IN-DEPTH

Anti-Bribery and Anti-Corruption

EDITION 12

Contributing editor
Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP

LEXOLOGY

Anti-Bribery and Anti-Corruption

EDITION 12

Contributing editor
Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Generated: November 17, 2023

Contents

Switzerland
Fanny Margairaz and Romain Wavre
Mangeat Attorneys at Law LLC

Thailand
Piya Krootdaecha and Nattanan Tangsakul
Baker McKenzie

United States
Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Preface

Mark F Mendelsohn

The invasion of Ukraine sent shockwaves across the globe. The war brought anti-corruption efforts to the forefront as the United States, the United Kingdom, Canada, the European Union and various international bodies stood together in efforts to freeze and seize the ill-gotten assets of Russian oligarchs, kleptocrats and corrupt officials. These efforts underscore the fact that corruption has become a central issue in global affairs.

Increasingly, progress is being made in the fight against corruption. Countries across the globe are strengthening their domestic anti-bribery and anti-corruption laws and adopting important new law enforcement policies and guidance documents. While this framework is critical, effective enforcement requires, at a broader level, a functioning democratic system, including a commitment to the rule of law, institutions including law enforcement authorities that are independent and a free press.

Countries are increasingly investigating and prosecuting significant corruption cases, even those involving heads of state and senior officials, including the December 2022 conviction of sitting Argentine Vice President Cristina Fernández de Kirchner for rigging bids during her tenure as President; the October 2022 filing of a constitutional complaint in Peru against then President Pedro Castillo, alleging that he was operating a de facto 'criminal organisation' within the Peruvian government to corruptly benefit himself and his associates; and the ongoing investigation by Belgian prosecutors of multiple members of the European Parliament relating to allegations that they improperly received payments from a foreign country. These cases, along with the many cases against companies and individuals that engage in corruption and bribery, illustrate the growing global trend towards prosecuting acts of corruption, even when such misconduct is carried out by the most powerful members of society.

The United States has always been a central leader in anti-corruption efforts. To a large degree it retains this role – it is vigorously enforcing the Foreign Corrupt Practices Act, is expanding and utilising its sanctions tools to target corrupt actors and has taken a leading role in going after the ill-gotten assets of Russian oligarchs. In 2021, President Joe Biden even released a whole-of-government strategy on combating corruption.

However, at home, the US commitment to the principles of the rule of law is being tested. Following the November 2020 presidential election, President Donald Trump and his allies attempted to subvert and overturn the results of the election, which culminated in the violent insurrection at the US Capitol on 6 January 2021 in which allies of Donald Trump sought to prevent the peaceful transfer of power. At the time of writing, there are myriad criminal, civil, professional licensing and other proceedings underway in an attempt to hold those responsible accountable, including Trump himself. On 1 August 2023, a federal grand jury in Washington, DC, issued a four-count indictment against Trump alleging that he led an illegal, multipronged conspiracy to overturn the results of the 2020 presidential election, including attempting to block the counting of the valid electoral votes at the joint session of Congress on 6 January. On 14 August, a Georgia state grand jury issued an indictment of Trump and 18 others on sweeping racketeering and other charges stemming from efforts to overturn the 2020 presidential election. At the time of writing, the final outcome of these efforts remains to be seen, but it is certain that these events will have global repercussions.

Against this backdrop, global companies should consider their anti-corruption compliance programmes an imperative. The private sector's role in addressing corruption is an important one, and many jurisdictions have adopted policies and procedures that recognise the importance of effective compliance programmes. These include policies and procedures regarding corporate deferred prosecution resolutions, voluntary disclosure regimes and guidance regarding an effective anti-corruption compliance programme. Companies conducting cross-border business, and legal practitioners who advise them, need to understand anti-corruption trends and developments, and they should make managing corruption risk a priority. As this volume illustrates in discussing numerous enforcement actions across jurisdictions, including a number of coordinated and related ones, the failure to manage these risks can result in significant costs to the company.

The expert contributors to this book have provided informative descriptions of the most recent and most critical developments and prosecutions across nine jurisdictions. We will continue to observe the unfolding anti-corruption landscape in all our jurisdictions, and will share those perspectives with our readers in future editions. 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
New York

Chapter 1

Data-driven Compliance Programmes

Emmy Babalola, Tracy Sangster, Andrea Mathieu and Pavithra Chandramouli[1]

I INTRODUCTION

Bribery and corruption continue to pose a significant threat to the integrity of organisations and the global economy. Each year corruption and illicit financial flows cost the global economy US$3.6 trillion, according to the United Nations, a sum equivalent to more than 5 per cent of the global GDP.[2]

In the US, regulatory authorities such as the Security and Exchange Commission (SEC) and the Department of Justice (DOJ) have been clamping down on foreign bribery and corruption for several years under the Foreign Corrupt Practices Act (FCPA). Canada, by contrast, has been subject to ongoing criticism by organisations such as Transparency International, the Organisation for Economic Co-operation and Development and others for lagging behind peer countries regarding its commitment to anti-bribery and corruption enforcement,[3] and was recently demoted on the Corruption Perceptions Index. The Corruption of Foreign Public Officials Act, Canada's anti-corruption legislation, has been in existence since 1998, but remediation agreements[4] were implemented in Canada only in 2018. Since their introduction in 2018, only two agreements have been signed in Canada, whereas in the US, the DOJ and the SEC have entered into more than 300 deferred prosecution agreements (DPAs)[5] with corporations since their introduction in 1992.[6]

Both the Canadian and US enforcement regimes include books and records provisions and outline the ramifications of having inadequate internal controls to monitor for bribery and corruption. The inclusion of these books and records provisions highlights the need for organisations to modernise and strengthen their anti-bribery and anti-corruption (ABAC) compliance programmes.

II DATA-DRIVEN COMPLIANCE

Companies that operate in international jurisdictions face several significant challenges when reviewing financial transactions and books, and records for bribery and corruption risks, including:

- complex regulatory environments that may vary based on the jurisdiction;
- diverse geographies and currencies that can complicate transaction monitoring;
- data volumes;
- data quality and integration of different formats of data;
- different systems or technology platforms;
- resource and budget constraints;
- different cultural norms and ethical standards in various regions; and
- the role of third-parties, distributors and agents locally, etc.

In spite of these challenges, many organisations can still benefit from a data-driven approach to accelerate the monitoring capabilities of their compliance teams. For example, generating programmed alerts centrally and investigating exceptions locally within regional teams can be an effective use of data to mitigate the risk of operating in multiple different geographies.

Data analytic tools are already bringing value across organisations and have the potential to bring further value in a compliance context. Data analytics in an ABAC compliance programme can assist organisations in:

- flagging individual transactions indicative of bribery and corruption risks or identifying outliers;
- identifying trends or patterns of activity that are indicative of ABAC risks;
- risk ranking, scoring or prioritising of different ABAC risk factors; and
- producing real-time alerts of high-risk transactions.

The availability and use of data also provides meaningful information about the effectiveness of an organisation's compliance programme. Earlier this year the DOJ released updated guidelines on the evaluation of corporate compliance programmes, which include collection, tracking, access and appropriate use of available data sources to demonstrate an effective compliance programme.[7] The guidance requires prosecutors to look into various factors during an FCPA investigation, including:

- Access to data: do compliance personnel have adequate access to relevant sources of data to allow for timely and effective monitoring and testing of policies, controls and transactions? Are there any constraints that limit access to relevant sources of data and, if so, how is the organisation addressing them?
- Reporting concerns and management of incidents: is the company tracking data relating to concerns reported, resolution, disciplinary actions, etc., to measure the effectiveness of the reporting mechanisms and the investigation process?
- Ongoing testing: has the company reviewed and audited its compliance programme? How are the results reported and action items tracked?

The DOJ's guidance is important to note for Canadian companies with a US presence, and shows that regulators are staying ahead of the game when it comes to use of data analytics. The SEC utilises risk-based data analytics to uncover a wide range of illicit financial activity, including corruption.[8] Regulators in Canada also employ data analytics in their investigations to crunch the 'mind-numbing volume of data' the regulator takes in for investigations, and they do it in weeks, not years.[9]

While the transition to data-driven compliance requires some investment, organisations typically see savings and benefits throughout their broader compliance programme, as a cohesive approach can also mitigate the extent and related costs of fraud and other types of misconduct.

Transforming to a data-driven approach for monitoring

Organisations can begin their journey towards a data-driven compliance approach by taking small steps to gradually evolve and mature. In the past decade, organisations have focused on data quality, and the covid-19 pandemic has further increased the move towards digital information. In addition, several organisations have started adopting data analytics as part of their internal audit and risk management functions, some of which can also be applicable in the context of ABAC compliance. As such, organisations may be able to leverage existing analytical methodologies and models.

III PROACTIVE AND REACTIVE ANALYTICS

There are several ways to use proactive and reactive analytics for preventing and detecting bribery and corruption.

Transaction monitoring

Transaction monitoring can be automated through a set of data analytics rules (such as generating alerts for gifts, donations or charitable contributions). It can also be done through anomaly and pattern detection techniques that can comb through vast quantities of transaction data to provide alerts on high-risk transactions or suspicious transactions for further investigation by the compliance team; for example, reviewing vast quantities of employee expense data to identify abnormally large expense reimbursements or round-dollar payments, as seen in the ***Rolls-Royce*** case in 2016, which identified round-number payments ranging from US$10,000 to US$3 million, not easily identifiable through manual reviews.[10]

Another example of ABAC transaction monitoring could include risk profiling of employees within an organisation that might have government touch points or other political exposures, which can put them at a higher risk of corruption compared with others in the organisation. Transactions involving these high-risk employees, such as salaries, commissions, expense reimbursements and other payments, can then be proactively monitored, including for any patterns or anomalies over a time frame. There are numerous tools that help with visualisation of these profiles.

Below are some additional areas where data analytics could be applied for ongoing ABAC transaction monitoring, along with some illustrations of the type of analytics that can be undertaken:

Illustrative bribery/ corruption risk areas	Illustrative ABAC risks	Illustrative ABAC analytic procedures
Employee expense reimbursement	Bribe payments to public officials, directly or indirectly	• Duplicate payments • Payments to offshore accounts • Payments made near contract commencement or termination, or that appear to be milestone payments or certain payment methods (such as cash or credit memos) • Above-average expense reimbursements to certain employees • Country or client visited • Keyword searches to identify transactions of interest
Payments to third-party intermediaries	Bribe payments by third-party intermediaries to public officials, on behalf of an organisation	• Contracts with third-party intermediaries where exceptions were noted in their third-party due diligence • Third-party intermediaries with bank accounts in a country different from their country of operation • Duplicate or split invoices or payments • Cash payments • Payments to offshore accounts • Multiple payments within a short time frame • One-time payments or payments to a bank account in the name of a different vendor • Payments made near the date of contract commencement or termination, or that appear to be milestone payments • Keyword searches to identify transactions of interest
Sales to government entities	Bribe payments to public officials or their beneficiaries to secure a contract Meals and entertainment for public officials to secure a contract Deep discounts used to secure government contracts only to increase prices after	• Donations made to charitable organisations affiliated with governments • Above-average percentage of meals and entertainment expenses to total sales • Comparison of sales discounts by customer category (i.e., government versus non-government), employee and region to identify trends, patterns, relationships and outliers in discount data; number and the total value of change orders related to a contract; and keyword searches to identify transactions of interest

Illustrative bribery/ corruption risk areas	Illustrative ABAC risks	Illustrative ABAC analytic procedures
Transactions in books and records that present bribery and corruption risk	Consulting payments used for bribe payments Risk of disguising bribe payments in books and records	• Cash payments • High-value payments posted to compliance-sensitive accounts (i.e., accounts that can be used to disguise bribe payments such as consulting and professional fees, miscellaneous, donations, etc.) • Frequency/trend analysis of payments to third-party intermediaries or vendors to identify outliers or red flags • Frequency/trend analysis of payments that are outside permissible limits as per the applicable policies to identify employees, vendors or third parties who might be associated with such payments • Keyword searches to identify transactions of interest

Results from transaction monitoring will be enriched by layering in data from additional sources, ideally into one integrated view. Open-source intelligence, information within employee human resource files, and electronic evidence contained in emails and messaging applications, can all be invaluable in identifying high-risk activity. Examples of ABAC analytics using this non-financial data include:

- automated screening of regulatory watchlists to identify politically exposed persons;
- automated contract review to identify high-risk clauses or terms within contracts with government clients or third-party intermediaries;
- searches for email metadata of interest (e.g., employees corresponding directly with individuals at government entity domains); and
- keyword or conceptual searches to identify emails or other communications of interest.

IV LIMITATIONS AND CHALLENGES

While data analytics can be a powerful tool for extracting valuable insights, it is not without its limitations. When implementing data analytics within an organisation's ABAC framework, several practical challenges need to be considered.

i Availability of data

Analytic capabilities heavily rely on the quality, accuracy and completeness of the data. The most valuable insights come from a data set that compiles a holistic view of all potential risks. However, some data that would be valuable to bribery and corruption identification may not be available, such as beneficial ownership information for Canadian or foreign companies. In the case of shell companies or third-party organisations that are set up as flow-through entities, it can be hard to determine the ultimate beneficiaries of the funds without beneficial ownership data. Data availability limitations are unavoidable, but the presence of such limitations should be considered when developing an analytic approach to ABAC monitoring.

ii Data quality

Inconsistent, incomplete or inaccurate data can lead to false positives and negatives, undermining the effectiveness of compliance analytics. Further, even if all valuable data was available, without sufficient infrastructure to collect, verify and clean data, data analytic capabilities are significantly hindered.

iii Combining different types of data

Another practical challenge is combining the different types of data available – structured and unstructured – and the time commitment required to turn unstructured data into structured data. Court and legal documents, paper or scanned documents and records,

inter-company communications (e.g., Microsoft Teams chats, emails, Slack messages), social media information and images are all unstructured data sources that could contain valuable information for bribery and corruption identification. Although the transformation of unstructured data to structured data requires effort, doing so may enable the identification of indicators of bribery and corruption that may not be identified by more traditional data sources.

iv Consolidated reporting

Another challenge is that analytics activities are often conducted in isolated environments by different departments within an organisation, and the results are not consolidated for management reporting to provide an integrated view of the risks at the enterprise level.

v Data privacy

Beyond analytic limitations, privacy concerns may also arise when monitoring employee communications, social media content, vendor information, customer personally identifiable information (PII) and employee PII. While the need for privacy in relation to PII is not new, less traditional data sources such as social media and internal communications raise new privacy considerations; for example, collecting and storing employee communications and social media data may be subject to data protection laws. While monitoring employee or vendor communications and social media content can provide meaningful information to organisations, especially at the time of investigation, it is important to consider the potential privacy implications and ensure that ethical and legal boundaries are respected.

vi Skill set within compliance teams

The demand for compliance professionals has increased significantly in recent years due to the growing regulatory landscape and the need for organisations to comply with various regulations and laws.[11] However, it is critical that compliance teams have members with the appropriate skill sets, such as legal and compliance, accounting and technological skill sets, without which a data-driven compliance programme can be difficult to achieve.

vii Cost of establishing a data-driven compliance programme

Another potential roadblock to creating and implementing ABAC analytics capabilities is the cost associated with it. Making sure that a wide range of data is available, clean, structured and secure, and that there is sufficient infrastructure to collect, process and analyse data, will undoubtedly require investment. Small and medium-sized enterprises may not have sufficient budget to implement all these requirements. In addition, compliance teams may struggle to get funding from leadership if the organisation has not experienced any enforcement actions in the past. It is important to recognise that possessing even minimal data analytics capabilities is superior to having none, and that implementing a data-driven ABAC programme may require sustained funding over an extended period of time.

Organisations are often hesitant to invest in their anti-bribery and anti-corruption programmes as it is seen as an additional expense without any tangible benefit.[12] However, organisations must decide whether a lack of investment is worth the consequences of regulatory non-compliance and the potential reputational damage that ensues. Instead, organisations could consider integrating data analytics as part of their broader compliance objectives (e.g., fraud, compliance testing, control testing) to minimise the cost of a stand-alone programme. Further, sharing some of these costs with the business, where the risk actually originates, instead of considering it as the compliance team's cost, would be another way to make it more viable for organisations to adopt.

V THE FUTURE OF COMPLIANCE PROGRAMMES

The current pace of technological advancement will have major implications for ABAC compliance programmes and processes. The speed with which technology encompassing generative artificial intelligence (Gen-AI) and machine learning (ML) is able to process large amounts of data, including images, and generate intelligence will be transformative. However, in these early days, questions abound with respect to the potential inherent bias such technology may introduce, as well as ethical and privacy concerns around accessing certain sources of data. Nonetheless, the impact it will have on the way in which ABAC risks are identified and investigations are run is undeniable.

One notable example is the analytics platform built by Anheuser-Busch InBev SA, which leverages ML to identify ABAC risks.[13] With data sources spanning enterprise resource planning systems to sanctions lists and Transparency International's Corruption Perceptions Index, high corruption-risk transactions and third-party vendors are ranked and visualised on a user-friendly interface. Differences in data quality across varying sources are also accounted for, as the dashboard can assess mismatches and help correct for any biases generated.[14] The complexity shown by this platform gives insight into all that is possible for the future of compliance.

Another approach to using ML in ABAC transaction monitoring is the development of social networks, which can map relationships between any group of entities. Bribery and corruption are typically designed to be concealed, and perpetrators go to great lengths to disguise or delete relevant information, but AI tools are capable of processing data in such volumes that the underlying connections are still visible. Transactions between individuals, corporations and other relevant data points (e.g., shell companies, adverse findings related to bribery and corruption and money laundering) can be computed in such a way as to identify abnormal linkages and can easily be visualised and detected.[15]

ML can also support prevention efforts through predictive analytics by identifying patterns linked to professional misbehaviour. In Brazil, a country where corruption remains one of the major issues facing its economic development, a division of the federal government has created an application that calculates the likelihood that a public servant is corrupt by drawing on the database of past corruption cases and an ML algorithm that pulls from 'hundreds of variables' to analyse risk.[16]

ML tools trained on an organisation's historical data are capable of complex risk identification processes, which have a much higher true positive rate than mere rule-based transaction monitoring. The iterative nature of ML technology allows for increased automation in the process of identifying and preventing bribery and corruption. Every transaction flagged for human review, as well as the result of that human review, results in training data for the model. As organisations begin to use ML in their overall enterprise risk management framework, anti-money laundering framework or other risk frameworks, tweaking the ML in the context of ABAC compliance can be easier, and the models will develop and mature to have ever greater accuracy.

VI CONCLUSION

Leveraging a data-driven approach can be beneficial to organisations to monitor bribery and corruption risks. There is no one-size-fits-all approach when it comes to ABAC compliance: consideration must be given to the size of the business, industry risks, geographical and other considerations. Further, the automation of analytics through ML and AI could provide enhanced insights. However, these advancements are all intrinsically linked with and reliant upon the human element to verify the results. These technologies are most effective when they work in concert with human expertise and oversight.

Emmy Babalola	ebabalola@deloitte.ca
Tracy Sangster	tsangster@deloitte.ca
Andrea Mathieu	amathieu@deloitte.ca
Pavithra Chandramouli	pchandramouli@deloitte.ca

8 Adelaide St W, Suite 200, Toronto, Ontario, M5H 0A9, Canada
Tel: +1 416 601 6150
www.deloitte.com

Read more from this firm on Lexology

Endnotes

1 Emmy Babalola and Tracy Sangster are partners, Andréa Mathieu is a director and Pavithra Chandramouli is a senior manager at Deloitte LLP. The authors would like to thank Maria Jose Azuaje M, a manager, Chloe Allan, a senior associate, and Yuwen Zhang, a co-op student, at Deloitte for their contributions to this chapter.
2 https://thecommonwealth.org/news/curbing-trillion-dollar-cost-corruption-more-important-ever-commonwealth.
3 https://web-archive.oecd.org/2012-06-14/61005-canadasenforcementoftheforeignbriberyoffencestill laggingmusturgentlyboosteffortstoprosecute.htm.
4 Remediation agreements 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 (See https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/canada).
5 DPAs are similar to Canadian remediation agreements.
6 https://www.macfarlanes.com/what-we-think/in-depth/2021/is-the-united-states-more-effective-than-the-united-kingdom-at-prosecuting-economic-crime/.
7 See https://www.justice.gov/criminal-fraud/page/file/937501/download.
8 See https://www.justice.gov/criminal-fraud/file/1337591/download.
9 See https://lethbridgenewsnow.com/2017/10/12/securities-regulators-increasingly-employing-tech-tools-to-speed-probes/.
10 See https://www.journalofaccountancy.com/issues/2018/may/fraud-round-numbers.html.
11 See https://www.wsj.com/articles/competition-for-compliance-officers-intensifies-amid-regulatory-pressures-11642623091.
12 See https://deloitte.wsj.com/articles/is-now-the-time-to-enhance-corporate-compliance-programmes-2bab8637.
13 See https://www.wsj.com/articles/ab-inbev-taps-machine-learning-to-root-out-corruption-11579257001.
14 See https://www.wsj.com/articles/anheuser-busch-inbevs-brewright-how-it-works-11579257000?mod=article_relatedinline.
15 See https://www.sciencedirect.com/science/article/pii/S095741742201209X.
16 See Center for Effective Global Action: https://www.youtube.com/watch?v=2prrNVaD-Nc.

Chapter 2

Australia

Robert R Wyld, Kirsten Scott and Angus Hannam[1]

Summary

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 (Anti-Bribery Convention).

As a result of Australia adopting the Anti-Bribery Convention, the Criminal Code Act 1995 (Cth) (Criminal Code) was amended to prohibit bribery of a foreign public official.[2] Domestic bribery against the Commonwealth and foreign bribery offences are both contained in the Criminal Code.[3]

Since that time, Australia has submitted a number of monitoring reports to the Working Group on Bribery in regards to implementation and enforcement of the Anti-Bribery Convention in Australia. Australia submitted its most recent report, the Phase 4 evaluation of Australia: Additional Written Follow-up Report, on 9 January 2023.

II YEAR IN REVIEW

On 22 June 2023, after several years of delay, the government finally introduced the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 to Parliament to reform important parts of Australia's foreign bribery laws, many years after the Senate and numerous parliamentary committees called for reform. Historically, Australia was regularly criticised by the OECD for its poor record of investigation and enforcement of these laws.[4] The Senate Legal and Constitutional Affairs Legislation Committee recommended the Bill be passed with some minor changes. It is hoped these reforms, notwithstanding the lack of a deferred prosecution agreement scheme, will go some way to addressing long-standing concerns and facilitate a better process for the investigation and prosecution of foreign bribery.

III DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Domestic bribery law and its elements

There are no specific commercial or private bribery laws in Australia, although various state laws are wide enough to capture private bribery, often defined as corrupt conduct.

Sections 141 and 142 of the Criminal Code deal with offences relating to domestic bribery of a Commonwealth public official. These sections deal with the offences of giving a bribe[5] or corrupting benefit,[6] receiving a bribe[7] or corrupting benefit[8] and abuse of public office.[9] For the offences of giving or receiving a corrupting benefit, it is immaterial whether the benefit is in the nature of a reward.[10]

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 regulate 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.[11]

iii Definition of public official

Australian law defines the term public official in various ways. The Criminal Code widely defines Commonwealth public official and public official, and the definitions are 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 in office provided that their involvement in those commercial activities does not adversely affect the honest and independent exercise of their official functions.[12]

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 of any dependent children.

v Gifts and gratuities, travel, meals and entertainment restrictions

It is legally permissible to provide gifts and gratuities to public officials that do not breach the law or the Australian Public Service Code of Conduct. However, the provision of a gift or gratuity may in some circumstances amount to a bribe where it relates to a decision requiring the exercise of a discretion[13] 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.[14]

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.

In 2018, the Australian parliament enacted the Foreign Influence Transparency Scheme Act 2018 (Cth).[15] The Foreign Influence Transparency Scheme introduced registration obligations for persons or entities who have arrangements with, or undertake certain activities on behalf of, foreign principals. It was intended to provide transparency for the government and the Australian public about the forms and sources of foreign influence in Australia.

In late 2018, Australia also enacted the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (Cth) (National Security Act). The National Security Act had the effect of introducing a range of amendments to the Criminal Code and related legislation to create a range of criminal offences to cover foreign interference. The offences include intentional[16] and reckless foreign interference[17] by or on behalf of a foreign principal[18] with the intent to 'influence a political or governmental process in Australia or an Australian democratic or political right or duty'.

Some Australian states have already moved to ban political donations from foreign sources.[19] In New South Wales (NSW), it is unlawful for a party, elected member, group, 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.[20]

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. In New South Wales, for instance, the Crimes Act 1900 contains the relevant offence provisions.[21]

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.[22] 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.[23]

IV 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 was no Commonwealth anti-corruption commission until the establishment of the National Anti-Corruption Commission (NACC), which commenced operations on 1 July 2023. It detects, investigates and reports on serious or systemic corrupt conduct in the Australian public sector, including conduct occurring before it was established. The NACC has a range of investigative powers, including to:

- enter Commonwealth premises and require Commonwealth information without a warrant;
- make people and organisations produce documents and items and allow the NACC to search their property;
- conduct private hearings and, if it is in the public interest and exceptional circumstances justify doing so, conduct public hearings; and
- access a range of covert investigative capabilities, such as intercepting telecommunications.

In addition, 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 Australian federal police (AFP), being the police force responsible for investigating all offences against Commonwealth laws, is called in pursuant to a referral and, if charges are brought, they are prosecuted by the Office of the Commonwealth Director of Public Prosecutions (CDPP), being the independent statutory prosecutor responsible for prosecuting offences against Commonwealth laws.

As an example of state-based anti-corruption work, the NSW Independent Commission Against Corruption (ICAC) is an independent anti-corruption agency that was established by the NSW government in 1988.[24] 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.

V 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. Secondary liability may arise under statute or under common law principles of agency.

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:

- provides, or causes to be provided, a benefit to another person;
- offers or promises to provide a benefit to another person; or
- 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.

The term benefit is broadly interpreted and includes any advantage. It is not limited to property or money and can be a non-tangible inducement. Recent High Court authority (in the case of ***The King v. Jacobs Group (Australia) Pty Ltd*** [25]) has confirmed that benefit within the meaning of Section 70.2(5)(b) of the Criminal Code requires the value of the benefit obtained to be determined as the sum of the amounts the parties in fact received under the contracts secured by the bribery (or the 'contract price') to be the benchmark in determining the value of the benefit derived from the bribe or corrupt conduct.

The prosecutor is not required to establish any intention (on the part of an accused person) to influence a 'particular' foreign official.

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.

v Facilitation payments

Australian law permits facilitation payments to 'expedite or secure' the 'performance of a routine government action of a minor nature'.[26] This is despite the OECD's view that Australia should actively discourage all facilitation payments.

A payment will be a facilitation payment where the following conditions are satisfied:

- the value of the benefit is of a minor nature;
- 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
- 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.[27]

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.

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 authority. Fault elements are attributed to a company that 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'.[28] A corporation may be found guilty of any offence, including one punishable by imprisonment. Since 2001, very few companies have 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:

- set out important definitions of the board of directors, corporate culture and high managerial agent;
- establish criminal liability on a corporation by attributing the knowledge and conduct of a person to the corporation;
- attribute negligence to a corporation by reference to the corporation's conduct as a whole;
- provide a mistake-of-fact defence of limited application; and
- 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.[29] There have been no prosecutions for offences under these provisions in Australia.

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 civil or criminal liability (apart from Criminal Code offences) that might arise include the following:

- civil penalty prosecutions commenced by the Australian Securities and Investments Commission (ASIC), being the regulator responsible for the administration and enforcement of all corporations' laws under the Corporations Act for conduct in contravention of common law or statutory duties owed by a director or officer to the corporation;
- prosecutions by ASIC 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
- prosecutions by the Australian Taxation Office, being the agency administrating and enforcing Australia's Commonwealth taxation laws on behalf of the Commissioner of Taxation 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).

State criminal law can also be used to prosecute individuals, particularly where corporate records are falsified. In ***The Queen v. Ellery,***[30] 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).

ix Agency enforcement

Australia's approach to the enforcement of foreign bribery laws relies on the joint efforts of various enforcement, administrative and prosecution agencies. The investigation of criminal offences against Commonwealth laws, including foreign bribery offences, is carried out by the AFP. The CDPP is the statutory prosecutorial agency. The Australian Criminal Intelligence Commission is a statutory authority with secret, inquisitorial and compulsive powers to combat serious and organised crime (which includes conduct amounting to bribery or corrupting a foreign public official).[31]

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

- that there is sufficient evidence to prosecute the case (and there are reasonable prospects of securing a conviction); and
- it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.[32]

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. No foreign bribery charges were alleged by the prosecutor. Russell John Waugh was also charged in relation to his alleged role in aiding and abetting one of the alleged contraventions of Mr Gregg, but was later found not guilty. 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. On 30 September 2020, the NSW Court of Criminal Appeal unanimously upheld Mr Gregg's appeal and quashed the verdicts of guilty and entered a verdict of acquittal on each charge.[33]

In July 2017, Mamdouh Elomar, 62, his brother Ibrahim, 60, and businessman John Jousif, 46, pleaded guilty in the NSW 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 A$250,000.[34]

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.[35] On

3 September 2020, the corporate defendant pleaded guilty to the charge and was later convicted of each sequence and fined a total of A$1,471,500. A Crown appeal against the sentence imposed on Jacobs Group on the basis that the sentence was manifestly inadequate was dismissed by the Court of Criminal Appeal. Following a successful appeal to the High Court of Australia in July 2023 (which confirmed that benefit within the meaning of Section 70.2(5)(b) of the Criminal Code requires the value of the benefit obtained to be determined as the sum of the amounts the parties in fact received under the contracts secured by the bribery), the proceedings were returned to the sentencing judge to reassess the penalty imposed in line with the applicable maximum penalty (up from approximately AU$10 million to over AU$30 million). The CDPP discontinued its prosecution as against one of the parties to the Vietnam conspiracy prior to him standing trial. After each of the individuals facing trial in connection with the Philippines conspiracy were found not guilty by a jury in early 2022, the CDPP then discontinued the case against the individuals charged in connection with the Vietnam conspiracy (the two conspiracies having been heard separately after the indictment was severed).[36]

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 Naurum 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.[37] On 19 August 2020, following a sentencing hearing, the defendant was convicted and received a custodial sentence of two years and six months to be served by way of an intensive corrections order, with an additional condition of 400 hours of community service. The judgment has not been published.

In December 2018, the Securency banknote printing bribery and corruption cases finally concluded (after having commenced in July 2011) 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 banknote printing contracts and in the process, paid bribes to public officials in those countries. The companies pleaded guilty to criminal conduct[38] together with five individuals who received criminal convictions, but upon sentencing they were released as a result of their sentences of imprisonment being suspended.[39]

In September 2020, the AFP restrained A$1.6 million in assets as part of a criminal investigation into the alleged bribery of Malaysian officials by a Melbourne man. The 68-year-old man is accused of paying Malaysian government officials A$4.75 million dollars in bribes in exchange for the purchase of his property developments in Melbourne. In July 2020, the AFP charged Boon Lye (Dennis) Teen with foreign bribery and false accounting offences. The AFP commenced its investigations into the man, his associated companies and Melbourne property developments in February 2015.

x Defences

There are essentially three defences to a prosecution under Section 70.2 of the Criminal Code:

- 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;[40]
- if a payment is a facilitation payment;[41] and
- 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.[42]

There is no judicial authority in Australia considering these defences.

xi Leniency

There is no legal obligation on persons in Australia to report a crime (including potential foreign bribery), save for in NSW.[43]

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 and AFP jointly published their 'Best Practice Guideline: Self-reporting of foreign bribery and related offending by corporations' setting out how the director will exercise a statutory discretion in terms of whether to offer to negotiate a settlement agreement and the factors to be considered in that process. See the non-prosecution of Oz Minerals Ltd, Section IV.

xii Plea-bargaining

There are no procedures in Australia similar to the formal self-reporting or plea regime in the United States or the United Kingdom. There is no process or policy guidance to resolve investigations through court-approved settlement agreements (deferred or non-prosecution agreements, known as DPAs or NPAs) 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*,[44] the High Court limited the prosecutor's role in terms of recommendations as to the sentencing of an offender in these terms:

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

The High Court has made it clear, as have other appellate courts, that the sentencing task remains that of the sentencing judge and the judge alone.[45] A prosecutor can do no more than opine on sentencing principles, not on what a sentence or a range of sentences should be.[46]

The current Prosecution Policy of the Commonwealth does, however, deal with charge negotiation as between the defence and prosecution, a process that can result in the defendant pleading guilty to fewer than all of the charges that he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

On 26 November 2021, the OECD Working Group on Bribery made a number of recommendations to Australia in respect of its implementation of the Anti-Bribery Convention, including a recommendation encouraging Australia to consider a variety of forms of resolution, including non-trial resolutions (i.e., DPAs) when resolving criminal, administrative and civil cases involving both corporations and individuals.

xiii Prosecution of foreign companies

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:

- the conduct giving rise to the alleged offence occurred wholly or partly in Australia or on board an Australian aircraft or an Australian ship;
- 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
- 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.[47] 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.[48]

xiv Penalties

For a foreign bribery offence committed after 1 July 2023,[49] the maximum penalties, per offence, that may be imposed upon a conviction are as follows:

- for an individual:
  - imprisonment for up to 10 years;
  - a fine of up to 10,000 penalty units (the value of one penalty unit is currently A$313;[50] therefore, the maximum fine is currently A$3.13 million); or
  - both imprisonment and a fine; and
- for a corporation, the greatest of the following:[51]
  - a fine up to 100,000 penalty units (or A$31.3 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.

Sentencing of a company convicted of a criminal offence is traditionally no different to that of an individual. The sentencing judge applies the relevant sentencing principles for the offence. For Commonwealth offences, the criteria are set out in the Crimes Act 1914 (Cth).[52] The penalty is imposed in the discretion of the court, taking into account a range of factors, each of which much be considered by a court. In the ALRC Report, recommendations were made to amend the Crimes Act to ensure certain factors are taken into account when a court sentences a company upon conviction for a criminal offence.[53] These factors involve, for example, the company's culture of compliance, any voluntary reporting of the conduct, any compensation to victims, the effect of a sentence on third parties (such as employees, suppliers, shareholders) and measures taken by a company to reduce the likelihood of subsequent offending.

VI ASSOCIATED OFFENCES

i Financial record-keeping laws and regulations

From 1 March 2016, Section 490 of the Criminal Code introduced the offences of false[54] or reckless[55] dealings with accounting documents. While these offences are complicated in their structure, a person commits an offence if:

- he or she makes, alters, destroys or conceals an accounting document[56] 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
- he or she intended (or was reckless as to the consequences) that the conduct facilitate, conceal or disguise 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;
  - loss to another person that is not legitimately incurred by the other person; and
  - certain factual threshold criteria exist.[57]

The penalties are significant, including fines of up to AU$22.2 million for companies and imprisonment.

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.

There remain various Australian laws and regulations that impose general obligations on corporations to maintain true and accurate books and records, and financial statement disclosures, and otherwise to ensure that the books and records are not false or misleading in any material way. The laws and regulations include:

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

ii Disclosure of violations or irregularities

Under the continuous disclosure obligation in the Listing Rules, once a listed or public entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities, the entity must immediately disclose that information to inform the market.[58] 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.[59]

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.[60]

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.

iv Sanctions for record-keeping violations

Penalties for record-keeping violations are civil and criminal in nature and include pecuniary penalties (fines), imprisonment and potential disqualification from holding offices as a company director or officer, or both, or being involved in the management of a company.

v Tax deductibility of domestic or foreign bribes

The Income Tax Assessment Act 1997 (Cth) (ITAA) denies taxpayers a deduction for bribes paid to domestic or foreign public officials.[61] A facilitation payment made to a foreign public official may be tax deductible.[62] The ITAA requires that records be kept for all transactions and that those records are adequate to explain the transactions.[63] 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.[64] These laws cover financial services, gambling services and bullion dealing, and other professionals or businesses that provide designated services (described as reporting entities).[65] 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).[66] The penalties for contraventions of the anti-money laundering laws (a failure to carry out the required customer identification procedures) is a civil penalty, per offence, set at 100,000 penalty units or, from 1 July 2023, either or both of an amount just over A$31 million or injunctive relief to prevent offending conduct from occurring. If one fails to submit a suspicious transaction report, penalties exist, per offence from 1 July 2023, of 20,000 penalty units against an individual (or A$6.26 million) or 100,000 penalty units against a company.

While the Australian Transaction Reports and Analysis Centre (AUSTRAC), being the Commonwealth criminal intelligence agency responsible for administering and enforcing Australia's anti-money laundering and counter-terrorism laws, has traditionally been reluctant to prosecute companies for civil penalty proceedings for breaches of Australia's anti-money laundering laws, the relatively recent settlements of civil penalty proceedings against Tabcorp Ltd (for an agreed penalty of AU$49 million)[67] and the Commonwealth Bank of Australia (for an agreed penalty of AU$700 million),[68] with the prospect of substantial fines, may signal a more robust approach by the regulator to anti-money laundering offences.

AUSTRAC commenced proceedings against Westpac Banking Corporation for a significant failure in its disclosure and reporting obligations that involved in excess of 23 million contraventions or breaches of its anti-money laundering obligations.[69]

On 24 September 2020, AUSTRAC and Westpac announced a resolution of the civil penalty proceeding with, for Australia, a staggering fine of approximately A$1.3 billion.[70]

On 11 July 2023, AUSTRAC and Crown Ltd settled the proceeding where AUSTRAC alleged Crown engaged in systemic money-laundering activities at its Melbourne and Perth casinos and failed to comply with Australia's anti-money laundering laws, with the court-approved fine of AU$450 million.[71]

vii Prosecution under money laundering laws

No prosecutions have occurred to date for money laundering relating to foreign bribery. Separate civil penalty proceedings for contraventions of Australia's anti-money laundering laws are covered above (Section V.vi).

viii Sanctions for money laundering violations

Penalties for money laundering offences under the Criminal Code range, per offence from 1 July 2023, from fines of 10 penalty units (A$3,130) and six months' imprisonment to fines of 1,500 penalty units (A$469,500) and 25 years' imprisonment for offences involving a value of money or property in excess of A$1 million or more.[72]

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 or gambling or betting services) under Australia's anti-money laundering and counter-terrorism financing laws are obliged to report any suspicious matter within either 24 hours or three days, depending on the nature of the matter, to the regulatory authority, AUSTRAC.[73]

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

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

In July 2011, subsidiaries of the RBA, Securency International Pty Ltd (Securency),[74] a provider of polymer banknotes, and Note Printing Australia Pty Ltd (NPA),[75] a printer of 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.[76] 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).

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 million 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 were sentenced to four years' imprisonment (with parole after two years), with fines for two of the accused of A$250,000 each.[77]

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, based on a business imperative'.

In December 2018, in *CDPP v. Boillot*, the court said the following, which reflected the general enforcement views of Australian courts:

> *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*.[78]

In July 2023, the AFP concluded its investigation into the conduct of a Cambodian subsidiary of Oz Minerals Limited (arising from a voluntary disclosure). The company agreed to pecuniary penalties and the forfeiture of the proceeds of crime of approximately AU$9.3 million and the CDPP accepted that, in the circumstances, there should be no criminal prosecution.

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

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

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

Since then, Australia has become a party to:

- the United Nations Convention against Corruption (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;[79] and
- the United Nations Convention against Transnational Organized Crime, signed in 2000 and ratified in 2004.

IX LEGISLATIVE DEVELOPMENTS

On 22 June 2023, after several years of delay, the government finally introduced the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 to Parliament to reform important parts of Australia's foreign bribery laws, many years after the Senate and numerous parliamentary committees called for reform. The Bill seeks to enact various reforms to the Criminal Code Act 1995, including:

- extending the foreign bribery offence to include the bribery of candidates for public office (not just current holders of public office);
- extending the foreign bribery offence to include bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain a business advantage);
- removing the existing requirement that the benefit or business advantage be 'not legitimately due' and replaces it with the concept of 'improperly influencing' a foreign public official;
- removing the existing requirement that the foreign public official be influenced in the exercise of their official duties;
- making it clear that the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else; and
- critically for corporations, creating a new indictable corporate offence of failing to prevent foreign bribery. The new offence, directed to Australian corporations, is, in substance, that a corporation commits an offence if an associate (defined widely) of the corporation engages in conduct that would constitute an offence under Section 70.2 of the Code and the conduct is undertaken for the profit or gain of the corporation.

The Parliamentary Legislation Committee approved the Bill and recommend it be enacted. Regrettably, it fails to introduce a deferred prosecution agreement scheme, which means it will still be a challenge for Australian corporations to voluntarily disclose potential criminal conduct without the risk of investigation, prosecution and a criminal conviction. While one AFP investigation into the conduct of a Cambodian subsidiary of Oz Minerals Limited (with a voluntary disclosure) resulted in pecuniary penalties and the forfeiture of the proceeds of crime of approximately AU$9.3 million, there was no prosecution by the CDPP.[80] In our experience, that is rare, and it remains to be seen how willing prosecutors are to forego a prosecution.

X 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.[81] 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.[82]

ii Suppression and non-publication orders

It is not uncommon for courts to make orders in commercial criminal proceedings suppressing certain details of, anonymising or redacting, or altogether prohibiting the publication of, judgments handed down throughout the course of the proceedings. Statutory schemes for the entry of suppression and non-publication orders (NPOs) exist at both the Commonwealth and state level.

In the context of commercial criminal proceedings, including bribery cases,[83] suppression orders or NPOs are often sought by defendants to safeguard the integrity of the criminal process and in particular the right of accused persons to a fair trial, including before an impartial jury. For instance, where evidence is excluded by a pre-trial ruling prior to the commencement of a jury trial, and that evidence is highly prejudicial to an accused person, there may be good grounds for a court to make an NPO over the reasons for judgment.[84] Such orders will not, however, be made merely to protect against embarrassment, inconvenience, annoyance or unreasonable or groundless fears,[85]

iii Privacy or data protection

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

iv 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.[86] Other Commonwealth and state statutes create specific regimes for non-disclosure in certain circumstances.

v Whistleblowing protection

In Australia, there has been no national scheme to promote or encourage whistleblowers to come forward and report wrongdoing. Most whistleblowing protections are specific to Commonwealth and state government departments, private organisations and statutes limited to certain types of offences and officials.[87]

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.[88]

As of 1 July 2019, the government enacted enhanced private sector whistleblower protections in the Corporations Act.

Since the new laws have been enacted, ASIC has updated its Regulatory Guide 270 for whistleblower protections.[89]

In March 2023, ASIC commenced civil penalty proceedings against TerraCom Limited (a Queensland coal producer), its managing director Daniel McCarthy, chief commercial officer Nathan Boom, former chair Wallace King and former director and deputy chair Craig Ransley. This is the first time ASIC has taken action for alleged breaches of the whistleblower protection provisions, alleging that TerraCom and its senior company employees engaged in conduct that harmed a whistleblower who revealed the alleged falsification of coal quality certificates. The case is ongoing.

vi Blocking statutes

There are no blocking statutes in Australia that are designed to prevent the flow of information to a foreign entity.

vii Public procurement

In Australia, there are procurement policies for the Commonwealth and each state government. The Commonwealth Procurement Rules 2020 deal primarily with the process of securing and issuing procurement contracts.

XI 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.

There is no official guidance in Australia on what constitutes an effective anti-corruption compliance programme.

XII OUTLOOK AND CONCLUSIONS

Effective enforcement for foreign bribery and corruption is still in the low to medium range. 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. The real test, of course, aside from legislative reform that is now finally underway, remains to proactively enforce the law with proper resources allocated to the investigators and prosecutors. The Bribery Prevention Network is a public–private partnership that brings together business, civil society, academia and government with the shared goal of supporting Australian business to prevent, detect and address bribery and corruption, and promote a culture of compliance.[90]

Some topics remain to be addressed in Australia in relation to domestic and foreign bribery. These are clearly identified in the current reforms that now appear likely. However, we

remain cautious and think it is unlikely that there will be a rush of any voluntary disclosures to regulators. Rather, there is likely to be an enhanced focus on internal investigations, remediation and a careful consideration of whether voluntary disclosure is warranted, notwithstanding the recent Oz Minerals non-prosecution.

JOHNSON
WINTER
SLATTERY

Robert Wyld	robert.wyld@jws.com.au
Kirsten Scott	kirsten.scott@jws.com.au
Angus Hannam	angus.hannam@jws.com.au

Level 14, 50 Bridge Street, Sydney NSW 2000, Australia
Tel: +61 2 8274 9555
www.jws.com.au

Endnotes

1 Robert R Wyld is a consultant, Kirsten Scott is partner and Angus Hannam is a senior associate 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 For example, the OECD Phase 4 Follow-Up Report noted that Australia had eight cases under investigation, and of those eight cases, two were new cases and one was returned from the prosecutor to the investigators.
5 Section 141.1(1) of the Criminal Code.
6 Section 142.1(1) of the Criminal Code.
7 Section 141.1(3) of the Criminal Code.
8 Section 142.1(3) of the Criminal Code.
9 Section 142.2 of the Criminal Code.
10 Section 142.1(4) of the Criminal Code.
11 Sections 141 and 142 of the Criminal Code.
12 See, for example, Section 8 of the Independent Commission against Corruption Act 1988 (NSW).
13 See Australian Public Service Code of Conduct, Section 4.12 – Gifts and Benefits.
14 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).
15 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.
16 Section 92.2, Criminal Code.
17 Section 92.3, Criminal Code.
18 Section 90.2 gives a broad definition of a foreign principal and a foreign government principal.
19 The Queensland Parliament passed legislation in 2008 that bans donations of foreign property.
20 Section 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW).
21 See Sections 249A to 249J, Crimes Act 1900 (NSW).
22 Sections 142.1 and 142.2 create offences against the bribe payer and the bribe giver.
23 Section 249B Crimes Act 1900 (NSW).
24 Independent Commission Against Corruption Act 1988 (NSW).
25 The King v. Jacobs Group (Australia) Pty Ltd [2023] HCA 23).
26 Section 70.4 of the Criminal Code.
27 Section 70.4(1) of the Criminal Code.
28 Sections 12.1 to 12.6, Criminal Code.
29 Section 12.3(3) of the Criminal Code.
30 The Queen v. David John Ellery [2012] VSC 349 at [27] to [29].
31 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)).
32 Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process, available at www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth_0.pdf.
33 Gregg v. R [2020] NSWCCA 245.
34 R v. Jousif; Elomar v. R; R v. M Elomar [2017] NSWSC 1299 and on appeal for Elomar, see Elomar v. R; Elomar v. R [2018] NSWCCA 224.
35 See www.theguardian.com/australia-news/2018/jul/14/sinclair-knight-merz-foreign-bribery-case-sparks-call-for-greater-police-resources.
36 R v. Dougas; R v. Read; R v. Linke; R v. Casamento; R v. Counihan (No. 2) [2021] NSWSC 682.
37 See www.abc.net.au/news/2018-09-17/company-linked-to-alleged-Nauru-bribery-received-2.5m-from-aus/10258152.
38 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.
39 Queen v. Ellery [2012] VSC 349; CDPP v. Radius Christanto [2013] VSC 521; CDPP v. Curtis [2017] VSC 613; CDPP v. Gerathy [2018] VSC 289; and CDPP v. Boillot [2018] VSC 739.
40 Section 70.3, Criminal Code.
41 Section 70.4, Criminal Code.
42 Section 12.3(3), Criminal Code.
43 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.
44 [2014] HCA 2 at [39].
45 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 Inspectorate 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.

46 Judgments by the Federal Court of Australia in the shipping cartel cases highlight the lack of overall relevance of civil penalties for cartel conduct for a court in assessing a criminal penalty. The prosecutor cannot make submissions on the penalty range in criminal cases, but the accused may do so as part of its submissions in mitigation of sentence in accordance with the statutory regime for criminal sentencing. See Commonwealth Director of Public Prosecutions v. Nippon Yusen Kabushiki Kaisha [2017] FCA 876 at [294]; Commonwealth Director of Public Prosecutions v. Kawasaki Kisen Kaisha Ltd [2019] FCA 1170; Commonwealth Director of Public Prosecutions v. Wallenius Wilhelmsen Ocean AS [2021] FCA 52. Each of these cases is of interest as the court had to assess the financial penalty for a cartel offence that is identical to the foreign bribery offence penalty.

47 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.

48 R v. Doot [1973] AC 807; see also Lipohar v. R [1999] HCA 65 at [37] per Gleeson CJ and at [112] per Gaudron, Gummow & Hayne JJ.

49 The value of penalty units will be automatically increased every three years based on the consumer price index. This started from 1 July 2020.

50 Increase effective from 1 July 2023.

51 See footnote 46 and the judicial consideration of assessing a criminal penalty using this framework in the context of criminal cartel prosecutions.

52 Some of the purposes of sentencing are currently reflected in the list of sentencing factors in Section 16A(2) of the Crimes Act 1914 (Cth) (see, e.g., Paragraphs (j)–(k), (n)), while others are exclusively supplied by common law. For a judicial analysis, see the cases at footnotes 45 and 46. By contrast, a number of state and territory statutes contain a comprehensive statement of the purposes of sentencing: the Crimes (Sentencing) Act 2005 (ACT) Section 7; the Crimes (Sentencing Procedure) Act 1999 (NSW) Section 3A; the Sentencing Act 1995 (NT) Section 5(1); the Penalties and Sentences Act 1992 (Qld) Section 9(1); the Sentencing Act 2017 (SA) Sections 3–4; the Sentencing Act 1991 (Vic) Section 5(1).

53 ALRC Report, pp. 329–376.

54 Section 490.1, Criminal Code.

55 Section 490.2, Criminal Code.

56 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.

57 Section 490.1(2), Criminal Code.

58 Listing Rule 3.1, and on continuous disclosure obligations, see Grant-Taylor v. Babcock & Brown Ltd (in liquidation) [2016] FCAFC 60 at [95].

59 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.

60 There are an increasing number of securities class actions in Australia. 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). On 24 October 2019, the Federal Court of Australia in TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v. Myer Holdings Ltd [2019] FCA 1747 delivered the first judgment in a shareholder class action. While the Court accepted the concept of market-based causation so shareholders did not need to prove reliance on the incorrect company statements to establish loss, on the facts, the Court did not find that the price of the company shares was inflated by reason of the non-disclosure breaches.

61 See Section 26.52 (foreign public officials) and 26.53 (public officials).

62 Section 26.52(4) and (5).

63 Section 262A of the ITAA.

64 Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), the Anti Money Laundering and Counter Terrorism Financing (Prescribed Foreign Countries) Regulations 2018 and the AML/ CTF Rules.

65 Section 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/ CTF Act).

66 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.

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

68 Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Commonwealth Bank of Australia Limited [2018] FCA 930.

69 www.austrac.gov.au/about-us/media-release/civil-penalty-orders-against-westpac, being the AUSTRAC Notice of Filing, Statement of Claim and Application filed in the Federal Court of Australia.

70 Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Westpac Banking Corporation [2020] FCA 1538.

71 Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v. Crown Melbourne Limited [2023] FCA 782.
72 Sections 400.3 to 400.7, Criminal Code.
73 Section 41 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
74 Securency is a joint venture between the RBA and Innovia Films, a UK-based supplier of polypropylene films. The RBA has now sold its interest in Securency to Innovia and is no longer a shareholder in Securency.
75 NPA is wholly owned by the RBA.
76 AFP, 'Media Release: Further charges laid in foreign bribery investigation', 14 March 2013.
77 See footnote 34.
78 CDPP v. Boillot [2018] VSC 739 at [39].
79 See www.ag.gov.au for a discussion about Australia's international anti-corruption obligations.
80 https://www.afp.gov.au/news-media/media-releases/australian-mining-company-investigated-afp-over-alleged-foreign-bribery.
81 AWB Limited v. Cole (No. 5) [2006] FCA 1234 at 211.
82 See Mann v. Carnell [1999] HCA 66; 201 CLR 1; 168 ALR 86; 74 ALJR 378.
83 R v. Note Printing Australia Limited (Ruling No. 2) [2012] VSC 304; R v. Dougas; R v. Read; R v. Linke; R v. Casamento; R v. Counihan; R v. Jacobs Group (Australia) Pty Ltd [2021] NSWSC 534.
84 The Country Care Group Pty Ltd and Others v. CDPP [2020] FCAFC 44 at [27].
85 ACCC v. Cascade Coal Pty Ltd (No. 1) [2015] FCA 607 at [30].
86 Section 70 Crimes Act 1914 (Cth) with the penalty fixed at two years' imprisonment.
87 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.
88 Section 6.
89 See https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/#:~:text=ASIC%20has%20released%20Regulatory%20Guide,and%20maintaining%20a%20whistleblower%20policy.
90 See https://briberyprevention.com/.

Chapter 3

Brazil

Rodrigo de Bittencourt Mudrovitsch, Felipe Fernandes de Carvalho, Ivan Candido da Silva de Franco, Gustavo Teixeira Gonet Branco and Adriano Teixeira Guimarães[1]

Summary

I INTRODUCTION

Brazil has been historically marked by political corruption scandals. Recently, the country gained international awareness due to massive schemes of corruption, such as *Mensalão*[2] and *Petrolão*, also known as *Operation Car Wash*,[3] and its criminal procedures garnered huge media coverage. During this period, the Anti-Corruption Law was enacted in 2013, inspired by foreign conventions and regulations. Ten years on, however, it is safe to say that there is still a long way to go.[4]

As a matter of fact, it is relevant to highlight that Brazilian corruption is systemic, which means that illicit relationships between the public and private sectors are common. This is so whether to achieve legal or illegal gains or benefits.[5] In Brazil, corruption is mainly used as a tool to enrich and increase influence, generating a cycle of power that is difficult to combat.

Nonetheless, as will be shown below, the country disposes of a robust set of legislation that regulates and punishes both domestic and foreign bribery and corruption, whether regarding illicit acts practised by individuals or by legal entities.

II YEAR IN REVIEW

In the past year, Brazil's federal government enacted Decree No. 11,129/22, which regulates Law No. 12,846/2023 (Anti-Corruption Law). The new Decree revokes Decree No. 8,420/2015 and modifies the regulation of anti-corruption legislation by improving the procedures related to the preliminary investigation, the administrative accountability process and, primarily, the negotiation, execution and fulfilment of leniency agreements, ensuring greater legal certainty, predictability and attractiveness of the institute for legal entities. According to the Decree, the main objectives of leniency agreements are to increase the investigative capacity of the public administration; the enhancement of the state's ability to recover assets; and fostering a culture of integrity in the private sector.

Moreover, the Decree establishes new directives that expand the prerogatives of the Comptroller General of the Union (CGU) within the scope of accountability procedures of legal entities. Such rules reinforce the promotion of a culture of integrity in the private sector and seek to address legal insecurities so far observed in the Brazilian anti-corruption microsystem. Decree No. 11,129/22 reinforces the need to adopt effective risk-management processes and appropriate diligence, especially in the hiring of third parties and politically exposed persons and in the supervision of sponsorships and donations.

In addition, regarding administrative sanctions, the Decree altered the calculation criteria for the imposition of fines, bringing new calculation percentages and innovations in terms of mitigating or aggravating factors for the definition of the fine's level. Differently from the past regulation – which set out a range, with maximum and minimum percentages – Decree No. 11,129/22 sets out only a maximum percentage, offering more discretion to authorities.

The modifications concerning aggravating factors for calculating the fine, according to Article 22, include:

- an aggravating factor of up to 4 per cent in the case of joinder of tortious acts;
- an increase in the percentage range in the case of neglect or awareness of the tortious conduct by the legal entity's management or executive board by up to 3 per cent; and
- interruption of supply of public services or the performance of contract works may result in an aggravating factor of up to 4 per cent.

Changes in the mitigating factors, as established by Article 23, include:

- a reduction of up to 1 per cent for cases of evidence that the legal entity voluntarily returned the advantage gained and redressed the damage resulting from the tortious act, or non-existence or lack of evidence of the advantage gained and of damage resulting from the tortious act;
- modification in the percentage range to up to 1.5 per cent concerning the level of cooperation given by the legal entity; and

- an increase in the percentage range on evidence that the legal entity has adopted and enforces a compliance programme to up to 5 per cent.

Furthermore, it is relevant to highlight that in December 2022, Brazil's Supreme Court (STF) declared unconstitutional 'secret budgets', which are rapporteurs' amendments to the federal budget. The mechanism was designated a secret budget because the lawmakers benefited from the grants that came unidentified. Most of the Court's justices considered this type of budgetary practice incompatible with Brazil's Constitution.

III DOMESTIC BRIBERY: LEGAL FRAMEWORK

Regarding the legal framework regarding bribery in Brazil, it is important to state first that the Brazilian Criminal Code (Decree Law No. 2,848/1940) incriminates active and passive corruption within its chapter dedicated to offences against public administration. Specifically, Article 333 defines active corruption as the offering or promising of an undue advantage to a public official, to influence him or her to perform, omit or delay an official act. The penalty for this crime varies between two to 12 years of imprisonment, added to a fine, which can be increased by one-third in cases where the unlawful favour is sought by a public official.

On the other hand, Article 317 sets forth the crime of passive corruption, defining it as the solicitation or receipt, for oneself or others, directly or indirectly, of an undue advantage due to the public function the corruptor exercises. The penalty for this offence is the same as mentioned above. Passive corruption can also occur when the public official performs, fails to perform or delays an official act, in breach of his or her functional duty, yielding to the request or influence of a third party. The penalty for this type of offence ranges from three months to a year of detention, or a fine (Article 333, Paragraph 2).

In this matter, it is important to emphasise the definition of a public official under this legislation. As outlined by Article 327, a public official is any individual who, even temporarily or without remuneration, holds a public position, job or function, or works in utilities that render services to governmental entities. Therefore, the Brazilian legislation defines public official in a much wider sense, since it includes even a person that temporarily exercises a public service. In fact, the most important thing to define someone as a public agent is the public service that is exercised.

Besides crimes of corruption in strict sense, Brazil's Penal Code typifies the practice of graft (Article 316), which consists in the demand of an undue advantage by a public official, due to his or her function, that has a penalty ranging between two to 12 years of imprisonment, plus a fine. As can be seen, the criteria for distinguishing this offence from passive corruption relies upon the presence, or not, of coercion; it exists in the first and does not in the second. In graft, the public official makes a demand; in passive corruption, however, he or she solicits it.

Furthermore, Article 332 incriminates influence peddling, and defines it as the act of requesting, demanding or obtaining an advantage or a promise of advantage on the pretext of influencing an act practised by a public official in the exercise of his or her function. The penalty for this crime varies between two to five years' imprisonment, and a fine.

Even though Brazil recognises different acts that are considered an attack to the public administration, all of them can be considered a form of bribery; all such crimes have in common someone in an appointed position acting voluntarily in breach of trust, and in exchange for a benefit.

In addition to the regulation given by the Criminal Code, Brazil also has other legal provisions concerning bribery and corruption. One of the main pieces of legislation regarding the topic is Law No. 12,846/2013, commonly called the Anti-Corruption Law, which was enacted with the intent to stop an existing gap in the country's legal system concerning the liability of legal entities for the practice of illicit acts against the public administration, especially for acts of corruption and public tender fraud.

This legislation presents a list of acts that are considered harmful for the public administration – local and foreign – and therefore illicit, such as, among other illegal conducts:

- promising, offering or giving, directly or indirectly, any undue advantage to a national or foreign public official, or a related third party;
- defrauding a public tender or public contract; or
- obstructing the investigation of public agents, or intervening in their performance (Article 5o).

The penalties for the practice of those offences can be administrative or judicial, or both.

Administrative sanctions include a fine, in an amount ranging between 0.1 to 20 per cent of gross revenue of the company in the last fiscal year prior to the filing of the administrative proceeding; and publication of the condemnatory decision (Article 6o).

In turn, judicial sanctions include:

- loss of assets, rights or values that represent the advantage or profit directly or indirectly obtained from the infraction;
- suspension or partial interdiction of the company's activities;
- compulsory dissolution of the legal entity; and
- prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies and public financial entities, for one to five years (Article 19).

Other legislation worth mentioning is:

- Federal Law No. 8,429/1992 (later modified by Law No. 14,320/21), which outlines sanctions for public agents that violate their government duties and public law principles, and aims to prevent them from gaining illicit enrichment, among other things; and
- Federal Law No. 14,133/2021, responsible for regulating public tenders and contracts with the government.

Moreover, regarding political contributions, Federal Law No. 9,504/97 states that individuals can make donations for election campaigns, which are limited to 10 per cent of their gross income in the year prior to the election (Article 23, Paragraph 1). Nowadays, legal entities are not allowed to donate for this purpose due to the modification brought about by Federal Law No. 13,165/2015.

Finally, it is relevant to stress that private commercial bribery is not criminalised in Brazil.

IV ENFORCEMENT: DOMESTIC BRIBERY

When analysing corruption in Brazil, and its enforcement, it is practically impossible not to mention *Operation Car Wash*,[6] which uncovered a pre-existing corruption scheme that had been going on for years in the country. Overall, the operation, which began in 2014, was one of the biggest initiatives regarding anti-corruption and anti-money laundering in Brazil's recent history. It started when the Federal Public Prosecutor's Office (MPF) launched an investigation into alleged corruption involving politicians and the state-owned gas company, Petrobras, which uncovered a plan designed to divert millions of dollars off contracts. As stated by the MPF: 'in this scheme, which lasted at least ten years, large contractors organised into cartels paid bribes that varied from 1 per cent to 5 per cent of the total amount of overpriced contracts. These bribes were distributed through the financial operators of the scheme, including 'doleiros' investigated in the first stage of the operation.'[7]

The operation then quickly became far larger than just Petrobras, exposing a culture of systemic corruption in the country, with hundreds of politicians, as well as private sector executives being arrested, tried and sentenced to jail. Nevertheless, Brazil's *Car Wash* era, which continued until 2021, was also characterised by several prosecution and judicial tactics that tightened the interpretation of the law in order to achieve more efficient enforcement. Three points are worth mentioning:

- the concentration of jurisdiction in some federal courts, such as the 13th Federal Court of Curitiba, despite its questionable legal foundations;
- the excessive use of preventive detention; and

- 'the *quid pro quo* legal requirement needed to characterise the crime of corruption has become less defined in case law over the years, evolving from a specific and clear act benefitting a third party to a vague possibility of giving a third party better access to a government structure'.[8]

However, more recently, between 2021 and 2022, the STF annulled various *Operation Car Wash*-related cases based on arguments that, especially, the 13th Federal Court of Curitiba improperly expanded the scope of its powers to prosecute facts that should have never fallen within its jurisdiction. The most emblematic one involved the current President of Brazil, Luiz Inácio Lula da Silva, whose criminal action was declared null and void due to – specifically – the matter of jurisdiction.

V FOREIGN BRIBERY: LEGAL FRAMEWORK

To comply with its adherence to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, in 2002, Brazil enacted Law No. 10,467/2002, which amended the Penal Code and added the crimes of active corruption of a foreign public official (Article 337-B) and influence-peddling in the context of international business transactions (Article 337-C).

Article 337-B criminalises the acts of promising, offering or giving, directly or indirectly, an undue advantage to a foreign public official, or to a third party, to determine him or her to practise, omit or delay an official act related to international commercial transactions. The penalty for active corruption of a foreign public official is imprisonment from one to eight years and a fine. In addition, the penalties for this offence shall be increased by one-third if the foreign public official carries out an act or omission violating his or her duties in exchange for the advantage solicited, accepted or promised (sole paragraph).

In turn, Article 337-C criminalises a request or demand, for oneself or for others, directly or indirectly, for an advantage or promise of an advantage on the pretext of influencing an act practised by a foreign public official in the exercise of his or her duties related to an international commercial transaction. The penalty for this crime is imprisonment from two to five years and a fine.

Moreover, according to Article 337-D, for criminal purposes, a foreign public official is an individual who, even on a temporary basis or without remuneration, holds a position, job or public function in state entities or in diplomatic representations of a foreign country. Also considered to be a foreign public official is someone who holds a position, job or function in companies that are controlled, directly or indirectly, by the public administration of a foreign country or in international public organisations.

Regarding bribery of foreign public officials committed by legal entities, under the Anti-Corruption Law, entities can be subject to administrative and judicial penalties. However, the Law allows the public administration[9] to sign leniency agreements with legal entities that violate the law, provided they effectively collaborate with the investigation or administrative procedure, and the collaboration results in the identification of other individuals involved in the infraction, when applicable; and the rapid obtaining of information and documents proving the illegal acts under investigation (Article 16, Main Section and Items I, II).

For a legal entity to be able to sign a leniency agreement, it must:

- be the first to express its interest in collaborating in the investigation of the illegal act;
- completely cease its involvement in the investigated offence from the date of signature of the agreement; and
- confess its participation in the illegal act, as well as cooperate fully and permanently with the investigations and the administrative process, appearing, at its expense, whenever requested, at all procedural acts, until an investigation's conclusion (Article 16, Paragraph 1).

It is important to note that leniency agreements do not exempt legal entities from their obligation to redress the damage caused, but reduce the fine by up to two-thirds, as well as exempt the legal entity from making the condemnatory decision public and from the

prohibition on receiving incentives, subsidies, grants, donations or loans from public agencies or entities, and from public financial institutions or institutions controlled by the government, for a period from one to five years (Article 16, Paragraph 2).

VI ASSOCIATED OFFENCES

With the enactment of Federal Law No. 9,613/1998 (AML Law), later amended by Federal Law No. 12,683/2012, money laundering became an offence in Brazil. The crime is defined as the concealment or disguise of the true nature, origin, location, disposition, movement or ownership of assets, rights and values that result directly or indirectly from a criminal offence (Article 1o).[10] Penalties are imprisonment from three to 10 years, plus a fine, and, in cases where the crime was committed through a criminal organisation, or if there were reiterated acts of money laundering, the penalty may be increased by one-third to two-thirds, plus a fine.

The Law further establishes that the same penalties apply to individuals who, to conceal or disguise the use of assets, rights or amounts or value deriving from a criminal infraction:

- convert them into legal assets;
- acquire, receive, exchange, negotiate, grant or receive as guaranty, deposit in cheques or transfer;
- import or export assets or goods at amounts that do not correspond to their real value;
- use, in their financial and economic activity, assets, rights or amounts or value deriving from criminal infractions; and
- participate in groups, associations or offices knowing that their main or secondary activity is directed at the crimes described in Law No. 9,613/1998.

It is relevant to stress that authorities may investigate money laundering crimes and initiate a criminal action even though the prior criminal offence has not received a definitive ruling from the judiciary branch.

Moreover, the AML Law regulations affect companies licensed by the Central Bank of Brazil. According to Article 9o, companies must follow AML rules if they are engaged in:

- the reception, brokerage, and investment of third parties' funds in Brazilian or foreign currency;
- the purchase and sale of foreign currency or gold as a financial asset; or
- custody, issuance, distribution, clearing, negotiation, brokerage or securities management.

In addition, the Law provides a list of companies and individuals falling under its obligations, including:

- stock, commodities and futures exchanges;
- insurance companies, insurance brokers and institutions involved in private pension plans or social security;
- payment or credit card administrators;
- administrators or companies that use cards or any other electronic, magnetic or similar means that allow fund transfers;
- companies that engage in leasing and factoring activities;
- companies that distribute any kind of property (including cash, real estate and goods) or services, or give discounts for the acquisition of such property or services by means of lotteries or similar methods;
- branches or representatives of foreign entities that engage in any of the activities referred to herein that take place in Brazil, even if occasionally;
- all other legal entities engaged in the performance of activities that are dependent upon an authorisation from the agencies that regulate the stock, exchange, financial and insurance markets;
- any and all Brazilian or foreign individuals or entities that operate in Brazil in the capacity of agents, managers, representatives or proxies, or commission agents, or represent in any other way the interests of foreign legal entities that engage in any of the activities referred to herein;

- legal entities that engage in activities pertaining to real estate, including the promotion, purchase and sale of properties;
- individuals or legal entities that engage in the commerce of jewellery, precious stones and metals, works of art and antiques; and
- individuals or legal entities that trade luxurious goods or those with high prices or that perform activities that involve great amounts in cash.

Finally, according to the Law, the Council for Control of Financial Activities is the agency responsible for the regulation and investigation of transactions suspected of money laundering, as well as for the imposition of administrative penalties.

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

In April 2022, one of the first criminal actions regarding foreign corruption in Brazil finally came to an end. In the case, the Federal Court from the Second Region accepted an appeal and recognised the statute of limitation regarding the conviction of eight former Embraer executives who were charged, and then sentenced, for acts of corruption of a foreign public official and for money laundering. The MPF accused the defendants of bribing a colonel of the Dominican Republic Airforce, with an amount of US$3.5 million, which was intended to encourage and facilitate the acquisition, by the Caribbean country, of eight military aircrafts.

In the trial, the Court acquitted the executives of the money laundering charge and recognised the statute of limitations regarding international corruption, maintaining the conviction for this crime only to one of the defendants.

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Brazil has already ratified numerous international conventions regarding combating corruption. The following ones stand out:

- the OECD Anti-Bribery Convention, sanctioned on 24 August 2000 and promulgated by Decree No. 3,678 on 30 November 2000;
- the United Nations Convention against Transnational Organized Crime, sanctioned on 29 January 2004 and promulgated by Decree No. 5,015 on 12 March 2004;
- the United Nations Convention against Corruption, sanctioned on 15 June 2005 and promulgated by Decree No. 5,687 on 31 January 2006; and
- the Inter-American Convention Against Corruption, sanctioned on 29 March 1996 and promulgated by Decree No. 4,410 on 7 October 2002.

IX LEGISLATIVE DEVELOPMENTS

A bill to incriminate corruption in the private sector (Bill No. 3,163/2015) is currently going through the Brazilian Congress, and is currently being appraised by the House of Representatives.

In addition, Bill No. 4850/2016 – which aims to enforce prosecution of corruption and to reduce impunity – is awaiting approval from the House of Representatives concerning amendments made by the Senate.

Moreover, Bill No. 1,202/2007 intends to discipline lobby activities in Brazil. The Bill is currently awaiting Senate approval.

Finally, through Decree No. 10,531/2020, the federal government has launched an anti-corruption plan with 153 measures aiming at improving mechanisms for prevention, detection and accountability for acts of corruptions, which are set to be accomplished by 2025.

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Other Brazilian laws that are applicable to this matter are:

- the Procurement Law (Law No. 8,666/1993, amended by Law No. 14,133/2021), which establishes general rules on tenders and administrative contracts relevant to construction works and services, including advertising, purchases, alienations and leases within the branches of the union, the states, the federal district and the municipalities. It is important to highlight that Law No. 14,133/2021 altered the Penal Code, and added a new Chapter (Chapter II-B, inserted in Title XI: 'Crimes Against the public administration') to it criminalising crimes regarding public tenders (Articles 337-E to 337-P);
- the Conflict-of-Interest Law (Law No. 12,813/2013), aimed at qualifying situations that could be considered as a potential conflict of interest involving Brazilian authorities;
- the Crimes of Responsibility Law (Law No. 1079/1950), which defines crimes of responsibility and their regulation;
- the Clean Record Law (Complementary Law No. 135/2010), which mainly aims to bar corrupt candidates from office;
- the Anti-Trust Law (Law No. 12,529/2011), which structures the Brazilian system for the protection of competition and sets forth preventive measures and sanctions on violations against the economic order;
- the Crimes Against the National Financial System (Law No. 7,492/1986), which defines crimes against the national financial system and their regulation;
- the Organised Crime Law (Law No. 12,850/2013), which defines criminal organisations, regulates criminal investigations and establishes the means for obtaining proof;
- the Whistleblower Law (Law No. 13,608/2018), which establishes protection of and rewards to individuals that report relevant information regarding crimes against the public administration, administrative offences or any actions or omissions harmful to the public interest; and
- the Crypto-assets Act (Law No. 14,478/2022), which sets guidelines for providing services with virtual assets and for regulating providers of these services.

XI COMPLIANCE

As discussed above, Decree No. 11,129/2022, which regulates the Anti-Corruption Law, revoked outdated Decree No. 8,420/2015 and made some important changes regarding compliance programmes. Overall, the Decree made positive alterations and brought Brazil's integrity programme closer to compliance management systems pegged to international standards, such as ISO 37301 (compliance management system) and ISO 37001 (anti-bribery management system).

According to Article 56 of the new Decree, the integrity programme consists of a set of internal mechanisms and procedures regarding integrity, auditing and whistleblowing, as well as effective appliance of the legal entity's code of conduct. It aims to prevent, detect and remediate irregularities and illicit acts practised against the public administration, and to develop a compliance culture in the organisational environment.

Furthermore, Article 57 establishes a set of parameters under which an integrity programme will be evaluated:

- commitment of the legal entity's senior management, including board members, proven by their clear and unequivocal support for the programme, as well as the allocation of adequate resources;
- standards of conduct, code of ethics, policies and integrity procedures to be applied to all employees and administrators, regardless of their position or role;
- standards of conduct, code of ethics and integrity policies extended, when necessary, to third parties, such as suppliers, service providers, intermediaries and other associates;
- periodic training and acts of communication with regard to the integrity programme;
- adequate risk management, including analysis and periodic reassessment, to make necessary adaptations to the integrity programme, and an efficient allocation of resources;
- precise accounting records that reflect all transactions of the legal entity;

- internal controls that ensure that reports and financial statements of the legal entity are readily prepared and trustworthy;
- specific procedures to prevent fraud 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, subjection to inspection, or the obtaining of authorisations, licences, permits and certificates;
- independence, in structure and authority, of the internal department responsible for enforcing the integrity programme and its monitoring;
- channels to report irregularities, openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistleblowers;
- disciplinary measures enforced against violation of the integrity programme;
- procedures that assure the immediate suspension of irregularities or detected infractions and the timely remediation of the damage caused;
- proper due diligence being conducted:
- prior to engaging third parties and, depending on the circumstances, the monitoring of third parties such as suppliers, service providers, intermediaries and other associates;
- prior to engaging and, depending on the circumstances, the supervision of politically exposed people, as well as their families, collaborators and legal entities in which they participate;
- the realisation and supervision of sponsorships and donations;
- verification, during a merger, acquisition or other corporate restructuring, of irregularities or illicit acts, or the existence of vulnerabilities in the legal entities involved; and
- continuous monitoring of the integrity programme to ensure it remains effective at preventing, detecting and otherwise addressing wrongful acts described in Article 5 of the Anti-Corruption Law.

Finally, although compliance programmes are not mandatory in Brazil, Decree No. 11,129/2022 states that sanctions may be reduced by up to 5 per cent in cases where the legal entity possesses and applies an integrity programme. This represents a substantial benefit for companies that have been penalised due to violations.

XII OUTLOOK AND CONCLUSIONS

Ultimately, it is important to note that the biggest operation in Brazil's recent history, *Operation Car Wash*, is still seeing developments concerning the fight against corruption and how far the state can go to prosecute and punish such acts.

As illustration, on 6 September 2023, the Brazilian Supreme Court decided to annul evidence produced in *Operation Car Wash* related to agreements confirmed with Odebrecht, which was one of the most important companies involved in the investigations. This decision argues that the agreements had occurred outside the official means of the persecutory body.

Justice Dias Toffoli stated that, beyond the illegality of the agreements, which clearly harmed the defendants in numerous criminal proceedings of *Operation Car Wash*, the operation reflected coordinated actions between the prosecution and the magistrate contrary to the principles of criminal procedure. Therefore, it is likely that in the near future, several criminal actions resulting from *Operation Car Wash* will be annulled or archived.

All the developments in the fight against corruption in Brazil, in concrete cases, lead us to conclude that, besides the new regulations and laws mentioned above, we still have a long way to go to make our legal system one that functions properly, with the correct prosecutions and punishments, without losing sight of the principles that govern the processes of Brazil's democratic state of law.

MUDROVITSCH
ADVOGADOS

Rodrigo de Bittencourt Mudrovitsch	rodrigo@mudrovitsch.adv.br
Felipe Fernandes de Carvalho	felipe@mudrovitsch.adv.br
Ivan Candido da Silva de Franco	ivan@mudrovitsch.adv.br
Gustavo Teixeira Gonet Branco	gustavo@mudrovitsch.adv.br
Adriano Teixeira Guimarães	ateixeiraguimaraes@gmail.com

St. de Habitações Individuais Sul, QI 3 Conjunto 06 Casa
25 - Lago Sul, Brasília/DF, 71605-260, Brazil
Tel: +61 3366 8000
www.mudrovitsch.adv.br

Read more from this firm on Lexology

Endnotes

1 Rodrigo de Bittencourt Mudrovitsch is the founding partner, Felipe Fernandes de Carvalho, Ivan Candido da Silva de Franco and Gustavo Teixeira Gonet Branco are partners and Adriano Teixeira Guimarães is an adviser at Mudrovitsch Advogados.

2 A vote-buying scheme involving Brazil's most senior politicians, it saw some of them sent to prison, under trial in Criminal Lawsuit No. 470, which took place in the Supreme Court.

3 A corruption scheme that diverted billions of dollars from state-owned company Petrobras, involving political parties, contractors and businessmen.

4 According to the Corruption Perceptions Index, developed by the organisation Transparency International, Brazil has a lost decade in the fight against corruption, dropping five points and 25 positions in the rankings since 2012.

5 Analysis of law professor (USP) Gustavo Justino de Oliveira at the Corporate Compliance and Ethics Seminar of FEAUSP.

6 Named after a car wash in the city of Brasilia/DF, which was initially used to launder illicit money gained by the scheme.

7 Ministério Público Federal. Caso Lava Jato: Entenda o Caso. Available at https://www.mpf.mp.br/grandes-casos/lava-jato/entenda-o-caso. Accessed 4 September 2023.

8 Taffarelo, R; Leardini, F; Nascimento, P: 'Bribery & Corruption Laws and Regulations 2023 | Brazil'. Global Legal Insights. Available at https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/brazil. Accessed 5 September 2023.

9 The CGU is the competent body to enter into leniency agreements, resulting from the Brazilian Anti-Corruption Law, under the Federal Executive Power, and in harmful acts against a foreign public administration.

10 The Law no longer restricts money laundering to the prior occurrence of a set of crimes previously outlined in Article 1. Therefore, the list of predicate offences has been extinguished and this concept now encompasses any criminal offence, including misdemeanours.

Chapter 4

France

Guillaume de Rancourt[1]

Summary

I INTRODUCTION

Less than a decade ago, France was widely perceived as lagging behind international standards in terms of its anti-corruption efforts. Limited resources available to the criminal authorities, procedural hurdles to prosecuting acts committed abroad and a general lack of successful prosecution of French companies all contributed to this assessment. This situation changed significantly following the enactment in late 2016 of a sweeping anti-corruption reform known as Sapin II.[2]

This strengthened anti-corruption framework has far-reaching consequences for French and foreign groups alike. Of particular note are the following:

- an affirmative obligation for companies above certain thresholds to design and implement a compliance programme to prevent corruption, which the French Anti-corruption Agency (AFA, also created by Sapin II) is responsible for monitoring and assessing;
- an extension of the extraterritorial reach of French anticorruption laws;
- enhanced protection for whistleblowers; and
- the introduction of a new kind of agreement allowing a legal entity to settle corruption allegations with criminal authorities (akin to a deferred prosecution agreement in the United States).

II YEAR IN REVIEW

On 16 January 2023, important revisions to the National Financial Prosecutor's (PNF's) corporate enforcement guidelines (Guidelines) were announced.[3]

According to the PNF, the updated Guidelines aim at providing more transparency, clarity and predictability regarding the use of these settlement agreements.

i Good faith

The only situation that will disqualify a company from this negotiated path is if the misconduct caused serious harm to individuals. Other than that, the PNF stated during the conference organised to announce the Guidelines that its door was 'wide open'. The Guidelines emphasise that in order to obtain a *convention judiciaire d'intérêt public* (CJIP, akin to a deferred prosecution agreement in the United States), a company's good faith is paramount. The company can demonstrate good faith by promptly self-disclosing the relevant facts, fully cooperating with the PNF and appropriately remediating misconduct. Prior compensation of any victims and change in the company's management, as appropriate, are also listed as positive factors. Conversely, failure to implement an effective compliance programme or to take corrective measures may preclude the company from being offered a CJIP, or will count as aggravating factors in the calculation of the fine, as explained below.

ii Confidentiality

The Guidelines make clear that exchanges during the negotiations are protected by the *foi du palais*, a time-honoured, unwritten French usage that ensures confidentiality between judicial professionals. Confidentially is also safeguarded for all documents transmitted by the company after the settlement proposal, whereas documents obtained following subpoenas or dawn raids can still be used if an agreement is not reached.

iii Computation of the fine

French law mandates that the sanction be 'proportionate to the benefits derived from the offences' and capped at 30 per cent of the average annual turnover for the past three years. It does not otherwise explain the calculation of the sanction.

Moreover, in this respect, the Guidelines indicate that the turnover to be taken into account is the one recorded in the consolidated accounts, if such accounts have been established pursuant to the relevant regulations. Whether this interpretation is in line with the law is debatable, and this new position is a departure from previous guidance issued in 2018, which only took into account the turnover of the entity signing the CJIP. The Guidelines offer substantial clarification as to how the final amount of the fine is to be determined. The fine is composed of two parts, namely the disgorgement, which is equal to the undue benefits derived from the misconduct, and a 'punitive part,' which is based on the amount of undue benefits obtained, adjusted by aggravating and mitigating factors. The amount of the undue benefits derived from the misconduct is the result of an assessment discussed with the PNF at the date of the agreement. It is established in cooperation with the company, with which the PNF will agree on a list of all direct and indirect benefits to be taken into account and principles for assessing the undue benefits, on the basis of accounting information provided by the company, which may be certified by its auditors. Nine aggravating factors and eight mitigating factors are listed – compared to a total of nine factors in the previous version of the Guidelines – as well as their impact on the amount of the fine's punitive part. For instance, the size of the company may now be considered to increase the punitive part of the fine up to a maximum of 20 per cent, and prior compensation of the victims by the company may reduce it up to a maximum of 40 per cent.

The list of all 17 factors can be summarised as follows, in ascending order of importance:

Cap (%)	Aggravating factors	Mitigating factors
10	–	• Misconduct was an isolated incident • Effectiveness of the internal whistleblowing system
20	• Large company • Shortcomings in the compliance programme (for companies that must implement one) • Judicial, fiscal or regulatory track record of the company • Use of corporate resources to conceal misconduct	• Relevance of the internal investigation conducted • Corrective measures implemented • 'Unambiguous' acknowledgement of the facts by the company
30	• Any form of obstruction to the investigation • Creation of means to conceal misconduct • Involvement of public officials	• Active cooperation
40	–	• Prior compensation of the victims
50	• Recurrent nature of misconduct • Serious disturbance of public order	• Voluntary self-disclosure

It will be up to the company and the PNF to negotiate, on a case-by-case basis, the precise impact of each of these factors on the punitive part of the fine. Of note, factors that were not mentioned in the 2019 Guidelines are now included as the judicial, fiscal or regulatory track record of the company (20 per cent). This is of interest to regulated entities such as financial institutions, which may have been sanctioned by their relevant regulators, including the ACPR (the Prudential Supervision and Resolution Authority).

iv Scope of the settlement

One of the main benefits of the CJIP once validated by the judge is that it allows the company to turn the page on the misconduct described in the statement of facts, without a criminal conviction and without an admission of guilt. In principle, only the facts described in the CJIP are covered. Nonetheless, the Guidelines provide that in very exceptional circumstances, when systemic misconduct makes it difficult to ascertain all the facts, it is possible to provide that all facts of a similar nature (e.g., corruption) that occurred within a certain period on a certain territory will be covered as well, provided that they were not concealed from the PNF. In that case, the amount to be paid will be higher, and the aggravating factor for repeated misconduct will outweigh the mitigating factor for active cooperation (30 per cent), and can even exceed 50 per cent.

v Compliance programme

The CJIP may also provide for an obligation to implement a compliance programme supervised by the AFA, whose costs are borne by the company, during a maximum period of three years. To assess if this monitoring obligation is warranted, the PNF and the AFA take into account the result of any recent audit conducted by the AFA and the implementation of a compliance programme under the aegis of a foreign authority (such as the US Department of Justice (DOJ)) or an international financial institution (such as the World Bank). In practice, the implementation of this additional obligation in the CJIP is subject to the quality of the company's current compliance programme.

vi International cooperation

The Guidelines recognise that the *ne bis in idem* principle is of little practical value to corporations: a corporation that settles allegations of misconduct with the authorities of one country cannot claim that it should not pay a second time for the same facts if authorities of another country decide to investigate. The Guidelines endeavour to mitigate this risk. First, during the negotiations with the company, the PNF coordinates its investigation with that of foreign criminal authorities (such as the DOJ or the UK Serious Fraud Office) or international organisations (such as the World Bank). Second, in order to avoid paying twice for the same underlying misconduct, the company may seek a joint resolution with all authorities concerned. Third, following the conclusion of a CJIP, the PNF may condition its cooperation with requests for international mutual assistance to an undertaking from the foreign authority not to initiate new proceedings against the company for the same facts.

vii Individuals

Individuals will not be identified by name in CJIPs, which are published on the website of the Ministry of Justice. Other than that, the Guidelines offer little comfort for individuals potentially involved in misconduct. Unlike legal entities, they cannot enter into a CJIP, and their only option to avoid a trial is to sign a guilty plea. Corporate officers and employees should be aware that their criminal exposure remains and may even be increased following a CJIP entered by the company, given that the PNF expects companies to name names in order to reduce the amount of the fine.

The Guidelines state that whenever possible, the PNF favours a joint resolution of the matter, with a CJIP for the company and a guilty plea for individuals. However, individuals should know that this joint resolution is ultimately in the hands of the judge, and that in one corruption matter in 2021, the judge approved the CJIP but refused to validate the guilty pleas agreed between the PNF and the individuals.

III DOMESTIC BRIBERY: LEGAL FRAMEWORK

Under French law, corruption, including active and passive bribery and influence-peddling, is a criminal offence punishable by up to 10 years of imprisonment and fines of up to €1 million for individuals and €5 million for legal entities, which may be increased in both cases to twice the proceeds of the offence,[4] as well as related sanctions.

i Domestic bribery law and its elements

The French Penal Code criminalises both active[5] and passive corruption.[6] Corruption offences include bribery of domestic public officials,[7] domestic judicial staff[8] and private individuals.[9]

A bribe is defined as any offer, promise, donation, gift or reward unlawfully offered or requested, without any restriction as to the value of such an advantage. The AFA identifies sponsorship, patronage, fees and commissions, travel and entertainment expenses, gifts and hospitality, donations and legacies as transactions presenting high risks of bribery.[10]

A public action may be initiated within six years of the offence. Special provisions are applicable to the investigation of offences related to potential acts of corruption: surveillance; infiltration, interception of telecommunications, sound recordings and fixation of images; and protective measures.[11]

French law also criminalises influence peddling: that is, offering directly or indirectly gifts, promises, donations, presents or benefits of any kind to a person entrusted with public authority, entrusted with a public service mission or invested with a public elective mandate, for him or herself or for another person.[12]

ii Definition of public official

Under 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 elected office'.[13] The definition of foreign public officials is the same.[14] Persons holding a judicial office are excluded from the scope of public officials, and corruption concerning them is covered as a separate offence.[15]

iii Penalties

Individuals guilty of corruption offences are liable to 10 years' imprisonment and a fine of up to €1 million, which can be increased to twice the value of the proceeds, except for private commercial bribery, punishable by five years' imprisonment and a fine of up to €500,000, which can also be increased to twice the value of the proceeds. The fine may be increased to €2 million or an amount equivalent to twice the proceeds of the offence if it is committed by an organised group.[16] Passive bribery of judicial officials can be aggravated when it is committed for the benefit or to the detriment of a person subject to criminal prosecution. The offence then becomes a felony punishable by 15 years' imprisonment and a fine of €225,000.[17] In addition, five complementary penalties can be imposed on the perpetrator of corruption, including confiscation of the proceeds of the offence and disbarment from public procurement.[18]

As for legal persons, the maximum penalty applicable is five times the fine provided for individuals,[19] and it may be accompanied by specific penalties, which may include dissolution, exclusion from public contracts or a ban on making public offers on financial markets.[20] In addition, the implementation of a mandatory compliance programme, as set forth in greater detail in Section X, may be incurred for certain bribery offences.[21]

IV ENFORCEMENT: DOMESTIC BRIBERY

Before 2017, there was little incentive for companies to come forward and cooperate with the French criminal authorities in the context of corruption investigations, because there was no effective legal mechanism to settle.

This changed with the enactment of Sapin II: a legal entity can now settle corruption allegations with criminal authorities by entering into a CJIP.

The purpose of this mechanism is to incentivise companies to come forward regarding offences that are difficult to detect, while allowing companies to continue to qualify for public tenders and other forms of licences in jurisdictions where applicable laws provide for automatic disqualification in the event of a guilty plea or criminal conviction.

Under this mechanism, the public prosecutor may offer to legal entities (but not individuals) the possibility of entering into a settlement agreement requiring:

- the payment of an amount proportionate to the advantages derived from the offences, capped at 30 per cent of the company's average annual turnover for the past three years;
- the implementation of a compliance programme under the supervision of the AFA, at the expense of the company, if appropriate; and
- compensating the damage suffered by any victim.

The company officials remain accountable as individuals. In this regard, they can be assisted by an attorney before providing their consent to a settlement agreement. The agreement must be validated by a judge after hearing from both the legal entity and any victim. Following its validation, the agreement terminates the criminal proceedings without the company being convicted. After a judge validates the settlement agreement, the company has the right to withdraw within 10 days. Once final, the settlement agreement is published on the website of the French Ministry of Justice and the French Ministry of the Budget.[22]

V FOREIGN BRIBERY: LEGAL FRAMEWORK

Sapin II broadens the jurisdiction of French laws and courts by relaxing the principle of territoriality. As a result, the extraterritorial reach of French legislation was significantly extended, meaning that there is a greater possibility of French criminal liability for directors and officers of both French and non-French companies for acts of corruption committed abroad, with a potential extension of criminal liability to legal entities as well.[23]

Sapin II has also relaxed or eliminated certain procedural impediments to prosecutions of violations of French anti-corruption laws. Under the current law:

- French anti-corruption laws apply to acts committed abroad by French nationals, French residents, or persons whose business activity is in all or in part performed in France,[24] even if the conduct is not prohibited in the foreign jurisdiction. Previously, this was only the case if the acts in question were also prohibited under the laws of the foreign jurisdiction.
- Similarly, prosecution in France previously required either a criminal complaint by the victim of the acts of corruption or prosecution by foreign authorities. Since Sapin II, French prosecutors may act – *sua sponte* or pursuant to a complaint by certain private parties, such as NGOs or associations fighting corruption – even in the absence of a prosecution abroad; and
- French law applies to accomplices acting in France in relation to acts of corruption committed abroad, so long as the relevant conduct is an offence both in France and in the relevant foreign jurisdiction (i.e., without the requirement of a definitive judgment in the relevant foreign jurisdiction establishing that the offence has been committed, as was required prior to Sapin II).

VI ASSOCIATED OFFENCES

i Financial record-keeping

Different sources under French law provide for the obligation of truthful financial record-keeping. Most companies must provide the court registry with annual accounts, an annual report and an auditors' report on their annual accounts. Listed companies are required to publish several financial information reports on a quarterly basis and may also be brought before the French Financial Markets Authority (AMF), which is responsible for overseeing the financial and securities markets. The AMF can carry out inspections and investigations to ensure that entities comply with specific professional obligations.

French law prohibits false or misleading financial accounts or reporting.

ii Money laundering

French law criminalises money laundering, defined as either 'facilitating, by any means, the false justification of the origin of the assets or income of the author of a crime or felony that provided them with a direct or indirect profit' or 'assisting in the investment, concealment or conversion of the direct or indirect product of a crime or felony'.[25] Money laundering is punishable by a maximum of five years' imprisonment and a fine of €375,000 (€1.875 million for legal entities).[26] Aggravated money laundering is punished by up to 10 years of

imprisonment and a fine of €750,000 (€3.75 million for legal entities).[27] These amounts may be increased to up to half the value of the assets or funds that were the object of the laundering activities, and five times that amount for legal entities.[28]

On 20 February 2019, the Paris Criminal Court found that Swiss bank UBS AG had set up a system whereby private bankers would solicit French residents to convince them to place their funds in Swiss bank accounts, and, as a result, the bank was found guilty of illegal solicitation and laundering the proceeds of tax fraud. UBS AG was fined €3.7 billion; the French subsidiary was fined €15 million for aiding and abetting; five executives faced suspended prison sentences and personal fines; and the state was awarded €800 million in damages.

On 13 December 2021, the Paris Court of Appeal upheld the conviction of UBS AG for illegal solicitation and money laundering but found the prosecuted individuals and UBS' French subsidiary not guilty of money laundering. The Court of Appeals reduced the amount of the sanctions to €1.8 billion (€800 million in civil damages to the French state and a confiscation order of €1 billion), fined the French subsidiary €1.875 million, and sentenced four former executives to suspended prison sentences of up to one year and €300,000 in fines. UBS filed a further appeal with the French Cour de Cassation, which is currently pending.

In addition, the European Union published six directives between 1991 and 2018 on the fight against money laundering and terrorist financing.[29] These European directives have been transposed into French law, including in the Monetary and Financial Code.

These regulations apply to financial (banking and insurance sectors) and non-financial (taxation, accounting, law, gambling and sports, trading in valuables sectors) professions, and require the intervention of various supervisory authorities with powers of investigation and sanction. In France, TRACFIN is the financial intelligence unit responsible for collecting and analysing information that regulated entities must report, while the PNF (discussed in Section VI) has jurisdiction over nationwide money laundering-related offences. Professionals are required to report any suspicious transactions to TRACFIN whenever they 'know, suspect or have good reasons to suspect that a transaction may originate from an offence punishable by a prison sentence of more than one year or are related to the financing of terrorism'.[30]

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

i The PNF

The PNF is a special prosecutors' office that was created in 2013. It specialises in the prosecution of three categories of offences: offences against probity (corruption, influence peddling or favouritism); offences against public finances; and offences against the proper functioning of financial markets. The PNF can initiate an investigation on its own initiative or following a complaint or whistleblower alert.

On 2 June 2020, the Ministry of Justice issued guidelines (guidance addressed to members of the judicial branch) establishing guidance regarding the fight against international corruption and, in particular, outlining the PNF's central role.[31]

The guidelines highlight the PNF's role in reporting, analysing and investigating acts of corruption. In particular, the PNF has an active role in the treatment and processing of any source of information regarding foreign companies, since its jurisdiction extends to acts of corruption or influence peddling committed by any entity outside of France that exercises part or all of its economic activity within the French territory. The PNF may prosecute legal entities with a subsidiary, office or any other establishment in France. These channels for uncovering international corruption can include criminal mutual assistance requests, press articles, information gathered through the OECD Working Group on Bribery in International Business Transactions, whistleblower alerts and self-reporting.

Investigations led by the PNF aim at identifying the financial circuit and individuals involved in the corruption scheme, as well as their level of implication. Investigations may

consist of document review, witness interviews, custody searches, accounting and tax investigations and, specifically regarding acts of corruption or influence peddling of a foreign official, wiretapping.

Upon completion of the investigation, the PNF may close the proceedings, refer the matter to an investigative magistrate for further investigation or decide to prosecute by referring the matter to the relevant criminal court.

The PNF was reportedly investigating between 90 and 100 cases of international corruption of foreign public officials as of 31 December 2018, and that number has increased since then.[32]

ii Settlement of allegations of corruption, influence peddling, tax fraud, laundering of tax fraud and related offences

As noted above, a legal entity can also settle allegations of corruption, influence peddling, tax fraud and laundering of tax fraud with criminal authorities by negotiating a CJIP, akin to a deferred prosecution agreement in the United States.[33]

The first CJIP was concluded with HSBC Private Bank Suisse SA in October 2017, in connection with the laundering of proceeds of tax fraud. To date, 32 CJIPs have been entered into, for a total amount exceeding €4.5 billion:

- 11 for laundering of tax fraud, tax fraud or complicity in tax fraud;
- 14 in corruption cases, including:
  - three relating to a system of illegal commissions set up by an employee;
  - one for corruption of foreign public officials in Libya;
  - one for corruption of foreign public officials in Algeria;
  - one as part of a coordinated settlement to resolve a joint investigation by US, UK and French authorities into bribery and corruption relating to both foreign public officials and private customers;
  - one for corruption of foreign public officials in Central Asia;
  - one for corruption of foreign public officials in Togo and breach of trust;
  - one for corruption of foreign public officials in Angola; and
  - one for corruption of foreign public officials in Bangladesh;
- one for influence peddling and related offences in connection with a consulting agreement concluded between a former French intelligence officer and a private company; and
- six in the field of environmental criminal law.

The first coordinated resolution by US and French authorities involving a foreign bribery case was signed in June 2018, for a total penalty of US$585 million, split equally between the DOJ and the PNF. This case highlights the potential for greater coordination by authorities in multiple jurisdictions, thereby limiting the imposition of multiple penalties on a company for the same conduct, as well as the increased risk of enforcement actions against multinational companies based on violations of anti-corruption laws across several jurisdictions.

Furthermore, the first CJIP, which was signed in October 2017, expressly noted that while the company did not 'voluntarily disclose the facts to the French criminal authorities, or acknowledge its criminal liability during the course of the investigation, one must recognise that when the investigation started and until December 2016, the French legal system did not provide for a legal mechanism encouraging full cooperation'. This can be interpreted as a strong signal that now that the CJIP is available, French authorities expect companies to self-report and cooperate. They have indicated as much on repeated occasions.

iii Guidelines on the CJIP regime

First version (2019)

On 26 June 2019, the AFA and the PNF co-signed common guidelines on the legal regime of the CJIP, designed to 'encourage legal entities to adopt a cooperative approach with the judicial authorities and the AFA'.[34]

The common guidelines listed the prerequisites and additional criteria taken into account by the public financial prosecutor before initiating settlement negotiations, namely:

- a proposal by the PNF in the course of preliminary investigations as an alternative to criminal proceedings (Article 41-1-2 of the French Code of Criminal Procedure) or during judicial investigations (Article 180-2 of the French Code of Criminal Procedure). The guidelines also mentioned that the company itself may express its interest in concluding a CJIP;
- sufficient evidence of acts of corruption or influence peddling;
- an absence of previous sanctions for such acts;
- implementation of an effective compliance programme;
- cooperation during the investigation and implementation of internal investigations;
- voluntary compensation of the victims of wrongful acts, even before the settlement negotiations are considered; and
- voluntary disclosure of relevant facts by the company.

Akin to the '9-47.120 FCPA Corporate Enforcement Policy' published by the DOJ,[35] the guidelines also enumerate the aggravating and mitigating factors that will be taken into consideration when negotiating the overall amount of the sanction. Among the factors weighing in the company's favour are self-disclosure, the quality of cooperation, the efficacy of its compliance programme and the thoroughness of the internal investigations conducted by the company. Nevertheless, the guidelines did not provide specific metrics on the magnitude of fine reductions that a company may obtain by self-reporting and cooperating.

According to the AFA and the PNF, their common guidelines on the legal regime of the CJIP will 'constitute for economic operators and foreign judicial authorities a factor of predictability and legal certainty'.[36] As indicated in its public guidance, the PNF appeared to take an approach similar to that of its international counterparts in that it provides credit for cooperating with criminal investigations and sought to impose disgorgement of any related financial benefits that the misconduct created. However, the PNF did not specify the precise calculation of those benefits.

The PNF's central role in the fight against international corruption has been reaffirmed in the Ministry of Justice's 2020 guidelines, in which the Ministry of Justice also insisted on the different channels for uncovering international corruption, such as whistleblower alerts, self-reporting, and domestic and foreign press articles containing 'credible and detailed factual elements'.[37]

Second version (2023)

The second version, which came out in January 2023, is described under Section II.

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

France is a party to many international agreements, including:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force in 1999;
- the Criminal Law Convention on Corruption of the Council of Europe, which entered into force in 2002;
- the Civil Law Convention on Corruption of the Council of Europe, which entered into force in 2003;
- the United Nations Convention against Transnational Organised Crime, which entered into force in 2003; and
- the United Nations Convention Against Corruption, adopted in Merida in 2003, which entered into force in 2005.

On 9 December 2021, the OECD Working Group on Bribery issued its fourth phase monitoring report assessing France's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The report underlines that

France has undergone significant achievements in sanctioning bribery of foreign officials since the third phase (October 2012), but nevertheless observes a remaining insufficiency in prosecutions and convictions.

The OECD Working Group recommended that France increase the means and resources devoted to investigators and magistrates and continue its efforts to render negotiated resolutions of corruption cases more attractive, while safeguarding the roles of the PNF in handling anti-corruption cases and the AFA in monitoring compliance measures.

As part of its mission to disseminate information to help prevent and detect bribery, the AFA contributes to the implementation of France's international commitments, in particular through the development of bilateral cooperation. The AFA may conclude cooperation agreements with foreign authorities carrying out similar missions of prevention and detection of corruption.[38] It regularly receives foreign delegations, organises or takes part in international cooperation actions, and exchanges best practices and training. With the support of the Council of Europe, as part of a joint initiative with the Italian National Anti-Corruption Authority, the AFA also contributed to the launch of the Network of Corruption Prevention Authorities in October 2018, which it chaired in 2020.

Finally, France participates in the European Public Prosecutor's Office (EPPO),[39] which is an independent body of the European Union responsible for investigating, prosecuting and bringing to judgment crimes against the financial interests of the European Union. In its first Annual Report, EPPO states that since 1 June 2021, when it began operations, it has processed 2,832 crime reports and opened 576 investigations, of which 515 were active by the end of 2021 for aggregated estimated damages of €5.4 billion. The cases handled by EPPO mainly concerned non-procurement expenditure fraud, VAT revenue fraud and cross-border investigations.[40]

IX LEGISLATIVE DEVELOPMENTS

i Law No. 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice

The Law on the European Public Prosecutor's Office (EPPO), environmental justice and specialised criminal justice of 24 December 2020 extends the scope of action of the PNF to the fight against anticompetitive practices, and lifts the requirement that a legal entity acknowledge the facts and accept the criminal characterisation before entering into a CJIP. This mechanism is also extended to certain environmental offences.[41]

In addition, the law introduces EPPO into national law. It specifies the powers and duties of members of EPPO at the national level. The prosecutors forming part of EPPO have jurisdiction throughout the national territory to investigate, prosecute and bring to trial the perpetrators of and accomplices in criminal offences affecting the financial interests of the European Union. The law also designates the Paris judicial court and the Paris Court of Appeal as competent to hear related cases.

ii Implementation of Directive (EU) 2019/1937 on whistleblower protection

In December 2019, a directive of the European Union came into force to establish common minimum standards for the protection of whistleblowers in reporting breaches of EU law that are harmful to the public interest.[42] The Directive requires the establishment of several reporting channels and an escalation process. Member States had two years to transpose the text into domestic law, this period being extended to four years concerning the establishment of internal reporting channels in private companies with 50 to 249 employees.

In France, the Directive was transposed by Law No. 2022-401 of 21 March 2022, which came into force in September 2022 and whose aim is to correct some limitations highlighted by a July 2021 report assessing the impact of Sapin II. Decree No 2022-1284 of 3 October 2022 was also adopted to strengthen whistleblower protection.

This law includes the following measures:

- an extension of the definition of what constitutes whistleblowing;
- a simplification of the whistleblowing procedure;
- a strengthening of the protection afforded to whistleblowers, including the nullity of retaliation measures such as the demotion or refusal to promote a whistleblower, forced transfers, salary reductions, early termination or cancellation of a contract, modification of work hours, or other practices amounting to intimidation, harassment, discrimination and blacklisting;[43]
- an extension of the protection to third parties helping the whistleblower (called enablers); and
- an obligation for companies to open their whistleblowing lines to third parties, including co-contractors and subcontractors.

iii Bill registered with the Presidency of the National Assembly on 7 July 2021, No. 4325 (not passed into law)

On 7 July 2021, two French MPs issued a report assessing the impact of Sapin II and formulated 50 proposals to reform the French anti-corruption legal framework.[44] This report was followed by a draft law aimed at reinforcing the fight against corruption, sometimes referred to as 'Sapin III', which was submitted to the National Assembly on 19 October 2021.[45] This bill considers several measures, including:

- a structural reorganisation of the AFA. The advisory and control functions over public actors currently performed by the agency would be transferred to the High Authority for Transparency in Public Life, which would become an administrative authority competent in matters of public ethics and corruption prevention;
- the tightening of the conditions for referral to the Sanctions Commission by making it compulsory for the AFA president to give the controlled entity a deadline to comply within a period of six months to two years before the matter can be referred to the Sanctions Commission;
- the removal of the condition that the headquarters of a parent company be located in France, in order to subject small subsidiaries of foreign groups established in France to the obligation to implement compliance programmes under Article 17 of Sapin II;
- the extension of the scope of a CJIP to allegations of favouritism; and
- the implementation of a legal framework for internal investigations applicable only in the event that the legal person is subject to parallel criminal proceedings for the same facts as those covered by internal investigations.

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i French Blocking Statute

Adopted in 1968, and amended in 1980, the Blocking Statute prohibits the transfer outside of France of certain information unless the proper channels provided by international treaties are used. Article 1 provides that, subject to international treaties or agreements, French nationals, French permanent residents and any director, representative, agent or employee of a French legal entity are prohibited from communicating economic, commercial, industrial, financial or technical information to foreign public officials if it is harmful to France's sovereignty, security or essential economic interests.[46] Article 1 bis provides that '[s]ubject to treaties or international agreements and applicable laws and regulations, it is forbidden for any person to request, search or communicate under written, oral, or any other form, documents or information of an economic, commercial, industrial, financial, or technical nature for the purpose of constituting evidence for or in the context of foreign judicial or administrative proceedings'.[47]

Violations of the Blocking Statute carry a maximum penalty of six months of imprisonment, a fine of up to €18,000 for individuals and €90,000 for legal entities, or both.[48] On 12 December 2007, in the *Christopher X* case, the French Cour de Cassation upheld the

conviction of a French lawyer for the communication of information obtained to serve in US proceedings.[49] In 2014, the protective aspect of the Blocking Statute was reaffirmed when a Court of Appeal used it to shield a French party from pre-trial discovery.[50]

The Blocking Statute permits disclosure of documents or information in accordance with French laws and regulations in force (including the EU's General Data Protection Regulation (GDPR)[51] and the French data protection legislation) and with treaties or international agreements such as the Hague Convention on the Taking of Evidence Abroad.[52]

The French Data Protection Authority (CNIL) has provided guidance on the interaction between French data protection law and the Blocking Statute, and has considered that the proportionality requirement in a US-style discovery context could only be satisfied if the processing and transfer of personal data were made in compliance with the applicable duty of confidentiality and the Blocking Statute.[53]

Treaties such as mutual legal assistance treaties,[54] as well as the Hague Convention, contain mechanisms allowing for foreign disclosure. Discovery may be obtained through the Hague Convention by way of a letter of request sent by a court in the requesting state or by diplomatic or consular personnel of the requesting state.[55]

Pursuant to Decree No. 2022-207 of 18 February 2022, as of 1 April 2022, companies receiving foreign requests for documents or information potentially covered by the Blocking Statute should contact the Strategic Intelligence and Economic Security Service (SISSE), a French government body. If consulted, the SISSE will issue, within one month, an opinion on the applicability of the Blocking Statute and will assist the targeted company by indicating the categories of documents that may be transmitted.[56]

ii Protection of whistleblowers

Before Sapin II, France had disparate sets of rules protecting different types of whistleblowers. Following Sapin II, as amended bv Law No. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers, French law now provides for a unified set of rules protecting whistleblowers (see Section VIII).

Sapin II defines a whistleblower as an individual who, without direct financial consideration and in good faith, discloses a crime, a felony or a violation of an international commitment legally ratified or approved by France, a threat to the public interest or, where applicable, a violation of a company's code of conduct.[57] The whistleblower must have personal knowledge of the reported facts, unless the reported facts are related to their professional activity. Certain facts, information or documents that are subject to national security or medical secrecy, or that are covered by legal privilege, are excluded from the scope of whistleblower rules. In addition, certain persons acting in the course of their jobs cannot claim the status of whistleblower, such as journalists, witnesses called to appear before a court or public servants denouncing facts they are aware of as part of their jobs (e.g., judges and labour inspectors).

In principle, French law does not require a person to provide information under whistleblowing policies. This must remain optional for employees.

There are three distinct obligations for French companies to set up a whistleblower system:

- Article 8 of Sapin II requires companies with more than 50 employees to implement an internal whistleblower mechanism;
- Article 17 of Sapin II also requires the implementation of a whistleblower protection mechanism for companies that are subject to an affirmative obligation to prevent corruption through the implementation of an anti-corruption compliance programme; and
- Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance requires the implementation of an alerting mechanism for disclosing risks of severe violations of human rights, health risks and serious environmental damage.[58] While the mechanism provided in Law No. 2017-399 is distinct from the internal whistleblowing system

required under Sapin II, the AFA recommends establishing, where appropriate, a single technical system for receiving alerts, as long as the requirements laid down in the two sets of rules are met.[59]

XI COMPLIANCE

Before Sapin II, French law did not mandate the implementation of an anti-corruption compliance programme and was thus perceived as falling short of international standards, particularly when compared to the 1977 US Foreign Corrupt Practices Act (FCPA) and the 2010 UK Bribery Act (UKBA).

Article 17 of Sapin II introduced mandatory compliance programme requirements, which had to be implemented by 1 June 2017 as part of a new set of proactive anti-corruption obligations. This requirement applies to:

- French companies having 500 or more employees and a turnover above €100 million;
- foreign companies belonging to a group having a French parent company, 500 or more employees in total and a consolidated turnover above €100 million; and
- all of the subsidiaries of (a) and (b).

As a result, any French entity that belongs to a group having a French parent company, 500 or more employees in total and a consolidated turnover above €100 million is subject to this obligation.

i Mandatory compliance programmes

The AFA is in charge of monitoring and assessing compliance programmes. It is headed by a magistrate under the joint supervision of the Ministry of Finance and the Ministry of Justice and possesses broad investigative and sanctioning powers.

On 22 December 2017, following a broad public consultation, the AFA published its Guidelines for public and private legal entities to prevent and detect acts of corruption (AFA 2017 Guidelines), which were revised on 12 January 2021 (Guidelines).[60]

The Guidelines are inspired by the best international standards.[61] Similar guidelines have been issued in the United States by the DOJ and Securities and Exchange Commission (2012),[62] as well as in the United Kingdom by the Ministry of Justice (2010).[63] The Guidelines are nonetheless a unique and thorough set of non-binding measures and procedures, different from and in certain respects more stringent than other anti-corruption standards, such as those established by the FCPA or the UKBA.

In addition to the Guidelines, the AFA released other practical guides to assist public and private legal entities with framing their compliance programmes appropriately, including:

- a practical guide to preventing conflicts of interests, issued on 18 November 2021, which aims at assisting public and private legal entities in identifying and addressing situations where conflicts of interests may arise;
- an anti-corruption guide for small and medium-sized companies, released on 16 December 2021, to foster the implementation of anti-corruption measures and compliance programmes in those companies, which are not compulsory under Sapin II;
- a practical guide on anti-corruption accounting controls, released on 8 April 2022, to outline best practices in the implementation of internal and external accounting procedures for those public and private legal entities subject to the obligation set out at Article 17 of Sapin II; and
- a comparison of French, American, British and World Bank Group anti-corruption standards, released in May 2023.

Top management's commitment to preventing and detecting corruption

Inspired by its Anglo-Saxon counterparts and the tone at the top approach, the AFA emphasises that the implementation of a risk management strategy and an anti-corruption compliance programme relies on the commitment of a company's top management to establish a culture of integrity, transparency and compliance.[64]

Although the involvement of companies' top management was not contemplated per se by Sapin II, it is at the forefront of the Guidelines. The AFA recommends that the commitment from top management be based on the following principles:

- adopting a zero-tolerance approach to corruption, especially by ensuring that the resources allocated are proportionate to the risk incurred and by using the organisation's audit reports to guarantee that the anti-corruption system is organised, effective and up to date;
- mainstreaming anti-corruption measures in the company's policies and procedures, with a particular focus on human resources management procedures, internal alert systems for reporting suspected cases of corruption and other applicable policies related to any process defined as high-risk by the risk map (see below);
- governance of the corruption prevention and detection programme, especially by appointing a compliance officer responsible for overseeing the deployment, implementation, evaluation and updating of the anti-corruption compliance programme;
- providing human and financial resources that are proportionate to the company's risk profile; and
- engaging in broad-based communication aimed at all staff about the company's bribery prevention and detection policy.

Enactment of a detailed and regularly updated anti-corruption code of conduct

A code of conduct defining and illustrating prohibited behaviours likely to constitute acts of corruption must be implemented. In that respect, the Guidelines specify that such code of conduct should not be merely a collection of best practices, but rather should prohibit those practices that are deemed inappropriate in light of the organisation's specific circumstances. The code must address gifts, invitations, facilitation payments, conflicts of interest, patronage and sponsorship and, where appropriate, lobbying.

The code of conduct, updated periodically, must be written in French, using simple and clear terms. It may be translated into one or more languages in order to be understood by employees from other countries.

Implementation of a detailed operational internal alert system

The Guidelines outline 10 operational items that an internal alert system established pursuant to Sapin II should include. They concern:

- the role of the line manager in directing and assisting his or her colleagues;
- the person designated (from within or outside the company) to collect alert reports;
- the measures implemented to ensure confidentiality of the disclosures and of a whistleblower's identity;
- the procedures applicable to authors of reports in providing information or documents;
- the procedures for communicating with the author of a report;
- the applicable steps to notify the authors upon receipt of an alert report and the time period necessary to decide on its admissibility;
- the measures taken to notify the author of a report at the end of the procedure and, where appropriate, the persons targeted by the alert;
- the procedure used, if no action is taken, to destroy the information on file identifying the author;
- whether the automated processing of disclosures is used, with the authorisation of the CNIL; and
- if applicable, the policy used to process anonymous reports.

The Guidelines also specify that the internal alert system is distinct from two other legal mechanisms, namely:

- the procedures implemented pursuant to Articles 6 to 16 of Sapin II to ensure the protection of whistleblowers reporting a crime or a major and clear violation of an international commitment or law; and
- the whistleblowing mechanism provided by Law 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and ordering companies.

The Guidelines mention the possibility of enacting a single system for processing the various disclosures mentioned above.

Six-step methodology for risk mapping

Article 17 of Sapin II provides that a risk map must be implemented and regularly updated. In that respect, the Guidelines stress that risk mapping potential acts of corruption serves two purposes: identifying, assessing, prioritising and managing corruption risks that are inherent in the organisation's activities; and informing top management and providing the compliance team with the required transparency for preventing and detecting those risks.

The Guidelines recommend following a six-step methodology:

- clarifying roles and responsibilities for elaborating, implementing and updating the risk map;
- identifying risks that are inherent in the organisation's activities;
- assessing exposure to corruption risks;
- assessing the adequacy and effectiveness of the procedures aimed at managing these risks;
- prioritising and addressing net or residual risks; and
- formalising and updating the risk map.

Third-party due diligence procedure

Sapin II requires companies to implement due diligence and risk assessment procedures relating to 'clients, rank one suppliers and intermediaries'. The Guidelines extend this obligation to all third parties – clients, main suppliers, subcontractors or intermediaries – with whom the organisation has or is about to initiate a relationship, with an emphasis on third parties identified in the risk map as presenting a risk of corruption.[65]

In addition, the AFA recommends using multiple indicators and gathering different sets of information, listed in the Guidelines, before initiating or continuing a contractual relationship.

Accounting control procedures

With respect to the obligation to implement control procedures aimed at ensuring that accounting systems are not used to conceal acts of corruption, the Guidelines note that, while companies are not required to establish new accounting procedures, they should nonetheless consider the concealment of acts of corruption as one of many risks that may arise when records are not prepared regularly, sincerely and faithfully. The Guidelines provide that controls can be performed internally or externally, but, in either situation, companies are advised to adopt a three-level procedure to conduct accounting and financial audits:

- at the first level, the persons responsible for preparing and approving journal entries should ensure that entries, especially if done manually, are properly substantiated and documented;
- at the second level, independent employees or collaborators should perform controls throughout the year to ensure that the first level of control is conducted accurately; and
- at the third level, internal audits should confirm the compliance of all accounting control procedures with the requirements of the company, and ensure that these procedures are scheduled at regular intervals and updated frequently.[66]

Corruption risk training

With respect to the requirement that training programmes for executives and employees most exposed to the risk of corruption be implemented, the Guidelines provide that the head of human resources should work with the compliance officer to identify which managers and other employees are most exposed to the risk of corruption. Companies should also enact a broader training and awareness plan so that all employees, regardless of their degree of exposure, are gradually trained to prevent and detect corruption.

The training should be delivered in an appropriate format, either in person or as e-learning modules, and in a language that the target audience understands.

Internal monitoring and assessment

Article 17 of Sapin II creates an obligation to implement an internal control procedure to evaluate the effectiveness and implementation of existing measures. The Guidelines recommend the adoption of a three-level process:

- at the first level, controls by operational or support staff, or by line managers;
- at the second level, a monitoring plan designed by the compliance officer or any other designated manager covering the prevention and detection of corruption in its entirety; and
- at the third level, an internal audit to determine whether corruption prevention and detection measures are effective.

ii The AFA's Sanctions Commission

The AFA has both an advisory and supervisory role, managed by two separate teams. In its advisory role, the AFA provides guidance regarding the detection and prevention of corruption by companies, including by issuing guidance on what an effective compliance programme should include. In its supervisory role, the AFA conducts audits to assess the quality and effectiveness of compliance programmes, and acts as a monitor. The AFA, however, does not have jurisdiction to bring charges if it uncovers any misconduct. In such a case, the AFA notifies the relevant public prosecutor of any such suspicious conduct.

The AFA conducts compliance audits assessing the implementation of the aforementioned obligations,[67] and non-compliance can result in administrative fines of up to €1 million. If such an audit is conducted, the fulfilment of the guidelines laid down by the AFA, as well as the periodic reassessment of existing programmes, will prove critical.

The first hearing of the Sanctions Commission of the AFA took place on 25 June 2019 against a French electrical equipment manufacturer for alleged violations of five anti-corruption obligations under Article 17 of Sapin II, namely the implementation of a risk map, a code of conduct, an internal alert system, third-party evaluation and accounting control procedures. In its 4 July 2019 decision, the Sanctions Commission of the AFA declined to issue an injunction or impose a financial penalty, while providing additional guidance on how to implement adequate compliance programmes. One notable aspect of the ruling is that it indicates that Sonepar remedied any deficiencies in its compliance programme between the date of the AFA's director's report on Sonepar's alleged violations and the decision of the Sanctions Commission. The Sanctions Commission held that 'on the date on which it made a ruling, none of the breaches relied on by the Director of the AFA to propose the issuing of an injunction [were] identified by the Sanctions Commission'.[68]

On 7 February 2020, the Sanctions Commission of the AFA rendered a second decision against a French multinational specialising in mineral-based products.[69] The Sanctions Commission ruled that its code of conduct and accounting procedures and controls did not comply with the requirements of Article 17 of Sapin II. With respect to the former, it

ordered the company to update its code of conduct by 1 September 2020. With respect to the latter, the Sanctions Commission noted that the company had engaged in a financial and accounting reorganisation and requested that the company provide evidence demonstrating its complete implementation of accounting control procedures by 31 March 2021. By virtue of two subsequent rulings, respectively on 7 July 2021 and 30 November 2021, the Sanctions Commission deemed that the company had abided by the injunction with regards to the update of its code of conduct and the implementation of accounting procedures and controls in compliance with the requirements of Article 17 of Sapin II.[70]

The fact that the Sanctions Commission's hearings are public is a powerful incentive for companies to ensure that their compliance programmes are satisfactory in the eyes of the AFA. To that end, companies would be well advised to comply, to the fullest extent possible, with the French-specific guidelines, which can differ significantly from their foreign equivalents.

iii Anti-corruption due diligence in the context of mergers and acquisitions

On 12 March 2021, the AFA updated its 'Practical Guide – Anti-Corruption Due Diligence in the Context of Mergers and Acquisitions',[71] which encourages potential acquirers, regardless of their characteristics (business model, size, staff, nature of activities, etc.), to evaluate the risks associated with the potential involvement of the target company in a corruption case and the quality of the target's compliance programme in order to assess the extent to which any deficiencies will need to be addressed once the transaction is completed.

Under French law, legal entities are criminally liable for offences committed by them or their representatives for their benefit.[72] As for civil liability, the consequences of any misconduct by the target will be borne by the acquiring entity if the target is merged into the acquirer or if both merge to form a new company.

Consistent with its prior general guidance, the AFA has indicated, through non-binding guidelines, its stated goal of helping French companies meet the highest international anti-corruption standards, including in the context of mergers and acquisitions. The AFA's Guide stands out in particular for the level of detail that it provides to companies on the steps that they should take.

The AFA defines different steps that acquirers should consider implementing before and after signing transaction documentation:

- gathering information related to the target's anti-corruption history, including whether it has been previously involved in any corruption cases;
- during the period between the signing and the closing, conducting further assessments as necessary, including with respect to the target's high-risk third-party relationships, accounting controls and whistleblowing alert systems; and
- obtaining additional information by means of questionnaires, document requests or even on-site visits, as necessary.

The AFA notes that the level of detail of the due diligence depends on the level of risk identified. Such risk assessment should be managed by an employee appointed by the company to manage the due diligence process (or an external adviser) and should be based on different factors, including the company's relationship with third parties, the countries and sectors in which it operates, its activity and business model, and its history of prior convictions. Upon completion of the transaction, the acquirer should ensure that its compliance programme is appropriately implemented throughout the target and that any corrective measures are properly executed. If any suspicions of corruption appear during the due diligence process, an audit may be warranted. To the extent that any misconduct is uncovered, the company should promptly terminate these actions and consider disciplinary sanctions against the employees involved.

XII OUTLOOK AND CONCLUSIONS

Taking a step back, the most momentous development of 2023 is probably the revision of the PNF's corporate enforcement guidelines discussed in Section VI, coupled with the publication of guidance about anti-corruption internal investigations.

On 14 March 2023, the AFA and the PNF jointly issued updated guidance about anticorruption internal investigations (Guide).

The purpose of the Guide is to educate companies about best practices on how to conduct an anti-corruption internal investigation while respecting the rights of all parties involved.

Among the points to bear in mind when conducting an internal investigation, the Guide recommends that before carrying out an internal investigation, companies should draft and adopt as part of their policies and procedures an internal investigation protocol. This recommendation serves several purposes, including safeguarding the rights of the individuals targeted by the investigation, securing the integrity and admissibility of the evidence collected, and ensuring consistency of methodology across internal investigations. The last is an important point for the company to demonstrate if the AFA audits their compliance programme.

The Guide states that if external lawyers are involved, they should not be the same as those handling the criminal defence of the company or the employees targeted by the investigation. As to the former, we do not believe that this is the case. The company may choose under certain circumstances to have different lawyers handle the internal investigation on the one hand, and the criminal defence of the company on the other, but this is by no means an obligation: it is entirely a matter of strategic choice for the client to decide.

This is why companies should exercise caution before implementing what is only a recommendation from the Guide into their policies and procedures. It seems more prudent for a company to keep its options open as to its choice of external counsel. Companies should remember that communications with in-house counsel and outside investigators who are not lawyers (including forensic consultants) are not privileged. Of note, the Guide considers that what it calls 'the document drafted at the end of the internal investigation' is not privileged, even if it was drafted by lawyers. Again, we do not see why this would be the case. It is true that the company, which is not bound by professional secrecy obligations, may choose to disclose the internal investigation report as it sees fit, as a matter of strategic choice. However, the report itself, which is a document drafted by a lawyer for his or her client, remains privileged.

The Guide cautions international groups conducting internal investigations in France to be extra vigilant as to the lawfulness, fairness and proportionality of the means of investigation used. For example, e-discovery measures should respect the EU GDPR as interpreted by French data protection law, and the persons targeted by the investigation should be afforded certain procedural rights, including before their data is reviewed and before they are interviewed. Drafting a comprehensive investigation report is highly recommended, and, if the internal investigation is conducted in parallel to a criminal investigation, making the report available to the prosecutor may be viewed as evidence both of the company's willingness to cooperate and of the strength of its compliance programme.

If circumstances so warrant, the company may consider self-reporting to the criminal authorities, for reasons and under conditions outlined in the updated corporate enforcement guidance (discussed in Section VI), to which the Guide makes explicit reference. In any event, an internal investigation that identifies shortcomings in the anti-corruption compliance programme should be followed by corrective measures.

As the press release accompanying the Guide makes clear, the PNF and the AFA view the opening of an internal investigation in cases of suspected misconduct as 'a sound management reflex.' If facts indicative of a criminal offence are unearthed, then having conducted an internal investigation in a 'loyal and structured' fashion is helpful if the company wants to negotiate a CJIP.

In sum, the guidance published in 2023 offers welcome clarifications, predictability and transparency for companies on how to handle suspicions of misconduct in their midst. Looking ahead, additional guidance on compliance programmes is expected in the near future.

CLEARY GOTTLIEB

Guillaume de Rancourt gderancourt@cgsh.com

12 Rue De Tilsitt, Paris 75008, France
Tel: +33 140 746 800
www.cgsh.com

Read more from this firm on Lexology

Endnotes

1 Guillaume de Rancourt is counsel at Cleary Gottlieb Steen & Hamilton LLP.
2 Law No. 2016-1691 dated 9 December 2016 on transparency, combating corruption and the modernisation of economic life (Sapin II).
3 AFA and PNF, Guidelines for the implementation of the CJIP (16 January 2023).
4 See Articles 432-11 and 433-1 of the French Criminal Code. All influence-peddling offences are punishable by five years' imprisonment and a fine of €500,000 for individuals and €2.5 million for legal entities, except for active and passive influence peddling by public officials, which is punishable by 10 years' imprisonment and a fine of €1 million, which may be increased in either case to an amount corresponding to twice the proceeds of the offence. Comp. Articles 434-9-1 (domestic judicial staff), 433-2 (private individuals), 435-4 (foreign public officials) and 435-10 (foreign judicial staff) with Article 433-1 (domestic public officials) of the French Criminal Code.
5 Article 433-1 of the French Criminal Code.
6 Article 432-11 of the French Criminal Code.
7 Articles 433-1 and 432-11 of the French Criminal Code.
8 Article 434-9 of the French Criminal Code.
9 Articles 445-1 and 445-2 of the French Criminal Code.
10 AFA, Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism (January 2021), ¶ 298.
11 Article 706-1-1 of the French Code of Criminal Procedure.
12 See Articles 433-1, 433-2, 434-9-1, 435-4 and 435-10 of the French Criminal Code.
13 Articles 432-11 and 433-1 of the French Criminal Code.
14 Articles 435-1 and 435-3 of the French Criminal Code.
15 Article 434-9 of the French Criminal Code.
16 Article 433-1 of the French Criminal Code.
17 Article 434-9 of the French Criminal Code.
18 Articles 432-17 and 433-25 of the French Criminal Code.
19 Article 131-38 of French Criminal Code.
20 Article 131-39 of the French Criminal Code.
21 Articles 131-39-2, 433-26, 434-48, 435-15 and 445-4 of the French Criminal Code.
22 Article 41-1-2 of the French Code of Criminal Procedure, amended by Law No. 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office (EPPO), environmental justice and specialised criminal justice.
23 The French Criminal Code criminalises active and passive bribery of foreign or international public officials (Articles 435-1 and 435-3 of the French Criminal Code) and of foreign or international judicial staff (Articles 435-7 and 435-9 of the French Criminal Code).
24 Article 435-11-2 of the French Criminal Code.
25 Article 324-1 of the French Criminal Code.
26 ibid.
27 Article 324-2 of the French Criminal Code.
28 Article 324-3 of the French Criminal Code.
29 See Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering; Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing; Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.
30 Articles L561-15 to L561-23 of the French Monetary and Financial Code.
31 French Ministry of Justice, Guidelines on criminal policy in the fight against international corruption (2 June 2020).
32 U Bernalicis and J Maire, Information report on the evaluation of the fight against financial delinquency, registered with the Presidency of the National Assembly on 28 March 2019, No. 1822, p. 173. The number of ongoing investigations related to offences against probity including corruption has increased from 239 in 2018 to 318 in 2020. See U Bernalicis and J Maire, Information report on the implementation of the conclusions of the information report (No. 1822) of 28 March 2019 on the evaluation of the fight against financial delinquency, registered with the Presidency of the National Assembly on 6 July 2021, No. 4314, p. 92.
33 Article 41-1-2 of the French Code of Criminal Procedure.
34 AFA and PNF, Guidelines for the implementation of the CJIP (26 June 2019), p. 2.
35 DOJ, '9-47.120 – FCPA Corporate Enforcement Policy'. The FCPA Guide provides a non-exclusive list of factors to be considered by the DOJ when determining whether to bring charges and negotiating plea or other agreements. See also DOJ and US Securities and Exchange Commission, 'A Resource Guide to the US Foreign Corrupt Practices Act', 2nd edition (July 2020).
36 AFA and PNF, Guidelines for the implementation of the CJIP (26 June 2019), p. 2.
37 French Ministry of Justice, Guidelines on criminal policy in the fight against international corruption (2 June 2020).

38 See, e.g., the technical cooperation protocol concluded between the AFA and the General Inspectorate of the Government of Vietnam, on 15 January 2018, in Hanoi, aimed at strengthening the technical capacities of Vietnamese authorities.
39 Articles 1–5 of Law No. 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice.
40 EPPO, 2021 Annual Report, 2022, pp. 5, 13.
41 See Law No. 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice, which created a new Article 41-1-3 in the French Code of Criminal Procedure.
42 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.
43 See Law No. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
44 R Gauvain, O Marleix, 'Information Report on the assessment of the impact of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.
45 See Draft law No. 4586 aimed at reinforcing the fight against corruption.
46 Law No. 68-678 of 26 July 1968 relating to the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons, modified by Law 80-538 of 16 July 1980, Article 1.
47 ibid., Article 1 bis.
48 ibid., Article 3.
49 Cass Crim, 12 December 2007 No. 07-83228.
50 Nancy Court of Appeal, 4 June 2014, No. 14/01547.
51 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
52 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, 23 UST 2555, 847 UNTS 231.
53 Commission nationale de l'informatique et des libertés, Délibération No. 2009-474 (23 July 2009), (concerning recommendations for the transfer of personal data in the context of US court proceedings known as discovery). Article 48 of the GDPR provides that judgments of a foreign court requiring the transfer of personal data will be enforced so long as they are based on an international agreement in force between the two countries.
54 See, e.g., Treaty on Mutual Legal Assistance in Criminal Matters Between the United States of America and France, US-Fr, 10 December 1998, TIAS No. 13010.
55 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 18 March 1970, 847 UNTS 231, Article 1.
56 Decree No. 2022-207 of 18 February 2022 relating to the communication of economic, commercial, industrial, financial or technical documents and information to foreign natural or legal persons, Articles 2, 4.
57 Law No. 2016-1691 dated 9 December 2016 on transparency, combating corruption and the modernisation of economic life, Article 6. See also ibid., Article 17.
58 Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance, Article 1 (which added a new Article L. 225-102-4 to the French Commercial Code). This obligation applies to companies employing, at the end of two consecutive financial years, 'at least 5,000 employees within the company and its direct and indirect subsidiaries whose head office is located on French territory, or at least 10,000 employees within the company and in its direct or indirect subsidiaries whose head office is located on French territory or abroad'.
59 AFA, 2021 Guidelines, p. 34. See also AFA, Guidelines for public and private legal entities to prevent and detect acts of corruption (December 2017), p. 12.
60 The new Guidelines became effective on 13 January 2021, with a six-month period for companies to adapt their compliance programmes to the extent required.
61 AFA 2017 Guidelines, p. 3.
62 See DOJ, '9-47.120 – FCPA Corporate Enforcement Policy' (last updated in November 2019).
63 See Ministry of Justice of the United Kingdom, 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing' (March 2011).
64 AFA's Guidelines, pp. 13–15.
65 AFA Guidelines, pp. 63–64.
66 AFA Guidelines, p. 10.
67 To date, the AFA has initiated over 110 audits. See AFA, annual report 2018 (referencing 47 audits); annual report 2019 (referencing 36 additional audits); and annual report 2020 (referencing 30 additional audits).
68 Sanctions Commission of the AFA, Decision No. 19-01, Société S SAS et Mme C (4 July 2019), p. 15.
69 Sanctions Commission of the AFA, Decision No. 19-02, Société I et M. C K (7 February 2020).
70 Sanctions Commission of the AFA, Decision No. 19-02, Société I et M. C K (7 July 2021); Sanctions Commission of the AFA, Decision No. 19-02, Société I et M. C K (30 November 2021).
71 AFA's Practical Guide – Anti-corruption due diligence for mergers and acquisitions, 2nd edition (12 March 2021). The AFA had published the first edition on 17 January 2020. The updated version takes into account the 25 November 2020 decision of the criminal chamber of the Cour de Cassation (Cass Crim, 25 November 2020, No. 18-86.955) whereby in the case of a merger where a company is acquired by another company falling within the scope of the Council Directive 78/855/EEC of 9 October 1978 on the mergers of public limited liability companies, the acquiring company may be sentenced to a fine or to seizure measures for acts constituting an offence committed by the company being acquired prior to its acquisition.
72 Article 121-2 of French Criminal Code.

Chapter 5

Greece

Ilias G Anagnostopoulos and Jerina Zapanti[1]

Summary

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.

Domestic legislation is frequently updated in harmonisation with relevant EU (and international) legislation. In this respect, there has been a restructuring of the anti-corruption and bribery provisions that are all now included in the Greek Criminal Code (GCC). In addition, since 2019, the National Transparency Authority has assumed the responsibilities of five (pre-existing) auditing public bodies: the Office of the Inspector General of Public Administration, the Inspectors-Auditors of Public Administration, the Inspectors of Health and Welfare Services, the Inspectors of Public Works, the Inspectors-Auditors of Transport and the General Secretariat for Combating Corruption. This merge was done to facilitate the National Transparency Authority's mission to design and implement policies for the detection and exposure, or prosecution, of acts of corruption.

New legislation was introduced regarding corporate governance of listed companies, and amendments have been made to corporate law to ensure that a minimum of compliance and good practices is satisfied by all medium-sized and large entities.

II YEAR IN REVIEW

The past year has been a year of adjustment to new regulations (especially in the public sector) regarding practices and procedures, and upgrading of auditing tools. There is a steady effort to update administrative processes and the digitisation of many processes so that many more functions of the public sector can be concluded online following automated know your customor procedures. In addition, there is an ongoing restructuring and digitisation of book-keeping and tax regulations, which will enable the tax authorities (and other enforcement agencies that have the power to access such information) to have an accurate overview of various transactions and target suspicious activity more easily.

III 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 (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 one's 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 one's 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 (ranging from a few days to five years) and pecuniary sanctions. If the act is committed in the course of one's professional duties it is punishable with imprisonment 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 an official in breach of his or her duties (felony) the act is punishable with incarceration for up to 10 years and pecuniary sanctions and if the act of passive bribery is committed in breach of duty habitually the act is punishable with incarceration for up to 15 years.

As regards active bribery, if the act is a misdemeanour, it is punishable with imprisonment of up to three years and pecuniary sanctions or imprisonment ranging from five to eight 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 include fines, temporary or permanent suspension of activity, prohibition from exercising specific activities, and temporary or permanent ban from public tenders.

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.

IV ENFORCEMENT: DOMESTIC BRIBERY

After years of rearranging the powers of various enforcement agencies, investigation and prosecution of bribery and corruption is done by the financial and economic crimes prosecutors and a selected group of judges with the first instance court who are assigned exclusively to bribery and corruption cases. These special bodies have extensive powers in terms of gathering evidence and seizing property, and almost unlimited access to privileged information (e.g., tax records, bank records and stock market transactions). They also have the power to use the resources of other enforcement or regulatory agencies such as the Financial Police and the Financial and Economic Crime Unit (FECU), which enables targeted and more effective investigations.

V 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 European Union'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 and gratuities, among other things 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 criteria such as common experience, custom and other characteristics of the transaction (e.g., long-term cooperation). Money laundering provisions may apply if payments are linked to questionable conduct (e.g., proceeds of a criminal act).

Facilitating payments (direct or indirect) are prohibited. The wording of Articles 235 and 236 of the GCC on passive and active bribery respectively covers 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 (e.g., gifts and benefits). 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 the subject of a criminal prosecution and conviction. After ratification of the OECD Anti-Bribery Convention with Law 2656/1998 and other international instruments and the amendments of the 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 came into force. These sanctions are usually administrative fines and, depending on the severity of the misconduct, restrictions regarding the operation of entities, such as debarment from public tenders, suspension of participation in subsidies programmes and suspension of operations for a specific period of time. 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 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 Office of Financial and Economic Crimes Prosecutors. 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 Office of Financial and Economic Crimes Prosecutors may request the assistance of any enforcement agency such as the FECU and the Hellenic Capital Market Commission, and there is also support by experts (if the process of information and evidence requires special expertise). It is also quite usual for the Hellenic FIU (the authority investigating money laundering acts) to conduct a parallel inquiry in corruption offences by monitoring and gathering information on suspicious transactions

or sudden changes in the financial status of individuals and entities, among other things. 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 Office of Financial and Economic Crimes Prosecutors for further actions. There is also a provision for a special office of experts that will assist the prosecutor in his or her work. The prosecutor 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).

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 (possibly 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. Such provisions (with limited application) 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.

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 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 carried out by a judge, following an agreement between the prosecutor and the defendant. Violent crimes are explicitly excluded. Generally speaking, plea bargaining provisions apply to the following categories of cases:

- where the defendant has made full restitution to the victim; and
- 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 and accessories, among other officials, that have acted in Greece, and their conduct facilitated bribes to foreign or domestic public officials.

The basic penalties for violation of foreign bribery law – with respect to individuals – are the same as bribery of domestic public officials, and range from imprisonment for up to five years (for misdemeanours) to imprisonment for up to eight years (active bribery) or 10 years (for felonies). Passive bribery under aggravating circumstances is punishable with imprisonment of up to 15 years.

Sanctions against legal entities that have gained or benefited from acts of corruption include fines, temporary or permanent suspension of activity, prohibition from exercising specific activities, and temporary or permanent ban from public tenders.

VI ASSOCIATED OFFENCES

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. Currently, businesses and the self-employed are transitioning to fully electronic books and records that will enable real-time monitoring of their financial status and behaviour by the Revenue Service. 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, discrepancies between registrations and payments, insufficient documentation or failure to justify the transaction 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 and disclosure of unknown or unregistered assets, among other things. 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.

Law 4557/2018 (as amended) is the core anti-money laundering legislation. It includes provisions of the second European Parliament and European Council Directive against money laundering (Directive 2005/60/EC), the third European Parliament and European Council Directive against money laundering (Directive 2006/70/EC), the European Parliament

and European Council Directive (Directive 2015/849/EC on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) and Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. All supporting regulations and administrative orders are compatible with Law 4557/2018, which is also the means to apply the provisions of all international instruments.

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 15 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.

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Greek authorities are generally cooperative with foreign authorities in terms of gathering and forwarding evidence, seizing properties or investigating possible misconduct. Although there are currently no new significant investigations regarding bribery and corruption, there are many occasions where the Greek authorities are requested either to forward information and evidence, or they receive notice for possible misconduct, which they follow up and investigate.

VIII 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.

IX LEGISLATIVE DEVELOPMENTS

Although the core legislation was not significantly amended during the past year, there have been some adjustments in accordance with EU law and regulation, and reforms in company law (especially regarding listed companies), tax regulations (especially regarding book-keeping obligations) and whistleblower protection (for breaches of Union law). These amendments aim at promoting transparency in transactions and early detection of possible misconduct.

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Certain categories of officials or public figures (e.g., politicians, government officials and high-ranking public officers) 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 (e.g., funding of trade unions and crimes against the state). 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.

Law 4990/2022 has integrated EU Directive 2019/1937/EU regarding the protection of persons reporting breaches of Union law. There are provisions in respect of gathering, handling and reporting information from whistleblowers, measures for protecting whistleblowers from retaliation, protection of privilege and personal data, and provisions for compensation and legal assistance.

XI COMPLIANCE

A comprehensive compliance programme may be very effective in detecting and exposing corruption acts in all kinds of financial and economic activities. In certain types of companies it has become mandatory (listed public limited companies incorporated, entities of public interest). 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.

XII OUTLOOK AND CONCLUSIONS

It is expected that the public sector will continue to update and upgrade its processes and adopt compliance and internal controls procedures. Digitisation of many processes of the public sector have had a positive impact not only in their speeding up but also in the transparency of dealings with public services. Measures have been taken to enable the reporting of corruption practices to the authorities, but there is still a need to address issues related to corporate liability (e.g., lack of plea bargaining proceedings for entities) and parallel proceedings for the same misconduct (criminal, civil, administrative).

Ilias G Anagnostopoulos ianagnostopoulos@iag.gr
Jerina Zapanti jzapanti@iag.gr

Odos P Loakeim 6, Athens GR 106 74, Greece
Tel: +30 210 729 2010
www.iag.gr

Endnotes

1 Ilias G Anagnostopoulos is managing partner and Jerina Zapanti is a partner at Anagnostopoulos.

Chapter 6

Italy

Roberto Pisano[1]

Summary

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 of 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 light of the above, it can certainly be stated that in the past decade the effectiveness of the Italian anti-corruption system has been significantly improved.

II YEAR IN REVIEW

Several high profile prosecutions and trials for bribery offences have been conducted by Italian authorities in recent years, especially with regard to foreign bribery, with verdicts and written grounds that were released in the course of 2022 and 2023.

In particular, in July 2022, the Milan Court of Appeal finally confirmed the acquittal of all defendants in the ***Eni-Shell Nigeria*** case, in relation to which the companies Eni and Shell, and their top managers, had been prosecuted for the alleged offence of bribery of Nigerian public officials (the President, the Attorney General and the Minister of Petroleum) in connection with the granting in 2011 of an oil prospecting licence by the Nigerian government to the subsidiaries of Eni and Shell.

In November 2022, the Milan Court of Appeal also rejected a civil action for damages filed by the Nigerian government against the same defendants, and the appeal before the Court of Cassation is expected to be heard in the course of 2024.

The written grounds of the mentioned landmark decisions represent a precious and unavoidable legal standard for all future cases of foreign bribery.

III 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 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 or alleged relations with a public official, unduly makes someone give or promise to give money or other advantage as payment for his or her unlawful intermediation with the public official, or as consideration for the carrying out by the public official of an act conflicting with the office's duties, or for the omission or delay of an office's act. In conclusion, the less serious offence of 'instigation to bribery', provided for by Article 322 ICC, occurs where the private party makes an undue offer or promise that is not accepted by the public official, or where the public official solicits an undue promise or payment that is not carried out by the private party.

The above-mentioned bribery offences apply in relation not only to public officials, but also, with exceptions, to persons in charge of a public service (Article 320, ICC).

According to Italian law:

- public officials are persons 'who perform a public function, either legislative or judicial or administrative' (for the same criminal law purposes, 'an administrative function is public if regulated by the rules of public law and by acts of a public authority and characterised by the forming and manifestation of the public administration's will or by a procedure involving authority's powers or powers to certify'; Article 357, Paragraphs 1 and 2, ICC); and
- 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 and police officers, 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 and entertainment, among other things, 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 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, among other things, to Italian officials. As of 1 January 2008, 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 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.

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 three to eight 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 four years and six months 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, and they 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).

IV ENFORCEMENT: DOMESTIC BRIBARY

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 prosecutions and trials, 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 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

This case concerns the prosecution of top politicians and officers of the Lombardy region for allegedly having facilitated the obtention of public healthcare funds by certain private hospitals in exchange for money or other financial 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 and finally by the Court of Cassation. 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 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, and on 21 February 2019, the Court of Cassation reduced the sentence to five years and 10 months.

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 key leg of the proceeding had 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 two other legs of the proceeding, the Milan Court of First Instance sentenced an important public official to, respectively, two years and two months' imprisonment on 19 July 2016, and three years' imprisonment on 9 May 2018. The Milan Court of Appeal reduced the first sentence to eight months' imprisonment on 10 November 2020, and quashed the second sentence on 1 December 2020.

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 high tides. On 16 October 2014, a key 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. With respect to another leg of the proceeding, transferred for geographical jurisdiction to Milan, on 15 April 2016 the Milan Court of First Instance sentenced a significant public official (former member of parliament and adviser to the Ministry of Economy) to two years and six months' imprisonment for the offence of 'trafficking of unlawful influences'. This conviction was first confirmed by the Milan Court of Appeal on 29 June 2017, but was then quashed by the Court of Cassation in April 2018 due to a time bar.

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 the Mafia to be well-founded). In October 2019, the Court of Cassation confirmed most of the convictions, but rejected the Mafia aggravating circumstances.

V 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 limitations that 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).

As previously mentioned, as of 2000, under Article 322 bis ICC, the reach of bribery offences has been significantly broadened in that it is 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, as explained in Section II. Facilitating payments are prohibited by Italian law. Payments amounting to bribery offences (described in Section II) are prohibited either if 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 and 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 (see Articles 12 and 17 of Legislative Decree No. 231/2001, which provide for the non-applicability of disqualifications, and the reduction of fines from one-half to two-thirds, in the event the relevant requirements are met).

With respect to individuals, on 31 January 2019 Law No. 3/2019 introduced the benefit of exemption from criminal responsibility for anyone who voluntarily self-reports corruption crimes. In order to qualify for the exemption, the self-reporting has to be made within four months of the offence and prior to receiving notice of being subject to investigation, and it should provide the authorities with useful and concrete indications to secure evidence of the crime and to identify the other offenders.

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.

VI ASSOCIATED OFFENCES

Financial record-keeping and money laundering

The relevant provisions on bookkeeping and auditing, among other things, 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 assets 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 contained in Legislative Decree No. 231 of 21 November 2007.

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:

- customer due diligence obligations, which mainly consist of the following activities:
  - identifying the customer and verifying the customer's identity based on 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;
  - conducting ongoing monitoring in the course of the business relationship or professional service;
- record-keeping obligations; and
- reporting obligations: according to Articles 35 to 42 of Legislative Decree No. 231/2007, 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.

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Several prosecutions and trials 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 defendants because the charges were time-barred.

ii The Nigeria Bonny Island case

This case concerns an investigation conducted by the Milan prosecutor's office against the companies Eni SpA and Saipem SpA in relation to the offence of foreign bribery allegedly committed by the companies' officers (in the frame of the international consortium TSKJ, involving the US company KBR/Halliburton, Japanese company JGC and French company Technip), and allegedly consisting of significant payments to Nigerian public officials between 1994 and 2004 to win gas supply contracts. On 17 November 2009, the Milan judge for the preliminary investigations rejected the prosecutors' application to apply a pretrial interim measure prohibiting Eni SpA and Saipem SpA from entering into contracts with the Nigerian National Petroleum Corporation, owing to lack of Italian jurisdiction. The case against Eni SpA was subsequently dismissed, and the case against five officers of Saipem SpA was also dismissed on 5 April 2012 because of the time bar. In contrast, in July 2013, Saipem SpA was sentenced by the Milan Court of First Instance to a fine of €600,000 and to confiscation of €24.5 million. In February 2015, the conviction of Saipem SpA was confirmed by the Milan Court of Appeal, and in February 2016 the Court of Cassation issued the final judgment convicting Saipem SpA.

iii The Finmeccanica–AgustaWestland case

This case concerns an investigation conducted by the prosecutor's office of Busto Arsizio (an area close to Milan) against the companies Finmeccanica and AgustaWestland, and their top managers, in relation to the offence of foreign bribery allegedly committed in 2010 in

connection with the supply to the Indian government of 12 helicopters. In 2014, the prosecutor discontinued the investigations against Finmeccanica in the light of the assessment that the company was not involved in the alleged wrongdoing and had implemented adequate compliance programmes to prevent corruption offences. In the same period, AgustaWestland SpA and AgustaWestland International Ltd entered into a plea bargain with the prosecutor's office. In October 2014, the Milan Court of First Instance acquitted on the merits the top executives of both companies in relation to the bribery offences, but sentenced them to approximately two years' imprisonment for the offence of tax fraud. In April 2016, the Milan Court of Appeal overturned the acquittal of the two executives and sentenced them to four and four-and-a-half years' imprisonment respectively. These convictions were then quashed by the Court of Cassation on 16 December 2016 and, in the subsequent appellate trial, the Milan Court of Appeal acquitted both defendants in January 2018, and the Court of Cassation confirmed the acquittal in May 2019.

iv The Eni-Saipem Algeria case

In 2013, the Milan prosecutor's office started a criminal investigation into the companies Eni SpA and Saipem SpA, and 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 before the Milan Court of Appeal ended in January 2020 with the acquittal of all defendants, and the acquittal was then finally confirmed by the Court of Cassation in December 2020.

v The Eni-Shell Nigeria case

In November 2013, the Milan prosecutor's office started a 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 (in particular, the President, the Attorney General and the Minister of Petroleum) 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 for trial. The trial at first instance, which started in 2018, ended in March 2021 with the acquittal of all the defendants. The acquittal was finally confirmed by the Milan Court of Appeal in July 2022. In November 2022, the Milan Court of Appeal rejected a civil action for damages filed by the Nigerian government against the same defendants. In June 2021, in a leg of the same case, the Milan Court of Appeal also finally acquitted two businessmen who had been sentenced to four years' imprisonment at first instance following a summary trial.

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Italy is a signatory to the following European and international conventions with relevance for anti-corruption purposes:

- the 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);
- the 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

- 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
  - the UN International Convention against Corruption, New York, 31 October 2003 (ratified by Law No. 116/2009, entered into force on 15 August 2009).

Italy actively participates in the OECD Working Group on Bribery and with the Council of Europe's Group of States against Corruption, whose recommendations have mostly been implemented by Italy.

IX 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, and 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 prosecutors' offices investigating cases of corruption, as well as providing the ANAC with effective powers of supervision over relevant public tenders.

Additional provisions, providing especially for an increase in the periods of punishment, entered into force on 31 January 2019, further to Law No. 3/2019 (the Bribe Destroyer Act).

X 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). However, 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).

XI 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 EU Framework Decision 2003/568/JHA on combating corruption in the private sector.

The significant powers given to the ANAC in 2014 were an additional concrete step in the right direction.

Studio Legale Pisano

Roberto Pisano robertopisano@pisanolaw.com

Via Cino Del Duca 5, Milan 20122, Italy
Tel: +39 027 600 2207
www.pisanolaw.com

Endnotes

1 Roberto Pisano is the managing partner of Studio Legale Pisano.

Chapter 7

Japan

Yusuke Takamiya, Aki Tanaka and Aritsune Miyoda[1]

Summary

I INTRODUCTION

Japan is ranked 18th on the 2022 Corruption Perceptions Index published by Transparency International and is generally seen as one of the least corrupt countries in the world. However, foreign bribery has become a focus of attention of Japanese companies due to the increase in overseas business transactions and activities over the past 10 years or more. Further, the Unfair Competition Prevention Law (UCPL), which is the primary regulation regarding foreign bribery, has been amended this year to increase the penalty and expand the law's territorial jurisdiction. The issue of foreign bribery is expected to continue to be a focal point for Japanese companies. On the other hand, domestic bribery appears far less common in Japan than in other countries. However, Japan is not free from domestic bribery and corruption incidents, which continue to emerge. Compliance with domestic bribery regulations remains a crucial and serious issue, especially given that Japanese society views domestic bribery as a very serious transgression as a result of the infrequency of bribery in Japan.

In Japan, both domestic and foreign bribery are regulated. The Criminal Code (CC) regulates domestic bribery of public officials and the 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 YEAR IN REVIEW

One important event in the anti-bribery and anti-corruption legal area from 2022 to 2023 is the amendment of the UCPL to more severely punish foreign bribery in response to recommendations of the Organisation for Economic Co-operation and Development (OECD), which were stated in Japan's Phase 4 report mentioned in Section IX.i. The key elements of the amendment are, as discussed in Section V, imposing more severe sanctions on foreign bribery and expanding the scope of the extraterritorial application of the UCPL's anti-foreign bribery provisions. Before the amendment, the bribery of foreign public officials was subject to imprisonment not exceeding five years or a fine not exceeding ¥5 million. After the amendment, foreign bribery is now subject to imprisonment not exceeding 10 years or a fine not exceeding ¥30 million. As a result of the foregoing amendments, the applicable statute of limitations for prosecuting foreign bribery under the Criminal Procedure Code has been extended from five years to seven years. The fine on guilty entities has been also increased from ¥300 million to ¥1 billion. Additionally, this amendment makes it possible to punish a foreign national who, as an officer or employee of a Japanese entity, committed bribery in a foreign country. In this case, the Japanese entity may be also subject to a fine.

In terms of enforcement, the number of arrested cases involving bribery has reached two-digit figures every year since 2020. According to the statistics of the National Police Agency, there were 24 cases in 2020, 52 cases in 2021 and 40 cases in 2022. In particular, it was widely reported that in relation to the Olympic Games Tokyo 2020, officers (including former officers, some of whom were members of the Tokyo Olympic organising committee) of an entertainment company, an advertising agency and an apparel company were prosecuted and convicted. In addition, the news that a member of the House of Representatives was prosecuted for alleged bribery in respect of wind-power generation projects also garnered public attention.

III 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 (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 national public officials at a certain level or higher to report quarterly 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:

- foreign persons;
- foreign entities; or

- 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.

IV 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. In 2019, a House of Representatives member was arrested and indicted on a charge of accepting bribes from a Chinese company in relation to integrated resort projects, including a casino when he was serving as a state minister in charge thereof. In addition, in 2021, a number of public officials of the Ministry of Internal Affairs and Communications were punished for violation of the Ethics Code due to lavish meals or entertainment treated by Nippon Telegraph and Telephone Corporation or its group companies. Most recently, beginning in 2022, alleged bribery in relation to the Olympic Games Tokyo 2020 has drawn the public's interest.

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.

V 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 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).

Article 18(1) of the UCPL provides:

> *No person shall give, or offer or promise to give, any money or other benefit, to a foreign public official, in order to have the foreign public official act or refrain from acting in relation to the performance of official duties, or in order to have the foreign public official use his/her position to influence another foreign public official to act or refrain from acting in relation to the performance of official duties, in order to obtain wrongful gains in business with regard to international commercial transactions.*

International commercial transaction means the act of economic activity beyond national borders such as trade and foreign investment, and international means that either an international relationship exists between the parties to the commercial transaction, or 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 person who engages in public services for a national or local foreign government;
- a person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest;
- 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;
- a person who engages in public services for an international organisation (which means an international organisation constituted by governments or intergovernmental international organisations); and
- 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 (METI) and revised in May 2021 (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; and
- 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]

v Penalties and other matters

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 10 years or a fine not exceeding ¥30 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 ¥1 billion 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. Further, a foreign national who is an officer or employee of a Japanese entity who commits bribery 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 crimes committed by others (not crimes committed by the defendants themselves). To date, there have only been three reported cases on the use of the plea-bargaining system.

VI 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 obliged, 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 financial institutions (including banks, insurance companies, securities companies, money lenders and money exchange operators) and 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:

- customer identification data;
- purpose of conducting the transaction;
- occupation and nature of business; and
- 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 obliged 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 obliged 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:

- provide their employees with educational training regarding the verification of customer identification;
- establish and maintain internal rules for these verification procedures; and
- 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 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.

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There have been a small number of reported 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 with 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, of 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 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 handbag in mid-December 2007 to persuade authorities to overlook an irregularity at the plant of a subsidiary of Futaba and not reporting 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 11 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. Upon the appeal of the judgment of the court of first instance by one executive, in July 2020, the appellate court reversed the judgment saying that the appellant executive was not involved in a conspiracy but just abetted in the crime, and imposed a fine of ¥2.5 million. The prosecutor further appealed the judgment of the appellate court, and in May 2022, the Supreme Court reversed the appellate judgment and reinstated the judgment of the court of first instance.

vi Bribery of public officials in Vietnam

This is a case in which a plastic manufacturing company and three of its former officers and employees (i.e., a former president, a former manager and a former president of the company's subsidiary in Vietnam) were indicted for paying 5 billion dong in total to public officials at a tax office in Vietnam to enable the subsidiary to evade taxes. In November 2022, the Tokyo District Court imposed a one-year imprisonment on the former president, and a one-and-a-half year imprisonment on the former manager and the former president of the subsidiary, with a probation period of three years for each. The Court also imposed a fine of ¥25 million on the company. The company did not appeal the decision. (There is no public information as to whether or not the three individuals appealed the decision.)

vii Other recent cases

According to the Guidelines for the Prevention of Bribery of Foreign Public Officials issued by the METI (as amended in May 2021; also see Section VIII.ii), there have been four recent cases in 2019 and 2020 where the defendants were fined. Details of those cases are not clear since the judgments in those cases have not been published. A summary of each of these cases based on the foregoing guidelines is provided below:

- a Vietnamese national living in Japan paid approximately ¥150,000 to a Vietnamese consul stationed in Fukuoka in exchange for the issuance of documents necessary to support a visa application. The Vietnamese national was fined ¥500,000;
- a Japanese national, who is a representative of a company in Vietnam, paid approximately ¥7,350,000 to two high-ranking officials at a customs office in Hai Phong in exchange for reducing a surcharge imposed on the company for violating customs related regulations. The Japanese national was fined ¥1 million;
- a Vietnamese national living in Japan paid approximately ¥100,000 to a Vietnamese consul stationed in Osaka in exchange for the issuance of documents necessary to support an application for marriage registration. The Vietnamese national was fined ¥500,000; and
- a Vietnamese national living in Japan promised to pay approximately ¥140,000 to a Vietnamese consul stationed in Osaka in exchange for the issuance of documents necessary to support an application for marriage registration. The Vietnamese national was fined ¥500,000.

VIII 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

The United Nations Convention against Corruption was adopted by the General Assembly of the United Nations on 31 October 2003. The National Diet of Japan approved adoption of this Convention in June 2006 and approved the relevant domestic legislation on 15 June 2017. The Convention entered into force on 10 August 2017.

iii The United Nations Convention against Transnational Organised Crime

The National Diet of Japan approved adoption of the United Nations Convention against Transnational Organised Crime in May 2003 and approved the relevant domestic legislation on 15 June 2017. The Convention entered into force on 10 August 2017.

IX 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 a press release dated 3 July 2019 and a 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 having sanctioned only 12 individuals and two companies since 1999. The Working Group recommended that Japan take certain measures, including that it should:

- improve key elements of its legislative framework, in particular to increase the level of sanctions and the limitation period for foreign bribery;
- broaden its framework for establishing nationality jurisdiction over legal persons;
- encourage its agencies with the potential to detect foreign bribery to become more proactive in this respect;
- ensure that the Ministry of Justice's role in transmitting and clarifying certain allegations does not create unnecessary delays in opening investigations;
- 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
- ensure that both the police and prosecution are more proactive and coordinated when investigating foreign bribery, including by reducing reliance on voluntary measures and confessions.

As a result of the foregoing recommendations, in August 2022, the METI established a working group on foreign bribery to discuss foreign bribery-related issues, including the possibility of introducing stricter sanctions under the UCPL. In March 2023, the working group released its report on potentially amending the UCPL in response to recommendations of the OECD stated in Japan's Phase 4 report. The working group's report was considered in the process of amending the UCPL.

ii METI Guidelines

The METI established the Study Group on Prevention of Bribery of Foreign Public Officials, and the Study Group has held meetings since January 2020. On the basis of the recommendations by the OECD Working Group and the results of the Study Group's discussions, the METI revised its guidelines regarding bribery of foreign public officials in international business transactions under the UCPL and released a new handbook in May 2021 that elaborates on the guidelines in ways that are easy to understand. This is not new legislation, but the revision clarifies legal interpretations as follows:

- it is advisable for companies to clearly state in their internal rules that 'small facilitation payments' are prohibited in principle because such payments themselves may fall under the category of provision of benefits 'for the purpose of obtaining wrongful gains in business'; and
- the UCPL does not explicitly provide an exemption for small facilitation payments. Therefore, the provision of money or other benefits to foreign public officials, even in small amounts, is a violation of the UCPL if the purpose is to obtain wrongful gains in business. The mere fact that a payment is a small facilitation payment does not exempt the payer from punishment.

Furthermore, in light of the increased risk of bribery in transactions conducted through agents and M&A transactions, the revised guidelines have also added points that should be kept in mind when retaining agents and conducting M&A transactions.

iii Japanese Federation of Bar Associations Guidelines

On 15 July 2016, the Japanese Federation of Bar Associations (JFBA) issued 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. The guidelines were amended in January 2017.

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Confidentiality obligation and privilege

With effect from 25 December 2020, the Rules on Investigations by the Fair Trade Commission (administrative rules relevant to the enforcement of the Anti-Monopoly Act) were amended to introduce a system similar to an attorney–client privilege system under which companies can keep their communications with lawyers confidential under certain conditions. However, the scope of the system is limited to certain types of infringements of the Anti-Monopoly 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 Whistleblower protection

The Whistleblower 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 whistleblowing. More than 400 laws are covered by the WPA, including the CC, the CA, the FIEA, the UCPL, the FEFTA and the Act on the Protection of Personal Information.

The WPA was amended with effect from 1 June 2022. Certain key amendments are as follows:

- enhancing self-correction by business operators and enabling whistleblowers to report safely: requiring business operators to establish systems and appoint personnel to deal with whistleblowing;

- enhancing whistleblowing for administrative authorities: expanding the scope of protected whistleblowing to administrative authorities, and mass media and consumer organisations; and
- strengthening the protection of whistleblowers: expanding the scope of people protected as whistleblowers, the categories of reporting protected as whistleblowing and the actions prohibited as adverse actions against whistleblowers.

XI COMPLIANCE

The METI Guidelines 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 guidelines emphasise the importance of subsidiaries and sub-subsidiaries, many of which have not completely managed their risks, and the necessity of support from parent companies; and
- 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.

XII OUTLOOK AND CONCLUSIONS

As discussed at the beginning of this chapter, the Japanese foreign bribery regulations were amended to introduce stricter sanctions, and foreign bribery will continue to be one of the most important concerns for the legal community in Japan. We expect to see more corruption prosecutions in the near future, particularly following the amendment of the UCPL. As a result, we expect rapid development of the practices in this area, including those in relation to anti-corruption compliance programmes, whistleblowing practices and risk and crisis management in the event of actual corruption incidents.

MORI HAMADA & MATSUMOTO

Yusuke Takamiya	yusuke.takamiya@mhm-global.com
Aki Tanaka	aki.tanaka@mhm-global.com
Aritsune Miyoda	aritsune.miyoda@mhm-global.com

16th Floor Marunouchi Park Building, 2-6-1 Marunouchi
Chiyoda-ku, Tokyo 100-8222, Japan
Tel: +81 3 5220 1811
www.mhmjapan.com

Endnotes

1 Yusuke Takamiya and Aritsune Miyoda are partners and Aki Tanaka is counsel at Mori Hamada & Matsumoto.
2 METI Guidelines 3.1(4), p. 26.
3 METI Guidelines 3.1(3), p. 25.

Chapter 8

Switzerland

Fanny Margairaz and Romain Wavre[1]

Summary

I INTRODUCTION

Given the federal system of government in Switzerland, comparable to some extent to the US system, corruption offences can be prosecuted both by prosecutors at the cantonal level (26 cantons) and by the Office of the Attorney General of Switzerland (OAG) at the federal level. Cantonal and federal prosecutors apply the anti-bribery and anti-corruption statutes contained in Title Nineteen of the Swiss Criminal Code (SCC),[2] which prohibit bribery of Swiss public officials (Article 322 ter to Article 322 sexies SCC) and foreign public officials (Article 322 septies SCC), as well as bribery of private individuals (Articles 322 octies and 322 novies SCC).

Switzerland continues to be viewed as one of the least corrupt countries in the world.[3] In recent years, few domestic Cases have made the headlines, but major Cases related to bribery of foreign public officials have resulted in convictions of both individuals and companies. Companies benefited from the lack of corporate criminal liability statutes for a long time, then from the lack of enforcement of such statutes, but criminal authorities seem to be picking up the pace to some extent. For instance, the OAG has put in place a taskforce dedicated to corporate criminal liability, which could potentially increase the number of convictions in the years to come. As a general trend, during the past 10 years, most major convictions of companies for corruption have occurred as a result of plea agreements.

II YEAR IN REVIEW

The past year in Switzerland has seen a number of high-profile cases that have undergone signifcant developments, with divergent outcomes.

In the fight against corruption, a state councillor who had been acquitted of accepting an undue advantage on appeal was finally convicted by the Federal Court.

In the area of corporate criminal liability, the first Swiss bank to ever be convicted by a tribunal in relation to financial offences was eventually acquitted on appeal, while a second Swiss bank convicted at first instance a few months later announced its intention to appeal the verdict. Both decisions may still be overturned by higher courts.

The near future will reveal whether the Swiss authorities are sufficiently equipped to hold banks criminally liable.

2023 also saw the Federal Council present a bill aimed at increasing the transparency of legal entities by creating a federal register containing the identity of the beneficial owners of legal entities.

III DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Elements

With respect to Swiss public officials, the SCC prohibits the acts of bribing or accepting a bribe, as well as the acts of granting or accepting an advantage. The distinction between these two categories of offences is the following: while bribery (Articles 322 ter and 322 quater SCC) is in a relationship of 'exchange' with the undue advantage, the granting of an advantage (Articles 322 quinquies and 322 sexies SCC) refers to unjustified favours given or accepted without any concrete consideration in return. In this latter category, it does not matter whether or not the public official has accepted the advantage or whether or not the advantage has an influence on his or her behaviour.[4] Regarding the offence of accepting an advantage (Article 322 quinquies SCC), it is also irrelevant whether the person who granted the advantage intended to offer a favour as long as it could have been perceived as such by the public official.[5]

Article 322 ter SCC forbids any person from offering, promising or giving to a Swiss public official (or to a third party) an undue advantage in order to cause the official to carry out or to fail to carry out an act in connection with his or her official activity. The act must be

contrary to the official's duty or dependent on his or her discretion. The passive behaviour of the Swiss public official is prohibited under Article 322 quater SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party).

Article 322 quinquies SCC forbids any person from offering, promising or giving to a Swiss public official an undue advantage (for himself or herself or for a third party) in order to cause the public official to carry out his or her official duties. The passive behaviour of the Swiss public official is prohibited under Article 322 sexies SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party).

ii Prohibition on paying and receiving

As described in Section II.i, Articles 322 ter, 322 quater, 322 quinquies and 322 sexies SCC prohibit both procuring and accepting undue advantages.

iii Definition of public official

Public officials are defined broadly under Title Nineteen SCC as public servants[6] (appointed or employees of any public administration), members of the judicial, executive or legislative branches, officially appointed experts, translators, interpreters and arbitrators, and members of the armed forces.

Under Article 322 decies Paragraph 2 SCC, private individuals who fulfil official duties are subject to the same provisions as public officials. The employees of a state-owned or controlled company are not necessarily considered as public officials: the control operated by the state is a very strong clue, without being decisive.[7] The determining factor is whether the state grants the company any special treatment or protections with respect to the competition, for example granting a monopoly on a certain activity.[8]

iv Undue advantage (gifts and gratuities, travel, meals and entertainment restrictions)

An advantage is defined broadly and includes any benefit, whether material or immaterial, that improves the situation of the public official,[9] in particular giving money, giving an object or providing an object to be used, giving real estate, providing services, paying for the services provided by a third party, providing a place to live and inviting for a holiday.[10] An advantage can also result from an unbalanced contractual relationship: selling at an undervalued price, buying at an overrated price[11] and granting a loan at conditions that are too advantageous.[12] Moreover, according to authors, an advantage can also take the form of an amelioration of the legal situation of the public official, for example renouncing filing a criminal complaint against him or her,[13] or an amelioration of his or her social status, for example, awarding him or her with a distinction or prize.[14]

An advantage is undue when the public official has no legal basis to claim it.[15] Under Article 322 decies SCC, advantages permitted under public employment law or contractually approved by a third party, as well as negligible advantages that are common social practice, are not undue.

At the federal level, in general, public employees can accept advantages that are common social custom and (cumulative condition) whose value does not exceed 200 Swiss francs.[16] If the employee cannot refuse a donation for reasons of politeness, and if the acceptance of the donation serves the general interest of the Swiss Confederation, he or she shall hand it over to the competent authority.[17] Employees shall decline any invitation that may restrict their independence and freedom of action, and they shall refuse invitations to travel abroad without the written consent of their superior.[18] Moreover, when federal public employees are involved in a purchasing or decision-making process and if the negligible advantage or invitation is offered by an actual or potential bidder, a person participating in or affected by the decision-making process, or if it is impossible to exclude any link between the granting of the benefit or the invitation and the purchasing or decision-making process, employees are prohibited from accepting the negligible advantage or the invitation.[19]

In Geneva, public employees are prohibited from soliciting or accepting for themselves or others gifts or other benefits because of their official position.[20] The breach of this regulation may lead to disciplinary sanctions including immediate dismissal, without prejudice to the penal consequences.[21] Benefits that are personally and immediately consumable, such as chocolate or medium-range wine, are admissible.[22] Employees have the duty to inform their superior in cases where they feel a third party tries to offer them an undue gift or advantage.[23]

v Public official participation in commercial activities

There is no general rule forbidding public officials from participating in commercial activities. In this matter, cantonal public officials are governed by their respective cantonal rules, and federal public officials are governed by federal statutes. For example, federal public employees must require an authorisation in order to exercise any paid or unpaid activity outside of their public function, if the activity might present a risk of conflict of interest.[24] If any risk of conflict of interest cannot be ruled out, no authorisation is granted.[25] In the canton of Geneva, the same kinds of rules apply.[26]

That said, both at the federal and cantonal level, members of the parliament are elected volunteers who, in most cases, are professionally active in the public or private sectors in addition to their elected positions.

vi Political contributions

Switzerland used to lag behind its European neighbours when it came to political contributions. Except specific laws in some cantons, until October 2022, there was no federal law governing this kind of funding.

On 23 October 2022, new statutes (Articles 76b to 76k) of the Federal Act on Political Rights (PRA) and a new related federal ordinance, the Ordinance on the Transparency of the Financing of Political Life (OTFPL), entered into effect. The new rules on transparency will thus apply for the first time to the National Council elections of 2023.

Essentially, political parties represented in the Federal Assembly have now an obligation to declare their revenues, as well as their donations (monetary and non-monetary) whose value exceeds 15,000 Swiss francs per donor per year (see Article 76b PRA). Furthermore, under certain circumstances, mainly depending on the amounts involved, individuals, groups of individuals and companies that campaign at the federal level can be obliged to declare their financing (see Article 76c PRA). Compliance with these obligations is verified by the Swiss Federal Audit Office (see Articles 76e and 76g PRA with Article 7 OTFPL), which in turn publishes on its website some of the information collected (see Article 76f PRA). Finally, it is now forbidden to accept anonymous donations or donations from abroad, with the exception of donations from Swiss citizens abroad and donations made for the purpose of election to the Council of States (see Article 76h PRA). Failure to comply with their obligations will result in a fine of up to 40,000 Swiss francs for political parties and campaigners (see Article 76j PRA).

Notably, the cantons may provide for stricter provisions on the transparency of cantonal political actors in the exercise of political rights at the federal level (see Article 76k PRA).

vii Private commercial bribery

Bribery of private individuals is forbidden under the SCC.

Article 322 octies Paragraph 1 SCC prohibits any person from offering, promising or giving an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party, so that the person carries out or fails to carry out an act in connection with his or her professional or commercial activity. The act in question must be contrary to the person's duties or dependent on the person's discretion. The passive behaviour is prohibited under Article 322 novies Paragraph 1 SCC (demanding,

securing the promise of or accepting an undue advantage for himself or herself or for a third party). In minor cases, these offences are only prosecuted if a criminal complaint has been filed by the victim.[27]

Unlike in the public sector, private bribery requires an exchange. Hence, the mere granting or accepting of an undue advantage in the sense of Articles 322 quinquies and 322 sexies SCC (see Section II.i) is not criminalised.

The notion of private individual is defined broadly and basically includes any individual bound by a general obligation of loyalty toward the victim.[28]

viii Penalties

Individuals convicted for bribery (Swiss public officials) under Articles 322 ter and 322 quater SCC may be punished by up to five years' imprisonment or a monetary penalty of up to 540,000 Swiss francs (see Article 34 SCC).

Individuals convicted for granting or accepting an advantage (Swiss public officials) under Articles 322 quinquies and 322 sexies SCC may be punished by up to three years' imprisonment or a monetary penalty of up to 540,000 Swiss francs (see Article 34 SCC).

Individuals convicted for bribery of private individuals under Articles 322 octies and 322 novies SCC may be punished by up to three years' imprisonment or a monetary penalty of up to 540,000 Swiss francs (see Article 34 SCC).

If any of these sentences is suspended, it may be combined with a fine of up to 10,000 Swiss francs.[29] Moreover, the advantage procured by the receiver is subject to forfeiture,[30] as well as the advantage procured by the payer, for example, payments made according to a contract concluded thanks to the bribe.[31]

IV ENFORCEMENT: DOMESTIC BRIBERY

In Switzerland, a few proceedings for domestic bribery have been conducted these past years, and convictions remain very rare. In these domestic cases, one issue seems to come up more regularly: holidays of Swiss officials abroad, paid for by third parties.

i Conviction of a state councillor

In February 2021, an elected official of the Geneva State Council was convicted for acceptance of an advantage (Article 322 sexies SCC) for having accepted a paid trip abroad with his family, on official invitation from a foreign country. He was sentenced to a suspended monetary penalty and to the payment of a compensatory claim of 50,000 Swiss francs (corresponding to the estimated value of the trip). The Tribunal found that the state councillor considered, accepted and accommodated the risk of being influenced in the performance of his duties by accepting such a gift, considered half-official and half-private.

The state councillor's chief of staff was convicted of the same criminal offence, as well as for violating secrecy of function, and sentenced to a suspended monetary penalty. Two individuals were convicted for granting an advantage (Article 322 quinquies SCC), and sentenced to a suspended monetary penalty.

However, after the state councillor and most parties appealed the decision, the Geneva Criminal Court of Appeals overturned the state councillor's conviction and acquitted him on all counts in a December 2021 ruling. According to the Court, although the state councillor had undoubtedly accepted an undue advantage, it had not been established that the foreign authorities wished to obtain anything from him.

Upon appeal of the Public Prosecutor's Office, the Swiss Federal Tribunal eventually convicted the state councillor. Unlike the previous instance, our highest court decided that it was not necessary that the person granting the advantage wanted to influence the person accepting it. As a result and even though it had been proven that the advantage had not

been granted with the intention of influencing the activities of the state councillor, the Swiss Federal Tribunal found the latter guilty of accepting an undue advantage within the meaning of Article 322 quinquies SCC.

ii Trial of a former federal employee of the Federal Roads Office

In April 2021, the OAG filed an indictment with the Federal Criminal Court against a former employee of the Federal Roads Office (FEDRO) and two members of the board of directors of a vehicle import company. According to the indictment, the two board members paid the FEDRO employee to alter data for the calculation of CO_2 penalties so that their company would not pay any penalties for more than three years. This resulted in a loss for the Swiss Confederation of about 9 million Swiss francs. The former FEDRO employee faces multiple charges, including acceptance of bribes (Article 322 quater SCC), and the two other individuals face multiple charges, including bribery of a Swiss public official (Article 322 ter SCC).

On 26 April 2021, the Federal Criminal Court suspended the proceedings pending a decision in a related case.

iii Conviction of two former federal employees of the FEDRO

In July 2021, it was confirmed that the OAG had convicted (by summary penalty orders) two former employees of the FEDRO for having received gifts from the director of a construction company on several occasions, such as wine and foodstuffs (Article 322 quater SCC).

iv Conviction of a former federal employee of the State Secretariat for Economic Affairs

In 2014, the State Secretariat for Economic Affairs (SECO) reported a corruption case within its ranks to the OAG, which had since been investigating the case. Over a period of 10 years, a former head of department had allegedly favoured certain companies during the contract award process (by manipulating the evaluations of the bids) and obtained in return benefits totalling more than 1.7 million Swiss francs (VIP tickets, household appliances, meals, sponsorship for events, various other gifts and cash). The OAG put about 10 individuals under investigation and convicted some of them by issuing summary penalty orders.

In August 2021, the head of department at SECO, accused of accepting bribes as a Swiss public official (Article 322 quarter SCC), mismanagement, forgery and money laundering, along with the heads of three private companies, accused of granting bribes to a Swiss public official (Article 322 ter SCC) and other offences, stood trial before the Federal Criminal Court. The OAG asked the Court to sentence the head of department to four years in prison and to a monetary penalty, requesting lower prison sentences and monetary penalties for the three other individuals (between two and three years). The Court rendered its verdict on 17 September 2021 and convicted the former head of department for acceptance of bribes (Article 322 quater SCC) and forgery, and sentenced him to 52 months in prison, as well as a suspended monetary penalty.

V FOREIGN BRIBERY: LEGAL FRAMEWORK

i Elements

Bribery of foreign public officials falls under the SCC. Article 322 septies Paragraph 1 SCC forbids any person from offering, promising or giving to a foreign public official an undue advantage for himself or herself or for a third party in order to carry out or fail to carry out an act in connection with his or her official activity. The act must be contrary to the official's duty or dependent on his or her discretion. The passive behaviour is prohibited under Article 322 septies Paragraph 2 SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party).

Unlike the system applying to Swiss public officials, bribery of foreign public officials requires an exchange. Hence, the mere granting or accepting of an undue advantage in the sense of Articles 322 quinquies and 322 sexies SCC (see Section II.i.) is not criminalised.

ii Definition of foreign public official

Foreign public officials are defined broadly under Title Nineteen SCC as officials of a foreign state or international organisation.[32] Hence, they can be public servants (appointed or employees of any public administration), members of the judicial, executive or legislative branches, officially appointed experts, translators or interpreters, as well as arbitrators, or members of the armed forces. In this context, the Swiss judge will apply the Swiss notion of foreign public official,[33] which basically concurs with the notion of Swiss public official (see Section II.iii). In short, a foreign public official is any person who carries out a task that is by nature public, either because the task is a matter of state sovereignty, or because the person or legal entity benefits from special treatment or protection in comparison with the competition (for example a monopoly has been granted by the state).[34]

Officials of international organisations are considered foreign public officials when said organisations are intergovernmental or constituted by public law authorities, not when they are non-governmental organisations.[35]

iii Undue advantage (gifts and gratuities, travel, meals and entertainment restrictions)

The same definition of an undue advantage applies to bribery of Swiss and foreign officials (see Section II.iv): an advantage is undue when the public official has no legal basis to claim it.[36] Under Article 322 decies SCC, advantages permitted under public employment law or contractually approved by a third party, as well as negligible advantages that are common social practice, are not undue.

Three aspects are specific to bribery of foreign officials. First, knowing if an advantage is authorised by service regulations or the applicable law is a question that must be decided in the light of the law governing the official's activity. Second, most authors consider that bribes are not justifiable by the fact that they are in accordance with the local customs.[37] Third, the local context must be taken into account when considering a 'negligible' advantage. Where a gift for 20 Swiss francs (about the price of a daily special at lunch) will be considered as negligible in Switzerland, the same value could represent a weekly salary in other parts of the world.[38]

iv Payments through third parties or intermediaries

Payments through third parties or intermediaries also fall under Article 322 septies SCC. In fact, using third parties or intermediaries for conducting business abroad is deemed 'risky', when it comes to corruption.

v Individual and corporate liability

Both individuals and companies can be criminally liable for bribing a foreign public official. In fact, when violating Article 322 septies Paragraph 1 SCC by bribing a foreign public official, companies can be punished irrespective of the criminal liability of any natural persons, provided that said entities have failed to take all the reasonable organisational measures that are required in order to prevent such an offence.[39]

vi Civil and criminal enforcement

Companies and individuals only face criminal enforcement under the SCC. That said, civil claims can be brought in the criminal proceedings by the victim under Article 122 Paragraph 1 of the Swiss Criminal Procedure Code (SCPC).[40]

vii Agency enforcement

In general, the criminal authorities at the cantonal level prosecute and judge offences under federal law.[41] When there is cantonal jurisdiction, local prosecutors conduct the investigations and bring cases to trial. That said, in many instances there is federal jurisdiction, and the OAG conducts the proceedings. In the context of bribery, the OAG is competent when the offences in Title Nineteen SCC are committed by a member of an authority or an employee of the Swiss Confederation or against the Confederation.[42] Moreover, in cases of bribery of a Swiss or foreign official, or granting or accepting an undue advantage, federal jurisdiction applies and the OAG is competent, if the offences have to substantial extent been committed abroad or in two or more states with no single state being the clear focus of the criminal activity.[43]

Finally, if a criminal case is subject to both federal and state jurisdiction, the OAG may instruct the proceedings to be combined and dealt with by the federal authorities or the state authorities.[44]

viii Leniency

Self-reporting of violations, cooperation with criminal authorities and reparation can lead to reduced sentences,[45] a more favourable settlement[46] or a decision not to prosecute, not to refer the case to the tribunal or not to impose any sentence.[47]

While self-reporting is rare, cooperation does lead to many plea agreements, in particular when companies are involved. In fact, in Switzerland's short history of corporate criminal liability, only few cases have made it to trial.[48] In most instances, charges have been dropped after reparation or convictions have been negotiated and decided by prosecutors, who have the ability to issue summary penalty orders when the accused has accepted responsibility for the offence (or if his or her responsibility has otherwise been satisfactorily established).[49] In the context of transnational corruption cases involving companies (Articles 102 and 322 septies SCC: bribery of a foreign official by a company), the OAG has convicted several companies in the past 10 years by means of summary penalty orders.

ix Plea-bargaining

Plea-bargaining and negotiated settlements are key when it comes to bribery of foreign public officials by companies. The SCPC does not provide for deferred prosecution agreements (although a modification of the SCPC has recently been discussed), but three other mechanisms exist: non-prosecution agreements,[50] summary penalty orders[51] and accelerated proceedings.[52]

Non-prosecution agreements negotiated with the prosecution allow the offender to avoid criminal conviction, if he or she has admitted the offence, if a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine are suitable as a penalty, and if the interest in prosecution of the general public and of the persons harmed are negligible.[53]

Summary penalty orders negotiated with the prosecution allow the offender to be convicted directly by decision of the prosecutor, without having to go to trial or submitting said decision to the review of the criminal judge. This is possible when the accused has accepted responsibility for the offence in the preliminary proceedings (or if his or her responsibility has otherwise been satisfactorily established), and if a fine, a monetary penalty of no more than 180 daily penalty units (i.e., a maximum of 540,000 Swiss francs)[54] or a custodial sentence of no more than six months are deemed appropriate.

Accelerated proceedings negotiated with the prosecutor allow the offender who has admitted the charges and the civil claims to conclude an agreement on the content of the indictment.[55] Hence, contrary to summary penalty orders, the civil claims must necessarily be part of the agreement. Accelerated proceedings can occur when the appropriate sentence exceeds the limit set under the rules of summary penalty orders described above. In fact, accelerated

proceedings can occur as long as the prosecutor does not request a custodial sentence of more than five years.[56] In corruption matters, since the offences under the SCC never entail custodial sentences of more than five years,[57] accelerated proceedings are always an option.

x Prosecution of foreign companies and individuals

Foreign companies and individuals can be prosecuted in Switzerland according to the principle of territoriality. In short, the offence must be committed 'in Switzerland', which means that the offender must commit the act or unlawfully omit to act in Switzerland, or that the place where the offence has taken effect is Switzerland.[58] An attempted offence is considered committed at the place where the person concerned attempted it and at the place where he or she intended the offence to take effect.[59] Hence, foreign companies and individuals can obviously be prosecuted when bribing foreign officials from their base in Switzerland, but also when the bribe is paid (paid using a bank account in Switzerland or paid abroad from a Swiss bank account) or laundered in Switzerland.[60]

xi Penalties

Individuals convicted for bribery of foreign public officials under Articles 322 septies SCC may be punished by up to five years' imprisonment, or a monetary penalty of up to 540,000 Swiss francs.[61] If the sentence is suspended, it may be combined with a fine of up to 10,000 Swiss francs.[62]

Companies can be sentenced to a fine of up to 5 million Swiss francs.[63] The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the company to pay the fine.[64]

Moreover, and most importantly, the advantage given to the receiver is subject to forfeiture,[65] as well as the advantage given to the payer, for example the payments made according to a contract concluded thanks to the bribe.[66] In a June 2021 ruling, the Swiss Federal Tribunal further developed its case law on the extent of the forfeiture, providing criteria for determining whether and to what extent the profits from a contract obtained through corruption should be forfeited.[67] If the assets subject to forfeiture are no longer available, the authorities may uphold a claim for compensation by the state in respect of a sum of equivalent value.[68] In a 2019 corruption case (bribes paid in Africa), a Geneva-based company was sentenced by the OAG to pay a fine exceeding US$4 million and to pay a sum equivalent to the proceeds of the deals made thanks to the bribe for an amount exceeding US$95 million (summary penalty order dated 14 October 2019).[69]

On 1 January 2021, a new federal Act on Public Procurements entered into effect. Under Article 44 of this Act, an individual or a company can be excluded from an award procedure, deleted from a list or lose a contract already awarded if said tenderer (an organ of the tenderer, a third party to which the tenderer appeals or an organ of the third party) has violated provisions on combating corruption. For exclusion based on corruption, the exclusion can last for up to five years and relates to every public procurement of the Swiss Confederation.[70]

VI ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

Under Article 957 Paragraph 1 of the Swiss Code of Obligations (SCO),[71] sole proprietorships and partnerships that have achieved sales revenue of at least 500,000 Swiss francs in the last financial year as well as legal entities have the duty to keep accounts and file financial reports.

Under Article 957 Paragraph 1 SCO, sole proprietorships and partnerships with less than 500,000 Swiss francs sales revenue in the last financial year, associations and foundations that are not required to be entered in the commercial register, and some foundations need only to keep accounts on income and expenditure and on their asset position.

Depending on the volume of their business and their legal structure, companies (for example a publicly traded limited liability company) must have their annual accounts and, if applicable, their consolidated accounts reviewed by an external auditor.[72]

Under the federal Act on Combating Money Laundering and Terrorist Financing (AMLA), special auditing rules apply to financial intermediaries.[73]

ii Disclosure of violations or irregularities

Strictly speaking, companies do not have a specific duty to disclose violations of anti-bribery laws. That said, as explained in Section V.ix, companies that qualify as financial intermediaries have specific obligations of disclosure under the anti-money laundering laws.

iii Prosecution under financial record-keeping legislation

Financial record-keeping legislation is not specifically used to prosecute bribery-related conduct. That said, falsifying accounting records can constitute forgery, which is a criminal offence under Article 251 SCC. Hence, as in most white-collar crime cases, forgery charges are often brought in corruption proceedings in relation to falsification of financial records. This approach targets in particular illicit payments made by companies or funds allocated to future such payments (slush funds).[74]

iv Sanctions for record-keeping violations

Individuals convicted for falsifying financial records under Article 251 SCC may be punished by up to five years' imprisonment, or a monetary penalty of up to 540,000 Swiss francs (see Article 34 SCC).

v Tax deductibility of domestic or foreign bribes

Since 1 January 2022, under the federal Act on Direct Federal Taxation (ADFT) (see Articles 27 and 59)[75] and the federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels (AHDFT) (see Articles 10 and 25),[76] any bribe that falls under the SCC is not deductible.

vi Money laundering laws and regulations

The anti-money laundering system is based on the SCC and the AMLA.

Article 305 bis Paragraph 1 SCC forbids any person from carrying 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 must assume originate from a felony or aggravated tax misdemeanour. An aggravated tax misdemeanour is any of the offences set out in Article 186 ADFT and Article 59 Paragraph 1 Clause 1 AHDFT, if the tax evaded in any tax period exceeds 300,000 Swiss francs.[77] The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission.[78]

Foreign and domestic bribery (Articles 322 ter, 322 quater and 322 septies SCC) are predicate offences under Article 305 bis Paragraph 1 SCC, since they qualify as felonies (which are offences that carry custodial sentences of more than three years). By contrast, the mere granting or accepting of an undue advantage (Articles 322 quinquies and 322 sexies SCC) or

the bribery of private individuals (Articles 322 octies and 322 novies SCC) are not predicate offences as they are misdemeanours (which are offences that carry custodial sentences not exceeding three years or a monetary penalty).

Moreover, aside from money laundering, the SCC penalises the conduct of financial intermediaries who lack diligence in their financial transactions. Under Article 305 ter Paragraph 1 SCC, any person who as part of his or her profession accepts, holds on deposit or assists in investing or transferring outside assets and fails to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances is criminally liable. The financial intermediaries mentioned above are entitled to report to the Money Laundering Reporting Office in the Federal Office of Police any observations that indicate that assets originate from a felony or an aggravated tax misdemeanour in terms of Article 305 bis Number 1 bis.[79]

Money laundering can result in corporate criminal liability under Article 102 SCC. In December 2021, the Federal Criminal Court convicted a financial institution based on its corporate criminal liability for the first time. The bank concerned was found guilty of failure to guarantee an appropriate separation of duties, to provide effective independent supervision of high-risk business relationships and to avoid conflicts of interest.[80] The bank was acquitted in July 2023, following its appeal. The detail of the decision has not been made public yet.[81]

Another Swiss bank was convicted in June 2022 by the Federal Criminal Court. The full decision has not been made public yet either.[82]

vii Prosecution under money laundering laws

Money laundering laws are key in the fight against corruption. First, this is because bribery of foreign and Swiss officials both qualify as predicate offences,[83] and second, because financial intermediaries have a duty to report where there is suspicion of money laundering.[84]

viii Sanctions for money laundering violations

A person convicted for money laundering under Article 305 bis SCC is liable to a custodial sentence not exceeding three years, or to a monetary penalty not exceeding 540,000 Swiss francs.[85] In serious cases, the penalty is a custodial sentence not exceeding five years, or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 1.5 million Swiss francs.[86] A serious case is constituted, in particular, where the offender acts as a member of a criminal organisation, of a group that has been formed for the purpose of the continued conduct of money laundering activities or achieves a large turnover or substantial profit through commercial money laundering.[87]

A person convicted for lack of diligence under Article 305 ter SCC is liable to a custodial sentence not exceeding one year or to a monetary penalty not exceeding 540,000 Swiss francs (see Article 34 SCC).

A person who fails to comply with the duty to report under Article 9 AMLA is liable to a fine not exceeding 500,000 Swiss francs,[88] or 150,000 Swiss francs in the event of negligence.[89]

ix Disclosure of suspicious transactions

On top of the repressive statutes of the SCC, the AMLA provides preventive and regulatory statutes that apply to financial intermediaries (banks, fund managers, investment companies, insurance institutions, securities dealers),[90] as well as individuals and legal entities that deal in goods commercially and, in doing so, accept cash (i.e., dealers).[91] The main duties under the AMLA are the duty of due diligence (verification of the identity of the customer, establishing the identity of the beneficial owner, ascertaining the nature and purpose of the business relationship wanted by the customer, keeping records, taking organisational measures to prevent money laundering)[92] and the duty to report. Under Article 9 AMLA, financial intermediaries and dealers must immediately file a report with the Money

Laundering Reporting Office Switzerland if it knows or has reasonable grounds to suspect that assets involved in the business relationship are connected to money laundering (and a few other offences).

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

i Petrobras

In the eighth edition of this ***Review***, it was mentioned that since 2014 the OAG had initiated over 60 criminal investigations into bribes paid to managers of Petrobras and politicians in Brazil.

In the ninth edition, it was reported that on 22 October 2019, the OAG announced the filing of its first indictment with the Federal Criminal Court under accelerated proceedings (which means that the accused has admitted his or her guilt) against an individual – financial intermediary – on the charge of complicity in the bribery of foreign public officials and of money laundering. In February 2020, the Federal Criminal Court convicted the individual for complicity in bribery of foreign public officials and money laundering and handed down a suspended custodial sentence of 16 months (five years' probation) and the payment of a compensatory claim of 1.6 million Swiss francs. The judges agreed with the conclusions of the OAG: while acknowledging that the proposed sentence of 16 months was close to the minimum acceptable limit, the judges approved it, the defendant benefiting from mitigating circumstances for his sincere repentance, exceptional cooperation, availability for the authorities for future trials and awareness of the seriousness of his actions.[93]

More recently, on 23 May 2022, the OAG convicted a former Swiss bank executive for money laundering in relation to the ***Petrobras*** case. The accused was found guilty of allowing the laundering of US$17.5 million linked to the corruption scheme. In its summary penalty order, the OAG convicted the former banker to a monetary penalty of 270,000 Swiss francs (the execution of the sentence was suspended and the banker subjected to a two-year probation period).[94]

ii FIFA

In the eighth edition of this ***Review***, it was mentioned that the OAG had initiated various proceedings related to FIFA, in particular an investigation concerning allegations of private bribery.

In the ninth edition, it was reported that the trial of three individuals was held between 14 and 23 September 2020 at the Swiss Federal Criminal Tribunal in Bellinzona, and that two individuals were accused of having paid bribes in order to secure media rights to various championships.

On 30 October 2020, the Tribunal acquitted the two individuals on all counts of bribery.

On 23 June 2022, after the OAG had filed an appeal, the Appeal Court confirmed the acquittal of one individual but convicted FIFA's former secretary general for receiving bribes (and committing forgery).

The OAG and some of the accused filed an appeal to the Swiss Federal Court and the case is now pending before the latter.[95]

iii Gunvor SA

In the eighth edition of this ***Review***, it was mentioned that after the conviction for bribery of a foreign official of a former oil trader with Gunvor Group in 2018, the Geneva branch of Gunvor International BV and Gunvor's Swiss entity, Gunvor SA, were facing charges for the same offence.

In the ninth edition, the verdicts were reported.[96] Gunvor SA was convicted of bribery of foreign officials on 14 October 2019 and sentenced to pay a fine of 4 million Swiss francs

and pay 90 million Swiss francs (proceeds of the crime) in compensation. In substance, Gunvor SA was blamed for its organisational shortcomings, not having taken any measures to prevent corruption: the trader had no code of conduct to give a clear signal and guide employees in their activities, no compliance programme, no internal audit, no staff member responsible for identifying, analysing or reducing the risk of corruption and no internal guidelines or training in place to raise employee awareness and reduce the risk of corruption. Moreover, Gunvor SA failed to address the risk of corruption associated with the use of agents to obtain oil cargoes and to whom commissions of several tens of millions of US dollars were paid between 2009 and 2012. In particular, Gunvor SA did not select the agents used and did not monitor their activity. However, Swiss and international anti-corruption standards (OECD, ICC, SECO) specifically highlight the increased risk of corruption in the activities of agents. They recommend, among other things, that due diligence should be carried out and adequately documented, that the selection process should be regulated, that warning signals should be defined to detect potentially illegal activities and that regular checks should be carried out, in particular when paying their bills.

iv BSGR

In the eighth edition of this ***Review***, it was mentioned that the Office of the Attorney General of Geneva had announced on 12 August 2019 that a trial for bribery of foreign officials (Article 322 septies SCC) and forgery would take place before the Geneva Court. Three individuals were accused of having bribed officials of the Republic of Guinea in order to secure mining rights worth US$5 billion to the benefit of Beny Steinmetz Group Ressources (BSGR). Although the canton of Geneva is familiar with white-collar cases and proceedings involving corruption offences, this was to be the first trial involving bribery of foreign officials in Geneva.

In the ninth edition, we indicated that the first instance trial took place in January 2021 and lasted two weeks. The Court found that the three defendants did work together to pay US$8.5 million in bribes between 2006 and 2012 to Mamadie Touré, the fourth wife of Guinean President Lansana Conté, in order for BSGR to obtain rights to mines in Simandou. The head of the group was convicted and sentenced to five years' imprisonment (his effective management position within the group having been established) and the payment of a compensatory claim of 50 million Swiss francs. An administrative director of companies linked to the group was convicted and sentenced to two years' imprisonment (suspended) and the payment of a compensatory claim of 50,000 Swiss francs. The man in charge of the field in Africa was sentenced to three-and-a-half years' imprisonment and the payment of a compensatory claim of 5 million Swiss francs. Finally, we indicated that the appeal process was ongoing.

We can now report that the trial on appeal took place in early September 2022 and that the first instance's verdict was mainly upheld by the Appeal Court, which only reduced the sentence considering the length of the proceedings and acquitted the accused on minor grounds. The accused announced their will to appeal the decision to the Swiss Federal Court.

v Oil trading in Ecuador

In June 2021, the OAG opened criminal proceedings against unknown persons on suspicion of bribery of foreign public officials (Article 322 septies SCC). The OAG was acting on the basis, in particular, of court documents from criminal proceedings conducted by the US authorities in connection with alleged acts of bribery of Ecuadorian public officials and money laundering by a former employee of a group of companies active in commodities trading based in Geneva, among other places. The aim is to clarify whether, in this complex of facts, offences could have been committed on Swiss territory.

vi Conviction of the son of a former minister from Libya

In the ninth edition, it was mentioned that, in July 2021, the Federal Criminal Court found the son of a former Libyan minister (under Muammar Qaddafi) guilty of complicity of passive bribery of foreign public officials (Article 322 septies Paragraph 2 SCC) for having received US$1.5 million from a Norwegian multinational, in order to allow it to set up in Libya. The money transited through the Geneva subsidiary of the Norwegian company and then ended up in an account in Geneva belonging to the minister's son. The convicted individual was sentenced to a fine of 360,000 Swiss francs and to the payment of a compensatory claim of 1.5 million Swiss francs. This is a rare case in Switzerland of conviction for passive bribery of a foreign official. In 2016, the OAG had already convicted the Geneva subsidiary and its managers by issuing summary penalty orders. His conviction was upheld by the Appeal Court on 2 July 2022.

vii SBM Offshore

In a summary penalty order dated 18 November 2021, the OAG sentenced three Swiss subsidiaries of the multinational group SBM Offshore and ordered them to pay an amount of over 7 million Swiss francs, including a fine of 4.2 million Swiss francs, for having failed to take all the reasonable organisational measures required to prevent the bribery of foreign public officials in Angola, Equatorial Guinea and Nigeria. Their criminal practices were part of a system specifically set up to pay substantial bribes to foreign public officials with the aim of securing contracts for the SBM Offshore group. According to the OAG, the extent and the duration of the acts of corruption show that, during the period under investigation, the assessment of the risk of corruption and the related measures and procedures to prevent it were either non-existent or wholly inadequate.[97]

viii SICPA SA

In a summary penalty order dated 27 April 2023, the OAG convicted the company SICPA SA to pay 81 million Swiss francs for its deeds related to acts of corruption, including a 1 million Swiss franc fine. A former sales director of the company was also convicted with a suspended sentence of 170 days of imprisonment.

According to the OAG, because of the lack of organisation within the enterprise, some employees of the company were able to give bribes to foreign public officials in Brazil, Colombia and Venezuela. It was mainly the convicted sales director who benefited from the lack of organisation, hence his conviction for bribing a foreign official.[98]

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Although not a member of the European Union, Switzerland is a member of the United Nations, the OECD and the Council of Europe. Switzerland is party to the following:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Council of Europe Criminal Law Convention on Corruption;
- the Council of Europe Additional Protocol to the Criminal Law Convention on Corruption;
- the United Nations Convention against Corruption; and
- the United Nations Convention against Transnational Organized Crime.

IX LEGISLATIVE DEVELOPMENTS

As mentioned in Section IV.xi, on 1 January 2021, a new federal Act on Public Procurements entered into effect,[99] making it possible, in particular, to exclude individuals who have violated provisions on combating corruption from an award procedure.

The federal Act on the Fiscal Treatment of Financial Sanctions, which was voted on by the Swiss Parliament on 19 June 2020, entered into effect on 1 January 2022. As a consequence,

two federal tax laws were amended: the federal Act on Federal Direct Taxation (see Articles 27 and 59) and the federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels (see Articles 10, 25 and 72). As a result, the deductibility of any bribe that falls under the SCC is now prohibited.

As mentioned in Section II.vi, on 23 October 2022, new statutes (Articles 76b to 76k) of the federal Act on Political Rights (PRA) and a new related federal ordinance entered into effect, creating at the federal level new obligations for certain political parties, elected officials and campaigners regarding financing of the political life.

On 30 August 2023, the government presented to the parliament a proposal for a new act to increase the efficiency of the fight against money laundering. The proposal most notably includes the creation of a federal register in which companies and other legal entities operating in Switzerland will have to register, providing information on their beneficial owners.[100]

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

In Switzerland, attorney–client privilege is guaranteed for attorneys who have passed the bar exam and who actually practice law as independent attorneys (in a law firm).[101] For these practitioners, breach of attorney–client privilege constitutes a criminal offence that carries a custodial sentence of up to three years' imprisonment.[102] By contrast, the professional activity of lawyers who have passed the bar, but who work in the legal departments of companies, is not covered by attorney–client privilege.

Bribery of a Swiss military official falls under the Swiss Military Criminal Code. All forms of bribery or granting of an undue advantage are criminalised under Articles 141, 141a, 142, 143, 143a of this Code.

As mentioned in Sections IV.xi and VIII, on 1 January 2021, a new federal Act on Public Procurements entered into effect, making it possible, in particular, to exclude individuals who have violated provisions on combating corruption from an award procedure.

In Switzerland, in general, whistleblowing mechanisms are not mandatory for private companies.[103] Moreover, employees of the private sector who wish to blow the whistle must be careful not to violate banking secrecy (if an employee of a Swiss bank)[104] or commercial secrecy,[105] if they want to avoid criminal prosecution themselves. In general, an employee must keep secret any wrongdoing of his or her employer, unless a superior interest commands the whistleblower to act on the information. In this situation, the employee must first talk to the employer, then to the competent authority, and only if this authority does not act, to the general public.[106] In the public sector, whistleblowers are better protected. Under Article 22a Paragraph 5 of the federal Act on Employees of the Swiss Confederation,[107] employees of the federal administration must not suffer any professional disadvantage for having denounced an offence or an irregularity or for having testified as a witness.

XI COMPLIANCE

Compliance programmes have been essential in Swiss banks for quite some time and have become more and more important for other companies. In fact, under Article 102 SCC, companies are convicted where they have not taken the appropriate measures to prevent the commission of an offence. In recent cases, the lack of compliance systems was a major aspect of the decision taken by the criminal authorities. Compliance can be a mitigating factor in sentencing. The Swiss authorities do provide guidance. For example, the SECO and other actors have authored a brochure providing Swiss companies operating abroad advice on active prevention of corruption. This brochure, called 'Preventing corruption – Information for Swiss business operating abroad', is available online in different languages.[108] Moreover, local authorities and private associations provide their own brochures.

XII OUTLOOK AND CONCLUSIONS

Although Switzerland is still considered as one of the least corrupt countries in the world, it has recently been criticised for 'stagnating' in its fight against corruption.[109] The lack of whistleblower protection and transparency in political party funding still needs improving, according to commentators. The new provisions of the federal Act on Political Rights should eventually improve the situation regarding this second issue.

That said, bribery, especially of foreign public officials, is being prosecuted, and companies as well as individuals are being convicted. As noted above, Swiss criminal authorities have prosecuted and tried significant cases related to bribery this past year, involving both Swiss and foreign officials. If sentences can be viewed as lenient in comparison with other jurisdictions, restitution claims (equivalent to the proceeds of a crime) are not limited under the SCC. We expect that increasingly more cases will be brought to justice and that companies will need to up their game in terms of organisational pre-emptive measures.

MANGEAT

Fanny Margairaz fanny.margairaz @mangeat.ch
Romain Wavre romain.wavre @mangeat.ch

Passage des Lions 6, Geneva 1204, Switzerland
Tel: +41 22 319 22 00
https://mangeat.ch

Endnotes

1 Fanny Margairaz is a partner and Romain Wavre is a senior associate at Mangeat Attorneys at Law LLC.
2 In German, French, Italian, Romansh and English: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/fr (Federal Law 311.0).
3 Ranked seventh out of 180 countries in 2021 by Transparency International: https://www.transparency.org/en/cpi/2022/index/che.
4 Swiss Federal Tribunal, Case 6B_391/2017, § 5.2.
5 Swiss Federal Tribunal, Case 6B_220/2022, § 1.3 and 2.4.
6 See Article 110 Paragraph 3 SCC.
7 Ursula Cassani, *Droit pénal économique*, Helbing Lichtenhahn, 2020, p. 323 and cited references.
8 Ursula Cassani, op. cit., p. 323 and cited reference.
9 Swiss Federal Tribunal, Case 6B_433/2020, Paragraph 1.2.3.
10 Ursula Cassani, op. cit., p. 326 and cited reference.
11 Swiss Federal Tribunal, Case ATF 126 IV 141, pp. 145–146.
12 Ursula Cassani, op. cit., pp. 326–327; Swiss Federal Tribunal, Case 6B_339/2011: where a loan was granted without interest.
13 Ursula Cassani, op. cit., p. 327 and cited reference.
14 Ursula Cassani, op. cit., p. 327 and cited reference.
15 Ursula Cassani, op. cit., p. 327.
16 Article 93 Paragraph 1 of the Ordinance on State Personnel, in German, French and Italian: www.fedlex.admin.ch/eli/cc/2001/319/fr (Federal Ordinance 172.220.111.3).
17 Article 93 Paragraph 3 of the Ordinance on State Personnel.
18 Article 93a Paragraph 1 of the Ordinance on State Personnel.
19 Article 93 Paragraph 2 and Article 93a Paragraph 2 of the Ordinance on State Personnel.
20 Article 25 of the Regulations under the General Law on the Staff of the Cantonal Administration, theJudiciary and Public Medical Institutions, www.lexfind.ch/fe/fr/tol/30870/versions/169597/fr (Geneva Regulations B 5 05.01).
21 01.07.06 Conflits d'intérêts et avantages octroyés aux membres du personnel de l'administration cantonale par des tiers (7 October 2022): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.
22 01.07.06 Conflits d'intérêts et avantages octroyés aux membres du personnel de l'administration cantonale par des tiers (7 October 2022): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.
23 01.07.06 Conflits d'intérêts et avantages octroyés aux membres du personnel de l'administration cantonale par des tiers (7 October 2022): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.
24 Article 91 Paragraph 2 of the Ordinance on State Personnel.
25 Article 91 Paragraph 3 of the Ordinance on State Personnel.
26 Article 9 of the Regulations under the General Law on the Staff of the Cantonal Administration, the Judiciary and Public Medical Institutions.
27 Articles 322 octies Paragraph 2 and 322 novies Paragraph 2 SCC.
28 Ursula Cassani, op. cit., p. 323 and cited reference.
29 Article 42 Paragraph 4 and Article 106 SCC.
30 Article 70 SCC.
31 Swiss Federal Tribunal, Case ATF 137 IV 79, p. 80 et seq.
32 Article 322 septies Paragraph 2 SCC.
33 Ursula Cassani, op. cit., p. 339 and cited references.
34 Ursula Cassani, op. cit., pp. 339–340 and cited references.
35 Ursula Cassani, op. cit., p. 340 and cited references.
36 Ursula Cassani, op. cit., p. 327.
37 Ursula Cassani, op. cit., p. 341 and cited reference.
38 Ursula Cassani, op. cit., p. 341.
39 Article 102 Paragraph 2 SCC.
40 https://fedlex.data.admin.ch/eli/cc/2010/267.
41 Article 22 SCPC.
42 Article 23 Paragraph 1 Letter j SCPC.
43 Article 24 Paragraph 1 SCPC.
44 Article 26 Paragraph 2 SCPC.
45 Article 47 SCC and Article 48 Letter d SCC.
46 See Articles 352 and 358 SCPC.
47 Article 53 SCC.
48 Only two decisions have been rendered by the Swiss Federal Tribunal on appeal: ATF 142 IV 333 (in 2016) and ATF 146 IV 68 (in 2019). That being said, new major cases have made it to trial (see Section V.vi).
49 Article 352 SCPC.
50 In application of Article 53 SCC.
51 Article 352 SCPC.
52 Article 358 SCPC.
53 Article 53 SCC.
54 See Article 34 SCC.
55 Article 358 Paragraph 1 and Article 360 SCPC.

56 Article 358 Paragraph 2 SCPC.
57 See Article 322 ter to Article 322 novies SCC.
58 Articles 3 and 8 Paragraph 1 SCC.
59 Article 8 Paragraph 2 SCC.
60 Ursula Cassani, op. cit., p. 349 and cited references.
61 Article 322 septies SCC with Article 34 SCC.
62 Article 42 Paragraph 4 and Article 106 SCC.
63 Article 102 Paragraphs 1 and 2 SCC.
64 Article 102 Paragraph 3 SCC.
65 Article 70 SCC.
66 Swiss Federal Tribunal Case ATF 137 IV 79, p. 80 et seq.
67 Swiss Federal Tribunal Case ATF 147 IV 479, p. 493 et seq. See the same case (p. 500 et seq.) regarding the question of whether the assets of the sole shareholder can be forfeited (according to the transparency principle) when the profits were made by his or her company.
68 Article 71 Paragraph 1 SCC.
69 OAG press release dated 17 October 2019: www.bundesanwaltschaft.ch/mpc/fr/home/medien/archiv-medienmitteilungen/news-seite.msg-id-76725.html.
70 Article 45 Paragraph 1 of the federal Act on Public Procurements.
71 In German, French, Italian, Romansh and English: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/fr (Federal Law 220).
72 Article 727 and Article 727a SCO.
73 See Articles 15 and 19a AMLA, in German, French, Italian and English: www.fedlex.admin.ch/eli/cc/1998/892_892_892/fr (Federal Law 955.0).
74 Ursula Cassani, op. cit., p. 354.
75 Articles 27, al. 3 and 59, al. 2, in German, French and Italian: www.fedlex.admin.ch/eli/cc/1991/1184_1184_1184/fr (Federal Law 642.11).
76 Articles 10, al. 1 bis and 25, al. 1 bis, in German, French and Italian: www.fedlex.admin.ch/eli/cc/1991/1256_1256_1256/fr (Federal Law 642.14).
77 Article 305 bis Paragraph 1 bis SCC.
78 Article 305 bis Paragraph 3 SCC.
79 Article 305 ter Paragraph 2 SCC.
80 https://www.bstger.ch/fr/media/comunicati-stampa/2021/2021-12-15/1224.html.
81 https://www.bstger.ch/fr/media/comunicati-stampa/2023/2023-07-03/1351.html.
82 https://www.bstger.ch/fr/media/comunicati-stampa/2022/2022-06-27/1275.html.
83 Article 305 bis SCC.
84 Article 9 Paragraph 1 AMLA.
85 Article 305 bis Paragraph 1 SCC with Article 34 SCC.
86 Article 305 bis Paragraph 2 SCC.
87 Article 305 bis Paragraph 2 SCC.
88 Article 37 Paragraph 1 AMLA.
89 Article 37 Paragraph 2 AMLA.
90 See Article 2 Paragraph 2 AMLA.
91 Article 2 AMLA.
92 Articles 3–8a AMLA.
93 www.tdg.ch/suisse/affaire-petrobras-condamnation-suisse/story/28084049.
94 https://www.swissinfo.ch/fre/petrobras--premi%C3%A8re-condamnation-d-un-banquier-suisse-par-le-mpc/47698436.
95 https://www.lemonde.fr/sport/article/2023/08/18/fifagate-troisieme-round-judiciaire-pour-nasser-al-khelaifi_6185806_3242.html.
96 OAG press release dated 17 October 2019: www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-76725.html.
97 https://www.bundesanwaltschaft.ch/mpc/fr/home/medien/archiv-medienmitteilungen/news-seite.msg-id-86009.html.
98 https://www.bundesanwaltschaft.ch/mpc/fr/home/medien/archiv-medienmitteilungen/news-seite.msg-id-94554.html.
99 www.fedlex.admin.ch/eli/cc/2020/126/fr.
100 https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-97561.html.
101 Articles 2 and 13 of the Federal Law on the Free circulation of Attorneys.
102 Article 321 SCC.
103 Concerning financial intermediaries, see Section V.ix.
104 Article 47 of the Act on Banks.
105 Article 162 SCC.
106 Swiss Federal Tribunal, Case ATF 127 III 310, p. 316.
107 In German, French, Italian and Romansh: www.fedlex.admin.ch/eli/cc/2001/123/fr (Federal Law 172.220.1).
108 www.seco.admin.ch/seco/en/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Aussenwirtschafts/broschueren/korruption_vermeiden.html.
109 https://transparency.ch/fr/la-lutte-contre-la-corruption-stagne-y-compris-en-suisse-selon-une-etude/.

Chapter 9

Thailand

Piya Krootdaecha and Nattanan Tangsakul [1]

Summary

I INTRODUCTION

In 2011, Thailand ratified the United Nations Convention against Corruption (UNCAC).[2] Since the ratification, Thailand has made various amendments to its anti-corruption laws so that they conform with the UNCAC.

The Constitution of the Kingdom of Thailand (Constitution), which provides the basis for the rule of law in Thailand, has several provisions relating to corruption. To illustrate, one of the duties of Thai people is not to participate in or support any forms of corruption and wrongful conduct.[3] It also sets a mission for the state to promote, support and provide knowledge to the people on the dangers resulting from corruption and wrongful conduct in both the public and private sectors; to provide efficient measures and mechanisms to prevent and eliminate corruption and wrongful conduct rigorously; to promote collective participation by the people in a campaign to provide knowledge on counter-corruption; and to enable people to provide leads under the protection of the state, as provided by law.[4]

Most importantly, the Constitution established the National Anti-Corruption Commission (NACC) as an independent constitutional organisation. Independent constitutional organisations are established for the independent, honest, just and courageous performance of duties, without any partiality in exercising discretion, and in accordance with the Constitution and the laws.[5]

The NACC is the main state agency responsible for investigating and inquiring into alleged offences under the Thai anti-bribery and anti-corruption laws.

The main laws that deal with criminal offences of bribery and corruption are as follows:

- the Organic Act on Anti-Corruption, BE 2561 (2018) (Anti-Corruption Act);
- the Act on Offences Relating to the Submission of Bids to State Agencies, BE 2542 (1999) (Bid Submission Offences Act);
- the Public Procurement and Supplies Administration Act, BE 2560 (2017);
- the Penal Code; and
- the Anti-Money Laundering Act, BE 2542 (1999) (Anti-Money Laundering Act).

II YEAR IN REVIEW

As Thailand has been attempting to introduce various measures to prevent and suppress corruption and bribery, it is expected that such measures will be put in place in the future. In 2022 and 2023, these measures have included a measure that prevents the filing of SLAPP (Anti-Strategic Lawsuit Against Public Participation Law or Anti-SLAPP Law) lawsuits for malfeasance or misconduct by public officers; tools for corruption investigation such as wiretapping of phone calls, special investigative techniques and undercover operations; and the admissibility in court of evidence derived from these methods. In addition, on 14 January 2023, a regulation of the Office of the Prime Minister came into force to provide more detailed guidelines regarding the giving or receiving of gifts by governmental officials. In particular, the regulation makes it clear that officers and their family members are prohibited from giving gifts to the officers' supervisors, unless such gift is in accordance with social tradition and within the prescribed threshold; and that officers are also prohibited from allowing or conniving their family members to accept such gifts.

III DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Complicity in bribery

The Penal Code and the Anti-Corruption Act generally criminalise:

- the offering of property or other benefits by a private party to an official for the purpose of inducing the official to act or omit to act, or to delay acting, contrary to the official's functions; and

- the acceptance of, or demand for, property or other benefits by an official for the purpose of inducing the official to act in accordance with the official's functions or to omit to act, or to delay acting, contrary to the official's functions.

The Penal Code and the Anti-Corruption Act specifically criminalise:

- bribery of public officials, legislators, public prosecutors, judges, inquiry officials, foreign public officials and officials of international organisations;
- soliciting or accepting of gifts by public servants, public prosecutors and judges, foreign public officials and officials of international organisations;
- malfeasance by public officials, foreign public officials and officials of international organisations to obtain property or benefits; and
- malfeasance by public prosecutors and judges for property or benefits.

Even if property or other benefits are not given to an official in his or her position, the Anti-Corruption Act also penalises any public official, foreign public official or official of an international organisation who performs or omits to perform an official act with the intention of obtaining assets or other benefits that he or she requests, accepts or agrees to accept while in or before taking office.[6]

ii Definition of bribery

The Penal Code and the Anti-Corruption Act do not provide a clear definition of bribery. However, the meaning of bribery can be interpreted from applicable legal provisions to mean to give, to offer or promise to give property or any other benefit to an official, a member of a state legislative assembly or provincial assembly, a member of a municipal assembly, an official holding a judicial post, a public prosecutor, an official responsible for conducting cases or inquiries, a foreign public official or an official of an international organisation so as to induce that person to do or not to do any act, or to delay the carrying out of any act, contrary to their duty.[7] Under the Penal Code and the Anti-Corruption Act, bribery can be committed by any entity or individual.

Regarding the element of the offence of bribery that requires inducement for the official to act contrary to his or her duties, this means that a person will not be regarded as committing bribery under Thai laws if that person offers property or any other benefit:

- to the public official to act in accordance with the public official's duties; or
- if such offer is made to a public official who has no authority regarding the matter for which a benefit is sought.[8]

As an example of this interpretation, in Supreme Court Decision No. 1262/2547, the Court determined that a police officer did not have the official duty to give a testimony before the Court. Therefore, giving money to the police officer in order to induce him to give a false testimony did not fall within the scope of Section 144 of the Penal Code. However, the action may be deemed as an offence subject to other laws.

iii Definition of public official

The Penal Code defines a public official as any person who has been appointed in accordance with the laws to perform an official duty, whether on a regular basis or for an occasion, and regardless of whether he or she receives remuneration for doing that duty.[9] On the basis of this definition, public officials include not only public servants but also members of the state legislative assembly, members of provincial and municipal assemblies, public prosecutors, inquiry officials, judges and execution officers.

Under the Anti-Corruption Act, state official means a government official or local official holding a position or receiving a regular salary, a person performing duties in a state agency or a state enterprise, a local administrator, a deputy local administrator, an assistant local administrator, a member of a local assembly and an official under the law on local administration or another official as provided by the law, and includes employees of a

government agency, state agency or state enterprise, and persons or groups of persons permitted by law to exercise administrative power established under the government system, a state enterprise or other state administration.[10]

Under the Bid Submission Offences Act, government agency is defined as a ministry, bureau, department, provincial administration authority, local administration authority, state enterprise, or other governmental agency or entity that performs public duties under the law and receives financial aid or capital from the state.[11]

Under the Act on Offences Committed by Officials of State Organs or Agencies, BE 2502 (1959), the term officer is defined to include a board chair, president, board member or person who performs work in an organisation, limited company, registered partnership or agency, or a work unit otherwise named, in which all the capital or more than 50 per cent of the capital belongs to the state, and who receives a monthly salary or other benefits in return from the organisation, limited company, or registered partnership or agency, but excluding persons who are already officials under the law.[12]

iv Penalties for bribery

Penalties differ depending on whether the person committing the crime is a private party bribing a public official or a public official accepting a bribe under the Penal Code, the Anti-Corruption Act or other applicable legislation. As the same act can fall under more than one criminal offence, the court will determine the penalty in accordance with the law that carries the severest punishment for any act that is an offence violating several provisions.

Penalties for a private party bribing a public official

The penalties specified for a private party who bribes a public official, member of the state legislative assembly, or member of a provincial or municipal assembly to act or refrain from acting, or to delay acting, are imprisonment for a term not exceeding five years or a fine not exceeding 100,000 baht, or both.[13] The penalties for a private individual bribing a public official and agreeing to give benefit to an official holding a judicial post, a public prosecutor, an inquiry official, a judge or an execution officer, so that that person will wrongly do or not do any act, or will delay in acting, are specified to be higher and are imprisonment for a term not exceeding seven years and a fine not exceeding 140,000 baht.[14]

Any persons who agree together in the submission of a bid, with the purpose of providing an advantage for a person to become entitled to enter into a contract with a government agency, by avoiding fair price competition, or by preventing the offer of other goods or services to the government agency, or by taking advantage of the government agency in a manner that is not the ordinary course of business, can face penalties of imprisonment for a term of one year to three years and to a fine of 50 per cent of the amount of the highest bid submitted among the co-offenders or to the amount of the contract concluded with the government agency, whichever amount is greater.[15]

A private individual who provides money or benefits to induce a person to submit a bid at a high or low level, or to refrain from bidding, or to withdraw a bid, faces penalties of imprisonment for a term of one year to five years and a fine equal to 50 per cent of the highest bid by the offenders or the value of the contract, whichever is higher.[16]

A private individual who compels another person, including by force or violence, to involuntarily participate or not participate in the submission of a bid, or to withdraw a bid, faces penalties of imprisonment for a term of five years to 10 years, and a fine equal to 50 per cent of the highest bid by the offender, or the value of the contract, whichever is higher.[17]

A person who dishonestly submits a low or high bid with the objective of preventing a fair price competition, and such act is the cause of the inability to perform the contractual obligations fully, faces penalties of imprisonment for a term of one year to three years and a fine equal to 50 per cent of the proposed bid or the value of the contract, whichever is higher.[18]

However, at the present time, only a fine can be imposed on a corporation, as a corporate entity cannot be imprisoned. The courts are also empowered to order the forfeiture of the following:

- property used, or possessed for use, in the commission of an offence;
- property or other tangible benefits obtained from the commission of an offence, or from acting as an instigator or supporter in the offence;
- property or other tangible benefits obtained from the sale or disposal of property or benefits; and
- any other benefits or property arising as a result of the offence.

Penalties for officials demanding or accepting bribes

A person who abuses public power through coercion, or accepts an inducement to act or not to act, faces penalties of imprisonment for a term of five years to 20 years, or imprisonment for life, and a fine of 100,000 to 400,000 baht, or death.[19]

Malfeasance by an officer with the power to approve or consider bids carries penalties of imprisonment for a term of one year to 10 years and a fine of 20,000 to 200,000 baht.[20]

An official who dishonestly designs price specifications, conditions or kickbacks in order to prevent fair competition, or an official who prevents fair competition during bidding, faces penalties of imprisonment for a term of five years to 20 years, or for life, and a fine of 100,000 to 400,000 baht.[21]

v Political contributions

Contributions to political parties are regulated under the Act Supplementing the Constitution Concerning Political Parties, BE 2560 (2017) (Political Parties Act). In general terms, a party leader, members of the party's administrative committee and sub-administrative committee, and general party members are prohibited from personally receiving any contributions or benefits from an anonymous source.

Under the Political Parties Act, individuals and legal entities are prohibited from making contributions to a political party in excess of 10 million baht per annum. The Act also specifies that contributions by a corporation, of money, assets or any other benefits totalling more than 5 million baht per year to political parties, whether one party or several parties, must be reported to the general meeting of shareholders at the next general meeting after the contribution has been made.

Political contributions are tax deductible, and it is possible for individuals to deduct up to 10,000 baht per annum, and for companies and legal entities to deduct up to 50,000 baht per annum.[22]

Independent from the foregoing, provided on the annual income tax form that individual taxpayers of Thai nationality are required to submit is an option to make a contribution of 500 baht to one political party, as prescribed under the regulations of the Revenue Department.

Foreign citizens and foreign companies are not entitled to make contributions to political parties. This prohibition also applies to any company registered in Thailand in which foreigners hold more than 49 per cent of the total number of shares.[23]

vi Limitations applicable to hospitality expenses

The Anti-Corruption Act prohibits public officials from accepting assets or other benefits that may be calculated in monetary value, from any person, except for assets or benefits that are permitted under the laws, regulations or rules permitted by virtue of law, or unless the acceptance of assets or benefits is on an ethical basis under the criteria and amounts prescribed by the NACC.[24] However, this prohibition does not apply to the acceptance of assets or benefits from ancestors, heirs or relatives in accordance with customs or on an ethical basis, within appropriate amounts.

The Regulation of the NACC re: Criteria for a Public Official's Receipt of Gifts or Benefits by Moral Obligation, BE 2563 (2022) also establishes a quantitative limitation on hospitality expenses (restrictions on gifts and gratuities, travel, meals and entertainment). In essence, hospitality expenses would not be considered bribery provided they fall under any of the following scenarios:

- the hospitality is received from a person who is not a relative of the receiver, and the value of the hospitality does not exceed 3,000 baht per occasion and per person; or
- the hospitality is received in the same manner as hospitality given to many undesignated persons.[25]

vii Facilitation or grease expenses

There are no exceptions for, or limitations or exemptions on, facilitation or grease expenses that exempt them from the definition of bribery, whether in the public or private sector. As a result, to determine whether it is likely to be regarded as a bribe, each facilitation or grease expense must be assessed separately and with consideration of the surrounding circumstances.

viii Private-to-private bribery

Thai bribery laws do not generally extend to promises or gifts requested or accepted, and offered or made, between persons in the private sector. Unlike the case of public officials, there is no specific law that addresses private bribery committed by non-governmental individuals or entities. However, commercial bribery, as a type of corporate fraud, may be regarded as a crime under the Penal Code of Thailand.

Definition of private bribery

There is no specific definition of private bribery under Thai law. However, private bribery schemes in Thailand can involve the following:

- kickbacks: undisclosed payments made by a vendor to an employee of a purchasing company;
- insider trading;
- embezzlement;
- false billing schemes;
- fraudulent statements;
- securities fraud; and
- bid rigging: in which the employees of a customer fraudulently assist a vendor in winning a contract through a competitive bidding process.

Penalties for private bribery

Depending on the crime specifics and the kind of legal entity the offender works for, different punishments may be imposed for private bribery.

An employee who is entrusted to manage another person's property or property co-owned by another person, and who dishonestly acts contrary to his or her duty and jeopardises the benefits of that other person, may face penalties of imprisonment for a term not exceeding three years or a fine not exceeding 60,000 baht, or both.[26]

A person responsible for the operation of an ordinary partnership, limited partnership or limited company, or a limited public company, who dishonestly acts or omits to act, in order to gain benefits illegally for himself, herself or other persons, faces a penalty of a fine not exceeding 50,000 baht.[27]

A director or manager, or any person responsible for the operation of a company, who is entrusted to manage property that the company owns or co-owns, and who dishonestly acts

or omits to act, in order to gain benefits for illegally himself, herself or other persons, thus causing damages to the company, faces penalties of imprisonment for a term of five years to 10 years and a fine of 500,000 to 1 million baht.[28]

A director or manager, or any person responsible for the operation of a company, who dishonestly acts, or omits to act, in order to gain benefits illegally for himself, herself or other persons, thereby causing damages to the company, faces penalties of imprisonment for a term of five years to 10 years and a fine of 500,000 to 1 million baht.[29]

The Penal Code does not establish quantitative limitations on hospitality expenses that may be deemed as private bribery. However, illegal gratuities are prohibited by most private company codes of ethics, regulations or work rules. In the absence of specific legal provisions governing private bribery, whether a hospitality expense could be considered bribery needs to be determined on a case-by-case basis, taking into account all relevant circumstances surrounding the case.

IV ENFORCEMENT: DOMESTIC BRIBERY

There are a number of enforcement agencies under Thai legislation empowered to prosecute corruption, including the various police bodies, the NACC, the Anti-Money Laundering Office (AMLO), the Department of Special Investigation and public prosecutors.

The NACC is the main state agency responsible for investigating alleged offences under Thai anti-corruption laws. Under the Anti-Corruption Act, the NACC has authority to investigate any corruption and bribery cases related to, among others, state officials.

The NACC also has the power to conduct investigations of instigators, agents or supporters, including any private person who gives, or is asked on behalf of the giver or promises to give, property or other benefits to induce a person holding a political position, a state official or an employee of a state enterprise to act wrongfully, refuse to act or delay an action contrary to official duties.

If there are multiple agencies that investigate the same corruption matter, the NACC is empowered to request the transfer of the matter being investigated by other agencies to the NACC.

As long as an offence is committed, or is deemed to have been committed, within Thailand, the NACC has the authority to conduct both a domestic and a cross-border investigation (subject to a treaty regarding mutual legal assistance with the country concerned).

As a first step in normal practice, the NACC will establish a subcommittee to conduct the investigation. The subcommittee must identify the issues, allegations and suspects who will be investigated. The subcommittee has the power to summon any person to give a statement or to request the court of jurisdiction to issue a warrant to enter any place in order to inspect, search, seize or impound any evidence relevant to the investigation. If there is sufficient evidence, the subcommittee must notify the accused of the charge, and a reasonable time must be given to the accused to prepare an explanation.

The subcommittee will gather evidence and prepare a report, which will then be sent to the NACC for consideration. The NACC will consider the charge based on the investigation file and determine whether the charge has any grounds. If the NACC determines reasonable grounds for the charge, it will send a report to the Office of the Attorney General, which will commence criminal proceedings in a criminal court against the accused. However, the NACC has the authority to initiate prosecution on its own even if the Attorney General considers that the inquiry case is incomplete.[30]

V FOREIGN BRIBERY: LEGAL FRAMEWORK

i Definition of bribery

The Anti-Corruption Act expands the scope of anti-corruption laws to cover private bribery involving foreign state officials and officials of international organisations. The Anti-Corruption Act covers:

- any foreign official who demands or accepts a bribe;
- any private party who accepts property or benefits to act as a middleman to induce an official to act improperly; and
- any private party making or offering a bribe.

If a private party making or offering a bribe is a person associated with any juristic person (either established under Thai laws or under foreign laws, and that operates a business in Thailand), and the action was taken for the benefit of that juristic person, provided that the juristic person does not have in place appropriate internal control measures to prevent the commission of the offence, the juristic person is also deemed to have committed the offence under the Anti-Corruption Act and is liable to a fine of one to two times the damage caused or benefits received.[31]

Persons deemed associated with a juristic person include representatives, employees, agents, affiliated companies, or any persons acting for or on behalf of the juristic person, regardless of whether they have the power or authority to take the action in question.

Regarding bribery of an official by a private party, corruption means any person who gives, offers to give, or promises to give any property or benefit to a public official, foreign public official or official of a public international organisation, with the intent to induce that person to perform wrongfully, not perform or delay the performance of any duty of his or her office.[32]

ii Definition of foreign public official

Foreign public official means any person holding legislative, executive, administrative or judicial office of a foreign country and any person performing duties for a foreign country, including for a public agency or public enterprise, whether appointed or elected, permanent or temporary, and whether or not they are receiving a salary or other remuneration.[33]

International organisation official means an international civil servant or any person who is authorised by an organisation to act on behalf of that organisation.[34]

iii Penalties for foreign bribery and corruption of foreign public officials

The penalty for bribery of an official, by a private party, is imprisonment for a term not exceeding five years or a fine not exceeding 100,000 baht, or both.[35]

The penalty for bribery of an official, by a private party who is related to, and has acted for the benefit of, a juristic entity that does not have appropriate internal control measures to prevent the offence is a fine equal to one, but not exceeding two times, the damages incurred or the benefits obtained.

The penalty for bribery of a foreign public official or an official of an international organisation who requests, accepts or agrees to accept a bribe is imprisonment for a term of five to 20 years or life imprisonment, and to a fine of 100,000 to 400,000 baht.[36]

iv Gifts and gratuities, travel, meals and entertainment restrictions

Unlike for Thai public officials, the Anti-Corruption Act does not provide specific limitations on hospitality expenses when it comes to foreign public officials. The NACC Regulations re: Criteria for a Public Official's Receipt of Gifts or Other Benefits by Moral Obligation, BE 2563 (2020) do not apply to foreign public officials.

However, in the absence of a quantitative cap on hospitality charges, the question of whether a hospitality expense may be deemed as bribery depends on all pertinent facts surrounding the case and updates to regulations.

VI ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

A limited company must produce a balance sheet at least once a year.[37] It must contain a summary of the assets and liabilities of the company, and a profit and loss account.[38] Failure to do so can lead to a fine not exceeding 20,000 baht.[39]

The directors must cause true accounts to be kept of the following:

- the sums received and expended by the company, of the matters for which each receipt or expenditure takes place; and
- the assets and liabilities of the company.[40]

The directors must also ensure that minutes of all proceedings and resolutions of meetings of shareholders and directors are duly entered in the books, which must be kept at the registered office of the company.[41] Directors who fail to ensure that the company keeps the correct records face a fine not exceeding 50,000 baht.[42]

ii Money laundering

The Anti-Money Laundering Act aims at the prevention of money laundering in Thailand. It stipulates offences of malfeasance in state office, under the Penal Code, offences under the Act on Offences by Employees of State Enterprises and offences of malfeasance in office or acting dishonestly in office, under other laws, as one of the predicate offences under the Anti-Money Laundering Act.

The Anti-Money Laundering Act criminalises an act of money laundering by any person who:

- transfers, accepts a transfer of or converts an asset connected with the commission of an offence for the purpose of covering up or concealing the source of that asset, or for the purpose of assisting other persons to evade criminal liability or to be liable to a lesser penalty regarding a predicate offence, before or after the criminal act;
- acts in any manner whatsoever for the purpose of concealing or disguising the true nature of the acquisition, source, location, distribution or transfer of, and entitlement to, an asset connected with the commission of an offence; or
- obtains, possesses or uses an asset, knowing at the time of obtaining, possessing or using that asset that it is an asset connected with the commission of a predicate offence.

The AMLO is a specialised organisation established for conducting money-laundering investigations. The AMLO may be involved in a bribery investigation together with the NACC or police, to specify measures against money laundering originating from bribery. It may seek court orders to confiscate assets and to stop any transactions suspected of being connected with alleged money laundering.

If there are reasonable grounds to believe that a person has violated any anti-corruption laws in Thailand, the AMLO has the power to freeze or confiscate that person's assets in Thailand, provided there is reliable evidence indicating that those assets belong to that person or that the person will receive the assets as a result of a criminal offence.

VII ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The Penal Code states that anyone who commits an offence within Thailand will be punished and is within Thai prosecution jurisdiction. It also provides that the following is deemed to be committed within Thailand:

- any offence committed even partially within Thailand;
- the consequence of any offence, as intended by the offender, if it occurs within Thailand;
- the nature of any offence, and the consequence of it, if it occurs within Thailand; or
- the consequence of any offence could be foreseen to occur within Thailand.

Furthermore, if an offence is committed or is deemed to have been committed within Thailand, even if the act of a co-principal, a supporter or an instigator in the offence is committed outside Thailand, the principal, supporter or instigator is deemed to have committed the offence within Thailand.

If the NACC needs assistance from overseas agencies to gather evidence, such as an interview with a witness or other information, the NACC must proceed through the central authority, which is the Office of the Attorney General, to contact the foreign government under the relevant mutual legal assistance treaty.

To illustrate, Thailand has a mutual legal assistance treaty with the United States. The treaty provides that the Thai and US governments are required to provide mutual assistance with investigations, prosecutions and other proceedings regarding criminal matters.

VIII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Since the ratification of the UNCAC in 2011,[43] Thailand has made various amendments to its anti-corruption laws for conformity with the standards expected under that Convention.

Thailand is not a party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development (OECD). However, Thailand has been a member of the OECD Development Centre since 2005, and has joined several core OECD bodies. In 2018, the OECD and Thailand signed a memorandum of understanding to launch a Thailand Country Programme for the OECD to provide support to Thailand's structural reform efforts, focusing on inclusive growth, governance, transparency, the business climate and competitiveness.[44]

IX LEGISLATIVE DEVELOPMENTS

The NACC proposed a new measure to prevent SLAPP lawsuits (Anti-Strategic Lawsuit Against Public Participation Law or Anti-SLAPP Law). This will be done through amendments to the Anti-Corruption Act, with the aim of preventing the filing of SLAPP lawsuits for malfeasance or misconduct by public officers. The proposed amendment will include protection measures for those who disclose or express opinions honestly, and are then sued for estoppel in a manner that uses the judicial process as a tool to deter and intimidate anyone who takes part in protecting the public interest or exercises the right to express opinions honestly.

The NACC also proposed another amendment to the Anti-Corruption Act. The new law will permit wiretapping of phone calls; special investigative techniques such as electronic or other forms of surveillance; undercover operations; and the admissibility in court of evidence derived from these methods.

These proposed amendments have passed the initial public hearing and will be further processed before they will be sent to Parliament for further consideration.

X OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Other laws in Thailand, despite not directly dealing with corruption and bribery, but that are relevant to this area, are described below.

i Official information

The Official Information Act creates transparency concerning certain conducts of state agencies and requires that they be accessible by the public.

The Official Information Act guarantees the rights of people regarding official information, which is defined to mean information in the possession or control of a state agency, whether relating to the operation of the state or to a private individual.[45] Under the Official Information Act, a state agency must publish certain official information, including the structure and organisation of its operation, and a summary of important powers and duties and operational methods.[46] State agencies must also make available certain official information for public inspection, including any concession contracts, agreements of a monopolistic nature or joint-venture agreements with private individuals for the provision of public services.[47]

ii Employment law

An employee's employment can be terminated if he or she violates the work rules or regulations of the employer. Bribery and corruption are prohibited by most private company codes of ethics, work rules, regulations or orders. A violation of these rules or regulations may result in termination of employment without severance pay, provided that the employer has already given a written warning, but in serious situations the employer is not required to give a warning.[48]

XI COMPLIANCE

Under the Anti-Corruption Act, companies operating in Thailand must put in place appropriate internal control measures that comply with guidelines issued by the NACC. Failure to do so carries a penalty of a fine from one to two times the value of the damages caused or benefits gained as a result of the violation.

According to the NACC, these measures are a tool to prevent companies, directors and connected parties from being associated with bribery, which would otherwise affect business reputation, operations and goodwill. This offers a fair playing field for all companies and reduces excessive fees and expenses related to bribery.

The internal control measures under the NACC's guidelines are as follows:

- strong, visible policies and support from top-level management to prevent bribery;
- risk assessment to identify and evaluate exposure to bribery effectively;
- enhanced and detailed measures for high-risk and vulnerable areas;
- application of anti-bribery measures to business partners;
- accurate books and accounting records;
- human resource management policies complementary to anti-bribery measures;
- communication mechanisms that encourage the reporting of suspicion of bribery; and
- periodic review and evaluation of anti-bribery prevention measures and their effectiveness.[49]

However, implementation of internal control measures under the NACC's guidelines is not a guarantee against liability for bribery, and does not guarantee that a juristic person will not be held liable.

XII OUTLOOK AND CONCLUSIONS

The Office of the Prime Minister has introduced the Regulation on the Giving or Acceptance of Gifts by Governmental Officials, BE 2565 (2022), which came into effect on 14 January 2023. This Regulation provides guidelines for the giving or receiving of gifts by governmental officials; increases efficiency in preventing corruption and misconduct, including acts that constitute a conflict between personal and public interests; and is in line with the national reform plan for preventing and suppressing corruption and misconduct and associated laws.

Under this new Regulation, government officials, including supervisors, and their family members, must not accept gifts from other government officials unless it is in accordance

with social tradition and within the prescribed threshold (not exceeding 3,000 baht per occasion and per person). The Regulation also prohibits government officials from allowing or conniving with their family members to accept such gifts.

The Regulation also prohibits officers and their family members from giving gifts to their supervisors, unless the gift is in accordance with social tradition and within the prescribed threshold.

The term family members includes non-registered spouses living together as de facto husband and wife.

Another significant principle under the Regulation regards the definition of the term gift. The Regulation makes it clear that a gift is any valuable property or benefit, whether tangible or intangible, including presents, discounts, entertainment, training and seminars, meals, travel, accommodation, digital assets and advance payments.

The Regulation provides the form for governmental officials to report to supervisors if they or their family members have received a gift in violation of the Regulation, as well as comprehensive guidance on how to deal with this situation.

Given this new Regulation, it is anticipated that Thailand will put in place more measures to prevent corruption and bribery in the future.

Baker McKenzie.

Piya Krootdaecha piya.krootdaecha@bakermckenzie.com
Nattanan Tangsakul nattanan.tangsakul@bakermckenzie.com

25th Floor Abdulrahim Place, 990 Rama IV Road, Bangkok 10500, Thailand
Tel: +66 2 666 2824
www.bakermckenzie.com

Endnotes

1 Piya Krootdaecha is a partner and Nattanan Tangsakul is an associate at Baker McKenzie.
2 The United Nations, 'Signature and Ratification Status' (United Nations, 18 November 2021) <https://www.unodc.org/unodc/en/corruption/ratification-status.html> accessed 18 August 2022.
3 The Constitution of the Kingdom of Thailand, Section 50.
4 The Constitution of the Kingdom of Thailand, Section 63.
5 The Constitution of the Kingdom of Thailand, Section 215.
6 The Anti-Corruption Act, Section 174.
7 The Penal Code, Section144, Section 167; and the Anti-Corruption Act, Section 176.
8 Supreme Court judgment Nos. 342/2506, 1262/2547 and 4212/2550.
9 The Penal Code, Section 1(16).
10 The Anti-Corruption Act, Section 4.
11 The Bid Submission Offences Act, Section 3.
12 The Act on Offences Committed by Officials of State Organs or Agencies, BE 2502 (1959), Section 3.
13 The Penal Code, Section 144.
14 The Penal Code, Section 167.
15 The Bid Submission Offences Act, Section 4.
16 The Bid Submission Offences Act, Section 5.
17 The Bid Submission Offences Act, Section 6.
18 The Bid Submission Offences Act, Section 8.
19 The Penal Code, Section 148, Section 149, Section 150.
20 The Bid Submission Offences Act, Section 10.
21 The Bid Submission Offences Act, Sections 11 and 12.
22 The Political Parties Act, Section 70.
23 The Political Parties Act, Section 74.
24 The Anti-Corruption Act, Section 128.
25 The Regulations of the NACC re: Criteria for Public Official' Receipt of Gifts or Other Benefits by Moral Obligation, BE 2563 (2022).
26 The Penal Code, Section 353.
27 The Act on Offences Concerning Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations BE 2499, Section 41; the Public Company Limited Act, BE 2535, Section 215.
28 The Security Exchange Act, BE 2535, Section 307.
29 The Security Exchange Act, BE 2535, Section 311.
30 The Anti-Corruption Act, Section 77.
31 The Anti-Corruption Act, Section 176.
32 ibid.
33 The Anti-Corruption Act, Section 4.
34 ibid.
35 The Anti-Corruption Act, Section 176.
36 The Anti-Corruption Act, Sections 173 and 174.
37 The Civil and Commercial Code, Section 1196.
38 ibid.
39 The Act on Offences Concerning Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations BE 2499 (1956), Section 18.
40 The Civil and Commercial Code, Section 1206.
41 The Civil and Commercial Code, Section 1207.
42 The Act on Offences Concerning Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations BE 2499 (1956), Section 28.
43 The United Nations, 'Signature and Ratification Status' (United Nations, 18 November 2021) <https://www.unodc.org/unodc/en/corruption/ratification-status.html> accessed 18 August 2022.
44 OECD, 'OECD strengthens engagement with partner countries during annual Ministerial Meeting' (OECD, 1 June 2018) <https://www.oecd.org/countries/thailand/oecd-strengthens-engagement-with-partner-countries-during-annual-ministerial-meeting.htm> accessed 28 August 2022.
45 Official Information Act, 1997, Section 4.
46 Official Information Act, 1997, Section 7.
47 Official Information Act, 1997, Section 9.
48 The Labour Protection Act, BE 2541, Section 119.
49 The NACC, 'Guidelines on Appropriate Internal Control Measures for Juristic Persons' to prevent bribery of public officials, foreign public officials or officials of public international organisations [2017].

Chapter 10

United States

Mark F Mendelsohn[1]

Summary

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 United States, 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.

The Biden Administration in particular has placed increased focus on combating corruption. On 3 June 2021, President Biden issued a memorandum declaring corruption as 'a core United States national security interest' and directing interagency coordination to develop a presidential strategy to combat corruption.[2] In December 2021, the White House issued the 'U.S. Strategy on Countering Corruption', which was the first whole-of-government strategy of its kind.[3] The strategy places 'special emphasis on the transnational dimensions of the challenges posed by corruption, including by recognizing the ways in which corrupt actors have used the U.S. financial system and other rule-of-law based systems to launder their ill-gotten gains'.[4]

At the same time, as we discuss in the Preface to this publication, the US has been confronted in recent years by an extraordinary challenge to its Constitution, the rule of law and its democratic institutions. The efforts to hold accountable those involved in seeking to overturn the results of the 2020 US presidential election, including former President Donald Trump and those involved in the 6 January 2021 insurrection at the US Capitol, present an extraordinary test of the strength and resilience of US laws and institutions at every level – federal, state and local. While these accountability efforts will play out over years, and will be the subject of great scrutiny by historians and common citizens, it is against this profound backdrop that we provide an overview of the US anti-corruption legal framework.

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'.

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.[5] 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 a 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'.[6] 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 '.[7] 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*.[8]

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'.[9] 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'.[10]

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.

iv 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'.[11]

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.[12] The rules also ban gifts of any value from a registered lobbyist, agent or foreign principal.[13]

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 for 'transportation, local travel, lodgings and meals'.[14] Furthermore, they cannot accept any gifts that are given because of the official's position or that come from 'prohibited sources'.[15] A prohibited source is a person or entity who is doing or seeking to do business with or who is regulated by the official's agency, or who has interests that may be substantially affected by performance or non-performance of the employee's official duties.[16] Furthermore, pursuant to an executive order signed by President Biden in 2021, executive branch appointees are banned from receiving gifts by any lobbyist or lobbying organisation, regardless of value.[17]

There are narrow exceptions that may apply to some of these restrictions.

House and Senate rules contain certain exceptions to the gift ban. These exceptions include, for example, allowing members to accept 'informational materials' that are sent to their office and relate to their official duties and allowing members to accept gifts relating to informational materials.[18] Additionally, members can accept an unsolicited invitation to attend a 'widely attended event' free of charge where at least 25 non-congressional employees will be in attendance and the event is related to their official duties.[19]

Executive branch officials may accept the unsolicited gift of free attendance at a 'widely attended gathering' with the written authorisation of their agency ethics official.[20] Furthermore, executive branch officials can receive gifts motivated by a family relationship or personal friendship.[21]

v Political contributions

In general, the Federal Election Campaign Act prohibits any foreign national from contributing, donating or spending funds, directly or indirectly, to any federal, state or local election.[22] 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.[23]

In addition, a domestic subsidiary of a foreign company may not establish a federal political action committee (PAC) 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.[24]

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.[25]

vi 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 their relationship with a foreign principal; and activities, receipts and disbursements in support of those activities.[26]

Administrative enforcement of FARA is the responsibility of the DOJ, National Security Division, Counterintelligence and Export Control Section. Historically, the enforcement of FARA had been relatively limited. In 2016, the DOJ's Inspector General released a report noting that the DOJ had only brought seven criminal cases from 1966 to 2015 and had not used its civil enforcement authority since 1991.[27] Following the 2016 election, Special Counsel Robert Mueller brought a number of criminal cases based on FARA violations,[28] including, most notably, the convictions of former Trump campaign officials Paul Manafort and Richard Gates. In 2019, a senior DOJ official stated that the DOJ was shifting from 'from treating FARA as an administrative obligation and regulatory obligation to one that is increasingly an enforcement priority'.[29] In addition to bringing more criminal cases, the DOJ also began to bring civil FARA cases, seeking to compel individuals and companies to register under FARA.[30] This renewed focus on FARA enforcement and compliance has resulted in a significant increase in the number of agents registering under FARA.[31]

However, the DOJ has not been successful in all of these cases. In May 2022, the DOJ sued casino magnate Stephen A Wynn in the US District Court for the District of Columbia to compel him to register under FARA. The District Court dismissed the lawsuit on the ground that any agency relationship between Wynn and the People's Republic of China had been

terminated before the DOJ brought the action.[32] This decision has created challenges for the DOJ by requiring that an injunctive case be brought while the alleged defendant is acting as an agent of a foreign nation.[33]

Given the continued focus on foreign influence in US politics, it is likely that the DOJ will continue to treat FARA enforcement as a priority. Furthermore, it is possible that Congress will pass new legislation to tighten FARA's restrictions. For example, in response to the *Wynn* decision, members of Congress have introduced legislation that would require 'retroactive' registration.[34]

vii 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.[35] 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'.[36] 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 previously discussed, 18 USC Section 666 also criminalises bribing recipients of federal programme funds. Such recipients can include private companies.

viii 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.[37] Violations of the gratuities provisions, however, are punishable by a maximum of two years' imprisonment and a fine of US$250,000.[38]

A violation of 18 USC Section 666 carries a maximum penalty of 10 years' imprisonment and a fine of US$250,000.[39]

A Hobbs Act violation is punishable by up to 20 years' imprisonment and a fine of up to US$250,000.[40]

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.

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.[41] In 1987, the Supreme Court held in ***McNally v. United States***[42] 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.[43] 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.[44]

In June 2016, the Supreme Court further narrowed the scope of honest services fraud, and the Hobbes Act, when it unanimously overturned the conviction of former Virginia Governor Bob McDonnell on grounds that federal prosecutors had erroneously relied on a 'boundless' definition of an official act that could result in criminally liability under 18 USC Sections 1346 and 1951.[45] 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:

- be a decision or action on a 'question, matter, cause, suit, or controversy';
- 'involve a formal exercise of governmental power'; and
- be something specific and focused that is 'pending' or 'may by law be brought' before a government official.[46]

Conversely, according to the Supreme Court, setting up a meeting, talking to another government official or organising an event, without more, does not constitute an official act, and thus cannot support convictions under 18 USC Sections 1346 and 1951.[47] More recently, in August 2019, the Second Circuit declined to extend the narrower definition of official acts in ***McDonnell*** to prosecutions under the FCPA and the federal bribery statute 18 USC Section 666, supporting similar analysis by the third, fifth and sixth circuits.[48]

In recent years, the Supreme Court has continued to restrict these statutes' application to cases involving bribery. In two unanimous decisions issued in May 2023, the Supreme Court vacated federal fraud and corruption convictions of individuals in New York state politics. In *Percoco v. United States*, the Supreme Court considered the conviction of Joseph Percoco, a former aide to Governor Cuomo who was charged with honest services fraud for accepting bribes while he had been working on Governor Cuomo's re-election campaign.[49] The District Court had instructed the jury to consider whether Percoco, who was a private citizen at the time of the alleged conduct, nonetheless had a 'special relationship' with the government and had 'dominated and controlled' government business.'[50] The Supreme Court reversed and remanded the conviction, finding that this 'is not the proper test for determining whether a private person may be convicted of honest-services fraud'.[51] While the Court did not categorically foreclose that a private citizen could be convicted of honest services fraud, the Court found that these jury instructions had been 'too vague.'[52] In *Ciminelli v. United States*, Louis Ciminelli, the owner of a New York construction company, had been convicted of wire fraud based on a theory that he had submitted a bid for a state contract while omitting information about his contact with New York state officials to ensure that he got the bid.[53] The Second Circuit had upheld this conviction under a 'right-to-control' theory wherein wire fraud can be established by showing that 'the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions'.[54] The Supreme Court reversed and remanded his conviction, holding that depriving someone of information that could have an economic value is not a deprivation of 'money or property' for purposes of the federal wire fraud statute.[55]

Federal courts have continued to limit the reach of the honest services wire fraud statute. Most recently, in *United States v. Full Play*, Judge Pamela K Chen of the Eastern District of New York vacated the honest services fraud convictions of two defendants prosecuted as part of the global bribery scandal involving the Fédération Internationale de Football Association and affiliated continental and regional soccer confederations who were charged

with participating in a scheme to bribe South American soccer officials to secure lucrative broadcasting rights. In vacating the convictions, Judge Chen cited *Percoco* and *Ciminelli* as 'strongly worded rebukes . . . against expanding the federal wire fraud statutes'.[56] Noting a lack of precedent applying honest services wire fraud to foreign commercial bribery, Judge Chen concluded that 'the honest services wire fraud statute does not encompass foreign commercial bribery'.[57]

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law and its elements

The FCPA, enacted in 1977 and 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:

- 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);
- the defendant acted corruptly and wilfully;
- the defendant made a payment, offer, authorisation or promise to pay money or anything of value either directly or through a third party;
- the payment was made to any of the following (a covered recipient):
  - a foreign official;
  - a foreign political party or party official; or
  - a candidate for foreign political office;
- any other person while knowing that the payment will be passed on to one of the above; and
- 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.[58]

The FCPA also requires issuers (publicly held corporations reporting to, or having a class of securities registered with, the Securities and Exchange Commission (SEC)), to keep accurate books and records and to establish internal accounting controls designed to, inter alia, prevent the maintenance or disbursement of funds that could be used as a source of improper payments to foreign officials. These accounting provisions are discussed further in Section V.

ii Definition of foreign public official

The FCPA prohibits payments made directly or indirectly to any foreign official or 'any foreign political party or candidate thereof, or any candidate for foreign political office'. The Act defines a foreign official as any 'officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality, or for or on behalf of any such public international organization'.[59]

Public international organisations include any entity designated as such by executive order of the President (e.g., the United Nations and the World Bank).[60]

While it generally is clear when an entity is an agency of a foreign government, there can be more ambiguity regarding whether an entity is an 'instrumentality' of a foreign government. In determining whether an entity is an instrumentality of a foreign state, the DOJ and SEC noted in their July 2020 Resource Guide (2020 Resource Guide) that the definition is 'broad and can include state-owned or state-controlled entities'.[61] In *US v. Esquenazi*, the US Court of Appeals for the Eleventh Circuit defined the term instrumentality under the FCPA.[62] In *Esquenazi*, the DOJ alleged that executives of a private telecommunications company in

Florida used intermediaries to make almost US$1 million in corrupt 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'.[63] The court enumerated non-exhaustive lists of factors to separately determine whether the government 'controls' the entity[64] and whether the entity performs a function the government 'treats as its own'.[65] The 2020 Resource Guide cited *Esquenazi* and noted that the DOJ and the SEC have 'long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government.'[66]

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.

As a general matter, the scope of the term 'foreign officials' can be quite broad. 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.

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.[67] The DOJ has issued several opinion releases that provide some guidance with respect to gift-giving.[68] Similarly, the 2020 Resource Guide advises:

> *Some hallmarks of appropriate gift-giving are when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law.*
>
> *Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC. The larger or more extravagant the gift, however, the more likely it was given with an improper purpose.*[69]

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.[70] 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 defence would not be available.'[71]

Second, it is a defence that the payment was lawful under the written laws of the foreign country.[72] 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]'.[73] 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.*[74]

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'.[75] The 2020 Resource Guide cautions against relying on this exception, noting that 'Labeling a bribe as a 'facilitating payment' in a company's books and records does not make it one'.[76] Furthermore, while the FCPA is silent on the size of such a payment, US authorities have construed this exception to only apply to relatively small payments. At a minimum, grease payments should be approached with considerable caution. FCPA compliance programmes have long trended 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 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'.[77] The legislative history emphasises that this standard encompasses instances of 'wilful blindness', 'conscious disregard' or 'deliberate ignorance' of the acts of an intermediary.[78]

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.[79] An issuer is a corporation that has issued securities registered in the United States or is required to make periodic reports to the SEC.[80] 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.[81] 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.[82]

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.[83] 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 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.[84] The court found jurisdiction even though none of the defendants were physically present in the United States when sending or receiving the emails.[85] Furthermore, the court found that because Magyar was an issuer, any attempt by the foreign defendants to conceal their bribes in relation to public filings constituted conduct sufficiently 'directed toward the United States' to give rise to personal jurisdiction.[86]

viii Civil and criminal enforcement

Companies and individuals can face both criminal and civil enforcement under the FCPA.

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 DOJ noted that it has 'exercised this civil authority in limited circumstances in the last thirty years' and has not brought a case under this authority since 2001.[87]

The SEC is responsible for civil enforcement with respect to issuers and their directors, officers, shareholders, employees and agents.

Other agencies can pursue actions related to foreign bribery, relying on different statutory authority but oftentimes in coordination with the SEC and DOJ. For example, the US Commodity Futures Trading Commission has stated that it will 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 'pil[ing] onto other existing investigations'.[88]

ix 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.

In determining whether to bring charges, federal prosecutors are required to consider the Principles of Federal Prosecution of Business Organizations (Principles), which explicitly provide for consideration of cooperation and self-reporting.[89]

In recent years, the DOJ has placed a premium on voluntary self-disclosures (VSDs), cooperation and remediation. In September 2022, Deputy Attorney General Lisa Monaco issued a memorandum (the Monaco Memorandum) stating that the DOJ will reward companies that voluntarily self-disclose misconduct to the government. Under the Monaco Memorandum, absent aggravating factors, the DOJ will not seek a guilty plea 'where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct'.[90] The Monaco Memorandum instructed DOJ components to develop policies for VSDs. In January 2023, the Criminal Division published its Corporate Enforcement and Voluntary Self-Disclosure Policy (Corporate Enforcement Policy), which superseded the earlier FCPA Corporate Enforcement Policy.[91] The Corporate Enforcement Policy, like the Monaco Memorandum, placed a premium on a company's VSD, cooperation and remediation. The Corporate Enforcement Policy emphasises that in order to receive

credit for a VSD, it must be timely, meaning it is 'within a reasonably prompt time after becoming aware of the misconduct'.[92] Furthermore, it noted that receiving credit for cooperation requires 'Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so' by the DOJ. [93]

In October 2023, the DOJ announced a complementary Safe Harbor Policy for acquiring companies in the context of mergers and acquisitions. Under this Policy, an acquiring company that identifies misconduct committed by the acquired company will receive the 'presumption of declination' if they 'engage in requisite, timely and appropriate remediation, restitution, and disgorgement[.]'.[94] Under the Policy, companies will have six months from the date of closing to disclose the misconduct and one year from the date of closing to fully remediate the misconduct.[95]

Under the Corporate Enforcement Policy, the DOJ issued a declination in March 2023 to Corsa Coal, a Pennsylvania-based coal company. According to the DOJ, the company engaged in a scheme to 'bribe Egyptian government officials in order to obtain and retain lucrative contracts[.]'.[96] However, the company received a declination from the DOJ based on the DOJ's view of the 'nature and seriousness of the offense and Corsa's 'timely and voluntary self-disclosure of the misconduct', 'full and proactive cooperation', 'timely and appropriate remediation' and agreement to the fact that Corsa 'disgorge the amount of its ill-gotten gains that it is able to pay'.[97] The company provided information that led to the prosecution of two former employees who had carried out the scheme.[98] In an October 2023 speech, Deputy Attorney General Monaco cited this as an example of the DOJ's approach to prosecuting these cases:

> *Encouraging companies to self-report misconduct can result in a virtuous cycle: by giving a path to resolution and declination to companies trying to do the right thing, we are able to identify and prosecute the individuals who are not. For example, earlier this year, we declined to prosecute Corsa Coal Corporation for FCPA violations, because the company timely and voluntarily self-disclosed the misconduct, remediated, cooperated, and disgorged the profits to the extent of its capability. Crucially, the company provided information about individual wrongdoers, including two former vice presidents who were charged criminally for their involvement in the scheme.*[99]

Similar to the DOJ, 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'.[100]

While the DOJ and civil enforcement agencies may bring parallel actions, the DOJ has adopted a policy that is intended to address the coordination of penalties in such circumstances. In 2018, the Department introduced a new Policy on Coordination of Corporate Resolution Penalties, which aims to 'discourage disproportionate enforcement of laws by multiple authorities' – also described as 'piling on'.[101] 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 an 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.[102] The Policy also sets out factors DOJ lawyers should evaluate to determine when multiple penalties serve the interests of justice in a particular case.[103] In 2021, a senior DOJ official stated that this 'anti-piling on' programme is designed to encourage coordination in parallel investigations, but that companies should not attempt to game the system 'to get lower penalties for foreign corruption violations'.[104]

x 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 discussed in Section V.ix, 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 and non-prosecution agreements, which can allow a company to avoid criminal conviction. The SEC has adopted these forms of settlement as well.[105]

Individuals, conversely, may have different options and incentives. While the DOJ has offered companies a pathway to a declination through VSDs, it has emphasised that it will bring actions against individuals. As noted regarding the *Corsa Coal* matter, the DOJ brought criminal charges against former employees of Corsa Coal and ultimately provided a declination to the company. When the DOJ does bring a case against an individual, plea-bargaining is certainly available, widely used and often beneficial, but 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.

xi Prosecution of foreign companies and individuals

Foreign companies can be prosecuted under Section 78dd-3, part of the 1998 amendments to the Act. That provision provides that it is unlawful for any person 'while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of' an improper payment.[106] 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.[107] In 2018, the US Court of Appeals for the Second Circuit held 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.[108] This ruling has made it harder for the DOJ to bring FCPA cases against foreign nationals acting wholly extraterritorially.

xii 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.[109] The applicable statute of limitations is five years. Officers, directors, stockholders and employees of business entities may be prosecuted for violations of the FCPA irrespective of whether the business entity itself is prosecuted. Any fine imposed upon an officer, director, stockholder, employee or agent may not be paid or reimbursed, directly or indirectly, by the business entity.[110]

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.[111] 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.[112] 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.[113] In ***Kokesh***, 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.[114] ***Kokesh*** did not address, however, 'whether courts possess authority to order disgorgement in SEC enforcement proceedings'.[115] The Supreme Court answered this question in ***Liu v. SEC***, holding that disgorgement is a form of equitable relief authorised under the Exchange Act, but that disgorged funds must be limited to a wrongdoer's net profits.[116] Courts have taken divergent approaches to interpreting ***Liu***, but have largely left to the SEC's discretion calculating a wrongdoer's net profits.[117]

Any entity found to have violated the FCPA's anti-bribery provisions may also be barred from government contracting. Even an indictment may render an entity ineligible to sell goods or services to the government. A finding that an entity has violated the FCPA can also have negative collateral consequences in other dealings with 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 keep books, records and accounts that accurately reflect the issuer's transactions; and
- to 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'.[118]

The records must be kept to 'reasonable detail', which the Act defines as the level of detail that 'would satisfy prudent officials in the conduct of their affairs'.[119] The FCPA holds issuers strictly liable on civil grounds for the bookkeeping violations of consolidated subsidiaries and affiliates.[120] 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.[121]

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]'.[122]

ii Disclosure of violations or irregularities

While the DOJ and SEC encourage disclosures of misconduct (as discussed in Section V.ix), 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.[123]

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.[124]

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 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.[125] The applicable statute of limitations is five years.[126]

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.[127]

v Tax deductibility of domestic or foreign bribes

The US Internal Revenue Code expressly prohibits the tax deductibility of domestic and foreign bribes.[128]

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.[129] Violation of the money laundering statute does not require a proof of violation of the underlying unlawful activity.[130]

Knowledge of criminal activity can be established from facts indicating that underlying criminal activity is likely; thus, wilful blindness is covered by the statute.[131] A transaction can constitute almost any form of surrendering the proceeds from an underlying crime.[132] The effect on foreign or interstate commerce need only be *de minimis*.[133] 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',[134] and courts have been permissive in interpreting the scope of the text.[135]

However, there is some uncertainty as to when proceeds means profits from the illegal activities or just the cash flow from all receipts associated with the activity. A plurality of the Supreme Court held that proceeds means profits in the context of an illegal gambling business.[136] 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.[137]

Two sections of the money laundering statute are most relevant in the context of foreign bribery:

- 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; and

- 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 or 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 other things – corruption cases involving the Venezuelan state-owned oil company, PDVSA, and the Malaysian sovereign wealth fund, 1Malaysia Development Berhad (1MDB).[138]

Promotion

Most courts have defined promotion as any transaction that helps the underlying offence continue to prosper.[139] 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.[140]

Concealment

Concealment is defined as having a purpose to conceal, so it would be an offence even if the concealment is not successful.[141] 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.[142]

A variety of case-specific factors influence a court's finding of concealment. As one court suggested:

> *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.*[143]

Structuring transactions to evade reporting requirements

The money laundering statute prohibits the structuring of a transaction to avoid an obligation to report.[144] The reporting requirements for financial transactions designed to prevent money laundering are discussed in Section V.ix. One of the requirements for the offence is actual knowledge of the underlying reporting requirement.[145]

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.[146]

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.[147]

Its scope can be wider than the coverage of the FCPA, and therefore money laundering charges are often included as a count in cases of potential corruption.[148]

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.[149]

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.[150] 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.[151]

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).[152] 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.[153] A year later, the DOJ filed a supplemental civil forfeiture action seeking recovery of assets valued at approximately US$540 million.[154] The complaints filed by the DOJ represent the largest single action brought under the Kleptocracy Asset Recovery Initiative to date.

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:

- financial institutions are obligated to report cash transactions involving US$10,000 or more;[155]
- trades and businesses other than financial institutions are obligated to report cash transactions involving US$10,000 or more;[156]
- persons in the US are required to report foreign financial agency transactions;[157] and
- financial institutions are required to file suspicious transaction reports under appropriate circumstances.[158]

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.[159]

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.[160] 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.[161]

xi US economic sanctions and related offences

Increasingly, the United States is utilising its economic sanctions authorities to combat corruption.

Building upon the Global Magnitsky Human Rights Accountability Act, in December 2017, President Trump signed an Executive Order establishing the 'Global Magnitsky' sanctions programme.[162] The Executive Order authorised sanctions to be imposed on individuals who engage in corruption or human rights abuses. Following that, the US Department

of Treasury's Office of Foreign Assets Control (OFAC) utilised this authority to sanction government officials engaged in corruption and human rights abuses around the world, effectively cutting them off from the US financial system.[163]

As part of the Biden Administration's efforts to combat transnational bribery in Central America, the State Department is directed under Section 353 of the United States-Northern Triangle Enhanced Engagement Act to identify individuals who have knowingly engaged in acts that undermine democratic processes or institutions, engaged in significant corruption or obstructed investigations into such acts. Accordingly, annually, the State Department publishes a list of corrupt actors in El Salvador, Guatemala and Honduras (known as the Engel List).[164] Individuals on the List are ineligible to receive visas or other documentation to enter the US, or to receive any other benefit under US immigration laws, and any current visas are revoked.[165]

Following Russia's February 2022 invasion of Ukraine, the Biden Administration has focused on imposing sanctions and bringing criminal cases, as appropriate, against individuals who have profited from the corruption of the Russian regime. In his March 2022 State of the Union, President Biden said: 'Tonight, I say to the Russian oligarchs and the corrupt leaders who've bilked billions of dollars off this violent regime: No more.'[166] OFAC imposed sanctions on Russian oligarchs.[167] The DOJ established 'Task Force KleptoCapture', whose mission is to bring criminal cases against those who violated the sanctions imposed on Russia.[168] In September 2022, the DOJ brought an indictment against Russian oligarch Oleg Deripaska and his associates for sanctions violations.[169]

A notable feature of the government's focus on the enforcement of sanctions is the emphasis on corporate enforcement and compliance, borrowing heavily from the DOJ's now mature FCPA enforcement framework. Indeed, Deputy Attorney General Monaco has said sanctions are the 'new FCPA'.[170] In drawing this connection, she underscored the DOJ's work pursuing multilateral cooperation to bring these cases and would incentivise VSDs through policies modelled after those developed in the FCPA enforcement programme.[171] Although FCPA enforcement remains a DOJ priority, it is clear that the DOJ is tackling sanctions enforcement with a new level of attention and resources in the wake of the invasion of Ukraine. Deputy Attorney General Monaco has emphasised that companies that have an international business profile sanctions should have sanctions 'at the forefront of [their] approach to compliance'.[172]

OFAC can bring civil penalties on a strict liability basis for sanctions violations, meaning that a person can be held civilly liable for the violation even if it did not know or have reason to know of the violation.[173] The DOJ can impose criminal penalties on a company or person that 'wilfully' violates US sanctions of up to US$1million or up to 20 years' imprisonment.[174]

VI 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 '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'.[175]

VII LEGISLATIVE DEVELOPMENTS

Congress enacted the Corporate Transparency Act (CTA) as part of the Anti-Money Laundering Act of 2020 on 1 January 2021. The CTA requires a wide range of entities to file reports with the Department of Treasury's Financial Crimes Enforcement Newtork (FinCEN) concerning their beneficial owners. The CTA establishes certain exemptions from these requirements, including for large operating companies. FinCEN has issued regulations to implement these beneficial ownership reporting requirements and they will take effect on 1 January 2024, although entities created before that date that are required to report will have until 1 January 2025 to file their beneficial ownership report.[176]

VIII OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

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.[177]

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, whistleblowers enjoy protection under a wide variety of federal and state laws. The US False Claims Act, 31 USC Sections 3729 to 3733, for example, encourages whistleblowers 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 whistleblowers who provide original information concerning violations of the federal securities laws. In response to this legislation, in 2012 the SEC established a Whistleblower Office to administer its whistleblower programme.[178] 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 whistleblower provisions, so that employees who blow the whistle on foreign official bribery are eligible for significant recoveries.

IX 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'.[179]

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. The DOJ has cited a company's compliance programme as a reason that it may decline to bring criminal charges. In a 2019 matter involving Cognizant, the DOJ cited the 'existence and effectiveness of the Company's pre-existing compliance program' as one of the reasons it issued a declination.[180] In 2012, the DOJ declined to bring charges against Morgan Stanley, noting that the company had 'constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials[.]'.[181]

The 2020 Resource Guide published by the DOJ and the SEC notes that there are 'no formulaic requirements regarding compliance programs' and instead the agencies:

> *employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions: Is the company's compliance program well designed? Is it being applied in good faith? In other words, is the program adequately resourced and empowered to function effectively? Does it work in practice?.*[182]

The Resource Guide nonetheless goes on to helpfully identify a number of critical areas:

- commitment from senior management and a clearly articulated policy against corruption;
- code of conduct and compliance policies and procedures;
- oversight, autonomy and resources;
- risk assessment;
- training and continuing advice;
- incentives and disciplinary measures;
- third-party due diligence and payments;
- confidential reporting and internal investigation;
- continuous improvement: periodic testing and review;
- mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration; and
- investigation, analysis and remediation of misconduct.[183]

In March 2023 the Criminal Division released an updated 'Evaluation of Corporate Compliance Programs' (Evaluation Framework).[184] This Framework guides how the DOJ assesses the adequacy and effectiveness of a company's compliance programme. The compliance themes in the Evaluation Framework are similar to the themes in the 2020 Resource Guide, but the DOJ has placed an increased focus on certain areas. First, the Evaluation Framework states that the DOJ will consider 'a corporation's policies and procedures governing the use of personal devices, communications platforms, and messaging applications, including ephemeral messaging applications'. Under the Framework, a company should ensure that 'to the greatest extent possible, business-related electronic data and communications are accessible and amenable to preservation by the company'.[185] Second, the Evaluation Framework emphasises the importance of the 'establishment of incentives for compliance and disincentives for non-compliance'.[186] The DOJ has emphasised that companies should claw back the compensation of individuals who commit wrongdoing and those who 'both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct'.[187] Deputy Attorney General Monaco has emphasised that as part of their compliance reviews, companies should ensure that their 'clawback programs are fit for purpose and ready for deployment'.[188]

The DOJ has continued to emphasise that a strong compliance programme can ultimately be of great benefit to the company. In October 2023, Deputy Attorney General Monaco stated that: 'Compliance should no longer be viewed as just a cost center for companies. Good corporate governance and effective compliance programs can shield companies from enormous financial risks and penalties.'[189]

X OUTLOOK AND CONCLUSIONS

At a broad level, the DOJ has made policy changes not only to strengthen enforcement, but also to standardise and reward VSD and corporate cooperation. The DOJ has made several pronouncements focused on enhancing corporate compliance programmes,

and encouraging companies to develop incentives to reward ethical behaviour and punish misconduct. Likewise, the SEC continues to prioritise corporate enforcement and incentivise whistleblowing.

Enforcement of the FCPA has continued to be a significant priority of US enforcement agencies. In 2022, the DOJ resolved five and the SEC resolved seven FCPA corporate enforcement actions. These 12 enforcement actions resulted in approximately US$1.5 billion in fines, penalties, disgorgement and prejudgment interest, of which around US$714 million was assessed by the DOJ and around US$265 million by the SEC.[190]

Notably, the DOJ has continued to promote and seek to reward corporate cooperation and self-disclosure. As discussed above, under the Monaco Memorandum, the Corporate Enforcement Policy and the Safe Harbor Policy, the DOJ has emphasised the importance of timely VSDs, cooperation and remediation. The *Corsa Coal* declination is an example of how the DOJ will provide a declination to a company that takes these actions, while the DOJ may pursue criminal charges against individual wrongdoers. Similarly, the DOJ has placed a renewed premium on strengthening compliance programmes and offered guidance on how it expects a compliance programme to be run, including limitations on ephemeral messaging and establishing incentives programmes, including clawbacks.

The SEC has stated that it 'remains committed to enforcing the Foreign Corrupt Practices Act (FCPA) against issuers of securities traded in the United States that engage in bribery and other prohibited corrupt practices abroad'.[191] In the 2022 fiscal year, the SEC received 12,322 whistleblower tips, the largest number ever received.[192] Of the 12,322 tips received in 2022, only 202 were related to the FCPA.[193] One FCPA-related tip, however, notched the largest whistleblower award of the year: US$37 million 'connected to an [FCPA] settlement reached by the SEC and DOJ with a publicly traded European healthcare company'.[194] The award ranked among the top 10 largest payouts ever to an individual whistleblower. In 2023, the SEC paid a US$279 million whistleblower reward – by far the largest in the programme's history.[195] Although the award was heavily redacted, the *Wall Street Journal* reported that it was related to an FCPA violation.[196] These large FCPA whistleblower awards may incentivise more whistleblower tips related to FCPA violations.

Given the ongoing focus at the DOJ and the SEC on FCPA violations, the DOJ's clear efforts to incentivise VSD by corporations, and the DOJ's new emphasis on corporate sanctions enforcement and compliance, companies engaged in global business need to be vigilant regarding their activities, and would be well-advised to review their anti-corruption and sanctions compliance programmes. When they do detect a violation, careful consideration must then be given to investigating, remediating and evaluating whether a VSD would be appropriate.

Paul|Weiss

Mark F Mendelsohn mmendelsohn@paulweiss.com

2001 K Street NW, Washington DC 20006-1047, United States
Tel: +1 202 223 7300
www.paulweiss.com

Endnotes

1 Mark F Mendelsohn is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The author would like to thank Sam Kleiner and Jacob Wellner for their substantial assistance in the preparation of this chapter.
2 The White House, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (3 June 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum--on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.
3 The White House, United States Strategy on Countering Corruption (December 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.
4 ibid. at 4.
5 18 USC §201(c).
6 Evans v. United States, 504 US 255, 268 (1992).
7 ibid. at 266.
8 See, e.g., United States v. Rabbitt, 583 F.2d 1014, 1023 (8th Cir. 1978), abrogated on other grounds by McNally v. United States, 483 US 350, 356 (1987).
9 18 USC §201(a).
10 Dixson v. United States, 465 US 482, 499 (1984).
11 United States v. Sun-Diamond Growers of California, 526 US 398, 405 (1999).
12 House Committee on Ethics, 'Gifts Guidance', https://ethics.house.gov/house-ethics-manual/gifts#_Campaign_Contributions.
13 See Rule 25 of the Rules of the House of Representatives (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf; Standing Rule XXXV of the Senate (2015), www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf#page=9 (together, the Congressional Rules).
14 5 CFR §2635.204.
15 5 CFR §2635.202.
16 5 CFR §2635.203(d).
17 Exec Order No. 13989, https://www.federalregister.gov/documents/2021/01/25/2021-01762/ethics-commitments-by-executive-branch-personnel.
18 Congressional Rules.
19 ibid.
20 5 CFR §2635.204.
21 ibid.
22 52 USC §30121.
23 52 USC §30121(b).
24 11 CFR 110.20(i); the Federal Election Committee, Foreign Nationals Brochure, www.fec.gov/pages/brochures/foreign_nat_brochure.pdf.
25 ibid.
26 22 USC §611 et seq.
27 Office of the Inspector General (DOJ), Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act (September 2016), https://oig.justice.gov/reports/2016/a1624.pdf.
28 Mark Mazzetti and Katie Benner,' Mueller's Digging Exposes Foreign Lobbying and Its Big Paydays', NY Times (1 August 2018), https://www.nytimes.com/2018/08/01/us/politics/fara-foreign-agents-mueller.html.
29 Katie Benner, 'Justice Dept. to Step Up Enforcement of Foreign Influence Laws,' NY Times (6 March 2019), https://www.nytimes.com/2019/03/06/us/politics/fara-task-force-justice-department.html.
30 Whitney K Novak, Cong. Rsch. Serv., Foreign Agents Registration Act (FARA): A Legal Overview (2023).
31 Julia Ainsley, et al., The Mueller effect: FARA filings soar in shadow of Manafort, Flynn probes, NBC News (18 January 2018), https://www.nbcnews.com/news/us-news/mueller-effect-fara-filings-soar-shadow-manafort-flynn-probes-n838571.
32 Memorandum Opinion, United States v. Wynn, No. 22-1372 (JEB), (D.D.C. 12 October 2022).
33 Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ FARA Loss in Stephen Wynn Action May Signal More Aggressive Enforcement to Come, Not Less (14 October 2022), https://www.paulweiss.com//practices/litigation/cybersecurity-data-protection/publications/doj-fara-loss-in-stephen-wynn-action-may-signal-more-aggressive-enforcement-to-come-not-less?id=45052.
34 Caitlin Oprysko, Lawmakers introduce bill to close Wynn FARA loophole, Politico (12 July 2023), https://www.politico.com/newsletters/politico-influence/2023/07/12/lawmakers-introduce-bill-to-close-wynn-fara-loophole-00106012.
35 For example, a manager at Apple was convicted of wire fraud for accepting kickbacks in exchange for providing information to Apple suppliers on price targets and future products. Jim Edwards, 'An Apple Exec Is Going To Prison For Taking Kickbacks On Leaked Information' (8 December 2014), www.businessinsider.com/apple-paul-shim-devine-sentenced-2014-12.
36 18 USC §1952(b) (2012).
37 18 USC §201(b); 18 USC §3571(b). See also Sun-Diamond, 526 US at 405. Corporations convicted under 18 USC 3571(c) may be fined up to US$500,000.
38 18 USC §201(c); 18 USC §3571.
39 18 USC §666(a); 18 USC §3571.
40 18 USC §1951; 18 USC §3571.
41 Peter J Henning and Lee J Radek, The Prosecution and Defense of Public Corruption, 8 (2011).
42 McNally v. United States, 483 US 350 (1987).
43 18 USC §1346.
44 130 SCt 2896, 2929 (2010).

45 McDonnell v. United States, 139 SCt 2355 (2016).
46 ibid. at 2357.
47 ibid.
48 See generally United States v. Ng Lap Seng, 934 F.3d 110 (2nd Cir. 2019).
49 United States v. Percoco, 598 U.S. 319, 329 (2013).
50 ibid. at 322.
51 ibid.
52 ibid.
53 598 U.S. 306 (2023).
54 ibid.
55 ibid. at 316.
56 2023 WL 5672268, at *24 (E.D.N.Y. Sept. 1, 2023).
57 ibid. at *23.
58 See 15. USC §§78dd-1(a), 78dd-2(a), 78dd-3(a) (1998).
59 15 USC §78dd-1(f)(1)(a).
60 8 CFR § 319.5 (2004).
61 DOJ, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2d ed. July 2020), https://www.justice.gov/media/1106611/dl?inline.
62 United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir 2014).
63 ibid.
64 ibid. ('[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.')
65 ibid. ('Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.')
66 DOJ, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2d ed. July 2020), https://www.justice.gov/media/1106611/dl?inline.
67 15 USC § 78dd-l(c)(2)(A)-(B). (See discussion of defences, Part D).
68 See, e.g., DOJ FCPA Review Procedure Release Op's 81-01 (1981), 81-02 (1981), 82-01 (1982).
69 DOJ, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2d ed. July 2020), https://www.justice.gov/media/1106611/dl?inline.
70 15 USC §78dd-l(c)(2)(A)-(B).
71 HR Conf Rep No. 100-418, at 922 (1988).
72 15 USC §78dd-l(c)(l).
73 15 USC §§78dd-l(b), 78dd-2(b), 78dd-3(b).
74 15 USC §78dd-3(f)(4).
75 15 USC §§78dd-l(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).
76 DOJ, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2d ed. July 2020), https://www.justice.gov/media/1106611/dl?inline.
77 15 USC §§78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3).
78 HR Conf Rep No. 100-418, at 919-21 (1988).
79 15 USC §§78dd-l(a), 78dd-2(a).
80 15 USC §78dd-l(a).
81 15 USC §78dd-2(h).
82 15 USC §§78dd-1(a), 78dd-2(a).
83 15 USC §78dd-3(a).
84 See SEC v. Straub, No. 1:11-cv-09645-RJS (SDNY 8 February 2013).
85 ibid.
86 ibid. However, see SEC v. Steffen, No. 1:11-cv-09073-SAS (SDNY 19 February 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').
87 Department of Justice, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2d ed. July 2020), at n. 374, citing United States & SEC v. KPMG Siddharta Siddharta & Harsono, et al., No. 01-cv-3105 (S.D. Tex. 2001), https://www.justice.gov/media/1283651/dl?inlinee.
88 James M McDonald, Commodity Futures Trading Commission Director of Enforcement, Remarks at the American Bar Association's National Institute on White Collar Crime (6 March 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.
89 DOJ, Justice Manual, 9-28.000 ('Principles of Federal Prosecution of Business Organizations).
90 DOJ, Further Revisions to Corporate Enforcement Policies (15 September 2022), https://www.justice.gov/opa/speech/file/1535301/download.
91 DOJ, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (9-47.120).
92 ibid.
93 ibid.
94 DOJ, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (4 October 2023),https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

95 ibid.
96 Letter from Department of Justice, Re: Corsa Coal Corporation, to Brian E. Spears and Kara Brockmeyer (8 March 2023), at 2, https://www.justice.gov/criminal-fraud/file/1573526/download.
97 ibid.
98 DOJ, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (4 October 2023),https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.
99 ibid.
100 See Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470 (23 October 2001).
101 DOJ, Rod J Rosenstein (then-Deputy Attorney Gen, DOJ), Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.
102 DOJ, Memorandum from Rod Rosenstein, Deputy Attorney Gen, DOJ, to Heads of Dep't Components US Att'ys Policy on Coordination of Corporate Resolution Penalties (9 May 2018), www.justice.gov/opa/speech/file/1061186/download.
103 ibid.
104 'U.S. Official to Firms: Don't Game DOJ Policy Against Multiple Penalties', Reuters (2 June 2021),https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02/.
105 See e.g., SEC, SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct (22 April 2013), www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780.
106 15 USC §§78dd-3(a).
107 US v. Patel, No. 09-cr-338 (DDC June 2011).
108 United States v. Hoskins, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).
109 15 USC §§78dd-2(g), 78dd-3(e), 78ff(c); 18 USC §3571.
110 15 USC §§78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3) (2002).
111 15 USC §§78dd-2(g), 78dd-3(e), 78ff(c).
112 15 USC §§78u, 78u-3 (2010).
113 Kokesh v. SEC, 581 U.S. 455, 457 (2017).
114 See ibid.
115 ibid. at 461 n. 3.
116 140 S. Ct. 1936, 1940 (2020)
117 See, e.g., SEC v. Blackburn, 15 F.4th 676, 678 (5th Cir. 2021); SEC v. de Maison, 2021 WL 5936385, at *2 (Dec. 16, 2021) (holding that 'the amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation', and that Liu 'did not disturb this court's longstanding principle that specific [equitable] tracing [is] unnecessary in ordering disgorgement for securities fraud'.
118 15 USC §78m(b) (2006).
119 ibid.; see SEC v. World-Wide Coin Invs, Ltd, 567 F. Supp. 724, 750 (ND Ga 1983) ('Among the factors that determine the internal accounting control environment of a company are its organizational structure, including the competence of personnel, the degree and manner of delegation and responsibility, the quality of internal budgets and financial reports, and the checks and balances that separate incompatible activities').
120 15 USC §78m(b).
121 15 USC §78m(b)(4)-(5); see e.g., SEC v. Kelly, 765 F. Supp. 2d 301, 322 (SDNY 2011) ('SEC need not prove scienter to succeed on a claim . . . [liability] is predicated on reasonableness . . . of defendant's conduct').
122 15 USC §78m(b)(6).
123 See, e.g., In the Matter of Watts Water Technologies, Inc. and Leesen Chang, SEC Administrative Proceeding File No. 3-148585 (13 October 2011).
124 See, e.g., SEC, Order In the Matter of Exelon Corporation and Commonwealth Edison Company, Exchange Act Release No. 11248 (28 September 2023); United States v. Control Components Inc, No. 8:09-cr-00162 (C.D. Cal. 22 July 2009); United States v. SSI Int'l Far East Ltd, No. 3:06-cr-00398-KI (D. Or. 16 October 2011).
125 15 USC §78ff(a); 18 USC §3571.
126 18 USC §3282 (2003).
127 15 USC §78u.
128 See 26 USC §162(c)(1)(2006).
129 18 USC §1956(c)(7) (2012) (listing the predicate offences as 'specified unlawful activit[ies]').
130 See 18 USC §1956.
131 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').
132 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').
133 ibid.
134 18 USC §1956(c)(9) (2012).
135 See United States v. Akintonbi, 159 F.3d 401, 403 (9th Cir. 1998) (finding that checks with no value were proceeds under the statute).
136 See United States v. Santos, 553 US 507, 515–516 (2008).
137 See e.g., United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011).

138 See DOJ, Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested (25 July 2018), www.justice.gov/opa/pr/two-members-billion-dollar-venezuelan-money-laundering-scheme-arrested; Associated Press, Malaysia ex-PM's Wife Pleads Not Guilty to Money Laundering, (4 October 2018), https://apnews.com/f769ed693a224cc6bd733673664af68c.
139 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).
140 18 USC §1956(a)(2)(A); United States v. Moreland, 622 F.3d. 1147 (9th Cir 2010).
141 See United States v. Heid, 651 F.3d 850, 855 (8th Cir 2011).
142 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).
143 United States v. Magluta, 418 F.3d 1166, 1176 (11th Cir 2005).
144 18 USC §1956(a)(1-2); see also United States v. Bowman, 235 F.3d 1113, 1118 (8th Cir 2000).
145 Bowman, 235 F.3d at 1118 (citing United States v. Young, 45 F.3d 1405, 1413 (10th Cir 1995), cert denied, 515 US 1169 (1995)) (not reaching the structure of the transaction because the evidence indicated that offender was unaware of the requirement government alleged).
146 31 USC §5324(a)–(c).
147 See United States v. Bodmer, 342 F. Supp. 2d 176, 191-92 (SDNY 2004) (finding that a foreign national defendant had conspired to violate the money laundering statue'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).
148 See, e.g., United States v. Kozeny, 638 F. Supp. 2d 348 (SDNY 2009) (finding testimony of two witnesses that the 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)).
149 See, e.g., United States v. Jean Rene Duperval, No. 1:09-cr-21010-JEM (SD Fl 2009) (money laundering prosecution of former director of international relations for Haiti Telco).
150 18 USC §1956(a)(1)(2).
151 18 USC §1957(b)(1)(2) (2012).
152 18 USC §981(a)(1)(A) and (C).
153 See DOJ, United States Seeks to Recover More Than US$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (20 July 2016), www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign.
154 See DOJ, US Seeks to Recover Approximately US$540 Million Obtained From Corruption Involving Malaysian Sovereign Wealth Fund (15 June 2017), www.justice.gov/opa/pr/us-seeks-recover-approximately-540-million-obtained-corruption-involving-malaysian-sovereign.
155 31 USC §5313.
156 31 USC §5331 (2011); 31 CFR §§103.22, 103.30 (2011).
157 31 USC §5314; 31 CFR §103.24.
158 31 USC §5318 (2011).
159 Ratzlaf v. United States, 510 US 135, 137 (1994); see also United States v. Tatoyan, 474 F.3d 1174, 1177 (9th Cir 2007).
160 31 USC §5322(a) (2001).
161 31 USC §5322(b).
162 Exec Order No. 13818, https://ofac.treasury.gov/media/8656/download?inline.
163 Dep't of Treasury, Treasury Sanctions Corrupt Actors in Africa and Asia (9 December 2020), https://home.treasury.gov/news/press-releases/sm1206.
164 Section 353 Corrupt and Undemocratic Actors Report: 2023, https://www.state.gov/reports/section-353-corrupt-and-undemocratic-actors-report-2023/.
165 ibid.
166 The White House, President Biden's State of the Union Address (1 March 2022), https://www.whitehouse.gov/state-of-the-union-2022/.
167 Dep't of Treasury, Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin's War Against Ukraine (11 March 2022), https://home.treasury.gov/news/press-releases/jy0650.
168 DOJ, Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture (2 March 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture.
169 DOJ, Russian Oligarch Oleg Vladimirovich Deripaska and Associates Indicted for Sanctions Evasion and Obstruction of Justice (29 September 2022),https://www.justice.gov/opa/pr/russian-oligarch-oleg-vladimirovich-deripaska-and-associates-indicted-sanctions-evasion-and.
170 DOJ, Deputy Attorney General Lisa O. Monaco Delivers Keynote Remarks at 2022 GIR Live: Women in Investigations (16 June 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-remarks-2022-gir-live-women.
171 ibid.
172 ibid.
173 See 31 CFR Appendix A to Part 501, 'Economic Sanctions Enforcement Guidelines.'
174 50 U.S.C. § 1705(c).
175 Inter-American Convention Against Corruption, Article IX, 29 March 1996.
176 Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting FAQs, https://www.fincen.gov/boi-faqs.
177 Upjohn Co. v. United States, 449 US 383, 389 (1981).
178 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No. 111-203, 124 Stat 1376 (2010).

179 DOJ, USAM, Criminal Resource Manual, §§9–28.300.
180 DOJ, Letter Re: Cognizant Technology Solutions Corporation (13 February 2019), at 2, https://www.justice.gov/media/989496/dl?inline.
181 DOJ, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (25 April 2012), https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required.
182 DOJ, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2d ed. July 2020), https://www.justice.gov/media/1106611/dl?inline.
183 ibid.
184 DOJ, Evaluation of Corporate Compliance Programs (updated March 2023), https://www.justice.gov/opa/speech/file/1571911/download.
185 ibid. at 17.
186 ibid. at 12.
187 DOJ, The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks (3 March 2023), https://www.justice.gov/criminal-fraud/file/1571941/download.
188 DOJ, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (4 October, 2023),https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.
189 ibid.
190 Paul, Weiss, Rifkind, Wharton & Garrison LLP, 2022 Year in Review: FCPA Enforcement and Anti-Corruption Developments, at 6 (21 March 2023), https://www.paulweiss.com/media/3983171/fcpa_enforcement_and_anti_corruption_developments_2022_year_in_review.pdf.
191 ibid. at 10.
192 ibid. at 11.
193 ibid.
194 ibid. at 12.
195 SEC, Whistleblower Award Proceeding File No. 2023-55, Release No. 97438 (5 May 2023), https://www.sec.gov/files/rules/other/2023/34-97438.pdf.
196 Mengqi Sum, 'Record $279 Million Whistleblower Award Went to a Tipster on Ericsson', Wall Street Journal (26 May 2023), https://www.wsj.com/articles/record-279-million-whistleblower-award-went-to-a-tipster-on-ericsson-5af40b98?mod=markets_featst_pos2.