helped to uncover the offence, contributed to its administrative investigation and resolution; or if extortion had taken place in relation to the legal entity.
III ENFORCEMENT: DOMESTIC BRIBERY

As mentioned in Section I, information on criminal cases in Russia is only available to a limited extent.

Until a court ruling on the matter is issued, the case materials may be covered by investigation privilege. Information relating to investigations and any findings are required to be kept secret except in a limited number of circumstances. Unauthorised disclosure of such information would give rise to criminal liability.

The non-disclosure obligations apply to all persons involved in the investigation process (members of law enforcement agencies, suspects, victims, witnesses, etc.). The officials of the relevant investigating authority will notify other participants involved in the investigation that disclosure of any such information will incur criminal liability. The latter must acknowledge this notification in writing. Similarly, tipping-off in relation to anti-money laundering investigations is prohibited. Banks, credit institutions, accountants, lawyers, notaries and other persons may not disclose the fact that their client is being investigated. The above explains why very limited information may be publicly available at the investigatory stage.

After the case is considered by the court, a court ruling is published, but not necessarily in the aggregated databases. This adds difficulty to summarising the enforcement practices for these matters.

Occasionally the Supreme Court publishes its guidelines on various types of crimes. The latest guidelines on public and commercial bribery were published on 9 July 2013 and amended on 3 December 2013. Although largely reworded, they are more or less in line with the previous guidelines issued in 2000 and amended several times.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Giving a bribe to a foreign public official or an official of an international public organisation is punishable in Russia under the Criminal Code in the same manner as giving a bribe to a Russian public official.

A foreign public official is any person appointed or elected to any position in a legislative, executive, administrative or judicial body of a foreign country, as well as any person performing public functions for any foreign state, including for a public body or public corporation (the Supreme Court gives the following examples: a minister, mayor, judge or prosecutor).

Officials of an international public organisation are defined much more narrowly: these are the members of parliamentary assemblies of the international organisations that Russia is a party to, or the individuals occupying judicial positions in any international court acknowledged by Russia.

Russian legal entities conducting illegal activities outside Russia are subject to administrative liability if the violation is directed against the interests of Russia or in cases stipulated by international treaties ratified by Russia. The same approach is applicable to foreign legal entities that commit bribery acts counter to the interests of Russia. The provisions should not apply where the violating entity has already been brought to administrative or criminal liability by the foreign state.
V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

As mentioned in Section II.i, in Russia, a criminal prosecution may only be carried out against individuals and not companies. To that end, financial recording and internal compliance procedures would normally have nothing to do with the criminal prosecution of corruption and bribery. At the same time, if, for instance, the bribe is paid out of a company’s funds, its management or other people involved in the payment could be accused of being complicit in the bribery.

The Anti-Money Laundering Law governs anti-money laundering activities and generally complies with international anti-money laundering standards, as confirmed by the Financial Action Task Force.

Pursuant to the Criminal Code, a money laundering offence is committed where financial operations and transactions involving property obtained by illegal means are entered into to make the possession, use and disposal of the property appear lawful. As such, where a company is in possession of the proceeds of a contract obtained by corruption, the possession is unlikely of itself to constitute money laundering (although corrupt individuals would be subject to criminal proceedings). However, where the proceeds are then used in subsequent transactions, the transactions would be deemed to be money laundering.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

In recent years, Russian investigatory authorities have not reported any successful foreign bribery investigations.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

As mentioned in Section I, Russia is a member of all the main international organisations and conventions aimed at countering corruption activities.

On 9 May 2006, Russia ratified the UN Convention against Corruption (2003); on 4 October 2006 it ratified the Council of Europe Criminal Law Convention on Corruption; and on 1 February 2007 it became a member of GRECO.

Further, on 17 February 2012, Russia ratified the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

VIII LEGISLATIVE DEVELOPMENTS

On 9 January 2014, the Russian government issued a regulation relating to anti-corruption. According to the new regulation, public officials shall inform their employees of any gifts received in connection with their position. In light of the new regulation a possibility of interpretation exists whereby employees of state-owned legal entities would be subject to the same rules as public officials with respect to the prohibition on making gifts to them. No clarification has yet been given as to the operation of this regulation. The practice shows so far that these could be state-owned federal state institutions incorporated to perform not-for-profit activities. However, we cannot rule out that these rules may apply to employees of state-owned profit-making companies (other than state corporations).
Russian anti-corruption legislation continues to improve every year to fulfil the country’s obligations under international agreements. However, the process takes time and the amendments proposed are not flawless. Following its rejection, a draft law introduced in 2016 on strengthening liability for corruption was split into two (which, as GRECO mentions, ‘may cast doubts over the robustness of the legal framework’). Both drafts were subsequently introduced in July 2017, proposing amendments regarding criminal liability for corruption-related crimes.

The first draft provides for criminal liability of domestic and foreign arbitrators for commercial bribery, qualifies the provision of non-proprietary rights and unlawful benefits (e.g., matriculation of children to university) as bribery, and extends the term of imprisonment to a maximum of four years for givers and receivers of bribes engaged in the crime of public bribery.

The second draft proposes to criminalise the promise, offer or request to receive or transfer a public bribe; conspiracy to transfer (or receive) such a bribe, promise, offer or request to participate in commercial bribery; the consent, by an individual, to the use of his or her influence on the decisions of certain officials; and a request to use, or consent to the use of, such influence in connection with the transfer of monetary or other benefits, including, among others, securities and other property, unlawful advantages, non-proprietary rights and services.

At the moment both drafts are still pending and have yet to pass their first reading in the State Duma (the lower chamber of the Russian parliament). The proposed amendments, however, are not perfect, and it is now obvious that they will not cover all possible corruption-related criminal activities. For example, although the second draft law criminalises the promise, offer or request to participate in commercial bribery, it omits the elements of ‘request’ or ‘acceptance of an offer or a promise’ of an undue advantage.7 Thus GRECO concludes that the amendments in question do not fully conform to the standards of the Criminal Law Convention on Corruption and its Additional Protocol.8

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

There are several issues that should be kept in mind with respect to the specifics of the Russian anti-corruption regime.

i Self-incrimination

Russian law recognises the privilege against self-incrimination in relation to all types of investigations in Russia. There is a right of silence for a suspect but no such right for a witness. If a witness avoids giving testimony without just cause, he or she may be compelled to attend court or meet with investigators to give evidence.

ii Advocates

As a general rule, in criminal investigations legal assistance is provided by qualified ‘advocates’. Advocates are legal professionals admitted to advocacy practice upon passing the Bar exam.

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7 https://rm.coe.int/third-evaluation-round-addendum-to-the-second-compliance-report-on-the/16808b6d68.
8 ibid.
Communication between the advocate and his or her client is legally protected but to a much lesser extent than in certain Western jurisdictions where legal professional privilege applies. This legal protection covers all information connected with an advocate's legal assistance to the client. The advocate cannot be subject to interrogation concerning information he or she became aware of while providing legal assistance to his or her client. Documents and other materials received from the client in connection with providing legal assistance cannot be seized. Any lawyers who are not advocates do not enjoy any legal privilege with respect to the communications and documentation between them and their clients.

iii Plea-bargaining

Although there is no formal plea-bargaining under Russian law, the Criminal Code provides for an option for the suspect or accused to enter into a ‘pretrial’ agreement on cooperation with the prosecutor. According to these agreements the suspect or accused admits committing a crime, discloses its details (place, date, etc.) and agrees to provide the investigation with certain assistance. These pretrial agreements also include a list of circumstances that may be used by a court as a basis for reducing the sentence of the suspect or accused.

If a suspect or accused complies with the terms of a pretrial agreement, a court may reduce the sentence (as a general rule, the sentence cannot be more than two-thirds of the most severe sanction provided for such a crime). The fact that such a pretrial agreement is entered into will not itself predetermine the type or amount of sentence, as this remains at the court’s discretion.

iv Whistle-blowing

There is no general whistle-blowing obligation under Russian criminal law. However, such an obligation does exist under anti-money laundering legislation. Banks, lawyers, notaries, accounting organisations and certain other groups of persons are under an obligation to report to the regulator any transactions by their clients (without tipping their client off) that breach the anti-money laundering legislation and fall within certain categories, including:

a transactions involving 600,000 roubles or more;
b receipt of monetary funds in the amount of 100,000 roubles or more by Russian non-commercial entities from foreign states, international organisations, foreign companies, citizens of foreign states and stateless citizens, and expenditure of the same;
c crediting and debiting accounts in an amount of 10 million roubles or more of Russian companies, federal unitary enterprises and state corporations and companies, as well as public law companies that are of strategic importance for the military industrial sector and security of Russia, and companies under their control;
d crediting and debiting special accounts of a head contractor or a contractor performing a state defence order; the first crediting of such accounts from other special accounts of 600,000 roubles or more; and the second and subsequent crediting and debiting of the above-mentioned accounts of the legal entity performing the state defence order from or to other special accounts of 50 million roubles or more;
e real estate transactions involving 3 million roubles or more if as a result of the transaction title to the real estate property would be transferred to another person;
f transactions entered into by a person or a legal entity known to be involved in extremism or terrorism;
g transactions entered into by an individual or a legal entity included in the list of individuals or legal entities implicated in the proliferation of weapons of mass
destruction, or a legal entity directly or indirectly owned or controlled by such listed individuals and legal entities, or any individual or legal entity acting on behalf or on the instructions of such individuals and legal entities; and

b) any other suspicious transactions that could reasonably be related to money laundering or terrorist financing.

Failure to comply with this obligation may trigger an administrative liability, namely a fine of up to 1 million roubles, or result in the company’s activities being suspended for up to 90 days. It may also trigger the revocation of a licence to carry out banking operations. Companies would not have to report themselves for money laundering if they suspect a contract had been obtained by bribery where they were in possession of the proceeds of a crime. While a money laundering offence might be committed by a company if it subsequently used that sum, there would be no obligation on the company to report itself for money laundering. However, it might be prudent for a company to consider reporting the matter to the authorities. Furthermore, in the absence of a general ‘whistle-blowing’ obligation under Russian criminal law, the concealment of a gravest crime (if not promised in advance) constitutes a crime itself. If the concealment was promised in advance, it may constitute crime complicity. Recently, the failure to report crimes connected with terrorism and certain other crimes was introduced as a separate crime into the Criminal Code.

X  COMPLIANCE

The workability of compliance programmes in Russia is not guaranteed, in particular with respect to criminal prosecutions. At the same time, they could serve well before the regulator and investigators in anti-money laundering proceedings.

The changes to anti-corruption legislation in 2013 tried to encourage Russian companies (which thus far have not adopted any anti-corruption compliance measures) to change their mindset, as new provisions came into effect setting forth various anti-corruption measures that may be used by companies. This stimulus hardly worked because of the non-mandatory ‘may’ form of wording used by the law. However, unlike many Russian companies, the Russian Ministry of Labour did pay attention to the new amendments and prepared best-practice guidelines, the ‘Methodical Recommendations on Development and Implementation by Organisations of Measures for Preventing and Counteracting Corruption’ (the Recommendations), amended as of 8 April 2014. Although the Recommendations are not binding, the actions of the Ministry hint that the government may in the near future start enforcing the anti-corruption provisions of the legislation with respect to compliance programmes.

XI  OUTLOOK AND CONCLUSIONS

As can be seen from the above discussion, Russian anti-corruption and anti-bribery legislation has developed significantly over the past few years.

Currently, the effective enforcement of the existing legal framework is a significant challenge for the government. It remains to be seen how it will work in practice.

We expect more clarity on the matter in the coming years.
Chapter 23

SWEDEN

David Ackebo, Elisabeth Vestin and Saara Ludvigsen

I INTRODUCTION

Historically ranking high on Transparency International’s Corruption Perceptions Index, Sweden is generally perceived as having low levels of corruption, and for a long time corruption was not considered an issue. However, in recent years several major Swedish companies have been the subject of bribery allegations in the media, primarily because of conduct relating to their foreign operations. The media attention has raised awareness of the issue and of the de facto presence of corruption and bribery in Swedish society, and has led to increased efforts to combat corruption, both by the authorities and by private entities.

Since 2012, Swedish provisions on bribery have primarily been found in Chapter 10 of the Swedish Penal Code (the Penal Code); the legislation was revised in an effort to modernise the anti-corruption provisions and introduce sustainable, more efficient legislation. In addition to certain editorial changes, two new bribery offences were introduced to widen the scope of the anti-bribery legislation: trading in influence and negligent financing of bribery.

Sweden is continuously working to strengthen its anti-corruption framework, through legislative revisions and by placing more demands on the internal processes of companies. As a result of the efforts of the past years, Sweden now has a more comprehensive anti-corruption system in place, including legislation criminalising most forms of bribery. In the wake of the legislative developments and the media’s focus on corporate corrupt behaviour, anti-corruption is much higher on the agenda in Swedish business society today than it was 10 years ago. One of Sweden’s current challenges is to successfully enforce its anti-corruption legislation on acts of bribery by Swedish companies abroad.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Taking a bribe and giving a bribe

Pursuant to Chapter 10, Section 5(a) of the Penal Code, an employee or contractor may not receive, accept a promise of or request an improper benefit for the carrying out of the employment or assignment (passive bribery).

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2 In the 2017 Corruption Perceptions Index, Sweden’s position suffered a slight decline, and it is now ranked in sixth place.
4 See Section VI, below.
Section 5(b) similarly prohibits the provision, promising or offering of an improper benefit to an employee or contractor for the carrying out of the employment or assignment (active bribery).

Three components are central to the assessment of the bribery offence: (1) the persons involved; (2) the connection between the recipient’s position and the benefit; and (3) the nature of the benefit. The same conditions apply to both offences.

ii The persons involved and the connection to performance of duties

The provisions apply to anyone who is an employee or performs a function or assignment, in either the public or the private sector. The benefit does not have to have any actual effect on the recipient’s actions, the essential element is that there is some connection between the benefit given or received and the performance of duties. To constitute a bribery offence, it is sufficient that a benefit objectively has the potential to affect the recipient’s actions or can be construed as a reward for an already undertaken action or omission.5

iii Improper benefit

Once a link between the recipient and the benefit has been established, criminal liability depends on whether the benefit can be considered ‘improper’. The term ‘improper’ is not defined in the Penal Code and, in most cases, the nature of a benefit must be determined through an assessment of all relevant circumstances in each case.

The giving of money is essentially always considered improper. However, there is no regulated minimum monetary value for an improper benefit. The value of a benefit must be put in relation to the nature of the office held by the recipient. Naturally, the giving and receiving of benefits within the public sector is viewed much more strictly than within the private sector because of the importance of protecting and maintaining trust in the decision-making process of public authorities. Therefore, even very insignificant gifts of little or no monetary value can be inappropriate if the recipient occupies a public office or handles sensitive processes, such as public procurement.6

Owing to general business practice within some industries, a more valuable benefit may be permitted if it falls within the norms of courteous or customary behaviour (e.g., certain invitations to traditional hunting events within the forest industry sector or invitations from sponsors to sporting events). Equally, if a benefit fulfils a professional purpose for the recipient, the benefit may be permissible (e.g., a lunch with clients), as long as the benefit is proportionate to the purpose.

Personal relationships between the giver and the recipient can constitute an extenuating factor if the benefit is exclusively or substantially given because of the personal relationship, and not because of the connection to the recipient’s professional position. By way of example, in a Supreme Court case from 2009, the Swedish Supreme Court found that a son’s gift of

5 Travaux préparatoires, Prop. 2011/12:79, p. 43.
6 In 2012, a police officer was convicted of taking a bribe when he accepted a salad worth 65 kronor for not filing a report of a traffic offence. Gothenburg District Court, judgment of 12 April 2012 in case No. B 14488-11.
a relatively expensive wine cooler to his father’s public defence lawyer was exclusively, or at least substantially, given within their personal relationship, and therefore not in connection with the performance of the lawyer’s duties as a public defender.7

Swedish legislation does not permit so-called facilitation payments.

iv  Gross bribery offence

Pursuant to Chapter 10, Section 5(c) of the Penal Code, a bribery offence is considered a gross offence if it involves the abuse of or an assault on a position of particular responsibility. According to the same provision, the bribery can be considered a gross offence if the bribe was of considerable value or if the act was part of systematic criminal activity, criminal activity of a systematic nature, of large proportions or if it was otherwise of a particularly dangerous nature.

v  Trading in influence

In 2012, the offence of trading in influence was introduced in Chapter 10, Section 5(d) of the Penal Code. This provision concerns the public sector. It prohibits receiving, accepting a promise of or requesting an improper benefit to influence a person who exercises public authority or decides on public procurements, and also prohibits providing, promising or offering an improper benefit for the recipient to influence the decision maker in exercising public authority or deciding on a public procurement.

vi  Negligent financing of bribery

In 2012, the offence of negligent financing of bribery was also added to Chapter 10, Section 5(e) of the Penal Code, targeting situations where a company’s representatives, agents or partners provide funds to a third party. Gross negligence on the part of the company is enough for liability to be imposed, requiring companies to take appropriate action to ensure that funds are not used for corrupt purposes. Accordingly, and in essence reminiscent of the UK Bribery Act, this provision imposes a duty on companies to have ‘adequate procedures’ in place to prevent bribery being committed by their intermediaries. However, since gross negligence is required, there is no automatic liability for companies that do not have adequate procedures in place.

The provision applies to both the public and the private sector, domestically and internationally, but was introduced mainly to target Swedish companies operating in markets where there is a high risk of corruption.8

vii  The Code on Business Conduct

When the revised anti-bribery legislation was implemented in 2012, the Swedish Anti-Corruption Institute9 presented the Code on Gifts, Rewards and other Benefits in Business (the Code on Business Conduct), which provides further guidance on the anti-bribery provisions of the Penal Code. The Code on Business Conduct is generally stricter than the provisions in the Penal Code and it is an effective tool to promote self-regulation as a means to combat corruption in society. The Swedish Anti-Corruption Institute also has

7  See Swedish Supreme Court case NJA 2009 s. 751.
8  Travaux préparatoires, Prop. 2011/12:79, p. 36.
9  Sw. Institutet Mot Mutor, IMM.
an Ethics Committee to which companies and individuals can turn for statements regarding whether certain specific actions (e.g., planned events with clients) are in accordance with the Code on Business Conduct. The Ethics Committee normally publishes its decisions on the Anti-Corruption Institute website.

viii Political contributions

Political contributions are not prohibited in Sweden. Since April 2014, following the introduction of the Transparency of Party Funding Act, all political parties that participate in elections to the Swedish or European Parliament have been obliged to keep proper books and accounts of all party funding and to submit an annual revenue report to the Legal, Financial and Administrative Services Agency. The report is to provide transparency on the origin of the party’s funding by specifying the respective amounts received from individuals, corporations, organisations, foundations, etc. If a contribution exceeds a certain amount, the contributor’s identity and the size of the contribution must be disclosed. Political parties must also specifically disclose the size and number of all anonymous contributions made to the party. The information is made available to the public on the Legal, Financial and Administrative Services Agency website. The Agency also publishes the names of the parties that have not submitted the annual revenue report.

ix Corporate fines

Only natural persons can be held criminally liable according to Swedish law. However, legal entities can be subject to corporate fines pursuant to Chapter 36, Section 7 of the Penal Code if a criminal offence is committed within the scope of a company’s business operations, and the company has failed to undertake reasonable actions that could have prevented the criminal offence. A company can also be subject to such corporate fines if the offence was committed by (1) a person with a position of authority due to a right to represent, and make decisions on behalf of, the company or (2) by a person with particular duties to monitor or supervise the company’s operations.

Corporate fines range from 5,000 kronor up to 10 million kronor. A corporate fine of up to 500,000 kronor may be imposed through an order of summary imposition of a fine. If the defendant contests the order, regular criminal court proceedings will be initiated against the defendant.

The size of a fine may, to some extent, be mitigated if the company has taken actions to prevent or reduce the damaging effects of the criminal offence or reported the crime voluntarily, or if the fine would render the combined penalty on the company disproportionate to the offence. A state inquiry into the corporate fines system was presented in 2016. Additionally, companies in breach of anti-corruption legislation face debarment from tendering for public procurement contracts pursuant to the Public Procurement Act.

10 Sw. Lag (2014:105) om insyn i finansiering av partier.
11 Sw. Kammarkollegiet.
12 The amount is equal to half of the full-price basic amount established pursuant to Chapter 2, Sections 6–7 of the Social Security Code. The full-price basic amount for 2019 is 46,500 kronor.
13 See Chapter 48, Section 4 of the Swedish Code of Legal Procedure (Sw. Strafföreläggande).
14 See Chapter 36, Section 10 of the Penal Code.
15 SOU 2016:82, En översyn av lagstiftningen om företagsbot.
Penalties

The penalty for a bribery offence is a fine or imprisonment for up to two years, or, in cases of gross offence, six months to six years. In addition to the penalty sentence, the court generally also orders disgorgement of the proceeds of the crime (i.e., the assets received with respect to passive bribery and the ill-gotten revenues in cases of active bribery). If confiscation is not possible because of the nature of the bribe, the recipient must pay a penalty fine equivalent to the estimated value of the bribe received.

III ENFORCEMENT: DOMESTIC BRIBERY

i Authorities and agencies focusing on corruption

To provide the Swedish Prosecution Office with specialist competence, a special public prosecution office, the National Anti-Corruption Unit (NACU), is tasked with administering investigations regarding crimes of corruption. To provide NACU with additional support and investigative resources, a National Corruption Group was founded within the police authority in 2012, consisting of specialists within the field of corruption.

ii Deferred prosecution agreements and other structured criminal settlements

Apart from the regime of summary imposition of a fine for less serious criminal acts (see Section II.ix), Sweden does not have a system of plea bargains, deferred prosecution agreements (DPAs) or other arrangements in place alongside regular court processes. That being said, it follows from Chapter 29, Section 5 of the Penal Code that when determining a penalty the court shall, to a reasonable degree, take into account to what extent the defendant reported the crime voluntarily or provided information essential to the investigation of the crime. However, to our knowledge, this provision in the Penal Code has never been applied by the courts in connection with any larger corruption case.

Although Sweden does not have a system of DPAs, the concept is still relevant to Swedish companies. In a recent case where the Swedish telecoms operator Telia Company was accused of bribery offences abroad (see Section VI), the Swedish authorities worked together with the US and Dutch authorities, who also claimed jurisdictional reach over the offences. The outcome was a global settlement in the form of a DPA.

iii Recent legal cases

Following a few high-profile corruption cases, for example in the 2010s, no major domestic cases have come to light in recent years. The courts continue to apply the anti-bribery provisions in cases of minor, everyday corruption, which is rarely reported on in the media.

Several cases concern situations in which carers within the home-care industry have accepted a gift or other benefit from a client, sometimes because a friendship has developed.

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17 Sw. Riksenheten mot korruption.
18 The ‘Gothenburg Municipality bribery scandal’ in 2010, which led to several indictments, and the ‘Swedish Prisons and Probations services’ case in 2014, which led to imprisonments, disgorgements and corporate fines in several instances (Svea Court of Appeal, judgment of 31 March 2016, in case No. B 8605-14).
and sometimes because of undue influence on the elderly. The conclusion that can be drawn from these cases is that only on very rare occasions can a carer accept a gift from a patient, because the recipient’s professional position as a carer typically renders the gift an improper benefit. In one instance, a woman who received money from a former client through testamentary disposition was acquitted by both the district court and the court of appeal, because the court could clearly establish through testimonies and documentation that the inheritance was based on a strong friendship that had developed after the carer’s employment had ended. Regarding gross bribery offences, the courts have specifically taken into account the value of the gift or benefit, any undue use of public office and the seriousness of taking advantage of elderly people who depend on the services of their carers.

Although large-scale corruption does occur, Sweden does not generally experience systematic bribery. The most common forms of bribery appear to be instances of private individuals attempting to influence public officials, often in relation to applications for permits, to gain access to information or to avoid responsibility for minor criminal offences. Within the private sector, bribes generally consist of simple benefits of limited monetary value, such as conference trips, technical products or dinners. This finding was presented in the most recent state sanctioned report on corruption published by the Swedish National Council for Crime Prevention in 2013. The same trends are seen today.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

The same government bodies that are responsible for enforcing domestic bribery laws also address foreign bribery. All the bribery provisions in the Penal Code are applicable to acts of bribery committed abroad, provided that the acts are subject to the jurisdiction of Swedish courts. Pursuant to Chapter 2, Section 2 of the Penal Code, Swedish courts have jurisdiction over criminal offences committed abroad if the crime was committed by a Swedish citizen, a foreign citizen domiciled in Sweden or if the criminal offence falls under universal jurisdiction. The implementation of the provision regarding negligent financing of bribery was an attempt at creating further options to hold both natural and legal persons liable for bribery offences committed abroad.

Additionally, there is a general requirement of double incrimination: the offence must be penalised under the law of the country where it was committed. Swedish jurisdiction is impeded if the statute of limitations has expired in the foreign jurisdiction.

As previously mentioned, Swedish legislation does not provide an exception for facilitating payments to foreign officials.

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19 See, e.g.: Svea Court of Appeal, judgment of 11 February 2016, case No. B 8022-15; the Swedish Supreme Court, judgment of 23 November 2016, case No. B 4940-16; Gothenburg District Court, judgment of 28 March 2017, case No. B 505-17; Nacka District Court, judgment of 2 June 2017, case No. B 5497-16; and Attunda District Court, judgment of 1 September 2017, criminal case No. B 9776-16.

20 Svea Court of Appeal, judgment of 8 September 2016, case No. B 3015-16.

ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i  Financial record-keeping provisions
The main regulations on financial record-keeping are provided in the Bookkeeping Act. Chapter 4, Section 1 of the Bookkeeping Act outlines the requirements placed on legal entities, and on natural persons who carry out business activities. The requirements include the maintaining of regular records of all business transactions, archiving all accounting information in an orderly state and in a satisfactory and transparent manner in Sweden for seven years, and closing the accounts with an annual financial statement or report each financial year. The annual statement or report shall be prepared in accordance with the provisions of the Annual Accounts Act.

Additional provisions on financial record-keeping can be found in the Swedish Companies Act, the Auditing Act, the Income Tax Act, and in the Anti-Money Laundering Act described below in Section V.ii.

Pursuant to Chapter 11, Section 5 of the Penal Code, the failure to maintain accounts can constitute a bookkeeping offence carrying a sentence of fines or imprisonment for up to two years, or up to six years in the case of a gross offence.

ii  Money laundering
According to Sweden’s Financial Supervisory Authority (SFSA), there are no reliable estimates of the extent of money laundering in Sweden. In 2017, the Financial Action Task Force (FATF) evaluated Sweden on the effectiveness of its anti-money laundering and counterterrorist financing measures and compliance with the FATF Recommendations, and rated Sweden as a country needing enhanced follow-up. The recent revision of the Swedish anti-money laundering legislation has led to the FATF re-rating Sweden and moving the country from enhanced to regular follow-up, because of Sweden’s progress in strengthening its framework to tackle money laundering and terrorist financing. However, the FATF points out that the understanding of money laundering-related risks is not consistent across authorities in Sweden, and that sanctions and supervision are still inefficient in certain areas relating to money laundering.

Two main laws in Sweden aim to regulate money laundering: the Money Laundering and Terrorist Financing Prevention Act (the Anti-Money Laundering Act) and the Money Laundering and Terrorist Financing Prevention Act.

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25 Sw. Finansinspektionen.
27 An inter-governmental body that sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.
Laundering Offences Act.\textsuperscript{30} The latter is a penal regulation that came into force in July 2014 following a state inquiry on the need to make the anti-money laundering legislation more efficient and accessible.\textsuperscript{31} Pursuant to the Money Laundering Offences Act, the penalty for a money laundering-related crime ranges from a fine to up to six years’ imprisonment.

An updated Anti-Money Laundering Act entered into force on 1 August 2017 and contains the administrative regulations that apply to entities within certain sectors.\textsuperscript{32} Natural and legal persons who are subject to the legislation are responsible for implementing procedures to prevent and discover money laundering activities or financing of terrorism in their operations.\textsuperscript{33} If suspicious activities are detected, such entities are obligated to immediately report the anomalies to the Financial Intelligence Unit of the Swedish National Police Board.

iii Tax law

Pursuant to Chapter 9, Section 10 of the Income Tax Act, any domestic or foreign payment that could constitute a bribe or unlawful benefit is non-deductible.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Despite allegations of foreign bribery made against Swedish companies, the allegations have rarely led to convictions. In a 2012 report on Sweden’s implementation of the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention,\textsuperscript{34} the OECD expressed concern about Sweden’s lack of enforcement against legal persons for foreign bribery offences.\textsuperscript{35} In the years since, Sweden has reported significant progress on the enforcement of the offence of bribing a foreign official, according to the OECD follow-up report in 2014.\textsuperscript{36}

In the spring of 2016, several Swedish banks were implicated in what has become known as the largest data leak in history: the Panama Papers. Nordea Bank (Nordea), one of four major banks in Sweden, was identified as one of the most active banks worldwide in assisting its customers in setting up anonymous shell companies for the purpose of tax evasion. Once the leak became known, the SFSA initiated an investigation against Nordea.

Prior to the Panama Papers, in 2015, the SFSA had carried out a general investigation into Nordea’s application of the anti-money laundering legislation. The investigation exposed serious systematic shortcomings and, as a result, Nordea was issued with a warning and fined 50 million kronor.\textsuperscript{37} To remediate, Nordea adopted a rigorous compliance plan, which the bank was still implementing at the time of the Panama Papers scandal. The SFSA concluded

\textsuperscript{30} Sw. Lag (2017:630) om åtgärder mot penningtvätt och finansiering av terrorism, and Lag (2014:307) om straff för penningtvättsbrott, respectively.
\textsuperscript{31} Travaux préparatoires, Prop. 2013/14:121, p. 44.
\textsuperscript{32} The legislative update was carried out to ensure compliance with EU regulations on anti-money laundering and financing of terrorism.
\textsuperscript{33} Travaux préparatoires, Prop. 2016/17:173, p. 2.
\textsuperscript{34} OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
\textsuperscript{36} OECD, ‘Sweden: Follow-Up to the Phase 3 Report & Recommendations’, August 2014, p. 4.
that Nordea’s lack of adequate anti-money laundering procedures was the explanation for Nordea’s involvement in the Panama Papers, and recognised that the bank was still working to implement proper procedures. Therefore, the SFSA announced that Nordea would not face any further penalties following its involvement in the Panama Papers affair.

In 2012, Swedish telecoms firm Telia Company (Telia, then TeliaSonera) became the subject of investigation following accusations that the company had paid millions of dollars to the daughter of the President of Uzbekistan to obtain necessary licences and access to the Uzbek telecoms operator market in 2007. The investigation was continued by American, Dutch and Swedish authorities and, in September 2017, Telia reached a global settlement with the US Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and the Dutch Public Prosecution Service. As part of the settlement, Telia will pay a combined penalty amounting to approximately US$965 million. The total disgorgement of approximately US$457 million ordered by the SEC is reported as the greatest such disgorgement ever ordered in a Foreign Corrupt Practices Act enforcement action. However, that amount includes US$40 million for the DOJ forfeiture and US$208.5 million for potential disgorgements in the Dutch and Swedish legal proceedings. Moreover, charges have been filed against three former executives of Telia for their involvement in the bribery scheme; the main hearing of the case, in the Stockholm District Court, began in September 2018. As the alleged offences were committed prior to 2012, their actions will be assessed in accordance with the former anti-bribery legislation; therefore, among other things, the prosecutor must be able to show intent. Furthermore, the recipient of the alleged bribes must be considered to belong to the specified category of persons who can be bribed pursuant to the former legislation. In connection with the filing of charges against the former executives, the Swedish prosecutor also initiated legal proceedings against Telia for a disgorgement of the company’s allegedly ill-gotten profits in Uzbekistan.

Another case that caught the public eye involved the Swedish subsidiary of the Canadian rail vehicle and equipment manufacturing company Bombardier Transportation. The company was under investigation for allegedly having channelled bribes to unidentified Azerbaijan officials to secure a tender to supply the state of Azerbaijan with a train signalling system. Despite not providing the best offer in the procurement, Bombardier won the tender in 2013, because the competitors were disqualified by the rail authority in Azerbaijan. Criminal proceedings were initiated against a Russian national and employee of Bombardier Transportation Sweden, who allegedly had a central role in the bribery scheme. The employee was acquitted by the district court; the prosecutor has appealed the acquittal and the hearing is planned for January 2019. According to the Swedish prosecutor, investigations of other high-ranking employees at Bombardier Transportation Sweden are being carried out.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Sweden is a signatory of numerous international conventions on anti-corruption (e.g., the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe

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Criminal Law Convention on Corruption and the Council of Europe Civil Law Convention on Corruption). In addition, Sweden is a member of organisations such as the Group of States against Corruption, the European Partners against Corruption and the European contact-point network against corruption.

VIII LEGISLATIVE DEVELOPMENTS

As from the start of the 2017 financial year, Swedish legislation obliges large companies to report on the environmental, social and governance-related risks within their operations, including their anti-corruption policies and their strategies on how to prevent and mitigate such risks. The new provisions are based on the 2014 EU Directive on non-financial reporting. Sweden chose to implement more far-reaching provisions than the Directive demanded, to target a larger group of Swedish companies.

On 1 January 2017, Sweden's first Whistleblowing Act entered into force. The Whistleblowing Act does not regulate the right to blow the whistle per se, but rather provides employees, as well as temporary workers, with protection from reprisals from the employer by placing a statutory liability for damages on the employer. The Whistleblowing Act applies to both the public and the private sectors. For the Whistleblowing Act to be applicable, a whistle-blower must first sound the alarm internally and must present a concrete suspicion of serious wrongdoing. If the employee has reasonable cause or if the employer fails to take appropriate measures, the employee can blow the whistle externally and still enjoy the protection of the Whistleblowing Act. Should an employee commit a crime when blowing the whistle, he or she forfeits the protection of the Act.

In June 2017, the parliament passed new legislation regarding the registration of beneficial owners (the Beneficial Ownership Act), thus implementing the Fourth Anti-Money Laundering Directive. The Beneficial Ownership Act entered into force on 1 August 2017. Legal entities are obligated to notify the Swedish Companies Registration Office of who their beneficial owners are. By increasing transparency concerning ownership and the actual control of companies, the new law is part of ongoing efforts to prevent money laundering and financing of terrorism. Legal entities must obtain reliable information about

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40 According to Chapter 6, Section 10 of the Annual Accounts Act, companies that meet two of the following criteria are subject to the non-financial reporting demands: in the past two fiscal years the company (1) has had more than 250 employees; (2) for each of the years has reported total assets of over 175 million kronor; and (3) for each of the years has reported total net sales of more than 350 million kronor.

41 See Lagrådsremiss, Företagens rapportering om hållbarhet och mångfaldspolicy, 19 May 2016, p. 43.


43 Sw. Lag (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden.

44 Sw. Lag (2017:631) om registrering av verkliga huvudmän.

the identity, nature and extent of the owner’s interest. If such information cannot be obtained, the legal entity must still inform the Swedish Companies Registration Office about that lack of information. Any changes in beneficial ownership must also be reported.

After the investigation into Sweden’s application of the OECD Anti-Bribery Convention in 2012, one of the OECD’s primary recommendations was for Sweden to revise its corporate fines system to ensure that the framework is effective and in line with the OECD Anti-Bribery Convention. In May 2016, the government presented a state inquiry proposing legislative amendments to the corporate fines system. The inquiry suggests a wider application of corporate fines to include public sector activities that can be considered equal to private business activities, as well as other activities intended to bring the legal person financial benefits. When determining the size of the fine, the inquiry suggests that the financial position of the companies be considered. Most importantly, it proposes that the maximum amount of the fine for particularly reprehensible offences should be raised from 10 million to 100 million kronor – a significant increase that would better correspond to international standards.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Privilege

Lawyers who are members of the Swedish Bar Association have a duty of confidentiality in respect of matters disclosed to, or that otherwise become known to, the lawyer within the framework of his or her legal practice. Exceptions to this duty arise when the client consents to disclosure of the information or if there is a legal obligation to provide information.

All entities subject to the Anti-Money Laundering Act must report suspicious transactions or other anomalies within their operations to the Financial Intelligence Unit of the Swedish National Police Board. This also applies to lawyers who have reason to suspect that money laundering is being undertaken or that a client’s property or transaction has criminal origins. Lawyers are exempt from this requirement whenever they defend or represent a client in the context of judicial proceedings.

Accountants performing statutory revisions are always obligated to report suspicions of criminal activity.

ii Money laundering and data protection

As mentioned in Section VIII, Sweden recently implemented the Whistleblowing Act in an effort to improve whistle-blower protection. Prior to May 2018, companies with whistle-blowing systems in Sweden had to ensure compliance with the Personal Data Act and the Data Inspection Agency’s regulations. In May 2018, the EU General Data Protection

46 Sw. Bolagsverket.
49 Pursuant to Chapter 8, Section 4 of the Swedish Code of Judicial Procedure, and to Section 34 of the Charter of the Swedish Bar Association.
Regulation entered into force providing a single set of regulations in all EU Member States, thus replacing the national laws. The Regulation contains stricter data protection and enforcement provisions than the former national legislation. Whistle-blowing systems must adhere to stricter technical requirements; data protection (i.e., ‘privacy by default’) must be an integral part of any whistle-blowing system. Furthermore, the Regulation imposes obligatory pseudonymisation and stricter data processing agreements, and places higher demands on documentation and on communication to employees. Companies are also obliged to notify the supervisory authority of all data breaches.

X COMPLIANCE

Compliance is universally viewed as an important part of business conduct in Sweden, and most large and medium-sized companies have some form of internal compliance programme and relevant processes in place. For certain financial institutions, compliance is regulated by decrees from the Financial Supervisory Authority.52

The government does not provide any general guidance on what constitutes an effective anti-corruption compliance programme. The Code on Business Conduct53 contains broad recommendations with respect to the implementation of policy documents as preventative measures against improper influencing.54 The Code on Business Conduct does not provide any more detailed guidance on how to implement an efficient anti-corruption compliance programme.

As mentioned in Section II.ix, above, self-reporting of an offence or a company’s efforts to prevent and reduce damage can be mitigating factors when the court determines the size of corporate fines, pursuant to Chapter 36, Section 10 of the Penal Code.

XI OUTLOOK AND CONCLUSIONS

Looking back on the past few decades, it is clear that Sweden has made significant progress as far as anti-corruption work is concerned. Much of what was once tolerated as cronyism and nepotism, or as accepted business practice, is now regulated and looked upon as corrupt behaviour by the public. Today, most agencies, authorities and other state-controlled organisations and companies have internal control mechanisms and codes of conduct in place to prevent and deal with corrupt behaviour. This work is certain to continue.

As previously stated, one of Sweden’s main challenges is to better enforce its anti-bribery legislation in cases of bribery by Swedish companies abroad. The revision of the anti-bribery legislation in 2012 was a step in that direction, but the full effect of the revision is yet to be seen. Currently, case law remains silent regarding the two newer offences (trading in influence and negligent financing of bribery); no one has yet been convicted for either offence. Swedish companies are regularly facing bribery allegations in the media, and the lack of convictions is seen by some as an indication that the Swedish anti-corruption framework is not adequate. The Telia case is a good example of the type of situation that the new provisions are intended to target. Nevertheless, the outcome in the currently ongoing trial of the three Telia executives is still of great interest and is likely to influence the direction of future legislative updates.

52 Financial Supervisory Authority Regulations, FFFS 2007:16, Chapter 6, Section 9.
53 Described in Section II.vii above.
54 Section 12 of the Code of Business Conduct.
Finally, it is being discussed whether Sweden should follow in the footsteps of other European countries, such as France, and adopt a system for DPAs or legislate on corporate criminal liability. These issues are the subject of an ongoing general debate, but thus far there are no official state inquiries or legislative proposals under way.
Chapter 24

SWITZERLAND

Yves Klein and Claire A Daams

I INTRODUCTION

While Switzerland is considered one of the least corrupt countries in the world, it is also the second most active jurisdiction, after the United States, in the World Bank/UNODC Stolen Asset Recovery Initiative database of asset recovery efforts.

This paradox may be attributable to Switzerland’s relatively low prevalence of known domestic corruption cases, resulting in a corresponding low number of prosecutions of domestic bribery. This is disproportionate to the numerous investigations into Swiss bank accounts used to launder the proceeds of foreign bribery.

Investigation and prosecution of allegations of bribery remain largely dependent on the proactivity of the federal and 26 cantonal attorney generals’ offices, as well as on the number of complaints and suspicious financial transaction reports received.

Because of the length and complexity of foreign bribery investigations, the main cases in 2017–2018 concerned the Petrobras, 1MDB and FIFA cases, with their parallel financial regulation enforcement proceedings. Resolved cases involved a company specialised in port infrastructure and one in oil trading.

Since 1 July 2016, private-to-private corruption has been criminalised in the Swiss Criminal Code. In addition, paying bribes to third parties, including sport associations, has been penalised.

The present situation and the outlook remain the same: Swiss authorities are very active in respect of enforcing international bribery cases, while domestic bribery remains a lower priority, mostly because fewer cases are detected.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Public bribery

The conclusion of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 caused important changes in the existing domestic anti-corruption

1 Yves Klein is a senior partner at Monfrini Bitton Klein and Claire Daams is a partner at Legal Remedy RMD.Legal.
2 Together with Finland and Norway, Switzerland ranks third in Transparency International’s Corruption Perceptions Index 2017.
3 star.worldbank.org/corruption-cases.
4 Until then private corruption was prohibited under Article 4(a) of the Federal Act on unfair competition.
provisions in the Swiss Criminal Code (SCC) as well as the creation of a separate chapter on this topic. These changes entered into force on 1 May 2000. Further revisions have taken place since. Both active and passive bribery of Swiss public officials constitute criminal offences under Swiss law.

Public bribery is defined as any person offering, promising or giving a public official or a third party an undue advantage (active bribery – Article 322 ter SCC), or for any public official to solicit or accept such an advantage (passive bribery – Article 322 quater SCC) to cause the public official to carry out or to omit to carry out an act in connection with his or her official activity, which is contrary to the official’s duty or that fall within his or her discretionary power.

Public officials susceptible to public bribery include ‘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 110, Section 3 SCC defines public officials as:

> the officials and employees of a public administrative authority or of an authority for the administration of justice as well as persons who hold office temporarily or are employed temporarily by a public administrative authority or by an authority for the administration of justice or who carry out official functions temporarily.

Article 322 decies, Section 2 SCC, foresees that ‘private individuals fulfilling official duties are subject to the same provisions as public officials’.

The Swiss legislature has opted to broadly define the group of people who may receive a public bribe (or advantage).

The bribe must ‘cause the public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion’. The breach of duty does not need to be a formal administrative act, but could, for example, consist of the undue sharing of information. It may also be an omission, such as not admitting a complaint.

The official’s act or omission must be specific, or fall within the provisions of granting and accepting an advantage (Articles 322 quinquies and 322 sexies SCC).

The acts that potentially qualify as bribery include the offer, promise or gift of an undue advantage to a public official or to a third party. The advantage consists of any objective improvement for the public official, and does not necessarily consist of patrimonial value. It may, for example, be the prospect of a promotion or support for an election.

The following advantages do not qualify as undue under Article 322 decies, Section 1 SCC:

- advantages permitted under public employment law or contractually approved by a third party; and
- negligible advantages that are common social practice.

Examples of the above include a bouquet of flowers to express appreciation for giving a speech, a small Christmas present or modest entertainment on the occasion of business meetings.

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5 At the time of writing, the most recent but unofficial English translation of the SCC is the one as of March 2018, available at https://www.admin.ch/gov/en/start/federal-law/classified-compilation.html.

6 AS 2000 1121 1126, BBl. 1999 5497.
The penalty for natural persons committing or abetting acts of active or passive public bribery is a custodial sentence of up to five years or a pecuniary penalty of up to 540,000 Swiss francs. The statute of limitations is 15 years.

ii Undue advantage

It is a crime for any person to offer, promise or grant a public official or a third party an advantage (granting an advantage – Article 322 quinquies SCC), or for any public official to solicit or accept an advantage for himself, herself or a third party (accepting an advantage – Article 322 sexies SCC), so that the public official carries out his or her official duties.

Typically, this may be a payment to accelerate the handling of a case by the public official or regular payments that may not be linked to a specific breach of duties.

The advantage must concern the future and the reward for a past behaviour does not qualify under this provision.

When the advantage is granted to a third party, the public official must somehow be aware of its existence.

The penalty for granting or accepting an advantage is a custodial sentence not exceeding three years or a pecuniary penalty of up to 540,000 Swiss francs. The statute of limitations is 10 years.

iii Private bribery

Under Articles 322 octies and 322 novies SCC, both of which entered into force on 1 July 2016, it is a crime to offer, promise or give an employee, company member, agent or any other auxiliary to a third party in the private sector, an undue advantage so that the person carries out or fails to carry out an act in connection with his or her official activities, which is contrary to his or her duties or dependent on his or her discretion, and to demand, secure the promise of or accept such an advantage.

In minor cases, the offence will only be prosecuted upon complaint of the aggrieved person within three months of learning of the offence (Articles 322 octies, Section 2 and 322 novies, Section 2 SCC).

The penalty for active and passive private bribery is a custodial sentence not exceeding three years or a pecuniary penalty of up to 540,000 Swiss francs. By opting for this level of maximum sanctions the Swiss legislature has chosen to exclude private bribery as a predicate offence to money laundering. The statute of limitations is 10 years.

III ENFORCEMENT: DOMESTIC BRIBERY

Over the past year, there have been slightly more reports in relation to domestic public bribery. Among the pending investigations, one of the most notorious cases is that of the Federal Secretariat for the Economy (SECO), where IT services, some of them allegedly non-existent, were purchased for millions of Swiss francs from two Swiss companies for kickbacks paid to a SECO civil servant. The criminal investigation, which started in 2014, is still under way and was extended in 2017 to six further individuals and now includes 10 persons in total.

7 In force since 1 January 2018.
8 In force since 1 July 2016.
9 Federal Court decision ATF 135 IV 204 of 21 August 2009.
Two other cases concern the Swiss National Railway Company (CFF). The first case involves a former CFF project leader who succeeded in awarding a total of 604 contracts in relation to electrical systems to two small enterprises belonging to his acquaintances. In return, the project leader received more than 1 million Swiss francs in kickback payments. The overall damage to CFF has been estimated at several million Swiss francs. This case, involving six persons, is at trial stage before the Federal Criminal Court. The second CFF case is still under investigation and involves a total of 14 persons, four of whom are former CFF employees.

A fourth case relates to a state-owned technology concern specialising in, *inter alia*, arms manufacturing. A senior staff member is under investigation on suspicion of having received significant kickback payments in relation to illegal arms deals.

Other smaller cases that have been reported involve the Federal Office of Roads and a publicly owned company in the canton of Geneva.

Finally two cases of allegations of bribery, one in relation to a national politician and one to a cantonal politician, have been reported. In both cases, the immunity of the politicians involved has been lifted and the investigations are ongoing.

It is unclear how many unreported cases of corruption are under investigation at cantonal level.

One possible explanation for the higher rate of investigation by the Office of the Attorney General of the Swiss Confederation and by the canton Geneva is that both have proactive and independent financial inspection services (the Swiss Federal Audit Office and the Geneva Court of Audits).

In respect of private bribery, the new Articles 322 *octies* and 322 *novies* SCC only entered into force on 1 July 2016, and no cases have been reported as yet.

In September 2015, the Federal Police created an (anonymous) anti-corruption reporting platform, which serves to report any acts of private and public bribery, in Switzerland or abroad. In 2016, 125 reports were filed on this platform, of which 29 were related to allegations of corruption, 63 concerned other crimes (cantonal competence) and 33 were considered irrelevant. Half of the reports were filed anonymously. At the time of writing, the Federal Police had not published the number of reports it received in 2017. In its Phase 4 evaluation report on the implementation of the OECD Anti-Bribery Convention, the OECD’s Working Group on Bribery noted that no cases of foreign bribery originating from whistle-blower reports had been brought to the attention of the cantonal or federal Office of the Attorney General.

**IV FOREIGN BRIbery: LEGAL FRAMEWORK**

Bribery of foreign public officials includes offering, promising or granting a foreign public official or a third party an undue advantage (active bribery), or for any foreign public official...
to solicit or accept such an advantage (passive bribery) to cause the public official to carry out or to fail to carry out an act in connection with his or her official activity, which is contrary to his or her duty or dependent on his discretion (Article 322 septies SCC).

A foreign public official susceptible to public bribery is described as a:

\[\text{member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces of a foreign state or of an international organisation.}\]

Article 322 decies, Section 2 SCC, which provides that ‘private individuals who fulfil official duties are subject to the same provisions as public officials’, also applies to foreign bribery. The definition of what constitutes an official duty is based on the applicable foreign law.

On 1 October 2014, the Federal Criminal Court confirmed that Riadh Ben Aissa, a manager of the Canadian company SNC-Lavalin, had paid bribes to Saadi Gaddafi, the son of former Libyan dictator Muammar Gaddafi, to settle disputes and secure the conclusion of public contracts from Libyan state entities. Because of his position in the ruling family and his de facto decision-making power, Saadi Gaddafi was considered a foreign public official. This interpretation is coherent with the autonomous definition of foreign public official used in Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

As was mentioned in the previous edition of this publication, the Federal Criminal Court took a different view in the Gazprom case, in which it acquitted the employees who were under suspicion of having received bribes in relation to several large projects in Russia and Poland. The Federal Criminal Court justified its decision by saying that, despite the autonomous definition of public officials used in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, one would still need to clarify whether the employees were public officials according to the law of the state in which they were employed. Since Gazprom had been privatised prior to the payment of the alleged bribes, the Court came to the view that its employees had no functional role as public officials. This case law sets a precedent that is likely to impact future cases involving officials of state-owned enterprises.

The penalty for individuals committing, or abetting, active or passive bribery of a foreign public official is a custodial sentence of up to five years or a pecuniary penalty of up to 540,000 Swiss francs. The statute of limitations is 15 years.

The granting or accepting of an undue advantage by a foreign public official does not constitute criminal offences under Swiss law.

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14 Federal Criminal Court judgment SK.2014.24 of 1 October 2014 issued in the context of abridged proceedings (Article 358 CPC).
V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Record-keeping

Pursuant to Article 957 of the Swiss Code of Obligations (SCO), any person or company who has to register with the Register of Commerce, namely anyone conducting a commercial activity, is obliged to hold commercial accounts.

The accounting records and the accounting vouchers, together with the annual report and the audit report, must be retained for 10 years following the expiry of the financial year (Article 958(f), Section 1 SCO).

In addition to shareholders, creditors with an interest worthy of protection may request to inspect the annual report and the audit reports (Article 958(e), Section 2 SCO).

ii Money laundering

Pursuant to Article 305 bis SCC, in force since 1 August 1990, whoever carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets that he or she knows or has to assume originate from a felony or aggravated tax misdemeanour shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

The assets must originate from a felony, namely a crime punishable by custody for more than three years (Article 10, Section 2 SCC). Domestic and foreign public bribery are felonies.

The offender shall also be punishable for money laundering if the predicate offence was committed abroad and was also punishable in the jurisdiction where it was committed (Article 305 bis, Section 3 SCC). If the predicate offence was committed abroad, the qualification as a felony is effected by transposing the facts as if they had been committed in Switzerland.

The Federal Act on the Prevention of Money Laundering in the Financial Sector or Law on Money Laundering (MLA), in force since 1 April 1998, applies to all financial intermediaries, including banks, investment funds managers, insurances, securities traders and all persons who, on a professional basis, accept or hold on to deposit assets belonging to others or who assist in the investment or transfer of such assets by having a power of disposal in their respect.

The MLA contains provisions on the duties of verifying the identity of the contracting party, of identifying the beneficial owner, of clarifying the economic background of transactions, of documenting these steps, of keeping records thereof for 10 years and of submitting to monitoring and audits by the Swiss Financial Market Supervisory Authority (FINMA) or a self-regulatory organisation (for non-regulated professions).

Article 9 MLA requests financial intermediaries to immediately file a report with the Money Laundering Reporting Office Switzerland (MROS) if it knows or has reasonable suspicions that assets involved in the business relationship:

- are connected to a criminal offence in the meaning of Article 260 ter SCC (participation or support of a criminal organisation) or Article 305 bis SCC (money laundering);
- are the proceeds of a felony or of a qualified fiscal misdemeanour (Article 305 bis, Section 1 bis SCC);
- are subject to the power of disposal of a criminal organisation (Article 260 ter SCC); or
- serve the financing of terrorism (Article 260 quinquies SCC).
The financial intermediary shall freeze the assets entrusted to him or her that are connected with the report filed under Article 9 MLA as soon as MROS notifies it that it forwarded the report to the competent prosecution authority (Article 10 MLA). It must maintain the freeze on the assets until it receives a freezing order from the competent prosecution authority, but at the most for five working days from the time it received the notification from MROS of the report having been forwarded to the competent prosecution authority, and may not inform the person affected or third parties until that delay has elapsed (provided he or she does not receive a gag order from the authorities).

The vast majority of bribery investigations start in Switzerland on the basis of suspicious-transaction reports. Those reports are taken very seriously and, if there are well-founded suspicions of bribery, the OAGS initiates a criminal investigation and almost systematically sends a request for mutual assistance to the country of the public official who was allegedly bribed, which usually in turn leads to the opening of a criminal investigation in that country and to requests for mutual assistance to Switzerland. Requests for mutual legal assistance are the second most important source for detecting bribery cases.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to published decisions, press releases, annual activity reports of the OAGS\textsuperscript{16} and of the Federal Office of Justice,\textsuperscript{17} Switzerland was at the centre of several of the main global enforcement proceedings.

\textbf{i Petrobras}

The investigation into systemic corruption at Petrobras, the Brazilian semi-state-owned oil company, which started in Brazil in March 2014, was almost immediately followed by criminal investigations in Switzerland, initiated following suspicious transactions reports made by Swiss banks and other financial intermediaries upon reading news about the Brazilian investigations in the local and international media.

Since April 2014, the OAG has initiated over 60 criminal investigations into bribes paid to managers of Petrobras and politicians for active and passive bribery (Article 322 \textit{septies} SCC) and money laundering (Article 305 \textit{bis} SCC).

In total, over 1,000 bank accounts held in 40 Swiss banks are under investigation. The accounts, most of which were held by domicile companies, are beneficially owned by managers of Petrobras, Brazilian politicians, Brazilian and foreign construction companies who used them to pay bribes, or agents who paid or received bribes on their behalf. A sum exceeding US$1 billion has been frozen.

Since the start of the investigation, an amount of about US$200 million has already been returned to Brazil. This high-priority case remains ongoing and has led to over 50 requests for mutual legal assistance, which are being handled by the OAGS together with the Federal Office of Justice.

\textsuperscript{17} www.bj.admin.ch/bj/en/home/sicherheit/rechtshilfe/strafsachen.html.
FINMA has investigated over 15 Swiss banks in respect of anti-money laundering due diligence failures in connection with the Petrobras case, and has started enforcement proceedings against some of these banks and concluded its proceedings against banks in Lugano, Zurich and Geneva.

ii 1MDB
On 14 August 2015, the OAGS initiated criminal investigations against two former officials of the Malaysian state-owned fund 1Malaysia Development Berhad (1MDB) and persons unknown on suspicion of bribery of foreign public officials (Article 322 septies SCC), mismanagement of public interests (Article 314 SCC), money laundering (Article 305 bis SCC) and criminal mismanagement (Article 158 SCC), in respect of four cases involving allegations of criminal conduct during the period 2009–2013 (relating to Petrosaudi, SRC, Genting/Tanjong and ADMIC) for around US$4 billion.

Since summer 2018, mutual legal assistance between Malaysia and Switzerland has been expected to be resumed.

In April 2016, the OAGS extended its proceedings to two former Emirati officials, in charge of Abu Dhabi sovereign funds. Switzerland also sent requests for mutual legal assistance to Luxembourg and Singapore.

In parallel, FINMA initiated enforcement actions against three banks. On 23 May 2016, FINMA issued a decision against BSI SA, founding it in serious breach of anti-money laundering rules, ordering the disgorgement of its profits (95 million Swiss francs). BSI SA has appealed the decision. Two bankers are under investigation.

The following day, the OAGS announced that it had initiated criminal proceedings against BSI SA, suspecting deficiencies in the internal organisation of BSI SA within the meaning of Article 102, Section 2 SCC.

Shortly after the appointment of the current Attorney General of Malaysia in June 2018, a working visit took place between him and the Swiss Attorney General to discuss cooperation between these two authorities with regard to this case. Six persons and two banks are under investigation.

iii FIFA
The Fédération Internationale de Football Association (FIFA) is an association governed by Swiss law, founded in 1904 and based in Zurich.

On 10 March 2015, the OAGS initiated criminal investigations for criminal mismanagement (Article 158 SCC) and money laundering (Article 305 bis SCC) in

20 ‘The deficiencies identified constitute serious breaches of the statutory due diligence requirements in relation to money laundering and serious violations of the principles of adequate risk management and appropriate organisation. BSI was therefore in serious breach of the requirements for proper business conduct. Right up to top management level there was a lack of critical attitude needed to identify, limit and oversee the substantial legal and reputational risks inherent in the relationships.’ www.finma.ch/en/news/2016/05/20160524-mm-bsi.

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connection with the allocation of the FIFA World Cups of 2018 to Russia and of 2022 to Qatar. On 24 September 2015, the OAGS initiated criminal investigations on the suspicion of criminal mismanagement (Article 158 SCC) and misappropriation (Article 138 SC) against the then president of FIFA Joseph Blatter. On 6 November 2015, the OAGS initiated criminal investigations for fraud (Article 146 SCC), criminal mismanagement (Article 158 SCC), money laundering (Article 305 bis SCC) and misappropriation (Article 138 SCC) against several members of the executive board of the organising committee of the German Football Association for the 2006 World Cup in Germany. The OAGS continues to conduct a large number of criminal investigations in relation to FIFA and opened a new case in 2017 concerning FIFA’s former Secretary General, Jérôme Valcke, and other persons. The investigation concerns allegations of private bribery under the legal provisions applicable prior to the introduction of private-to-private corruption in the SCC.22

iv Port infrastructure
A controversial issue arose in relation to the resolution of a case involving a foreign company specialising in port infrastructure projects that had paid bribes to foreign public officials in various African countries. Employees of the company involved had ordered disputed payments amounting to US$21 million over a period of several years. The financial intermediary involved was sanctioned for complicity in foreign bribery. The sanction imposed consisted of a suspended pecuniary penalty of 25,200 Swiss francs. The related financial benefits (bonuses) were confiscated.23

v Gunvor
On 28 August 2018, a former oil trader with Gunvor Group was convicted and given an 18-month suspended jail sentence by the Federal Criminal Tribunal24 after admitting to bribing foreign public officials to secure oil cargoes from the Republic of Congo and Ivory Coast. The judgment was issued in the context of abridged proceedings under Article 358 CPC. The criminal investigation was initiated by the Office of the Attorney General of Switzerland in 2011 following a Swiss bank’s suspicious-transaction report under Article 9 MLA. On 19 May 2017, the criminal proceedings were extended to the Geneva branch of the Netherlands-registered Gunvor International BV, and Gunvor’s swiss entity, Gunvor SA for criminal liability (Article 102 SCC) in connection with the bribery of foreign public officials. The criminal investigation into Gunvor is still pending.

vi BSGR
In 2013, the Office of the Attorney General of Geneva initiated criminal proceedings in respect of suspicions of bribes paid from Geneva to public officials of the Republic of Guinea in respect of the granting of mining rights worth US$5 billion to the BSGR group of companies. Criminal investigations have been initiated in Guinea, the United States and Israel. In 2014, BSGR brought arbitral proceedings before the International Centre for Settlement of

23 OECD Phase 4 evaluation report of Switzerland, p. 43.
Investment Disputes (ICSID)\textsuperscript{25} challenging the withdrawal of the mining rights by Guinea, who filed a counterclaim in the arbitration proceedings in respect of the damage caused by the acts of bribery. On 16 March 2017, the Office of the Attorney General of Geneva admitted Guinea as a plaintiff in the criminal proceedings, a decision that was ultimately upheld by the Federal Court on 17 October 2017,\textsuperscript{26} which held that Guinea did not need to establish the existence of pecuniary damage to be granted plaintiff status, as acts of bribery directly harm the state by perverting its decision-making process. On 14 March 2018, the Federal Court also held that the existence of mutual assistance proceedings between Switzerland and Guinea did not preclude Guinea from using evidence obtained in the Geneva criminal proceedings in the context of the ICSID arbitration proceedings.\textsuperscript{27}

\section*{VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS}

Switzerland, which is not a member of the European Union, is a member of the United Nations, the OECD and the Council of Europe, and is a party to the following international agreements:
\begin{itemize}
  \item[a] OECD Convention onCombating Bribery of Foreign Public Officials in International Business Transactions of 1997;
  \item[b] Council of Europe Criminal Law Convention Against Corruption of 1998; and
  \item[c] United Nations Convention against Corruption of 2003.
\end{itemize}

\section*{VIII LEGISLATIVE DEVELOPMENTS}

It has been recognised at international level, that whistle-blowers can be a valuable source of detection of foreign bribery cases. Effective safeguards should therefore be provided, both in law and in practice, to encourage whistle-blowers to speak out. These safeguards should not be limited to labour law, but should also offer protection from retaliation other than dismissal, such as from prosecution for violation of various types of secrecy provisions.\textsuperscript{28} The Swiss legal framework in this regard has been deemed inadequate.\textsuperscript{29} A first draft bill was rejected by parliament in 2015. Meanwhile the draft bill, proposing a partial revision of the Code of Obligations, has been revised. The Federal Council adopted the additional message accompanying the draft bill on 21 September 2018.

\begin{itemize}
  \item[\textsuperscript{25}] ICSID Case No. ARB/14/22 (the materials of the proceedings are publicly available on the ICSID website under the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration).
  \item[\textsuperscript{26}] Decision 1B_261/2017.
  \item[\textsuperscript{27}] Decision 1B_521/2017.
  \item[\textsuperscript{28}] Examples include official secrecy according to Article 320 SCC (public sector), the duty of care and loyalty (Article 321a (4) CO), commercial secrecy (Article 162 SCC), professional secrecy for certain professions (Article 321 SCC), bank secrecy (Article 47 LB) and secrecy in the accounting profession (Article 730b (2) CO) (private sector).
  \item[\textsuperscript{29}] OECD Phase 4 report, p. 14.
\end{itemize}
IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Jurisdiction

Switzerland is a federal state composed of 26 cantons. Constitutionally, cantons have competence over all attributions that are not expressly allocated to the Confederation.

The Confederation has exclusive legislative competence over substantive criminal law under the SCC of 1937 and over criminal law of procedure, as well as the Criminal Procedure Code (CPC) of 2007 (cantonal competence remains for judicial organisation). The Confederation also has exclusive competence to enter into international treaties.

At the federal level, the Office of the Attorney General of Switzerland and, under its supervision, the Federal Police, are responsible for investigating crimes. The CPC requires cantons to have as investigating authorities a cantonal police and a cantonal attorney general’s office.

Whoever commits a crime in Switzerland is subject to Swiss criminal law (Article 3 SCC). A crime is deemed to have been committed where the offender acted, or failed to act contrary to duty, or where a result occurred (Article 8 SCC).

The prosecution and trial of criminal offences is under the competence of cantons, unless the law provides otherwise (Article 22 CPC).

Federal authorities have jurisdictions over offences committed by federal officials or against the Confederation (Article 23, Section 1(j) CPC). They also have compulsory jurisdiction over the prosecution of crimes of money laundering, corruption and organised crime if the offences were mainly carried out abroad or in several cantons, if no canton manifestly appears to be predominantly concerned (Article 24, Section 1 CPC).

ii Criminal liability of companies

Since 1 October 2003, companies, namely Swiss or foreign legal entities under private law, legal entities under public law, companies and sole proprietorships, can be held punishable for a criminal offence (Article 102 SCC).

Corporate liability may occur in two instances: first, if any felony or misdemeanour was committed in the context of the company’s business activity and if, because of the deficient organisation of the company, that act cannot be attributed to a specific individual (Article 102, Section 1 SCC); second, in the case of specific offences (participation in a criminal organisation (Article 260 ter SCC), financing of terrorism (Article 260 quinquies SCC), money laundering (Article 305 bis SCC), bribing of Swiss officials (Article 322 ter SCC), granting of an advantage to a Swiss official (Article 322 quinquies SCC), bribing of a foreign official (Article 322 septies SCC) and private active bribery (Article 322 octies SCC)), the company shall be punishable independently of the criminal liability of individuals if the company did not take all the reasonable and necessary organisational measures to prevent such offences (Article 102, Section 2 SCC).

Companies shall be punishable with fines of up to 5 million Swiss francs. A disgorgement of profits may be ordered, as well as damages to the person harmed by the crime. The ban on exercise of a profession may only be imposed upon an individual (Article 67 SCC).

The most relevant decision to date in this respect remains a 22 November 2011 sentencing order of the OAGS, under which Alstom Network Schweiz AG, a Swiss company who was responsible for the Alstom Group’s global compliance, was found guilty of a breach of Article 102, Section 2 SCC in conjunction with Article 322 septies SCC in connection...
with bribes paid to foreign officials of three countries. All the bribes, whether paid in or from Switzerland or abroad, by several of the companies of the Group were taken into account. Also, all profits of the Group, which were calculated on the basis of the Earnings Before Interest and Tax margin generated by the corruptly obtained contracts, were taken into account in the calculation of the disgorgement of profits of 36.4 million Swiss francs. A fine of 2.5 million Swiss francs was imposed.

### iii  Negotiated criminal settlements

The CPC enhances the possibilities of negotiation between the parties, namely between the attorney general’s office, the suspect and the plaintiff, with the view of incentivising the compensation of the aggrieved person by providing two explicit (discontinuance of the criminal proceedings in the event of compensation of the aggrieved person under Articles 53 SCC and 319, Section 1(e) CPC; abridged proceedings under Article 358 CPC) and one implicit (sentencing order under Article 352 CPC) means of negotiating structured criminal settlements.

### iv  Criminal organisation

The participation in, or support of, a criminal organisation, namely an organisation that keeps its structure and personal composition secret and pursues the purpose of committing violent crimes or of enriching itself by criminal means, is punishable with a custodial sentence of up to five years (Article 260 ter SCC). The offender shall also be punishable if he or she committed the crime abroad, provided the organisation carries out, or intends to carry out, its criminal activity fully or partially in Switzerland. A kleptocrat and his or her entourage may constitute a criminal organisation, and employees of companies who had paid bribes to members of the said entourage and had assisted them to open or monitor bank accounts in Switzerland have been convicted of support of a criminal organisation.

### X  COMPLIANCE

Swiss corporations are required to have internal control processes, which are to be reviewed by an auditor (Articles 716(b), Section 2 and 728(a), Section 1.3 SCO).

As mentioned above, under Article 102 SCC, a company will be liable for punishment if a criminal offence committed within the company cannot be attributed to a specific individual because of the deficient organisation of the company or, in respect of the listed offences, if the company did not take all the reasonable and necessary organisational measures to prevent them.

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31 Under the CPC, the person, company or entity aggrieved by a criminal offence may, upon making a declaration to that end, participate in the criminal investigation with full party rights. It may also choose to sue the perpetrator for civil damages in the context of the criminal trial. The aggrieved person is also entitled to claim the allocation of forfeited assets and fine upon presentation of an enforceable damages award or an out-of-court settlement with the perpetrator. Foreign states aggrieved by bribes are entitled to be admitted as plaintiffs in Swiss criminal proceedings (see Federal Criminal Court decision BB.2011.130 of 20 March 2013).
32 Federal Court decision 6B_422/2013 of 6 May 2013.
There is therefore a strong incentive for Swiss companies and companies active in Switzerland to document the decisions made by their employees and to take organisational measures to prevent active public and private bribery, as well as money laundering.

XI OUTLOOK AND CONCLUSIONS

As is currently the case, the most significant developments in the future will probably continue to concern the detection of foreign bribery cases based on cases of money laundering. More case law is likely to be developed on the definition of a foreign public official.

The prosecution of private bribery is also likely to increase as a consequence of the recent legislative amendments.

Even though the active enforcement of Switzerland’s prosecution authorities is commended internationally, the country continues to be criticised by several international organisations for the low level of sanctions and lack of effective whistle-blower protection. Additional changes in legislation or practice may ensue.

The Group of States against Corruption continues to criticise Switzerland for failing to regulate on the transparency of political party funding, as well as for failing to make private bribery a predicate offence to money laundering.

Similarly, it appears that the upcoming Financial Action Task Force mutual evaluation report on Switzerland will be critical of several failings in money laundering prevention, notably in respect of the forming of foreign offshore structures by Swiss professionals; the opening and monitoring of Swiss bank accounts; the low number of suspicious-transaction reports, in particular before the initiation of criminal investigations; and the level of sanctions imposed by FINMA on banks and bankers.

Switzerland will play its part in response to the higher demand of the international community for more transparency and enhanced efforts in the fight against cross-border corruption.
I INTRODUCTION

The United States has long been a world leader in its efforts to combat bribery and corruption, and there are countless examples, large and small, of investigations and prosecutions of public officials and those involved in corrupting them. Given the federal system of government in the US, the legislative framework for combating corruption and the related enforcement efforts exists at the local, state and federal levels. The US federal government, however, and in particular the US Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI), have special roles in addressing public corruption.

Today, those federal agencies have at their disposal a wide variety of federal public corruption offences, ranging from a very broad federal bribery and gratuity statute (18 USC Section 201) to more focused legislation such as the Foreign Corrupt Practices Act of 1977 (FCPA). The principal statutes addressing bribery and corruption are discussed in Section II.i, although there exist a large number of government agency ethics rules, local and state laws and regulations, and election and campaign finance laws that are largely beyond the scope of this chapter.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Elements

The primary statute that expressly criminalises corruption of US federal public officials is 18 USC Section 201. The statute has two principal subparts: Section 201(b), which criminalises bribery, and Section 201(c), which prohibits the payment or receipt of gratuities. The primary difference is that Section 201(b) requires proof of a *quid pro quo*, while the gratuities provision does not.

To obtain conviction of the bribe payer under Section 201(b)(1), the government must prove that something of value was given, offered, or promised to a federal public official corruptly to influence an official act. To secure conviction of the person bribed under Section 201(b)(2), the government must show that a public official accepted, solicited or agreed to accept anything of value corruptly in return for 'being influenced in the performance of any official act'.

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1 Mark F Mendelsohn is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The author would like to thank Jonathan Silberstein-Loeb and Diana V Valdivia for their substantial assistance in the preparation of this chapter.
A gratuities conviction only requires that the thing of value be knowingly or wilfully offered or given ‘for or because of any official act’, rather than corruptly to influence the official act.2

18 USC Section 666 applies when governmental or other entities receive federal programme benefits of over US$10,000. The bribery provisions contained in Section 666(a)(1)(b) penalise an agent of the entity receiving the funds who corruptly solicits, accepts or agrees to accept anything of value ‘intending to be influenced or rewarded in connection with any business, transaction, or series of transactions’ of the receiving entity involving anything of value of US$5,000 or more. Section 666(a)(2) covers the bribe payer.

The Hobbs Act, 18 USC Section 1951, also targets public corruption by criminalising extortion under colour of official right. The Act applies to any public official who ‘has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts’.3 The Supreme Court has held that a conviction for extortion under colour of official right does not require the government to prove that the payment was affirmatively induced by the official; rather, ‘the coercive element is provided by the public office itself’.4 The Act also has a broader jurisdictional reach as it can be applied to state public officials so long as the activity ‘affects commerce’. This requirement can be satisfied even if the effect is de minimis.5

ii Prohibition on paying and receiving

The bribery and gratuities provisions of 18 USC Section 201 prohibit both making and receiving either bribes or gratuities. The Hobbs Act prohibition on extortion under colour of official right applies only to the receipt of bribes.

iii Definition of public official

Public officials are defined broadly under Section 201 as not only federal government officers or employees, but also ‘person[s] acting for or on behalf of the United States, or any department, agency, or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of government’.6 The Supreme Court has extended the reach of Section 201 officers of a private, non-profit corporation administering and expending federal community development block grants. The Court made clear, however, that the mere presence of some federal assistance would not bring a local organisation and its employees within the jurisdiction of Section 201. Rather, to be a public official, ‘an individual must possess some degree of official responsibility for carrying out a federal program or policy’.7

Even if an official is not covered under Section 201, Section 666 potentially expands the reach of bribery prohibitions beyond the Section 201 definition to include agents of any state and local organisations that receive more than US$10,000 in federal funds in any one-year period.

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2 18 U.S.C. §201(c).
4 id. at 266.
5 See, e.g., United States v. Rabbitt, 583 F.2d 1014, 1023 (8th Cir. 1978).
iv  Public official participation in commercial activities

Members of Congress are prohibited from earning outside income that exceeds 15 per cent of the annual rate of basic pay for Level II of the Executive Schedule (currently US$189,600) in any calendar year. Members of Congress may not receive any income from employment or affiliation with any entity that provides services involving a fiduciary relationship and may not sit on a corporation’s board of directors. Presidential appointees in the executive branch subject to Senate confirmation are prohibited from all outside earned income. ‘Covered non-career employees’ of the executive branch (generally presidential appointees not subject to confirmation by the Senate) have the same restrictions on outside income as members of Congress. Executive branch career civil servants not subject to Senate confirmation have no cap on their outside earned income but cannot engage in outside employment that conflicts with their official duties.

v  Gifts, travel, meals, and entertainment restrictions

The giving of gifts or gratuities to public officials is restricted by 18 USC Section 201(c). The statute also prohibits public officials from receiving gifts under certain circumstances. The gratuities provisions of Section 201 largely overlap with the bribery provisions contained in the same statute, except that the gratuities provisions do not require the gift to be given with the intent to influence the public official. Instead, a gratuities violation occurs if a person offers anything of value ‘for or because of’ any official act performed or to be performed. As interpreted by the Supreme Court, the improper gift ‘may constitute merely a reward for some future act that the public official will take and may have already determined to take, or for a past act that he has already taken’.

House and Senate rules prohibit Members from receiving gifts worth US$50 or more, or multiple gifts from a single source that total US$100 or more in a calendar year. The rules also ban gifts of any value from a registered lobbyist, agent, or foreign principal.

In addition, executive branch employees may not accept gifts of over US$20 in value (or multiple gifts from a single source totalling US$50 in a calendar year), including ‘transportation, local travel, lodgings and meals’ that are given because of the official’s position or that come from ‘prohibited sources’. A prohibited source is a person or entity who (1) is doing or seeking to do business with or who is regulated by the official’s agency or (2) has interests that may be substantially affected by performance or non-performance of the

11  5 C.F.R. §2635.804(b).
15  5 C.F.R. §2635.
employee’s official duties.\textsuperscript{16} In 2009, President Obama tightened restrictions for presidential appointees in the executive branch, banning all gifts from registered lobbyists, even those valued at under US$20.\textsuperscript{17}

The Ethics Reform Act of 1989, 5 USC Section 7353, provides the statutory underpinning for the gift bans promulgated in regulations and House and Senate rules. The Act generally prohibits federal officials, including House members and staff, from soliciting or accepting anything of value, except as provided in rules and regulations issued by their supervising ethics office.

\textbf{vi Gifts and gratuities}

As discussed in Section II.v, above, gifts to members of Congress valued at less than US$50, or multiple gifts from a single person that do not exceed US$100 in a single calendar year, are permissible if they are not made by registered lobbyists or agents of a foreign government.\textsuperscript{18} Gifts with a value of under US$10 will not count towards the US$100 limit. House and Senate rules also contain several other narrow exceptions to the gift ban, including informational materials, contributions to a member’s campaign fund, and food and refreshments of nominal value that do not constitute a meal. Additionally, members can attend ‘widely attended events’ free of charge where at least 25 non-congressional employees will be in attendance and the event is related to their official duties.

Executive branch employees are permitted to receive gifts of under US$20 but cannot receive gifts totalling US$50 from the same person in the same year.\textsuperscript{19} Exceptions for executive branch officials not appointed by the President exist for widely attended events and for food and refreshments provided when travelling abroad on official business, so long as the refreshments are not provided by a foreign government and do not exceed the official’s daily allowance.\textsuperscript{20} All executive branch officials can receive gifts motivated by family relationship or personal friendship.

\textbf{vii Political contributions}

In general, the Federal Election Campaign Act prohibits any foreign national from contributing, donating, or spending funds, directly or indirectly, to any federal, state, or local election.\textsuperscript{21} Foreign nationals broadly covers foreign governments, political parties, corporations, associations, partnerships, individuals with foreign citizenship, and immigrants who do not have lawful permanent resident status.\textsuperscript{22}

In addition, a domestic subsidiary of a foreign company may not establish a federal political action committee to make political contributions if the foreign corporation finances

\textsuperscript{16} 5 C.F.R. §2635.203(d).
\textsuperscript{19} 5 C.F.R. §2635.204(a); U.S. Office of Gov’t Ethics, Gifts From Outside Sources, available at www.oge.gov/Topics/Gifts-and-Payments/Gifts-from-Outside-Sources/.
\textsuperscript{20} 5 C.F.R. §2635.204.
\textsuperscript{21} 52 U.S.C. §30121.
\textsuperscript{22} 52 U.S.C. §30121(b).
the PAC’s establishment, administration or solicitation costs, or individual foreign nationals participate in the operation of the PAC, serve on its board, make decisions regarding PAC contributions or expenditures, or participate in selecting persons to operate the PAC.23

Finally, a domestic subsidiary of a foreign corporation (or a domestic corporation owned by foreign nationals) may not donate in connection with state and local elections if the activities are financed by the foreign parent or individual foreign nationals are involved in making donations.24

viii Registration of foreign agents

The 1938 Foreign Agents Registration Act (FARA) requires persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of: (1) their relationship with a foreign principal, and (2) activities, receipts and disbursements in support of those activities.25 Administrative enforcement of the FARA is the responsibility of the DOJ, National Security Division, Counterintelligence and Export Control Section.

Historically, enforcement of the FARA has been relatively limited, but that may be changing. Between 1966 and 2015, the DOJ brought only seven criminal FARA cases, and there were only three convictions.26 In 2017, however, Special Counsel Robert Muller, who is tasked with investigating Russia’s efforts to interfere with the 2016 US presidential election, charged President Trump’s former campaign manager, Paul Manafort, and his associate Rick Gates, with FARA violations in connection with their previous work in Ukraine.27 Currently, many of the DOJ’s views on the appropriate interpretation and application of FARA are not publicly available, since they are communicated in the form of confidential advisory opinions. The DOJ has indicated, however, that it will soon publish on its website redacted copies of the advisory opinions it has issued since 1 January 2010.28

ix Private commercial bribery

No US federal statute specifically addresses private commercial bribery. Federal prosecutors may, however, prosecute commercial bribery through the use of several existing laws. Section 1346 of Title 18 gives prosecutors broad leeway by extending liability under the mail and wire fraud statutes to ‘a scheme or artifice to deprive another of the intangible right to honest services’. Honest services fraud has been used to prosecute employees of private companies who breach a fiduciary duty to their employers by, for example, taking or paying

24 id.
bribes.29 With respect to international business, another federal criminal statute that the DOJ has used to prosecute commercial bribery in some circumstances is the Travel Act, 18 USC Section 1952. The Travel Act makes it a crime to travel in interstate or foreign commerce or to use ‘the mail or any facility in interstate or foreign commerce’ with intent to ‘promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity’.

The definition of ‘unlawful activity’ broadly includes ‘extortion [and] bribery . . . in violation of the laws of the State in which committed or of the United States’.30 This definition assimilates state commercial bribery laws (as well as the laws of the District of Columbia and federal territories) and provides a basis for federal criminal liability where an individual violates state commercial bribery laws and uses, for example, a phone, fax, wire transfer or email to further the commercial bribe, or travels across state lines in furtherance of the scheme. Currently, approximately 36 US states have commercial bribery laws.

As discussed, 18 USC Section 666 also criminalises bribing recipients of federal programme funds. Such recipients can include private companies.

x Penalties

For individuals convicted under Section 201 for bribery, both the payer and the recipient of the bribe may be punished by up to 15 years’ imprisonment or a fine of up to US$250,000 or both, or triple the value of the bribe, whichever is greater.31 Violations of the gratuities provisions, on the other hand, are punishable by a maximum of two years’ imprisonment and a fine of US$250,000.32

A violation of 18 USC Section 666 carries a maximum penalty of 10 years’ imprisonment and a fine of US$250,000.33

A Hobbs Act violation is punishable by up to 20 years’ imprisonment and a fine of up to US$250,000.34

A violation of the Travel Act (based on bribery conduct) is punishable by up to five years’ imprisonment and a fine of the greater of US$250,000 or twice the pecuniary gain or loss.

III ENFORCEMENT: DOMESTIC BRIBERY

Domestic bribery laws are criminal offences pursued through both the US federal and state courts. There are no enacting regulations for domestic bribery laws, and the statutes do not

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31 18 U.S.C. §201(b); 18 U.S.C. §3571(b). See also Sun-Diamond, 526 U.S. at 405. Corporations convicted under 18 U.S.C. 3571(c) may be fined up to US$500,000.
provide a private cause of action. Statutory and case law on domestic bribery has remained mostly stable in recent years. This section discusses the areas of recent change in domestic bribery case law and statutes.

i Limiting honest services fraud to bribes and kickbacks

Federal prosecutors have long used the mail and wire fraud statutes (18 USC Sections 1341 and 1343) to combat public and private corruption, and in the late 1980s, Congress created honest services fraud to give prosecutors another tool in battling corruption. In 1987, the Supreme Court held in *McNally v. United States*, 483 US 350 (1987), that 18 USC Sections 1341 and 1343 did not reach ‘honest services fraud’. Congress responded by passing 18 USC Section 1346, which specifically defines a ‘scheme or artifice to defraud’ as including the failure to provide honest services. In *United States v. Skilling*, however, the Supreme Court narrowed the reach of the honest-services fraud statute to bribery and kickback schemes to avoid finding the statute unconstitutionally vague.

In June 2016, the Supreme Court further narrowed the scope of honest services fraud, and the Hobbes Act, when it unanimously overturned the conviction of former Virginia Governor Bob McDonnell on grounds that federal prosecutors had erroneously relied on a ‘boundless’ definition of an ‘official act’ that could result in criminally liability under 18 USC Sections 1346 and 1951. McDonnell was convicted on federal bribery charges in 2014 for accepting US$175,000 in loans, gifts, and other benefits in exchange for arranging meetings, hosting promotional events, and contacting other government officials on the payee’s behalf. The Court clarified that an official act must (1) be a decision or action on a ‘question, matter, cause, suit, or controversy’; (2) ‘involve a formal exercise of governmental power’; and (3) be something specific and focused that is ‘pending’ or ‘may by law be brought’ before a government official. Conversely, setting up a meeting, talking to another government official or organising an event, without more, does not constitute an official act, and thus cannot support convictions under 18 USC Sections 1346 and 1951.

ii Influencing employment decisions by a member of Congress

Congress adopted the Honest Leadership and Open Government Act of 2007 in response to lobbying scandals on Capitol Hill involving Jack Abramoff, a former lobbyist, and Randy ‘Duke’ Cunningham, a former House Representative. The statute bars any congressperson, congressional staffer, or employee of the executive branch, from taking or influencing an official act with the intent to make or influence private hiring decisions on the basis of political party affiliation (18 USC Section 227 (a)–(b)).

37 130 S. Ct. 2896, 2929 (2010).
39 id. at 2357.
40 id.
FOREIGN BRIBERY: LEGAL FRAMEWORK

i  Foreign bribery law and its elements

The FCPA, as amended in 1988 and 1998, broadly prohibits making corrupt payments to foreign officials in connection with international business. The operative prohibition of the FCPA’s ‘anti-bribery provisions’ has the following elements:

a  the defendant falls within one of three categories of legal or natural persons covered by the FCPA (issuer, domestic concern, or foreign company or national);

b  the defendant acted corruptly and wilfully;

c  the defendant made a payment, offer, authorisation or promise to pay money or anything of value, either directly or through a third party;

d  the payment was made to any of the following (a ‘covered recipient’):
   •  a foreign official;
   •  a foreign political party or party official;
   •  a candidate for foreign political office; or
   •  any other person while knowing that the payment will be passed on to one of the above; and

e  the payment was for the purpose of:
   •  influencing any official act or decision of that person;
   •  inducing that person to do or omit to do any act in violation of his or her lawful duty;
   •  inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision; or
   •  securing any improper advantage to obtain or retain business, or direct business to any person.42

The FCPA also requires issuers, that is publicly held corporations reporting to, or having a class of securities registered with, the Securities and Exchange Commission (SEC), to keep accurate books and records and to establish internal accounting controls designed to, inter alia, prevent the maintenance or disbursement of funds that could be used as a source of improper payments to foreign officials. These ‘accounting provisions’ are discussed further in Section V.

ii  Definition of foreign public official

The FCPA prohibits payments made directly or indirectly to ‘any foreign official’ or ‘any foreign political party or candidate thereof, or any candidate for foreign political office’. The Act defines a foreign official as any ‘officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality, or for or on behalf of any such public international organization’.43

Public international organisations include any entity designated as such by executive order of the President (e.g., the United Nations and the World Bank).44

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As a general matter, the DOJ and the SEC regard officers and employees of corporations and other business entities that are wholly or primarily owned or controlled by a foreign government as government officials for the purposes of the FCPA. In countries where enterprises owned or controlled by the government account for substantial economic activity (e.g., China), there can therefore be large numbers of individuals holding business positions who must be treated as ‘foreign officials’ for FCPA purposes. Consultants and advisers that have been retained by foreign government agencies to assist in carrying out official functions typically are also considered to be ‘foreign officials’, as are members of royal families and certain traditional and tribal leaders, depending on the facts and circumstances.

In determining whether an entity is a government instrumentality, courts have considered the following, non-exhaustive list of factors in their analysis:

- the foreign state’s characterisation of the entity and its employees;
- the foreign state’s degree of control over the entity;
- the purpose of the entity’s activities;
- the entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- the circumstances surrounding the entity’s creation; and
- the foreign state’s extent of ownership of the entity. 45

In their November 2012 Resource Guide to the FCPA, the DOJ and SEC endorsed these six factors, and identified the following five additional factors:

- the exclusive or controlling power vested in the entity to administer its designated functions;
- the level of financial support by the foreign state;
- the entity’s provision of services to the jurisdiction’s residents;
- whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- the general perception that the entity is performing official or governmental functions. 46

In *US v. Esquenazi*, the US Court of Appeals for the Eleventh Circuit defined the term ‘instrumentality’ under the FCPA. 47 In *Esquenazi*, the DOJ alleged that executives of a private telecommunications company in Florida used intermediaries to make almost US$1 million in payments to executives of the Haitian national telecommunications company, Teleco, in exchange for securing lower rates and other business advantages. The court held Teleco to be an ‘instrument’ of the Haitian government. The court defined instrumentality as ‘an entity controlled by the government of a foreign country that performs a function the controlling

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47 *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).
government treats as its own’. The court enumerated non-exhaustive lists of factors to separately determine whether the government ‘controls’ the entity and whether the entity performs a function the government ‘treats as its own’.

iii Gifts, travel, meals and entertainment restrictions

Whether payments for gifts, meals, travel or entertainment for the benefit of a foreign official are permissible under the FCPA turns on whether the gifts or payments in question are made with the requisite corrupt intent. There is no de minimis provision or materiality threshold in the statute; so conceivably, even gifts of nominal value made to a foreign official in exchange for favourable official action could trigger liability.

It is, however, an affirmative defence to liability that a payment was a ‘reasonable and bona fide expenditure, such as travel and lodging expenses . . . directly related’ to the promotion of products or the execution of a contract. The DOJ has issued several Opinion Releases that provide some guidance with respect to gift-giving.

Likewise, the DOJ and SEC’s recent Resource Guide to the FCPA advises:

Some hallmarks of appropriate gift-giving are when the 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. The larger or more extravagant the gift, however, the more likely it was given with an improper purpose.

iv Defences

There are two primary affirmative defences to liability under the FCPA. First, as noted above, the FCPA allows reasonable and bona fide expenditures directly related to the promotion, demonstration or explanation of products and services or for the execution or performance of a contract with a foreign government. This defence, however, does not apply to all

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48 id.
49 id. (‘[C]ourts and juries should look to the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.’)
50 id. (‘Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.’)
promotional expenses: ‘If a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a *bona fide*, good-faith payment, and this defense would not be available.’

Second, it is a defense that the payment was lawful under the written laws of the foreign country. This defense is rarely of much practical utility, since the conduct in question must be expressly permitted by a country’s written laws (i.e., the absence of an express prohibition on the particular conduct is not sufficient).

### v Facilitating payments

The FCPA contains a narrowly defined exception for ‘facilitating’ or ‘grease’ payments made to expedite ‘routine governmental action by a [covered official]’. Routine governmental action is defined as:

- only an action which is ordinarily and commonly performed by a foreign official in:
- a obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- b processing governmental papers, such as visas and work orders;
- c providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- d providing phone service, power, and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- e actions of a similar nature.

The FCPA emphasises that the exclusion applies only to non-discretionary actions related to the award of business: ‘routine governmental action does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party’. In practice, US authorities have also construed this exception only to apply to relatively small payments, though the FCPA is silent on this point. At a minimum, ‘grease’ payments should be approached with considerable caution. FCPA compliance programmes are trending away from permitting such payments.

### vi Payments through third parties or intermediaries

In addition to payments made directly to foreign officials, political parties, and candidates for office, the FCPA also prohibits any payment to ‘any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly’, to a covered official for a proscribed purpose. The FCPA, as amended in 1988, defines ‘knowing’ as actual awareness that an improper payment will be made or a firm

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57 15 U.S.C. §§78dd-l(b), 78dd-2(b), 78dd-3(b).
belief that such a payment is ‘substantially certain’. The legislative history emphasises that this standard encompasses instances of ‘wilful blindness’, ‘conscious disregard’ or ‘deliberate ignorance’ of the acts of an intermediary.

vii Individual and corporate liability

Both companies and individuals can face liability for violations of the FCPA. The FCPA’s jurisdiction extends to ‘issuers’, ‘domestic concerns’ and, in some circumstances, foreign nationals or businesses. An issuer is a corporation that has issued securities registered in the United States or is required to make periodic reports to the SEC. A domestic concern is any individual who is a citizen, national or resident of the United States, or any business entity with its principle place of business in the United States or that is organised under the laws of any state of the United States. US issuers and US persons (i.e., US nationals and legal entities organised under the laws of the United States or any state thereof) may be held liable for any act in furtherance of a corrupt payment, regardless of any connection to the territory of the United States or US interstate commerce. Jurisdiction will apply with respect to foreign issuers and non-citizen US residents if they make use of the US mails or US interstate commerce in furtherance of a corrupt payment.

A foreign national or company is subject to liability if it causes an act in furtherance of a corrupt payment within the territory of the United States. US parent companies can also be held liable for the acts of their foreign subsidiaries if they authorised, directed, or controlled the activity in question. In one recent SEC enforcement case, a federal court found that it had jurisdiction over foreign national defendants, executives of Magyar Telekom who allegedly bribed officials in Macedonia and Montenegro, based largely on emails relating to the corrupt scheme that had passed through computer servers in the United States. The court found jurisdiction even though none of the defendants were physically present in the United States when sending or receiving the emails. Furthermore, the court found that because Magyar was an issuer, any attempt by the foreign defendants to conceal their bribes in relation to public filings constituted conduct sufficiently ‘directed toward the United States’ to give rise to personal jurisdiction.

viii Civil and criminal enforcement

Companies and individuals can face both criminal and civil enforcement under the FCPA.

68 id.
69 id. But see SEC v. Steffen, No. 1:11-cv-09073-SAS (S.D.N.Y. Feb. 19, 2013) (finding no personal jurisdiction over a foreign defendant who allegedly pressured executives to authorise bribes during a telephone call with the United States and commenting that ‘the exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle’).
Agency enforcement
The DOJ is responsible for all criminal enforcement of the FCPA and for civil enforcement with respect to domestic concerns, foreign companies that are not issuers, directors, officers, shareholders, employees, and agents of the foregoing, as well as foreign nationals. The SEC is responsible for civil enforcement with respect to issuers and their directors, officers, shareholders, employees and agents.

Leniency
Self-reporting of violations and cooperation with the DOJ and the SEC are factors that can lead to reduced monetary penalties, or an otherwise more favourable settlement, or a decision by the government not to prosecute. For example, under the US Sentencing Guidelines companies are only eligible for certain sentence mitigation credit if they self-reported the violation. In determining whether to bring charges, federal prosecutors are required to consider the Principles of Federal Prosecution of Business Organizations (the Principles), which explicitly provide for consideration of cooperation and self-reporting.

Similarly, the SEC will consider cooperation and self-reporting as mitigating factors under its 2001 Report of Investigation pursuant to Section 21(a) of the Securities and Exchange Act of 1934, which is commonly referred to as the ‘Seaboard Report’.

In the November 2012 Resources Guide to the FCPA, the DOJ and SEC reaffirmed that both agencies ‘place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters’ in their Resources Guide. Even after the publication of this guidance, however, the adequacy of the DOJ and SEC’s guidance regarding the benefits of self-reporting and cooperation, and the sufficiency of those benefits, are still hotly debated topics within US legal and corporate circles.

In the context of cooperation by corporations, a September 2015 DOJ policy memorandum, commonly referred to as the Yates Memo, underscores the Department’s determination to identify and prosecute individuals responsible for corporate misconduct and provides that, as a threshold matter, to qualify for any cooperation credit corporations must provide to the Department ‘all relevant facts relating to the individuals responsible for the misconduct’ and that ‘absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation’.

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70 U.S.S.G. §8C2.5(g)(1).
In November 2017, the Department further refined and articulated its approach on self-reporting, cooperation, and remediation in its FCPA Corporate Enforcement Policy, which formalised and replaces the year-and-a-half-long FCPA Pilot Program, which the Department announced in April 2016. The Pilot Program was designed to ‘motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs’. The Program, which applied to business organisations only, reflected an effort by the DOJ ‘to increase transparency regarding charging decisions in corporate prosecutions’, and to ‘increase the Fraud Section’s ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered’ by making full disclosure of individual wrongdoing a condition of full cooperation by business organisations.

To qualify for full mitigation credit under the Program, a company had to (1) voluntarily self-disclose; (2) fully cooperate with a DOJ investigation; and (3) remediate, as appropriate, internal controls and compliance programmes. A company that met all three requirements and also disgorged profits could receive up to a 50 per cent reduction off the bottom end of the US Sentencing Guidelines fine range. Additionally, if the company had implemented an effective compliance programme at the time of resolution, the Department typically would not require the appointment of a compliance monitor. In some circumstances, full compliance with the Pilot Program could even result in declination to prosecute. During the 18 months that the Pilot Program was in effect, the Department received almost double the number of voluntary disclosures compared with the previous 18-month period. According to Deputy Attorney General Rosenstein, of the nine matters involving voluntary disclosures that have been resolved under the Pilot Program since April 2016, seven resulted in declinations of prosecution and two resulted in non-prosecution agreements without any requirement for a corporate monitor.

The new Corporate Enforcement Policy retains many of the features of the original Pilot Program, but goes further to incentivise self-reporting in two ways. First, it creates a rebuttable ‘presumption’ that companies will receive a full declination of prosecution if they voluntarily self-disclose, remediate misconduct, and cooperate with the Department’s investigation. This differs from the language of the earlier Pilot Program, which stated only that the Department would ‘consider’ such declinations. The new Policy’s presumption may be overcome, however, in cases with ‘aggravating circumstances involving the seriousness of

77 U.S. Dept of Justice, The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance 2 (the ‘Memorandum’) (Apr. 5, 2016), www.justice.gov/opa/file/838386/download. In addition to the Pilot Program, the memorandum also announces other enhancements to DOJ’s FCPA enforcement framework, including an increase in DOJ and FBI staff dedicated to FCPA prosecutions and enhanced collaboration efforts with foreign authorities.
78 Memorandum at 2.
80 id.
the offense or the nature of the offender’. 82 Second, the new Policy commits the Department to providing specific fine reductions for non-recidivist companies that meet the Policy’s requirements. Specifically, the Policy states that where aggravating factors overcome the presumption of a declination, a company will still receive a 50 per cent discount off the low end of the fine recommended under the US Sentencing Guidelines, and generally will not be required to appoint a corporate compliance monitor. 83 Under the prior Pilot Program, companies in this situation were promised only a discount of ‘up to’ 50 per cent.

Most recently, in May 2018, the Department introduced a new Policy on Coordination of Corporate Resolution Penalties, which aims to ‘discourage disproportionate enforcement of laws by multiple authorities’ – also described as ‘piling on’ . 84 The aim of the Policy is to avoid unfair duplicative penalties from overlapping enforcement agencies, foreign and domestic, directed at the same conduct The Policy provides that enforcement authority should not be used against companies for purposes unrelated to the investigation and prosecution of crimes, and that Department lawyers and enforcement authorities in other federal, state or local offices should coordinate with one another to achieve an overall equitable result. 85 The Policy also sets out factors Department lawyers should evaluate to determine when multiple penalties serve the interests of justice in a particular case. 86

xi Plea-bargaining

Plea-bargaining and negotiated settlements play a major role in FCPA enforcement as the criminal and civil penalties involved following an adverse result at trial can be severe. This is particularly true with respect to companies, which have strong incentives to avoid adverse publicity and prolonged uncertainty. Moreover, as mentioned in Section X, below, genuine cooperation with an investigation can result in more favourable settlements, including reduced monetary penalties. The DOJ has also increasingly turned to alternative dispositions such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), which can allow a company to avoid criminal conviction. The SEC has recently introduced these forms of settlement as well. On 22 April 2013, the SEC announced its first ever FCPA-related NPA, in connection with its investigation into the Ralph Lauren Corporation for bribes paid by a subsidiary to government officials in Argentina from 2005 to 2009. 87 When announcing the NPA, the SEC noted that its decision not to charge the company was ‘due to the company’s prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC’s investigation’. 88

82 id. at § 9-47.120(1).
83 id.
86 id.
88 id.
Individuals, on the other hand, may have different incentives. While plea-bargaining is certainly available, widely used, and often beneficial, it is also the case that the prospect of potential incarceration and reputational harm, combined with available strategies to defend these cases, has resulted in a number of FCPA trials in recent years.

**xii Prosecution of foreign companies and individuals**

Foreign companies can be prosecuted under Section 78dd-3, part of the 1998 amendments to the Act. The DOJ explains that: ‘A foreign company or person is now subject to the FCPA if it takes any act in furtherance of the corrupt payment while within the territory of the United States.’

The statute does not also require that such acts make use of the mail or any other instrumentality of interstate commerce. The DOJ interprets this Section as ‘conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company’s or national’s agent.’

In a 2011 case, a US court dismissed an FCPA 78dd-3 charge against a foreign defendant who mailed a package containing an allegedly corrupt purchase agreement from the United Kingdom to the United States because the act of mailing the package took place outside the United States. Moreover, the US Court of Appeals for the Second Circuit held in August 2018 that non-resident foreign nationals cannot be held liable for violating the FCPA under accomplice liability theories such as conspiracy or aiding and abetting unless they acted as an agent of a domestic concern or were physically present in the United States.

A likely result of this ruling is that it may be harder for the DOJ to bring future FCPA cases against foreign nationals acting wholly extraterritorially.

**xiii Penalties**

**Criminal penalties**

Companies that violate the anti-bribery provisions of the FCPA may be fined the greater of US$2 million per violation or twice the gain or loss resulting from the improper payment. Individuals who violate the anti-bribery provisions are subject to penalties of the greater of US$250,000 per violation or twice the gain or loss resulting from the improper payment and may also face up to five years’ imprisonment.

The applicable statute of limitations is five years. Officers, directors, stockholders and employees of business entities may be prosecuted for violations of the FCPA irrespective of whether the business entity itself is prosecuted. Any fine imposed upon an officer, director, stockholder, employee or agent may not be paid or reimbursed, directly or indirectly, by the business entity.

Beyond these statutory maximum sentences, the penalties in any particular case will be calculated under the US Sentencing Guidelines, which provide a framework for determining penalties based on a series of factors, including the characteristics of the offence, the characteristics of the offender, and various mitigating and aggravating factors.

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90 id.
93 15 U.S.C. §§78dd-2(g), 78dd-3(e), 78ff(c); 18 U.S.C. §3571.
Civil penalties

The FCPA’s anti-bribery provisions provide that the DOJ or the SEC, as appropriate, may impose civil penalties not greater than US$10,000 per violation.95 In practice, however, these relatively modest civil fines tend not to be meaningful, both because the DOJ invariably brings FCPA enforcement cases as criminal cases and because the SEC frequently uses other civil enforcement powers available to it. The SEC’s civil enforcement powers include issuing administrative cease-and-desist orders and, through court action, obtaining civil injunctions; civil fines typically are much smaller than the profits disgorged by the SEC.96 Importantly, in June 2017, the US Supreme Court ruled that claims for disgorgement brought by the SEC are governed by a five-year statute of limitations.97 In Kokesh v. SEC, the Court unanimously held that disgorgement, as it is applied in SEC enforcement proceedings, operates as a ‘penalty’ for purposes of the general federal statute of limitations applicable to ‘actions for the enforcement of . . . any . . . penalty’, thus subjecting this remedy to the same statute of limitations as claims by the SEC for civil fines, penalties other than disgorgement and forfeitures.98

Any entity found to have violated the FCPA’s anti-bribery provisions may also be barred from US government contracting. Even an indictment may render an entity ineligible to sell goods or services to the US government. A finding that an entity has violated the FCPA can also have negative collateral consequences in other dealings with US government agencies, including the ability to obtain US export licences and the ability to participate in programmes sponsored by the Overseas Private Investment Corporation, the Export-Import Bank of the United States, the Agency for International Development and other agencies.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

The FCPA’s accounting provisions require all issuers to (1) keep books, records, and accounts that accurately reflect the issuer’s transactions; and (2) establish and maintain a system of internal controls that are sufficient to ensure accountability for assets in accordance with management’s ‘general or specific authorization’.99 The records must be kept to ‘reasonable detail’, which the Act defines as the level of detail that ‘would satisfy prudent officials in the conduct of their affairs’.100 The FCPA holds issuers strictly liable on civil grounds for the

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95 15 U.S.C. §§78dd-2(g), 78dd-3(e), 78ff(c).
97 Kokesh v. SEC, No. 16-529, slip op. at 5 (U.S. June 5, 2017) (Sotomayor, J.)
98 See id.
100 15 U.S.C. §78m(b); see SEC v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 750 (N.D. Ga. 1983) (‘Among the factors that determine the internal accounting control environment of a company are its organizational structure, including the competence of personnel, the degree and manner of delegation and responsibility, the quality of internal budgets and financial reports, and the checks and balances that separate incompatible activities.’)
bookkeeping violations of consolidated subsidiaries and affiliates.\textsuperscript{101} Criminal liability arises when a firm or person either knowingly circumvents or knowingly fails to implement internal accounting controls; or knowingly falsifies books, records, or accounts.\textsuperscript{102}

Where an issuer holds 50 per cent or less of the voting power of a domestic or foreign firm, the FCPA requires that the issuer ‘proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [the FCPA’s requirements]’.\textsuperscript{103}

\section*{ii Disclosure of violations or irregularities}

The FCPA does not require companies to disclose violations. A public company may have a disclosure obligation under US securities laws if it determines, typically in consultation with disclosure counsel, that a violation or irregularity rises to the level of being material information concerning the issuer’s financial condition.

\section*{iii Prosecution under financial record-keeping legislation}

Both the books and records and internal controls provisions of the FCPA are frequently used to prosecute bribery-related conduct. Sometimes these provisions are used in addition to the anti-bribery provisions; in other circumstances these provisions are used exclusively to prosecute bribery-related conduct, including in situations where there may be jurisdictional or proof challenges to an anti-bribery charge, as well as part of a negotiated disposition.\textsuperscript{104}

The FCPA’s accounting provisions are also used to prosecute cases of commercial bribery, as well as various forms of fraud and accounting-related misconduct.\textsuperscript{105}

\section*{iv Sanctions for record-keeping violations}

\subsection*{Criminal penalties}

Companies that ‘knowingly and willfully’ violate the books and records and internal controls provisions of the FCPA may be fined the greater of US$25 million per violation or twice the gain or loss resulting from the improper conduct. Individuals who violate these provisions are subject to penalties of the greater of US$5 million per violation or twice the gain or loss resulting from the improper conduct and may also face up to 20 years’ imprisonment.\textsuperscript{106} The applicable statute of limitations is five years.\textsuperscript{107}

\begin{thebibliography}{99}

\bibitem{101} 15 U.S.C. §78m(b).
\bibitem{102} 15 U.S.C. §78m(b)(4)-(5); e.g., \textit{SEC v. Kelly}, 765 F. Supp. 2d 301, 322 (S.D.N.Y. 2011) (‘SEC need not prove scienter to succeed on a claim [. . .] liability] is predicated on reasonableness [. . .] of defendant’s conduct [. . .]’).
\bibitem{103} 15 U.S.C. §78m(b)(6).
\bibitem{104} See, e.g., \textit{In the Matter of Watts Water Technologies, Inc. and Leesen Chang}, SEC Administrative Proceeding File No. 3-148585 (13 October 2011).
\bibitem{105} See, e.g., \textit{United States v. Control Components Inc.}, No. 8:09-cr-00162 (C.D. Cal. 22 July 2009); \textit{United States v. SSI Int’l Far East Ltd.}, No. 3:06-cr-00398-KI (D. Or. 16 October 2011).

\end{thebibliography}
Civil penalties

The SEC’s civil enforcement powers with respect to violations of the accounting provisions are similar to its powers with respect to violations of the anti-bribery provisions. They include cease-and-desist orders, civil fines and disgorgement of profits.\footnote{108}{15 U.S.C. §78u.}

Tax deductibility of domestic or foreign bribes

The US Internal Revenue Code expressly prohibits the tax deductibility of domestic and foreign bribes.\footnote{109}{See 26 U.S.C. §162(c)(1)(2006).}

Money laundering laws and regulations

Both foreign and domestic bribery are considered predicate offences under US federal money laundering statutes where a financial transaction occurs in whole or in part in the United States.\footnote{110}{18 U.S.C. §1956(c)(7) (2012) (listing the predicate offences as ‘specified unlawful activity’).} Violation of the money laundering statute does not require a proof of violation of the underlying unlawful activity.\footnote{111}{See 18 U.S.C. §1956.}

Knowledge of criminal activity can be established from facts indicating that underlying criminal activity is likely; thus, wilful blindness is covered by the statute.\footnote{112}{United States v. Quinones, 635 F.3d 590, 594 (2d Cir. 2011) (quoting United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000) (‘A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact’).}

The effect on foreign or interstate commerce need only be \textit{de minimis}.\footnote{113}{e.g., United States v. Blair, 661 F.3d 755, 764 (4th Cir. 2011) (‘Almost any exchange of money between two parties qualifies as a financial transaction subject to criminal prosecution under § 1956, provided that the transaction has at least a minimal effect on interstate commerce and satisfies at least one of the four intent requirements . . . ’).} Proceeds of crime is defined in the statute as ‘any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity’,\footnote{114}{18 U.S.C. §1956(c)(9) (2012).} and courts have been permissive in interpreting the scope of the text.\footnote{115}{United States v. Akintonbi, 159 F.3d 401, 403 (9th Cir. 1998) (finding that checks with no value were proceeds under the statute).}

However, there is some uncertainty as to when ‘proceeds’ means profits from the illegal activities or just the cash flow from all receipts associated with the activity. A plurality of the Supreme Court held that proceeds means profits in the context of an illegal gambling business.\footnote{116}{e.g., United States v. Santos, 553 U.S. 507, 515–516 (2008).} Most lower courts have interpreted this to mean that the proceeds-means-profit principle only applies where there was a risk that the offender would be effectively punished twice for the same transaction, where the transaction is part of the predicate offence.\footnote{117}{United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011).}

Two sections of the money laundering statute are most relevant in the context of foreign bribery:

112 United States v. Quinones, 635 F.3d 590, 594 (2d Cir. 2011) (quoting United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000) (‘A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact’).
113 e.g., United States v. Blair, 661 F.3d 755, 764 (4th Cir. 2011) (‘Almost any exchange of money between two parties qualifies as a financial transaction subject to criminal prosecution under § 1956, provided that the transaction has at least a minimal effect on interstate commerce and satisfies at least one of the four intent requirements . . . ’).
114 e.g., id.
116 United States v. Akintonbi, 159 F.3d 401, 403 (9th Cir. 1998) (finding that checks with no value were proceeds under the statute).
118 e.g., United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011).
Section 1956(a)(1) prohibits attempted or executed financial transactions involving the proceeds of predicate offences with the intent of promoting further predicate offences; with the intent of evading taxation; knowing the transaction is designed to conceal laundering of the proceeds; or knowing the transaction is designed to avoid anti-money laundering reporting requirements.

Section 1956(a)(2) prohibits the international transportation or transmission (or attempted transportation or transmission) of funds with the intent to promote a predicate offence; knowing that the purpose is to conceal laundering of the funds and knowing that the funds are the proceeds of a predicate offence; or knowing that the purpose is to avoid reporting requirements and knowing that the funds are the proceeds of a predicate offence.

Transactions may fall afoul of Section 1956(a)(1) and (2) if they are meant to promote predicate offences, conceal predicate offences or are designed to avoid anti-money laundering reporting requirements.

In recent years, US and foreign officials have made use of money laundering charges in prosecuting – among others – corruption cases involving the Venezuelan state-owned oil company, PDVSA, and the Malaysian sovereign wealth fund, 1Malaysia Development Berhad (1MDB).

**Promotion**

Most courts have defined promotion as any transaction that helps the underlying offence continue to prosper. Under Section 1956(a)(2), the international transmission or transportation provision, all that is required is that the offender use the transported funds to promote a predicate offence; the funds need not themselves flow from a predicate offence.

**Concealment**

Concealment is defined as having a purpose to conceal, so it would be an offence even if the concealment is not successful. Engaging in unnecessary transactions to add extra degrees of separation between an individual and the source of the funds supports a finding of ‘concealment’ under the money laundering statute.

A variety of case-specific factors influence a court’s finding of concealment. As one court suggested:

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120 United States v. Lee, 558 F.3d 638, 642 (7th Cir. 2009) (payment of the advertising expenses of a prostitution enterprise promoted the underlying offence).


122 United States v. Heid, 651 F.3d 850, 855 (8th Cir. 2011).

123 See, e.g., United States v. Blankenship, 382 F.3d 1110, 1129-30 (11th Cir. 2004) (finding that a defendant’s performance of the ‘minimum number of transactions reasonably necessary’ to spend money at issue and failure to use intermediate accounts or dissociate himself from the accounts in which money was deposited supported a finding that the defendant did not engage in money laundering).
Evidence that may be considered when determining whether a transaction was designed to conceal . . . includes, among others, [deceptive] statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transactions; structuring the transaction to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals.124

**Structuring transactions to evade reporting requirements**

The money laundering statute prohibits the structuring of a transaction to avoid an obligation to report.125 The reporting requirements for financial transactions designed to prevent money laundering is discussed in Section V.ix. One of the requirements for the offence is actual knowledge of the underlying reporting requirement.126

Structuring violations are more commonly brought under 31 USC Section 5324. It is prohibited for a person to cause the failure to submit a report required by law, to cause a false report to be submitted, or to structure transactions in such a way as to evade reporting requirements.127

**vii Prosecution under money laundering laws**

Money laundering laws are used to prosecute bribery-related conduct. For example, in the prosecution of a Swiss lawyer for foreign bribery and money laundering activity, the money laundering charges succeeded where the FCPA charges failed on jurisdictional grounds.128

Because its scope can be wider than the coverage of the FCPA, money laundering charges are often included as a count in cases of potential corruption.129

In addition, on a number of occasions the DOJ has used the money laundering laws to prosecute foreign officials who are the recipients of corrupt payments and who cannot be prosecuted under the FCPA itself.130

**viii Sanctions for money laundering violations**

Violations of Sections 1956(a)(1) and (2) are punishable by a fine of no more than US$500,000 or twice the value of the property involved in the transaction, whichever is

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124 United States v. Magluta, 418 F.3d 1166, 1176 (11th Cir. 2005).
126 Bowman, 235 F.3d at 1118 (citing United States v. Young, 45 F.3d 1405, 1413 (10th Cir. 1995), cert. denied, 515 U.S. 1169 (1995)) (not reaching the structure of the transaction because the evidence indicated that offender was unaware of the requirement government alleged).
128 See United States v. Bodmer, 342 F. Supp. 2d 176, 191-92 (S.D.N.Y. 2004) (finding that a foreign national defendant had conspired to violate the money laundering statute's international transfer of funds provision even where, under the pre-1998 version of the FCPA, he was not subject to criminal punishment under the FCPA).
129 See, e.g., United States v. Kozeny, 638 F. Supp. 2d 348 (S.D.N.Y. 2009) (finding testimony of two witnesses that defendant agreed with others that one of the uses of his investment would be bribing foreign government officials sufficient for a reasonable jury to find conspiracy to launder money under Section 1956(a)(2)).
greater, and imprisonment for not more than 20 years.\textsuperscript{131} Violations of Section 1957 are punishable by a fine of not more than twice the amount of the criminally derived property involved in the transaction and imprisonment for not more than 10 years.\textsuperscript{132}

\textbf{iX} \hspace{1em} \textbf{Civil forfeiture}

Any property, real or personal, involved in a transaction or attempted transaction in violation of Sections 1956(a)(1) and (2) is also subject to forfeiture pursuant to 18 USC Section 981(a)(1)(A) and (C).\textsuperscript{133} As part of its commitment to the global fight against international corruption, the DOJ launched the Kleptocracy Asset Recovery Initiative in 2010 to specifically target and recover stolen assets that are laundered into the United States. In July 2016, the DOJ filed civil forfeiture complaints seeking to recover more than US$1 billion in assets associated with an international conspiracy to launder funds misappropriated from the Malaysian sovereign wealth fund, 1MDB.\textsuperscript{134} A year later, the DOJ filed a supplemental civil forfeiture action seeking recovery of assets valued at approximately US$540 million.\textsuperscript{135} The complaints filed by the DOJ represent the largest single action brought under the Kleptocracy Asset Recovery Initiative to date.

\textbf{x} \hspace{1em} \textbf{Disclosure of suspicious transactions}

31 USC Section 5322 makes it unlawful for certain institutions and persons to fail to disclose certain kinds of transactions that may be associated with bribery:

\begin{itemize}
  \item[a] financial institution are obligated to report cash transactions involving US$10,000 or more;\textsuperscript{136}
  \item[b] trades and businesses other than financial institutions are obligated to report cash transactions involving US$10,000 or more;\textsuperscript{137}
  \item[c] persons in the US are required to report foreign financial agency transactions;\textsuperscript{138} and
  \item[d] financial institutions are required to file suspicious transaction reports under appropriate circumstances.\textsuperscript{139}
\end{itemize}

To establish that a violation of Section 5322 was wilful, the burden is on the government to prove that the accused knew that his or her breach of the statute was unlawful.\textsuperscript{140}

\textsuperscript{133} 18 U.S.C. §981(a)(1)(A) and (C).
\textsuperscript{136} 31 U.S.C. §5313.
\textsuperscript{140} \textit{Ratzlaf v. United States}, 510 U.S. 135, 137 (1994); see also \textit{United States v. Tatoyan}, 474 F.3d 1174, 1177 (9th Cir. 2007).
Violations of Section 5322 are punishable by a term of imprisonment of not more than five years or a fine of not more than US$250,000, or both. Violations committed during the commission of another federal crime or as part of a pattern of illegal activity involving more than US$100,000 over the course of 12 months can be punished by a term of imprisonment of not more than 10 years or a fine of not more than US$500,000, or both.

VI ENFORCEMENT: FOREIGN BribERY AND ASSOCIATED OFFENCES

The DOJ and the SEC have jurisdiction to enforce the anti-bribery provisions of the FCPA. For a discussion of significant trends, developments and cases in anti-bribery enforcement, see the preface to this edition of *The Anti-Corruption and Anti-Bribery Review*.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The United States has signed and ratified a number of significant treaties related to the fight against corruption, including: the Organisation for Economic Co-operation and Development Anti-Bribery Convention; the United Nations Convention Against Corruption (UNCAC); and the Inter-American Convention Against Corruption. The United States has signed, but not ratified, the Council of Europe Criminal Law Convention.

The United States has made two relevant reservations to these treaties: under the UNCAC, the US has declined to provide a specific right of action for corruption; and under the Inter-American Convention against Corruption, the US has declined to enact laws expressly rendering illegal the ‘illicit enrichment’ as defined in the Convention. Article IX of the Inter-American Convention requires a state party to, subject to the fundamental principles of its legal systems, ‘establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions’.

VIII LEGISLATIVE DEVELOPMENTS

i The STOCK Act

In July 2012, the Stop Trading on Congressional Knowledge Act (the STOCK Act) was enacted. The STOCK Act bans insider trading on Capitol Hill. The STOCK Act was a response to public reaction to an investigative news television broadcast questioning whether lawmakers made investments based on their knowledge of legislative activity. President Obama had also called for such an act in his 24 January 2012 State of the Union Address.

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143 Inter-American Convention Against Corruption, Article IX, 29 March 1996.
Speech.\textsuperscript{145} The STOCK Act provides a variety of mechanisms for preventing insider trading and increasing transparency to the public. It covers legislators, executive branch officials, and their spouses and children.\textsuperscript{146}

**IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

The attorney-client privilege is one of the oldest and best recognised privileges for confidential communications between a client and his or her attorney. The US Supreme Court has recognised the privilege, stating that by assuring confidentiality the privilege encourages clients to make ‘full and frank’ disclosure to their attorneys, who are then better able to provide candid advice and effective representation.\textsuperscript{147}

The privilege is supported by two related doctrines, the joint defence privilege or ‘common interest rule’, and the work product doctrine. In general, the common interest rule protects the confidentiality of communications from one party to another party where a joint defence or strategy has been decided upon between the parties and their counsel. The work product doctrine protects materials prepared in anticipation of litigation from discovery by opposing counsel, including the government.

It is essential that multinational companies and their counsel understand these privileges and doctrines in connection with everything from routine counselling regarding anti-corruption compliance matters to defence of a government investigation to the proper handling of an internal investigation.

In the US, whistle-blowers enjoy protection under a wide variety of federal and state laws. The US False Claims Act, 31 USC Sections 3729–3733, for example, encourages whistle-blowers by promising them a percentage of the money received or damages won by the government and at the same time protects them from wrongful dismissal or retaliation.

Notably, the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) offers significant incentives and increases protections for whistle-blowers who provide original information concerning violations of the federal securities laws. In response to this legislation, in 2012 the SEC has established a Whistleblower Office to administer its whistle-blower programme.\textsuperscript{148} These developments are significant for domestic and foreign ‘issuers’ of securities because the FCPA is among the US securities laws covered by these Dodd-Frank whistle-blower provisions, so that employees who blow the whistle on foreign official bribery may now be eligible for significant recoveries. A recent unanimous decision from the US Supreme Court clarified that the anti-retaliation provisions of Dodd-Frank apply only to persons who have reported alleged securities violations to the SEC, not to those who have made complaints solely within a corporation.\textsuperscript{149}

\textsuperscript{145} The White House, Office of the Press Secretary, Remarks by the President in State of the Union Address (24 January 2012), available at www.whitehouse.gov/the-press-office/remarks-president-state-union-address.


X COMPLIANCE

The existence of a compliance programme, whether effective or not, is not a defence to prosecution under the FCPA or any other federal bribery-related statute. The existence of an effective compliance and ethics programme is considered as a sentencing mitigation factor under Chapter 8 of the US Sentencing Guidelines. In addition, under the DOJ’s Principles of Prosecution of Business Organizations, federal prosecutors are required to consider as one of the factors in deciding whether to charge an organisation with a crime, ‘the existence and effectiveness of the corporation’s pre-existing compliance program’. 150

While Chapter 8 and the Principles of Prosecution of Business Organizations are of general application and not specifically addressed to anti-corruption compliance, many recent settled FCPA enforcement actions describe in significant detail the DOJ’s and SEC’s views regarding the essential elements of an effective anti-corruption compliance programme. These details are typically set out in an attachment to a form of settlement agreement. In settling FCPA cases, both the DOJ and the SEC have frequently cited the existence of a genuine compliance programme as a mitigating factor.

Significantly, in 2012 the DOJ announced its decision not to prosecute a company after an FCPA investigation, citing the company’s pre-existing compliance programme as one reason for that decision, along with its self-disclosure and robust cooperation. 151 Similarly, in 2013 the SEC praised a company’s ‘enhanced compliance program’ and compliance training as among the factors that resulted in the SEC’s decision to enter into a Non-Prosecution Agreement with the company rather than charge it with FCPA violations. 152

Most recently, in February 2017 the DOJ released the Evaluation of Corporate Compliance Programs (the Evaluation Guidance), a guidance document that sets out a list of common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. 153 The questions are divided into 11 topics: (1) analysis and remediation of underlying misconduct; (2) senior and middle management; (3) autonomy and resources; (4) policies and procedures; (5) risk assessment; (6) training and communication; (7) confidential reporting and investigation; (8) incentives and disciplinary measures; (9) continuous improvement, periodic testing and review; (10) third-party management; and (11) mergers and acquisitions. 154 Although the Evaluation Guidance does not indicate correct answers to the compliance questions, it does give companies insight into the Fraud Section’s views on the components of an effective compliance programme and builds upon the DOJ’s hiring of a full-time compliance expert in 2015.

153 See id.
XI OUTLOOK AND CONCLUSIONS

Enforcement of the FCPA has been a significant priority of US agencies for many years, and it is expected to remain so for the foreseeable future. In November 2017, Deputy Attorney General Rod Rosenstein stated that he and Attorney General Jeff Sessions ‘plan to continue to emphasize [FCPA enforcement] as an essential step in promoting respect for the rule of law’.\textsuperscript{155} Also in November 2017, SEC Co-Director of Enforcement Steven Peikin emphasised the importance of the SEC’s FCPA enforcement programme, stating: ‘Will the SEC continue to be committed to robust FCPA enforcement? My answer to that question is simple: Yes. . . [B]ribery and corruption have no place in society. They often go hand in hand with many other societal ills, including instability, inequality, and poverty, and have anti-competitive effects, including putting honest businesses at a disadvantage. Bribery and corruption undermine and distort the marketplace and ultimately harm investors. Combating corruption therefore remains an important government mission, including at the SEC’s Enforcement Division.’\textsuperscript{156} He further emphasised the global nature of the enforcement mission, saying ‘[I]n an increasingly international enforcement environment, the US authorities cannot – and should not – go it alone in fighting corruption. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption by itself. . . I have observed that the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption.’\textsuperscript{157}

Notably, there has been a lull in enforcement under the early Trump administration. In September 2017, Deputy Attorney General Rod Rosenstein explained that existing federal policies on prosecuting corporate crime were ‘under review’.\textsuperscript{158} Rosenstein added that he ‘anticipate[d] there may be some change to the policy on corporate prosecutions’, and that the DOJ ‘may in the near future make an announcement about what changes [it] [is] going to make to corporate fraud principles’.\textsuperscript{159} Caution should be taken, however, before drawing any conclusions about the new administration’s enforcement priorities, as the absence of prosecutions may simply be a by-product of personnel issues, including turnover and the current lack of permanent leadership, or otherwise reflect normal variation in enforcement patterns.

In recent years, both the DOJ and the SEC have expressed their intention to bring more cases against individuals in addition to cases against companies, and their enforcement efforts over the past few years reflect this. In September 2015, the DOJ issued a policy memorandum re-emphasising the Department’s dedication to identifying and prosecuting individuals for corporate misconduct.\textsuperscript{160} The memo directs prosecutors to focus on individuals from the very beginning of investigations, stating ‘[o]ne of the most effective ways to combat corporate


\textsuperscript{157} id.


\textsuperscript{159} id.

\textsuperscript{160} See Yates Memo on Individual Accountability for Corporate Wrongdoing (9 September 2015) at 1, www.justice.gov/dag/file/769036/download.
misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing’. Underpinning the policy is the view that individual accountability deters future illegal activity, incentivises changes in corporate behaviour, ensures that the proper parties are held responsible for their actions and promotes the public’s confidence in the US justice system. The result of this attention to individual prosecutions has been more litigation and court decisions regarding the FCPA and more trials. These trends are expected to continue. In April 2017, Attorney General Jeff Sessions confirmed that ‘[t]he Justice Department will continue to emphasize the importance of holding individuals accountable for corporate misconduct.’\textsuperscript{161}

Self-reporting by companies of FCPA issues continues to be a significant, if not uncontroversial, feature of the US government’s FCPA enforcement programme. In April 2016, the DOJ launched the FCPA Pilot Program to further incentivise companies to report alleged violations as a means of obtaining mitigation credit, or in some circumstances a declination to prosecute. This year, the Department formalised the Pilot Program through the FCPA Corporate Enforcement Policy. Consequently, it is expected that self-reporting will remain a common phenomenon.

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David Ackebo, partner at Hannes Snellman, heads the firm’s dispute resolution team in Stockholm. Mr Ackebo’s field of expertise includes international arbitration, as well as domestic arbitration and litigation. He has acted as counsel for Swedish and foreign clients in complex arbitrations under various rules, such as ICC, AAA/ICDR, SCC, LCIA and SIAC, as well as in ad hoc administered arbitrations. Mr Ackebo has also advised clients and acted as counsel in several high-value disputes before state courts. Mr Ackebo’s broad dispute resolution experience includes, among other things, IT, telecoms, construction, M&A, real estate and securities-related disputes.

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Ilias is chairman of the Hellenic Criminal Bar Association, a member of the Criminal Law Committee of the Council of the Bars and Law Societies of Europe (chair, 2007–2013), a member of the Criminal Law Experts Commission (Ministry of Justice) and a member of FraudNet, which operates under the auspices of the International Chamber of Commerce’s Commercial Crime Services.
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Oliver Armas handles complex domestic and international disputes, and he has an extensive practice in US federal and state courts.

Because he is fluent in Spanish (and understands Portuguese), he routinely counsels clients on matters involving Latin America. Mr Armas has acted as a legal expert in certain aspects of US law in foreign proceedings (e.g., in Mexico and Peru), and has supervised litigation and conducted FCPA investigations in almost every country in Latin America.

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Yongman Bae focuses his practice on disputes regarding management rights, hostile takeovers, general shareholders’ meetings, boards of directors, share ownership and equity investment, and on commercial and financial litigation. He has provided advisory and litigation services to a broad array of listed and unlisted companies. He joined Bae, Kim & Lee LLC in 2010 after receiving an LLB degree from Korea University and completing the Judicial Research and Training Institute course. He also obtained an LLM from UC Berkeley School of Law and was seconded to Bae, Kim & Lee LLC’s Vietnam office in Ho Chi Minh City. He also actively engages in pro bono work related to North Korea and North Korean defectors.

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John trained and qualified at a general crime firm and then spent three years as a legal and policy adviser at the Legal Services Commission, before joining a leading criminal and regulatory defence firm of solicitors. He joined BCL in 2010 and has been a partner there since 2017.

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Shaul speaks regularly on business crime and related topics and has authored numerous publications, including the chapter on the main fraud offences prosecuted by the SFO in its book *Serious Economic Crime: A boardroom guide to prevention and compliance*, and the England and Wales chapter in the *International Comparative Guide to Business Crime*.
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Ophélia has significant experience in litigating cases dealing with corruption and related offences, money laundering, tax fraud and insider trading, as well as with extradition matters. She also advises companies on the implementation of anti-corruption programmes in France and abroad. Ophélia was listed as a rising star in France by *Expert Guides: White-Collar Crime 2018*.

Prior to joining Hogan Lovells, Ophélia was an associate at Allen & Overy LLP, Paris, and at the French criminal boutique firm Metzner Associés.

CLAIRE A DAAMS

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Dr Claire A Daams is a Swiss lawyer. She is admitted to the Dutch bar (1997) and holds law degrees from several European universities, as well as a doctorate in criminal law and criminal procedure from the University of Basel (2003). She was in private practice in the Netherlands for nine years as a lawyer and tax adviser and consultant, before serving as senior researcher and lecturer at the law faculty of the University of Basel and assistant to the President of the OECD’s Working Group on Bribery. From 2003–2015 she was a federal prosecutor in the Office of the Attorney General of Switzerland, responsible for complex and multi-jurisdictional cases of international bribery and corruption, money laundering, fraud and other financial crimes. During this period, she represented the OAG at the OECD’s Working Group on Bribery, was elected its vice-chair and chaired its law enforcement committee. In January 2016, she joined the Basel Institute on Governance as Head of Legal and Case Consultancy of the Institute’s International Centre for Asset Recovery (ICAR). Together with her staff, she advised developing and transitional countries in Africa, the Americas, Asia and eastern and south-eastern Europe on investigations of transnational cases of bribery, corruption and money laundering with a view to recovering assets related to these crimes. She has taught mutual assistance law at the University of Bern since 2009. She returned to private practice on 1 July 2017 and is registered with the Geneva Bar Commission as a lawyer from an EU/AA Member State authorised to practise in Switzerland under her home title (Advocaat at the Netherlands Bar).

Claire Daams is Secretary of the IBA’s Anti-Corruption Committee and the Switzerland representative for the Roxin Alliance, a global network of lawyers specialising in cross-border business crime, internal investigations and asset recovery. She speaks Dutch, English, French, German, Italian and Spanish.
ROSLI DAHLAN

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Rosli Dahlan heads the corporate and commercial disputes practice group at Lee Hishammuddin Allen & Gledhill. He has a broad civil and commercial practice. Conversant in both civil and shariah law, he is much sought after for his in-depth knowledge of conflict of laws. His wide network has enabled him to resolve contentious cross-border issues internationally and in the Asian region. He is highly regarded by Middle Eastern clients and his counterparts in the region.

Rosli’s portfolio of corporate litigation work includes shareholder disputes, restructuring, recovery, land disputes and regulatory compliance work. He has been the lead adviser to several foreign companies, among others, on the application of the US Foreign Corrupt Practices Act 1977. In recent years, Rosli has been prominent in public interest and civil rights litigation, winning landmark cases that made constitutional inroads against the religious authorities and government agencies: Berjaya Books Sdn Bhd & Ors v. Department of Federal Territories Islamic Affairs & Ors [2014] 1 MLJ 138, HC; Department of Federal Territories Islamic Affairs & Ors v. Berjaya Books Sdn Bhd & Ors [2015] 3 MLJ 65, CA; Kassim @ Osman bin Ahmad v. Dato’ Seri Jamil Khir bin Baharom Minister in the Prime Minister’s Department (Islamic Affairs) & Ors [2016] 7 MLJ 669, HC; Kassim @ Osman bin Ahmad v. Dato’ Seri Jamil Khir bin Baharom Minister in the Prime Minister’s Department (Islamic Affairs) & Ors [2016] 5 MLJ 258, CA; and United Allied Empire Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Ors [2017] 8 CLJ, CA.

Rosli had personal brushes with the Malaysian Anti-Corruption Commission (MACC) when he launched several lawsuits against various mainstream newspapers, the Anti-Corruption Agency and its successor, the MACC, for defamation, and also against the Attorney General, the Chief Commissioner of the MACC, the Inspector-General of Police, the Director of Legal and Prosecution Division of the MACC and several other senior officers of the MACC for the tort of conspiracy to injure him, false and malicious investigations, abuse of power, abuse of prosecutorial discretion, malicious prosecution, prosecutorial misconduct and public misfeasance.

Rosli won all his lawsuits. The newspapers settled, paid undisclosed damages and published public apologies. The MACC was also held liable for defamation and ordered to pay damages of 300,000 ringgit.

In his lawsuit against the Attorney General, the Chief Commissioner of the MACC, the Inspector-General of Police, the Director of Legal and Prosecution Division of the MACC and several other senior officers of the MACC, the government of Malaysia and the MACC settled, paid an undisclosed compensation and the MACC read out a public apology in open court. All these are widely reported in the Malaysian press.

In Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors [2014] 11 MLJ 481, Rosli succeeded in obtaining an unprecedented ruling that the notion of the Attorney General’s absolute prosecutorial immunity is anathema to the rule of law.
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Maximiliano D’Auro is a partner at Beccar Varela. He has wide experience in banking and financial law, advising both foreign and local financial institutions, not only on structuring complex financial transactions, but also on specific regulatory matters. In this field, Maximiliano has counselled and represented major financial institutions in matters related to the Financial Entities Law, the Public Offering Law and regulations issued by the Argentinian Central Bank (BCRA) and the National Securities Commission (CNV). He also has a great deal of expertise in designing and implementing compliance programmes for prevention of money laundering and terrorism financing, and bribery and corruption. In addition, he focuses his practice on bank secrecy and personal data protection. Mr D’Auro received his law degree from the National University of Mar del Plata (Argentina, 1997), and an LLM from the London School of Economics (United Kingdom, 2000).

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Michael Dixon is a partner in Blakes’ business crimes, investigations and compliance group. Michael regularly assists clients in complex multijurisdictional investigations. He also regularly provides advice on domestic and international anti-corruption laws, including advice on gifts and hospitality, client entertainment, travel and other business development practices. Michael was also co-counsel in the successful defence of a multinational company charged with bribery of government officials. Michael also assists clients with their anti-corruption compliance programmes, including policy drafting and review, preparing contractual clauses with agents and JV partners, and due diligence during mergers and acquisitions. Michael has also acted as defence counsel in a variety of Criminal Code prosecutions, and acted in proceedings before the Provincial Court of Alberta and Court of Queen’s Bench, and a variety of utilities boards and regulatory bodies, including the Alberta Securities Commission. Prior to joining Blakes, Michael served as a law clerk to the Chief Justice and Justices of the Superior Court in Toronto. Michael is a member of both the Alberta and Ontario bars.

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Sergei Eremin is a Russian-qualified lawyer specialising in national and cross-border structuring, corporate and individual taxation, investigation and litigation. Sergei has significant experience in advising clients on anti-bribery and corruption issues, including with respect to the Foreign Corrupt Practices Act and the UK Bribery Act. Sergei has participated in numerous investigation projects and assisted clients in the development of their compliance systems. Sergei is active in dispute resolution and litigation.

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Virginia Frangella is a senior associate at Beccar Varela, where she focuses on compliance. Virginia has ample experience advising multinationals and public-sector entities on compliance and ethics, risk management and internal controls. She also focuses on creating sustainable communities by strengthening companies and governments. Virginia obtained her law degree from the University of Buenos Aires (1990) and completed her postgraduate studies at the Boston University School of Law, including an LLM in American law (1996) and an LLM in international banking and financial law (1997), and where she was awarded the A John Serino Outstanding Graduate Banking and Financial Law Student Prize.

**CHAIM GELFAND**
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Chaim Gelfand is recognised as one of the leading professionals in the field of anti-corruption compliance in Israel, with over eight years of experience in this relatively new field, and also having established and implemented one of the first and most comprehensive anti-corruption policies to be set up under Israeli’s foreign-bribery statutes; this included anti-corruption compliance activity and due diligence for third parties around the globe, including Asia, the Middle East, Africa and South America.

In his practice at Shibolet & Co, Chaim has assisted multinational corporations with investigations in Israel, assisted large and medium-sized Israeli multinationals in setting up and implementing anti-corruption and anti-money laundering policies and related policies and procedures. Chaim is regularly invited to be a guest speaker in the field of anti-corruption compliance at business forums and in the Israeli media.

Chaim prides himself on finding solutions that provide companies with the maximum legal comfort without staunching their commercial goals.

In his previous position, before joining Shibolet, Chaim served as deputy general counsel for compliance in one of Israel’s largest defence companies.

**LUIS ENRIQUE GRAHAM**
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Luis Enrique Graham has extensive experience in complex civil and commercial litigation, and alternative dispute resolution procedures. He also counsels clients in connection with anti-corruption regulations, including the FCPA (and other US regulations), local anti-corruption regulations in Mexico, and other international instruments, and he has conducted several FCPA investigations in Mexico and Latin America.

and the *Latin Lawyer* survey of top law firms and lawyers active in the Latin American anti-corruption space. He is the only Mexican attorney recognised as an outstanding investigations practitioner by *Who's Who Legal: Investigations*.

He is former president of the Mexican Bar Association and is a member of its disciplinary board. He has been member of the advisory committee of the Ministry of Public Administration (2011–2012) and of the advisory committee of the Ministry of Foreign Affairs (2012–present), both of the Mexican government.

**LYNNE GREGORY**

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Lynne Gregory is an English qualified solicitor and senior associate at Baker & Partners.

Lynne’s work covers a broad range of civil and commercial disputes with emphasis on complex, multi-jurisdictional cases, tracing of assets and fraud claims. She has extensive experience gained over 25 years of practice covering a wide range of disciplines and environments.

Lynne studied at University College London, graduating with first-class honours before completing her legal studies at the College of Law in London. She went on to train at the Magic Circle law firm Allen & Overy before qualifying into its litigation department, where she carried out a broad range of commercial litigation, arbitration and public-inquiry work.

Lynne subsequently worked at several of London’s top firms, including Baker McKenzie and Charles Russell Speechlys, practising the full spectrum of commercial and civil dispute resolution.

In 2013, she became in-house lawyer at Centamin PLC, a FTSE 250 mining company based in Jersey. In this role, Lynne carried out a wide range of international regulatory, compliance, advisory and commercial work, in addition to litigation spanning multiple jurisdictions, including the United Kingdom, Africa, Australia and Canada.

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Tony has represented not only Koreans, but also parties from the United States, Hong Kong, Taiwan, Singapore, Malaysia, Japan, Switzerland, the Netherlands, Austria, Denmark, Sweden, Puerto Rico, Canada, China, Ukraine, the United Kingdom, Lebanon, Italy, Germany, France and Belgium, among others, in various lawsuits conducted in the Korean courts, and all of which he conducted successfully in his clients’ interests.

Recognised as a leading lawyer by Chambers Asia-Pacific, Tony also actively participates in professional and academic seminars and is in demand as a speaker in his field. He is also a visiting professor at various law schools in Seoul and an active member of the Society of Civil Precedents and the International Association of Defense Counsel. Tony has also authored various theses and articles dealing with such topics as commercial disputes, civil liens, commercial leases, accounting books and records, and divorce.

Tony received his bachelor’s degree from the Seoul National University school of law (cum laude, 1991) and his master’s degree (LLM) from Harvard Law School (2002). He is fluent in English and frequently serves as an arbitrator in domestic and international arbitration proceedings.

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He has published on tracing and recovery of assets and anti-corruption issues since 1996 and regularly speaks at international conferences on these matters.
He is recognised in asset recovery and business crime by Chambers and Who’s Who Legal (he has been a Who’s Who Legal Asset Recovery Thought Leader since 2016 and has been ranked in Who’s Who Legal’s Highest Regarded Individuals in Asset Recovery since 2013).

Yves Klein is the immediate former chair of the Asset Recovery Subcommittee of the International Bar Association’s Anti-Corruption Committee and is the Switzerland representative for ICC FraudNet, the world’s leading asset-recovery network, operating under the auspices of the International Chamber of Commerce. He is fluent in French, English, Portuguese and Spanish, and speaks Italian and German.

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He frequently represents companies and their directors as claimants or defendants in criminal proceedings, and has undertaken internal investigations into the business activities of companies operating in several industries. Antonin has worked on several flagship cases, including in relation to the Concorde accident that took place in France in 2000, in which he obtained a not-guilty verdict for Continental Airlines.

Prior to joining Hogan Lovells, Antonin was a partner at the highly regarded French criminal boutique firm Metzner Associés.

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Stephan Ludwig has been a managing legal assistant at stetter Rechtsanwälte since 2015. He studied law at Heidelberg University and at Ludwig-Maximilian University in Munich. In parallel with his studies, he gained experience in different fields of law in a number of renowned law firms. Following his interest in international corporate law and white-collar crime, Stephan Ludwig completed internships in Malaysia and France. Furthermore, he
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Kana Manabe is a partner at Mori Hamada & Matsumoto. She practises in the areas of dispute resolution, compliance and antitrust matters in a broad range of fields, both domestic and international. Since 2015, she has split her time between the firm's offices in Singapore and Myanmar, and has been advising clients on compliance matters, including anti-bribery, antitrust and regulatory matters, as well as handling international disputes mainly in South East Asia.

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Mark F Mendelsohn is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mark chairs the Foreign Corrupt Practices Act (FCPA) practice group, and is a member of the white-collar crime and regulatory defence, internal investigations, and securities litigation practice groups. Prior to joining Paul Weiss, Mark served as the deputy chief of the fraud section of the criminal division of the United States Department of Justice (DOJ), and is internationally acknowledged and respected as the architect and key enforcement official of the DOJ’s modern FCPA enforcement programme.

Mark’s practice emphasises white-collar criminal matters, internal corporate investigations, and compliance counselling. He regularly represents clients in FCPA and corruption-related internal investigations, designing and implementing compliance programmes, transactional anti-corruption diligence, and responding to and defending against governmental investigations, prosecutions, and trials on behalf of both business entities and individuals.

Mark has spoken frequently as a faculty member, panellist and keynote speaker at numerous FCPA, anti-corruption, corporate compliance, securities fraud, money laundering and white-collar crime programmes and conferences. He has taught international criminal law as a visiting professor at the University of Virginia School of Law. Mark is a member of the board of directors of Transparency International-USA.

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Mark Morrison is a partner and co-chair of Blakes’ business crimes, investigations and compliance group. Mark regularly advises Canadian and multinational corporate clients on compliance with domestic and international anti-corruption legislation, undertakes internal investigations, assists clients with anti-corruption due diligence during mergers and acquisitions and has successfully defended complex Criminal Code anti-corruption cases. Mark has undertaken numerous internal investigations and assisted companies in resolving anti-corruption issues arising from conduct in Africa, Central America, South America, Eastern Europe and Asia. Mark was a finalist in the Benchmark Canada Awards 2017 in the category of White Collar Crime Lawyer of the Year and is widely recognised as one of

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Shiho Ono is a partner at Mori Hamada & Matsumoto. She handles a broad range of domestic and international disputes. In particular, she regularly advises clients on labour and employment law and antitrust law, having handled a wide variety of corporate legal matters, including international cartel cases, bribery cases and other regulatory and compliance matters.

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Mareva advises clients on queries regarding basic corporate issues, as well as providing assistance with more complex matters, such as mergers, transformations and dissolution of companies.

Mareva was in-house counsel at Autolider Ecuador SA, the official Mercedes Benz dealer in Ecuador and a company that has brought significant investment to the country; she provided legal assistance and she was the company’s compliance officer in relation to the Financial and Economic Analysis Unit. Currently, she is Ferrere’s representative in the Ecuador Chapter of the World Compliance Association (WCA).

Mareva obtained her JD from SEK International University and then pursued a specialisation in corporate law at the Simón Bolívar Andean University, also in Ecuador. She is currently finishing her master’s degree in law, business and justice at the University of Valencia in Spain.

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Daphna Otremski has worked for several years as an associate in the anti-corruption compliance practice at Shibolet & Co, having completed her practical legal training in the Department of International Affairs at the State Attorney’s Office in Israel. Daphna specialises in international criminal law, including extradition, multilateral legal assistance and anti-money laundering, as well as privacy and data protection regulation.
ALEXEI PANICH

*Herbert Smith Freehills CIS LLP*

Alexei Panich is a partner at Herbert Smith Freehills, where he is an advocate and head of the dispute resolution and investigations practice in Moscow. He has been representing clients for more than 18 years in banking, commercial, construction, fraud and regulatory cases, as well as in bankruptcy proceedings. Alexei has extensive experience advising on complex Russian and international litigation and arbitration matters affecting the activities of both foreign investors and national Russian companies. Alexei advises clients on all types of investigations, including formal investigations arising in connection with the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA), and internal investigations, initiated by the company head office, into employees of Russian subsidiaries.

THOMAS N PIEPER

*Hogan Lovells*

Thomas Pieper focuses on complex international dispute resolution, with a particular emphasis on Latin American and European matters. He has successfully represented foreign and domestic clients in large international cases before German, Mexican and US courts.

Mr Pieper routinely assists clients in FCPA-related investigations and has conducted widespread FCPA investigations in different countries in Latin America.

Fluent in Spanish, he has spent significant time during his professional and academic career in Spain and Mexico. Mr Pieper’s dual training in civil and common law, combined with his language skills, allows him to understand the cultural and legal differences between the various legal systems and to communicate with clients in their native language.

ANDREAS PIESIEWICZ

*Johnson Winter & Slattery*

Andreas Piesiewicz is a dispute resolution partner specialising in complex, high-stakes litigation and investigations, across a range of jurisdictions and a variety of industries.

His experience ranges broadly and includes advising high-profile directors and officers of ASX listed companies in the finance and construction industries in relation to securities and foreign bribery-related investigations conducted by ASIC and the AFP; seeking urgent interlocutory and final relief in expedited Commercial List proceedings concerning the market for nuclear medicine technology and associated distribution rights; prosecuting a A$100 million plus negligence claim against a Big Four accounting firm; and defending a US-based company operating in the nutraceuticals industry in Federal Court proceedings seeking to unwind share sale agreements and seeking A$175 million in damages.

Most recently he acted for ASIC in landmark Federal Court proceedings against the Australia and New Zealand Banking Group Limited concerning the alleged rigging of the bank bill swap rate.

ROBERTO PISANO

*Studio Legale Pisano*

Roberto Pisano obtained a law degree, *summa cum laude*, from the state University of Milan in 1992, and a PhD from the University of Genoa in 1999. Between 1993 and 1997 he was
a research associate at Bocconi University, Milan, where he has since 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 and 2008, and vice chair of the ECBA in 2008 and 2009. He is the author of several publications on the subject of business crime and mutual legal assistance, including Tax Crimes (Cedam, 2002, co-author); Criminal Responsibility from Asbestos (Giuffré, 2003, contributor); The Relations Between Domestic Law, Treaty Law and EC Law (Egea, 1995); ‘EU arrest warrant in action’ (in European Lawyer, 2005, co-author); and The Illegal Performance of Financial Intermediation (Cedam, 2007).

Roberto Pisano is the founder and managing partner of Studio Legale Pisano, an Italian boutique firm that specialises in all areas of white-collar crime, including corporate criminal responsibility, corruption, tax crime, money laundering, market abuse and false accounting, fraud and recovery of assets, bankruptcy crimes, and environmental and health and safety crimes, with an emphasis on transnational investigations and related aspects of mutual legal assistance and extradition.

In the course of his practice, Mr Pisano has successfully represented prominent individuals and entities in high-profile Italian criminal proceedings with media impact, including various cases of corruption involving international corporations and their top officials (including alleged corruption of foreign public officials, with multiple investigations in the United States, the United Kingdom, France, 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 involving a major US bank in the bankruptcy of the Parmalat group; 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 United States, Hong Kong, Switzerland, Monaco) against freezing and confiscation of assets; and criminal counsel for foreign multinationals and Italian corporations conducting internal investigations. Mr Pisano also advises and represents foreign governments on issues of international criminal law and in the frame of extradition proceedings.

Mr Pisano is a regular speaker at conferences and seminars in Italy and abroad on the subject of white-collar crime and mutual legal assistance and extradition.

JAVIER ROBALINO ORELLANA

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Javier Robalino Orellana is a partner at Ferrere in Ecuador and a member of the firm’s global executive committee (2015). He also co-chairs the arbitration practice and acts as managing partner for Ecuador.

He obtained his LLM degree from Duke University School of Law (2006, cum laude) and an SJD from the Pontifical Catholic University of Ecuador (1990–1995). In addition, he engaged in studies at the International Labour Organization (ILO); on the programme on social security modernisation in Turin, Italy (2004); and on the Program of Instruction for Lawyers at Harvard University (1998). He also has a diploma in political science from the University of California, San Diego (1995) and a diploma in comparative law from the University of Texas, Dallas (1994).

Robalino represents many multinationals in various local and international commercial and investment disputes. He has participated in many cases under CIADI, CNUDMI, CIAC,
CCI, and CAM Santiago rules, among others. Robalino also participates in international public law cases under the rules of the WTO, Andean Community of Nations (CAN), and Inter-American Convention on Human Rights, among others.

In the academic field, Robalino is a professor of administrative law at the INIDEM Business Law School of Central America (2011). He is also a professor of administrative and international law at the University of San Francisco, Quito (USFQ) (1999) and is chair of its graduate programme (2003).

JONATHAN SILBERSTEIN-LOEB

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Jonathan Silberstein-Loeb is an associate in the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison LLP. He has represented some of the world’s largest companies and financial institutions in internal investigations relating to corruption, fraud, and sanctions, as well as in arbitration and litigation ranging from antitrust claims to mass torts.

In addition to being a member of the New York Bar, Jonathan is a qualified barrister in England and Wales. Before practising law, he was a Fulbright Scholar in Japan, received his PhD in history from the University of Cambridge and lectured in history at the University of Oxford.

SHANTANU SINGH

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Shantanu Singh is an associate with the corporate practice of AZB & Partners and has experience in advising on anti-corruption and compliance legislation. Shantanu advises international and domestic clients across various sectors and works with foreign clients on matters relating to anti-bribery provisions in India.

SABINE STETTER

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Dr Sabine Stetter is managing partner at stetter Rechtsanwälte. She studied law at the Ludwig-Maximilian University in Munich and at the London School of Economics. From 2000 to 2003 she worked in criminal appeal proceedings before the Federal Court of Justice, Germany’s highest court of civil and criminal jurisdiction, in Karlsruhe. For nearly 20 years she has devoted herself exclusively to criminal business and criminal tax law, and she founded stetter Rechtsanwälte in 2010. Dr Stetter’s doctorate in criminal tax law provided a comparative evaluation of the German and American law systems in this area of practice. Furthermore, Dr Stetter is one of the co-authors of the Münchener Anwalts Handbuch Strafverteidigung (a standard reference work for German defence counsel) and the Handbuch Arbeitsstrafrecht (a comprehensive practical guide to the responsibility of company personnel in respect of labour criminal liability risk). She is a member and speaker of the International Bar Association, the American Bar Association and the American Chamber of Commerce in Germany.
KAREENA TEH
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Kareena Teh represents corporations and individuals in corporate investigations, including into bribery, corruption, market misconduct, money laundering and securities fraud issues, government prosecutions, administrative actions, and related civil actions. She also advises clients on legal and regulatory compliance, remediation and risk mitigation. Previously a practising barrister in New Zealand, Ms Teh has substantial experience running both civil and criminal defence cases. Her broad grounding in various aspects of contentious legal work and wide range of skills and expertise provides her with a unique advantage when conducting corporate investigations and defending prosecutions and administrative actions. As the first female solicitor in Hong Kong to be granted higher rights of audience to represent clients in civil matters at all levels of Hong Kong’s judicial system, she is also ideally suited to handle associated civil actions that arise out of such investigations.

Ms Teh is consistently recognised by Chambers Global, Chambers Asia-Pacific and The Legal 500 Asia Pacific for her work in dispute resolution and regulatory, anti-corruption and compliance matters, with the 2018 edition of Chambers, noting that she ‘can think on her feet’. She was recognised by Benchmark Litigation Asia-Pacific 2018 as a ‘Dispute Resolution Star’ for her commercial and transactions work, and was ‘Highly Commended’ in the Financial Times ‘Asia-Pacific Innovative Lawyers’ report 2017 for her work in dispute resolution. In addition, Global Investigations Review profiled her as part of their ‘Women in Investigations’ feature on the 100 top women in investigations globally. Ms Teh is a qualified lawyer in Hong Kong, New Zealand, and England and Wales. She speaks English, Bahasa Malaysia and Chinese.

SIMON THOMAS
Baker & Partners

Simon Thomas is a partner at Baker & Partners and is dual qualified as both an English barrister and Jersey advocate. He was educated at Oxford and called to the English Bar in 1995. He undertook a mixed civil and criminal practice at 7 Bedford Row Chambers, London, between 1997 and 2012.

He joined Baker & Partners in October 2012 before qualifying at the Jersey Bar in 2014. He achieved the highest mark of his year in the trusts, property, contract and family papers part of the Jersey Bar exams. He has appeared regularly in the courts in Jersey since qualifying. In 2015, he was appointed a Crown Advocate.

Simon retains his English Practising Certificate and is able to practise at the English Bar. Simon has over 20 years’ practical courtroom experience. He undertakes work that spans a number of diverse areas of law, including contentious trusts litigation, commercial litigation, employment law, public law and judicial review, licensing, and family and matrimonial law.

He is also skilled in the handling of cases with an international aspect, including asset tracing, international legal assistance (in particular dealing with issues that arise when Jersey is asked to assist criminal investigations in another jurisdiction) and proceeds of crime issues (particularly in relation to frozen funds). He has acted for both the prosecution and defence in serious crime matters, including complex fraud cases.

Simon also has significant experience in regulatory issues, including conducting and advising in internal investigations.
HIDEAKI ROY UMETSU
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Hideaki Roy Umetsu is a partner at Mori Hamada & Matsumoto. He focuses on, among other areas, international and domestic M&A transactions, as well as global compliance matters for Japanese companies. In particular, he has advised a number of Japanese clients on their anti-bribery compliance programmes and on internal investigations for bribery cases. He currently serves as an officer of the Asia-Pacific Regional Forum of the International Bar Association.

DIANA V VALDIVIA
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Diana V Valdivia is an associate in the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Diana focuses her practice on general criminal and civil litigation matters, including securities fraud litigation and international corruption-related investigations. Diana has experience representing clients in a variety of industries, including pharmaceutical companies and financial institutions.

Diana served as an articles editor of the Georgetown Journal of Legal Ethics, and has published in the areas of legal ethics and space law. While at law school, she worked with Georgetown’s International Women’s Human Rights Clinic and the Women’s Legal Aid Centre of Tanzania. Prior to joining Paul Weiss, Diana worked for the US Department of Justice, Criminal Division, Office of International Affairs.

ALDO VERBRUGGEN
Jones Day

Aldo Verbruggen is a partner at Jones Day and is the head of the Amsterdam investigations and white-collar defence team. Following an impressive career with the Dutch Public Prosecution Service, Aldo is highly regarded as one of the most prominent lawyers in the Netherlands in the field of corporate investigations and corporate criminal law. He specialises in financial and economic criminal law, and has a wealth of experience in handling complex high-profile cases. The majority of his clients are domestic and international companies and their management. Aldo is considered an opinion leader in the field of anti-corruption and bribery.

ELISABETH VESTIN
Hannes Snellman Attorneys Ltd

Elisabeth Vestin, partner, heads the intellectual property and technology, media and telecoms (IP and tech) practice at Hannes Snellman’s Stockholm office. Her fields of expertise include IP law, privacy law, market law, consumer law and e-commerce, as well as sports, media, music and entertainment law. Her practice includes drafting, interpreting, negotiating and disputing commercial agreements. She also advises on M&A in the IP and tech field.
In addition, Ms Vestin has worked with corporate sustainability, bribery, anti-corruption and compliance matters for over a decade. She regularly conducts presentations and training in these areas.

Because of her vast experience of working with franchise chains and other chain companies, Ms Vestin has become a board member of the Swedish Franchise Association.

ROBERT R WYLD

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Robert Wyld is a consultant in Johnson Winter & Slattery’s Sydney office specialising in regulatory investigations and prosecutions, white-collar crime and fraud, sanctions, money laundering and revenue and taxation disputes. He is a recognised leading Australian expert in business and commercial crime investigations and prosecution defence work.

Robert’s bribery and corruption work includes representing four former AWB officers before the Cole Inquiry into the AWB/Oil-for-Food wheat contracts with Iraq, and subsequent civil litigation and criminal investigations by the Commonwealth Criminal Assets Confiscation Taskforce; conducting confidential bribery investigations in Australia, North and South America and South East Asia for international and Australian companies; and prosecuting and defending both civil claims and criminal prosecutions in Australia involving tax fraud, money laundering, foreign bribery and conspiracy and claims involving the seizure and forfeiture of assets under the Proceeds of Crime Act 2002 (Cth).

Robert has written numerous papers on the detection and management of commercial risks, identifying fraud and tracing the proceeds of crime, the AWB role in the UN Oil-for-Food scandal, whistle-blower reforms in Australia and Australia’s foreign bribery laws for directors and issues across the Asia-Pacific region. He has delivered ethical compliance training seminars to clients in Australia and throughout Asia and is a regular guest speaker at conferences in Australia and overseas. Robert was co-chair of the International Bar Association’s Anti-Corruption Committee for 2015–2016.

JERINA (GERASIMOULA) ZAPANTI

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Jerina (Gerasimoula) Zapanti is a member of the Athens Bar (2001) and the Hellenic Criminal Association (2007). She has considerable experience in cases of corporate compliance, money laundering and cross-border criminal proceedings. She has been actively involved in internal corporate investigations and risk-management assessment for national and multinational corporations for more than a decade.

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Francisco Zavalía is a senior associate at Beccar Varela. He specialises in criminal matters and has broad experience in consultation and litigation, in particular in fraud and economic crime, embezzlement and corporate fraud, cybercrime, anti-money laundering, currency exchange crime, environmental offences, tax and fiscal offences, forgery, negligence and non-intentional crime, intellectual property, customs offences, corporate criminal responsibility and compliance. He received his law degree from the University of Buenos Aires (2008) and a master’s degree in criminal law from Austral University (2012).
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