THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

EIGHTH EDITION

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Mark F Mendelsohn

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The eighth edition of The Anti-Bribery and Anti-Corruption Review presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including new chapters covering Argentina, Brazil, Chile, Colombia, Mexico, Peru and Venezuela. The comprehensive scope of this edition of the Review mirrors the scope of global anti-corruption activity and developments.

Over the past year, countries across the globe continued to bolster their domestic anti-bribery and anti-corruption laws, but shifting international relations and global economic competition may be undermining international cooperation. This is most clearly reflected in tensions between China and the United States and in recent comments by the chairman of the US Securities and Exchange Commission (SEC) that called into question the extent to which international cooperation is real or perceived, and whether deliberately asymmetric enforcement is disadvantaging US companies.

In China there were several notable legislative developments that affect anti-bribery and anti-corruption enforcement. The Standing Committee of the National People’s Congress adopted amendments to the country’s Anti-Unfair Competition Law, which came into force in January 2018. The amendments specify the range of prohibited recipients of bribes, expand the definition of prohibited bribery to include bribery for the purpose of obtaining a competitive advantage, impose, with limited exceptions, vicarious liability on employers for bribery committed by employees and provide for increased penalties. China also amended its Criminal Procedure Law to codify rules encouraging cooperation in government investigations and to permit trials in absentia, including for bribery and corruption. The new Chinese Supervision Law creates commissions with authority to supervise public functionaries and to detain suspects for prolonged periods while investigating corruption cases.

India and Japan also passed legislation bolstering their anti-corruption laws. The Indian Prevention of Corruption (Amendment) Act criminalises giving an ‘undue advantage’ to a public official, establishes criminal liability for companies and creates a specific offence penalising corporate management. The Japanese government has introduced a plea bargaining system, which allows individuals and companies to negotiate reduced criminal sentences in exchange for providing information regarding third parties suspected of or charged with enumerated offences, including crimes of corruption.

In Europe, the Italian parliament approved what is known as the ‘bribe destroyer’ law aimed at combating corruption in Italy’s public sector. Among other things, the law increases the powers of prosecutors to investigate allegations of bribery, provides for increased penalties for individuals and increased sanctions for companies convicted for corruption and cases the statute of limitations for corruption cases. In Ukraine, as part of a US$3.9 billion loan programme with the International Monetary Fund aimed at prosecuting corruption
and insulating court decisions from political pressure or bribery, former President Petro Poroshenko announced the launch of a special court to try corruption cases. The United Kingdom’s Serious Fraud Office published guidance on corporate cooperation describing the steps a company can take if it wants to cooperate with prosecutors in an investigation, but the guidance is silent on the specific benefits of cooperation and does not guarantee any leniency for cooperative conduct. In addition, the European Parliament adopted a proposal for a Europe-wide whistle-blower directive aimed at defining the areas of EU law eligible for whistle-blowing and who qualifies for whistle-blower protections.

Despite these significant developments in national legislation around the world, SEC Chair Jay Clayton recently lamented that, although the SEC has ‘vigorously enforced’ the FCPA, it has done so ‘largely alone’ and ‘other countries may be incentivized to play, and . . . are in fact playing, strategies that take advantage of [the SEC’s] laudable efforts’. Similar sentiments may be behind the Foreign Extortion Prevention Act, proposed legislation introduced in the US Congress that would allow the DOJ to indict officials for demanding bribes to fulfil, neglect or violate their official duties.

Separately, on 1 November 2018, then-US Attorney General Jeff Sessions announced a new ‘China Initiative’, to counter perceived national security threats to the United States from China. The China Initiative specifies 10 goals, including identifying FCPA cases involving Chinese companies that compete with American businesses. Prior to the announcement of the China Initiative, China adopted the Law on International Criminal Judicial Assistance, which prohibits individuals and entities in China from assisting foreign countries in criminal investigations absent governmental authorisation.

Notwithstanding Chairman Clayton’s remarks and the DOJ’s China Initiative, senior DOJ officials have continued to affirm their commitment to international cooperation. The significant resolution, announced in March 2019, of the DOJ and SEC enforcement actions against Mobile TeleSystems PJSC, the Russian telecommunications provider, for grand corruption in Uzbekistan, relied on extensive international cooperation between US enforcement agencies and authorities in 13 different European countries, though notably not Russia or Uzbekistan. Likewise, the announcement this past June of a resolution with Technip FMC PLC, a London-headquartered provider of oil and gas technology services, relied on cooperation between the DOJ and Brazilian authorities, along with six European countries. Admittedly, however, both settlements have been years in the making and may not be an indication of the DOJ’s current views on international cooperation. Even so, elsewhere in the world, most notably in the prosecution of bribery throughout Latin America, international cooperation remains a central feature of anti-corruption enforcement.

Given the numerous recent changes in domestic legal regimes, and the uncertainty in international relations, this book and the wealth of learning that it contains from around the world, will help guide practitioners and their clients when navigating the perils of corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
October 2019
I INTRODUCTION

In Argentina, anti-bribery and anti-corruption regulations are included in the Argentine Criminal Code (ACC) under Titles VI (property crimes), XI (public administration crimes) and XII (books and records crimes).

Until 2 March 2018, when Corporate Criminal Liability Law 27,401 (Law 27,401) came into force, there was no corporate criminal liability for acts of corruption.

Before Law 27,401, companies could, however, be held criminally liable and were prosecuted for associated offences such as money laundering and terrorism financing, tax evasion, manipulation of financial markets and misleading offers, insider trading and antitrust offences, which are often related to acts of corruption.

Argentina is a member of several conventions and international treaties aimed at fighting corruption, foreign bribery and associated offences. There have been sustained recent efforts by the Argentine government to update and enforce anti-corruption.

This chapter is intended as a guide to Argentinian regulations on domestic and foreign corruption. In addition, we address the legal framework of associated offences such as financial record-keeping and money laundering, legislative developments and recent cases and investigations. Finally, we have included a summary of the current trends in local anti-corruption matters and our conclusions.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The ACC sanctions any public officer or individual who engages in corrupt practices with public officers. Recently enacted Law 27,401 sets forth penalties applicable to legal entities involved in acts of corruption. Until Law 27,401 was enacted, only individuals involved in corruption offences could be held criminally liable.

According to Law 27,401, legal entities will be held criminally liable for corruption offences, if such offences were committed with their intervention, or in their name, interest or benefit.

The ACC broadly defines ‘public officer’ as any individual who is temporarily or permanently involved in public functions.2

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1 Vanina Caniza, Fernando Goldaracena and Francisco Fernández Rostello are partners, Ayelén León and Cecilia Máspero are associates and Karen Wegbrait is a paralegal at Baker McKenzie.

2 Section 77 ACC broad definition includes individuals who hold legislative, administrative, military or judicial positions of any kind; senior managers, officers and government appointees of any
Argentina

The ACC prohibits public officers from receiving or accepting money or other benefits or gifts, in exchange for doing or refraining from doing something related to their duties (i.e., passive bribery); and from giving or offering, directly or indirectly through an intermediary, any payments or gifts to a public officer (i.e., active bribery). Under the ACC, the mere giving or acceptance of money, gifts or any kind of benefits to obtain any illicit benefit from the public officer would constitute a corruption offence, regardless of whether the behaviour of the public officer was influenced or affected.

Penalties range from between one and six years of imprisonment, and special disqualification for life from exercising public duties in the case of passive bribery.

The ACC describes influence peddling as any request or acceptance of money or any gift, or acceptance of any promise, such as money or gifts, to unlawfully influence a public officer. Influence peddling is punished with imprisonment from one to six years and disqualification for life from exercising public duties.

Both bribery and improper lobbying offences involving members of the judiciary constitute aggravated specific offences, in which case penalties go up to 12 years’ imprisonment.

Gifts or other benefits to public officers are not permitted even if nothing specific is requested in exchange from a public officer. This crime requires the giving of a gift to a public officer (or the acceptance of a gift by a public officer) but does not require a direct connection to an action or omission of the public officer. This offence punishes the mere giving of a gift or benefit to a public officer due to his or her capacity as a public officer. Sanctions range from between a maximum of one year of imprisonment for private citizens and a maximum of two years of imprisonment for a public officer.

In addition to the above, under Law 27,401, individuals convicted for corruption offences would also be exposed to fines from two to five times the improper benefit obtained from the crime.

Decree 1179/2016 (18 November 2016), in turn, provides general guidelines on gifts to public officers. Judges are likely to take these guidelines into consideration when interpreting anti-corruption violations.

An exception is made for courtesy gifts or diplomatic traditions. Under Decree 1179/2016, public officers may accept gifts when their market value does not exceed 6,400 Argentine pesos. If the gift’s value exceeds 6,400 Argentine pesos, prior authorisation should be required and the gift must be registered as an asset of the federal government. Meals for public officers are allowed only if they are ‘modest’ and occasional.

There is no safe harbour for facilitation payments under Argentine law.

Private corruption is not expressly included in the ACC, as it is, for instance, in the UK Bribery Act. However, the ACC contains other offences such as fraudulent administration, concealment, embezzlement, fraud and illegal financial transactions that, while not exactly characterised as private corruption, would make it possible to prosecute individuals engaged in private corruption.
It is worth mentioning that under our criminal law system, unless a specific law sets forth corporate criminal liability, only individuals may be held criminally liable. Criminal liability is based on the principle of culpability, whether by negligence or criminal intent. While all the corruption offences described above require criminal intent, there are certain circumstances in which local courts have construed reckless disregard or gross negligence as constructive criminal intent. In fact, wilful blindness could be considered constructive criminal intent.

The Constitution prohibits retroactive application of criminal laws. Based on this legal principle, legal entities could be held criminally liable for corruption offences only if the offences were perpetrated after 2 March 2018.

Under Law 27,401, legal entities could be sanctioned with the following penalties: (1) fines of up to five times the amount of the improper benefit; (2) suspension of commercial activities; (3) special disqualification from participating in public tenders; (4) cancellation of the companies’ corporate registration with the local registry of commerce; (5) loss or suspension of governmental benefits; and (6) publication of the conviction imposed on the legal entity.

Law 27,401 has also included specific guidelines for judges to define penalties. In particular, Law 27,401 instructs judges to consider whether or not a given company has a strong corporate compliance programme in place, when determining the penalty for a given corporate corruption offence.

Judges will also take into account other anti-corruption regulations such as: (1) the Public Employment Law (Law No. 25,164); (2) the Ethics on Public Office Law (Law No. 25.188); and (3) the Code of Ethics of Public Office (Decree No. 41/99) to analyse the behaviour of public officers.

III ENFORCEMENT: DOMESTIC BRIBERY

Pursuant to the Federal Procedural Criminal Code (FPCC), the federal criminal courts will be in charge of investigations related to (1) violation of federal laws, fraud against any federal governmental assets, and obstructing public officers’ regular activities; (3) crimes occurred within federal government public offices; and (4) foreign bribery.

During the last four years, the Federal Criminal Court has accelerated investigations related to corruption offences. Making headlines in July 2018, a high-profile investigation referred to by local media as ‘The Notebooks case’ involves many high-profile companies and businessmen in the public works sector and public officers of the former Kirchner administration (in office for 12 years until 2015). Around 100 individuals have appeared before federal criminal courts; some of them are currently in prison awaiting trial.

In addition, the former Secretary of Public Works, José López, has recently been sentenced to six years of imprisonment for the offence of unlawful enrichment. Mr López was found in the middle of the night of 14 June 2016 hiding bags of cash (worth around US$9 million) and weapons in a Catholic convent in General Rodríguez, in the province of Buenos Aires. Mr López will serve time in prison and the trial court ordered the seizure of all assets he illegally acquired during his time in office.

In addition to Law 27,401, in recent years, the Argentine Congress and the executive branch have enacted several laws and regulations to speed up corruption-related investigations and provide investigators with additional tools to prosecute acts of corruption. Among other regulations, the current legal framework includes Law 27,304 (i.e., whistle-blowing processes
and whistle-blower protection programme); Laws 27,307 and 27,308 (the reorganisation and simplification of courts); Decree 62/2019 (extinction of property rights on assets obtained from drug trafficking, smuggling, money laundering and corruption); and Decree No. 258/2019 (Anti-Corruption National Plan). The Anti-Corruption Office issued Resolution 27/2018 with guidelines on implementation of corporate compliance programmes.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Under the ACC, any offence committed within Argentine territory or abroad but with effects within Argentine territory could be pursued by local courts. Therefore, both Argentine and foreign individuals or companies could be pursued for the commission of any criminal offence punished under the ACC or specific criminal legislation. Furthermore, both foreign individuals and companies could be criminally liable for corruption offences, if such offences took place after 2 March 2018. As explained in Section II, any corruption wrongdoing committed before 2 March 2018 shall not trigger corporate criminal liability.

Law 27,401 provides that any individual or company with domicile in Argentina involved in foreign bribery, could also be pursued by Argentine courts. Foreign bribery has been included as specific offence under the ACC following the United Nations Convention against Corruption (Law 26,097, enacted on 9 June 2006). By foreign bribery, the ACC intends any offer or delivery of money or any object of value or any other benefit such as gifts, favours or promises, to a foreign public officer either from a foreign country or an international public organisation – either personally or through an intermediary, for the purpose of:

a having such officer perform or refrain from performing his or her duties; or

b unlawfully influence in an economic, financial or commercial transaction.

In both cases, the individuals will be punished with imprisonment from one to six years and special disqualification for life to exercise public duties. As explained in Section II above, the ACC broadly defines public officer, covering not only the local public governmental officers, but also the foreign public officers who were temporarily or permanently involved in the exercise of public functions either locally or abroad.

In addition, Law 27,401 also established corporate criminal liability for foreign bribery.

Law 27,401 incorporated cooperation agreements (such as leniency programmes). Neither criminal nor administrative liabilities will apply if the legal entity spontaneously denounced the offence, had implemented an adequate compliance programme before the offence occurred and returns the illegal benefit obtained from the crime.

Cooperation agreements with the Prosecutor’s Office shall be confidential and meet certain requirements including, without limitation: (1) specific evidence or information to identify the responsible parties or uncover facts, (2) collaboration in the process of asset recovery, (3) payment of the minimum fine, (4) any damages, and (5) disciplinary measures on individuals responsible for the offence.
V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

Under certain Argentine regulations including, without limitation, those set forth below, accurate book and record-keeping, effective internal company controls, periodic financial statements, and external auditing are required.

a The Civil and Commercial Code requires that companies and individuals carrying out commercial activities keep accounting records, including daily operations records, inventories and financial statements and any other corporate or accounting records required by specific (activity related) applicable regulations.

b The General Corporations Law No. 19,550 requires keeping corporate books (actual books vary depending on the type of corporate vehicle, but should include at least shareholders’ or quota holders’ meeting minutes, managers’ meeting minutes and, for some corporations, a share registry book).

c The Financial Administration and Control Systems Law No. 24,156 requires state-owned companies to follow a specific governmental accounting system.

d The Security Markets Law No. 26,831 requires specific information on the financial statements of publicly traded companies (e.g., the equity that has been issued) and that the financial statements are audited by external auditors registered with the Argentine Securities Commission (CNV).

e Regulations issued by the CNV require minimum net worth and minimum liquid assets for certain participants in public offerings (e.g., brokers).

Specific criminal offences related to financial record-keeping are found in the ACC. The ACC establishes imprisonment of between six months and two years for the founder, director, liquidator or trustee of a corporation or cooperative or of any other entity who intentionally publishes, certifies or authorises either a false or incomplete inventory, balance sheet, report account or any other financial records report that can be used to assess the legal entity's financial condition.

Law 27,401 on corporate criminal liability for acts of corruption contains a false books and records offence (false balance sheets and reports with the purpose of concealing a bribery offence). Finally, the CNV, public registries and professional associations may impose sanctions on their members or entities for violating the requirement for accurate record-keeping.

ii Anti-money laundering

The main anti-money laundering (AML) regulations in Argentina are set forth in the ACC and the Money Laundering Law No. 25,246, as amended, and its Regulatory Decree No. 290/2007 (jointly, the AML Law), and the specific AML regulations issued for individuals or legal entities performing specific activities.

The administrative criminal regime established by the AML Law and the specific AML regulations is only enforceable against individuals and legal entities that directly conduct business in Argentina and are considered ‘obliged persons’ by these regulations.

Money laundering is defined by the ACC as the conversion, transfer, administration, sale, encumbrance over or any other use of money or other assets obtained through a criminal
activity with an aggregate value exceeding 300,000 Argentine pesos, either in a single act or through the repetition of different related acts, if the possible consequence of such conduct is to grant the money or assets the appearance of having been obtained by licit means.

Concealment is defined as providing assistance to a third party who has committed a crime, including hiding, alteration and safeguard of the proceeds of the crime and acquiring or concealing money or other assets obtained by means of a crime.

In addition, the ACC punishes anyone who receives money or other assets from a criminal source, with the purpose of applying the money or assets to a transaction, making them appearing to be from a lawful source.

Finally, the ACC sets forth corporate criminal liability if a money laundering criminal offence is committed in the name of, for the benefit of, or with the involvement of the company.

The ACC defines terrorism financing as the direct or indirect collection or provision of funds or assets with the intention to use them, or with the knowledge that they will be used: (1) to finance the commission of a crime with the purpose of terrorising the population or to define or condition the actions of the national public authorities, foreign governments or agents of an international organisation; (2) by an organisation that commits or attempts to commit a crime with the purpose established in (1); or (3) by any individual who commits, attempts to commit or participates in any way in the commission of a crime with the purpose established in (1).

The Argentine Financial Information Unit (FIU) is the regulatory authority for money laundering control and monitoring, with a special focus on the prevention of money laundering activities related to drug trafficking, terrorism financing, weapon smuggling, child prostitution and pornography, corruption and racially or politically motivated crimes. It has passed several regulations applicable to specific types of individuals or entities.

The FIU is also empowered to: (1) request reports, documents, background information and any other elements it deems useful for the fulfilment of its duties from any public agency; (2) request through the Attorney General's Office the judicial suspension of any transaction or act previously reported by certain individuals or legal entities (obliged persons) or any other related act; (3) request through the Attorney General's Office judicial orders to search and seize documentation or elements that may be useful for a given investigation; and (4) apply sanctions to obliged persons.

The AML Law requires obliged persons to, among others things, conduct due diligence investigations and background checks on their customers (know-your-customer (KYC) obligations), report on a regular basis to the FIU transactions above certain thresholds, and report any suspicious or unusual operations that come to their attention regardless of the sums involved in the transactions.

Among others, the following are considered obliged persons: financial entities under the control of the Argentine Central Bank; companies issuing traveller's checks or entities within the credit card or prepaid card system or that issue credit or prepaid cards; brokers, companies managing mutual investment funds and any natural or legal entity under the control of the CNV; and insurance companies.

The AML Law and Regulations passed by the FIU set forth specific guidelines and procedures that obliged persons must take into account to identify suspicious transactions and to prevent money laundering activities and terrorism financing, including reporting to the FIU any unusual transactions.
iii Administrative AML sanctions

Failure to comply with the requirements set forth in the AML Law and FIU regulations may be sanctioned with a fine of one to 10 times the total value of the property or transaction, provided that the wrongdoing does not constitute a more serious crime. The same penalty shall apply to the individual acting as a representative of the entity. When the real value of the property cannot be determined, fines will range from 10,000 to 100,000 Argentine pesos.

Additionally, a fine ranging from between five and 20 times the value of the assets shall be imposed on the legal entity that collected or provided goods or money, whatever their value, with the knowledge that they were going to be used by a member of an illicit terrorist association. When the act was committed as a result of recklessness or gross negligence of the legal entity, the fine shall be between 20 and 60 per cent of the value of the assets involved in the crime.

When the legal entity reveals confidential information that should only be available to the FIU for its analysis, it will be subject to a fine ranging from 50,000 to 500,000 Argentine pesos.

iv Criminal sanctions

For money laundering, penalties in the ACC include imprisonment from two to 10 years and fines from two to 10 times the value of the money or assets laundered. If the amount laundered does not exceed the minimum amount of 300,000 Argentine pesos, the wrongdoer shall be punished with imprisonment from six months to three years. The minimum punishment shall be of four years of imprisonment if the wrongdoer carries out similar acts on a regular basis or as a member of an association or organisation aimed at committing acts of similar nature.

In the case of concealment, criminal penalties shall be of imprisonment from six months to three years. If the money laundering or concealment was performed by a public officer while exercising his or her duties, he or she may additionally be subject to disqualification for three to 10 years. The same penalty shall apply to any person who acted in the practice of a profession or trade requiring a special authorisation.

Courts may seize any laundered assets.

For terrorism financing crimes, the penalties in the ACC include imprisonment from five to 15 years and fines from two to 10 times the amount involved in the perpetuation of the crime.

These penalties will be applied regardless of the occurrence of the crime to which the financing was destined, or even if such crime is committed, but the assets or funds recollected to finance the crime were finally not used for its commission. They will also be applied even when the criminal offence to be financed is out of the scope of the ACC, or when the organisation or the individual involved is outside Argentina, provided the crime to be committed is also considered as such in the country in which it took place.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The OECD Anti-Bribery Convention entered into force in 1990. Argentina has been a member since 2000, along with 43 other countries. Every year, the OECD Working Group releases a study updated with prominent cases about the enforcement of anti-bribery laws. Some of the cases mentioned in the 2019 study of the OECD Working Group are: Odebrecht SA (Brazil,
Argentina

Central and Latin America and Africa), **Biomet** (Argentina, Brazil, China and Mexico), **Siemens AG** (Asia, Africa, Europe, the Middle East and the Americas), **Embraer** (Brazil) and **Asfaltos** (Chile). All these cases have been settled with non-trial resolutions.

In the same way, Argentina submitted a report to the OECD Working Group on 26 June 2019 implementing the recommendations of the OECD Anti-Bribery Convention. The report lists cases of foreign bribery related to enforcement actions providing information on all ongoing investigations and prosecutions of bribery cases. Some include tax collection (Guatemala), oil-sector construction (Brazil), electricity transmission (Brazil), mapping system (Panama), grain export (Venezuela), oil refinery (Brazil), military horses (Bolivia), Consorcio Camisea (Peru), Contreras Hermanos (Brazil), Galileo Energy (Ecuador), Isolux (Bolivia), Tenaris (Brazil) and Unetel SA (El Salvador).

**VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS**

Argentina is signatory member of:

a. the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances since 1992;
b. the United Nations Convention Against Transnational Organized Crime since 2006;
c. the United Nations Convention Against Corruption since 1997;
d. the International Convention for the Suppression of the Financing of Terrorism since 2005;
e. the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention since 2000;
f. the Convention on the Fight against the Bribery of Foreign Public Officials in International Commercial Transactions since 2000;
g. the Inter-American Convention Against Corruption since 1997;
h. Inter-American Convention against Terrorism since 2005;
i. Egmonts Group of Financial Intelligence Units since 2003 (though FIU);
j. International Financial Action Task Force (FATF) since 2000; and

**VIII LEGISLATIVE DEVELOPMENTS**

Relevant actors within the public sector, among others, the Anti-Corruption Office and the Ministry of Justice, have focused on criminal enforcement related initiatives. As a result, a new Procedural Criminal Code has been approved. In this new legislative regulation, prosecutors will have a strong leadership in criminal investigations and judges will rule based on the evidence obtained by prosecutors. The intention is to speed up corruption investigations by providing improved rules and procedural tools. The implementation of the new Procedural Criminal Code has begun in the provinces of Salta and Jujuy. Implementation will continue throughout Argentina during the coming year.

At the time of writing, a bill intended to amend the ACC is being discussed in Congress. If approved, it will aggravate penalties for corruption offences by, for example, eliminating the possibility of probation. This bill also contains provisions related to commercial bribery.

As regards money laundering, following the guidelines issued by the International Financial Action Task Force (FATF), the FIU is in the process of amending the regulations...
for obliged persons, who will be granted a larger margin of discretion to determine which clients or situations should be considered as high risk, based on an individual risk analysis independently developed by each obliged person.

The following obliged persons are already required to adopt a risk-based analysis approach: (1) financial entities under the control of the Argentine Central Bank; (2) companies issuing travellers’ checks or entities within the credit card or prepaid card system or that issue credit or prepaid cards; (3) brokers, companies managing mutual investment funds and any individual or legal entity under the control of the CNV; and (4) insurance companies.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Law 27,304 (Whistle-Blower Protection) allows the reduction of penalties for defendants who give information that helps in the investigation of crimes such as drug trafficking, human trafficking, corruption, bribery, etc. In a famous case called Ciccone (where former Vice-President Amado Boudou was convicted), defendant Nuñez Carmona cooperated with the authorities providing information to reduce his penalty.

Corruption crimes will be prosecuted ex officio, that is, they will not be driven by, or depend on actions from, private plaintiffs.

Even though agreements based on a guilty plea are not contemplated under local laws, an abbreviated judgment procedure is permitted when the penalty does not exceed imprisonment of six years and the defendant has expressly agreed to plead guilty at the beginning of the oral stage of the trial.

In certain cases, the ACC allows the suspension of trial (referred to as probation). Probation will impose on the individual subject to probation the obligation to conduct social or charity works.

Personal Data Protection Law 25,326 prohibits the transfer of personal data of any kind to other countries or international agencies that do not provide adequate levels of data protection. This is especially important when designing the operation of whistle-blower hotlines, and planning and conducting internal investigations. In general terms, this prohibition will not operate: (1) in international judicial collaboration; (2) when the transfer had been agreed within the framework of international treaties to which Argentina is party; (3) when the transfer is aimed at international cooperation between intelligence agencies for the fight against organised crime, terrorism and drug trafficking; (4) when the transfer is performed with the express informed consent of the data owner; (5) when the parties execute a data transfer agreement in accordance with the regulations of the local authority; or (6) when the company involved has established internal adequate protection to the data following local requirements.

Companies that are issuers in the local exchange market are required to have a whistle-blower hotline for employees to report any compliance breaches. The AML Law also contains provisions regarding the reduction of penalties for whistle-blowers.

Companies undergoing judicial investigations for corruption may be barred from participating in public tenders or from executing contracts with the national government. Contracts with the national government may be terminated by the latter if a company is convicted for a corruption offence (Decree 1023/2001).
X COMPLIANCE

The Argentine Anti-Corruption Office is in charge of developing and coordinating programmes to prevent corruption. Enforcement of anti-corruption regulations is mainly within the orbit of the federal criminal courts. Therefore, federal judges and prosecutors will be in charge of deciding whether or not a given company under investigation has adopted, controlled and supervised an adequate compliance programme (taking into consideration, among other things, the type of activity of each company, the company’s size and its economic capacity).

Law 27,401 sets forth two sets of elements that any compliance programme should contain: (1) mandatory elements and (2) recommended elements.

Mandatory elements are:

a code of ethics or code of conduct;
b specific policies or procedures to prevent criminal offences in public tenders, administrative agreements or in any other dealings with the public administration; and
c periodic compliance training.

Recommended elements include, without limitation:

a periodic risk analysis and subsequent review of the compliance programme;
b a clear anti-corruption tone set by those who manage the company;
c whistle-blower channels to report misconduct or infractions;
d a whistle-blower protection policy;
e an internal investigation system that preserves the rights of the individuals under investigation and imposes effective sanctions;
f third-party due diligence policies;
g M&A due diligence policies; and
h the appointment of a compliance officer.

Many of the elements above are similar to the obligations for obliged subjects under the AML Law.

Due to the very recent enactment of Law 27,401 we have not yet seen any specific precedents and, therefore, it is difficult to anticipate how the judges will measure the existence of an adequate compliance programme and, most importantly, what kind of specific preventive measures would be required by courts to decide what sanctions to apply.

XI OUTLOOK AND CONCLUSIONS

Under the current administration, the fight against corruption and money laundering crimes has been very active. Many individuals (company executives and former public officers) have been prosecuted and some of them are now in jail while others are still under investigation.

Regarding money laundering, Argentina is adapting its regulations to comply with the new approach established by the FATF and is actively participating in international associations regarding this matter.
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 adopting other United Nations conventions against corruption, money laundering and organised criminal activity; and
d streamlining and enhancing inter-agency investigation and prosecution procedures for foreign bribery and corruption matters.
e enacting enhanced whistle-blower protection laws in 2019.

Australia is an active participant in the Asia-Pacific region, encouraging and funding anti-corruption initiatives. Despite these initiatives, however, there are lingering concerns

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.
that Australia remains a country that reacts to pressure on its foreign bribery record rather than being proactive. Criticism remains that Australia’s record is patchy and promising reforms get lost without a real political will to enact them.

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).

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:

1. Establishing an interagency National Fraud and Anti-Corruption Centre (FAC) 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;
2. Closer involvement of the AFP Asset Confiscation Taskforce in foreign bribery investigations to target proceeds of crime;
3. A restructuring of the Office of the Commonwealth Director of Public Prosecutions (CDPP) to allocate more resources to prosecute foreign bribery offences;
4. Improved public sector whistle-blower protections; and
5. 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 OECD 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:

1. Focusing on money laundering risks in Australia’s real estate sector;
2. Improving private sector whistle-blower protections;
3. Ensuring adequate resources are allocated to the AFP and the CDPP to investigate and enforce Australia’s foreign bribery laws;
4. Proactively charging companies with criminal offences for foreign bribery, false accounting, money laundering and tax offences; and
5. Encouraging small to medium-sized businesses to develop adequate internal controls and robust compliance programmes to prevent and detect foreign bribery.

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.

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.

In December 2014, the Attorney General’s Department published an online training module on foreign bribery, at www.agd.gov.au.

See https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf.
Throughout late 2017 to 2019, there have been significant proposals for legislative reform in the area of foreign bribery in Australia, yet only one of these reforms has come to fruition. 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, yet the underlying proposed DPA scheme has disappeared;\(^\text{14}\)

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, again these reforms have yet to be enacted;\(^\text{15}\)

c
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’),\(^\text{16}\) and yet again the Report and its recommendations have not been enacted;

d
in early 2019, the Australian government, then a minority government, reluctantly agreed to consider a Commonwealth Integrity Commission to address widespread concern that corruption was not being adequately addressed at the Commonwealth level, only to lose interest in the idea after the May 2019 election when it was returned (albeit with a modest working majority); and

e
commencing 1 July 2019, Australia enacted substantial reforms to its private-sector whistle-blower protection laws, set out in the Corporations Act 2001 (Cth).\(^\text{17}\)

Regrettably because of a lack of policy will or direction and a singular focus on terrorism, national security and immigration, these reforms appear to have languished. It is hoped the Australian government will regain a proactive focus on foreign bribery and implement 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.

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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 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.

\(^{18}\) 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).
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.\(^{27}\)

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 Bill\(^{28}\) 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 2018, the Australian parliament enacted the Foreign Influence Transparency Scheme Act 2018 (Cth).\(^{31}\) The Foreign Influence Transparency 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 or indeed from a property developer.\(^{33}\)

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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).
28 Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth).
29 This Bill has not passed the Senate.
31 This is subject to amendment by the Foreign Influence Transparency Scheme Amendment Bill 2019, which changes what constitutes a ‘communication activity’ under the Act to disclose the role of a foreign principal and other procedural matters.
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).
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

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

In early 2019, the Australian government proposed to establish a Commonwealth Integrity Commission to address increasing calls for there to be a formal Commonwealth anti-corruption commission. The model proposed by the government was widely criticised as being too weak and leaving many individuals, including politicians and their staff, outside

34 See Sections 249A to 249J, Crimes Act 1900 (NSW).
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.
the scope of the proposed Commission. At present, government interest in the proposal appears minimal. Both major parties seem to have little real interest in establishing a truly independent Commonwealth body to investigate systemic or serious corrupt conduct. This hardly reflects well on the principles of integrity, transparency and accountability.

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.

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 Australia\(^{40}\) 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 benefitting 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.\(^{42}\) After successful appeals, each of the defendants were acquitted. It remains difficult to prosecute high-profile individuals for corrupt conduct in Australia.\(^{43}\)

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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.
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 in 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. For each criminal offence, the Criminal Code requires a prosecutor to establish a physical element (action or conduct) and a fault element (intention, knowledge, recklessness or negligence) for an offence, otherwise a default physical and fault element will apply.

The following statutes create potential secondary liability:

a dealing in proceeds or instruments of crime is an offence giving rise to proceedings under the Proceeds of Crime Act 2002 (Cth);
b obstruction of justice under the Crimes Act 1914 (Cth);
c 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);
d 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
e general Commonwealth and state criminal law for domestic criminal offences.

ii 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.

iii 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’. 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:

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. 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 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’. 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

44 Section 70.4 of the Criminal Code.
45 Section 70.4(1) of the Criminal Code.
46 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’.
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, many 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) (formerly Leighton Holdings, which has long been subject to a foreign bribery investigation by the AFP) 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 attributes liability to 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. A prosecutor must establish that at the time the relevant act occurred, an officer or officers of the corporation whose knowledge may be attributed 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 attribution of knowledge of individual officers to a corporation. Under the Criminal Code, physical elements are attributed to a company in circumstances in which an employee, agent or officer of a company commits the physical element when acting within the actual or apparent scope of his or her employment or

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49 In *Krakowski v. Eurolynx 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.
Fault elements are attributed to a company that ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence’. 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.

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. establish 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 of limited application; and
e. establish criminal liability 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. There have been no prosecutions for offences under these provisions in Australia.

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 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. 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);
b. the associate acts for the profit or gain of the company; and
c. 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 or an 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 hoped that the guidance will reflect the UK guidance under the Bribery Act or be otherwise included as factors the CDPP takes into account under the Commonwealth

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50 Sections 12.1 to 12.6, Criminal Code.
51 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.
52 Section 12.3(3) of the Criminal Code.
Prosecution Policy (and the CDPP Best Practice Guidance on Corporate Self-Reporting)\textsuperscript{53} in determining whether to commence or continue a prosecution. The effect of this proposed offence cannot be underestimated in Australia. It will have 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.

\textbf{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:

\begin{itemize}
  \item[a] 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;
  \item[b] prosecutions by ASIC against individuals and corporations for 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
  \item[c] 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).
\end{itemize}

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).\textsuperscript{54} 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 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.\textsuperscript{55} Any foreign bribery or corruption is likely to be inconsistent with a director’s common law and statutory duties.\textsuperscript{56}

The state criminal law can also be used to prosecute individuals, particularly where corporate records are falsified. In \textit{The Queen v. Ellery},\textsuperscript{57} the former chief financial officer of Securency (as part of the now concluded 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.

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\textbf{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. ASIC will focus on civil (and to a lesser extent, criminal) investigations and prosecutions, working collaboratively with the AFP.\textsuperscript{58} The ACIC is a statutory authority with secret, inquisitorial and compulsive powers to combat serious and organised crime (which includes conduct amounting to


\textsuperscript{56} \textit{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 \textit{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 funneling funds to the former Iraq government in breach of UN sanctions) and in the sentencing judgment, \textit{ASIC v. Flugge} [2017] VSC 117, disqualified him from managing a company for five years and fined him A$50,000.

\textsuperscript{57} \textit{The Queen v. David John Ellery} [2012] VSC 349 at [27] to [29].

\textsuperscript{58} See the memorandum of understanding between the AFP and ASIC on collaborative working arrangements at https://download.asic.gov.au/media/1310383/ASIC-MOU-Oct%202013.pdf.
bribery or corrupting a foreign public official). The AFP and the CDPP can often both 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 compulsory 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 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 Securency banknote printing bribery prosecution.

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

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59 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)).

60 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 AFP and 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 created a substantial and incurable forensic disadvantage and prejudice to the fair trials of the accuseds with the Court permanently staying the prosecutions.


62 Annexure A to the ‘Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process.'
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.63 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 former officers of Leighton Holdings were charged after a long-standing investigation into the conduct of the company in relation to purported centralised steel procurement contracts. Peter Gregg, a former Leighton chief financial officer, was 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 was also been charged in relation to his alleged role in aiding and abetting one of the alleged contraventions of Mr Gregg. In December 2018, a district court jury convicted Mr Gregg of the offences as alleged. In July 2019, Mr Gregg was sentenced to a 24-month intensive corrections order and 12 months of home detention (to be served concurrently), so avoiding imprisonment.

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. Each individual was convicted and sentenced, after appeals, to up to three years’ imprisonment and fines of $250,000.64 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.65 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. The prosecution continues.

In December 2018, the Securency banknote printing bribery and corruption cases finally concluded and Australia-wide non-publication or suppression orders were lifted. As a result of the High Court ruling permanently staying the prosecutions against four individuals and the last remaining individual pleading guilty, the various judgments and court rulings became public. Between 2011 and 2018, the two then subsidiaries of the Reserve Bank of Australia engaged agents in Indonesia, Malaysia, Vietnam and Nepal to help secure valuable bank note printing contracts and in the process, paid bribes to public officials in those countries. The companies pleaded guilty to criminal conduct together with five individuals who received criminal convictions, but upon sentencing they were released as a result of their sentences of imprisonment being suspended. While the Reserve Bank of Australia was at pains to point out that the boards of its two subsidiaries had no involvement in or knowledge of the offending conduct and the AFP regarded the case as a singular success, the Australian courts were less than impressed. While the High Court of Australia regarded the AFP’s and ACIC’s conduct (and indirectly the independent CDPP) as egregious and illegal (in the manner the pre-prosecution investigation and compulsory interviews were conducted) in staying four prosecutions, the trial judge managing the prosecutions in Victoria made some interesting observations. First, the trial judge had some reservations about the accuracy of the alleged fact (agreed to between the companies and the CDPP) that the boards of directors (of the two Reserve Bank subsidiary entities) had no knowledge of the conduct, contrary to the public statements made by the Reserve Bank. Second, the trial judge gave credit to the two whistle-blowers, who, throughout the saga, attempted to report their concerns and misgivings and who were met with a culture of hostility and resistance. The Court said that each whistle-blower had shown tremendous courage in speaking out with the consequence that their careers had suffered because ‘of their attempts to do the right thing’.

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

\[a\] ASIC, which is an independent government body that regulates Australia’s corporate markets and financial services to protect investors and consumers;

\[b\] the ATO, which ensures proper compliance with Australia’s Commonwealth revenue laws;

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67 CDPP v. Note Printing Australia Pty Ltd and Securency International Pty Ltd [2012] VSC 302 that were fined a total amount of A$480,000 reduced on the undertaking to provide future cooperation.
71 ibid at [14] to [16].
c 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

d AUSTRAC, which works with Australian industries and businesses to ensure compliance with anti-money laundering and counterterrorism financing laws.72

x 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.73 Second, if a payment is a facilitation payment.74 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.75 There is no judicial authority in Australia considering these defences.

xi 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.76

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)77 and the Prosecution Policy;

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72 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.

73 Section 70.3, Criminal Code.

74 Section 70.4, Criminal Code.

75 Section 12.3(3), Criminal Code.

76 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.

77 Sections 9(6), 9(6B) and 9(6D) of the Director of Public Prosecutions Act 1983 (Cth).
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 induced 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 material discount on sentence upon any conviction being recorded by a court.78

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. In December 2017, the CDPP published its guidance on corporate self-reporting that sets out how the director will exercise a statutory discretion in terms of whether to offer to negotiate a DPA and the factors to be considered in that process.

Plea-bargaining

There are no procedures in Australia similar to the formal 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.

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,79 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.

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78 Section 21E of the Crimes Act 1914 (Cth).
79 [2014] HCA 2 at [39].
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.\textsuperscript{80} 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,\textsuperscript{81} applying to a range of financial crime offences. In December 2017, the Attorney General published a model DPA scheme. Key features of the scheme included the following:

- it will apply to nominated serious Commonwealth criminal offences, with these to be assessed after two years;\textsuperscript{82}
- 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);
- 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;
- 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;
- monitors might be appointed to provide independent oversight of a DPA; and
- 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

\textsuperscript{80} 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. In Commonwealth of Australia, Director, Fair Work Building Inspectore v. CFMEU, the High Court of Australia again made it clear that the principles set out in Barbaro continue to apply and that, in a criminal prosecution (in contrast to a civil penalty prosecution), a court should have no regard to penalties agreed between the parties.

\textsuperscript{81} Courts and Crime Act 2013, Schedule 17.

\textsuperscript{82} 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.
(but not guaranteed) certainty in how a matter might progress. However, in two recent high-profile cases in the United Kingdom, DPAs were accepted by the SFO and the courts (with findings of bribery and corruption), yet later courts, in assessing individual liability cases, threw them out (based on the same facts) as failing to justify a case to be answered by the individuals. This willingness of companies to admit to allegations of criminal conduct that cannot later be substantiated against individuals may call into question the nature and success of DPAs. While a DPA might be financially attractive to a company and the correct decision to maintain its reputation and shareholder value, individuals allegedly involved in unlawful conduct often have a very different view in seeking to defend their own liberty and in doing so, putting the Crown to proof in lengthy and complex cases.

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rosecution 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.83 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.84

83 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. Horty 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.

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.

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.

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85 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 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.86

As a result of the Royal Commission, in February 2019, ASIC published an Update on Implementation of Royal Commission Recommendations.87 As part of the update and in response to widespread criticism that ASIC had failed to be a proactive conduct regulator and was too prepared to negotiate settlements with companies, it announced its approach going forward would reflect the philosophy of a ‘why not litigate?’ approach to investigations and enforcement. This resulted in the creation of a newly focused ASIC Office of Enforcement and a clearer divide between the regulatory and the investigative and litigation functions of ASIC.

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 false88 or reckless89 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’90 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

88 Section 490.1, Criminal Code.
89 Section 490.2, Criminal Code.
90 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.
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

Certain factual threshold criteria exist.91

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.

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:

a the Criminal Code;

b the Corporations Act (see Sections 286, 1307 and 1309);

c the Australian Securities and Investment Commission Act 2001 (Cth);

d the Australian Securities Exchange (ASX) Listing Rules (the Listing Rules); and

e state criminal law legislation.

91 Section 490.1(2), Criminal Code.
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. 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.

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.

iii Prosecution under financial record-keeping legislation

There is the potential for prosecutions for foreign bribery or other commercial fraud prosecutions 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.

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.

The Income Tax Assessment Act 1997 (Cth) (ITAA) denies taxpayers a deduction for bribes paid to domestic or foreign public officials. A facilitation payment made to a

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92 Listing Rule 3.1, and on continuous disclosure obligations, see Grant-Taylor v. Babcock & Brown Ltd (in liquidation) [2016] FCAFC 60 at [95].
93 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.
94 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).
95 ‘ATO Bribes and facilitation payments: A guide to managing your tax obligations’.
96 See Section 26.52 (foreign public officials) and 26.53 (public officials).
foreign public official may be tax deductible. The ITAA requires that records be kept for all transactions and that those records are adequate to explain the transactions. 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. These laws cover financial services, gambling services and bullion dealing, and other professionals or businesses that provide ‘designated services’ (described as ‘reporting entities’). 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).

During 2017, amendments came into effect to the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1). 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:

- 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;
- 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;
- 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
- 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)

97 Section 26.52(4) and (5).
98 Section 262A of the ITAA.
99 Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and the AML/CTF Rules.
100 Section 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
101 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.
103 Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Tabcorp Limited [2017] FCA 1296.
and the Commonwealth Bank of Australia (for an agreed penalty of AU$700 million),\textsuperscript{104} 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).

\textbf{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.

\textbf{viii} Sanctions for money laundering violations

Penalties for money laundering offences range, per offence, from fines of 10 penalty units (A$1,700) and six months’ imprisonment to fines of 1,500 penalty units (A$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.

\textbf{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.\textsuperscript{105} Serious penalties can be imposed for the non-reporting of suspicious transactions.

\section{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, Securrency International Pty Ltd (Securrency),\textsuperscript{106} a provider of polymer banknotes, and Note Printing Australia Pty Ltd (NPA),\textsuperscript{107} a printer of

\textsuperscript{104} Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Commonwealth Bank of Australia Limited [2018] FCA 930.

\textsuperscript{105} Section 41 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).

\textsuperscript{106} Securrency 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 Securrency to Innovia and is no longer a shareholder in Securrency.

\textsuperscript{107} NPA is wholly owned by the RBA.
polymer banknotes, and several senior executives paid or conspired to have paid bribes through local intermediaries to foreign public officials in Indonesia, Malaysia, Vietnam and Nepal to secure valuable polymer banknote printing contracts. The AFP charged the companies and various individuals with foreign bribery, conspiracy and false accounting offences as part of the Securency investigation. The investigation and prosecutions concluded in December 2018 with a number of guilty pleas and convictions recorded, although no individual served a term of imprisonment (see Section IX.iv above).

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'.

In the last case in December 2018, CDPP v. Boillot, the Court said the following:

Although there is no evidence before the court as to the prevalence of foreign bribery offences, general deterrence and denunciation are usually very important sentencing considerations in all cases involving 'white collar' crime. Such offences are usually hard to detect. They have often been committed by persons who had been regarded as being of good character and reputation. Because such offenders generally have good prospects of rehabilitation, specific deterrence is often not a very relevant consideration. In such cases, courts generally place great weight on the need to deter others from engaging in similar conduct.

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.

109 See footnote 68.
Since then, Australia has become a party to:

a. 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;¹¹¹ 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.¹¹² 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’. In July 2019, al-Jarah, described by the SFO as a former partner of Unaoil in Iraq, pleaded guilty to five charges that related to conduct between 2005 and 2013 concerning the award of contracts to supply and install single-point moorings and oil pipelines in southern Iraq. Three other individuals have pleaded not guilty and will face trial in 2020.¹¹³ In addition, it was reported in the media in March 2019 that CIMIC had entered into an ‘investigation agreement’ with the US Department of Justice following a long-running investigation by the AFP into allegations that the construction group formerly known as Leighton Holdings paid bribes to win contracts. The AFP has been investigating former senior staff over allegations the company’s subsidiaries paid bribes in the Middle East and Asia before 2012 but has not prosecuted any former or existing employees. It remains to be seen whether these ongoing investigations in the United States, the United Kingdom and Australia will ultimately result in any charges in Australia.

¹¹¹ See www.ag.gov.au for a discussion about Australia’s international anti-corruption obligations.
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.114

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 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.

In July 2019, substantial reforms to private sector whistle-blower protections became law. It is hoped that, despite the apparent lack of political will in the Australian government, 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.115 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.116

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

114 The Fraud Control Policy exists to ensure non-corporate Commonwealth entities discharge their responsibilities under the Public Governance, Performance and Accountability Act 2013 (Cth).
115 AWB Limited v. Cole (No. 5) [2006] FCA 1234 at 211.
116 See Mann v. Carnell [1999] HCA 66; 201 CLR 1; 168 ALR 86; 74 ALJR 378.
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:

\[117\] 

\(a\) 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;
\(f\) keeping personal information secure; and
\(g\) 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.118 Other Commonwealth and state statutes create specific regimes for non-disclosure in certain circumstances.

There are currently some high-profile investigations and prosecutions in Australia. The most prominent is that of a lawyer Bernard Collaery and an individual known as Witness K. In conduct seemingly at odds with the integrity expected of a developed nation, while Australia was seeking to negotiate a treaty with the fledgling government of Timor-Leste for access to underwater oil and gas reserves, the Australian government used ASIS (the Australian Secret Intelligence Service) to bug the offices of the Timor-Leste government to learn its confidential views during the treaty negotiations. A treaty was struck that was incredibly beneficial to Australia and certain Australian public companies. Australia’s actions would have been buried in perpetuity, had it not been for one ASIS operative, known only as Witness K, who approached the intelligence watchdog, the Inspector General of Intelligence and Security (IGIS) and obtained permission to talk to an approved lawyer, Bernard Collaery, a barrister and one-time attorney general for the ACT. Collaery helped the Timor-Leste government build a case against Australia at The Hague, alleging the bugging had rendered the treaty void. The revelations were splashed across mainstream media, first through The Australian (owned by News Corp), then the ABC. The conduct and subsequent refusal by all governments in Australia to address the issue has been startling. After many years, Witness K and Collaery were prosecuted under the Crimes Act for breaching secrecy laws, with Witness K agreeing to plead guilty under Section 39 of the Intelligence Services Act 2001 (Cth) for communicating secret information in the course of his duties as an ASIS agent (with a potential sentence of up to 10 years’ imprisonment).119 Collaery waived his rights to a committal and his trial will continue, while the Australian government is attempting to smother any publication of the trial or its own conduct on the grounds of national security. Whether there is any real national security concern or whether it is rather old-fashioned embarrassment at officials having been caught acting, as it might be alleged, illegally, remains to be seen.

This paranoia by the Australian government against transparency reared its head most dramatically during 2019 when after the recent federal election in May 2019, the AFP enforced search warrants against a Canberra-based News Corp journalist (for publishing details of an alleged departmental plan to allow the government to spy on Australians in the name of national security) and the public Australian Broadcasting Commission (ABC) (for publishing a story known as The Afghan Files, which was based on leaked Department of Defence documents containing allegations of unlawful killings and misconduct by Australian soldiers in Afghanistan). The ABC has moved to challenge the actions taken by the AFP.120 As a result of these raids, the Australian media, to the left and the right, has been up in arms about the intrusive use of search warrants and the targeting of journalists and whistle-blowers. The Australian government, while promoting whistle-blower protections in the private sector, seems rather less keen to protect whistle-blowers when its own conduct comes under close scrutiny. And in a twist of irony, while The Australian had been championing the war

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118 Section 70 Crimes Act 1914 (Cth) with the penalty fixed at two years’ imprisonment.
120 See Australian Broadcasting Commission v. Kane [2019] FCA 1312 as an example.
on terror, security issues and increasing intrusive laws affecting individuals in Australia, it suddenly changed its position when its own journalists became the target of a government attempt to find and prosecute whistle-blowers disclosing government ineptitude or worse, illegal conduct. It remains to be seen how these matters will develop over time but it is a depressing reminder to those who learn of misconduct that those who blow the whistle are the ones who pay the price.

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 limited to certain types of offences and officials.121 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.122

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.123 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:

a that ASIC establish an 'Office of the Whistle-Blower';
b that existing laws should be extended to cover anonymous disclosures;
c that the good-faith requirement for protected disclosures under the Corporations Act 2001 (Cth) be repealed; and
d 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

121 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.
122 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.
123 Section 6.
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.

As of 1 July 2019, the Australian government enacted enhanced private-sector whistle-blower protections. These new laws 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 contractors and 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 and protections to maintain the secrecy of the informant’s identity and criminal sanctions if the whistle-blower’s identity is disclosed;
f. removal of the threshold criteria that a whistle-blower has to act in good faith and rather, simply that the whistle-blower had reasonable grounds to suspect that a contravention of a law had or might occur;
g. enhanced provisions for compensation and victimisation remedies to be available to whistle-blowers, supervised by a court; and
h. the requirement for a public, listed entity and a ‘large proprietary company’ to have in place a whistle-blower policy consistent with the new laws.

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.125

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 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

124 Defined in Section 45A Corporations Act 2001 (Cth) as a company (and controlled entities) that in a financial year satisfies two of the following – first, has consolidated gross operating revenue for a financial year of A$10 million or more; second, the value of consolidated gross assets at the end of the financial year is A$5 million or more; and third, has 50 or more employees at the end of the financial year.
125 Mutual Assistance in Criminal Matters Act 1987 (Cth).
126 An APP entity can be an agency or organisation that as part of its business collects or handles personal information concerning individuals.
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.  

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.


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127 Section 2A(f) Privacy Act 1988 (Cth).
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. Initiatives for reform significantly increased over late 2017 and throughout 2018 but seems to have dropped off in 2019. 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 or intelligence agencies involved in the never-ending ‘war on terror’, 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 domestic and foreign bribery. These include:

1. Implementation of the Foreign Bribery Report on Australia’s foreign bribery laws;
2. Ongoing material resourcing for the AFP to investigate, and the CDPP to prosecute, serious financial crime, including foreign bribery;
3. Enacting the proposed reforms to Section 70 of the Criminal Code, including the introduction of the corporate offence of failing to prevent foreign bribery;
4. Abolishing the facilitation payment defence in Section 70.4 of the Criminal Code;
5. Introducing the model Commonwealth DPA scheme for serious Commonwealth financial offences;
6. 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; and
7. From a domestic perspective, the establishment of a robust, independent anti-corruption commission to cover the entirety of the Commonwealth Government, its direct and indirect agencies and any entity or person who uses or spends Commonwealth money (provided in any manner, grant, donation or funding arrangement).

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.
I INTRODUCTION

The awareness of the importance of a culture of compliance in the corporate environment is recent in Brazil and has reflected significant changes in the management of companies. The global trend towards fighting corruption, recent events in the country and the promulgation of legislation dedicated to this issue have made Brazilian companies turn their attention to the need to ensure conformity and integrity while developing their activities.

This culture – already mature in foreign companies, multinationals or those that operate abroad, subject to legislation from other jurisdictions that already foresaw harsh sanctions against corrupt practices in the corporate environment – has evolved considerably in the Brazilian business environment, but there is still a long way to go. Despite the robust normative apparatus, besides the intrinsic ethical imperatives, it is still common to question the validity of creating new internal processes and allocate financial and human resources in developing compliance measures in companies.

In 2013, Brazil’s anti-corruption law – Federal Law No. 12,846/2013 (LAC) – was enacted, following commitments made by the country in international agreements, bringing unprecedented mechanism and concepts of accountability of legal entities and the importance of implementing controls by companies in the fight against corruption and other illicit conducts in the corporate environment. By law, legal entities can be strictly liable for the occurrence of harmful acts foreseen in the law, carried out in their interest or benefit, and may be punished by the conduct of their partners, employees, representatives and third parties.

For the first time, compliance programmes (or integrity, as stated in the LAC) will bring benefits provided by law. Besides being an instrument for risk mitigation and accountability, the LAC established the existence of internal compliance mechanisms and procedures as a factor for reducing the calculation of applying sanctions if violation occurs. Federal Decree No. 8,420/2015, which regulated the law, established the parameters of reduction, granting a greater percentage of reduction to companies that have and apply an effective compliance programme, which can result in a decrease of up to 4 per cent in the calculation of the fine to be applied.

What the LAC establishes, therefore, is that the adoption of a properly structured and effective integrity programme may prevent irregularities not only from being committed, but may also grant a higher discount in the administrative sanctions if a violation occurs.
The LAC and its regulating Federal Decree No. 8,420/2015 are the main pieces of legislation regarding compliance matters in Brazil. The LAC is an administrative and civil law that establishes the liability of companies for acts of corruption and other acts against the local or foreign public administration. The LAC is restricted to companies.

It is important to stress that in Brazil, in the vast majority of cases, non-natural persons, such as corporations or other legal entities, cannot be charged with crimes. The exception to this general rule is criminal liability imposed on corporate entities for environmental crimes. Therefore, only individuals are criminally liable for bribery in Brazil.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Corporate liability under Brazilian legislation

Individuals and legal entities can be held liable for bribery of public officials in Brazil. Bribery of public officials is regulated under the Brazilian Criminal Code (Decree Law No. 2,848)\(^2\). As mentioned above, only individuals can be held criminally liable for bribery in Brazil. The LAC establishes judicial and administrative sanctions for legal entities. The LAC not only covers acts of corruption, but also prohibits other conducts such as fraud in public tenders, for both the national and foreign public administration.

The Brazilian Criminal Code sets forth the crime of active bribery, which is defined as the crime of offering or promising an undue advantage to a public official, in order to influence him or her to perform, hide or delay an official act within the scope of his or her duties. According to the LAC, it is prohibited to promise, offer or give, directly or indirectly, an undue advantage to a national or foreign public official, or a third person related to them.

ii Definition of domestic public official

As set forth in Article 327 of the Brazilian Criminal Code, a ‘public official’ is any person who, even on a temporary basis or without remuneration, renders services in governmental agencies or entities, and carries out a public function, job or office.

iii Brazilian anti-corruption law

As mentioned above, in 2013, Brazil enacted the LAC, later regulated by Federal Decree No. 8,420/2015, which provides civil and administrative liability of legal entities for conduct against local and foreign public administration. The provisions not only covers acts of corruption, but also prohibits fraud in public tenders, manipulation of contracts, obstruction of investigations and other illicit acts practiced against both national and foreign public administration. It is important to highlight that private bribery is not criminalised under Brazilian legislation.

Differently from US anti-corruption laws and very similar to the UK Bribery Act, under the LAC, legal entities can be strictly liable (and therefore is not necessarily to demonstrate intent) for prohibited acts committed in their interest or for their benefit (whether exclusively or not). This means that the authorities only need to show that the illegal acts were committed for the benefit or interest of the legal entity. Note also that the LAC provides for successor liability if amendments to the articles of incorporation, transformation, restructuring, merger, acquisition or spin-off of a company occurs.

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\(^2\) Article 333.
Besides the statute mentioned above, two other laws contain additional provisions: (1) Federal Law No. 8,429/1992 (the Brazilian Improbity Law), which establishes civil and administrative corporate liability for acts against public law principles, such as morality and legality; and (2) Federal Law No. 8,666/1993 (the Brazilian Public Procurement Law) that establishes rules for public tenders and contracts with the government.

As mentioned earlier, legal entities cannot be held criminally liable, except for environmental crimes. If environmental crimes occur, criminal liability may be imposed on corporate entities when the offence is committed: (1) as a result of a decision of its legal or contractual representative or of its board; and (2) for the company’s interests or for its benefit.

### iv Penalties under the LAC

Legal entities are prohibited from promising, offering or giving, directly or indirectly, any undue advantage to a national or foreign public official, or a third person related, and to defraud a public tender or public contract, among other illicit conduct. If a violation occurs, the administrative and civil sanctions in the LAC are as follows.

**a Administrative:**
- Fine of 0.1 to 20 per cent of the gross revenue in the last year prior to the start of the administrative proceeding; if such criteria cannot be used, the fine will range from 6,000 reais to 60 million reais; and
- publication of the condemnatory decision.

**b Judicial:**
- prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, for up to five years;
- loss of assets, rights or valuables representing the advantage or profit, directly or indirectly obtained from the wrongdoing;
- partial suspension or interdiction of the legal entity's activities; and
- compulsory dissolution of the legal entity.

The LAC sets forth a list of factors that will be taken into consideration when applying sanctions, including the seriousness of the offence; the advantage gained or sought; whether the offence was fully or partially completed; the level of damages; and the negative effects produced by the offence.

Regarding individuals, they are subject to criminal prosecution in case of corruption acts. Criminal liability requires evidence of the participation of each individual and of the extent of each one’s intent in perpetrating the improper conduct. Therefore, strict liability does not apply to criminal charges.

### v Political contributions

According to Federal Law No. 9,504/97, individuals can make political contributions that do not exceed 10 per cent of their gross income. Law No. 9,504/97 allowed companies to contribute to candidates or political parties up to 2 per cent of the company’s gross revenue in the year prior to the election. However, this provision was revoked by Federal Law No. 13,165/2015, and companies are no longer permitted to make political contributions.
vi Commercial bribery and facilitation payments
Private bribery is not regulated by Brazilian legislation and facilitation payments are prohibited.

III ENFORCEMENT: DOMESTIC BRIBERY
If an individual commits a crime of corruption or other crimes set forth in the Brazilian Criminal Code or laws, the state police, federal police and the state or federal Public Prosecutor's Office are the authorities entitled to investigate and prosecute corruption.

For violations of the LAC, the highest authority of the relevant agency or entity of the executive, legislative and judiciary branches is allowed to investigate the matter and impose administrative sanctions. The Office of the Federal Comptroller General (CGU) has authority to investigate, process and sanction illegal acts set forth in the law that are committed against a foreign public administration. At the federal executive level, the CGU will also have concurrent authorisation to initiate administrative proceedings against legal entities and audit the proceedings handled by other authorities. In the case of judicial sanctions, the entities may follow the procedure established by the Brazilian Class Action Law, set forth in Law No. 7,347/1985.

In addition, the LAC allows the public administration to sign leniency agreements with legal entities that violate such law, provided they effectively collaborate with the investigation, and that the collaboration results in: (1) identifying those involved in the violation, when applicable; and (2) rapidly obtaining information and documents proving the illegal acts under investigation.

Furthermore, Federal Decree No. 8,420/2015 specifies that implementing or improving an existing compliance programme according to the 16 parameters mentioned below may also be included among the obligations of a company wishing to enter into a leniency agreement.

The leniency agreement does not exempt the legal entity from its obligation to redress damages caused. However, it reduces the fine by up to two-thirds, and exempts the legal entity from making the condemnatory decision public and from the prohibition to receive incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, from one to five years. According to the LAC, leniency agreements may also cover violations under Articles 86 to 88 of the Brazilian Public Procurement Law.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK
Individuals and legal entities can be liable for bribery of foreign public officials in Brazil. Bribery of foreign public officials is regulated under the Brazilian Criminal Code (Decree Law No. 2,848) for individuals, and the LAC for legal entities (administrative and civil liability). This Law not only covers acts of corruption, but also prohibits acts such as fraud in public tenders, for both national and foreign public administration.

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3 Article 337-B.
The Brazilian Criminal Code defines the crime of active bribery in an international commercial transaction as an individual offering or promising undue advantage to a foreign public official or to a third party to influence him or her to perform, hide or delay an official act related to an international commercial transaction.

Under the LAC, it is forbidden to promise, offer or give, directly or indirectly, an undue advantage to a national or foreign public official, or a third person related to them.

In Brazil, foreign public officials are those who, even temporarily and without compensation, hold a public position, job or office in government agencies and entities, or in embassies of a foreign country, as well as in legal entities controlled, directly or indirectly, by the government of a foreign country, or in international public organisations. Public international agencies and entities, diplomatic representations of foreign countries, legal entities controlled, directly or indirectly, by the government of a foreign country, and international public organisations, are considered foreign public administration, according to the LAC.

The consequences of bribery of foreign public officials are as follows.

a For the individuals involved: Under the Brazilian Criminal Code, individuals who commit acts of corruption in international commercial transactions can be subject to penalties of a fine and up to eight years of imprisonment.

b For the company or legal entity: Under the LAC, legal entities can be subject to administrative and judicial penalties:

- **Administrative:** a fine of 0.1 to 20 per cent of the gross revenue in the last year prior to the start of the administrative proceedings; if such criteria cannot be used, the fine will range from 6,000 to 60 million reais; and publication of the condemnatory decision.
- **Judicial:** prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, for up to five years; loss of assets, rights or valuables representing the advantage or profit, directly or indirectly, obtained from the wrongdoing; partial suspension or interdiction of the legal entity’s activities; and compulsory dissolution of the legal entity.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

Federal Law No. 9,613 of 1998 (the AML Act), as amended by Law No. 12,683/2012, increased prosecution for money laundering crimes in Brazil. This regulation establishes a stricter criminal regime for the crime of money laundering, broadening its scope and establishing additional sanctions on different parties who participate in money laundering schemes. The AML Act no longer restricts the crime of ‘money laundering,’ to the prior occurrence of one of the crimes previously described in Article 1 of the AML Act. Hence, the list of predicate offences has been extinguished and this concept now encompasses any criminal offence, including misdemeanours and, notably, tax evasion crimes. These measures were designed to prevent the misuse of the financial system for illicit actions described in this law. It also requires legal entities to identify its customers and to maintain updated records of any transaction, as well as the duty to report any transaction that seems related to crimes referred to in this law. In case of omission, entities may be subject to administrative penalties for non-compliance.
The AML Act is based on the Financial Action Task Force Recommendations that identify three phases of money laundering crimes: (1) placement; (2) layering; and (3) integration of assets originating from crime. Even if money laundering crimes are related to a prior criminal offence, the proper authorities may investigate money laundering acts and initiate a criminal lawsuit even before the prior criminal offence has received a definitive ruling from the courts. It is important to stress that money owners may be held criminally liable alongside anyone who facilitated the use, acquisition or retention of criminal property on behalf of another person. Individuals who work for an entity used directly or indirectly for money laundering may also be held liable if they had knowledge of the scheme.

On the other hand, some corporations and individuals, including financial institutions, brokers (currency or stock exchanges), insurance, credit card companies, leasing and factoring companies, gold, jewellery, arts and luxury items dealers, real estate agents and several others, have a legal duty to establish anti-money laundering and terrorism financing policies and to report all suspicious activity to the authorities.

The same law created the Council for the Control of Financial Activities (COAF), an agency that is now subordinate to the Central Bank of Brazil and currently named the Financial Intelligence Unit (UIF). It is responsible for the regulation and investigation of transactions suspected of money laundering. The UIF has the power to impose administrative penalties. Law No. 12,683/2012 broadened the number of individuals and legal entities that are obliged to inform suspicious activities to the UIF. Some entities such as stock exchanges, commodities exchanges, derivative exchanges, banks, securities brokers and dealers, insurance companies and factoring companies must pay special attention to suspicious transactions in relation to money laundering rules and inform the UIF of transactions that violate money laundering laws. Moreover, any transaction conducted with those entities involving assets that can be converted into currency exceeding 10,000 reais must be reported to the UIF.

The Central Bank has published specific rules regarding money laundering prevention. For example, it has issued rulings in order to enhance the Anti-Money Laundering and Terrorist Finance system in Brazil. These rules were enacted in accordance with the recommendations of the Financial Action Task Force (FATF), the inter-governmental body created to promote the development of international policies to combat money laundering and terrorism financing. Brazil has been a member of FATF since 2000.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Even though it is not common, we have seen criminal cases involving the prosecution of individuals for foreign bribery and administrative procedures against companies for acts of foreign bribery.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Brazil is a signatory to the United Nations Convention against Corruption, the Inter-American Convention against Corruption and the OECD Anti-Bribery Convention, though it is not a member of OECD.
VIII LEGISLATIVE DEVELOPMENTS

In addition to the provisions of the Anti-Corruption Law and the Federal Decree No. 8,420/2015, several other bills advance in this matter by offering advantages to companies with effective compliance structures in place.

Most Brazilian states have already implemented the Anti-Corruption Law through local laws or decrees that benefit the effective application of the Law at the state level - and the issue is under discussion in other states that have not yet done so.

The pioneering initiative of the state of Rio de Janeiro in State Law No. 7,753/2017, made mandatory the existence of compliance programmes at companies entering into contracts with the state administration. The example was followed by the federal district in Law No. 6,112/2018 and the states of Rio Grande do Sul (State Law No. 15,228/2018), Amazonas (State Law No. 4,370/2018) and Goiás (State Law No. 20,489/2019).

Federal Law No. 13,303/2016 (the State-Owned Companies Law) provides for the legal status of state-owned companies, government-controlled private companies and their subsidiaries, within the union, the states, the federal district and municipalities. In this regard, the State-Owned Companies Law contains provisions on the modernisation of the management of state-controlled companies, seeking to inhibit the political influence on their administration with rules regarding corporate governance, compliance and transparency in their activities.

Converging on the importance of compliance, there are several bills that deal with the subject. Bill No. 429/2017, recently approved by the Senate and awaiting approval by the House of Representatives, determines the creation of an integrity programme for political parties. According to the proposed text, parties will have to provide an integrity programme in their statutes that should contain a set of internal mechanisms and procedures for control, audit and incentive to report irregularities.

Furthermore, the Bill registered under No. 435/2016 in the Senate proposes modifications to Article No. 7 of Federal Law 12,846/2013 to require not only the implementation of a compliance programme, but also its certification by a manager designated solely for the compliance system. Other propositions should also be mentioned: (1) Bill No. 7,149/2017 determines that companies that enter into contracts with the Federal Public Administration must implement a compliance programme; and (2) Bill No. 303/2016 proposes the implementation of a compliance programme by the states, municipalities and the union so these entities can receive transfers of resources.

The legislative movement represents a trend to impose stricter regulation on companies that want to contract with the government. Integrity in commercial relations and public contracting are no longer optional in Brazil.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Besides the LAC and the Brazilian Criminal Code, additional federal laws contain provisions that affect the response to corruption:

- the Brazilian Improbability Law establishes civil and administrative corporate liability for acts against public law principles, such as morality and legality;
- the Brazilian Public Procurement Law establishes rules for public tenders and contracts with the government;
Brazil

Federal Law No. 13,709/2018 (the Data Protection Law) governs rights and obligations related to the processing of personal data (i.e., information related to an identified or identifiable individual) and good practices, and creates a national data protection authority, among other topics. It will enter into force in 2020; and

date-owned Companies Law provides for the statute of state-owned and state-controlled companies and their subsidiaries, aiming to modernise the management of public companies and avoid corruption, creating distance from political influences, as mentioned above.

**X COMPLIANCE**

The LAC and its regulating Federal Decree No. 8,420/2015 are the main pieces of legislation regarding compliance matters in Brazil. The LAC establishes that the highest authority of the damaged public entity of the executive, legislative and judiciary has competence to investigate and impose administrative sanctions under the LAC. The CGU has authority to investigate, process and sanction illegal acts set forth in the LAC that are committed against a foreign public administration. At the federal executive branch level, the CGU also has concurrent authority to initiate administrative proceedings against legal entities and audit the progress of proceedings handled by other authorities.

The implementation of a compliance programme is not mandatory under the LAC. If a violation occurs, the entity’s compliance programme will be assessed by the enforcement authorities and may be considered a mitigating factor for a fine. The existence of a compliance programme does not eliminate civil or administrative liability for legal entities, but it can reduce sanctions on them.

Federal Decree No. 8,420/2015 provides guidance on what can be considered an effective compliance programme. According to this Decree, a compliance programme must be customised and structured to each legal entity and its activities. This provision is important and solidifies the understanding that there are no ‘off-the-shelf’ compliance programmes. Furthermore, the Federal Decree No. 8,420/2015 establishes 16 parameters against which a compliance programme will be evaluated:

- **a** commitment by the legal entity’s senior management, including board members, proven by their clear and unequivocal support for the programme;
- **b** standards of conduct, code of ethics, policies and integrity procedures to be applied to all employees and administrators, regardless of their position or role;
- **c** standards of conduct, code of ethics and integrity policies extended, when necessary, to third parties (e.g., suppliers, service providers, intermediaries and other associates);
- **d** periodic training on the compliance programme;
- **e** periodic analysis of risks to implement necessary adjustments to the compliance programme;
- **f** precise accounting records that reflect all transactions of the legal entity;
- **g** internal controls that assure that reports and financial statements of the legal entity are readily prepared and trustworthy;
- **h** specific procedures to prevent frauds and illicit acts within tender processes, in the execution of administrative contracts or in any interaction with the public sector, even if intermediated by third parties, such as the payment of taxes, subject to inspection, or obtainment of authorisations, licences, permits and certificates;
independence, in structure and authority, of the internal department responsible for enforcing the compliance programme and monitoring its compliance;

channels to report irregularities, openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistle-blowers;

disciplinary measures enforced against those found to have violated the compliance programme;

procedures that assure the immediate suspension of irregularities or detected infractions and the timely remediation of the damages caused;

proper due diligence conducted prior to engaging third parties and, depending on the circumstances, monitoring of third parties such as suppliers, service providers, intermediaries, and other associates;

verification, during a merger, acquisition or other corporate restructuring, of irregularities or illicit acts, or the existence of vulnerabilities in the legal entities involved;

continuous monitoring of the compliance programme to ensure it remains effective at preventing, detecting and otherwise addressing wrongful acts described in the LAC;

and

transparency surrounding donations to candidates and political parties made by the legal entity.

Another factor considered when applying sanctions is ‘the cooperation of the legal entity with the investigation of the offence’. Federal Decree No. 8,420/2015 sets forth that penalties may be reduced by 1 to 1.5 per cent, regardless of a leniency agreement, if the entity had cooperated with the authorities.

As mentioned above, there is no specific legal requirements to implement codes of conduct, policies, procedures, corporate protocols and whistle-blowing channel, but the adoption of compliance measures effectively represents a relevant benefit to the entity in case of a violation. In addition, the CGU has published material related to the LAC and to Federal Decree No. 8,420/2015. Those materials include a guideline to assist companies in developing and improving a code of conduct, policies and instruments according to the parameters set forth in Federal Decree No. 8,420/2015, a manual providing guidelines on the calculation of penalties imposed by the LAC and a manual about conflicts of interest.

XI OUTLOOK AND CONCLUSIONS

Even though the LAC has no mandatory provision for the implementation of a compliance programme, some states have regulations that require companies to implement compliance programmes when contracting with the public administration depending on a certain threshold. It is a strong trend towards the requirement of a compliance programme when contracting with a public entity.

Additionally, in January 2019, the National Bank for Economic and Social Development (BNDES) published Resolution No. 3,493/2018, which amended the rules of contracts signed by the bank. Therefore, the BNDES began to require its financial agents to prove, whenever requested, the adoption of procedures aimed at complying with rules to prevent money laundering and terrorism financing. Furthermore, it also required financial agents to prove the adoption of a compliance programme, policies and procedures aimed at preventing...
and combating corruption, fraud and other irregularities foreseen in legislation, in particular in the LAC and its changes in the applicable regulations and in the policies and norms of the BNDES.

Therefore, the lack of a compliance programme may impede the company’s participation in public transactions. In those circumstances, consult local regulations to verify whether there is any need to adapt the compliance programme to meet the local requirements.

Another entity that followed the trend in Brazil is the Brazilian Securities and Exchange Commission (CVM). In 2019, the CVM published Rule No. 607/2019 regulating its sanctioning activity and establishing that any public-held company with an effective compliance programme may have reduction in their fines. The text provides that ‘the effective adoption of internal mechanisms and procedures of integrity, auditing and incentives to report irregularities, as well as the effective application of codes of ethics and conduct within the legal entity’ are mitigating circumstances in the new administrative process, reducing the penalty by up to 25 per cent.

Furthermore, another initiative, called Pró-Ética and created by the CGU, aims to promote the voluntary adoption of compliance measures by companies, through the public recognition of those that, regardless of the size and industry, demonstrate that they are committed to implement measures aimed at the prevention, detection and remediation of acts of corruption and fraud. In summary, companies provide information and documents to the CGU regarding the compliance measures that were adopted. At the end of the process, companies that reach a certain score are considered ‘Pro-Ética companies’, and the information is later disclosed to the public.

Another point of attention is that, although not provided by criminal law (because there is no strict liability in criminal matters) it is increasing the understanding that compliance officers may face personal liability for corporate irregularities as a result of their absence or omission in performing their duties. Based on the ‘in fact control theory’, even though an individual committed no active crime, he or she may be considered liable if he or she (1) had control over the perpetrators who perpetrated the illicit act and (2) could have prevented the crime. Even with no direct action, the individual – such as a compliance officer that could have frustrated a crime, but failed to carry out his or her activities or acted with reckless (negligence, malpractice, omission, etc.) making the crime possible – may be held criminally liable. In Brazil, there is no decision regarding compliance officers’ liability for corporate wrongdoing yet; however, the matter has been a frequent topic of discussion among legal experts and enforcement authorities.
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). Since 2017, the federal government of Canada has undertaken several changes that may alter the enforcement environment in Canada, including 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). Since late 2018, Canadian authorities have also advanced Canada’s enforcement of domestic and foreign bribery laws by obtaining convictions and prison sentences in several bribery prosecutions against corporate executives. Corruption enforcement has been a recurring theme in the Canadian press throughout 2019 as a result of the Director of Public Prosecutions’ refusal to enter into a remediation agreement with a prominent Canadian company accused of foreign bribery, and the reaction of the Prime Minister’s Office to that decision.

While enforcement of Canadian bribery and corruption laws has historically lagged behind its southern neighbours, these recent legislative trends and convictions show that enforcement in Canada is maturing. These developments must be contrasted against complications facing Canada’s attempts to implement a modernised approach to enforcement, as shown by the recent public and political debate about the appropriate use of remediation agreements.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Sections 121 to 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), 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

4 R v. Yellow Old Woman, 2003 ABCA 342.
6 ibid.
gains’. Canadian courts have found that hockey tickets, 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. 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. Canadian courts have found that even a general manager can be considered a ‘senior officer’ and create criminal liability for an organisation.

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

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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.
9 Criminal Code, Section 2: Definition for ‘senior officer’.
no limitation periods for indictable offences in Canada\(^\text{11}\) 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.

### 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  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.

**ii  Michel Fournier**

In August 2017, Michel Fournier, former head of Canada’s Federal Bridge Corporation, pleaded guilty to accepting more than C$2.3 million in payments from a Canadian engineering firm in connection with the Jacques Cartier Bridge. Fournier was sentenced to five and a half years’ imprisonment.

**iii  Pierre Duhaime**

In February 2019, Pierre Duhaime, former CEO of a Canadian engineering firm, pleaded guilty to breach of trust by a public official in violation of Section 122 of the Criminal Code in relation to C$22.5 million of kickbacks paid to obtain construction contracts. Mr Duhaime was sentenced to 20 months of house arrest.

### IV FOREIGN BRIBERY: LEGAL FRAMEWORK

**i  CFPOA**

Like the United States Foreign Corrupt Practices Act\(^\text{12}\) (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.\(^\text{13}\) 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.\(^\text{14}\)

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\(^{11}\) 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.

\(^{12}\) As amended, 15 USC Section 78dd-1, et seq.

\(^{13}\) CFPOA, Section 3(1).

\(^{14}\) ibid.
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.\(^{15}\) 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.\(^{16}\) 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 citizens, permanent residents, corporations, societies, firms or partnerships to be acts within Canada for the purposes of the CFPOA.\(^{17}\) 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.\(^{18}\) 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.\(^{19}\)

### 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 and organisations should consider prohibiting facilitation payments to ensure compliance with both the FCPA and CFPOA.

### iv Organisational liability

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

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\(^{15}\) ibid., Section 2: Definition for ‘foreign public official’.

\(^{16}\) *R v. Karigar*, 2013 ONSC 5199.

\(^{17}\) 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.
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.\(^{20}\) Courts can also impose additional, onerous probationary terms on convicted companies, including a third party compliance monitor.

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.\(^ {24}\)

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\(^{20}\) CFPOA, Section 3(2).  
\(^{21}\) 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.
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 function, and employees or officials that belong to these organisations.\textsuperscript{25} As of 1 June 2017, Reporting Entities must also report payments made to indigenous governments in Canada.\textsuperscript{26} Indigenous governments may include any 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.\textsuperscript{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.\textsuperscript{28}

Failure to report a required payment is an offence under ESTMA.\textsuperscript{29} Additionally, an attempt to structure any payment, or other financial obligation, to avoid reporting requirements is an offence under ESTMA.\textsuperscript{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 the Remediation Regime
In September 2018, amendments to the Criminal Code came into force that 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 announced that the federal government of Canada plans to enhance the Integrity Regime. These proposed enhancements are discussed in Section VIII.

\textsuperscript{25} ibid., Section 9.
\textsuperscript{26} ibid., Section 29.
\textsuperscript{27} ibid., Section 2: Definition for ‘payee’.
\textsuperscript{28} ibid., Section 9(4).
\textsuperscript{29} ibid., Section 24(1).
\textsuperscript{30} ibid., Sections 24(2) and (3).
iii Historic enforcement

The CFPOA is enforced by the Royal Canadian Mounted Police (RCMP) and prosecuted by the Public Prosecution Service of Canada. The years 2018 and 2019 have seen an uptick in CFPOA enforcement. Until 2019, Canadian courts had only sentenced one individual to jail time under the CFPOA. In January 2019, Robert Barra, the former CEO of Cryptometrics Inc, and Shailesh Govindia, the company’s former agent, were each convicted of bribing a foreign public official contrary to Section 3(1) of the CFPOA for their roles in a conspiracy to bribe an Indian minister in exchange for a contract with a state-owned enterprise, Air India. They were each sentenced to two-and-a-half years’ imprisonment.

In addition to being only the second and third individuals sentenced to prison under the CFPOA, these decisions provide useful jurisprudence about the jurisdiction of Canadian courts and the essential elements of CFPOA offences. In *R v. Barra and Govindia (Barra)*, the accused, a British national and an American national, applied for a directed verdict for an acquittal in advance of their trial on the basis that Canadian courts lacked jurisdiction over foreign nationals accused of an offence that occurred outside of Canada. Despite the impugned conduct occurring in New York and in India, the Court found that the attendance of Canadian senior management at meetings related to the impugned conduct, as well as the ‘fruits of the transaction’ related to the bribes being intended for a Canadian company, created a real and substantial link between the offence and Canada and grounded the jurisdiction of a Canadian court.

*Barra* is also the first time a Canadian court has expressly held that it is an essential element of an offence under the CFPOA that an accused know, or ought to have known, that the recipient of a bribe is indeed a foreign official.

Prior to these two convictions, there have been several other significant prosecutions under the CFPOA. Between 2011 and 2013, two oil and gas companies 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, the first individual incarcerated under the CFPOA, was sentenced to three years’ imprisonment for the same bribery conspiracy associated with *Barra and Govindia*.

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, 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 based on the Court’s view that the wiretap had been improperly authorised.

iv Ongoing investigations

Between 2014 and 2015, a Canadian engineering firm, along with two of its subsidiaries and two of its former executives, was charged with bribery offences under the CFPOA and

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34 *Chowdhury v. Canada*, 2014 ONSC 2635.
fraud charges under the Criminal Code. On 9 October 2018 the Canadian Director of Public Prosecutions, Canada’s lead federal prosecutor, formally notified this firm that the government would not invite the firm to negotiate a remediation agreement to resolve the charges against it. In response, the firm applied for a judicial review of the Director’s decision. On 8 March 2019, the Federal Court struck the application, finding that whether to invite an accused to negotiate a remediation agreement ‘clearly falls within the ambit of prosecutorial discretion’ and is only subject to judicial review in cases of abuse of process. This decision is under appeal and the firm has been ordered to stand trial in September 2019. A former executive vice-president of the same firm has also been charged with bribing a foreign public official and fraud in connection with the firm’s Libyan activities. His prosecution is ongoing.

Dario Berini, who was involved in the Air India bribes but cooperated with prosecutors and testified against Barra and Govindia, was charged in connection with the conspiracy. The resolution of his case is still outstanding.

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 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 investigated 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.35 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. The Attorney General must also consent to negotiations.

A prosecutor must consider certain factors when determining if a remediation agreement is in the public interest and appropriate in the circumstances, including whether an organisation has taken disciplinary action against culpable individuals and whether an organisation has taken remedial action. Self-reporting is not required to be eligible for a remediation agreement; however, it is a factor a prosecutor must consider.

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.

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. 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.42

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.

The Remediation Regime has been the subject of political and public debate in 2019, centered on the foreign bribery prosecution set out in Section VI.iii, above. This public discourse, which received extensive coverage by traditional news media (and therefore will not be covered in detail again here), has highlighted the policy considerations related to the use of remediation agreements, including the appropriateness of remediation agreements, prosecutorial independence, and whether the collateral impact of criminal convictions against companies on innocent employees, shareholders, etc. should be considered when resolving criminal charges.

While the availability of a non-criminal resolution option created by the Remediation Regime could lead to increased self-reporting, resolutions and enforcement in Canada, its impact has yet to be seen.

ii Integrity Regime update

On 27 March 2018, Public Services and Procurement Canada (PSPC) announced that the federal government of Canada plans to enhance the Integrity Regime. According to a draft Ineligibility and Suspension Policy (the Draft Policy), a central policy to the Integrity Regime, published by the PSPC, organisations convicted of CFPOA offences will still be automatically debarred from contracting with the federal government; however, the period of debarment would be discretionary. Under the Draft Policy, the period of debarment would be determined by a number of factors, including the seriousness of the conduct that led to debarment and actions taken by an organisation to address that conduct. The Draft Policy incentivises an active role in remediation and encourages corporations to strengthen their compliance programmes. It is currently unclear when, or if, the Draft Policy will be implemented.

IX 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.

42 ibid., Section 715.37(7).
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.

X 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.\(^\text{43}\) Additionally, the factors outlined in the Criminal Code to guide prosecutors in deciding whether or not to offer a remediation agreement, when read holistically, indicate that a strong compliance programme would likely be a factor that militates in favour of negotiating a remediation agreement, in the event of misconduct.

Guidance documents from other jurisdictions, such as the United States\(^\text{44}\) and United Kingdom,\(^\text{45}\) provide useful commentary related to effective compliance programmes that apply broadly in Canada. According to these documents and accepted best practices, the first step in establishing a comprehensive compliance programme is to conduct an anti-bribery and corruption risk assessment and identify the unique corruption risks a company may face. Not only do risk assessments ensure proper resource allocation and a tailored compliance program, but they are also an important factor considered by the RCMP, Public Prosecution Service of Canada, Department of Justice (DOJ), Securities Exchange Commission, and Serious Fraud Office when assessing a company’s anti-corruption compliance programme. While the guidance documents referred above and the steps they advocate are helpful for companies with Canadian operations, compliance in Canada would be improved by a formal guidance for the Criminal Code and CFPOA, issued by enforcement authorities.

XI OUTLOOK AND CONCLUSIONS

While the Canadian legal framework related to domestic and foreign bribery remains largely unchanged, the recent legislative and enforcement developments 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.


\(^{45}\) Bribery Act: Guidance on adequate procedures facilitation payments and business expenditure, the Serious Fraud Office (2012).
Chapter 5

CHILE

Sebastián Doren and Juan Ignacio Donoso

I INTRODUCTION

Chile remains the second most transparent country in Latin America, only surpassed by Uruguay, according to the 2018 Corruption Perceptions Index reported by Transparency International. Still, Chile has dropped six positions in the last four years. The fall of Chile in the corruption index occurs amid numerous huge corruption scandals and investigations. In recent years, several cases of corruption, especially of misappropriation of public funds, have affected Chile, generating a feeling among public opinion that the existing control mechanisms or punishments are not sufficient. Cases such as SQM, Penta and Caval have received broad coverage by the media and corruptions scandals have lately stained the reputation of institutions admired and respected by the Chilean people such as its army (Milicogate) and police (Pacogate).

Nonetheless, during the last years, Chile has made huge efforts to strengthen its anti-corruption legal system. In this regard, it is important to remark that Chile was the first Latin American country to establish corporate criminal liability for the commission of offences of bribery, money laundering and terrorism financing, under Law 20,393/2009. To date, numerous companies have been prosecuted and some have been sanctioned (e.g., Ceresita, Salmones Colbún). Illegal acts for which legal entities may be held criminally liable have increased considerably. In 2016, the felony of receiving stolen goods was incorporated to the catalogue of conducts for which a legal entity can be held criminally liable. In 2018, four new crimes were included: incompatible negotiation, misappropriation, unfair administration and commercial bribery. Lately, in 2019, four new crimes related to illegal fishing were included. A bill recently introduced to Congress to criminalise offences against the environment, which will include criminal liability for legal entities, has been discussed. However, the most recent development in this matter was the enactment in November 2018 of Law 21,121, which introduced major amendments to Chilean criminal law on crimes against corruption. This law considerably strengthens the Chilean legislation in the fight against corruption by increasing the punishment of certain existing crimes and incorporating new criminal offences to Chilean legislation, among others. This law represents a considerable step forward in the fight against corruption in Chile. The granting of the status of felony to several offences, coupled with the introduction of new criminal offences and the broadening of criminal liability for legal entities, should foster deterrence of bribery offences. Moreover,
the law increases the likelihood of being detected for failure to comply with anti-corruption laws, and the consequences for such infringements, for both individuals and corporate entities involved.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Bribery in Chile is considered a criminal offence, sanctioned with imprisonment and fines. Public officers, private individuals, and legal entities can be held criminally liable for corruption crimes.

Only public officials can be subject to administrative liability. According to Law 18,575, public officials should act with administrative probity, which consists of having irreproachable public conduct and a loyal and honest performance of his duty, with pre-eminence of the general interest over the personal one. This law considers a contravention to the administrative probity principle the request or acceptance of advantages or privileges of any nature either for themselves or for third parties. The violation of this principle may eventually lead to the removal of the public official from office.

In addition, any individual affected by a bribe can bring a civil action against the individuals involved in it, to obtain the reparation for all damage caused by the wrongdoing.

i Corporate criminal liability

In December 2009, Law 20,393 was enacted to establish corporate criminal liability for certain crimes, including bribery of Chilean and foreign public officials, money laundering and terrorism financing. The enactment of this law was influenced by Chile’s accession to the Organisation for Economic Co-operation and Development (OECD), which requires parties to ‘take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official’, under its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Under Article 1 of Law 20,393, corporate criminal liability is only limited to the following crimes:

- money laundering;\(^2\)
- financing terrorism;\(^3\)
- active bribery;\(^4\)
- active bribery of a foreign public official;\(^5\)
- receiving stolen goods;\(^6\)
- incompatible negotiation;\(^7\)
- commercial bribery;\(^8\)
- misappropriation;\(^9\)

\(^2\) Article 27 of Law No. 19,913.
\(^3\) Article 8 of Law No. 18,314.
\(^4\) Article 250 of the Criminal Code.
\(^5\) Article 251 \textit{bis} of the Criminal Code.
\(^6\) Article 456 \textit{bis} A of the Criminal Code.
\(^7\) Article 240 of the Criminal Code.
\(^8\) Articles 287 \textit{bis} and 287 \textit{ter} of the Criminal Code.
\(^9\) Article 470 No. 1 of the Criminal Code.
i unlawful administration,\textsuperscript{10} and

j illegal fishing.\textsuperscript{11}

Legal entities may be held responsible for these offences when (1) the offences are committed directly and immediately in their interest or for their benefit; (2) the offences are committed by their owners, controllers, responsible officers, principal executives officers, representatives or those conducting activities of administration and supervision; and (3) provided that the commission of the offences results from the breach of the legal entity’s direction and supervisory functions.

The burden of proof falls on the Public Prosecutor, who must prove each of these requirements for corporate criminal liability to exist. In this regard, the law sets forth that legal entities would not be responsible if the individual has committed the offence exclusively in his advantage or in favour of a third party. In addition, the law considers that the functions of direction and supervision have been met if, before the commission of the offence, the legal entity adopted and implemented an organisation, administration and supervision model to prevent the commission of these offences.

\textit{ii Bribery of domestic officials offences}

Chilean Criminal Code has provided for bribery of public officials since its first enactment in 1874.\textsuperscript{12} The provision has been modified in several occasions. In November 2018, Law 21,121 substantially broadened the scope of sanction of this crime.

This offence can be committed by both public officials, who solicit, receive or consent to receive a bribe, and by private individuals, who offer, pay or consent to pay a bribe to a public official. The offence encompasses bribes of an economic nature or any kind, and it can be for the public official benefit, or a third party’s benefit.

The Criminal Code contains a general or basic provision against passive bribery that punishes the public official who solicits, receives or consents to receive a gift of any kind, for his, her or for a third party’s benefit, to which he or she has no right.\textsuperscript{13} It also contains four aggravated circumstances of passive bribery: (1) bribery to execute a proper due act of office for which no rights are contemplated;\textsuperscript{14} (2) bribery to omit or for having omitted a proper due act of office, or to perform or for having performed an act in violation of the duties of his or her office;\textsuperscript{15} (3) bribery to exercise influence on another public employee in order to obtain from it a decision that may generate a benefit for an interested third party;\textsuperscript{16} and (4) to execute a criminal offence committed while carrying out his or her job.\textsuperscript{17}

In addition, the Criminal Code contains a provision against active bribery that sanctions the private individual who offers, pays or consents to pay a bribe to a public official, to perform or to incur in any of the above-mentioned actions or omissions.\textsuperscript{18}

\textsuperscript{10} Article 470 No. 11 of the Criminal Code.

\textsuperscript{11} Articles 136, 139, 139 \textit{bis} and 139 \textit{ter} of Law 18,892.

\textsuperscript{12} https://www.leychile.cl/Navegar?idNorma=1984&tipoVersion=0.

\textsuperscript{13} Article 248 Section 1 of the Criminal Code.

\textsuperscript{14} Article 248 Section 2 of the Criminal Code.

\textsuperscript{15} Article 248 \textit{bis} Section 1 of the Criminal Code.

\textsuperscript{16} Article 248 Section 2 of the Criminal Code.

\textsuperscript{17} Article 249 of the Criminal Code.

\textsuperscript{18} Article 250 of the Criminal Code.
Sanctions for bribery include up to 10 years’ imprisonment and fines of up to four times the benefit offered, paid or accepted. The seriousness of the sanction will depend on the type of action requested of the public official, and the degree to which the offence is executed. Sanctions can also include temporal or permanent prohibition from holding public office.

iii Definition of domestic public official

Article 260 of the Chilean Criminal Code contains a broad definition of ‘public official’ for criminal purposes. It defines a public official as anyone who holds a position or a public duty, either in the central administration or in semi-public, municipal, autonomous institutions or companies or in organisms created by the state or that depend from the state, even if they are not appointed by the Head of the Republic and even if they do not receive a remuneration from the state.

Therefore, the definition is very broad and covers numerous employees who are not subject to administrative laws.

iv Gifts, gratuities, travel, meals and entertainment

Chilean law does not establish quantitative or qualitative limitations on gifts, gratuities and hospitality expenses. However, according to the general bribery provisions of Article 248 of the Chilean Criminal Code, any type of gift, gratuity, entertainment or invitation could potentially be considered as a bribe.

Law 18,575 considers as a breach to the public probity principle that every public official has to abide by, the request or acceptance of gifts, advantages or privileges of whichever nature either for themselves or for third parties. However, the law exempt official and protocol gifts as well as those gifts authorised by custom as a courtesy and polite expression.

Therefore, whether a gift, gratuity or hospitality expense should be considered bribery will need to be determined on a case-by-case basis, taking into account all the facts and circumstances surrounding the case.

v Commercial bribery offences

Commercial bribery offences were recently incorporated in November 2018 to Law 21,121. Before that, commercial bribery was not a crime in Chile.

Articles 287 bis and 287 ter of the Criminal Code establish sanctions for private individuals and employees or agents who request or receive an economic benefit or another advantage to favour or for having favoured a certain party over another party for the execution of a contract with up to three years’ imprisonment. The Law also punishes individuals who consent to the act of giving the employee or agent an economic benefit or another advantage with penalties of up to 540 days’ imprisonment. In both cases, the crime also entails a fine of double the benefit requested or accepted, and up to US$35,000 approximately, if the benefit is of a different nature.

We strongly believe that this new offence will likely serve as a basis for numerous criminal investigations and prosecutions.

vi Political contributions by foreign citizens or companies

Political contributions in Chile were profusely regulated in 2016 after several criminal investigations regarding irregular political financing (e.g., Caso Penta, Caso Corpescas and Caso SQM).
Law 19,884, as amended by Law 20,900 of 2016, sets forth that only individuals can make political contributions. Under Law 20,900, legal entities, both foreign and Chilean, cannot make political contributions. Besides, the law sets forth certain thresholds of the contributions that can be made, which depends on the authority being elected.

Foreign individuals domiciled abroad cannot make political contributions. Only foreigners who are legally authorised to vote in Chile can make political contributions.

III ENFORCEMENT: DOMESTIC BRIBERY

The enforcement of domestic bribery by the Public Prosecutor’s Office has been very strong during the past years against both individuals and companies. There have been numerous cases of domestic bribery prosecuted, some of them arriving at conviction of the accused individuals. Some of the main cases have been related to illegal political financing (e.g., Penta, SQM, Corpesca) and, admittedly, though initially prosecuted for bribery and tax offences, in several procedures the convictions of individuals obtained by the Public Prosecutor’s Office have been for tax evasion, rather than bribery.

In addition, there are several former high-ranked military personnel under criminal investigation for corruption offences, some of them for bribery. In this regard, Mr Juan Miguel Fuente-Alba, former commander-in-chief of the Chilean army, was detained for six months before he was released on bail. Mr Fuentealba is being investigated for numerous corruption offences.

The oral trial for a huge corruption case, Caso Basura, regarding the municipality of Maipú began in August 2019. There are eight defendants in the Maipú side of Caso Basura, among them, the former mayor of this commune, Christian Vittori, to whom the Prosecutor’s Office imputes crimes of bribery, fraud to the treasury and money laundering, and thus, is asking for a penalty of 13 years of imprisonment. Regarding the bribery offence, according to the prosecution, between 2009 and 2011, during two bidding processes for collection and disposal of household waste, former council member Christian Vittori and other mayors agreed with the KDM to carry out actions to favour this company, in exchange for payment of approximately US$201,000. The oral trial is expected to last six months.

Furthermore, there have been numerous companies sanctioned or for which investigations and criminal trials have been suspended upon their fulfillment of certain conditions, mainly payments or donations of certain amounts. Some are discussed below.

Ceresita

This case was suspended with conditions. In the framework of a bribery investigation directed against the director of buildings of the municipality of Recoleta, Industrias Ceresita SA was indicted for bribery, under Law 20,393. On 30 April 2013, an agreement was reached with the Prosecutor’s Office. The company had to compensate the residents of the Recoleta neighbourhood by building parks and infrastructure for an amount that exceeds US$2.5 million. Ceresita withdrew a plant from the municipality of Recoleta, complying with all environmental regulations, demolishing all the facilities of the plant, carrying out cleaning and decontamination work, and obtaining an environmental study that insures against any health risk to the population. Likewise, it donated 6,000 square metres corresponding to the property’s site to the Chilean Treasury, to transform it into a tree, sports and social park for the benefit of the community of Recoleta. This park had to be equipped with multiple pitches, pedestrian walks, trails, playgrounds, stationary sports implementation, grass,
flowers, lighting, etc. Ceresita also equipped all the public health offices of the commune of Recoleta with equipment for respiratory diseases and painted the facades of the houses of the affected sector. The company agreed to design and implement a crime prevention model of Law 20,393 and certify it.

**Salmones Colbún**

Two companies were convicted in bribery investigations. The Criminal Court of Guarantee of Talca issued a sentence against two companies for their criminal responsibility as legal entities, under Law 20,393. Salmones Colbún LTDA and Sociedad Agrícolas Mecanizado LTDA were convicted and fined approximately US$35,000 and the loss of 40 per cent of the tax benefits.

## IV FOREIGN BRIBERY: LEGAL FRAMEWORK

### i Criminal liability

Article 251 *bis* of the Chilean Criminal Code, as recently amended by Law 21,121, sets forth the provision against bribery of foreign officials. The criminal offence is committed by whoever, for the purpose of obtaining or maintaining for itself or for a third party any business or advantage in the field of any international transactions or of an economic activity performed abroad, offers, promises, gives or consents to give to a foreign public official an economic benefit or a benefit of another nature to this or a third party (1) due to the position of the official; or (2) to omit or execute, or for having omitted or executed, an act proper to his or her position or in violation of the duties of his or her position.

### ii Definition of foreign public official

Article 251 *ter* of the Criminal Code contains the definition of ‘foreign official’. It defines foreign officials as persons who (1) hold a parliamentary, administrative or judicial position in a foreign state, whether appointed or elected; (2) perform public duties or functions for a foreign state, whether in a public entity or a state-owned company; or (3) are officials or agents of a public international organisation.

### iii Gifts, gratuities, travel, meals and entertainment

Chilean criminal law does not provide guidance on gifts, hospitality and entertainment for the benefit of foreign public officials.

### iv Penalties

Sanctions can include up to 10 years’ imprisonment; seven to 10 years’ debarment from holding public office; and a fine of between two and four times the benefit offered.

### v Defences

Defences may be raised upon the lack of intent to bribe or the fact that the benefit corresponds to an official or protocol donation, or to a gift of low economic value authorised by convention as a manifestation of courtesy.

Finally, from the legal entity’s perspective, having implemented a crime prevention model that fulfils the requirements of Law 20,393 may result in complete exemption from criminal liability for the entity.
vi  Plea bargaining

In Chile, a criminal proceeding may be suspended though a conditional suspension of the procedure (similar to a pretrial probation), if the indicted individual or entity accepts to comply with certain conditions (i.e., to be subject to the control of the Prosecutor’s Office for certain amount of time, to pay an amount of money to the victim of the offence). To be eligible for a conditional suspension of the procedure, the offence must not be sanctioned with a penalty of over three years of imprisonment in the case of individuals and, in the case of legal entities, they cannot be reoffenders. As the penalties for bribery have considerably increased lately, it is unlikely that individuals will benefit from this kind of suspension in future cases.

In Chile, there is an ‘abbreviated procedure’, which is to some extent similar to a plea bargaining, in which the accused individual or entity enters into a negotiation with the Public Prosecutor, accepting the facts of the Prosecutor’s accusation and the facts gathered in the investigation, and thus receives a reduced sanction.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i  Financial record-keeping laws and regulations

Chile lacks a section on financial record-keeping offences similar to the one in the FCPA. In Chile, the provisions of the Commercial Code,\(^{19}\) the Tax Code\(^{20}\) and the Law of Corporations\(^{21}\) require the maintenance of accurate and complete corporate books and records. Similar to other jurisdictions, publicly traded or listed companies are also subject to laws regarding periodic financial reporting and disclosure, and avoidance of self-dealing and insider trading. Financial institutions are subject to additional laws regarding their fiduciary duties toward the parties whose assets they hold.

ii  Money laundering laws and regulations

Anti-money laundering provisions area contained in Law 19,913 of 2003. This law sets forth criminal offences that are sanctioned with five to 15 years of imprisonment and fines of up to approximately US$14 million.

The Law also created an independent public entity, the Financial Intelligence Unit (UAF), to prevent and avoid the use of the financial system and other sectors of economic activity for money laundering.

The UAF has the function of requesting, verifying and examining the information of several institutions subject to Law 19,913, and to send such records to the criminal prosecutor when there are indications that money laundering has been committed.

Law 19,913 applies to a wide range of institutions, including banks and financial institutions; factoring companies; leasing companies; securitisation companies; exchange houses; stock exchanges; insurance companies; casinos and racetracks; customs agents; property brokers and notaries.

\(^{19}\) Commercial Code, Article 25 and 31.
\(^{20}\) Tax Code, Article 35.
\(^{21}\) Law 18,046, Article 73.
The UAF has the power to give binding instructions to the entities subject to Law 19,913 for adequate compliance with the established obligations to prevent money laundering offences.

iii Prosecution

Exclusively the criminal prosecutor prosecutes the anti-money laundering criminal offences. The UAF is obliged to give the prosecutor any indicia of money laundering.

The criminal prosecutor can also request the UAF to provide information in its possession that is necessary for money laundering investigations.

The UAF can also impose administrative sanctions for violations of Law 19,913 or its instructions.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There have been just a few cases regarding foreign bribery.

In Asfaltos Chilenos, the company Asfaltos Chilenos SA was prosecuted for violations of Law 20,393 in connection with bribes paid in Bolivia. In 2010, Asfaltos Chilenos SA granted a power of attorney to a Bolivian citizen to offer its products in Bolivia. This woman appeared before the Bolivian Highway Agency and offered asphalt for the preparation of the roads, but also offered a public officer a percentage of the profit for each ton of the product purchased. The woman was arrested and convicted for bribery in Bolivia. However, it was unclear what the role of the Chilean company had been. Although the investigation could not determine whether Asfaltos Chilenos SA had been directly related to the bribery attempt, it determined that the company did not have the control mechanisms to prevent this situation from happening. The prosecution reached a conditional suspension of the procedure and the following conditions were imposed on the company so that it could avoid a criminal trial: (1) the company was obliged to implement a crime prevention model pursuant to Law 20,393; and (2) to donate computer equipment worth approximately US$16,000 to an educational institution.

In Serlog or Fragata, an individual was effectively sanctioned with an imprisonment penalty as well as a fine for bribing an adviser of the Attaché of the Ministry of Defence of the Embassy of Korea in Chile, in exchange for being introduced to Korean companies that were seeking contracts from the Chilean military and to act as representatives of those Korean companies, accordingly.22

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Chile is a member of the Organisation for Economic Co-operation and Development (OECD), the United Nations and the Organization of American States. Chile is a signatory to the OECD Anti-Bribery Convention, the United Nations Convention against Corruption (UNCAC) and the Inter-American Convention against Corruption.

VIII LEGISLATIVE DEVELOPMENTS

The most relevant legislative development is the enactment in November 2018 of Law 21,121 which:

a sets a new criminal sanction to punish certain types of corruption offences, consisting of the absolute, permanent and temporary debarment from holding positions, jobs, trades or professions in companies that contract with government agencies or companies or with companies or associations in which the state has a majority participation; or in companies that participate in concessions granted by the state or which purpose is the provision of public utility services;

b incorporated new legal figures of corruption offences in the private sphere;

c modified the bribery offence by substantially expanding the scope of sanctions and also reformulated the criminal offence of bribery to foreign public officials, established in Article 251 bis of the Chilean Criminal Code, and increased the penalties of this crime;

d introduced amendments to corporate criminal liability law (Law 20,393). First, it incorporated new criminal offences for which legal persons may be held criminally liable, incorporating into the catalogue of offences established in Law No. 20,393 the offences of incompatible negotiation by directors or managers of a corporation, bribery between private parties, misappropriation and unfair administration. Second, the Law broadened sanctions that include debarment from contracting with any state agencies, including state-owned companies and majority state-owned companies or associations, and from awarding any state concession. Third, fines increased to up US$24 million approximately. Fourth, the concept of confiscation was extended to encompass all gains obtained through the commission of the offence. Fifth, the Law included the dissolution of the infringing company, if the company has been convicted, within the previous five years, for the same offence and there is no mitigating circumstance. Sixth, the Law set forth that if the legal representative of a company under investigation is formalised in an investigation for the same punishable act by which the criminal responsibility of the legal entity is investigated, its representation will cease. In this case, the court will order a new representative to be appointed within a certain period of time, and if the appointed representative does not make the appointed nomination, the court will appoint a professional to represent it.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

We are expecting that amendments to the Chilean Data Privacy Act will aid, to some extent, the fight against corruption.

X COMPLIANCE

As mentioned, Law 20,393 sets forth an exemption of a corporate liability in case the company adopted and implemented, before the commission of the offence, a compliance programme to prevent its commission. This law provides for an exemption of criminal liability since it assumes that the functions of direction and supervision have been met.

Law 20,393 sets forth the minimum legal standard of a prevention model for the exemption of corporate liability to apply, which includes (1) the appointment of a prevention supervisor with sufficient means, powers and independence for performing its duties; (2) the establishment of a crime prevention system that identifies the entity’s risks of the offences been
committed, establishes specific protocols, rules and procedures to prevent the commission of said offences, identifies procedures for administering and auditing the financial resources of the entity, and includes internal administrative sanctions, as well as procedures for reporting the wrongdoing; and (3) the establishment of methods for the effective application of the prevention model and its supervision, so as to detect and correct its failures and to update it according to the change of circumstances of the legal entity.

The Public Prosecutor has been very clear that the pure formal implementation of a crime prevention model by itself is not enough to determine that the direction and supervision obligations of the company have been satisfied. In this regard, there are actual precedents in Chile, for instance, Corpesca and SQM, in cases of bribery, were indicted regardless of having crime prevention systems, as their systems were deemed by the Prosecutor to be merely perfunctory and not implemented to a high standard. Therefore, a merely formal prevention model will not exempt a company from criminal corporate liability. Accordingly, the prevention model must be effective and properly implemented (i.e., the prevention model must be tailor-made to the company and the activities it carries out, and must be an integral part of the business structure and operations).23

XI OUTLOOK AND CONCLUSIONS

Regardless of the fact that there remains much to be done, Chile has implemented some strong measures in the fight against corruption. As previously mentioned, Laws 20,393 and 21,121 are clear examples of these efforts. Furthermore, it is interesting to remark that in undergoing criminal cases, cosmetic crime prevention models have not been accepted by the Public Prosecutor’s Office as effective defences to exclude the investigated companies from criminal liability.

In the near future, we can only expect further regulation and stronger enforcement of bribery and corruption offences from the Public Prosecutor’s Office.

In this regard, companies that have not already implemented a crime prevention system should not delay doing so any longer.

Finally, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as TPP-11, though facing material opposition from some political parties, NGOs and pressure groups, advances in the Chilean Congress. TPP-11 has a chapter establishing commitments on anti-corruption efforts.

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COLOMBIA

Maria Carolina Pardo Cuéllar and Luis Alberto Castell

I \ INTRODUCTION

In the last decade, Colombia has introduced several legislative measures against corruption. In 2011, Congress enacted the Anti-Corruption Statute, which amended the Criminal Code, introduced harsh sanctions against corrupt individuals and increased the term of debarment preventing former public officers from interacting with state-owned entities. In 2013, Colombia joined the OECD Anti-Bribery Convention. In 2016, Congress enacted one of the most recent legislative efforts against corruption, which included the recommendations from the OECD on corporate responsibility and effective prosecution against legal entities, leniency programmes and the obligation to adopt compliance programmes. Yet corruption levels have not appeared to decrease.

After completing the negotiations that resulted in the peace process in Colombia, there was an expectation that the Colombian government would focus on increasing and enhancing measures to combat corruption. Unfortunately, these efforts have been erratic. A report from 2016 concluded that in at least 43 per cent of the cases, participants in public bids in Colombia lost against unethical companies according to circumstantial evidence. This is 10 points higher than the global average. This scenario, coupled with recent corruption scandals in institutions such as the national police, former presidents and the courts, has reduced the expectations of a dramatic change in the corruption perception of the country.

Many maintain that the problem is not the legislation but the lack of effective enforcement. Some officers consider that implementing successful measures against corruption requires a multinational cooperation effort.

In Colombia, the laws assign responsibility for enforcement related to compliance matters to different authorities. The General Prosecutor’s Office (GPO) is in charge of criminal anti-money laundering and anti-corruption investigations against individuals, and the Superintendence of Companies is in charge of investigations against legal entities. The Superintendence of Industry and Commerce (SIC) is responsible for the administrative prosecution of cartels, and can impose significant fines against individuals and legal entities.

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II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal law

Criminal liability
In Colombia, legal entities cannot be direct subjects under criminal investigations. Only individuals are subject to such procedures. However, a legal entity could be held jointly and severally liable for any damage caused by its employees and executives, duly demonstrated during the criminal process followed against such individuals.\(^3\) This includes those cases in which an employee or executive is tied to the criminal process for having committed public or private corruption offences.

As a result, employees or executives as individuals have direct criminal liability. Legal entities for which those individuals work, have accessory civil liability. This civil liability is part of the criminal process and it is accessory because it depends on the judgment against the employee or executive.

Bribery of domestic officials offences
In Colombia, criminal liability for domestic bribery is set forth in the Colombian Criminal Code in multiple conducts.

Bribe solicitation\(^4\) takes place when a public official abuses his or her position, constraining or inducing someone to give, or promise to give, money or other undue profit.

Bribery\(^5\) takes place when a public official receives, directly or indirectly, money or other undue profit, or the simple acceptance of its promise, to delay or avoid an official act.

Indirect bribery\(^6\) takes place when a public official receives, directly or indirectly, money or other undue profit, or the simple acceptance of its promise, to perform an official act.

Giving or offering a bribe\(^7\) is when any person gives or offers money or other profit to a public official.

Definition of domestic public official
The Criminal Code defines ‘public official’ as any person currently employed by the government, judiciary, legislature, police and military forces, as well as certain officers of government-owned companies and individuals exercising public duties or administering public funds.\(^8\)

Gifts, gratuities, travel, meals and entertainment
The Criminal Code does not provide quantitative or qualitative limitations on hospitality expenses. However, considering the broad definition of bribery, hospitality could produce a bribery effect when it has the potentiality to influence a public official in any way with respect to a decision that he or she would need to make, that is not in compliance with his or her duties.

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\(^3\) Article 96 of the Colombian Criminal Code (Law 599 of 2000).
\(^4\) Article 404 of the Colombian Criminal Code.
\(^5\) Article 405 of the Colombian Criminal Code.
\(^6\) Article 406 of the Colombian Criminal Code.
\(^7\) Article 407 of the Colombian Criminal Code.
\(^8\) Article 20 of the Colombian Criminal Code.
The possibility of giving public officials hospitality of low value is based on the rulings of the Colombian courts. However, such rulings do not provide for a minimum or maximum amount for such hospitality. In general, the maximum amount will depend on the hierarchy of the public officer that receives the hospitality. A normal business occasion for a high-ranking officer would not be considered lavish or excessive if the price is not high under regular business custom.

**Penalties**

Sanctions or legal consequences of domestic bribery in Colombia for legal entities are:

- **a** Civil liability (torts) – the legal entity responds to all damages caused by the punishable act once the sentence is final.  
- **b** Piercing the corporate veil – this measure seeks to identify the individuals who own a legal entity and can thus be direct subjects of the criminal action. This measure is taken by the Attorney General of the Nation at the beginning of the investigation or at any stage of the process.
- **c** Suspension and cancellation of legal status – at any stage of the criminal process and before indictment, the prosecutor may request the suspension as a preliminary measure, generating the temporary closure of commercial establishments when it is proven that the offence was committed through the legal entity.  
- **d** Finally, the legal entity (including its parent company, subsidiaries and affiliates) is banned from contracting with the state for a term of 20 years when one of its administrators, legal representatives, members of the board of directors or of the controlling shareholdings is convicted for public corruption, private corruption, unfair administration, misuse of privileged information and transnational bribery, among others. This inability is not given as a penalty in the criminal process but is a general debarment for the legal entity on state procurement.

**Commercial bribery offences**

Private-to-private corruption is a crime in Colombia, and is included in the Anti-Corruption Statute. This crime is committed when someone, acting to the detriment of the interest of the legal entity where the individual acts as a director, manager, adviser or employee, offers or makes a payment or any other grant to a third party, to benefit himself or herself or any third party different from the legal entity.
**Administrative law**

*Bribery of domestic officials offences*

In Colombia, non-public officials are not liable for domestic bribery under administrative law. Public officials are responsible for criminal behaviour under the Disciplinary Code (Law 734 of 2012).¹³

**Penalties**

Penalties include fines, publication of the sanction in the media, being prevented from receiving government subsidies and administrative disciplinary sanctions.

Fines derive from the existence of an enforceable final judgment issued against the legal representative or administrator of the legal entity when they have been convicted of receiving or giving a bribe. The Superintendence of Companies may impose fines of up to 200,000 times the legal minimum wage if the legal entity benefited from the commission of that offence.¹⁴ In certain cases, the Colombian Antitrust Authority could see bribery as anti-competitive conduct in the public procurement context. If this is the case, the Superintendence of Industry and Commerce may impose fines of up to 100,000 times the minimum monthly wage on the legal entity involved in the anti-competitive conduct.¹⁵

Publication of the sanction on media – this reputational penalty consists of the publication of an extract from the decision of the Superintendence of Companies in widely circulated media and on the website of the legal entity for a period of one year.¹⁶

The prohibition on receiving governmental subsidies lasts for five years.¹⁷

Public officials are subject to administrative disciplinary sanctions based on the Disciplinary Code.

**Commercial bribery**

In Colombia, there are no provisions regarding private-to-private corruption under administrative law.

**Public officials’ participation in commercial activities**

Public officials can participate in commercial activities or in any other activities while serving as public officials, as long as their position does not represent a conflict of interest. The conflict of interest prohibition lasts up to two years after the individual leaves his or her position as a public official.¹⁸

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¹³ The actual Colombian Disciplinary Code will be replace by the New Colombian Disciplinary Code (Law 1952 of 2019) from July 1st of 2021.

¹⁴ Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.


¹⁶ Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.

¹⁷ Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.

¹⁸ Article 8 literal (f) of the Public Procurements Law.
Political contributions by foreign citizens or companies

According to the Colombian Anti-Corruption Statute, any entity that makes a contribution to the political campaign of a candidate to the Colombian presidency, governors or mayors, exceeding 2 per cent of the maximum threshold for investment of the candidates in such campaigns, will be debarred or banned from entering into contracts with public entities of the respective administrative circumscription for which the candidate is elected. The prohibition on contracting with the entity will last for as long as the candidate is in office.19

In addition, no political party, movement, significant group of citizens, candidate or campaign will be able to collect contributions and individual donations exceeding 10 per cent of the total value of the expenses that can be made in the respective campaign.20 These values are set forth before the respective election.

Administrative and criminal enforcement

In Colombia, bribery is monitored by different regulators, depending on the matter. In the case of criminal enforcement, the GPO is in charge of criminal investigations against individuals. In the case of administrative investigations, the Superintendence of Companies is in charge of the enforcement of administrative anti-bribery measures. In addition, as mentioned before, in some cases the Superintendence of Industry and Commerce could investigate bribery as part of anti-competitive behaviour in the public procurement context.

Companies that have a statutory auditor appointed are subject to special supervision. Statutory auditors have the legal duty to report to the authority any corrupt practices that they detect in the activity of the companies. This report must be made within the six months following the day on which the auditor was made known of the corrupt act.

Defences

Since bribery entails the violation of a public official’s independence by offering or delivering something of value, said offering or delivery must have the capacity to corrupt the public official. This implies that the conduct must be materially unlawful, that is, that the offering or delivery must have a real capacity to modify the conduct of the public official.21 This implies that the gift or promise must be sufficiently significant as to serve as a motive for the improper behaviour. Gifts or promises of nominal value, although formally constituting a criminal offence according to the legal definition, should not be considered bribery.22

Plea agreements

Legal entities are not subject to criminal liability, as mentioned above. However, employees or executives under a criminal investigation may use various mechanisms to achieve an early termination of a criminal proceeding, such as:

a a guilty plea with the GPO. In this case, the defendants accept the commission of the crime, and their penalty is reduced to half or one-third of the legal penalty. Because of the guilty plea, convictions will be declared against them;

19 Colombian Anti-Corruption Statute, Law 1474.
20 Article 23 of Law 1475 of 2011.
21 Article 11 Colombian Criminal Code.
22 Supreme Court, Criminal Section, Court Order (auto) of 18 January 1979. Judge: Romero Soto.
a settlement agreement with the victim. In this case, there is no conviction but a decision in which the principle of discretionary prosecution is approved. If the individuals persist in this crime, this benefit will not be granted and a conviction will proceed; or

III ENFORCEMENT: DOMESTIC BRIBERY

Year after year, new corruption scandals are unveiled in Colombia. In 2019, the country faced corruption scandals within the military forces, where several generals and individuals in high command have been dismissed for bid rigging in public procurement. Likewise, acts of corruption to manipulate the records of entry into the army were found in a plan to obtain early pensions.

Not even the special peace justice (JEP), created as a transitional justice tribunal after the peace process with the FARC, is excluded from this phenomenon. A former prosecutor of this tribunal, along with some other individuals, is being prosecuted for corruption and influence peddling.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal law

Bribery of foreign officials offences

Transnational bribery is a criminal offence in Colombia. The Transnational Bribery Law modified this criminal offence to meet the commitments to be met by Colombia under the OECD Anti-Bribery Convention. This Law sets forth that transnational bribery takes place when someone gives, promises or offers money or anything of value to a foreign public official, in exchange for an omission or delay of any act of that official, and in relation to international business transactions.

Definition of foreign public official

The Colombian Transnational Bribery Law defines ‘foreign government officials’ as any individual that:

a holds a legislative, administrative or judicial position in a government, its political subdivisions or local authorities in a foreign jurisdiction, regardless of whether the individual was appointed or elected;

b performs a public function for the state, its political subdivisions or local authorities in a foreign jurisdiction or within a public body;

27 Paragraph one of Article 2 of the Colombian Transnational Bribery Law.
is part of a state enterprise or an entity whose decision-making power is subject to the will of the state, its political subdivisions or local authorities, in a foreign jurisdiction; or

d is an officer or agent of an international public organisation.

**Penalties**

Penalties are defined as follows:

a Civil liability (torts) – the legal entity responds to all damages caused by the punishable act once the sentence is final.  

b Piercing the corporate veil – this measure seeks to identify the individuals who own a legal entity and can thus be direct subjects of the criminal action. This measure is taken by the Attorney General at the beginning of the investigation or at any stage of the process.

c Suspension and cancellation of legal status – at any stage of the criminal process and before indictment, the prosecutor may request the suspension as a preliminary measure, generating the temporary closure of commercial establishments when it is proven that the offence was committed through the legal entity.

d The legal entity (including its parent company, subsidiaries and affiliates) is banned from contracting with the state for a term of 20 years when one of its administrators, legal representatives, members of the board of directors or of the controlling shareholding is convicted for public corruption, private corruption, unfair administration, misuse of privileged information and transnational bribery, among others. This inability is not a penalty in the criminal process but is a general debarment preventing the legal entity from being involved in government procurement.

e Fines – these derive from the execution of the administrative conduct of transnational bribery. The Superintendence of Companies may impose fines of up to 200,000 times the minimum monthly wage if the legal entity is found responsible for that offence.

f Publication of the sanction in the media – this reputational penalty consists of the publication of an extract from the decision of the Superintendence of Companies in widely circulated media and on the website of the legal entity for a period of one year.

g The prohibition from receiving government subsidies lasts for five years.

**ii Administrative law**

**Bribery of foreign public officials offences**

The Transnational Bribery Law creates administrative corporate liability. This administrative offence takes place when a director, employee, contractor or controlling shareholder of a Colombian company (whether or not they have the legal authority to bind the entity), commits transnational bribery. This conduct consists in giving, offering or promising, to a

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29 Article 91 of the Colombian Criminal Procedural Code.
30 Article 8(j) of the Public Procurement Law (Law 80 of 1993), included by Article 1 of the Colombian Anti-Corruption Statute.
31 Article 5 of the Colombian Transnational Bribery Law.
32 Article 5 of the Colombian Transnational Bribery Law.
33 Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.
foreign public official, directly or indirectly, money or any other benefit in exchange for an agreement from the foreign official to perform, omit or delay any act related to the exercise of their functions in relation to international business transactions.

**Defence**

Companies can reduce or avoid penalties when they self-report.\(^{34}\) To be eligible to avoid a penalty, they must meet two conditions. First, they must come forward before the Superintendence of Companies initiates its own investigation. Second, they must come forward before exercising rights or fulfilling obligations. If these conditions are not met, penalties can still be mitigated by up to 50 per cent when offences are disclosed after they have been committed.\(^{35}\) This reduction of penalties will only apply to administrative fines and not to criminal sanctions.

One of the elements that the Superintendence of Companies must take into account when imposing fines for corruption is the existence of ethics programmes. This type of programmes are not mandatory for all companies in Colombia. Only companies that meet the conditions defined in the regulation should have one.\(^{36}\)

Similarly, the Superintendence of Companies does not establish mandatory requirements of a business ethics programme, but the Superintendence issued a guideline\(^ {37}\) to be taken into account when implementing it. This guide states that a good business ethics programme must contain, at least, the following:

a. a commitment from the management level of the entity in the prevention of bribery;

b. evaluation of the risks related to bribery;

c. documentation of the business ethics programme;

d. appointment of a compliance officer;

e. existence of due diligence mechanisms;

f. existence of mechanisms for control and supervision of compliance policies and business ethics programme;

g. disclosure of compliance policies and business ethics programme; and

h. existence of communication channels.

**V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING**

**i Financial record-keeping laws and regulations**

In Colombia, merchants must keep their accounting books and records organised in a clear, complete and reliable manner that facilitates their consultation. Such books must allow for a verification of individual entries and of the general state of the business.\(^ {38}\)

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34 Article 19 of the Colombian Transnational Bribery Law

35 The Superintendence of Companies regulates the application of this program through the resolution 200-000816 of 2018. Essentially, the Superintendence recognizes that the main criteria to define the effectiveness of the collaboration would that the information must be provided timely, being useful and provide high-quality evidence.


37 Externa Circular Number 100-000003 of 26 July 2016.

38 Decree 2649 of 1993.
Companies required to adopt a money laundering control system must keep their books and records in accordance with the rules governing the preservation of the merchant’s information.

As a general rule, the obligation applicable to the merchants obliges them to keep such information for no less than 20 years unless the company opted for a preservation method, in which case the term will be 10 years.

ii Money laundering laws and regulations

In Colombia, the Criminal Code prohibits money laundering and defines it as the acquisition, investment, transportation, custody or administration of funds with the purpose of hiding or concealing its illicit origin. Whoever engages in these activities can be subject to imprisonment from 10 to 30 years and receive fines of up to approximately US$12 million.

The regulation provides that companies which assets exceed certain thresholds and are engaged in the financial services, legal services, real estate, mining, accounting and automotive industries, among others, must implement a system designed to prevent money laundering activities and terrorism financing.

In addition to implementing a control system, companies must also file periodic reports on suspicious activities with the Information and Financial Analysis Unit (UIAF).

iii Prosecution

The UIAF is responsible for investigating and prosecuting money laundering and terrorism financing, and overseeing compliance with the obligations set forth in the anti-money laundering laws. Criminal prosecution requires that the UIAF exercises its investigative powers and subsequently reports the potential misconduct to the Superintendence of Finance, the tax authority and the GPO.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Recently, the Superintendence of Companies imposed the first fine for transnational corruption in a case related to Interamericana de Aguas y Servicios SA (Inassa) for corrupt practices in Ecuador. The fine is equivalent to approximately US$1.2 million (after a reduction of the original US$1.7 million following a decision on the reconsideration remedy filed by Inassa).

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Colombia has been accepted as a member of the OECD. Congress passed Bill No. 268 of 2018, which is now being studied by the Constitutional Court before ratification.

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39 Article 323 of the Colombian Criminal Code.
40 Depending on the specific sector, the regulation setting forth the obligation is the Article 102 of Decree 663 of 1993 (for the financial sector), and the External Circular 100-000006 of the Superintendence of Companies (for the real sector – the threshold for the asset value will vary from industry and industry-).
41 For instance, foreign trade operators are regulated by the customs authority and its regulation on this matter is set forth in the authority’s External Circular 170 of 2002.
42 See https://www.supersociedades.gov.co/delegatura_aec/normatividad/estudios_economicos_financieros/documentos_nacional/Anexo-1-ROS.pdf.
Nevertheless, Colombia signed the OECD Anti-Bribery Convention in 2013. Colombia is also a member of the United Nations and the Organization of American States and as such signed the United Nations Convention against Corruption and the Inter-American Convention against Corruption.

The UIAF is a member of the Egmont Group, which provides a platform for 164 agencies around the world to exchange expertise and financial intelligence to combat money laundering and terrorist financing.  

**VIII LEGISLATIVE DEVELOPMENTS**

After being defeated in Congress in June 2019, President Iván Duque introduced the Anti-Corruption Bill again. This Bill includes multiple administrative, procedural and criminal modifications.

Administrative measures to discourage and reduce criminal actions related to corruption include the following, among others:

- the creation of permanent debarment from contracting with the government for legal entities related to individuals sanctioned for corruption;
- extension of the debarment from public procurement to private contractual processes;
- exclusion of direct contracting in some cases in which it applies today; and
- the mandatory use of the banking system for certain operations involving public resources.

Punitive measures proposed include:

- excluding the possibility of house arrest for those who have been convicted of corruption behaviours;
- an accessory penalty of debarment for those individuals convicted of corruption for abusing the exercise of their position or functions;
- punitive aggravation for forgery related to the general social security system (health, pension, etc.); and
- two new criminal offences would be created for public officials who, after having performed illegal acts, induce, constrict or request (bribery request for a completed act) or receive (bribery for a completed act) money or similar, without the need for a prior remuneration promise.

As procedural measures, the bill proposes:

- the extension of the competence of judges to guarantee control;
- the possibility for the Office of the Comptroller General to become a victim in criminal proceedings for punishable conduct affecting public assets, allowing the state to recover some of the resources lost as a result of corruption; and
- additional requirements for possible punitive rebates under negotiations and agreements with the GPO in cases associated with corruption.

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43 See https://www.egmontgroup.org/.
44 Bill number 5 of 2019, Senate.
45 Bill number 119 of 2019, Senate.
An additional bill was introduced to fight against corruption in the judiciary and measures to favour corruption complaints, offering rewards to those who provide information on corruption cases and helping to locate the assets of corrupt people.46

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Data protection is currently governed by the Colombian Constitution, the Statutory Law 1581 of 2012 and Decree 1377 of 2013 (collectively, the Colombian data protection laws).

Entities wanting to process personal data from individuals residing in Colombia must obtain prior, express and informed consent from those individuals. Silence and tacit and blanket consent are not acceptable.

These entities are required to keep a record of the consent provided by data subjects, as they should be able to prove who has provided consent and, upon request, the record of consents should be made available for data subjects, their successors and the Data Protection Authority.50

Data subjects have the right to revoke or request the suppression of their personal data at any time, except for certain instances in which the data controller (i.e., the entity that collected the personal data and determines the manner in which and the purposes for which it is processed) must preserve the personal data (e.g., fraud prevention).

Sensitive personal data is defined in the Colombian data protection laws as personal data which processing may affect data subjects’ intimacy or the wrongful processing of which could lead to discrimination (religious beliefs are expressly cited as an example of this type of data). The Colombian data protection laws provide that consent for the processing of sensitive personal data must also be explicit and that the provision of such type of data must not be a condition for the rendering of any service.

The Colombian data protection laws expressly prohibit entities from transferring personal data across borders unless prior, express and informed consent is obtained from the data subject for this purpose.

The Colombian data protection laws are highly protective of personal data of children and adolescents (minors under the age of 18) and treat this information as sensitive. Article 12 of Decree 1377 prohibits the processing of personal data of children and adolescents, except in the case of data of a public nature, and when such data processing complies with the following parameters: it (1) ‘responds and respects the highest interests of children and

46 Bill number 18 of 2019, Senate.
47 This law regulates privacy rights in respect of personal data of individuals collected and processed in any type of database.
48 Law 1581 provides some exceptions: (1) when the processing is authorised by a Law for historic, statistical, scientific, or other purposes; (2) when the information is of a public nature; (3) when the information is required by a government authority exercising its duties, as explicitly conferred by law; (4) when the circulation of personal information is necessary in the event of a medical or sanitary emergency and (5) information regarding the civil registry.
49 Consent can be granted electronically, since electronic messages have the same legal effect as written documents and therefore in principle they can replace the requirement of the written document.
50 Article 7 of Decree 1377 sets forth the obligations that data controllers must comply with, including the obligation to keep record of the granted consent.
adolescents'; and (2) ‘ensures respect for their fundamental rights’. To mitigate any risks, the entity must have the parent or the legal guardian of the child expressly provide consent, but in addition, when applicable, ensure that the child’s right to be heard is respected.51

According to the provisions of Law 1581, all data controllers responsible for processing personal data of individuals residing in Colombia shall adopt: (1) a privacy policy, and (2) an internal manual that regulates how the policies for processing of personal information will be applied. Pursuant to Decree 1377, privacy policies must be made available to data subjects using physical or electronic means, and must be drafted in plain and simple language, in Spanish.

Entities with total assets over 100,000 units of tax value, equivalent to 3.427 million Colombian pesos in 2019, must register all their databases (not the personal data contained therein but information on how the data is processed) with the National Database Registry.

X COMPLIANCE

Recently, the Colombian Constitutional Court has participated in the discussion on the legality of dawn raids conducted by the Colombian administrative authorities.52 The court sets forth that dawn raids conducted by the Superintendence of Industry and Commerce and the Superintendence of Companies are evidentiary proceedings that do not violate the constitutional rights of the individual under investigation, if the specific objective of the visit is linked to their investigative goals and do not intercept separate personal communications.

51 Article 12 of Decree 1377 provides that ‘the legal representative of the child will grant the child’s prior authorization for the right to be heard, an opinion that will be valued taking into account the maturity, autonomy and ability to understand the matter.’

52 Sentence C-165 of 2019.
Chapter 7

ECUADOR

Javier Robalino Orellana and Mareva Orozco Ugalde

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, the resolution No. SCVS-DSC-2018-0041 issued by the Superintendence of Companies, Values and Insurances, along with the Comprehensive Organic 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, integral security and 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 revoke public officials from office in the event that they are charged with corruption. Similarly, the ‘fifth branch’ – Transparency and Social Control – is in charge of fighting corruption, investigating corruption complaints and protecting whistle-blowers, among other tasks.

The Financial and Economic Analysis Unit (UAFE) during 2018 and so far in 2019 has been working to contribute to the fight against corruption in Ecuador. Different cooperation agreements have been made, such as with the United Nations Office on Drugs and Crime UNODC, establishing as the goals of institutional strengthening and training, and technical assistance against the current regulatory framework for asset recovery.

In February 2019, the Council of the Judiciary and the Secretariat of the Presidency of the Republic joined the Framework Agreement on Interinstitutional Cooperation to strengthen the fight against corruption and asset recovery. The agreement was signed by the State Comptroller, the State Attorney General and the Director of the UAFE, and aims to ‘establish and implement cooperation mechanisms to strengthen the exercise of its constitutional and legal functions, in the fight against corruption and asset recovery’. The agreement establishes several inter-institutional cooperation mechanisms, including the following:

a. Training for the investigation and timely processing of criminal cases initiated by the Prosecutor’s Office.

b. Exchange of information that may be useful for the exercise of the constitutional and legal powers of each of the parties.

1 Javier Robalino Orellana is a partner and Mareva Orozco Ugalde is a senior associate at Ferrere.
Timely collaboration in the investigations initiated by the State Attorney General.

Collaboration of the State Comptroller’s Office in the establishment of the amounts for the collection of the integral reparation of the patrimonial damage caused to the state.

Coordinate the actions for the exchange of information in order to recover the assets of the public administration.

Agile and timely execution of legal actions in defence of the national heritage.

Development of joint research and innovation projects in sectors of institutional interest.

Development of professional training programs in institutional interest sectors, among others.

Within its various activities, the UAFE signed a reimbursable technical assistance agreement with the World Bank that will facilitate the use of an analytical tool to create a National Risk Matrix, this document will provide specialised advice to the UAFE.

The National Risk Assessment’s main objective is to identify, evaluate and understand the risks of money laundering and terrorist financing in order to take action including the designation of authorities and mechanisms to coordinate actions, distribute resources and ensure that these risks are effectively mitigated.

Among other actions taken this year by the Ecuadorian government is the creation of the International Commission against Corruption. This Commission was formed by five international experts in the field of anti-corruption, and its objective is to give specialised technical attention to strengthening public institutions in this area.

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 forth 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.2 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 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

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2 Constitution, Article 233.
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 (Comprehensive Organic 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. There are many debates about whether or not to include corporate liability in the Ecuadorian criminal law, but for now, there is 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 threatens 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. An aggravation circumstance takes place 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 such conduct; 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

### iv Definition of public official

Public officials are defined at the constitutional level as 'all persons that, 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.

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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.
8 Constitution, Article 229.
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

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,13 this gift must become part of the inventory of the public institution to which the public official belongs.

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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).
13 Equivalent to US$394 for 2019.
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 was to lead 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 influences or influence peddling: three to five years, and if it was committed for illegally obtaining business with a public entity, up to five years;19
d embezzlement: 10 to 13 years;20 and
e illicit enrichment of a public official: this depends on the enrichment value, calculated based on the monthly minimum wage.21 Up to 200 – from three to five years; between 200 and 400 – five to seven years; and over 400 – up to 10 years.22

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.
21 Equivalent to US$394 for 2019.
22 Criminal Code, Article 279.
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.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 branch. Moreover, Article 57 states that for someone to apply for a position within the judiciary branch, 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. Its actions receive collaboration from supporting entities such as the Council for Citizen Participation and Social Control, 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.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.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, there is the Petroecuador case (see subsection i, below) and the Odebrecht case where several public figures have been indicted in Ecuador according to local criminal procedure.

On 8 August 2019, a prison order was issued to Rafael Correa, the former President of Ecuador (a previous prison order was issued on 3 July by the same judge for Corea’s alleged participation in the kidnapping of the former opposition assemblyman, Fernando Balda). The judge ratified the request for pretrial detention against Correa and said that the prison will be ‘legal, constitutional and conventional’ and therefore ‘non-arbitrary’.

The Prosecutor’s Office accused Correa of leading an ‘illegal network’ to raise funds from state contractor companies for Alianza País campaigns and then award them infrastructure works contracts.

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23 Organic Law on Public Service, Articles 10 and 48.
24 Organic Law on the Transparency and Social Control Branch, Article 5.
25 Organic Law on the State Comptroller’s Office, Articles 2, 3, 4, 5 and 31.
26 Alianza País, now officially named Movimiento Alianza País – Patria Altiva i Soberana, is a left-wing Ecuadorian political movement, founded by former President Rafael Correa.
Similarly, the judge also asked for preventive detention for four other former ex-collaborators of the Correa government (2007–2017), including former Vice-President Jorge Glas, who has been in prison for almost two years for illegal association in another case related to the Odebrecht matter.

The prosecution is also investigating a plot known as ‘bribes 2012–2016’ (formerly ‘Green Rice’), in which four other former senior collaborators of the Correa government (2007–2017) are allegedly involved, to which it also applied caution.

The Prosecutor’s Office suspects that the investigation will shed light on approximately a dozen elements of conviction that point to the commission of the crimes of bribery, illicit association and influence peddling, in the alleged irregular financing of the Alianza País. To date, Correa, who has more than a dozen open files, has not been convicted by a court in Ecuador, and refuses to return to the country because he believes he is the victim of political persecution by his successor, Lenin Moreno.

In addition, Rafael Correa and his former Vice-President Jorge Glas are identified in 26 cases. These include peculation, organised crime, bribery, abuse of authority or power of his charge as President and Vice-President, influence peddling, laundering, forgery of signatures and illegal association.

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 commercialization. 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 Alex 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

27 Public Procurement Law, Article 2 and Regulations on the Public Procurement Law, Article 104.
28 See www.contraloria.gob.ec/CentralMedios/PrensaDia/13243.

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contractors to close relatives and friends of Alex 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 Alex 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 made public statements. The two key points of the press conference were that Alex 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 Alex 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, Alex Bravo and others.32

On 15 February 2017, 10 people, including Carlos Pareja and Alex 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 provoked cross-border consequences; in the United States several former Petroecuador executives and individuals related to contractors have been sentenced based on the Foreign Corrupt Practices Act and money laundering offences.35

31 Based on media reports: www.elcomercio.com/actualidad/alexismera-carlosparejayannuzzelli-million-dolares-cuenta.html; and www.lahora.com.ec/index.php/noticias/show/1101990246/1/Carlos_Pareja_Yanuzzelli_salio_del_pa%C3%A1s_hace_una_semana.html#.WA0jKxArL6Y.
33 Based on media reports: www.eltelagrafo.com.ec/noticias/judicial/13/caso-petroecuador-10-sentenciados-a-5-anos-de-prision-y-a-pagar-reparacion-por-25-millones.
Attempt to establish corporate liability

In 2015, a bribery case attracted public attention because of two unusual situations. 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 awarded company. 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 it.36

FOREIGN BRIBERY: LEGAL FRAMEWORK

Ecuador has not enacted specific provisions with regards to foreign bribery; nevertheless, the Criminal Code establishes that crimes committed overseas may be subject to Ecuadorian law if the crime causes 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.37

ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

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 Superintendency of Companies must keep accurate books and records. Entities must also maintain effective internal control, issue periodical financial statements, and in some cases, have external auditing. Accounting must be maintained in Spanish and according to the Superintendence regulations, the law and International Financial Reporting Standards. It is not required that companies, their legal representatives or employees disclose violations or irregularities on their books and in records.38

As for banks and other financial institutions, the Monetary and Financial Organic Code requires them to keep accurate books and records. Financial institution regulations do not require regulated entities to disclose violations or irregularities on their books and in records.39

36 Based on media reports: https://www.elcomercio.com/actualidad/asambleista-alianzapais-detena-corrupcion.html.
37 Criminal Code, Article 14.
38 Companies Law, Articles 289, 290 and 293.
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 times the minimum monthly wage. 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.

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 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.

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, the resolution No. SCVS-DSC-2018-0029 issued by the Superintendence of Companies, and the Criminal Code. The anti-money laundering rules mainly set forth reporting duties for financial institutions and other entities such as stock exchanges and brokerage companies, trust fund administrators, car, ship and plane dealers, money transfer, real estate and construction companies.

v Prosecution under money laundering laws

Money laundering provisions and the UAFE contribute directly to prosecuting corruption-related crimes. One of the main purposes of the UAFE is to report suspicious transactions to the State Prosecutor’s Office and produce reports if specifically requested. As stated in Section III, the UAFE’s report became a key element in 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:

- if it involves less than 100 times the minimum monthly wage: from one to three years;
- if there was no criminal association: from five to seven years;

40 Equivalent to US$394 for 2019.
41 Criminal Code, Article 298.
42 Law for the Prevention of Money Laundering and the Financing of Crimes, Articles 4 and 5.
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,\textsuperscript{43} 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.\textsuperscript{44}

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 UAFE 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.\textsuperscript{45}

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.\textsuperscript{46}

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.\textsuperscript{47}

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.\textsuperscript{48}

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

\textsuperscript{43} Equivalent to US$394 for 2019.
\textsuperscript{44} Criminal Code, Article 317.
\textsuperscript{45} Law for the Prevention of Money Laundering and the Financing of Crimes, Articles 4(d), 5 and 7.
\textsuperscript{46} Constitution, Articles 417 and 425.
\textsuperscript{47} See http://www.cpccs.gob.ec/docs/PLAN%20ANDINO%20DE%20LUCHA%20CONTRA%20LA%20CORRUPCION.pdf.
\textsuperscript{48} See https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.
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.49

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 Council for Citizen Participation and Social Control was appointed as the central authority for the IACAC.50

VII LEGISLATIVE DEVELOPMENTS

During the past three years there is the expectation that a single law can be enacted to combat corruption, which may be named the Anti-Corruption Law.

In fact, there have been several bills intending to reform not only the Comprehensive Organic Criminal Code, but the Public Procurement law and the State Comptroller’s Office are also necessary to be amended. 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 was promoted by congressmen aligned to former President Correa. The National Assembly President is unsuccessfully promoting an asset recovery bill and there are at least other three bills.

On 6 February 2019, President Lenín Moreno ordered the creation of the Anti-Corruption Secretariat through Decree 665.51 This new entity will be attached to the Presidency of the Republic and will generate public policies and actions to facilitate the reporting of acts of corruption. It will also be responsible for coordinating cooperation between government institutions, control bodies and judicial entities involved in the investigation, prosecution and punishment of these crimes. To date, the Anti-Corruption Secretariat has:

a recovered US$13.5 million, money that was handed over to the Ecuadorian state, as a result of the Odebrecht corruption scheme linked to senior government officials;

b presented information to the State Prosecutor’s Office to investigate the undeclared apartment of former director of the Ecuadorian Institute of Social Security (IESS), María Sol Larrea, located in the United States and valued at US$440,000;

c advanced the creation of the Commission of International Experts against Corruption that will strengthen the ability of the country’s institutions to prevent and punish criminal acts;

d provided documentation related to acts of destabilisation, to the Eloy Alfaro Foundation, State Prosecutor’s Office and the Foreign Ministry;

e denounced alleged crimes related to customs, tax, labour and money laundering in the Xinglong SA Chinese Steelworks, located in the Milagro–Guayas canton;

f asked the Prosecutor’s Office to investigate payments of premiums for US$9.1 million by Constructora OAS SA, which led strategic projects under the previous government;

50 See www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp.
51 Executive Decree 665
worked on the incorporation of anti-corruption units in public companies to consolidate preventive, corrective and investigative actions of possible illegal acts; and

strengthened relations with justice and control authorities in Brazil and Peru, in order to speed up investigations in corruption cases involving the two nations.\(^{52}\)

**VIII COMPLIANCE**

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

- voluntary disclosure before the justice authorities; and
- effective collaboration within the investigation of a criminal infringement.\(^{53}\)

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 is still a long way to go towards generating substantial improvements. Anti-corruption regulations are spread throughout different statutes. The benefits of enacting specific anti-corruption legislation include boosting citizens’ awareness and increasing commitment from enforcement institutions. This law may include regulations on compliance programmes and effective first-tier administrative oversight. Since Ecuador has signed and ratified relevant international conventions, foreign bribery will also need to be legislated on.

Ecuadorians and the media are demanding results in the most high-profile corruption investigations every time new information on these cases comes to light, which is why the President of Ecuador has created the Anti-Corruption Secretariat and the Commission of International Experts – both institutions with the sole purpose of combating corruption and creating a culture of prevention in government institutions.

From the previous pronouncements of certain assembly members, we expect that changes in criminal regulations will be included, in fact it has been suggested that penalty mitigation will be allowed if it is demonstrated that compliance processes have been put in place in companies, but nothing has been published yet. We hope these will be included to continue the fight against corruption in public and private institutions.

\(^{52}\) https://www.presidencia.gob.ec/secretaria-anticorrupcion-quienessomos/

\(^{53}\) Criminal Code, Article 45 (5) and (6).
In any case, we expect that there will be significant results from the ongoing investigations and that real action will be taken to prevent corruption in the private sector, since the existing regulations, as discussed in this chapter, are very weak. There is still much to be done regarding anti-corruption regulations in Ecuador.
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.

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1 Shaul Brazil and John Binns are partners at BCL Solicitors LLP.
2 The historic common law offence of bribery also survives but is rarely if ever used. In brief, the common law provides that where a person in the position of trustee to perform a public duty takes a bribe to act ‘corruptly’ in discharging that duty, both the person who pays the bribe and the person who receives the bribe commits an offence (R v. Whithaker [1914] 3 KB 1283).
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

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 a

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4 The Bribery Act 2010, Section 14.
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:

a 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.

b 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.

c Risk assessment: conducting periodic, informed and documented assessments of the internal and external risks of bribery in the relevant business sector and market.

d 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.

e Communication and training: ensuring that bribery prevention policies are understood and embedded throughout the organisation through education and awareness.

f 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
premises and seize documents.\(^6\) 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\(^7\) or a civil recovery order (CRO) in respect of the proceeds of criminal conduct.\(^8\) Specified prosecutors can offer immunity from prosecution or a statement to assist mitigation to an individual who assists an investigation.\(^9\)

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.\(^10\)

At the time of writing, the first investigations, prosecutions and convictions under the 2010 Act have started to make their way through the system. A number 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.

With respect to the broader issue of corporate cooperation with a criminal investigation (including but not limited to bribery cases), the SFO has issued guidance about what will be taken into account in assessing the extent of such cooperation (which, in turn, will impact on the decision on whether to prosecute and, if so, whether a DPA would be appropriate).\(^11\) Among other things, it suggests that ‘true co-operation . . . will be reflected in the nature and tone of the interaction between a genuinely co-operative organisation, its legal advisers and the SFO’. It goes on to provide a non-exhaustive list of indicators of good practice about preserving and providing material, witness accounts, and waiving privilege, noting in particular that ‘if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged’.

\(^6\) The Criminal Justice Act 1987, Section 2.  
\(^7\) The Proceeds of Crime Act 2002, Part 2.  
\(^8\) The Proceeds of Crime Act 2002, Part 5.  
\(^9\) 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).  
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 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.12

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.13

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.14

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

13  The Bribery Act 2010, Section 11.
14  The Bribery Act 2010, Section 12.
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.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The commission of bribery offences often also entails ancillary offences such as false accounting,15 money laundering,16 and failure by a company to keep adequate records.17

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 (POCA), 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. They also have duties under anti-money laundering regulations to collect information on the sources of wealth and beneficial ownership of their customers, enhanced where a politically exposed person (PEP) is involved (due to the potential for PEPs to be involved in corruption), breach of which is also an offence.18

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 was 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

15 The Theft Act 1968, Section 17.
17 The Companies Act 2006, Section 387.
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.

Notwithstanding the apparent success of Mr Alderman’s strategy, 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 2012.19

The SFO under Mr Green obtained convictions under the 2010 Act, as well as the first conviction, after a contested trial, of a corporate entity for foreign bribery, the first conviction of a corporate entity for failing to prevent bribery under Section 7 of the 2010 Act (the Sweett Group PLC, ordered to pay £2.25 million in February 2016), and three deferred prosecution agreements (DPAs) in relation to bribery (see Section VIII.i).

Meanwhile, 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 legislative programme that began in June 2017. Instead, a new National Economic Crime Centre (NECC) was 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

It was in that context that Lisa Osofsky, a former Federal Bureau of Investigation counsel, took over as the SFO’s latest director in August 2018.21 Since then, there have been a number of developments and announcements in connection with the SFO’s foreign bribery work, including convictions in its cases involving Alstom,22 FH Bertling23 and Unaoil,24 and the closure of investigations in connection with GlaxoSmithKline and Rolls Royce25 (the

23 https://www.sfo.gov.uk/2019/06/03/fh-bertling-sentenced-for-20m-angolan-bribery-scheme/.
latter following a DPA with the company – see Section VIII.i). A House of Lords committee set up to review the working of the 2010 Act, meanwhile, reported that it was ‘an exemplary piece of legislation’.26

In terms of Ms Osofsky’s personal impact on the SFO, the most eye-catching development so far has been her suggestion, in an interview with London’s Evening Standard, that individuals involved in criminal conduct could ‘spend 20 years in jail for what [they] did, or wear a wire and work with us’.27 While such an approach may well work in the United States, it is unlikely to do so here, not least because of the shorter sentences typically imposed and the much more limited role of the prosecutors in setting them.

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 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


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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).

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 successful completion of the DPA, on its expiry after three years, was confirmed in December 2018.) The second, in July 2016, was with Sarclad Limited, and involved financial orders of £6,553,085, comprising a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. Sarclad 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

28 The Crime and Courts Act 2013, Section 45 and Schedule 17.
triggered by an external source and not by self-reporting. In his judgment, Sir Brian Leveson 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 was 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’.31

Another source of controversy about DPAs has been their relationship with the prosecution (or lack thereof) of associated individuals, with the SFO facing criticism of its decision not to prosecute individuals associated with Rolls Royce,32 and of its failure to secure the conviction of individuals associated with Sarclad33 (which followed a similar failure to convict those associated with a fourth, non-bribery DPA, against Tesco).34

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 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.35

35 ‘Fraud, Bribery and Money Laundering Offences: Definitive Guideline’ (see www.sentencingcouncil.org.uk).
iii  Proceeds of crime developments

Authorities in the UK have a number of options under POCA to freeze and recover assets on the basis that they represent the proceeds of crime or are intended for use in 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 would be available to satisfy a confiscation order at the end of criminal proceedings, and freezing assets pending proceedings for civil recovery.

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. The NCA announced several uses of these powers in 2019 in the context of alleged foreign corruption, securing the forfeiture in January of a diamond ring worth around £1 million belonging to a Mrs Zamira Hajiyeva (the wife of an Azeri state banker, who had been convicted in Azerbaijan of corruption offences), and in February of nearly £500,000 from accounts held by the son of the former prime minister of Moldova, and announcing in August 2019 the freezing of £120,000 in bank accounts that it said was suspected to have derived from bribery and corruption in an unnamed overseas nation.

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, and 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. Importantly for foreign bribery cases, a UWO can be made against a foreign PEP where an interest in a property appears inconsistent with his or her known sources of wealth. The first UWO was obtained in July 2018, and survived a challenge from the respondent, the aforementioned Mrs Hajiveya. The second use of the power, in May 2019, was said to involve a foreign PEP with an interest in real property in London worth around £80 million.

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, possible debarment from participating in public contracts in the European Union, and potential breaches of regulatory provisions. Two 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), 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.

X 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.

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


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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 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 Sapin II Law also significantly reinforced the anti-corruption compliance landscape for large French companies. More recently, France has been focusing on strengthening the prevention of corruption at the parliamentary level.

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.
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 abstain from taking part in acts falling within the scope of their function that could give rise to a conflict of interest. The law contains transparency rules governing representatives.

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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.
6 Article 25 bis, Law No. 2016-483 dated 20 April 2016 on the ethics, rights and obligations of civil servants.
of interest groups’ lobbying activities. The French Senate also adopted a code of conduct for representatives of interest groups that prohibits them from offering gifts to senators exceeding €150. In December 2018, the Senate published the Senators’ Ethics Guide containing ethics rules for senators, parliamentary assistants and representatives of interest groups.

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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7 Article 25 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 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
- 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

There is a special office of the National Financial Prosecutor (PNF), dedicated to investigating financial and economic crimes, including corruption.

According to the 2018 report published by the French Anti-Corruption Agency (AFA), there were 816 ongoing investigations proceedings in France regarding corruption and related offences. Of the persons target by an investigation, 55.2 per cent were indicted. In 2017, 297 convictions were rendered by French courts in cases on corruption and related offences. Of those convictions, 66 per cent resulted in a prison sentence (including suspended sentences). In 2017, 51 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),10 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 €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. A total of six CJIPs have been concluded as of September 2019 in all criminal matters.

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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 Convention judiciaire d’intérêt public.
On 3 April 2019, the French Supreme Court upheld the conviction of a regional prefect for domestic bribery because of a €200,000 payment received by her husband in exchange for her assistance on a matter falling within the scope of her role.  

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 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.

11 Crim. 3 April 2019, No. 17-87209.
12 The Law authorising the ratification of the OECD Anti-Bribery Convention was passed on 27 May 1999.
iii Penalties
Corruption of foreign public officials is 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 up to twice the value of the assets to which the offence relates for individuals; and

b 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.  

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.  

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).

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.

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.

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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 €1,875,000 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 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.

On 21 December 2018, the French oil company Total was sentenced to a €500,000 fine for paying bribes in exchange for obtaining oil contracts in Iran in 1997.

On 20 February 2019, the Paris first instance tribunal sentenced the Swiss bank UBS to a €4.5 billion fine – the highest fine ever imposed by French courts – in a money laundering case.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

France is party to:

- the United Nations Convention against Corruption, which entered into force on 14 December 2005;
- the OECD Anti-Bribery Convention, which entered into force on 15 February 1999;
- the Council of Europe Criminal Law Convention on Corruption; and
- 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 dedicated to incriminations and political party funding. The five pending recommendations have been partly implemented.

In September 2018, GRECO published the Fourth Evaluation Round report on prevention of corruption in respect of members of parliament, judges and prosecutors and concluded that France had implemented only four out of 11 of GRECO’s recommendations.

VIII LEGISLATIVE DEVELOPMENTS

i 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:
declaration of interests and activities for the presidential candidate;
creation of an ancillary penalty of ineligibility, which is not mandatory and is left to the
criminal tribunal’s discretion;\textsuperscript{22} and
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.

\textbf{ii 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.\textsuperscript{23}

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
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.

\textbf{iii 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.

\textbf{iv Tax fraud}

On 23 October 2018, the Law on the Fight against Tax Fraud was passed, which aims to
strengthen the tools given to criminal and tax law enforcement authorities when combating
tax fraud. The Law creates an automatic referral of cases to the Prosecutor by the French
tax administration when a tax reassessment reaches a certain threshold and under specific
conditions. The Law also creates a specific tax police and opens the possibility to conclude a
CJIP in tax fraud offences.

\section*{OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION}

\textbf{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

\textsuperscript{22} Decision No. 2017-752 DC 8 September 2017.
\textsuperscript{23} Article L225-102-1 of the French Commercial Code.
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.

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:

a legal opinions sent by external counsel to their clients;
b communication between external counsel and their clients, and between external counsel – except for correspondence identified as ‘official’;
c 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;
d clients’ names and external counsels’ agendas; and
e 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.

On 27 June 2019, the French Anti-Corruption Agency (AFA) and the National Financial Prosecutor (NFP) issued joint guidelines relating to the implementation of the CJIP. The guidelines are modelled on the US Department of Justice 9-47.120 FCPA Corporate Enforcement Policy. They outline the conditions under which a company may be eligible to enter into a CJIP. Companies are required to conduct thorough internal investigations into potential misconduct and to produce investigation reports to the Prosecutor even when they are covered by legal privilege. The Prosecutor will decide a on case-by-case basis whether refusing to produce documents covered by legal privilege is sufficiently justified not to undermine the possibility of concluding a CJIP.

24 Article 66-5 of Law 71-1130.
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.25

X  COMPLIANCE

Since the entry into force of the compliance provisions of the Sapin II Law on 1 June 2017, 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 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. The AFA Commission rendered its first decision on 4 July 2019, in which it concluded that the company’s compliance programme under review was compliant with the Sapin II Law.

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 CJIP has become an effective enforcement tool in corruption and related offences cases. The Sapin II Law has also 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\(^2\), 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.\(^3\) 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:

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1 Sabine Stetter is a managing partner and Christopher Reichelt is a research assistant at stetter Rechtsanwälte.
3 IMF Staff Discussion Note, Corruption: Costs and Mitigation Strategies, May 2016, referring to a publication by Kaufmann.
a Sections 299 to 302 – bribery in business dealings and the health sector;
b Sections 331 to 337 – bribery of public officials; and
c 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, even if this agreement was concluded informally.

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.4 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).5 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.

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5 Federal Supreme Court, NJW 2008, p. 3580.
section 108e of the StGB governs the corruption and bribery of members of parliament at state and federal level. 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 convictions or even investigation of high-ranking officials.

However, in constructing Section 108e of the StGB 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 by private individuals and legal entities to members of parliament and political parties, there are general limitations, such as the prohibition of anonymous donations of more than €500, the requirement to list donations of more than €10,000 in an accountability report with the name and address of the donor and the exact amount of money, and a notification to the President of the Bundestag with immediate publication of donations of more than €50,000.

### 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. To date, only 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.

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6 LobbyControl, Lobbyreport 2017, p. 35.
7 See Section 25(3) of the Law on Political Parties (PartG).
ii Plea-bargaining

Until 2009, German law did not contain any legal provisions on plea-bargaining. 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) together with additional legal provisions to ensure the process has a degree of commonality.

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 273(1a) 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. 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 and to what extent this has to be documented in public court records.

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 discussion on the applicability of Section 153a of the StPO, 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.

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8 Federal Constitutional Court, judgment of 19 March 2013, 2 BvR 2628/10 et al.
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(1) No. 2a of the StGB. In addition, the provisions regarding bribery of public officials also apply to public officials and other employees of the International Criminal Court (ICC) as well as – since 2015 – the members of certain courts at the European level specialised in these matters.

Substantial parts of the previously applicable EU Bribery Act and the Act on Combating International Bribery have to exist at the same time. The provision in Section 11(1) No. 2a of the StGB goes beyond the previous EU legal framework.

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 (AO) 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, unless they are made with the consent of the person entitled to them.

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 (FATF) 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. Furthermore, this could have a significant impact on the confiscation of incriminated assets.

Continuing along this path, the EU adopted the Fifth Money Laundering Directive in May 2018. Among other things, it strengthens transparency measures, leads to improvements in financial intelligence unit (FIUs) due to better access to information through centralised bank accounts, combats risks of terrorist financing through anonymous use of virtual currencies and pre-paid instruments, and implements stronger cooperation and exchange of information between anti-money laundering supervisors and the European Central Bank.10

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.

However, the EU has also been active in this area with the proposal for a regulation on European production and preservation orders for electronic evidence in criminal matters (the E-Evidence Regulation) and an accompanying directive. Once Parliament has approved the Commission’s proposal and the procedure has been completed in the coming months, direct access to e-evidence will be created without the need for a traditional request for mutual legal assistance. In this respect, negotiations are already underway with the United States on the corresponding exchange of data. In addition, European Criminal Records (ECRIS) and ECRIS-TCN (with third-country nationals) provide a tool for taking into account criminal records from other EU Member States or third countries when reaching a decision in court. Reference should also be made to cross-border investigation teams and Eurojust, which can coordinate the investigations.

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 European and international treaties on anti-corruption:

a the OECD Anti-Bribery Convention;
b the United Nations Convention against Corruption;

10 Finally, reference should be made to the EU Policy on High-Risk Third Countries. In this context, the EU is currently working on a list of countries where there is increased concern about money laundering risks. This list is likely to have further implications for payments to these countries.
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.

From 2020, the European Public Prosecutor’s Office (EPPO), supported by 22 Member States (including Germany), will have the power to investigate, prosecute and bring to court crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. This will entail a new type of investigation and will require new approaches to criminal justice counselling with appropriate expertise.

VIII LEGISLATIVE DEVELOPMENTS

i Corruption in healthcare

The practice of pharmaceutical companies (particularly through their sales teams) of giving out complimentary 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.

ii ‘Roving doors’

Another issue that has been under scrutiny recently is the practice of politicians and senior public officials transferring to lucrative 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 can be criminally relevant, where offered or otherwise expressed to induce or in part motivate the carrying out of breaches of duty. Furthermore, lawmakers have 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 130 of the OWiG). 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 built up an FIU in 2001 under control of the Federal Criminal Police Office (BKA). Since 2017, the FIU reports to the Ministry of Finance. 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. For information on the adoption and consequences of the Fifth Money Laundering Directive, see above.

In addition, on 1 July 2017 a law, which transposed the EU Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime (2014/42/EU) into German law, entered into force reforming the criminal rules on disgorgement and confiscation. Disgorgement and confiscation are designed to enable public authorities to effectively confiscate undue profits. As German law does not provide punitive damages, disgorgement and confiscation 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

Corruption structures

The following two types of corruption are generally identified: situational corruption and structural corruption. 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. Structural corruption, however, 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.

12 This approach is further strengthened by the Regulation (EU) 2018/1805 publicised on 28 November 2018 on the mutual recognition of freezing orders and confiscation orders. The Regulation sets clear and short deadlines for the mutual recognition and execution of freezing orders. It improves the victims’ right to get compensation for damage inflicted on their assets and provides safeguards to ensure that mutual recognition of freezing or confiscation orders are in line with the EU Charter of Fundamental Rights and the European Convention on Human Rights.
13 See Bannenberg, Handbuch des Wirtschafts- und Steuerstrafrechts (2014), Chapter 14, point 7.
In Germany, known cases almost exclusively concern structural corruption. According to the federal status index of the German Federal Criminal Police Office (BKA), in 2016 about 20 per cent of criminal connections between givers and receivers lasted for more than two years. In 66 per cent of all known cases receivers were public officials. Today, 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. In this respect, the exceptions in Section 5 of the Law on the Protection of Trade Secrets from criminal liability for betraying trade secrets are also of high interest and relevance.

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.

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. This surely is in the best interest of the company, and particularly so as the Federal Court of Justice has ruled that the implementation and effectiveness of a CMS can be lent weight by courts, leading to harsher or reduced sentences. Of course, companies and law enforcement authorities have to ask themselves how, for example, a scandal such as Dieselgate could remain undetected for so long despite the existence of compliance programmes concerned with internal technical auditing and encouraging whistle-blowers to contact ombudspersons. 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. Here too, the effects of the new General Data Protection Regulation (GDPR) on the European and US legal area are not to be underestimated. 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.

17 Federal Court of Justice, decision of 9 May 2017, 1 StR 265/16.
18 In Germany, Sections 41, 42 and 43 of the Federal Data Protection Act (BDSG) must also be kept in mind.
Chapter 11

GREECE

Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti

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, which includes state services, state entities and municipalities.

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...
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.

Private commercial bribery is prohibited by Article 396 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, as is in force) 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 circumstances of the offence and whether there was a breach of public duty. If the act (passive or active bribery) is characterised as a misdemeanour and falls within the duties of the public official, it is punishable with imprisonment (of at least one year and up to three years) and pecuniary sanctions. If the act is committed in the course of one’s professional duties it is punishable with imprisonment for between three and five years and pecuniary sanctions. Pecuniary sanctions are calculated depending on the seriousness of the act and the financial status of the convicted person. 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. If the act of passive bribery is committed by an official in breach of his or her duties (felony) and if the act of passive bribery is committed in breach of duty and habitually or the gain or benefit is of high value, the act is punishable with incarceration for up to 10 years and pecuniary sanctions.

As regards active bribery, if the act is a misdemeanour, it is punishable with imprisonment of one to three years and pecuniary sanctions or imprisonment ranging from three to five years and pecuniary sanctions if the act of active bribery is related to an official’s act in breach of his or her duties.

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.

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 Anti-Corruption Prosecutor, 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 and domestic legislation is also compliant with EU legislation on the protection of the EU’s financial interests. In view of this, provisions for active and passive bribery are applicable to officers or other employees in any contractual status of 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 and persons 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.

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.

Initiation of preliminary investigations in respect to corruption cases is done by the Anti-Corruption Prosecutor. After the preliminary inquiry, the case file is forwarded to a presiding judge of a first instance court for the conduct of a main investigation. In the first stages of preliminary inquiries, the Anti-Corruption Prosecutor may request the assistance of any enforcement agency such as the FECU, the Hellenic Capital Market Commission, the General Inspector of Public Administration, 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 Anti-Corruption Prosecutor 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 263A 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.
As of 1 July 2019 new plea-bargaining procedures are provided for in the Code of Criminal Procedure for many financial and economic crimes (including money laundering and serious tax offences). These new procedures aim to ensure faster and more effective prosecution in cases where the factual basis of a case is not contested. In such cases, sentencing is done by a judge, following an agreement between the prosecutor and the defendant. Violent crimes are explicitly excluded. Generally speaking, the new provisions apply to the following categories of cases:

a) cases where the defendant has made full restitution to the victim; and
b) cases where the defendant has made partial or no restitution to the victim.

The defendant is always represented by a lawyer. If the defendant and the prosecutor do not reach an agreement acceptable to both parties, all related material is removed from the case file and destroyed.

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 one to five years (for misdemeanours) to imprisonment for up to 10 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 (and also to make quarterly results for listed companies public), 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 are under legal obligation to monitor transparency standards and corporate ethics, 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. As of 1 July 2019 a new Criminal Code and a new Code of Criminal Procedure is in force. Both laws have consolidated various provisions in other legal texts and have set a unified framework for prosecuting corruption offences. A new legal framework has made adjustments to comply with the latest EU Regulation and international instruments and has also integrated various special procedures with the standard procedural rules.

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 (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. The latest amendments (through the new Code of Criminal Procedure) will help to streamline relevant procedures and minimise chances of imposing excessively restrictive measures over a long period of time.
Chapter 12

INDIA

Aditya Vikram Bhat, Prerak Ved and Shantanu Singh

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, strengthening laws against intermediaries with fiduciary duties like auditors and the enactment of 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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Ⅱ 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 (in addition to liability for ‘criminal conspiracy’ under the Indian Penal Code). However, legislative changes to the PCA in 2018 have (in addition to liability for ‘abetment’ and ‘criminal conspiracy’) expressly targeted bribe-givers (including commercial organisations and their identified person in charge) 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 penalties for various offences under the PCA include imprisonment ranging from six months to 10 years and a fine (with one instance where it is imprisonment, 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

2 CBI v. Ramesh Gelli & Ors, 2016 (3) SCC 788.
public servant carried out his or her official duty improperly or dishonestly. An attempt to 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. The FCRA also mandates that persons such as member of a legislature or an office bearer of a political party or judge or government servant or employee of any corporation or any other body owned or controlled by the government shall not accept any foreign hospitality while visiting any country outside India without the prior permission of the central government.

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 and is punishable with simple imprisonment of up to a year, a fine or both. 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 general laws like the PCA that specifically prohibit private commercial bribery in India, although it could well be a criminal act under general criminal statutes (like the Indian Penal Code) and be covered under specific laws governing certain commercial organisations (like Companies Act – as stated below), and organisations may have internal codes of conduct that prohibit it. India’s legislation governing companies, being 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’ – and does not require there to be a wrongful gain or a wrongful loss. Acts of private bribery (and concealment thereof) could be considered to constitute a fraud on (or by) the company, which is punishable with imprisonment ranging from six months to 10 years and a fine (depending on the amount involved in the fraud) – however, for fraud that is below a de minimums limit (1 million rupees or 1 per cent of the turnover of the company, whichever is lower and not involving public interest), the punishment is imprisonment for up to five years, a fine of up to 5 million rupees or both. Directors (in their directors’ responsibility statement under the Companies Act) are also required to provide certain confirmations that are relevant in this context, and also provide details of any fraud reported by auditors (other than those which are mandatorily reportable to the central government). The Companies Act also obliges auditors (in the course of performance of their duties as an auditor), cost accountants in practice (in the course of conducting cost audit) and company secretaries in practice (in the course of conducting secretarial audit) to report any suspected fraud to the central government (as is detailed in Section V.i below). Listed companies and certain types of unlisted companies are mandated to establish a vigilance mechanism for reporting

3 Sub-sections (c) and (e) of Section 134(5) of the Companies Act (which contains matters to be stated in the director’s responsibility statement) read as below:

(c) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities

(f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.
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 – although (given recent change in PCA) there is limited precedent of proceedings under PCA against bribe givers. 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 August 2019, 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, and as per various media reports, extradition proceedings are ongoing against both main accused.

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 (MCA) 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 December 2018, 100,150 shell companies have already been struck off in the period commencing from April 2018. Additionally, as per news articles, the Central Board of Direct Taxes has issued directions to the income tax offices across India to probe financial transactions of around 300,000 (shell) companies that had been struck off by the MCA.

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 and a fine).

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, cost auditors and company secretaries in practice with regard to performance of their respective duties (statutory audit, cost and secretarial audit) and reporting of suspected frauds (including to the central government, if they cross the relevant threshold). In this regard, the Institute of Chartered Accountants of India is issued a guidance note, that clarifies certain aspects on fraud reporting by (statutory) auditors.
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.

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.
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 2019

The PMLA was amended by the Finance Act 2019 with effect from 1 August 2019, pursuant to which, for the Enforcement Directorate (i.e., the relevant authority under the PMLA) to investigate a matter thereunder, the prerequisite of a first information report (FIR) or charge sheet being filed by the other relevant agencies that are authorised to probe the relevant offence (the identified offences that would attract the application of PMLA) has been removed. Additionally, all offences under the PMLA have been made cognisable (which would empower the Enforcement Directorate to arrest an accused on its own motion without warrant) and non-bailable (that is, where grant of bail is a matter of discretionary power in the hands of the court).

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

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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. The office of the Lokpal (the ombudsman at the federal level) is currently headed by Justice Pinaki Chandra Ghose, who is a retired judge of the Supreme Court of India.

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. This law is not currently in effect.

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*,⁴ 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*, ⁵ 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.

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⁴ *Iridium India Telecom Ltd v. Motorola Incorporated & Ors*, AIR 2011 SC 20.
⁵ *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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6 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) periodic 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,\(^7\) 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.

\(^7\) Section 212(2) 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

1 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:

a any offer or promise of a bribe, even when ultimately rejected or refused;

b solicitation of bribery;

1 Chaim Gelfand is a partner at Shibolet & Co.
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, prohibits 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.

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. In November 2018, Chaim Ben-Susan, the CEO of a company that transferred money to a high-ranking member of Yisrael Beiteinu, was convicted of assisting the provision of bribes and was sentenced to six months of community service, eight months of probation and a fine, while Daniel Elinson, the chairman of a different company that paid a high-ranking member of Yisrael Beiteinu US$49,000 and then an additional 150,000 Israeli new shekels was convicted of providing bribes and was sentenced to nine months of community service. In May 2019, the state of Israel filed an appeal concerning the sentencing's lack of severity, while the defendant appealed the conviction itself. Also in July 2019, Tali Keidar, a high-ranking official of Yisrael Beiteinu was convicted of accepting a bribe of at least 56,000 Israeli new shekels and was sentenced to a prison term of 10 months.

In May 2019, Avshalom Ashuri, a high-ranking employee of the Israeli Ministry of Foreign Affairs, was convicted of committing theft and accepting a bribe of at least 30,000
Israeli new shekels, by receiving a bribe of free air conditioners for his personal home from the same entity that supplied air conditioners to the Ministry of Foreign Affairs, the sentencing has yet to be published.

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. A hearing is due to be held in October 2019 by the Israeli Attorney General to determine whether to indict Netanyahu for these allegations.

## 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:

- 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);
- 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
- 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.

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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.
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.

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.

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:

a the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
b 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.
Chapter 14

ITALY

Roberto Pisano

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.

Roberto Pisano is the managing partner of Studio Legale Pisano. The information in this chapter was accurate as at November 2018.
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:

a 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
Apellate 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 businesspeople 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 businesspeople 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
event of payments made through intermediaries, Italian prosecutors should prove, and Italian courts should assess, whether the payment to the intermediary was made with the knowledge of the intent to subsequently bribe the foreign public official.

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.
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 © 2019 Law Business Research Ltd
Italy

€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.
Chapter 15

JAPAN

Kana Manabe, Hideaki Roy Umetsu and Shiho Ono

I FOREIGN COMPLIANCE

Introducing the Legal Framework: Bribery

Japan is ranked 18th on the 2018 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 who give bribes to Japanese public officials outside the territory of Japan.

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 or 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 Ministry of Economy, Trade and Industry (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) 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...
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 five 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 the JICA through the 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.

v Bribery of public officials in Thailand

The fifth case was also widely reported in Japan, mainly because this is the first case where the plea-bargaining system was used. Three former executives of Mitsubishi Hitachi Power Systems, Ltd were indicted for paying 1.1 million baht to the public officials at the Ministry of Transportation in order to avoid delay in the import of the materials necessary for the construction of a thermal power plant. Two were punished by imprisonment of one year and six months and one year and four months with probation period of three years. The trial is still pending for one executive as of August 2019.

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


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 3 July 2019 and its new report (Japan’s Phase 4 report), the OECD Working Group on Bribery criticised Japan for only having prosecuted five cases of foreign bribery and sanctioned 12 individuals and two companies since 1999. The Working Group recommended that Japan take certain measures, including that it should (1) improve key elements of its legislative framework, in particular to increase the level of sanctions and the limitation period for foreign bribery; (2) broaden its framework for establishing nationality jurisdiction over legal persons; (3) encourage its agencies with the potential to detect foreign bribery to become more proactive in this respect; (4) ensure that the Ministry of Justice’s role in transmitting and clarifying certain allegations does not create unnecessary delays in opening investigations; (5) ensure that the prosecution’s role in conducting investigations and prosecutions is exercised independently of the executive, and in particular of the Ministry of Justice and the METI; and (6) ensure that both the police and the prosecution are more proactive and coordinated when investigating foreign bribery, including by reducing the reliance on voluntary measures and confession.

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.
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**

In 2019, the National Diet of Japan approved a bill, which will come into force by the end of 2020, to introduce an attorney–client privilege system under which companies can keep their communications with lawyers confidential under certain conditions but the introduction of this system is limited only to the area of the Antimonopoly Act. In other areas, including the CC and the UCPL, 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 in the course of performing their professional duties. 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:

- 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.
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.

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.

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. AG* 2 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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2 [2018] JRC 064.
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.*³ 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 Vii).

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.

³ [2016] JRC048A.
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

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.

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Prohibitions on paying and receiving bribes

Prohibition of bribery under the Criminal Act

The Criminal Act prohibits the following forms of bribery:

- 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);
- 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
- 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 96Doh1703, 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 2002Doh3539, 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.

The Supreme Court, however, does not consider the giving of money or goods that are considered to be part of a ritual in light of social norms or that are given for the maintenance or furtherance of a personal relationship in light of social norms to constitute a bribe, since this does not have any connection with a public official’s duties (Supreme Court Judgment 2001Doh3579, 12 October 2001).

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 summoned on a charge of theft. Two days after the suspect had been summoned, 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:

a any person holding legislative, administrative or judicial office in a foreign government, whether appointed or elected;

b any person conducting public affairs delegated by a foreign government;

c any person holding office in a public organisation or public agency established by any law; and

d 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.
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 2012 Noh865, 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

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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

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. On 2 March 2015, the Graft Act was promulgated 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).

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

In recent years, Mexico has increased its efforts to combat corruption; however, recent surveys still show a lack of sufficient progress to effectively root out graft in comparison to other Latin American countries. A recent index published by Americas Society/Council of the Americas (AS/COA) and consultancy firm Control Risks shows the foregoing, where the country with the highest overall score was Chile, and Mexico came in a distant sixth, followed by Guatemala and Venezuela.

As a result of the enactment of the constitutional anti-corruption amendment of May 2015, Mexico’s primary anti-corruption body was created, the National Anti-Corruption System, which focuses on providing legal framework for oversight of public officials and private parties in the anti-corruption and anti-bribery context. The National Anti-Corruption System coordinates the federal, state and municipal levels to prevent, detect and prosecute corruption offences. The centrepiece of the constitutional anti-corruption amendment was the General Law of Administrative Responsibilities, which now punishes both public officials and private parties, including both individuals and legal entities, for any bribery of public officials, whether in the federal, state or municipal public procurement context or otherwise. This key element, coupled with the advent of corporate criminal liability in 2016, have been the most notable anti-corruption developments in Mexico’s history.

Although the federal laws to implement the National Anti-Corruption System entered into full force in July 2017, Mexico has been struggling to fully implement these provisions at the federal and state levels. First, as of this writing, appointments for the 18 federal anti-corruption judges of the Federal Court of Administrative Justice, who will have jurisdiction over serious administrative offences, are still pending. Thirteen out of the 18 nominees withdrew their nominations, and recently the Senate voted to reject the five remaining nominees. Now, it is time for President Andrés Manuel López Obrador to submit fresh nominations to Senate. Paradoxically, the government is seeking to reduce or eliminate these seats as part of its austerity measures. While it is not clear whether this proposal will move forward, this measure will definitely produce negative impacts on the
National Anti-Corruption System. Second, at the local level, four out of 32 states have not yet harmonised their anti-corruption legislative framework with the federal anti-corruption legislation, in addition to seven out of 32 states that have not yet appointed members to one or more anti-corruption bodies.

Despite these shortcomings, there have been positive developments in Mexico’s efforts to combat corruption. On 1 December 2018, President Andrés Manuel López Obrador was sworn in as Mexico’s President, vowing to lead a sweeping transformation against corruption, impunity and inequality. Since then, the country has been in a major austerity and anti-graft push.

This chapter provides an overview of Mexico’s domestic anti-corruption framework, including criminal, civil and administrative legislation. It discusses the elements of anti-bribery legislation in various contexts, and examines related criminal offences. It closes with a section dedicated to a forecast for legislative developments and other final thoughts.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal law

Criminal liability

Following the constitutional anti-corruption amendment of 2015, in July 2016, the Federal Congress passed an amendment to the Mexican Federal Criminal Code and the National Code of Criminal Procedures, to establish direct corporate criminal liability for certain white-collar crimes, including bribery. As a result, legal entities are now liable for crimes when (1) the offences are committed in their name, on their behalf, for their benefit, or using means provided by them; and (2) when the entity did not have ‘proper controls’ in place. Although some people believe that the lack of proper controls should be an element to be proven by the criminal authorities in prosecution, others believe that, in practice, the commission of a crime is prima facie evidence of a lack of controls, which would need to be rebutted by evidence of a compliance programme. Based on the foregoing, private parties, including both individuals and legal entities, can be criminally liable for bribery of public officials pursuant to the Mexican Federal Criminal Code and most of, if not all, local criminal codes.

Bribery of domestic officials offences

Mexico’s Federal Criminal Code has provided for bribery of public officials since its first enactment in 1931, covering bribery of federal and some state public officials. Similarly, state criminal codes prohibit bribery of state and local public officials.

6 National Criminal Procedure Code, Art. 421.

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Article 222 of the Federal Criminal Code defines bribery and provides that bribery can be committed both by public officials, who solicit or receive a bribe, and by private individuals, who offer or pay to corrupt a public official. Mexico’s Federal Criminal Code sanctions:

\[ a \] the public official who, directly or indirectly, solicits or receives unduly for the public official or another person, money or any other gift, or accepts a promise to do or refrain from doing any just or unjust act in relation to the public official’s function, employment, charge or commission; and

\[ b \] whoever promises or gives any benefit to any public official, to cause the public official to do or refrain from doing an act related to the public official’s function, employment, charge or commission.\(^8\)

**Definition of domestic public official**

The Mexican Federal Criminal Code has a broad definition of ‘public official’. This definition includes any individual who has employment, position or charge of any nature in: (1) the central Federal Public Administration or in the Mexico City Public Administration; (2) decentralised organisms; (3) majority state-owned companies; (4) organisations or entities that have been assimilated to majority state-owned companies; (5) public trusts; (6) state-owned enterprises; (7) autonomous constitutional bodies; (8) federal Congress; (9) federal judiciary; or (10) entities that manage federal economic resources.\(^9\)

In addition, the relevant anti-bribery provisions of the Federal Criminal Code also apply to state governors, representatives, officials in local legislatures and magistrates in local courts.

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

Mexican criminal law does not establish quantitative or qualitative limitations on hospitality expenses. In principle, a public official may not receive any gifts, gratuity, meal or entertainment for his or her own benefit. Whether a hospitality expense should be considered bribery will need to be determined on a case-by-case basis, taking into account all the facts and circumstances surrounding the case. There is no *de minimis* exception to the prohibition on gifts to public officials, so all hospitality must be provided to the represented government entity and not to the public official personally.

**Penalties**

The Mexican Federal Criminal Code establishes the same penalties for both public officials and private parties, including both individuals and legal entities that corrupt public officials. Penalties for public officials and private parties include up to 14 years’ imprisonment,\(^10\) fines of up to approximately US$670,\(^11\) removal from public office, if applicable, up to 20 years’ prohibition from holding public office and debarment from participating in public procurement processes.\(^12\)

\(^8\) Federal Criminal Code, Art. 222.
\(^10\) Federal Criminal Code, Arts. 222.
\(^11\) Throughout the chapter the exchange rate is MXN$19/US$1.
\(^12\) Federal Criminal Code, Art. 212.
Moreover, if the perpetrator is an elected public official or a public official whose appointment requires ratification by the Mexican Congress, penalties can increase by up to one-third,\(^\text{13}\) and by up to half if the public official is a member of a police, customs or immigration agency.\(^\text{14}\)

In addition, if a court determines that an individual used the legal entity as an alter ego, it may impose suspension of the entity’s activities or even the dissolution of the entity.\(^\text{15}\)

**Commercial bribery offences**

In Mexico, commercial bribery per se is not a crime. However, although in practice we are not aware of it ever having been done, crimes such as fraud, forgery, theft and abuse of trust, which is similar to embezzlement,\(^\text{16}\) could be charged in cases of commercial bribery.

**ii Administrative law**

**Bribery of domestic officials offences**

The General Law of Administrative Responsibilities (GLAR) mainly targets domestic bribery in Mexico. This law punishes both public officials and private parties, including both individuals and legal entities, for any bribery of public officials, whether in the federal state or municipal public procurement context or otherwise. Specifically, the GLAR prohibits both:

Public officials from, directly or indirectly, soliciting or receiving unduly any benefit that is not included in their salary, for the public official, their relatives, or any individual or entity with whom the public official has a professional, labor, or business relationship, or partners or corporations related to, regulated or supervised by, the public official;\(^\text{17}\) and

Private parties, including both individuals and legal entities, from directly or indirectly, promising, offering or giving any undue benefit to any public official, where such benefit may be viewed as part of a quid pro quo arrangement to cause him or her to do or refrain from doing any just or unjust act related to a public official’s function, employment, position, or charge; or to exert the real or apparent influence on the decision-making of a public official for the purpose of obtaining an undue benefit or advantage, regardless of the acceptance or receipt of the benefit, or the outcome.\(^\text{18}\)

**Definition of domestic public official**

The GLAR defines public officials as the individuals who have employment, position or charge, at the federal and state level, as provided in Article 108 of the Political Constitution of the United Mexican States.\(^\text{19}\) The definition in the Mexican Constitution includes those elected by popular vote; members of the federal judiciary; and any individual that has an employment, position or charge of any nature in the federal Congress, the federal public administration, and the autonomous constitutional bodies.

\(^{13}\) Federal Criminal Code, Art. 212.

\(^{14}\) Federal Criminal Code, Art. 213 \textit{bis}.

\(^{15}\) Federal Criminal Code, Art. 11.

\(^{16}\) Federal Criminal Code, Arts. 386, 243, 367, 382.

\(^{17}\) GLAR, Art. 52.

\(^{18}\) GLAR, Art. 66.

\(^{19}\) GLAR, Art. 3(XXV).
Penalties
Penalties for public officials include up to 90 days’ suspension from their employment in public office, removal of public office, double disgorgement, up to 20 years’ debarment from holding public office or participating in public procurement processes, plus damages.20

Both individuals and legal entities can be sanctioned by double disgorgement or, even if there was no proven tangible benefit, sanctions can include fines of up to the equivalent of US$600,000 or US$6 million, respectively; up to 10 years’ debarment from participating in public procurement processes; and damages. In addition, sanctions for legal entities may include suspension of the entity’s activities or even dissolution of the entity.21

Gifts, gratuities, travel, meals and entertainment
The Code of Ethics of the Federal Public Administration strictly prohibits public officials from soliciting, accepting or receiving any gifts, for the public official, their spouse, relatives, individuals or entities with whom the public official has a professional, labour or business relationship, or partners or corporations related to, regulated or supervised by the public official. However, it does not provide for guidance on gifts, hospitality and entertainment.

Commercial bribery
Commercial or private-to-private bribery is not specifically proscribed by Mexican administrative anti-bribery provisions.

Public official’s participation in commercial activities
Public officials are not forbidden from participating in commercial activities or in any other activities while serving as a public official, provided these activities do not conflict with their public functions.

Political contributions by foreign citizens or companies
Article 33 of the Mexican Constitution strictly prohibits foreign individuals and companies from participating in politics in Mexico. The Mexican public is very sensitive to foreign influences in politics, so multinationals would be well advised to steer clear of involvement in this area, including any political contributions.

Administrative and criminal enforcement
For corruption cases under the GLAR, enforcement authorities are (1) the Secretary of Public Administration and the local entities at the state level; internal control boards of each government entity; (2) the Superior Audit Office of the Federation and the superior auditing entities of the states; (3) the Federal Court of Administrative Justice and the local courts; (4) the Supreme Court of Justice, Mexico City Superior Court of Justice and the state courts; (5) the Federal Council of the Judiciary and the corresponding local entities; (6) and the responsibility units of the state-owned productive enterprises.22

Internal control boards, the Secretary of Public Administration and the local agencies are responsible for investigating, settling and ruling minor administrative offences and

20 GLAR, Arts. 78 and 79.
21 GLAR, Art. 81.
22 GLAR, Art. 9.
administrative offences. The Superior Audit Office of the Federation and the superior local auditing entities are responsible for investigating and settling serious administrative offences. The Federal Court of Administrative Justice and the state courts are responsible for ruling over sanctions for serious administrative offences committed by either public officials or private parties.

**Defences**

Demonstrating the existence of adequate procedures and a compliance structure in place at the time of the commission of the bribery offence can be a mitigating factor for determining sanctions under the Federal Criminal Code and reduce sanctions by up to 25 per cent. In practice, we believe it can also influence the determination on the part of the prosecutor of whether or not the company had ‘proper controls’ in place, and so could be an affirmative defence to potentially bar any liability at all.

Pursuant to the GLAR, the existence of an adequate integrity policy or a compliance programme is a mitigating factor for reducing sanctions, as long as it has:

- a clear and complete organisational and procedures manual that clearly defines the functions and responsibilities of each department of the company, and clearly specifies the chains of command and leadership for each corporate structure;
- a code of conduct that is duly published and made known to every person in the organisation and that has systems and mechanisms for effective implementation;
- adequate and effective control, monitoring and audit systems that ensure compliance on a continuous and periodic basis throughout the organisation;
- adequate whistle-blowing systems both for internal reports and for reporting to authorities, as well as disciplinary processes with clear and specific consequences for those who act contrary to internal standards or to Mexican legislation;
- adequate systems and processes for training on ethics standards;
- human resources policies to avoid hiring people who could be a risk to the integrity of the company. These policies cannot enable discrimination based on ethnicity, nationality, gender, age, disabilities, social status, health status, religion, political opinion, sexual orientation, marital status or any other that compromises human dignity or curtails human rights and liberties; and
- mechanisms to ensure transparency and publication of interests (avoiding conflicts of interest) at all times.

**Plea agreements**

In Mexico, criminal cases are not resolved through plea agreements, where the defendant pleads guilty.

### III ENFORCEMENT: DOMESTIC BRIBERY

The current administration of President Andrés Manuel López Obrador has launched numerous probes into both public officials and private individuals and legal entities related
to corruption and bribery offences. Recently, Pemex workers’ union leader Carlos Romero Deschamps was accused of corruption, illicit enrichment and money laundering.\textsuperscript{26} Former federal super-delegate Carlos Lomelí is under investigation by the Secretary of Public Administration for alleged bribery, conflict of interest, illicit enrichment and influence peddling.\textsuperscript{27} Prominent lawyer Juan Collado, who is very well connected to Mexican political parties, was arrested under charges of money laundering and organised crime.\textsuperscript{28} Emilio Lozoya Austin, former Pemex CEO, and Alonso Ancira, director of steel company Altos Hornos de México, are part of an anti-graft probe under suspicion of bribery and money laundering.\textsuperscript{29}

Perhaps the case of utmost importance is the ongoing probe initiated by Mexican General Prosecutor’s Office into former Pemex CEO Emilio Lozoya Austin, for bribery, criminal association and money laundering charges related to US$10.5 million bribes he allegedly received between 2009 and 2012 from Brazilian construction giant Odebrecht, in exchange for securing government contracts,\textsuperscript{30} in addition to a purchase of a property allegedly made with bribes paid by steel company Altos Hornos de México.\textsuperscript{31} Since the unravelling of the corruption scandal in late 2016, Mexico was the Latin American country to engage in the lowest level of investigations and enforcement against the alleged participants. Throughout 2017 and 2018, the investigation conducted by the then General Attorney’s Office during the administration of former President Enrique Peña Nieto was delayed by Mexico’s 2018 presidential elections. It was not until recently that the General Prosecutor’s Office reopened the case and issued arrest warrants against Emilio Lozoya and some of his relatives for bribery, corruption and money laundering charges. However, using his defence attorney as means of communication, Lozoya has repeatedly insisted on his innocence and has even stated that he will provide evidence in this regard, while refusing to appear in court to respond to charges. In light of Mexico’s increasing efforts to combat corruption, we expect enforcement authorities to effectively continue this investigation and avoid another chapter of impunity to pass on to history.


IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal law

Criminal liability

Bribery of foreign public officials is prohibited by Article 222 bis of the Federal Criminal Code. Both individuals and legal entities are subject to criminal liability for foreign bribery.

Bribery of foreign officials offences

Bribery of foreign public officials is defined as giving, directly or indirectly, anything of value to a foreign public official, to influence him or her to act or refrain from acting in relation to functions inherent to his or her position, for the purpose of obtaining or retaining an undue business advantage in international commercial transactions.32

Definition of foreign public official

A foreign public official is defined as any individual holding public employment, commission, or office in the legislative, executive or judicial branch; or in any public entity, including state-owned companies, of a foreign country, and any official or agent of a public international agency or organisation.33

Gifts, gratuities, travel, meals and entertainment

Mexican criminal law does not provide for guidance on gifts, hospitality and entertainment for the benefit of foreign public officials.

Penalties

Sanctions for individuals can include fines of up to approximately US$670, up to 14 years’ imprisonment,34 and up to 20 years’ debarment from participating in public procurement processes and from holding public office.35 Legal entities can be sanctioned by up to six years’ debarment from contracting with any federal public authority, coupled with a fine of up to approximately US$4,600.36 Additionally, if a court determines that an individual was effectively using the company as an alter ego, the court may impose the suspension of the company’s activities or even its dissolution.37

ii Administrative law

Bribery of foreign public officials offences

Bribery of foreign public officials is not explicitly prohibited by the provisions of the GLAR.

Definition of foreign public official

There is no definition of foreign public official under Mexican administrative law.

32 Federal Criminal Code, Art 222 bis.
33 Federal Criminal Code, Art. 222 bis.
34 Federal Criminal Code, Arts. 222 and 223.
36 Federal Criminal Code, Art. 222 bis.
37 Federal Criminal Code, Art. 11 bis and 222 bis.
Gifts, gratuities, travel, meals and entertainment
There are no administrative rules governing gifts, gratuities, travel, meals and entertainment for the benefit of foreign public officials.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations
In Mexico, the provisions of the Commercial Code,\(^{38}\) the Federal Tax Code\(^{39}\) and the General Law of Business Corporations\(^{40}\) require the maintenance of accurate and complete corporate books and records. Publicly traded or listed companies are also subject to laws regarding periodic financial reporting and disclosure, and avoidance of self-dealing and insider trading. Financial institutions are subject to additional laws regarding their fiduciary duties toward the parties whose assets they hold.

In addition, the ‘books and records’ offences under the Federal Tax Code are as follows: (1) failing to keep an accounting system; (2) failing to keep a required book or register, or failing to maintain internal inventory control; (3) incomplete, inaccurate or false record-keeping; and (4) failing to demonstrate the existence of transactions covered by fake invoices.\(^{41}\) Sanctions can include fines of up to US$4,460.\(^{42}\) Furthermore, if individuals or legal entities are also sentenced for domestic or foreign bribery, these fines may increase by up to 150 per cent of the amount of bribes paid.\(^{43}\) Taxpayers can be also sanctioned by up to three years’ imprisonment for (1) keeping a double set of books of accounting records; (2) concealing part of all the accounting books or records; and (3) declaring false or inaccurate information concerning accounting, tax or social transactions.\(^{44}\)

ii Money laundering laws and regulations
The Federal Criminal Code strictly prohibits money laundering.\(^{45}\) Sanctions include up to fifteen years’ imprisonment and fines of up to approximately US$23,000. The Banking Law governs anti-money laundering efforts in the banking context. In addition, the Mexican Congress passed a law intended to stop money laundering in the non-banking sectors of the economy, the Federal Law for the Prevention and Identification of Transactions with Funds from Illicit Sources (the AML Law). Pursuant to the AML Law, high-risk activities, also called vulnerable activities, are subject to compliance with specific obligations if they exceed specific threshold amounts established by the AML Law.\(^{46}\) Vulnerable activities include the following: lottery or gambling activities; service card, credit card or other prepaid value card transactions; transactions with travellers’ cheques; consumer loans, guarantees, credit or loans; construction, development or brokerage services involving real estate; sale of precious metals,

\(^{38}\) Commercial Code, Art. 16(III).
\(^{39}\) Federal Tax Code, Art. 28.
\(^{40}\) General Law of Commercial Companies, Art. 158(III).
\(^{41}\) Federal Tax Code, Art. 83(I)(II)(IV)(XVIII).
\(^{42}\) Federal Tax Code, Art. 84(I)(II)(III)(XVI).
\(^{43}\) Federal Tax Code, Art. 84.
\(^{44}\) Federal Tax Code, Art. 111.
\(^{45}\) Federal Criminal Code, Art. 400 \textit{bis}.
\(^{46}\) Federal Law for the Prevention and Identification of Transactions with Funds from Illicit Sources.
stones or jewellery; auctions or sale of works of art; sale of automobiles; armouring services of vehicles or protection of premises; professional activities involving the transportation and custody of cash and valuables; certain professional services; services of public attesters; donations; customs brokerage services; creation of rights over real estate and; exchange of virtual assets through electronic platforms. Additionally, financial institutions are required to notify and maintain all information and documentation related to the participants and beneficiaries of the transactions involving vulnerable activities.47

iii Prosecution

The Financial Intelligence Unit of the Secretary of Finance and Public Credit, Mexico’s anti-money laundering watchdog, is responsible for investigating and prosecuting money laundering and terrorism financing, and overseeing compliance with the obligations set forth in the AML Law. Criminal prosecution requires that the Financial Intelligence Unit exercises its investigative powers and subsequently reports the potential misconduct to the General Prosecutor’s Office to initiate the criminal prosecution of money laundering offences.48

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There is no evidence of actual prosecutions or convictions for foreign bribery and associated offences.49

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Mexico is a member of the Organisation for Economic Co-operation and Development (OECD), the United Nations and the Organization of American States. Mexico is a signatory to the OECD Anti-Bribery Convention, the United Nations Convention against Corruption and the Inter-American Convention against Corruption, accordingly.

VIII LEGISLATIVE DEVELOPMENTS

Relevant developments include the increased prosecution of administrative and criminal white-collar crimes by the General Prosecutor’s Office, the Secretary of Public Administration and the Financial Intelligence Unit. In addition, the recent enactment of a new law that overhauls forfeiture of assets proceeding from illicit activities, including corruption, coupled with increasing efforts against tax evasion and tax fraud, and the recent launch of a whistle-blowing platform hosted by the Secretary of Public Administration, are of utmost importance.

Despite these developments, there have also been shortcomings. As of this writing, the appointment for the 18 federal anti-corruption judges of the Federal Court of Administrative Justice is still pending. In July 2019, the Mexican Senate voted to reject five nominees (13 out of the 18 nominees had withdrawn their nominations by that time). Now, it is the time

47 Federal Law for the Prevention and Identification of Transactions with Funds from Illicit Sources, Art. 15.
48 Federal Criminal Code, Art. 400 bis.
for President Andrés Manuel López Obrador to submit fresh nominations to the Senate even though his administration is seeking to reduce or eliminate these seats as part of its austerity measures.

**IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

The Mexican Data Protection Law has become one of utmost relevance. During the last years, Mexico's data protection watchdog has become very active in pursuing enforcement actions and thus sanctions for non-compliance with the Mexican Data Protection Law has increasingly being applied in Mexico.

In addition, we expect that the recent National Asset Forfeiture Law that overhauls forfeiture of assets proceeding from illicit activities, including those related to organised crime, kidnapping, hydrocarbon, health, human trafficking, corruption, motor vehicle theft, illicit proceeds, and those committed by public officials, would become one of the most relevant laws affecting the response to corruption in Mexico. In practice, civil forfeiture has not existed in Mexico before this law. Under the terms of this new law, forfeiture is not limited to property related to a crime, and the level of evidence required is not clear. Furthermore, there is no statute of limitations, and recovery may be made against estates of deceased suspects.

**X COMPLIANCE**

As previously mentioned, in Mexico, there is no explicit affirmative defence for adequate procedures to negate corporate liability under the relevant anti-corruption legal framework. The existence of a compliance programme or an adequate integrity policy, however, can act functionally as an affirmative defence in some criminal cases and clearly may act as a mitigating factor for determining sanctions in administrative cases for legal entities, as long as it meets the characteristics described in Section II.iv.

The Secretary of Public Administration published the Model Program for Corporation Integrity to provide guidance on what constitutes an adequate integrity policy, as follows:

- a include measures to promote internal standards and accountability in the company, in accordance with national and international commitments;
- b ensure ‘tone at the top’ commitment from board of directors and general manager;
- c require third-party intermediaries and distributors to adhere to the company’s compliance policies;
- d ensure that the Code of Conduct is adequately published and communicated to employees. Reference to the standards of the Confederation of Employers of the Mexican Republic (Coparmex) is recommended;
- e apply the Code of Conduct in practice and promote reports of suspicious activities. Implementation by departments if a company has multiple divisions; and
- f ensure that the anti-corruption policy takes into account the degrees of risk for the country, industry, transaction, commercial opportunity and commercial association. For these purposes, they should rely on the Committee of Sponsoring Organizations of the Treadway Commission (COSO) Internal Control – Integrated Framework.
Financial organisations should refer to these three guidelines:

\(a\) the Sole Memorandum for Banks (CNBV);
\(b\) the Sole Memorandum for Stock Exchange (CNBV); and
\(c\) the Sarbanes Oxley Act.

Special attention should be paid to the following areas in the company: sales, contracts, human resources and government contacts. The guide also recommends observing the guide for the UK Bribery Act to:

\(a\) ensure that systems for self-reporting and training are adequate and efficient; and
\(b\) ensure that human resources department employs policies to avoid the employment of individuals who could become a risk to the integrity of the company.

**XI OUTLOOK AND CONCLUSIONS**

President López Obrador began his term by continuing his campaign discourse on eliminating corruption. In his daily hour-long press conferences, Obrador has frequently called out specific transactions and even named companies that he promises to investigate fully. Claiming that the government procurement processes were in the past marred by corruption, he has suspended many of the rules that have previously governed these processes in favour of having members of his government that he trusts assigning contracts to companies that he perceives as trustworthy. Although this can make for attractive rhetoric, it can also undermine the rule of law.

The President also promised in his inaugural address that he would not persecute former political opponents through corruption investigations, leading many to understand that he was announcing a functional amnesty for past corruption at the same time that he declared that corruption would no longer exist in Mexico. As described above, however, investigations into high-profile corruption cases have been plentiful. In addition to the Odebrecht-related case, the new administration has been aggressive in investigating the *Estafa Maestra* (the ‘master/teacher swindle’) involving over US$250 million in fraudulent contracting during former administration. Various investigative journalists have reported that the Secretary of Social Development used a loophole in the procurement rules to award tens of millions of dollars in no-bid contracts to state-owned universities, which then illegally sub-contracted the services to shell companies, some of which they have traced to public officials and related persons. Former Secretary Rosario Robles, who served under former President Peña Nieto, is, as of this writing, under arrest without bail, awaiting trial on corruption charges. Reporters have speculated that this investigation may eventually lead to charges against Peña Nieto. No former president of Mexico since the aftermath of the Revolution (1910–1920) has ever been prosecuted, so this would be momentous.

Finally, the United States–Mexico–Canada Agreement (USMCA), which is intended to replace the 1994 North America Free Trade Agreement (NAFTA), has been ratified by the Mexican Congress and awaits ratification by US and Canadian counterparts. Unlike the NAFTA, the USMCA has a chapter alone establishing commitments on anti-corruption efforts titled ‘Transparency and Anti-Corruption’. If ratified, the USMCA will oblige the three parties to adopt or maintain anti-corruption legislative and other measures as may be necessary to combat corruption.
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

1 Aldo Verbruggen is a partner and Jasmijn Dorant is an associate at Jones Day.
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.

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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 €83,000 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 €830,000, 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 €83,000 or four years of imprisonment, or both. For legal entities, the maximum fine that may be imposed is €830,000, 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.

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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. 8 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. 9 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. 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.

In July 2016, by verdict of the District Court of Rotterdam, a former senator was found guilty of passive bribery (among other offences). 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.

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 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. In November 2018, the Supreme Court confirmed the conviction of the former Prime Minister of Curacao, who was found guilty of passive bribery (and related crimes) and was sentenced to serve three years in prison. It was proven that the Prime Minister received large sums of money from an Italian businessman who was connected to Italian organised crime, in order to receive preferential treatment. The
Prime Minister accepted the payments and forged invoices to conceal the criminal origin and nature of the payments. The Prime Minister argued that the payments served to finance a yet-to-be-formed political party and therefore did not constitute ‘gifts’ pursuant to the bribery offence description. The Supreme Court confirmed the ruling of the court of appeal that the payments could be considered as ‘gifts’, since they also had value for the Prime Minister when used for financing the political party.

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.

iii 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.

iv 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.

The rules governing jurisdiction of the DCC provide that the (legal) persons that can be prosecuted in the Netherlands are:

- any person who bribes a public official (foreign or domestic) from within the Netherlands;
- a Dutch public official (not necessarily having Dutch nationality) or Dutch national bribed abroad;
- any person bribed abroad who is in the public service of an international organisation having its seat in the Netherlands;
- a Dutch citizen who bribed a public official – foreign or otherwise – abroad; and
- 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:

- the public official concerned was required by law to do or not do something (whichever the payment intended to achieve);
- the amounts involved are small – either in absolute or in relative terms;
- the payments are made to lower-tier public officials;
- the gift is shown in the records of the business in a transparent, open manner; and
- 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 €83,000 or six years of imprisonment, or both. For legal entities, the maximum fine that may be imposed is €830,000, 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 €83,000 (for legal entities, the maximum fine is €830,000, 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 €20,750 (or €83,000 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 €83,000 for natural persons, or €830,000 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 €83,000 for natural persons or €830,000 (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 €83,000 for natural persons or €830,000 (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 bis.1 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 €20,750 for natural persons or €83,000 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 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.

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19 Goudriaan, ‘Nederland is een beetje corrupt en glijdt verder af’, NRC 3 March 2017.
In March 2019, it was announced that Shell will be prosecuted by the PPS over an allegedly corrupt deal in Nigeria. The company is currently subject of a criminal investigation concerning a payment that secured an exploration licence for an oil block. It was alleged that although the funds were paid to the Nigerian government, the money actually went to a company linked to a former oil minister.

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 of the 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.

In February 2019, the Council of Europe’s Group of States Against Corruption (GRECO) published an evaluation report calling for enhanced measures to prevent corruption in the Netherlands in respect of persons entrusted with top executive functions, including ministers, state secretaries and political advisors; and in respect of members of law enforcement agencies. The implementation of the 16 recommendations addressed to the Netherlands will be assessed by GRECO in 2020.

22 Available at www.oecd.org/daf/anti-bribery/Netherlands-Phase-3-Written-Follow-Up-Report-ENG.pdf.
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.23

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. The Dutch ‘UBO register’ will be introduced in January 2020.

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

23 Wetvoorstel Computercriminaliteit III (Kamerstukken I 2016/17 34 372, A).
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.

In 2014, DNB published good practices to help banks and insurers fight corruption in the form of bribery or conflicts of interest.28 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.

27 See www.rijksoverheid.nl/documenten/brochures/2017/01/19/eerlijk-zakendoen-zonder-corruptie.
I INTRODUCTION

Since 1963, each year the Peruvian government has chosen a slogan summarising the government’s main goal. The slogan for 2019 is the ‘year of the fight against corruption and impunity’. According to President Martín Vizcarra, the slogan chosen by the Peruvian government aims to highlight the progress made on this regard in the previous years and that the fight against corruption is a top priority for the government.

One of the most significant developments in the fight against corruption has been the advent of corporate criminal liability for bribery. Traditionally, corporations could not be held criminally liable for bribery, only the individuals who committed the crime. However, in 2016, the Peruvian Congress approved Law 30,424 that establishes criminal liability for corporations, although solely for the crime of active bribery of foreign public officials.

Later, in 2017, Law 30,424 was amended, extending such liability to other crimes, such as active bribery of domestic public officials, money laundering, and terrorism financing.

The above was a result of the uncover of the Odebrecht case, by the end of 2016, because of a plea agreement between this company and the Department of Justice of the United States, where the Brazilian construction company recognised that, in the past 20 years, it paid bribes to public officials in 12 countries, including Peru, to secure government contracts.

Between 2005 and 2014, Odebrecht made and was the cause of approximately US$29 million in corrupt payments to public officials in Peru. The Brazilian company realised benefits of approximately US$143 million because of these corrupt payments. This case also includes the financing of electoral campaigns of several presidential candidates, which is currently under investigation as a money laundering offence.

This corruption scandal has had severe consequences in the Peruvian political environment. Former President Ollanta Humala spent nine months in pretrial detention for allegedly having received corrupt payments during his electoral campaign. The judiciary also ordered former president Alejandro Toledo to be placed in pretrial detention for having received a US$20 million bribe payment. Former President Pedro Pablo Kuczynski (who resigned from the presidency last year) is also under investigation and in pretrial detention.

The Peruvian government has implemented several measures to protect the interests of the country in this context. The government has entered into agreements that are still in force with entities that have admitted the commission of bribery crimes (e.g., construction

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companies in charge of projects in progress, such as Odebrecht). Among these measures, the law that guarantees the payment of civil indemnifications to the government by companies that have committed crimes is of the utmost importance. Sanctions for the commission of bribery crimes include debarment from contracting with the Peruvian government.

Another milestone in the fight of the Peruvian government against corruption has been the criminalisation of private corruption – approved last year – which also has made a great impact on the business environment.

This chapter aims to describe the main aspects of the anti-corruption legal framework in Peru.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal liability

Law 30,424, in force as of January 2018, establishes that legal persons may be held criminally liable for bribery crimes – including money laundering and terrorism financing – when they are committed in the name of or on behalf of the legal entity and for its direct or indirect benefit, by:

a shareholders, directors, de facto or de jure administrators, legal representatives, or attorneys-in-fact of the legal entity, including those of its affiliates or subsidiaries; and

b individuals under the authority and control of the persons mentioned above who have committed the crime under their order or authorisation, or because of non-compliance with their duties of supervision, vigilance and control.

Thus, both individuals and legal entities may be held criminally liable for bribery crimes committed as of 1 January 2018.

ii Bribery of domestic officials offences

The Peruvian Criminal Code distinguishes between passive and active bribery.

Passive bribery refers to the act of requesting, accepting or receiving donations, promises or any type of advantages, by a public official, to do or refrain from doing an act in violation of his or her obligations, or without violating his or her obligations. This constitutes a crime sanctioned with imprisonment, as well as debarment from participating in public procurement processes.

Active bribery refers to the act of offering, giving or promising a donation, benefit or advantage, to a public official, to cause the public official to do or refrain from doing an act in violation of his or her obligations, or without violating them.

Another offence related to bribery is ‘influence peddling’. The Peruvian Criminal Code sanctions the person who has – or alleges to have – the ability to influence on the decision-making of a public official (e.g., for having a bond with the public official) and exchanges this influence for an undue advantage.

It is also important to mention that Article 8 of the Code of Ethics in the Public Function prohibits public officials from obtaining improper benefits or advantages, for themselves or another person, by using their position, authority, real or apparent influence.

3 Peruvian Criminal Code, Article 400.
In this regard, the Peruvian Criminal Code also sanctions public officials who receive bribe payments as follows: proper passive bribery,\textsuperscript{4} improper passive bribery,\textsuperscript{5} specific passive bribery,\textsuperscript{6} and illicit enrichment.\textsuperscript{7}

The Peruvian Criminal Code also establishes corruption practices, different from ‘bribery’, as follows:
\begin{enumerate}
\item Abuse of authority: \textsuperscript{8} When a public official uses his or her position or position for private gain.
\item Improper payment: \textsuperscript{9} When a public official or servant abuses his or her position, and requests improper payments or contributions or emoluments in an amount that exceeds the legal tariff.
\item Simple and aggravated collusion: \textsuperscript{10} When a public official, directly or indirectly, intervenes in the contracting and acquisition of goods, works or services, concessions or any operation carried out by the state, or agrees with the interested parties to defraud the state or public entity or agency of the state.
\end{enumerate}

iii Definition of public officials

The Peruvian Criminal Code\textsuperscript{11} has a broad definition of ‘public officials’. This definition includes any individual who:
\begin{enumerate}
\item is a member of the public administrative career;
\item either appointed or elected for a political or confidence public position;
\item has a labour or contractual relationship of any nature with governmental organisms or entities, including state-owned companies, regardless of the labour regime applicable;
\item is an administrator or custodian of assets attached by a court, even if such assets belong to private entities or persons;
\item is a member of the military or police forces; or
\item performs functions in the name of the state.
\end{enumerate}

Additional laws regulating the Public Administration (e.g., the Code of Ethics in the Public Function, Law 30,057 and the Law of Civil Service) contain a definition of ‘government official’ with a different scope. However, in analysing the alleged commission of a corruption crime, the definition contained in the Peruvian Criminal Code will prevail.

iv Impediments for participating in commercial activities

Law 27,588 regulates what public officials, directors, holders, senior officials, members of the advisory councils, administrative courts, commissions and other collegiate bodies that fulfil a public function or commission of the state are permitted and prohibited from doing. According to this Law, directors of government-owned companies or government representatives in directories and advisers, officials or servers with specific commissions who,

\textsuperscript{4} Peruvian Criminal Code, Article 393.
\textsuperscript{5} Peruvian Criminal Code, Article 394.
\textsuperscript{6} Peruvian Criminal Code, Article 395.
\textsuperscript{7} Peruvian Criminal Code, Article 401.
\textsuperscript{8} Peruvian Criminal Code, Article 382.
\textsuperscript{9} Peruvian Criminal Code, Article 383.
\textsuperscript{10} Peruvian Criminal Code, Article 384.
\textsuperscript{11} Article 425.
due to the nature of their function or the services they provide, have accessed privileged or relevant information, or whose opinion has been determining in decision making, are prohibited from:

\( a \) providing services in private entities in any form;
\( b \) accepting paid representations;
\( c \) being part of the board of directors;
\( d \) acquiring, directly or indirectly, shares from private companies, its subsidiaries or entities that could have economic linkage to them;
\( e \) entering into civil or commercial contracts with such entities; and
\( f \) intervening as attorneys, advisers, sponsors, experts or arbitrators of individuals in processes that have pending with the same division of the government in which they provide their services, while they hold the position or fulfil the conferred assignment.

These impediments extend up to one year after the cessation or completion of the services provided under any contractual form, whether by resignation, termination or dismissal, expiration of the contract term or contractual resolution.

v Gifts, gratuities, travel, meals and entertainment

According to the Peruvian anti-corruption legislation, any payment made in favour of a public official, a gift or hospitality could be considered as bribery if no prior formal request has been filed and no formal approval has been issued by the corresponding government agency.

Pursuant to Articles 393 to 401-B of the Peruvian Criminal Code, a gift or hospitality could be considered bribery, depending on the circumstances and time on which it is granted. In this regard, ‘concealed bribery’ will be considered effective bribery if there is an obvious disproportion between the reason for the gift or hospitality (for example, the birthday of the official) and the value of the gift (for example, a new car).

The courts will also consider the behaviour of public officials as an element to analyse the commission of ‘concealed bribery’. This means determining whether – as consequence of the gift or hospitality given – the official performs an act under his or her direct functional competence benefiting the person or company who delivered the gift or hospitality (for example, grant an authorisation or award a tender).

vi Political contributions

As of November 2017, Law 28,094 (the Political Parties Act) prohibits political parties from receiving contributions of any kind from private legal entities, whether national or foreign.

vii Sanctions

Public officials can be sanctioned with up to 15 years’ imprisonment, depending on the type of bribery committed, and may be subject to secondary penalties, such as removal from office and temporary or definitive prohibition from being elected or appointed for public office. In certain cases, monetary fines could also apply.

12 Pursuant to Legislative Decree 1,243, a person will be permanently prohibited from being elected or designated for a public office if he or she commits the crime while belonging to a criminal organisation, and provided that the benefits from the commission of the crime exceed 15 tax units.

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Private individuals can be sanctioned with up to eight years’ imprisonment, depending on the type of bribery committed, and may be subject to secondary penalties. These secondary penalties include prohibition from carrying on professional or social activity in the exercise or in the context of which the offence was committed and temporary or definitive prohibition from being elected or appointed for public office. In certain cases, a monetary fine could also apply.

If a legal entity is found liable for a bribery crime, the criminal judge can impose these sanctions:

a. fines of up to six times the benefit obtained or expected to be obtained with the commission of the crime;
b. up to two years’ suspension of the entity’s activities;
c. up to five years’ or definitive prohibition from conducting future activities of the same kind or nature as those that were performed to commit, favour or cover up the crime;
d. debarment from contracting with the government;
e. cancellation of licences, concessions, rights and other administrative authorisations;
f. temporary (up to five years) or definitive closure of the company’s premises; and
g. dissolution of the company.

viii Defences

Having a prevention model or compliance programme by which adequate monitoring and control measures are implemented to prevent crimes or to significantly reduce the risk of their commission has the following benefits:

a. Exemption from liability: If a legal entity adopted and implemented, prior to the commission of any of the crimes, a prevention model (appropriate to its nature, risks, needs and characteristics), it may be exempted from liability.
b. Mitigation of the sanction: If a legal entity (1) adopted and implemented a prevention model after the commission of a crime and before the start of the oral trial, or (1) proves to have partially implemented the minimum elements of the prevention model, then the fine to be imposed on such legal entity may be reduced.

The minimum elements of prevention models to apply for the exemption of liability are:

a. appointment of a person in charge of the prevention functions;
b. measures taken to identify, evaluate and mitigate risks to prevent crime;
c. implementation of an internal complaint proceedings (e.g., a whistle-blower hotline);
d. dissemination and periodic training on the prevention model; and
e. ongoing evaluation and monitoring of the prevention model.

Upon request of the Public Prosecutor, the Superintendence of Capital Markets (SMV) will evaluate the suitability of the implementation and functioning of the prevention model. If the SMV report determines that the prevention model is adequate, the Public Prosecutor will order the conclusion of the investigation or proceeding.

13 Pursuant to Legislative Decree 1,243, a person will be permanently prohibited from being elected or designated for a public office if commits the crime while belonging to a criminal organisation, and provided that the benefits from the commission of the crime exceed 15 tax units.
The prevention model must include the appointment of a person in charge of the prevention functions (e.g., a compliance officer) by the maximum managing body of the legal person or equivalent. The compliance officer must exercise his functions with autonomy and independence.

ix Plea agreements (effective collaboration regime)

Pursuant to Article 472 of the Peruvian Code of Criminal Procedure, the Public Prosecutor’s Office is entitled to promote or receive requests for effective collaboration from those subjects who, whether or not they are subject to an investigation or criminal proceedings, are involved in the commission of certain crimes, including bribery of public officials. Originally, this regime was intended for individuals only; however, because of an amendment introduced last year,14 legal entities may also apply for it.

Thus, in order for a legal entity to have access to an effective collaboration regime, it must have:

a voluntarily abandoned their criminal activities;

b admitted freely and expressly or not contradict the facts in which they have intervened or which are imputed to them. Those facts that are not accepted will not be part of the effective collaboration process, and will abide by the resolution of the corresponding criminal process; and

c presented themselves to the Public Prosecutor’s Office showing their willingness to provide useful information.

This information must allow, among other aspects, to avoid the continuity, permanence or consummation of a crime, or substantially diminish the magnitude or consequences of its execution, as well as to prevent or neutralise actions or damages that could occur.15 The main purpose of requests for effective collaboration is for the applicant to provide useful information to assist the Public Prosecutor’s Office in elucidating the facts, in exchange for the granting of reward benefits, which will be included in the agreement on benefits and collaboration entered into by the applicant and the Public Prosecutor’s Office, which is confidential. This agreement is submitted to the judiciary for control and review of legality and, only if no legal violations are detected, will it proceed to approval, acquiring full force.

14 Law No. 30,737 amends nine Articles (472, 473, 474, 475, 476-A, 477, 478, 479 and 480) of the Code of Criminal Procedure regulating the so-called ‘process for effective collaboration’.

15 Code of Criminal Procedure Article 475.- Information effectiveness requirements and reward benefits

1. The information provided by the collaborator must allow, alternatively or cumulatively:

a) To avoid the continuity, permanence or consummation of the crime, or substantially diminish the magnitude or consequences of its execution.

b) Know the circumstances in which the crime was planned and executed, or the circumstances in which it is being planned or executed.

c) Identify the perpetrators and participants in a crime committed or to be committed, or the members of the criminal organization and its functioning, in such a way as to dismantle or diminish it, or arrest one or more of its members;

d) Deliver the instruments, effects, profits and criminal assets related to the activities of the criminal organization, ascertain their whereabouts or destination, or indicate the sources of financing and supply of the criminal organization (…).
The benefits that may be obtained from applying to collaborate effectively are:

a. exemption from applicable complementary consequences;
b. decrease below established minimum parameters;
c. remission (substitution) of the complementary consequence;
d. other benefits established in the legislation. For example, if the agreement is entered into and approved judicially in the stage of preliminary diligence, this could include a benefit for which the Public Prosecutor’s Office promises it will not formalise the preparatory investigation against the collaborator. Similarly, if this were to occur at the preparatory investigation stage, the agreement could exclude the legal entity from the prosecution;
e. suspend application of Law 30,737, as well as obtain a recategorisation of the legal entity; and
f. non-debarment from contracting with the government (see Section IX.i).

The mere fact of invoking the effective collaboration regime does not lead to the automatic granting of reward benefits. Obtaining those benefits would be possible if the information provided is relevant and has been duly corroborated, and if the collaborator has complied with the obligations and commitments assumed in the corresponding agreement on benefits and collaboration.

x Commercial bribery

As of September 2018, the Peruvian Criminal Code includes the offence of commercial bribery. This offence occurs when a partner, shareholder, manager, director or any employee of a legal entity accepts, receives or requests a donation, advantage or undue benefit of any nature (for itself or another person) to do or refrain from doing an act in favour of a third party in the acquisition or distribution of goods, in the contracting of commercial services or in commercial relationships. Whoever promises, offers or provides such advantage to the representative or employee of the legal entity also participates in this offence.

Individuals who participate in this offence can be imprisoned for up to four years. Legal entities are not criminally liable for this offence.

III ENFORCEMENT: DOMESTIC BRIBERY

In addition to the Odebrecht case, a relevant and recent case is the Construction Club case, which involves several national and foreign construction companies that are alleged to have participated in a cartel to award infrastructure works (bid rigging). Although this case began as an antitrust case, it is alleged that the companies would have paid bribes to public officials (through third parties) to guarantee the functioning of the cartel.

A preliminary investigation was initiated against the representatives of the construction companies, former public officials of the Ministry of Transports and Communications and
those who would have acted as intermediaries to pay bribes.\textsuperscript{17} The construction companies were also included in the investigation, as ‘civilly responsible third parties’ jointly liable for the payment of damages resulting from the crimes committed by their legal representatives. In addition, the Corporate Supra-provincial Prosecutor’s Office Specialised in the Criminal Corruption of Public Officials has requested the incorporation of the construction companies in the investigation as ‘entities subject to accessory consequences’. Although the construction companies cannot be held liable for the offences under investigation (since they occurred before the entry into force of Law 30,424), they could receive accessory measures, such as the closure of establishments, suspension of activities and fines. It is not yet known whether the judge will accept their incorporation in the investigation.

Another relevant case, related to the Odebrecht case, is the discovery of front companies that would have been used to receive the money from Odebrecht so that the company had cash in Peru to pay bribes.\textsuperscript{18} A judge ordered the preliminary detention of the owner of such companies and the raid of his properties.

\textbf{IV \hspace{1em} FOREIGN BRIBERY: LEGAL FRAMEWORK}

\textbf{i \hspace{1em} Criminal liability}

As stated in Section II.i, as of 1 January 2018, legal entities may be held criminally liable for bribery crimes, including foreign bribery, when committed in the name of or on behalf of the legal entity and for its direct or indirect benefit. Thus, individuals and legal entities may now be held criminally liable for this offence.

\textbf{ii \hspace{1em} Bribery of foreign official}

Bribery of foreign officials refers to the act of offering, granting or promising, directly or indirectly, an undue donation, promise, advantage or benefit that results in his or her benefit or in the benefit of another person, to a public official of another country or an official of an international public organisation, for the purpose of inducing the foreign public official to do or refrain from any act in violation of his or her lawful duty or without breaching it to obtain or retain business or another undue advantage in the performance of international economic or commercial activities.

\textsuperscript{17} For additional information on the diligences and measures order within the investigation (e.g. impediment to leave the country, seizures, preventive prison), see: https://elcomercio.pe/politica/caso-lava-jato-primera-detencion-club-construccion-noticia-488776 ; https://gestion.pe/peru/politica/procuraduria-embarga-s-41-mlls-investigados-club-construccion-261650-noticia/ ; http://semanaeconomica.com/Article/legal-y-politica/politica/271333-club-de-constructoras-jueza-dicto-impedimento-de-salida-del-pais-a-ocho-investigados/ ; https://elcomercio.pe/politica/fiscalia-solicita-18-meses-prision-preventiva-seis-miembros-club-construccion-noticia-634951.

\textsuperscript{18} Find a brief note on this case in the link: https://elcomercio.pe/politica/gonzalo-monteverde-empresario-implicado-caso-odebrecht-noticia-610617.
iii Definition of foreign public official
Peru’s Criminal Code does not contain a definition of ‘foreign public official’; however, it adopts the definition of the United Nations Convention against Corruption.\(^{19}\)

iv Gifts, gratuities, travel, meals and entertainment
See Section II.v.

v Facilitation payments
Peruvian law does not include an exception or defence for facilitation payments in the context of foreign bribery.

vi Sanctions
Individuals involved in a foreign bribery offence can be imprisoned for up to eight years.

If the offence was committed on behalf of a legal entity and for its direct or indirect benefit, the legal entity will also be held criminally liable for this offence and the criminal judge would be entitled to impose the sanctions described in Section II.vii.

vii Defences
See Section II.viii.

viii Plea agreements
See Section II.ix.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping
Peruvian tax legislation (specifically, the Tax Code) requires companies to keep books and accounting records. Depending on the tax regime applicable to the company, the terms vary.

In addition, Legislative Decree 813, Criminal Tax Law, provides that failure to keep books and accounting records for tax purposes is punishable as a crime, and would be sanctioned with up to five years’ imprisonment. While the Criminal Tax Law does not establish criminal liability for legal entities that benefit from the commission of the offence, it provides that they can be subject to accessory measures, which may include temporary or permanent closure of premises, cancellation of licences, debarment from contracting with the government and even the dissolution of the company.

ii Money laundering
Money laundering is a criminal activity. It includes concealing the illicit origins and the use of illegal assets or resources from criminal activity, introducing them into the financial system.

\(^{19}\) Pursuant to Article 2(b) of the United Nations Convention against Corruption, a foreign public official is any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.
Acts that could constitute a money laundering offence include:

a converting or transferring money, goods, effects or profits whose illicit origin is known or can be presumed, with the purpose of avoiding their traceability, seizure or forfeiture; and

b acquiring, using, possessing, keeping, administering, receiving or concealing money, goods, effects or profits, whose illicit origin is known or can be presumed, to avoid the identification of its origin, its seizure or confiscation.

Penalties are up to 15 years’ imprisonment and between 120 and 350 days in fines.\(^{20}\)

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There is no information available on actual prosecutions or convictions for foreign bribery.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

As of today, Peru is a signatory to the Organisation for Economic Co-operation and Development (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.

VIII LEGISLATIVE DEVELOPMENTS

In March 2019, Peru approved Phase 1 of the evaluation of the Working Group on Bribery in International Business Transactions (‘Working Group’) of the OECD. This was achieved after Peru introduced modifications in its legal framework to comply with the OECD standards on the sanction of bribery of foreign officials.

However, because of this evaluation, the Working Group made several recommendations to improve the investigation and sanction of transnational active bribery and the responsibility of legal entities that incur in this crime. Although there are no bills relating to anti-corruption or anti-bribery under discussion by now, and because the implementation of the recommendations made by the Working Group will be followed up in Phase 2, it is expected that some modifications to the legal framework will be introduced in the short to mid-term. In addition, because of Phase 2 of the evaluation, it could be the case that the Working Group makes additional recommendations to amend Peru’s legislation.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Impediments to contract with the government

Law 30,225, the Government Procurement Law, as amended by Legislative Decree 1,341, contemplates a series of anti-corruption measures; one of the most relevant is the inclusion of debarment if bribery was committed.

\(^{20}\) ‘Days’ in this instance means that the convicted must pay a certain amount of money for the number of days stated in the sentence. The amount is calculated based on the average daily income of the convicted, considering his or her assets, level of expenditure and other external signs of wealth.
As a result, legal entities whose representatives or related persons have committed any of the actions below cannot be bidders, contractors or subcontractors in public procurement contracting processes. They may not:

a. have been convicted of corruption in Peru or abroad, by means of a consensual or enforceable sentence; or
b. have admitted to having engaged in corruption to domestic or foreign authorities.

Regulation of Law 30,225 provides that the definition of a legal entity's related person is as follows:

a. any legal entity that directly owns more than 30 per cent of the shares representing the capital or that holds shares in the capital; or
b. any natural person or legal entity that exercises control over it and the other persons over which it also exercises control.

Debarment also applies to consortiums. Consortiums whose legal representatives or related persons have been convicted of corruption in Peru or abroad by means of a consensual or enforceable sentence or have admitted to having engaged in corruption to authorities in Peru or abroad.

ii Regime for guarantying payment of civil remedy to the government

Law 30,737 and its regulations seek to ensure the immediate payment of civil remedy in favour of the Peruvian government in cases of corruption and related crimes, as well as to avoid the halting of public investment projects and the breakdown of the chain of payments.

In this regard, the Law establishes three categories of entities subject to a specific regime consisting of different restriction measures. The Ministry of Justice and Human Rights (MINJUS) has drawn up three lists identifying legal persons and legal entities in each category. These lists are published on its official webpage and are updated on a monthly basis.

The categories and the applicable measures are as follows.

Category 1

Category 1 includes legal entities:

a. convicted by means of a definitive sentence, in Peru or abroad, for offences committed against the public administration, money laundering and other offences;

b. whose officials or legal representatives have been convicted of corruption in Peru or abroad by means of a definitive sentence;

c. that, directly or through their representatives, admit to having committed the aforementioned offences to authorities in Peru or abroad; or

d. any entity involved in any of the above.

Applicable measures to entities that fall into this category are, as follows:

a. suspension from transferring abroad, under any title, totally or partially, the entire capital, dividends or profits from their investments in the country;

b. the need to require prior authorisation to dispose, under any title, of its assets, rights, shares or other securities representing rights; as well as the retention of 50 per cent of its sale price and subsequent deposit in the Withholding and Repair Trust (FIRR).
c witholding part of the payments that, by any title, must be made by the entities of the Peruvian state in their favour to these subjects, as well as their corresponding deposit in the FIRR; and

d preventive entry in public registries where property, assets, rights, shares or other representative values of rights are recorded, which specifies that the acquisition of these, under any title, is subject to prior authorisation of the MINJUS.

These entities will remain in this regime until the estimated amount of the civil reparation in favour of the Peruvian government is covered, as well as the full amount of the tax debt due.

**Category 2**

Category 2 includes legal entities that, as partners, consortiums or associates under any form of association or partnership, have participated in contracts with the Peruvian government jointly with the persons included in Category 1.

Restrictive measures applicable to entities that fall into Category 2 include the following:

a obligation to constitute a guarantee trust to ensure the payment of a civil remedy in favour of the Peruvian government;

b suspension from transferring abroad;

c implementation of a prevention model or compliance programme, containing the elements established in Law No. 30,424 and its regulations; and

d obligation to disclose information and collaborate with the Public Prosecutor’s Office in charge of the investigation, which may include making documents available and allowing access to facilities, if required.

**Category 3**

Category 3 includes legal entities under investigation for offences allegedly committed against the public administration, including bribery or related offences, in detriment of the Peruvian government, in the development of public or public-private investment projects, regardless of their date of execution.

The intervention scheme for Category 3 is optional. In other words, the incorporation of legal entities to this category occurs by means of a voluntary request.

Restriction measures applicable to entities that fall into this Category 3 are, as follows:

a Creation of a trust to guarantee the payment of civil remedy in favour of the Peruvian state.

b Implementation of a prevention model or compliance programme, containing the elements established in Law 30,424 and its regulations.

c Disclosure of information and collaboration with the prosecutor’s office in charge of the investigation, which may include making available documents, as well as allowing access to facilities, if required.

Subjects that fall into Category 3 will remain in this regime until the issuance of a sentence or resolution concluding the process. If it is convicted, subjects will fall into Category 1 and the corresponding measures will apply.
X COMPLIANCE

As stated in Section II.viii, having a compliance programme that contains all the minimum elements set forth in Law 30,424 could cause: (1) exemption from liability, if implemented in the organisation prior to the commission of the crimes; or (2) mitigation of the sanction, if implemented after the commission of a crime but prior to an oral trial.

Law 30,424 entered into force on 1 January 2018. There have not yet been cases in which compliance programmes have been evaluated to determine whether the remedies stated above apply.

XI OUTLOOK AND CONCLUSIONS

Because of the government’s interest in becoming a full member of the OECD, along with the corruption scandals discovered in previous years that have compromised many members of the Peruvian political class, arousing public awareness, Peru has been working hard to focus its public policy on the fight against corruption.

In the speech delivered by President Martín Vizcarra on 28 July 2019 on the occasion of Peru’s Independence Day Anniversary, he stressed that 68 per cent of citizens consider that corruption is a big problem in the country. He said that Peru is a country aware that corruption causes distrust, affects public resources and, therefore, hinders economic growth. He mentioned that, as part of Peru’s Bicentenary Plan for 2021, the government is committed to building a country with solid and transparent institutions.

President Vizcarra mentioned that some of the measures adopted with this purpose are as follows: (1) deactivation of the National Council of the Judiciary (responsible for appointing judges and prosecutors, whose members have been involved in bribery and influence peddling scandals); (2) definition of the fight against corruption as a general government’s policy; (3) creation of the Secretary of Public Integrity; (4) reactivation of 14 anti-corruption regional commissions; (5) creation of a platform to review the background of candidates for public positions; (6) implementation of a free hotline to report corruption; and (7) obligation of public officials to file affidavits of conflicts of interest and disclosure of assets.

Even though the President recognised these measures are insufficient to resolve this complex problem, it cannot be denied that they are a first and crucial step towards doing so. It is expected that Peru will continue to follow this path in the coming years.
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 2017-2018, Poland was ranked 36th out of 176180 countries.\(^1\)

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 2017-2018. 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, and in 2017 it was 294. 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, and in 2017 it was 1015.

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.

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Criminal liability for handing or promising a bribe may be imposed on each individual. However, liability is varied depending on the function performed by the person accepting the bribe.

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.

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

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3 Pursuant to Article 229 of the CC, anyone who gives or promises to give a material or personal benefit to a person holding a public function (including a person holding a public function in a foreign state or international organisation) is liable to imprisonment for between six months and eight years. If the value of such a benefit is significant a perpetrator is liable to imprisonment for between two and 12 years. Moreover, 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. The offender would not be liable for the offence, where they report this to the body responsible for prosecution, disclosing all the relevant circumstances of the offence before this authority learned about it.

4 Pursuant to Article 228 of the CC, anyone who, in connection with holding a public function (including a person holding a public function in a foreign state or international organisation) accepts a material or personal benefit, or a promise thereof, is liable to imprisonment for between six months and eight years. If the acceptance is in return for unlawful conduct, the offender is liable to imprisonment for between one and 10 years. The offender is also liable for making the performance of official duties dependent upon receiving or demanding a material benefit, or a promise thereof. Moreover, if the value of a benefit is considerable, a perpetrator is liable to imprisonment for between two and 12 years.
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 or personal 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. – a material and personal benefit includes both the benefit for oneself, as well as for another person.

The CC makes it possible for a person who has given amaterial 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. A material and personal benefit includes both the benefit for oneself, as well as for another person. 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 in commercial law companies, or work or undertake actions on behalf of business entities

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6 Article 296(a), Sections 1 to 5 of the Criminal Code (Journal of Laws No. 1997.88.553).
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 Parties\(^8\) 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., 31,500,000 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 / January 2019, 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. (or even up to 60 million zlotys in some specific situations, such as when a necessary internal investigation was not conducted). 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).

In 2018, the CBA disclosed damage to property owned by the state, the Treasury or public assets amounting to nearly 2 billion zlotys, secured the property in cash at a value of 448 million zlotys, charged 721 suspects and reported 30 suspected instances of crime on suspicion of committing crimes as a result of conducted inspections.

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, in August 2019, the CBA detained the ruling party in Poland. Kogut

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was chairman of the board of a foundation that received many donations from firms and businessmen, former Deputy Minister of the Environment and he is alleged to have made improper use of an entrepreneur from the public powers he had as a senator construction industry. The investigation concerns suspicions that the National Fund for Environmental Protection and Water Management in was subject to influence in 2015 and settling a matter in exchange for the donations.\textsuperscript{12} a material benefit in connection with the implementation of the project known as the comprehensive protection of underground waters of Kielce agglomeration.\textsuperscript{13}

In addition to the CBA, the Internal Security Agency (ABW) and the police hold powers to pursue crimes of corruption.\textsuperscript{14} 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.\textsuperscript{15} 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.

\textsuperscript{15} Article 228, Section 5 of the Criminal Code and Article 229, Section 5 of the Criminal Code (Journal of Laws No. 1997.88.553).
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.\(^{16}\) The possession of information concerning less serious crimes does not entail an obligation 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.

However, specific regulations provide for the obligation to report certain serious crimes. For instance – under banking law\(^{17}\) – if there is a reasonable suspicion that the bank’s activities are used to conceal any criminal activity or for any purposes connected with a fiscal offence, the bank is obliged to notify the enforcement authority with the competence to conduct criminal proceedings.

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.\(^{18}\) 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.\(^{19}\) 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

\(^{16}\) Article 240, Section 1 of the Criminal Code (Journal of Laws No. 1997.88.553).
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.20

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 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.21 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 funds22 or acting to the detriment of the company.23

The new Act on Money Laundering and Terrorism Financing Prevention (the Money Laundering Prevention Act) entered into force in July 2018.24 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

20 Article 9, Section 1 of the Act of 10 September 1999 – Fiscal Criminal Code (Journal of Laws No. 2013.186 consolidated text).
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.25

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

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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. In June 2019, the Polish parliament was working on an amendment to the CC. The purpose of the amendment was to provide severe sanctions for corruption and bribery crimes. However, many Polish experts on criminal law criticised the bill, stating that the anti-corruption amendments may not apply to persons managing the largest strategic commercial companies of the State Treasury. In the experts’ opinion, the amendment may result in impunity for some corrupt acts in the public sector. At the final stage of the legislative process, the President directed the bill to the Constitutional Tribunal. The Tribunal will decide whether the amendment will come into force.

In July 2019, the Polish parliament passed an amendment to the Code of Criminal Procedure. This amendment is intended to improve and speed up criminal proceedings as well as to adapt the procedure to technological development.

The amendment will eliminate an obligation to enumerate or read all documents at the hearing. Moreover, when justifying a verdict, the judges will be obliged to follow strict rules and draft grounds for a verdict on a special paper form.

Nevertheless, the amendment may undermine some procedural guarantees of the accused. For instance, the revision will provide for the statute of repose to limit the time within which the parties are entitled to report the evidence. The amendment also predicts the possibility of conviction by the court of appeal when a decision of the first instance court is a conditional discontinuance of proceedings. What is more, there will be no influence on the course of the proceedings if a party fails to appear but its attorney appears. These amendments indicate that parties to criminal proceedings will be forced to involve a professional attorney in any 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 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 zlotys. 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.

Recently, Polish criminal procedure was also aligned to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

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

Another requirement to introduce an internal anti-corruption procedure is included in the Draft Act on Transparency in Public Life. 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. Notwithstanding the above, in 2018, the government decided to suspend work on the Draft Act.

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 business crime and 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).

In 2017, the National Public Prosecutor has issued new the latest 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.27

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Chapter 22

RUSSIA

Alexei Panich and Sergei Eremin

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 fourth 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 at further improving the institutional framework for countering corruption in Russian subjects. In December 2018, the government submitted to the State Duma a package of draft laws aimed at ensuring the uniformity of anti-corruption requirements.

However, 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.

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1 Alexei Panich is a partner and Sergei Eremin is a senior associate at Herbert Smith Freehills CIS LLP.
3 According to the latest published Transparency International’s Corruption Perceptions Index of 2018, Russia is ranked 138 out of 180 countries in terms of the levels of public sector corruption.
4 https://rm.coe.int/16806cc128.
II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i 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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6 ‘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.

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7 Paragraph 10 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 14 June 2018 No. 17 on Some Issues Related to the Application of Property Confiscation in Criminal Proceedings.

These sanctions may be combined 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 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
- 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 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
- imprisonment for up to 12 years.

These sanctions may be combined 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 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 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 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. According to amendments in effect from January 2019, liability for these actions may be imposed on any legal entity even if they are committed in the interests of related entities, affiliated organisations, or subsidiaries.

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. The recent draft law covering amendments to several legislative acts, including the Anti-Corruption Law introduced to the State Duma, proposes a uniform approach to compliance with anti-corruption requirements for not only public officials, but also employees of both non-profit and for-profit state-owned legal entities. In addition, the draft provides a specific list of gifts that will be deemed acceptable for the mentioned persons.

The draft also broadens the disciplinary measures applied to individuals occupying state or federation subject positions who are accused of corrupt practices.

We note that 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. 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).

Among the more successful, a draft law regarding the period of administrative investigations in cases of unlawful remuneration on behalf of a legal entity should be mentioned. The draft proposes to extend the period from two to 12 months on the basis of a decision of the head of a higher-level prosecuting authority in cases related to the execution of a request for legal assistance sent to a foreign state. The draft has passed its first reading in the State Duma.

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. 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 minimise his or her liability for the bribery (and generally for other crimes) he or she committed if one of the following conditions is met:

a the accused comes forward with a plea and actively contributes to the detection and investigation of the crime;
b the accused enters into a pretrial agreement on cooperation with the prosecutor; or
c the case against him or her is examined in a special procedure (i.e., when accused agrees with the charges against him or her and applies for a special procedure without full investigation of the crime).

Depending on the specific type of crime and the applicable options (from those mentioned above), the sentence of the accused may be between half and two-thirds of the sentence that would have been imposed in the absence of the abovementioned circumstances. It is, however, difficult to determine the length of the sentence in each case 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 receipt of cash by an individual with a payment card if the latter is issued by a foreign bank registered in the territory of a foreign state or administrative-territorial unit of a foreign state included in the list approved by the authorities;
d 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;
e 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;
f 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;
g transactions entered into by a person or a legal entity known to be involved in extremism or terrorism;
h 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

i 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.
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 their detection by the federal and 26 cantonal attorney generals’ offices, as well as on the number of complaints, referrals and suspicious financial transaction reports received.

Due to the length and complexity of foreign bribery investigations, the main cases in 2018 concerned, as in last year’s edition, the Petrobras, 1MDB and FIFA cases, with their parallel financial regulation enforcement proceedings. The criminal investigation into the bribes paid by Odebrecht has led to Swiss criminal proceedings and mutual assistance requests in connection with bribes paid to officials from various Latin American, Caribbean and African countries (in alphabetical order, Angola, Argentina, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru and Venezuela).

The present situation and the outlook remain unchanged: 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

i 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
provisions in the Swiss Criminal Code (SCC)\(^4\) as well as the creation of a separate chapter on this topic. These changes entered into force on 1 May 2000.\(^5\) 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 \textit{ter} SCC), or for any public official to solicit or accept such an advantage (passive bribery – Article 322 \textit{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:

\begin{quote}
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.
\end{quote}

Article 322 \textit{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 \textit{quinquies} and 322 \textit{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 \textit{decies}, Section 1 SCC:

\begin{enumerate}
\item \textit{a} advantages permitted under public employment law or contractually approved by a third party; and
\item \textit{b} negligible advantages that are common social practice.
\end{enumerate}

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.

\(^4\) At the time of writing, the most recent but unofficial English translation of the SCC is the one as of July 2019, available at https://www.admin.ch/opc/en/classified-compilation/19370083/201907010000/311.0.pdf.

\(^5\) 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 cases, one of the most notorious is that of the Federal Secretariat for the Economy (SECO), where IT services, some of them allegedly non-existent, were purchased for an estimated 99 million Swiss francs from Swiss IT companies for kickbacks paid to a SECO civil servant. The criminal investigation started in 2014 and was extended

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6 In force since 1 January 2018.
7 In force since 1 July 2016.
8 Federal Court decision ATF 135 IV 204 of 21 August 2009.
in 2017 to include additional persons, bringing the total number of individuals under investigation to 10. In May 2019, the Federal Criminal Court convicted four. Three IT managers were convicted for corruption and sentenced to pay fines, and a trustee was found guilty of forging documents, criminal mismanagement and money laundering and convicted to a suspended sentence of imprisonment of six month in addition to paying the costs of the procedure. On 1 October 2019, the OAGS indicted the four remaining persons, including the former civil servant at SECO, and three entrepreneurs. The charges include accepting bribes (Article 322 quater SCC), misconduct in public office (Article 314 SCC), criminal mismanagement (Article 158 SCC), and bribery (Article 322 ter SCC).

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 2 million Swiss francs in kickback payments. The overall damage to CFF has been estimated at several million Swiss francs. The Federal Criminal Court convicted three persons involved, including the CFF employee, who was sentenced to 36 months’ imprisonment (a part of which has been suspended) and a monetary penalty. The two others were sentenced to suspended monetary penalties. 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, Articles 322 octies and 322 novies SCC only entered into force on 1 July 2016, and no cases have been reported to date.

In September 2015, the Federal Police created an (anonymous) anti-corruption reporting platform, which serves to report any suspicion of private and public bribery, in Switzerland or abroad. This integrity platform was discontinued at the end of 2018. 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.\textsuperscript{13}

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 \textit{septies} SCC).

A foreign public official susceptible to public bribery is described as a:

\begin{quote}
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.
\end{quote}

Article 322 \textit{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,\textsuperscript{14} 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.\textsuperscript{15} This case law sets a precedent that is likely to impact future cases involving officials of state-owned enterprises.


\textsuperscript{14} Federal Criminal Court judgment SK.2014.24 of 1 October 2014 issued in the context of abridged proceedings (Article 358 CPC).

\textsuperscript{15} www.bundesstrafgericht.ch, SK.2015.17 and SK.2016.17.
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.

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:

a. 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);

b. are the proceeds of a felony or of a qualified fiscal misdemeanour (Article 305 bis, Section 1 bis SCC);

c. are subject to the power of disposal of a criminal organisation (Article 260 ter SCC); or

d. 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 and of the Federal Office of Justice, Switzerland was at the centre of several of the main global enforcement proceedings.

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 septies SCC) and money laundering (Article 305 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

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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.

In this context, the OAG initiated in 2018 criminal proceedings against two financial institutions in Switzerland for corporate liability.

Since the start of the investigation, more than 300 million Swiss francs have 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.

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

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.

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.
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.\textsuperscript{21}

\section*{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 \textit{bis} SCC) in 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 \textit{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. In August 2019, the OAG filed the indictment against three former officials of the German Football Association. The proceedings against a fourth person continue in a separate criminal investigation.\textsuperscript{22} 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.\textsuperscript{23}

\section*{iv 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 Tribunal\textsuperscript{24} 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.

\textsuperscript{23} https://www.bundesanwaltschaft.ch/mpc/de/home/taetigkeitsberichte/taetigkeitsberichte-der-ba.html, p. 20.
\textsuperscript{24} Judgment SK.2018.38.
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 Investment Disputes (ICSID) 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, 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. On 12 August 2019, the Office of the Attorney General of Geneva announced that a trial for bribery of foreign officials and forgery will take place before the Geneva Criminal Court.

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:

a. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997;

b. Council of Europe Criminal Law Convention Against Corruption of 1998; and


VIII LEGISLATIVE DEVELOPMENTS

On 14 December 2018, the Swiss parliament adopted an amendment to Article 53 SCC regarding the possibility of discontinuance of the criminal proceedings in the event of compensation of the aggrieved person by adding the condition that the perpetrator admits the facts and that the contemplated custodial sentence does not exceed one year with suspension. The new provisions entered into force on 1 July 2019.

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

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).

26 Decision 1B_261/2017.

27 Decision 1B_521/2017.

than dismissal, such as from prosecution for violation of various types of secrecy provisions.\textsuperscript{29} The Swiss legal framework in this regard has been deemed inadequate.\textsuperscript{30} 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.\textsuperscript{31}

On 26 June 2019, the Federal Council adopted the dispatch to the parliament on the amendment of the Anti-Money Laundering Act (AMLA). The proposal follows the Federal Council’s strategy on financial market policy for a competitive Swiss financial centre and takes the main recommendations of the mutual evaluation report of the Financial Action Task Force (FATF) on Switzerland into account. These include measures for persons providing services in connection with companies or trusts (advisors), for trading in precious metals, precious stones and old precious metals, as well as for financial intermediaries. Under the Anti-Money Laundering Act, advisors will not only have to comply with due diligence obligations and a duty to verify, but will additionally have a new reporting obligations. In contrast, the measure only covers services for domiciliary companies or trusts. The parliament is expected to start deliberations of the proposed amendments in the second half of 2019.

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).

\textsuperscript{29} 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).

\textsuperscript{30} OECD Phase 4 report, p. 14.

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.32 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.

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,33 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 and full admission of facts 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.

33 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).
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.

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.

34 Federal Court decision 6B_422/2013 of 6 May 2013.
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.
Chapter 24

UNITED STATES

Mark F Mendelsohn

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’.

1 Mark F Mendelsohn is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The author would like to thank Lina Dagnew and Jonathan Silberstein-Loeb 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 to 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.

2 18 U.S.C. §201(c).
4 Id. at 266.
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$192,300) 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.

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 official's duties.

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11 5 C.F.R. §2625.804(b).
15 5 C.F.R. §2635.
employee’s official duties. 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. In 2017, President Trump signed a similar executive order precluding executive agency appointees from accepting any gifts from registered lobbyists.

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.

**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. 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. 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. All executive branch officials can receive gifts motivated by family relationship or personal friendship.

**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 candidate, committee, or political party. House and Senate rules also contain several 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. 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. All executive branch officials can receive gifts motivated by family relationship or personal friendship.

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16 5 C.F.R. §2635.203(d).
20 5 C.F.R. §2635.204(a); U.S. Office of Gov’t Ethics, Gifts From Outside Sources, available at https://www2.oge.gov/Web/oge.nsf/Resources/Gifts+from+Outside+Sources.
21 5 C.F.R. §2635.204.
local election. 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.

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 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.

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.

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. 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 is changing. Between 1966 and 2015, the DOJ brought only seven criminal FARA cases, and there were only three convictions. In 2017–2018, Special Counsel Robert Muller's investigation of Russia's efforts to interfere with the 2016 US presidential election resulted in prosecutions for FARA violations, including guilty pleas entered by President Trump's former campaign manager, Paul Manafort, and his associate Rick Gates, in connection with their previous work in Ukraine, and by former National Security Advisor Michael Flynn for false statements he made to the FBI regarding communications with the Russian Ambassador to the U.S. and work his company did for the Republic of Turkey. In March 2019, the Assistant Attorney General for National Security John Demers announced the DOJ's plan to treat FARA as ‘an enforcement priority’ and assign a dedicated former prosecutor from Special Counsel Muller's team to revamp the FARA enforcement unit. Since 2017, there have been eight FARA cases, including charges against Russian nationals and companies ‘for committing crimes while seeking to interfere in the US political system’ and a settlement with a prominent law firm (including a disgorgement of $4.6 million in fees) for false statements made during inquiries

25 Id.
26 22 U.S.C. §611 et seq.
28 See Dep't of Justice, Recent FARA Cases, available at https://www.justice.gov/nsd-fara/recent-cases; see also Manafort Superseding Indictment (June 8, 2018), available at www.justice.gov/file/1070326/download.
from the FARA Unit[.]30 While many of the DOJ’s views on the appropriate interpretation and application of FARA are not publicly available, the DOJ has published redacted copies of the confidential advisory opinions it issued since 1 January 2010 as well as three opinions it issued in 1984, 1988, and 2003.31

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 bribes.32 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’.33 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.34 Violations of the gratuities provisions, on the other hand, are punishable by a maximum of two years’ imprisonment and a fine of US$250,000.35

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31 Id.
34 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.
United States

A violation of 18 USC Section 666 carries a maximum penalty of 10 years’ imprisonment and a fine of US$250,000.36

A Hobbs Act violation is punishable by up to 20 years’ imprisonment and a fine of up to US$250,000.37

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 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.

1 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.38 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.39 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.40

In June 2016, the Supreme Court further narrowed the scope of honest services fraud, and the Hobbs 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 1951.41 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.42 Conversely, setting up a meeting, talking to another government official or organising an event, without more, does not constitute an official act, and thus

40 130 S. Ct. 2896, 2929 (2010).
42 Id. at 2357.

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cannot support convictions under 18 USC Sections 1346 and 1951. More recently, in August 2019, the Second Circuit declined to extend the higher ‘official acts’ standard in McDonnell to prosecutions under the FCPA and federal bribery statute 18 USC Section 666, supporting similar analysis by the third, fifth and sixth circuits.

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)).

IV 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.

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

43 Id.
44 See generally United States v. Ng Lap Seng, 934 F.3d 110 (2nd Cir. 2019).
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’.47
Public international organisations include any entity designated as such by executive order of
the President (e.g., the United Nations and the World Bank).48

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:

a the foreign state’s characterisation of the entity and its employees;
b the foreign state’s degree of control over the entity;
c the purpose of the entity’s activities;
d 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;
e the circumstances surrounding the entity’s creation; and
f the foreign state’s extent of ownership of the entity.49

In their November 2012 Resource Guide to the FCPA, the DOJ and SEC endorsed these six
factors, and identified the following five additional factors:

a the exclusive or controlling power vested in the entity to administer its designated
functions;
b the level of financial support by the foreign state;
c 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.\(^{50}\)

In *United States v. Esquenazi*, the US Court of Appeals for the Eleventh Circuit defined the term ‘instrumentality’ under the FCPA.\(^{51}\) 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 government treats as its own’.\(^{52}\) The court enumerated non-exhaustive lists of factors to separately determine whether the government ‘controls’ the entity\(^{53}\) and whether the entity performs a function the government ‘treats as its own’.\(^{54}\)

### 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.\(^{55}\) The DOJ has issued several Opinion Releases that provide some guidance with respect to gift-giving.\(^{56}\)

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.


\(^{51}\) *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).

\(^{52}\) Id.

\(^{53}\) 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.’)

\(^{54}\) Id. (‘[C]ourts 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.’)


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.57

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.58 This defence, however, does not apply to all 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.’59

Second, it is a defence that the payment was lawful under the written laws of the foreign country.60 This defence 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]’.61 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.62

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’.63 In practice, US authorities have also construed this exception only to apply

61 15 U.S.C. §§78dd-l(b), 78dd-2(b), 78dd-3(b).
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 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

72 Id.
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.73

viii  Civil and criminal enforcement
Companies and individuals can face both criminal and civil enforcement under the FCPA.

ix  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.

x  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.74 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.75

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’.76

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.77 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.78

73 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’).
74 U.S.S.G. §8C2.5(g)(1).
With regard to cooperation by corporations, in November 2017, the Department refined its approach on self-reporting, cooperation, and remediation in its FCPA Corporate Enforcement Policy, which formalised the year-and-a-half-long FCPA Pilot Program the Department announced in April 2016. 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.

The 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 the offense or the nature of the offender’. 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.

In March 2019, the DOJ released additional updates to its Corporate Enforcement Policy, allowing companies to secure cooperation credit for providing information on ‘all individuals substantially involved’ and relaxing the prior requirement under the September 2015 DOJ policy memorandum, commonly referred to as the Yates Memo. The revised policy also extends declination presumptions to companies engaged in acquisitions that uncover misconduct during the due diligence process, voluntarily disclose it, and cooperate in follow-up investigations. In October 2018, the DOJ also updated its guidance on the

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80 U.S. Dep’t 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.


82 Id. at § 9-47.120(1).

83 Id.

84 Id. at § 9-47.120; DOJ memorandum authored by Deputy Attorney General Sally Quillian Yates (Yates Memo) on Individual Accountability for Corporate Wrongdoing (9 September 2015) at 2-5, www.justice.gov/dag/file/769036/download.

principles prosecutors in the Criminal Division must use to assess if a monitor is needed, including if the misconduct (1) involved manipulation of books and records or an inadequate compliance program; (2) was pervasive and involved senior management; and (3) was remedied through the company’s significant investment in the compliance programme.86

Last year, 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’.87 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.88 The Policy also sets out factors Department lawyers should evaluate to determine when multiple penalties serve the interests of justice in a particular case.89 Relatedly, in March 2019, the US Commodity Futures Trading Commission (CFTC) announced, for the first time, that it would investigate ‘violations of the [Commodity Exchange Act] carried out through foreign corrupt practices[,]’ and work together with the DOJ, SEC and other law enforcement agencies to avoid ‘piling[ing] onto other existing investigations.’90 A month after the announcement, a large global commodity trading company disclosed that the CFTC is coordinating with the DOJ to investigate the company and its subsidiaries for potential violations of the CEA ‘through corrupt practices in connection with commodities.’91

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

89 Id.
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 2009.92 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’.93

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.’94 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’.95

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.96 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.97 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.98 The applicable statute of limitations is five

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93 Id.
95 Id.
98 15 U.S.C. §§78dd-2(g), 78dd-3(e), 78ff(c); 18 U.S.C. §3571.
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.99

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.

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.100 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.101 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.102 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.103

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’.104 The records must be kept to 'reasonable

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100 15 U.S.C. §§78dd-2(g), 78dd-3(e), 78ff(c).
102 *Kokesh v. SEC*, No. 16-529, slip op. at 5 (U.S. June 5, 2017) (Sotomayor, J.)
103 See id.
detail’, which the Act defines as the level of detail that ‘would satisfy prudent officials in the
conduct of their affairs’. 105 The FCPA holds issuers strictly liable on civil grounds for the
bookkeeping violations of consolidated subsidiaries and affiliates. 106 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. 107

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]’. 108

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.

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. 109

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. 110

iv Sanctions for record-keeping violations

Criminal penalties

Companies that ‘knowingly and wilfully’ 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

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.’)


107 15 U.S.C. §78m(b)(4)-(5); see e.g., 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 [. . .]’).


109 See, e.g., In the Matter of Watts Water Technologies, Inc. and Leesen Chang, SEC Administrative Proceeding
File No. 3-148585 (13 October 2011).

110 See, e.g., United States v. Control Components Inc., No. 8:09-cr-00162 (C.D. Cal. 22 July 2009); United
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. The applicable statute of limitations is five years.

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.

v Tax deductibility of domestic or foreign bribes

The US Internal Revenue Code expressly prohibits the tax deductibility of domestic and foreign bribes.

vi 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. Violation of the money laundering statute does not require a proof of violation of the underlying unlawful activity.

Knowledge of criminal activity can be established from facts indicating that underlying criminal activity is likely; thus, willful blindness is covered by the statute. A transaction can constitute almost any form of surrendering the proceeds from an underlying crime. The effect on foreign or interstate commerce need only be de minimis. 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’, and courts have been permissive in interpreting the scope of the text.

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

117 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’).  
118 See 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. . .’).  
119 Id.  
121 See United States v. Akintonbi, 159 F.3d 401, 403 (9th Cir. 1998) (finding that checks with no value were proceeds under the statute).
United States

business. 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.

Two sections of the money laundering statute are most relevant in the context of foreign bribery:

a. 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.

b. 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.


123 See e.g., United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011).


125 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).


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Concealment

Concealment is defined as having a purpose to conceal, so it would be an offence even if the concealment is not successful.\textsuperscript{127} 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.\textsuperscript{128}

A variety of case-specific factors influence a court’s finding of concealment. As one court suggested:

\begin{quote}
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.\textsuperscript{129}
\end{quote}

Structuring transactions to evade reporting requirements

The money laundering statute prohibits the structuring of a transaction to avoid an obligation to report.\textsuperscript{130} The reporting requirements for financial transactions designed to prevent money laundering is discussed in Section V.i.x. One of the requirements for the offence is actual knowledge of the underlying reporting requirement.\textsuperscript{131}

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.\textsuperscript{132}

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.\textsuperscript{133}

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\textsuperscript{127} See United States v. Heid, 651 F.3d 850, 855 (8th Cir. 2011).

\textsuperscript{128} 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).

\textsuperscript{129} United States v. Magluta, 418 F.3d 1166, 1176 (11th Cir. 2005).

\textsuperscript{130} 18 U.S.C. §1956(a)(1-2); see also United States v. Bowman, 235 F.3d 1113, 1118 (8th Cir. 2000).

\textsuperscript{131} 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).

\textsuperscript{132} 31 U.S.C. §5324(a)–(c).

\textsuperscript{133} 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).
\end{flushright}
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.\textsuperscript{134}

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.\textsuperscript{135}

\textbf{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 greater, and imprisonment for not more than 20 years.\textsuperscript{136} 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{137}

\textbf{ix} 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{138} 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{139} A year later, the DOJ filed a supplemental civil forfeiture action seeking recovery of assets valued at approximately US$540 million.\textsuperscript{140} The complaints filed by the DOJ represent the largest single action brought under the Kleptocracy Asset Recovery Initiative to date.

\textbf{x} 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:

- a financial institution are obligated to report cash transactions involving US$10,000 or more;\textsuperscript{141}

\textsuperscript{134} 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)).


\textsuperscript{138} 18 U.S.C. §981(a)(1)(A) and (C).


\textsuperscript{141} 31 U.S.C. §5313.
b trades and businesses other than financial institutions are obligated to report cash
transactions involving US$10,000 or more; 142
c persons in the US are required to report foreign financial agency transactions; 143 and
d financial institutions are required to file suspicious transaction reports under appropriate
circumstances. 144

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. 145

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. 146 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. 147

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’. 148

145 Ratzlaf v. United States, 510 U.S. 135, 137 (1994); see also United States v. Tatoyan, 474 F.3d 1174, 1177
(9th Cir. 2007).
148 Inter-American Convention Against Corruption, Article IX, 29 March 1996.
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 Speech. 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.

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.

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

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whistle-blower programme. 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.

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’.

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. 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.

In February 2017 the DOJ released the Evaluation of Corporate Compliance Programs (the Evaluation Guidance), a list of common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. 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.\textsuperscript{159} The Evaluation Guidance gives 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.

Most recently, in April 2019, the DOJ’s Criminal Division expanded the Evaluation Guidance to provide a framework for how prosecutors will evaluate corporate compliance programmes.\textsuperscript{160} Although the updated guidance covers the same 11 topics, it focuses the evaluation on whether the corporate compliance programme: (1) is well designed; (2) is applied earnestly and in good faith; and (3) actually works in practice.\textsuperscript{161}

\section*{XI OUTLOOK AND CONCLUSIONS}

Enforcement of the FCPA has continued to be a significant priority of US enforcement agencies. Just in the first half of 2019, the DOJ and SEC together assessed corporate penalties of US$1.5 billion, surpassing the combined corporate penalties for all of 2018. In March 2019, then-Deputy Attorney General Rod Rosenstein stated that over the previous year, the DOJ ‘increased its prosecutions of white collar crime and other priorities.’\textsuperscript{162} He further emphasised the continued global nature of the enforcement mission, saying ‘international cooperation is essential to prohibit corruption by multinational corporations.’\textsuperscript{163} At around the same time, the FBI announced that it was expanding its international corruption unit to Miami, Florida, following ‘the success of the FBI’s international corruption squads operating in New York, Los Angeles, and Washington, D.C.’\textsuperscript{164} Similarly, in September 2019, SEC Chairman Jay Clayton remarked that his office ‘has brought nearly 80 FCPA cases in the past five years alone, involving alleged misconduct in more than 60 countries’ and while he lamented that the United States is ‘acting largely alone’, he stated that he had no intentions of changing ‘the FCPA enforcement posture of the SEC’.\textsuperscript{165}

Notably, the DOJ and SEC have continued to promote and seek to reward corporate cooperation and self-disclosure in enforcement actions. Last year, the DOJ formalised the FCPA Pilot Program, an initiative that aimed to incentivise companies to report alleged violations as a means of obtaining mitigation credit or a declination to prosecute. In March 2019, the DOJ further revised the FCPA Corporate Enforcement Policy to offer a declination presumption to successor companies that uncover and disclose misconduct

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{159} See id.
\item \textsuperscript{160} Dep’t of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (Apr. 30, 2019), available at https://www.justice.gov/criminal-fraud/page/file/937501/download.
\item \textsuperscript{161} Id. at 1-2.
\item \textsuperscript{162} Keynote Address by Deputy Attorney General Rosenstein, Dep’t of Justice, FCPA Enforcement Developments (Mar. 7, 2019), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.
\item \textsuperscript{163} Id.
\end{enumerate}
\end{footnotesize}

The DOJ has also reaffirmed its commitment to prioritising individual prosecutions. As then-Deputy Attorney General Rosenstein recently explained, ‘[w]hile pursuit of criminal and civil remedies against corporations is important, we should always focus on the individuals responsible for misconduct . . . The most effective deterrent to corporate criminal misconduct is identifying the people who commit crimes and sending them to prison. Absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability.’\footnote{Keynote Address by then-Deputy Attorney General Rosenstein on FCPA Enforcement Developments (Mar. 7, 2019), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.} The DOJ’s ‘individual accountability policy is designed to drive change, and lead more companies to implement meaningful proactive compliance programs’ by holding accountable individuals ‘who play significant roles in setting a company on a course of criminal conduct’.\footnote{Id.} As a result, the DOJ has brought over a dozen FCPA enforcement actions in 2019 against individuals, ranging from business executives and consultants to government officials, and this attention to individual prosecutions is expected to continue.

\footnotesize{172} Id.
INTRODUCTION

Compliance matters are a hot topic in the jurisdiction for one essential reason: studies demonstrate that Venezuela is perceived as the most corrupt country in the Latin American region and one of the most corrupt countries in the world. Therefore, the actors of the economic landscape must carefully conduct all business operations to avoid compliance issues, including corruption and bribery.

Venezuela has had anti-bribery and anti-corruption legislation since the early 1980s. The most recent piece of legislation regulating these matters is the Law against Corruption (the Anti-Corruption Law). This Law includes all the crimes of administrative corruption and, in addition, it now includes transnational bribery and crimes of private corruption. Bribery and corruption offences are also included in a number of other regulations, which we describe below. Generally, the body of anti-bribery and anti-corruption rules focus on these main aspects: penalties for legal entities such as fines, disgorgement and debarment include sanctions for the bribery of foreign public officials and regulate certain administrative bodies (e.g., the National Anti-Corruption Body), which aim to accelerate investigations into corruption matters. Naturally, due to the current economic and political crisis in the country progress on these matters has stalled. As we note below, there is very little enforcement to date.

DOMESTIC BRIBERY: LEGAL FRAMEWORK

While there is no specific regulation on bribery in Venezuela, the Anti-Corruption Law and the Law against Organised Crime and Terrorism Financing (the Terrorism Financing Law), both regulate bribery.

Bribery of domestic officials offences

According to the Anti-Corruption Law, there are five different types of bribery.

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1 Jesús A Dávila is a partner and Adriana Gonçalves is a senior associate at Baker McKenzie. The authors acknowledge the research assistance of María F Fernández, junior associate at Baker McKenzie.
Extortion
Extortion is defined as when a public official, abusing his or her position, induces someone to give or promise, to him or her or to another person, a sum of money or any other undue benefit or gift. It is punished with two to six years of imprisonment and a monetary fine of up to 50 per cent of the value of the benefit given or promised.

Improper passive corruption (bribe)
Improper passive corruption is defined as when a public official receives or accepts (for personal benefit or for others) a promise of compensation or other benefits not due to them by virtue of a certain act within their functions. It is sanctioned with one to four years of imprisonment, a monetary fine of up to 50 per cent of the value of the benefit given or promised, and seizure of the money or objects given. The person giving or promising the compensation or benefit shall be subject to the same sanction.

Proper passive corruption (bribe)
A public official directly or indirectly receives or accepts money or a promise or other benefits in exchange for performing an act contrary to his or her functions or with the purpose of delaying or avoiding the execution of one of his or her functions. Sanctioned with three to seven years of imprisonment, a monetary fine of up to 50 per cent of the value of the thing given or promised, and seizure of the money or objects given. Both the person giving or promising the compensation, the person accepting it on behalf of the public official and the public official himself or herself, shall be subject to the same sanction.

The following circumstances aggravate proper passive corruption when:

a the purpose of the bribe is to confer public employment, subsidies, pensions or to cause the public official to agree to sign contracts related to the administration to which the official belongs;

b the purpose of the bribe is to favour or cause any harm or damage to any of the parties in an administrative, criminal, civil or any other kind of procedure or lawsuit; and

c the perpetrator is a judge who renders a judgment that might result in deprivation of freedom exceeding six months.

Inducement to corruption
A person who insists on persuading or inducing a public official to commit either qualified extortion or improper passive corruption, without achieving the objective is defined as inducement to corruption. It is sanctioned with six months to two years of imprisonment in case of inducement to improper passive corruption. In case of inducement to the crime of proper passive corruption, the penalties established for such crime apply, but are halved.

Agreement with contractors
This is when a public official who, in their official role, participates in an agreement or other transaction and negotiates with the interested parties or intermediaries for a specific result, or uses any manoeuvre or ruse for this purpose. It is sanctioned with two to five years of imprisonment. If the purpose of the crime was to obtain money, gifts or wrongful profits given or offered to the official or to a third party, this is sanctioned with imprisonment from two to six years and a monetary fine of up to 100 per cent of the benefit given or promised.
ii  Definition of domestic public official

The Anti-Corruption Law defines public officials as:

a Those vested with public functions, permanently or transitorily, remunerated or ad honorem, whether by election, appointment or contract granted by competent authorities, serving at: agencies of the republic; states, territories and federal dependencies; districts, metropolitan districts or municipalities; national, state, district and municipal autonomous institutes; public universities; the Central Bank of Venezuela; or of any entities that exercise public powers.

b Directors and administrators of civil and commercial companies, foundations, civil associations and other institutions created with public funds or managed by any of the persons mentioned in Article 4 of the Anti-Corruption Law, or when the aggregate of contributions in a year, from one or several of these persons, represents 50% or more of its budget or net worth; and the directors appointed to represent such bodies and entities, even if the participation of the Venezuelan government is less than 50% of the capital or net worth of such civil and commercial companies, foundations, civil associations or institutions.

For purposes of the Anti-Corruption Law, directors and administrators are persons who:

a perform functions such as direction, management, supervision, control or audit;

b have the right to speak and vote in committees for procurement, bidding, contracts, business, donations or of any other nature, whose actions could jeopardise public assets;

c manage or supervise warehouses, workshops or deposits, and in general, decide upon the receipt, provision and delivery of personal property to the entity or agency for consumption;

d mobilise the entity’s funds that are deposited in the entity’s bank accounts;

e are entrusted with the authority to represent the agency;

f can acquire commitments on behalf of the entity or agency or authorise the pertinent payments; and

g are capable of adopting measures that may have an impact on individuals’ sphere of rights or obligations, or on the powers and duties of the state.

The provisions of the Anti-Corruption Law apply to the above-mentioned persons even when they perform their duties or carry out their activities outside the territory of Venezuela.

Additionally, the Anti-Corruption Law states that all individuals and legal entities, public and private, public officials, communes, communal councils, socio-productive associations and base organisations of the popular power, as well as any other forms of popular organisations, are subject to the application of the Anti-Corruption Law when managing public funds.

iii  Public officials’ participation in commercial activities

Venezuelan legislation does not forbid the participation of public officials in commercial activities. No restrictions apply as long as the commercial activity is lawful and not contrary to the public interest.
iv Gifts, gratuities, travel, meals and entertainment

There is no specific regulation regarding hospitality expenses. However, under the Anti-Corruption Law, public officials shall not accept gifts or benefits in exchange for executing their functions.

Meals or receptions are acceptable as long as there is no connection between the meal or reception and the duties and obligations of the government official concerning the host’s business. A Venezuelan judge is not likely to consider a meal or reception that is reasonable in cost and provided as a courtesy without corrupt intent as an unlawful acceptance of a benefit. Venezuelan law does not establish a specific value limit for meals offered to a public official for such offer to be considered an act of corruption.

Gifts, on the other hand, are not acceptable, except gifts of nominal value (e.g., a bottle of wine, a box of chocolates or candies), customarily given during traditional celebrations, such as Christmas and New Year’s Eve. One should avoid offerings of cash or any other gift. There is no legal provision in Venezuela imposing gift value limits.

v Political contributions by foreign citizens or companies

According to the Law of Political Parties, Public Reunions and Manifestations, political parties cannot accept donations or subsidies from governmental entities (whether autonomous or not); foreign companies or those with headquarters abroad; concessionaries of public works or services; and foreign states or foreign political organisations.

vi Commercial bribery

The Anti-Corruption Law and the Organic Law on Fair Prices (the Fair Prices Law) regulate private bribery. Both the Anti-Corruption Law and the Fair Prices Law define private commercial bribery as the act perpetrated by an individual who, directly or indirectly, promises, offers or grants directors, administrators, employees or collaborators of a certain company or organisation, any kind of benefit or advantage in exchange for favours (either for themselves or for another person), thus, failing to perform their obligations regarding the acquisition or sale of goods or the provision of services. The Anti-Corruption Law sanctions the individual that offers or grants the bribe with two to six years in prison. On the other hand, the Fair Prices Law sanctions this offence with four to six years in prison. Likewise, the directors, administrators, employees or collaborators who personally, or through third parties receive, accept or request such benefit, will also be subject to criminal liability. In addition, the National Superintendence for the Defence of Socio-Economic Rights may suspend the offenders from the Sole Register of Persons that Engage in Economic Activities. We believe the provisions of the Anti-Corruption Law should prevail. Since the Venezuelan Supreme Court has not tested the application of one law over the other, this matter could be subject to further analysis and review.

III ENFORCEMENT: DOMESTIC BRIBERY

As mentioned above, in Venezuela there is little enforcement on domestic bribery and corruption regulations in general. A strong track of corruption cases tied to the Venezuelan
government have affected many important players in the global market. Furthermore, the 2018 Annual Report of the Inter-American Court of Human Rights issued the following recommendations:

Urgent adoption of measures to: (1) reduce significantly the number of provisory judges and increase the number of permanent judges; (2) avoid that, even in a provisory position, judges can only be removed from their position through a disciplinary process or administrative act, respecting due process and especially the duty of motivation; and (3) granting guarantees for the stability of their position.

These recommendations aim, among others, at reducing the large amount of politically driven judicial cases.

The Law of the National Body against Corruption created the National Body against Corruption, a decentralised governing body in charge of investigating and sanctioning corruption-related crimes, with jurisdiction within the Venezuelan territory.

Venezuelan law can hold legal entities liable to prosecution. As explained by Hernández-Bretón: 'If the commission of a crime is established by a court of law, legal entities may be subject to monetary fines, confiscations of profits and/or barring of contract awards depending on the circumstances of the case.'

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

The Anti-Corruption Law defines foreign bribery as the promising, offering or conveying of any object of commercial value or other benefits, favours, or advantages, to a public official of a foreign state, directly or indirectly, in exchange for an action or omission from the foreign official while exercising their public functions related to a commercial, economic or any other kind of transaction, commits this type of crime. However, there is no legal definition for foreign official under Venezuelan law.

Additionally, the Law against Terrorism sanctions Venezuelans and foreign citizens that commit any of the crimes regulated by this Law, that attempt against the patrimonial interests of security or integrity of the country. The Law Against Terrorism further sanctions offenders under investigation located in Venezuela or, if they committed part of the offence in the country, in domestic or international waters or in international air space. The authorities will not apply extraterritorial jurisdiction if another country has prosecuted the offender and they have served their sentence.

In addition, the Law against Terrorism provides several mechanisms for international cooperation, exchange of information, judicial assistance and reciprocity among nations for the investigation, prosecution and sanctioning of the crimes provided therein.

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8 Official Gazette No. 6156 Ext. of 19 November 2014.
V ASSOCIATED OFFENCES: FINANCIAL RECORD KEEPING AND MONEY LAUNDERING

The Venezuelan Commercial Code\textsuperscript{10} (the Commercial Code) establishes the obligation to keep accounting books and approve financial statements on an annual basis. Although the Commercial Code provides no sanctions for failure to comply with these obligations, other laws (e.g., the Tax Code) impose specific requirements and formalities that companies must follow generally. Specially regulated sectors, such as the banking sector, may impose additional formalities on bookkeeping and external auditing.

The Terrorism Financing Law and the Venezuelan Criminal Code\textsuperscript{11} (the Criminal Code) include provisions on money laundering. The Terrorism Financing Law considers bribery as an offence related to obstruction of justice, and sanctions it with 12 to 18 years in prison for the parties involved.

All of the obliged subjects under the Terrorism Financing Law (virtually all parties participating in the economy) have the obligation to report suspicious activities. That is, the obligation to report any transaction or group of transactions, regardless of their value, that raise suspicion as to the origin or the destination of the funds with regards to money laundering, terrorist acts, terrorism financing or any other organised crime offence.

The reporter of the suspicious activity must file a report before the National Finance Intelligence Unit, which, after conducting the proper investigations, might raise the case to the Ministry of Public Affairs to initiate a formal criminal investigation or criminal procedure. This report does not qualify as a criminal complaint.

The Terrorism Financing Law sanctions the failure to comply with the obligation to report suspicious activities with penalties that range between US$250 and US$500.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

As previously mentioned, enforcement rates on local corruption and bribery are very low, and foreign prosecution rates are even lower. A strong track of corruption cases tied to the Venezuelan government have affected many important players in the global business market, including Credit Suisse.\textsuperscript{12}

Recently, Euzenando Prazeres de Azevedo (former president of Odebrecht Venezuela) admitted to transferring US$35 million to fund President Maduro’s 2013 presidential campaign, during a statement rendered before the Brazilian Attorney’s Office. This is just one of the angles from which the Venezuelan government has been proven to be involved in the Lava Jato scandal.\textsuperscript{13}

\begin{thebibliography}{9}
\bibitem{10} Official Gazette No. 472 Ext. of 17 October 1955.
\bibitem{11} Official Gazette No. 5,768 Ext. of 13 April 2005.
\end{thebibliography}
VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Venezuela is a party to several agreements and international organisations dealing with anti-corruption, including the United Nations Convention against Corruption;\(^{14}\) the United Nations Convention against Transnational Organized Crime;\(^{15}\) and the Inter-American Convention against Corruption.\(^{16}\)

However, Venezuela is not a party to the Anti-Bribery Convention of the Organisation for Economic Co-operation and Development (OECD) nor to the Council of Europe Criminal Law Convention on Corruption.

VIII LEGISLATIVE DEVELOPMENTS

Since August 2017, there have been two parallel legislative bodies in Venezuela: the National Assembly (the National Assembly), elected in December 2015, and the National Constituent Assembly (NCA), elected in July 2017. In practice, the authorities have implemented and enforced the decisions taken by the NCA, and the Venezuelan Supreme Court of Justice has acknowledged the legal power and authority of the NCA to issue acts with the force of law. This issue is debatable and there are reasonable arguments to claim the unconstitutionality and illegality of the actions performed by the NCA. This has brought up constant conflict between the National Assembly and the NCA to the point where the Venezuelan Supreme Court of Justice has overthrown practically every piece of legislation passed by the National Assembly.

In October 2016, the National Assembly approved in first discussion a project for the Law against Corruption and for the Safeguard of the Public Patrimony. To date, neither the National Assembly nor the NCA have passed this legislative initiative. The National Assembly drafted this project based on the current Anti-Corruption Law. Its main features include: (1) the obligation for hierarchic authorities to publish a quarterly report on the administration of the public assets granted to them; (2) the creation of a public access system administered by the Ministry of Public Affairs containing information on ongoing cases, reports and sanctions of public officials; and (3) the inclusion of foreign bribery as an offence.\(^{17}\)

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

There are other relevant laws in Venezuela, which, although they do not deal directly with bribery and corruption, are key when performing economic activities in the country:

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\(^{14}\) Venezuela became a party on 10 December 2003 and ratified it on 2 February 2009.

\(^{15}\) Venezuela ratified this Convention on 13 May 2002 and further ratified all of its protocols, including:
(a) Protocol to Prevent, Suppress and Punish Trafficking of Persons, especially Women and Children (13 May 2002);
(b) the Protocol against the Smuggling of Migrants by Land, Sea and Air (13 May 2002);
and (c) the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (19 April 2005).

\(^{16}\) Venezuela became a party on 29 March 1996 and further ratified in on 22 May 1997.

The Law of the National Body against Corruption. The National Body against Corruption is a decentralised governing body in charge of investigating and sanctioning corruption related crimes, with jurisdiction within the Venezuelan territory.

The Fair Prices Law. This regulation also contemplates and sanctions corruption in the context of consumer protection. We note there is currently little enforcement of the Fair Prices Law to this date.

The Rules on Administration and Auditing of Risks. These Rules contain money laundering and anti-corruption provisions that apply to all financial institutions doing business in Venezuela, including a risk classification standard for the treatment of their clients, based on data published by Transparency International.

The Law of Public Contracting. Under this law, the contracting public entity is entitled to terminate unilaterally the agreement when the contractor has obtained the contract through corrupt means. A prior administrative or judiciary investigation must demonstrate the employment of corrupt means.

The Law of the Insurance Activity. Having a conviction for corruption is one of the impediments to assume certain positions in entities that carry out insurance activities. This is a temporary impediment applicable for 10 years after having served the corresponding sentence.

X COMPLIANCE

Anti-corruption and compliance programmes are not mandatory under Venezuelan law, thus, the enforcement of these types of programmes is not formally considered a defence or a mitigating factor in the judging and sentencing process.

However, legal entities may be able to mitigate their corporate criminal liability if they can prove that they exercised due control over their employees by means of internal policies, such as robust compliance programmes. In any case, Venezuela is not the exception to the global trend of implementation of compliance policies. Despite the lack of incentives offered by the Venezuelan government and civil society for the implementation of these programmes, they are especially common among local entities with foreign parent companies, which are typically subject to international compliance regulations such as the US Foreign Corrupt Practices Act.

XI OUTLOOK AND CONCLUSIONS

Entities wishing to enter, exit or continue operating in the Venezuelan market should take into consideration that Venezuela is a high-risk jurisdiction. Because public entities tend to be extremely bureaucratic, public officials will often request ‘special payments’ in order to accelerate or resolve ongoing procedures. Thus, foreign (and local) companies should implement comprehensive compliance programmes and trainings to avoid corruption cases when interacting with public entities, customers and suppliers in Venezuela. Compliance reviews are ‘a must’ under the current political and economic environment of the country. No business decision should be conducted concerning Venezuela without consulting possible compliance effects internally or abroad.

18 Official Gazette No. 6,154 Ext. of 19 November 2014.
19 Official Gazette No. 6, 220 Ext. of 15 March 2016.
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Jonathan heads up Baker McKenzie’s Compliance practice in Mexico and is the Chair for Baker McKenzie’s regional Compliance Steering Committee for Latin America, as well as a member of Baker McKenzie’s Global Steering Committee. Admitted both in Mexico and in two US states, he dedicates nearly 100 per cent of his practice to Compliance. His background includes extensive experience in Compliance, corporate, and pharmaceutical law, as well as having worked seven years in the US and 16 in Mexico and Central America. Jonathan advises clients from various industries on significant government sales in Latin America, as well as sensitive and high profile Compliance and anti-corruption investigations. With substantial experience as in-house and external counsel, he has helped clients establish Compliance policies for many industries, including the healthcare industry, for interactions with healthcare professionals and health-sector government officials. He also has extensive experience in oil and gas sector procurement law, as well as in technology sector procurement law.

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Ilias G Anagnostopoulos has appeared as lead counsel in the most significant criminal law cases in Greece during the past 25 years and is a professor of criminal law and criminal procedure at the National University of Athens school of law. He has extensive experience in most types of business crime, financial fraud, European criminal law, tax and customs fraud, medical malpractice, product criminal liability, environmental liability, compliance, money laundering, corrupt practices, anticompetitive practices and cartel offences, anti-terrorism, extradition and mutual assistance. His many publications in Greek, English and German deal with matters of Hellenic, European and international criminal law, business and financial crimes, reform of criminal procedure and human rights.

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.
YONGMAN BAE

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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.

ADITYA VIKRAM BHAT

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Aditya Vikram Bhat is a partner with the disputes practice of AZB & Partners, one of India’s pre-eminent law firms. He has advised and represented clients in a variety of civil, commercial and criminal matters in several jurisdictions within India and in arbitrations internationally. On anti-corruption matters, Aditya routinely advises corporations and individuals on compliance regimes, government and internal investigations, and on prosecutions. Aditya often works with foreign counsel on matters relating to the anti-bribery provisions of the US Foreign Corrupt Practices Act and the UK Bribery Act.

JOHN BINNS

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John Binns is a partner at BCL Solicitors LLP, specialising in all aspects of business crime. His experience includes representing suspects, defendants and witnesses in cases invoking allegations of bribery and corruption, fraud and tax evasion. He has particular expertise in anti-money laundering regulations, civil recovery and confiscation of the proceeds of crime, and criminal offences of money laundering, as well as related areas such as financial sanctions. He regularly represents individuals and businesses in connection with confiscation, property freezing and restraint orders, including in relation to applications to defend, discharge or vary such orders. He has represented individuals in challenges to the European Court of Justice against their inclusion on targeted sanctions lists arising from the Arab Spring, and advised on numerous Interpol Red Notices and extradition requests. His business crime and proceeds-of-crime cases often involve mutual assistance or parallel investigations in other jurisdictions, or both.

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.

SHAUL BRAZIL

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Shaul Brazil is a partner at BCL Solicitors LLP, specialising in business crime and regulatory enforcement. He has acted in numerous high-profile matters, including international
corruption and breach-of-sanctions investigations and prosecutions by the Serious Fraud Office (SFO) or overseas regulators; city fraud, insider dealing and market manipulation investigations and prosecutions by the SFO or the Financial Conduct Authority (formerly the Financial Services Authority); tax avoidance and evasion investigations by HM Revenue & Customs; international cartel investigations and prosecutions by the SFO, Office of Fair Trading and US Department of Justice; and extradition proceedings under the European Arrest Warrant scheme. Shaul also has broad experience acting in ancillary matters such as judicial review proceedings, restraint and confiscation proceedings, and proceedings for the civil recovery of the proceeds of crime. He also provides expert advice to companies in relation to anti-bribery and corruption and anti-money laundering compliance.

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*.

**VANINA CANIZA**

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Vanina Caniza is a partner at Baker McKenzie’s Buenos Aires office. She advises Argentine and foreign companies in a variety of corporate and commercial law matters, with extensive experience in corporate compliance, commercial agreements and mergers and acquisitions. She completed postgraduate courses on biotechnology at Universidad Torcuato Di Tella (Buenos Aires) and on health law at Universidad de Buenos Aires. She has served as chair of the Baker McKenzie healthcare steering committee for Latin America since 2015 and has sat on the corporate compliance steering committee of the firm for Latin America since 2016.

Vanina is client service director for Biogen, IQVIA and Boston Scientific. She holds a certification in ethics and compliance (AAEC-IFCA) and is currently a professor in the CEC compliance and ethics certification (AAEC-UCEMA).

Vanina advises clients on transactional, general commercial, and compliance matters. She has conducted several compliance investigations and has trained Argentine subsidiaries of global companies in compliance matters (in healthcare; energy, mining and infrastructure; technology, media and telecoms; financial institutions; industrials, manufacturing and transportation; consumer goods and retail).

She focuses her practice on the healthcare industry and on compliance and anti-bribery matters. She also has extensive experience in M&A transactions.

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Luis Castell has more than seven years of experience in competition law. First, as part of the Colombian Superintendence of Industry and Commerce, in the specialised group of competition protection in public procurement (bid rigging) and then as adviser to the Superintendence of Industry and Commerce in matters related to competition. Luis Castell was part of Mergers IV Shop of the Federal Trade Commission of the United States as an International Fellow. Luis has been at Baker McKenzie for more than a year, focused on compliance, antitrust and data privacy.
LORENA CASTILLO
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Lorena Castillo-Lopez is a senior associate at Baker McKenzie. Lorena regularly assists clients on compliance and anti-corruption internal investigations involving potential bribery in public procurement processes, allegations of wrongdoing and handling whistle-blowers. Lorena also advises multinational and domestic companies in the creation, development, implementation, and localization of global compliance programmes for their business operations in Mexico, and carries out regular compliance training sessions.

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Viviana Chávez Bravo is a specialist in corporate compliance. She has participated in several projects for the implementation of compliance programmes for clients in diverse industries. She has also advised companies in the conduction of due diligence processes and internal investigations.

Ms Chávez is also a specialist in competition law and data privacy, and has experience defending clients in administrative processes, and advising them in the development of specific projects (e.g., implementation of measures to comply with data privacy legislation in their operations and the design of antitrust compliance programmes).

She has concluded postgraduate studies at IE Law School (advanced compliance programme) and is accredited as an internationally certified compliance professional by the International Federation of Compliance Associations.

OPHÉLIA CLAUDE
Antonin Lévy & Associés A.A.R.P.I.
Ophélia Claude is a founding partner of Antonin Lévy & Associés.

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 and 2019. She was also named a ‘next generation lawyer’ in white-collar crime in France by The Legal 500 in 2019.

LINA DAGNEW
Paul, Weiss, Rifkind, Wharton & Garrison LLP
An associate in the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison LLP, Lina Dagnew focuses her practice on general commercial litigation, internal investigations, and white-collar defence. Lina has worked on various trial teams in civil and criminal litigations that have resulted in favourable jury verdicts or negotiated resolutions. Lina has experience representing clients in a variety of industries, including financial services, energy, entertainment, and pharmaceutical companies.
While at Harvard Law School, Lina served as a member of the Harvard Legal Aid Bureau for two years, representing indigent clients in family, housing, and employment law. She currently maintains an active pro bono practice in both civil and criminal matters, and serves as a junior board member for the DC Volunteer Lawyers Project.

JESÚS A DÁVILA

_Baker McKenzie_

Jesús Dávila has been an attorney in the firm since 2002 and became partner in 2009. _Chambers Latin America_ and _IFLR1000_ recognises him as a leading lawyer in Venezuela and he appears in the _Chambers’ global rankings_. Jesús advises domestic and multinational companies on the full scope of corporate transactions, including mergers, acquisitions, takeovers, joint ventures and a variety of other corporate work. He has a strong record of accomplishment providing insightful advice to companies on matters of antitrust, foreign investment and technology transfer, IT and communications, and trade and commerce.

MICHAEL DIXON

_Blake, Cassels & Graydon LLP_

Michael Dixon is a partner in Blakes business crimes, investigations and compliance group, where he focuses on internal investigations, anti-corruption compliance and white-collar defence. Michael regularly assists clients in complex multi-jurisdictional investigations. Michael was also co-counsel in the successful defence of a multinational company charged with bribery of government officials. He also regularly provides advice on domestic and international anti-corruption laws, and assists clients with their anti-corruption compliance programs, including policy drafting and review, preparing contractual clauses with agents and joint venture partners, and due diligence during mergers and acquisitions. Michael has also acted as defence counsel in a variety of Criminal Code prosecutions before the courts and a variety of regulatory bodies.

JUAN IGNACIO DONOSO

_Baker McKenzie_

Juan Ignacio Donoso is a senior associate in the compliance and antitrust practice group of Baker McKenzie's Santiago office. He is a lawyer of the Catholic University of Valparaiso and has a master's in competition law from King's College London. He has substantive experience in the antitrust field, specifically in cartel and abuses of dominance cases. Prior to joining the firm in 2017, he worked for eight years at the National Economic Prosecutor's Office (FNE), the Chilean Antitrust Agency where he served as deputy head of the antitrust division and lead significant antitrust investigations. He teaches antitrust law at the Pontificia Universidad Católica de Valparaíso Law School.

JASMIJN DORANT

_Jones Day_

Jasmijn Dorant is an associate at Jones Day and focuses her practice on financial and economic criminal law including corporate criminal defence, internal investigations and
Jasmijn assists clients in all stages of criminal proceedings related to fraud, corruption, misappropriations, tax crimes and environmental criminal law. She also has extensive experience advising clients on compliance matters and internal investigations.

SEBASTIÁN DOREN
Baker McKenzie

Sebastián Doren is a senior associate of the criminal litigation and compliance areas of Baker McKenzie Chile. He is a lawyer of the Catholic University of Chile. He holds a master’s in the criminal system and social problems from the University of Barcelona. He was a student of the doctoral program of criminal law and criminal sciences of the University of Barcelona and Pompeu Fabra University. He holds a diploma in economic criminal law and criminal procedure reform from Alberto Hurtado University. With more than 20 years of experience, he has represented several clients in white-collar crimes criminal proceedings, both as claimant and as defendant.

SERGEI EREMIN
Herbert Smith Freehills CIS LLP

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.

FRANCISCO FERNÁNDEZ ROSTELLO
Baker McKenzie

Francisco Fernández Rostello is a partner of the firm’s Buenos Aires’ office. He has previously worked at Balbín & Pascual Abogados, the International Swaps and Derivatives Association (ISDA) and the New York branch of Société Générale. He is part of the banking and finance, M&A, antitrust, IT/C and general practice groups.

Francisco has plenty of experience working on banking and M&A transactions (both local and cross-border) and advising clients on money laundering matters, specifically related to the financial and securities market. He advises on a day-to-day basis on a variety of legal matters related to banking, finance, commercial and transactional matters. He works regularly with teams located all around the world serving multinational clients.

CHAIM GELFAND
Shibolet & Co

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.

**FERNANDO GOLDARACENA**

*Baker McKenzie*

Fernando Goldaracena is a partner in the Baker McKenzie Buenos Aires office. He is the head of the white-collar crime practice group and member of the compliance and investigations practice group. Prior to joining the firm, Fernando served as secretary of Federal Criminal Court No. 2 of San Isidro, where he led several criminal investigations into matters ranging from white-collar crime, public corruption to tax fraud.

Fernando is member of both the compliance and money laundering and criminal law practice groups of the prestigious city of Buenos Aires Bar Association.

Fernando advises, represents and defends the clients on anti-corruption and compliance matters, and all kind of corporate crimes, such as criminal tax evasion, money laundering, financial intermediation, trade mark frauds, environmental criminal offences, customs criminal violations, and other criminal offences perpetrated by corporations or their management or employees within a corporate structure that are decided by criminal courts or misdemeanors courts.

He has broad experience in conducting investigations into white-collar crimes, compliance and anti-corruption matters and other offences perpetrated by companies or their officers and employees, such as forgery, fraud and concealment. Fernando regularly delivers compliance training for local subsidiaries of multinational corporations, seeking adequate preventive measures on anti-corruption.

**ADRIANA GONÇALVES**

*Baker McKenzie*

Adriana Gonçalves has been a member of the firm since 2014. She is one of the five lawyers in the country who were shortlisted as ‘Venezuela lawyer of the year’ in the *Chambers ‘Women in Law Awards: Latin America 2018*. She has been a member of the firm’s diversity and inclusion committee in Venezuela since 2017. Adriana has assisted national and international clients in the preparation of service agreement, and transnational transactions, including mergers and acquisitions. She has experience in comprehensive corporate counselling and international operations subject to trade regulations, including matters of customs, exchange controls, compliance and antitrust. Likewise, Adriana has broad knowledge and experience with corporate reorganisations and corporate governance.
LYNNE GREGORY

_Baker & Partners_

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.

TONY DONGWOOK KANG

_Bae, Kim & Lee LLC_

Tony DongWook Kang is the partner in charge of cross-border litigation for Bae, Kim & Lee LLC.

Tony’s practice is focused on litigation in the fields of civil and commercial (including post M&A disputes and hostile takeovers) law, control disputes, white-collar crime, product liability, real estate and finance. He served for 12 years as a judge in the Korean judiciary in various posts, from the Seoul Criminal District Court and the Seoul Civil District Court to the Seoul High Court of Appeals, before joining Bae, Kim & Lee LLC in 2006. While serving as a judge, he earned the respect of his peers for his diligence, devotion and keen legal mind, and accordingly, in 2004, he received an award naming him the most valuable judge in the DaeGu district. This extensive experience as a judge is reflected in a vigorous practice in a wide spectrum of cases that delivers both satisfaction and success for Tony’s clients, and garners him further recognition from his peers for his ability.

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.

Tony enjoys playing tennis and has won a number of championships in the Supreme Court, Seoul Bar and Hyatt Olympus tournaments.

YVES KLEIN

*Monfrini Bitton Klein*

Yves Klein is a Swiss international asset recovery lawyer and a senior partner at Monfrini Bitton Klein, Geneva. His main activity consists in litigating and coordinating transnational asset recovery proceedings before civil, criminal and bankruptcy courts on behalf of victims of economic crimes. In that context, Yves Klein and his partners have over the past 20 years represented and advised more than a dozen foreign governments in cross-border asset recovery proceedings regarding the proceeds of corruption, recovering in excess of US$2 billion (Nigeria, Tunisia and Brazil, notably). He is also active in transnational recovery proceedings on behalf of companies, foreign bankruptcy estates (notably Stanford International Bank Ltd, in liquidation) and individual victims of economic crimes.

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). He is *Who’s Who Legal Asset Recovery* ‘lawyer of the year’ 2019.

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.

TOMASZ KONOPKA

*Sołtysiński Kawecki & Szlęzak*

Tomasz Konopka joined Sołtysiński Kawecki & Szlęzak in 2002 and has been a partner since January 2013. Tomasz specialises in business crime cases, including white-collar crime, investigations, representation of clients related to custom seizures of counterfeit products, cybercrime and court litigation. He represents Polish and foreign clients before the courts and law enforcement authorities. He leads the firm’s white-collar crime department. Prior to joining Sołtysiński Kawecki & Szlęzak, Tomasz was a lawyer in a number of companies, including some listed on the Warsaw Stock Exchange. He is also a member of the Association of Certified Fraud Examiners (ACFE). Since 2013, as a partner specialising in business crime and investigation, he has headed a team of lawyers (which he created in 2008) that deals with business crime cases. Before joining SK&S, he was an attorney for a number of years and sat on the boards of a range of firms, including those listed on the Warsaw Stock Exchange. He advises and represents clients in cases involving criminal liability risk. He advises entities that have incurred damage as a result of business crimes. He has extensive experience in conducting internal clarification proceedings, covering abuses such as corruption, fraud,
money laundering, acting to the detriment of business entities, forgery and other crisis situations. He advises clients on planning and implementing comprehensive compliance projects, as well as solutions which improve business security, including cybersecurity. He represents Polish and foreign clients before courts and prosecution authorities in Poland and abroad.

MARCELO RAMOS LEITE
*Trench Rossi Watanabe Advogados*

Marcelo Ramos Leite joined Trench Rossi Watanabe Advogados as an associate in the firm’s ethics, compliance and investigations practice in 2016, after working as law clerk in the corporate, mergers and acquisitions, securities and contracts practice. In the compliance and anti-corruption area, he provides general assistance in Brazilian anti-corruption matters, participates in several large internal investigation cases (including multi-jurisdictional cases), and acts in the development, review and implementation of compliance programmes, the conduct of compliance risk assessments and anti-corruption due diligence in the context of M&A projects. He graduated from Universidade Federal do Rio Grande do Sul Law School, with an academic exchange at Lund University (Sweden), and attended a corporate law and governance course at London School of Economics and Political Science.

AYELÉN LEÓN
*Baker McKenzie*

Ayelén León is an associate at Baker McKenzie’s Buenos Aires office, and has been at the firm since August 2015. She assists other associates and partners on matters related to white-collar crime and corporate compliance and investigations. She also assists in designing and conducting compliance trainings and legal audits for local subsidiaries of multinational companies.

Ayelén focuses her practice on criminal litigation, assessment of criminal matters and corporate compliance. Ayelén provides assistance on issues related to tax evasion, trademark fraud, environmental pollution and other offences committed by companies and their managers, including fraud, fraudulent administration, concealment, bribery and corruption, among others. She currently provides advice on corporate crimes, tax evasion, money laundering, new economic and financial crimes, environmental criminal law, customs offences, contraventional law and any procedural issue related to criminal principles that can be decided by criminal judges. Ayelén is also involved in global compliance and investigations, and the review and draft of SOPs for companies of different industries.

ANTONIN LÉVY
*Antonin Lévy & Associés A.A.R.P.I.*

Antonin Lévy is a founding partner of Antonin Lévy & Associés. He is a member of the Paris and New York Bars. *Who’s Who Legal* (2015) considers Antonin a ‘standout figure’ and ‘revered practitioner’ when it comes to criminal business law, in particular in stock exchange, financial and industrial matters. Antonin has significant practical experience advising and litigating on a wide variety of issues, including fraud, anti-money laundering, anti-bribery
and corruption, international sanctions and other regulatory and compliance issues before law enforcement authorities and multilateral financing authorities such as the World Bank, as well as experience in the areas of defamation and extradition.

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.

**KANA MANABE**
*Mori Hamada & Matsumoto*

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.

**CECILIA MÁSPERO**
*Baker McKenzie*

Cecilia Máspero is an associate at Baker McKenzie’s Buenos Aires office, and has worked at the firm since August 2015. Cecilia focuses her practice mainly on banking and finance, general practice and antitrust, assisting clients with a variety of legal matters related to banking, finance, commercial and transactional matters.

Cecilia focuses her practice on general corporate law, banking and finance and M&A matters. Cecilia provides assistance on issues related to antitrust, exchange control regulations, money laundering, contract law and commercial matters, data privacy, among others.

**MARK F MENDELSOHN**
*Paul, Weiss, Rifkind, Wharton & Garrison LLP*

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
About the Authors

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.

MARK MORRISON
Blake, Cassels & Graydon LLP

Mark Morrison is the chair of Blakes business crimes, investigations and compliance group. His practice focuses on anti-corruption compliance, white-collar crime defence, and internal investigations. 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 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. On a pro bono basis, Mark provided training to prosecutors and enforcement authorities in Zimbabwe on the investigation and enforcement of anti-corruption laws. Mark also provided testimony at the Canadian Senate hearing in consideration of Canada’s new Remediation Agreement provisions in his capacity as a director of Transparency International (Canada). Mark was a finalist in the Benchmark Canada Awards 2018 in the category of ‘white-collar crime lawyer of the year’ and is widely recognised as one of Canada’s leading investigations and white-collar crime lawyers including in Chambers Canada’s Canada’s Leading Lawyers for Business 2019 (white-collar crime and government investigations), in Benchmark Canada’s The Definitive Guide to Canada’s Leading Litigation Firms and Attorneys (‘litigation star – white-collar crime’), in Who’s Who Legal’s Investigations, in Who’s Who Legal: Canada (business crime defence, investigations), in Who’s Who Legal’s Business Crime Defence (corporates, individuals), and in Legal Media Group’s Guide to the World’s Leading White Collar Crime Lawyers.

SHIHO ONO
Mori Hamada & Matsumoto

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.

MAREVA OROZCO UGALDE
Ferrere

Mareva Orozco Ugalde is a senior associate at Ferrere in Ecuador, where she is a member of the corporate, prevention of money laundering, and antitrust teams. Recently, she has specialised in the fields of compliance and prevention of money laundering and terrorism financing.

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.

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.

MARÍA CAROLINA PARDO CUÉLLAR
Baker McKenzie
María Carolina Pardo has advised major national and international clients on matters related to compliance, data protection, competition and consumer law. She has also successfully coordinated and prepared proposals for submission to national authorities on behalf of major industrial groups in Colombia.

She has been recognised by Chambers Latin America as leader in the competition ranking in Colombia, and the practice group she heads has been ranked first for two consecutive years.

She joined Baker McKenzie in 1994, and currently serves as international partner and heads the competition, IT and consumer law practice group.

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.
About the Authors

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.

CHRISTOPHER REICHELT
stetter Rechtsanwälte

Christopher Reichelt has been a research assistant at stetter Rechtsanwälte since 2019. He studied law at Ludwig Maximilian University in Munich, focusing on criminal law, especially white-collar crime. Parallel to his studies, he worked for a chair for criminal law at the same
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Christopher Reichelt

During his legal traineeship (OLG München), Christopher Reichelt gained practical experience at various courts in the fields of civil, criminal and administrative law and at a renowned Munich law firm specialising in white-collar crime. Currently, he is writing his doctoral thesis on European criminal law and works for the institute of criminal law at the Ludwig Maximilian University in Munich.

JAVIER ROBALINO ORELLANA

Ferrere

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

Paul, Weiss, Rifkind, Wharton & Garrison LLP

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

AZB & Partners

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

stetter Rechtsanwälte

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 almost 20 years she has devoted herself exclusively to criminal business and criminal tax law, and 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 Anwaltshandbuch Strafverteidigung (a standard reference work for German defence counsel) and the Handbuch Arbeitsstrafrecht (a comprehensive practical guide to the responsibilities of company personnel in respect of labour criminal liability risk). She is a member and speaker of the International Bar Association (IBA), the American Bar Association (ABA) and the American Chamber of Commerce in Germany. In 2019, she was appointed regional representative of western Europe in the Anti-Corruption Committee of the IBA.

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.
TERESA TOVAR MENA

Estudio Echecopar, member firm of Baker & McKenzie International

Teresa Tovar Mena is a specialist in corporate compliance, with experience in advising clients in the design and implementation of their compliance programmes, in the conduct of internal investigations, the conduct of compliance due diligence processes in the context of acquisitions, as well as in providing specialised training on compliance-related matters.

She also has extensive experience in advising companies in data privacy matters. In this respect, she has advised several clients on the implementation of privacy compliance programmes, and continuously provides legal advice for the development of projects of high complexity from a data privacy perspective. In addition, she is also specialised in competition law, with experience in advising companies on matters related to the application of antitrust, unfair competition and consumer protection law.

Ms Tovar is the chair of the compliance committee of AmCham Peru (Peruvian North American Chamber of Commerce) and a member of the technical committee of the National Institute of Quality, an entity appointed to develop the Peruvian versions of the ISO 37001 (Anti-bribery management systems) and the ISO 19600 (Compliance Management Systems). She is also a member of the Baker McKenzie Latin American compliance and antitrust steering committees.

HELOISA UELZE

Trench Rossi Watanabe Advogados

Heloisa Barroso Uelze joined the firm in 2000 and became a partner in 2005. She is currently head of both the Brazilian public law, government relations and regulatory practice group and the ethics, compliance and investigations practice group at Trench Rossi Watanabe Advogados. Mrs Uelze has vast experience working in compliance matters representing the clients before both the public administration and the judiciary department. On innumerable occasions, she has dealt with the federal and state Public Prosecutor’s Offices negotiating deals in matters that involved the Brazilian Improbity Law and Clean Companies Act. She has also defended clients’ interests before several courts of accounts (at federal, state and municipal levels). Mrs Uelze also works with the clients in strengthening their compliance areas, by improving both the internal rules and the mechanisms to enforce these rules. She prepares and reviews internal policies and guidelines, participates in several large internal investigation cases (including multi-jurisdictional cases) and also provides speeches and training to the clients’ teams, in order to make sure everyone is aware of the applicable rules. Heloisa is recognised as a leading practitioner in such areas of law by various international publications such as Chambers, LACCA, Análise Advocacia and PLC. She graduated from Pontificia Universidade Católica de São Paulo Law School and is a specialist in administrative law, constitutional law, tax law and civil procedure.

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.

**PRERAK VED**  
*AZB & Partners*

Prerak Ved is a partner with AZB. His practice comprises of a mix of acting for clients on private equity and merger and acquisition transactions, and an advisory practice that focuses on advising clients on legal implications arising from white-collar crimes, corporate governance and general corporate advisory. Prerak has been involved in advising clients on several internal investigations, whether conducted in-house by clients, third parties or through AZB’s team of forensic investigators.

**ALDO VERBRUGGEN**  
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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.

**KAREN WEGBRAIT**  
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Karen Wegbrait is a paralegal at Baker McKenzie’s Buenos Aires office, working at the firm since May 2019. Karen has recently graduated as a lawyer from Universidad Torcuato Di Tella (Buenos Aires). Karen is a member of the general practice, transactional, banking and finance and corporate compliance practice groups. Karen focuses on consumer related matters, antitrust, financial regulatory, M&A and compliance.

**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.
Appendix 2

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