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Anti-Corruption

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INTRODUCTION

Contributed by: Kiril Bougartchev and Emmanuel Moyne, **Bougartchev Moyne Associés**

Anti-corruption: the Global Picture

We are truly delighted to introduce the sixth edition of the Chambers Global Anti-Corruption Guide. The purpose of this Guide is to provide an overview of the current state of anti-bribery and anti-corruption law in 24 countries, as well as offer valuable insights into enforcement policies, trends and potential developments in this area, based on the opinion of leading lawyers in their respective countries.

The 2021 OECD Anti-Bribery Recommendation: a new reference norm

On 26 November 2021, the OECD Council - comprising the 44 countries party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Anti-Bribery Convention") - published the 2021 OECD Anti-Bribery Recommendation (the "2021 Anti-Bribery Recommendation"), which supersedes the 2009 Recommendation in order to reflect the development of key topics that have emerged or significantly evolved in the anti-corruption field during the past ten years.

The 2021 Anti-Bribery Recommendation encourages countries to:

- strengthen the enforcement of foreign bribery laws, including through proactive detection and investigation of foreign bribery, more effective international co-operation among law enforcement authorities and co-operation in multi-jurisdictional cases;
- implement extensive provisions to ensure effective protection of whistle-blowers in the public and private sectors; and
- incentivise companies to develop compliance programmes to prevent and detect foreign bribery.

Even though it is still too early to evaluate the impact of the COVID-19 pandemic on the levels of corruption throughout the world, 2021-22 is marked by the release of key reports assessing the enforcement of the Anti-Bribery Convention.

The OECD Phase 4 report on France

As regards France, the OECD Working Group on Bribery published its Phase 4 report on 9 December 2021 and welcomed the significant increase in the number of investigations opened in the country since Phase 3 in October 2012. It nonetheless emphasised the relatively low number of cases resolved in light of the country's economic situation and trade profile, as well as the number of foreign bribery allegations reported in the media. In December 2022, France is expected to submit an oral report on its implementation of some recommendations considered essential in maintaining the progress made since Phase 3 - for example, the increase of the resources available to investigators, prosecutors and trial judges. A written report on the implementation of all recommendations will be submitted in December 2023. The follow-up reports will be publicly available.

The Transparency International 2022 Exporting Corruption report

In October 2022, Transparency International released the 14th edition of its *Exporting Corruption* report. This independent review of the foreign bribery performance of 47 leading export countries encompasses 43 of the 44 parties to the Anti-Bribery Convention, as well as China, Hong Kong SAR, India and Singapore. The report intends to complement the OECD Working Group on Bribery's monitoring process.

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Transparency International raises significant concerns about an overall negative trend throughout a four-year period (2018-21), while the current global environment only compounds the declining commitment to foreign bribery enforcement in view of the war in Ukraine and climate-related natural disasters. Thus, only two of the 47 countries (United States and Switzerland) are now in the category of "active enforcement", compared with four countries in 2020 and seven countries in 2018. In 2022, the United Kingdom and Israel dropped from "active" to "moderate enforcement". Since 2020, nine countries have dropped an enforcement level whereas only two countries moved up a level. China and India, which still have no legislation criminalising foreign bribery, remain in the "little to no enforcement" category.

Therefore, to the authors of the report, "*the need for enforcement is stronger than ever to avoid a race to the bottom in the use of bribery in the contest for foreign markets*."

European co-operation initiatives

The transnational nature of several corruption issues underlines the need to strengthen international co-operation, as advocated by the 2021 Anti-Bribery Recommendation. Recent European initiatives were designed with this in mind.

In December 2021, the Italian National Anti-Corruption Authority (ANAC) released a study entitled *Using Innovative Tools and Technologies to Prevent and Detect Corruption*, featuring contributions from members of the Network of Corruption Prevention Authorities (an international network of corruption prevention authorities). According to ANAC President Giuseppe Busia, the study provides practical examples of best practice in the use of information and communication technologies for the prevention of corruption, thereby shedding light on how anti-corruption agencies around the world approach innovation.

Besides, in the aftermath of the European Colloquium on Ethics and Transparency, organised in Paris on 9 June 2022 in the context of the French Presidency of the Council of the European Union, public ethics authorities from 11 EU member states (Austria, Belgium, Croatia, Czech Republic, France, Italy, Lithuania, Malta, Spain, Romania and Slovenia) published a joint declaration and created the European Public Ethics Network. They intend to adopt a founding charter in the coming months and meet in autumn 2022 to discuss the issue of mobility between the public and private sectors.

The first steps of the European Public Prosecutor's Office

In March 2022, the European Public Prosecutor's Office (EPPO) released its inaugural annual report following the first seven months of its operational activity. The previous year witnessed the opening of 576 investigations, of which 298 were new cases initiated by the EPPO and 278 were cases initially reported by national authorities. Four per cent of the investigations conducted concerned cases of active and passive corruption of public officials.

At this stage, the EPPO's jurisdiction remains limited to the protection of the financial interests of the EU, which explains why the EPPO is not in charge of a recent highly publicised case concerning the alleged bribery of a European parliamentarian by an Arab state.

The report shows that the level of detection of fraud affecting the EU's financial interests varies significantly between EU member states. In this respect, it is interesting to note that out of 576 cases opened in 2021, 369 (a significant por-

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tion) were opened in the five EU member states ranked by Transparency International as the worst performers in foreign bribery enforcement (Romania, Bulgaria, Czech Republic, Slovakia and Italy). The EPPO could therefore be called upon to prioritise the investigation of countries that fail in the prosecution of probity offences. The EPPO could thus contribute to rectifying these shortcomings, especially if its scope is extended in the future.

In October 2022, the EPPO announced that it had opened an investigation relating to the procurement of COVID-19 vaccines in the EU, without providing any detail at this stage. The handling of this case should be followed closely by civil society.

Conclusion

In the wake of these introductory remarks, which are inevitably made from a European perspective, the expert contributions in the following chapters constitute an essential resource, as they give precise insights about what is going on in each country in many different corners of the world.

We express our deep gratitude to all authors for their valuable work.

May practitioners find helpful information in this Guide that will make it easier to identify, understand and manage the legal risks arising from anti-corruption rules around the world.

INTRODUCTION

Contributed by: Kiril Bougartchev and Emmanuel Moyne, **Bougartchev Moyne Associés**

Bougartchev Moyne Associés was formed in January 2017, when Kiril Bougartchev and Emmanuel Moyne joined forces to create a law firm that combined all disciplines of business litigation while specialising in criminal law. They are supported by a team of approximately ten lawyers. As litigators recognised throughout their profession, the founders and their team assist public and private enterprises such as banks, financial institutions and insurance companies – as well as their executives and other prominent figures – in all disputes, whether they concern white-collar crime, civil and commercial law, or regulatory matters. With wide experience of emergency, complex, cross-border and multi-jurisdictional proceedings, Bougartchev Moyne Associés' lawyers assist their clients both in France and internationally, and benefit from privileged relations with counterpart law firms on all continents. Primary practice areas are white-collar crime, civil and commercial litigation, regulatory disputes, compliance and investigations – as well as crisis and reputational injury management.

Contributing Editors

Kiril Bougartchev co-founded Bougartchev Moyne Associés following a career that began in 1988 as an auditor at Arthur Andersen. After joining Linklaters LLP in 2007, he became co-head of the dispute resolution practice at the Paris office and led the Linklaters LLP global white-collar crime group. Kiril continues to be involved in many notorious white-collar crime cases, both in France and internationally. He also acts in regulatory disputes (including before the French Financial Markets Authority, the French Anti-Corruption Agency and the French Prudential Supervisory Authority), as well as in complex civil and commercial litigation. Kiril was a Secrétaire de la Conférence des Avocats of the Paris Bar.

Emmanuel Moyne co-founded Bougartchev Moyne Associés following a career that began in 1997 when he was admitted to the Paris Bar. He then practised for ten years in Gide's litigation and white-collar crime department before joining the dispute resolution practice at Linklaters LLP in Paris in 2007 as a counsel. Emmanuel has acted in numerous white-collar crime cases and regulatory, civil and commercial disputes, as well as in industrial and environmental accident claims. He advises his clients on complex proceedings that often involve several foreign jurisdictions, as well as on compliance programmes, anti-corruption due diligence and internal investigations. Emmanuel was a Secrétaire de la Conférence des Avocats of the Paris Bar.

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1. Legal Framework for Offences

1.1 International Conventions

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

1.2 National Legislation

Australia gives effect to its treaty obligations primarily through the Criminal Code Act 1995 (Cth) (Criminal Code). This is the federal legislation prohibiting the bribery of Commonwealth domestic and foreign public officials. Other relevant Commonwealth legislation includes the Corporations Act 2001 (Cth) and the Proceeds of Crime Act 2002 (Cth).

All of Australia's six states and two territories have also legislated against public sector and private sector bribery, typically in the relevant state or territory's crimes legislation. While the laws differ between each state and territory, they generally make it an offence to corruptly give or offer an inducement or reward to an agent for doing or not doing something regarding the affairs of the agent's principal. It is also an offence to aid, abet, counsel, procure, solicit or incite the commission of these offences.

In addition, bribery and misconduct in public office remain criminal offences under the common law of some states and territories, rather than being criminalised by statute (as occurs in the other states and territories). The bribery offence at common law is constituted by the offering or receiving of an undue reward to or by any person in public office in order to influence that person's behaviour in that office.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Unlike the United States and the United Kingdom, Australian government agencies have only published limited guidance on the interpretation and enforcement of the various anti-bribery and corruption laws. The Attorney-General's Department (AGD) has developed an online learning module on foreign bribery, which provides guidance on Australia's anti-bribery policy, relevant laws, and their application. It has also published a Foreign Bribery Information and Awareness Pack, which provides key information on the foreign bribery offence.

The Australian Trade and Investment Commission ("Austrade") has published material online to provide general guidance to businesses operating overseas, including practical guidance on implementing an anti-bribery and corruption compliance programme, and proportionate anti-bribery procedures. The Australian Tax Office (ATO) has also published guidelines on understanding and dealing with the bribery of Australian and foreign public officials.

The Bribery Prevention Network is a recently established public-private partnership offering a free online resource portal designed to support Australian businesses in preventing, detecting and addressing bribery and corruption risks both locally and overseas.

The Prosecution Policy of the Commonwealth (the "Prosecution Policy") provides guidance as to how prosecution decisions are to be made by the Office of the Director of Public Prosecutions

(CDPP) in relation to Commonwealth offences, including bribery offences.

1.4 Recent Key Amendments to National Legislation

As discussed later in this chapter, the Crimes Legislation Amendment (the Combatting Corporate Crime) Bill 2019 (Cth) (the "Corporate Crime Bill"), which was re-introduced to parliament by the Australian government following the lapsing of an earlier bill in July 2019, again lapsed following a change of government in July 2022. It is not yet clear whether the new government intends to reinstate it, though some aspects of the Corporate Crime Bill were opposed by the new government whilst they were in opposition. It is therefore expected that, if reintroduced, the bill will likely be varied, at least to some extent. Prior to this there were several noteworthy amendments to Australia's anti-bribery and corruption laws in 2015 and 2016. In particular:

- in November 2015, Schedule 2 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015 (Cth) amended the offence of bribery of a foreign public official in the Criminal Code to clarify that it is not necessary to prove:
  - (a) an intention to bribe a particular foreign public official; or
  - (b) that any business or business advantage was actually obtained or retained as a result of the bribery; and
- in February 2016, two important new offences were introduced into the Criminal Code in relation to false dealings with accounting documents. It is expected that these offences, which are often easier to prove than traditional bribery and corruption offences, will be increasingly relied upon by prosecutors to ensure that companies engaging in bribery and corrupt practices are prosecuted.

Significant reforms to Australia's whistle-blower protection laws came into force in July 2019 pursuant to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth), see **6.4 Protection Afforded to Whistle-Blowers**.

Serious corruption is now also specifically targeted under Australia's new thematic sanctions framework. In December 2021, amendments to the Autonomous Sanction Act 2011 (Cth) allowed the Commonwealth government to impose economic, financial and trade restrictions on individuals who have engaged in situations of grave international concern, including those responsible for, or complicit in, serious corruption.

2. Classification and Constituent Elements

2.1 Bribery

Domestic Bribery

Section 141.1(1) of the Criminal Code provides that it is an offence for a person to: dishonestly provide, offer or cause to be provided or offered a benefit to another person with the intention of influencing a Commonwealth public official in the exercise of their duties.

"Benefit" is broadly defined to include any advantage, and is not limited to money or property, and "Commonwealth public official" includes all employees of the Commonwealth and any Commonwealth authority.

A similar but lesser offence applies to corrupting benefits given to a Commonwealth public official under Section 142.1(1) of the Criminal Code.

Corresponding offences apply to the receipt by Commonwealth public officials of bribes or corrupting benefits: Sections 141.1(3) and 142.1(3).

It is also an offence under Section 135.4(7) of the Criminal Code to conspire with another person with the intention of dishonestly influencing a Commonwealth public official in the exercise of their duties as a public official.

Furthermore, various state and territory provisions prohibit bribery of state and territory public officials, which provisions are often the same as those prohibiting private sector bribery.

Foreign Bribery

The foreign bribery offence is contained in Section 70.2(1) of the Criminal Code. That section provides that it is an offence to: provide, offer or cause to be provided or offered to another person a benefit which is not legitimately due to the other person with the intention of influencing a foreign public official in the exercise of their duties in order to obtain or retain business or a business advantage.

The offence captures bribes made to foreign public officials either directly or indirectly via an agent, relative or business partner. The key mental element is that the defendant must have intended to influence the foreign public official.

"Foreign public official" is broadly defined and includes, but is not limited to, an employee, contractor or official of a foreign government department or agency, a foreign government-controlled company or public international organisation. "Benefit" is also broadly defined to include any advantage.

Private Sector Bribery

Commercial, or private sector, bribery is criminalised by state and territory legislation, rather than by the Commonwealth. Generally speaking, those laws prohibit the corrupt giving or offering of inducements or secret commissions to, or receiving them from, employees or agents of private or public companies and individuals. Conduct is considered "corrupt" only if it is engaged in with the intention of influencing the recipient to show favour, and the fact that the commission is secret raises the presumption that it was given corruptly.

An example of the state and territory provisions are those contained in the Crimes Act 1900 (NSW) (NSW Crimes Act). Among other things:

- Section 249B(1) prohibits an agent from corruptly receiving or soliciting (or corruptly agreeing to receive or solicit) any benefit from another person:
  - (a) as an inducement, a reward, or on account of doing or not doing something, or showing or not showing favour to any person in relation to the affairs or business of the agent's principal; or
  - (b) if it would tend to influence the agent to show or not show favour to any person in relation to the affairs or business of the agent's principal.
- Corresponding offences of giving or offering such benefits to an agent are imposed by Section 249B(2).
- Section 249D prohibits a person from corruptly giving (or receiving) a secret benefit to (or from) another person for providing advice to a third party, with the intention of influencing the third party to either:
  - (a) enter into a contract with the person giving the benefit; or

(b) appoint the person giving the benefit to any office.

The definition of "agent" is wide and includes employees, while "benefit" includes money and any contingent benefit.

Failure to Prevent Bribery

Failure to prevent bribery is not currently an offence in Australia. However, it was proposed in the Corporate Crime Bill, modelled on Section 7 of the UK Bribery Act 2010. If a similar bill containing this offence is introduced and passed, a body corporate would be liable where an associate commits foreign bribery for the profit or gain of the body corporate. The offence would not apply if the body corporate had in place adequate procedures designed to prevent the commission of the foreign bribery offence by its associates.

It is expected that this proposed new offence would assist in facilitating responsibility for offending conduct being attributed to a company based in Australia, in circumstances where a subsidiary company commits foreign bribery (whether within or outside of Australia), provided it does so for the profit or gain of the parent company.

Gifts and Hospitality

Australian legislation does not expressly articulate the circumstances under which providing gifts and hospitality may amount to bribery. As the law currently stands, the giving of such benefits will only be unlawful if done with the intention of improperly influencing a public official.

In Australia, there is close scrutiny of the provision of gifts, entertainment and hospitality involving the public sector. As such, Australian public officials are usually subject to guidelines on the receipt of gifts and hospitality. In particular, each Commonwealth, state and territory government has its own public service with its own code of conduct. These codes of conduct are often supplemented by agency-specific codes of conduct, which regulate the conduct of Australian civil servants or officials working for them.

While it will depend on the applicable guidelines, generally speaking, gifts of more than token value should be avoided.

2.2 Influence-Peddling

There are no specific offences in Australia directed at influence peddling. However, given that the substantive bribery offences are broad in scope, depending on the facts and circumstances of a particular case, the exchange of influence in respect of decision-making for an undue advantage may constitute an offence.

2.3 Financial Record-Keeping

The false accounting offences mentioned in **1.4 Recent Key Amendments to National Legislation** are found in Part 10.9 of the Criminal Code. The provisions criminalise intentional or reckless concealment of bribery by dealing with accounting documents.

Section 286 of the Corporations Act 2001 (Cth) (Corporations Act) also puts an obligation on companies to keep written financial records for seven years that correctly record and explain its transactions and financial position and performance. Failure to keep such financial records is a strict liability offence. In addition, it is an offence under Section 1307 for an employee or former employee of a company to falsify any books relating to the affairs of the company.

The Crimes Acts of various states and territories also have similar false accounting offences, such

as Section 83(1)(a) of the Crimes Act 1958 (Vic) which makes it an offence to dishonestly falsify a document made for an accounting purpose.

2.4 Public Officials

Domestic public officials also commit an offence by engaging in corrupt practices. For example, as referred to in **2.1 Bribery**, Section 141.1(3) of the Criminal Code provides that it is an offence for a Commonwealth public official to: dishonestly ask, receive, obtain, or agree to receive or obtain a benefit for themselves or another person with the intention that the exercise of their official duties will be influenced, or of inducing, fostering or sustaining such a belief.

A similar but lesser offence applies if a Commonwealth public official receives a corrupting benefit (Section 142.1(3)).

A Commonwealth public official will also commit an offence against Section 142.2 of the Criminal Code for the abuse of public office. This provision will be breached if the official exercises influence, engages in conduct, or uses information obtained in their capacity as an official, with the intention of dishonestly obtaining a benefit for themselves or another person, or causing detriment to another person.

The states and territories also legislate against public officers seeking or accepting bribes or other benefits to which they are not entitled.

New South Wales is the only Australian jurisdiction that retains a specific offence of embezzlement (Part 4, Division 6, NSW Crimes Act). This offence criminalises conduct in which an employee intentionally misappropriates property entrusted to them by their employer. In other Australian jurisdictions, embezzlement conduct is dealt with under provisions relating to fraud, theft or other property offences.

2.5 Intermediaries

There are no specific provisions concerning the commission of an offence through an intermediary. However, the offences under the Criminal Code are structured broadly so as to capture such offences. See **3.3 Corporate Liability**.

3. Scope

3.1 Limitation Period

At general law, a prosecution for a criminal offence can be commenced at any time, unless a statute provides otherwise. However, criminal proceedings may be stayed to prevent injustice to the defendant caused by unreasonable delay.

There is no statute of limitations for prosecutions of the above-mentioned Commonwealth offences. That is because under the Crimes Act 1914 (Cth) (Crimes Act), there is no limitations period for the prosecution of offences by individuals against a law of the Commonwealth where the maximum penalty exceeds six months' imprisonment or for the prosecution of offences by companies where the maximum penalty exceeds AUD33,300.

3.2 Geographical Reach of Applicable Legislation

The Criminal Code offences referred to in **2.1 Bribery**, **2.3 Financial Record-Keeping** and **2.4 Public Officials** have broad extraterritorial reach.

In relation to the foreign bribery offence, either some part of the conduct constituting the alleged offence must have occurred in Australia or, if the conduct occurred wholly outside Australia, the

person must be an Australian citizen or resident, or a body corporate incorporated in Australia.

In relation to the offence of bribing a Commonwealth public official, it does not matter if the conduct constituting the alleged offence, or the result of that conduct, occurred entirely outside Australia.

In relation to the state and territory-based offences, there must be some nexus between the state or territory and the offence. In NSW, that nexus will be held to exist where the offence is committed:

- wholly or partly in the state; or
- wholly outside the state, but the offence has an effect in the state.

Liability for a breach of directors' duties under the Corporations Act will arise if the relevant person is a director or officer of an Australian-incorporated company. If the relevant person is a director or officer of a foreign company, the Corporations Act will only have extraterritorial reach over that individual in limited circumstances, including where the conduct occurred in connection with the foreign company carrying on business in Australia (Section 186).

3.3 Corporate Liability

Under Australian law, a company, as a separate legal entity, can be convicted of bribery offences. Companies and individuals can also be held liable for the same offence.

The Criminal Code has specific provisions which address corporate criminal responsibility. Under these provisions, for a company to be criminally responsible for an offence, the physical and mental (or "fault") elements must be attributed to the company as follows:

- the physical element is attributed if that element was committed by an employee, agent or officer of the company acting within the actual or apparent scope of that person's employment or within their actual or apparent authority; and
- the key fault element (intention) is attributed if the company expressly, tacitly or impliedly authorised or permitted the commission of the offence. The means by which that may be established include proving that a "high managerial" agent intentionally engaged in the relevant conduct or proving that a corporate culture existed that directed, encouraged, tolerated, or led to non-compliance with the relevant provision.

In other Australian jurisdictions, generally speaking, a corporation may be found guilty of a criminal offence either on the grounds of vicarious liability or on the basis that the person who committed the acts and had the requisite mental state was the directing mind and will of the company.

In the M&A context, a successor entity will not be held liable for offences by the target entity that occurred prior to the merger or acquisition. However, if the transaction was effected by a share sale, the target entity will remain liable even after the acquisition.

4. Defences and Exceptions

4.1 Defences

Two specific defences are available for the offence of foreign bribery under Section 70.2(1) of the Criminal Code. Both are very narrow.

The first defence (Section 70.3) is enlivened where the provision of the benefit is permitted

or required by a written law of the place where the conduct occurred.

The second defence (Section 70.4) is in respect of facilitation payments. If the value of the benefit was of a minor nature, and made to expedite or secure the performance of a "routine government action" of a minor nature, and a record of the details of the conduct was created as soon as practicable, a defendant will have a good defence against liability. Routine government action excludes a decision about the awarding of new business, continuing existing business, or the terms of new or existing business. Rather, it is an action commonly performed by the foreign public official, such as granting permits or licences, processing government papers or providing access to utilities.

Australia has been considering removing the facilitation payment defence for some time. However, the Corporate Crime Bill proposed that the defence be retained. Nonetheless, Australian authorities recommend avoiding such payments, given that they are often difficult to distinguish from bribes.

4.2 Exceptions

There are no exceptions to the above-mentioned defences, which are narrowly framed and only apply in specific situations.

4.3 De Minimis Exceptions

The Commonwealth legislation does not provide any de minimis exceptions. However, such exceptions are found in some of the state and territory legislation. For example, Section 249I of the NSW Crimes Act enables the court to exercise its discretion to dismiss a case if the offence is of a trivial or merely technical nature.

4.4 Exempt Sectors/Industries

No sectors or industries are exempt from the offences referred to in **2.1 Bribery**, **2.3 Financial Record-Keeping** and **2.4 Public Officials**.

4.5 Safe Harbour or Amnesty Programme

There is no formal safe harbour or amnesty programme in Australia based on self-reporting or the existence of adequate compliance procedures and remediation efforts. However, see the discussion regarding the CDPP and Australian Federal Police's (AFP) joint guidance on self-reporting in **7.4 Discretion for Mitigation**.

5. Penalties

5.1 Penalties on Conviction

The maximum penalties on conviction for foreign or domestic bribery offences are significant:

- for an individual:
  - (a) ten years' imprisonment; or
  - (b) a fine of AUD2,22 million, or both; or
- for a company, a fine being the greatest of:
  - (a) AUD22,2 million;
  - (b) three times the value of any benefit that can be reasonably attributed to the bribe; or
  - (c) where the value of the benefit cannot be determined, 10% of the company's annual turnover for the 12 months up to the end of the month in which the conduct constituting the offence occurred.

For the false accounting provisions, the maximum penalty for intentional conduct is the same as above, while reckless conduct attracts a maximum penalty of half that of those offences.

In addition to criminal penalties, any benefits obtained from foreign bribery may be forfeited to

the Australian government under the Proceeds of Crime Act 2002 (Cth) (POCA).

The maximum penalties that may be imposed for private sector bribery vary between the states and territories. By way of example, in NSW, the maximum period of imprisonment for a bribery offence under Section 249B of the NSW Crimes Act is seven years.

5.2 Guidelines Applicable to the Assessment of Penalties

Australia has complex legislated sentencing regimes which require each judge, through the exercise of judicial discretion, to impose a sentence of severity appropriate to all the circumstances of the offence. This requires the sentencing court to take into consideration both aggravating and mitigating factors relevant to the specific facts. The same sentencing principles which apply to individuals will apply to a corporation. In particular, general deterrence is an important consideration for the sentencing court. However, Australia does not have the same prescriptive sentencing guidelines that exist in other jurisdictions (eg, the United Kingdom). There are no guidelines specific to bribery and corruption offences.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Australian law does not currently establish any specific duties to prevent corruption.

However, the way the corporate criminal responsibility provisions are structured encourages companies to have sound compliance programmes. This is because, if an employee, officer or agent engages in the relevant conduct, the company may potentially be held liable if, among other things:

- it had a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- the employee, officer or agent was a "high managerial agent" and the company failed to exercise due diligence to prevent their conduct.

Corporate Culture

"Corporate culture" is yet to be judicially tested in this context, but is defined to mean "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place". A key aspect of corporate culture is looking beyond what the company says in its policy literature, to what it actually does in terms of its shared norms, values and how it manages risk. The diligent implementation of an appropriate compliance regime is therefore a very important factor to take into account when assessing corporate culture.

In addition, a director's duty to exercise reasonable care, skill and diligence would extend to taking reasonable care to ensure that the company has an appropriate risk management framework in place, including to manage bribery risk.

Corporate Crime Bill

The previously proposed offence of failing to prevent foreign bribery, which incorporated a defence of "adequate procedures", would further encourage action to prevent corruption. Under the Corporate Crime Bill (now lapsed), the Minister for Justice would have been required to publish guidance on the steps companies could take to help prevent their employees, agents and contractors from engaging in foreign bribery.

Adequate procedures guidance

In November 2019, the Australian government developed a principles-based draft guidance on adequate procedures. Public submissions on this draft were received in February 2020. It drew upon existing guidance published by various entities and government bodies, including the Australian Trade Commission, US Department of Justice, and the OECD. The draft guidance clarified that:

- all companies (regardless of size) require effective and proportionate procedures to prevent bribery, tailored to a corporation's circumstances; and
- indicators of an effective compliance programme include a robust culture of integrity, a clear pro-compliance tone from the top, a strong anti-bribery compliance function, effective risk assessment and due diligence procedures, and careful and proper use of contractors and other parties.

The draft guidance, which was broadly consistent with the UK guidance, suggested that companies adopt the following fundamental elements in their programmes:

- risk assessment;
- management dedication;
- due diligence;
- communication and training;
- confidential reporting and investigation; and
- monitoring and review.

6.2 Regulation of Lobbying Activities

Lobbying activities are regulated at the federal and state or territory level by the applicable Lobbying Codes of Conduct ("Code of Conduct") and Lobbyist Registers ("Register").

For example, the AGD administers the Commonwealth Code of Conduct, which was recently updated in 2022 and includes requirements to ensure contact between lobbyists and Commonwealth government representatives remain consistent with the public's expectations in respect of integrity, transparency and honesty.

Under the Commonwealth Code of Conduct, subject to very limited exceptions, anyone who acts on behalf of third-party clients (regardless of sector) for the purpose of lobbying a Commonwealth government representative is considered a lobbyist and is therefore required to register as such. Government representatives are prohibited from engaging with lobbyists that are not registered on the Register. The Commonwealth's Register is publicly searchable on the AGD's website.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

As a general rule, there is no requirement for individuals and/or companies to disclose violations of Australia's anti-bribery and corruption laws.

However, there are certain exceptions. For example, in NSW, it is an offence under Section 316 of the NSW Crimes Act for a person, including a company, who knows or believes that another person has committed a serious indictable offence, to fail without reasonable excuse to report that matter to the NSW Police.

Additional requirements also exist with respect to public disclosures of political donations in the Commonwealth, states and territories. Failure to report political donations may evidence corrupt or dishonest intentions for the purposes of domestic bribery offences.

6.4 Protection Afforded to Whistle-Blowers

To strengthen the protection afforded to whistle-blowers in Australia, new private sector whistle-blower laws came into effect in July 2019.

Protection under the Corporations Act

The new regime, contained in Part 9.4AAA of the Corporations Act, has significantly expanded and strengthened private sector whistle-blower protections, increased applicable penalties and introduced a requirement for public companies and large proprietary companies to have a whistle-blower policy which addresses certain matters.

Importantly, protected disclosures are no longer limited to potential contraventions of the corporations legislation, but now extend to disclosures where the whistle-blower has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to the relevant company or a related body corporate. This specifically includes conduct by the entity, or one of its employees or officers, that constitutes an offence against a law of the Commonwealth punishable by imprisonment for a period of 12 months or more, which would include the domestic and foreign bribery offences in the Criminal Code.

Where certain criteria are met, a whistle-blower will receive protections in relation to the confidentiality of their identity and in relation to victimisation. The penalties for breach of these protections have been significantly increased. The maximum civil penalty for companies, for example, is now the greater of AUD11.1 million, three times the benefit derived from the contravention, or 10% of annual turnover (up to a maximum of AUD555 million). It is also now easier for victimised whistle-blowers to claim compensation and other remedies.

Whistle-blowers are also protected against certain legal actions related to making a disclosure. This includes criminal prosecution (and the disclosure cannot be used against the whistle-blower in a prosecution, unless that disclosure is false), civil litigation (eg, breach of employment contract) or administrative action (eg, disciplinary action). Immunity is not given for any misconduct that the whistle-blower was involved in that is revealed in the disclosure.

Protection under the Public Interest Disclosure Act

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

Protection under the Fair Work (Registered Organisations) Amendment Act

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

6.5 Incentives for Whistle-Blowers

There are no financial rewards to incentivise whistle-blowing, as occurs in the USA. A reward system was recommended by the Parliamentary Joint Committee on Corporations and Financial Services to motivate whistle-blowers to come forward with high-quality information, however,

that recommendation was not ultimately adopted.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

The relevant provisions governing protections afforded to whistle-blowers are located in various pieces of legislation. The most important of these are:

- Part 9.4AAA of the Corporations Act;
- Part IVD of the Taxation Administration Act 1953 (Cth);
- Part 2 of the PID Act; and
- Fair Work (Registered Organisations) Amendment Act 2016 (Cth).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Despite a slowly growing number of successful prosecutions, Australia is still in the relatively early stages of enforcing anti-bribery laws in relation to foreign public officials. Enforcement of domestic bribery offences is more established and has been steady.

7.2 Enforcement Body

Australia does not have one single bribery and corruption enforcement agency. Instead, the country has adopted a multi-agency approach to combating corruption. At the Commonwealth level, Australia's main criminal law enforcement agencies in bribery cases are the AFP and the CDPP. State-based investigations are generally conducted by the fraud squad of the particular state police department, with the state directors of public prosecutions conducting prosecutions.

While allegations of corruption will generally be referred to the AFP, other agencies that may become involved in investigation processes include:

- the Australian Securities and Investments Commission (ASIC);
- the Australian Commission for Law Enforcement Integrity;
- the Australian Criminal Intelligence Commission;
- the Inspector-General of Intelligence and Security; and
- the Office of the Commonwealth Ombudsman.

The CDPP is largely responsible for prosecuting offenders under the anti-bribery provisions of the Criminal Code.

In 2013, the AFP established the Fraud and Anti-Corruption (FAC) business area, which enhanced the AFP's response to, among other things, serious and complex fraud against the Commonwealth, corruption involving Australian government employees, and foreign bribery. The FAC business area brought together multiple Commonwealth agencies, including the AFP, ASIC and ATO. In late 2019, the AFP transitioned its foreign bribery investigations out of the FAC centre to a new multi-agency taskforce specifically focused on foreign bribery and related transnational corruption issues.

In recent years, ASIC has taken a far more active interest in potential Corporations Act contraventions by directors and officers involved in foreign bribery investigations.

The ATO, as the Commonwealth's principal revenue collection agency, also refers information on suspected or actual bribe transactions to

the AFP for potential investigation and/or prosecution, and has established guidelines which require tax auditors to report any suspected foreign bribery.

If an investigating body (such as ASIC or the AFP) completes an investigation into a Commonwealth offence and concludes that there may be grounds to charge someone with a crime, it will refer the case to the relevant Director of Public Prosecutions, who will make an independent assessment on whether to prosecute the case.

Independent Commissions

In addition, there are a number of independent commissions at both the federal and state level which investigate possible corruption of public officials (including politicians) and the police. At a federal level, the Australian Commission for Law Enforcement Integrity is an independent body whose primary role is to investigate law enforcement-related corruption issues, giving priority to serious and systemic corruption. Each state also has independent commissions which investigate possible corruption of both public officials and police at a state level (eg, the Independent Commission Against Corruption in New South Wales (ICAC)). While these bodies cannot charge individuals or corporations with offences, they have wide-ranging investigative powers conferred by statute. Reports following an investigation can be given to the police for further investigation, to parliament, or released publicly. There is a proposal to create a similar independent commission at the federal level, see **8.1 Assessment of the Applicable Enforced Legislation**.

7.3 Process of Application for Documentation

Powers of Regulatory and Law Enforcement Agencies

Regulatory and law enforcement agencies have significant information-gathering powers to assist them with their investigations. ASIC, for example, may issue notices compelling a person to produce documents, provide information and/or attend a compulsory hearing or examination to answer questions.

ASIC and the AFP, and certain other law enforcement agencies (such as ICAC), also have the power to access premises to conduct searches and seize materials, usually after obtaining a search warrant. For some serious offences, law enforcement bodies will also have access to more intrusive covert powers, including telephone intercepts.

ASIC's powers may only be used for the performance of its functions or in relation to an alleged or suspected contravention of the law or for the purpose of a formal investigation. Failure to comply with a written notice, or to attend an examination, without reasonable cause, is an offence for which penalties may be imposed. In practice, demands for documents are often broadly defined, and it is common practice for recipients of such notices to engage with ASIC to negotiate the scope of those demands before responding.

Unlike ASIC, the AFP does not have the power to compel individuals to answer questions under oath.

However, search warrant powers are available to the AFP, ASIC and many other authorities, upon application to a magistrate, provided the relevant authority is able to establish that there are

"reasonable grounds for suspecting" that there is, or shortly will be, relevant evidentiary material at the premises.

Collaboration with Overseas Law Enforcement Agencies

Australian enforcement agencies are increasingly collaborating, and conducting parallel investigations, with other overseas law enforcement agencies. If relevant evidence is located in a foreign country, Australian enforcement agencies may, through the Attorney-General, seek the assistance of the relevant overseas enforcement agency to serve various documents, obtain evidence (including the production of documents and taking evidence by video link), and execute search and seizures. Australia's mutual assistance system is governed by the Mutual Assistance in Criminal Matters Act 1987 (Cth) (MA Act).

Subpoenas

In addition to the above, if criminal proceedings are instituted, courts still have their ordinary powers to issue subpoenas or summonses at the request of the prosecutor, compelling a person to give evidence prior to or at trial.

7.4 Discretion for Mitigation

Unlike in the UK and the USA, Australian enforcement agencies have fairly limited discretion for mitigation in enforcing their powers. This is largely due to the fact that there is not, as yet, any equivalent deferred prosecution or non-prosecution agreement regime in Australia.

Relevant Mitigating Factors

As a general rule, an offender who discloses that they have engaged in criminal conduct will still be prosecuted subject to there being a prima facie case, reasonable prospects of conviction and that it is in the public interest to prosecute. Nonetheless, the accused can expect to receive a significantly moderated sentence because pleading guilty, providing assistance to law enforcement agencies and showing contrition or remorse (including by making reparation for any injury, loss or damage caused by the offender's conduct) are all mitigating factors which a court must take into account in the sentencing process.

Various legal mechanisms can be found in published prosecution policies (such as the Prosecution Policy), guidelines and conventions, as well as statutes, which can apply to persons who voluntarily disclose their criminal conduct. This includes the granting of immunity from prosecution in extraordinary circumstances, or the investigating authority accepting an induced witness statement which cannot be used against the deponent.

Self-Reporting of Foreign Bribery

While the AFP encourages self-reporting of foreign bribery, there are still no real incentives to do so. In 2017, the CDPP and the AFP jointly developed a Best Practice Guideline on Self-Reporting of Foreign Bribery and Related Offending by Corporations, in an effort to incentivise companies to self-report. This guideline identifies public interest factors the CDPP will take into account when deciding whether or not to prosecute a self-reporting corporation, or how the self-report will be taken into account in any future prosecution. However, this policy does not offer much certainty or comfort for those who may be considering self-reporting.

Prosecution Policies and Guidelines

The formal decision as to whether or not relevant charges should be laid, either against individuals or a company, will be made by the CDPP (or its state/territory counterparts, where relevant)

in accordance with its Prosecution Policy, often following a referral by an Australian enforcement agency.

Prosecution policies and guidelines provide a foundation for the prosecution and the defendant to negotiate what charges should be proceeded with. However, agreements on sentence are not enforceable or binding upon a sentencing court, which ultimately has the discretion to determine the appropriate sentence. This places a significant constraint on a defendant's ability to plea bargain. In Barbaro v the Queen (2014) 253 CLR 58, the High Court confirmed that the prosecution is not required, and should not be permitted, to proffer even a sentencing range to a sentencing judge. Charge bargaining, on the other hand, is common.

Pre-trial Diversion Process

There are currently no legal mechanisms for a pre-trial diversion process or a deferred prosecution in Australia. The Corporate Crime Bill proposed to make deferred prosecution agreements (DPA) available for certain serious corporate crimes, including foreign bribery, which would no doubt incentivise more companies to self-report. For further details about these proposed amendments, see **8.2 Likely Changes to the Applicable Legislation of the Enforcement Body**.

7.5 Jurisdictional Reach of the Body/Bodies

The AFP's decision to investigate potential offences under the Criminal Code or ASIC's decision to investigate potential breaches of directors' duties under the Corporations Act will be guided by, among other things, whether or not they can establish a sufficient jurisdictional nexus based on the requirements referred to in **3.2 Geographical Reach of Applicable Legislation**.

In circumstances where an offence such as foreign bribery typically involves conduct occurring overseas, evidence of which must be properly obtained to support a prosecution, Australian enforcement agencies may seek mutual assistance from overseas authorities under the MA Act, see **7.3 Process of Application for Documentation**.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

According to the OECD's 2021 Addendum to its Phase 4 Two-Year Follow-Up Report on Australia (see **8.1 Assessment of the Applicable Enforced Legislation**), the AFP had five foreign bribery prosecutions underway as at November 2021, an increase from the two recorded in November 2019. The majority of the prosecutions commenced in Australia to date under foreign anti-bribery laws have been prosecutions of individuals, rather than companies. It is expected that this trend will continue, but that companies will also continue to be prosecuted in appropriate cases. Frequently, associated false accounting charges have been brought in parallel to the bribery prosecutions, against individuals who sought to disguise or conceal the true nature of the bribes.

While it is difficult to obtain reliable data on the ongoing bribery and corruption investigations in Australia, the most notable Australian enforcement actions in the anti-bribery and corruption space include the following:

- In 2011, in what were the first foreign bribery prosecutions in Australia, the AFP charged Securency International Pty Limited (Securency), Note Printing Australia Limited (NPA)

and several of the companies' former senior managers with the offences of bribery of foreign public officials, conspiracy to commit foreign bribery and false accounting offences connected with that conduct. The cases arose from allegations by a company insider that Securency had paid nearly AUD50 million to international sales agents to bribe central banking officials in Malaysia, Indonesia and Vietnam in order to secure banknote supply contracts. A series of hearings was run from 2011 to 2018, following which:

(a) each of the companies pleaded guilty to three charges of conspiracy to commit foreign bribery, were fined AUD480,000 and AUD450,000 respectively, and were separately the subject of pecuniary penalty orders under POCA in the amount of AUD22 million;

(b) convictions were obtained against various former employees of Securency, including the CEO, CFO, a senior business development manager, the Indonesian sales agent and a former banknote specialist; and

(c) charges against four other individuals were permanently stayed on the grounds that their continued prosecution would bring the administration of justice into disrepute, after the investigation into their conduct was tainted by unlawful compulsory examinations, to their prejudice (Strickland v Commonwealth Director of Public Prosecutions (2018) 266 CLR 325).

- In 2015, the AFP charged two directors of an Australian construction company, Lifese, and a third individual, with conspiracy to bribe a foreign public official in connection with building contracts in Iraq. The three men pleaded guilty, with the directors each ultimately sentenced to just over three years' imprisonment and fined AUD250,000, with the third man sentenced to four years' imprisonment (R v Jousif; R v I Elomar; R v M Elomar (2017) 325 FLR 108; and Elomar v R [2018] NSWCCA 224).
- In a series of cases running between 2012 and 2017, ASIC successfully prosecuted a number of former officers and directors of AWB Ltd, Australia's largest wheat exporter (at the time), for their involvement in a scheme between 1999 and 2003 by which AWB Ltd rorted the UN's Oil-for-Food Programme in Iraq. Civil penalties and disqualification orders were imposed on, amongst others, the board's chair and the managing director on the basis that the former had failed to make adequate enquiries into the lawfulness of the scheme, despite the existence of certain red flags, and the latter had failed to inform the board of certain matters, in breach of their duties to the company (ASIC v Flugge & Geary (2016) 342 ALR 1; ASIC v Flugge (No 2) (2017) 342 ALR 478; and ASIC v Lindberg (2012) 91 ACSR 640).
- In May 2018, engineering consultancy Sinclair Knight Merz, now known as Jacobs Group Australia, its former chief executive and other individuals, were charged with conspiring to bribe foreign officials in the Philippines (between 2000 and 2005) and Vietnam (between 2006 and 2012) to secure various infrastructure projects. The charges followed the company's self-report to the AFP in 2012. The cases concluded with a guilty plea by the company, the acquittal of individuals charged with the Philippines conspiracy, and the discontinuation of proceedings against the second group of individuals in relation to the Vietnam conspiracy shortly thereafter. The company was sentenced in 2021 to pay fines totalling AUD1,471,500, incorporating a 25% discount for the guilty plea and a further 40% discount for its extraordinary co-operation

and assistance provided to the authorities. The CDPP has sought leave to appeal to the High Court in relation to the company's sentence.

- In March 2019, charges were laid in NSW against the former chief of staff at National Australia Bank (NAB), Ms Rosemary Rogers, for dishonestly obtaining a financial advantage by deception and corruptly receiving a benefit as an agent under private sector anti-bribery laws. The charges related to a scheme by which Ms Rogers approved inflated invoices issued by an events company to the bank, in return for personal travel, cash and other benefits totalling AUD5,4 million. Ms Rogers pleaded guilty and was sentenced in January 2021 to eight years' imprisonment. The head of the events company, Ms Helen Rosamond, has also been charged and her trial commenced in August 2022.
- In July 2021, former NSW Minister for Mineral Resources, Mr Ian Macdonald, Mr Eddie Obeid (another former NSW Minister) and his son, Mr Moses Obeid, were found guilty of conspiring to commit misconduct in public office. The convictions concerned a conspiracy that Mr Macdonald would wilfully misconduct himself as Minister by acting in breach of his ministerial duties of confidentiality and impartiality in connection with the grant of a coal mining exploration licence in the Bylong Valley, where the Obeid family owned a rural property, for the improper purpose of benefitting the Obeids and others associated with them. Mr Macdonald was sentenced to nine-and-a-half years' imprisonment, Mr Eddie Obeid to seven years, and Mr Moses Obeid to five years. All three accused have appealed against their convictions and sentences.
- In 2022, Mr Eddie Obeid, together with two other former NSW Ministers, Mr Joe Tripodi and Mr Tony Kelly, as well as Mr Kelly's former chief-of-staff, were charged with misconduct in public office, arising from an earlier NSW ICAC inquiry. That inquiry found that Mr Tripodi and Mr Kelly used their ministerial positions to push for infrastructure company Australian Water Holdings to be awarded a lucrative government contract, to the potential financial benefit of the Obeid family.
- Following a lengthy AFP investigation into the conduct of subsidiaries of Leighton Holdings Ltd (now known as CIMIC) triggered by the company's self-report in 2011, Mr Russell Waugh, the former Leighton Offshore Pty Ltd managing director, was charged in late 2020 in relation to alleged foreign bribes paid via third party contractors to secure approvals for two oil pipeline contracts with Iraq Crude Oil Export in 2010 and 2011, and in respect of a separate infrastructure contract in Tanzania. Charges have also been laid against a second former Leighton executive, Mr David Savage, for knowingly providing misleading information.
- In August 2020, Mr Mozammil Bhojani, the director of Radiance International, pleaded guilty and was convicted for bribing two Nauru government officials in 2015 and 2017 with more than AUD100,000 in kickbacks. The bribes were in exchange for favourable phosphate shipments. Mr Bhojani was sentenced to an intensive correction order for two-and-a-half years of intensive correction in the community and 400 hours of community work.
- In July 2020, Melbourne man Mr Dennis Teen was charged with bribing Malaysian government officials by paying them AUD4,75 million in relation to the sale of a student accommodation block to a Malaysian government-owned entity in 2013. It is alleged that the bribes were paid to the officials in return for arranging the purchase of the property

at an inflated price. The AFP subsequently restrained property worth AUD1,6 million held by the accused, the accused's wife and their associated companies.
- In September 2022, two former employees of the SMEC engineering group were arrested and charged with conspiracy to commit foreign bribery in relation to projects in Sri Lanka. It is alleged that between 2009 and 2016 the men conspired to arrange the payment of more than AUD304,000 to foreign government officials to win contracts for the supervision of two infrastructure projects in Sri Lanka worth over USD8,8 million.

7.7 Level of Sanctions Imposed

Although there has been a steady increase in the level of enforcement action for bribery and corruption offences in recent years, in particular foreign bribery, there is still some way to go. Bolstering the resources and abilities of the dedicated fraud and anti-corruption teams within the AFP will assist, as will the reforms proposed by the Corporate Crime Bill if reintroduced and passed.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

As Australia is a party to the OECD Anti-bribery Convention, the adequacy and enforcement of Australia's anti-bribery legislation is subject to ongoing evaluation.

OECD Working Group

2017 Report

The OECD Working Group on Bribery published its Phase 4 Report for Australia in December 2017. The working group identified several achievements and positive developments, noting that Australia had stepped up its enforcement on foreign bribery since 2012 (when the working group had been critical of Australia's poor enforcement record). This improvement included reforms passed in 2015 and 2016 (see **1.4 Recent Key Amendments to National Legislation**), the establishment of the FAC, the establishment of the Fintel Alliance (a public-private partnership aimed at combatting money laundering, terrorist financing and organised crime), and the engagement of AFP liaison officers globally in foreign bribery investigations.

The OECD Working Group also made a number of recommendations. Key recommendations included ensuring that the AFP and CDPP have adequate resources to effectively enforce the foreign bribery offence, proactively pursuing criminal charges against companies for foreign bribery and related offences and encouraging companies to develop and adopt adequate internal controls and compliance programmes.

2019 Report

In the OECD's two-year follow-up report in December 2019, Australia was commended for its implementation of a number of the Phase 4 Report recommendations, most notably its detection of foreign bribery, aided by its enhanced protections for private sector whistle-blowers. However, there was continued concern about Australia's low level of foreign bribery enforcement, given the size of Australia's economy and the high-risk regions and sectors in which Australian companies operate, and doubts about Australia's ability to impose effective, proportionate and dissuasive criminal penalties.

2021 Report

In its 2021 Addendum to the above report, the OECD Working Group recognised Australia's

increased activity in prosecuting and investigating foreign bribery cases, together with budget increases for the CDPP. However, it also noted that the Corporate Crime Bill had not yet been passed. Australia was invited to provide a further progress report by December 2022, including on the legislative status of the adoption of the Corporate Crime Bill (which has since lapsed).

Senate Economics References Committee Report

In March 2018, the Senate Economics References Committee released its report regarding the effectiveness of Australia's legislation governing foreign bribery. The report highlighted that, despite the framework of laws and policies designed to criminalise foreign bribery being in place, Australia's poor enforcement record suggested that foreign bribery offences were not being adequately enforced. Factors contributing to this lack of enforcement included the complex nature of the cases, lack of sufficient expertise, delays in investigative procedures, lack of co-operation between companies and the authorities, and limited resources. The committee made several recommendations to improve the enforcement record, including increasing one-off funding to agencies for the large and complex investigation of foreign bribery offences and to introduce a "failure to prevent" bribery offence and a DPA regime.

In February 2021, the Australian government published its response to the Committee Report. It accepted many of the Committee's recommendations and noted that the proposed Corporate Crime Bill was intended to address many of the issues raised.

Royal Commission into Trade Union Governance and Corruption Report

Australia's anti-bribery legislation was also assessed by the Royal Commission into Trade Union Governance and Corruption, which delivered its final report on 28 December 2015, as well as by the Western Australia Corruption and Crime Commission's inquiry into information technology companies' contracts with the Department of Health.

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Report

More broadly, Australia's enforcement environment went through a period of intensification following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the final report of which was delivered on 1 February 2019. Following the commissioner's critique of ASIC's failure to take tougher action against companies and individuals, ASIC announced a stronger enforcement approach and established a new "Office of Enforcement" in July 2019 to lead its enforcement function. This led to a significant increase in the number of enforcement actions being brought by ASIC, including a 64% increase in civil penalty proceedings and a 36% increase in criminal proceedings commenced from 2018 to 2020.

As expected, ASIC's enforcement activity has significantly reduced over the past year, and ASIC recently announced that it had filed its final civil case following its enforcement investigations arising from the Royal Commission. However, it is not expected that this will diminish ASIC's continuing active interest in potential Corporations Act contraventions by directors and officers in the foreign bribery space.

Proposed Federal Anti-Corruption Commission

In September 2022, the National Anti-Corruption Bill 2022 (the "NACC Bill") was introduced, proposing the creation of a long-awaited National Anti-Corruption Commission (NACC). The NACC is expected to be in place by mid-2023 and will investigate serious or systemic corrupt conduct across the Commonwealth public sector, including any person who adversely influences a public official. It will therefore have the power to investigate both public and private sector targets, as well as third parties such as businesses and their employees. While corruption commissions have been operating in most states and territories for some time now, earlier proposed models for a federal equivalent had been heavily criticised as lacking teeth and did not progress.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

The Corporate Crime Bill was introduced in 2017 to significantly expand the scope of the foreign bribery offence, introduce a new corporate offence of failing to prevent foreign bribery, and to introduce a DPA scheme. The Bill lapsed on 1 July 2019 as a consequence of the 2019 federal election, and following its re-introduction in December 2019, again lapsed following a change in government in July 2022. The new government has not yet indicated whether it will be introduced (and, if so, in what form). However, given the focus on the Corporate Crime Bill by the OECD and others, it is reasonable to expect it to be back on the radar following the passage of the NACC Bill.

The Corporate Crime Bill proposed to amend the foreign bribery offence by:

- extending the definition of foreign public official to include a candidate for office;
- removing the requirement that the foreign official must be influenced in the exercise of their duties;
- removing the requirement that a benefit and business advantage must be "not legitimately due" and replacing it with the concept of "improperly influencing" a foreign public official; and
- extending the offence to cover bribery to obtain a personal advantage.

As outlined in **2.1 Bribery**, a new offence was also proposed to be included in Division 70 (to apply prospectively) which targets the failure of a company to prevent foreign bribery by an associate.

Significantly, the Corporate Crime Bill proposed to introduce Australia's first-ever DPA scheme. The purpose of the proposed scheme was to develop an effective response to corporate crime by encouraging greater self-reporting by companies and to enhance the accountability of Australian business for serious corporate crime. The basis of the scheme was reparation, remediation, financial penalties and implementation of effective compliance programmes, and was modelled on the equivalent scheme in the UK.

However, the proposed DPA scheme was met with criticism by the current government when it was in opposition for being "too weak". It is therefore expected that, if the Corporate Crime Bill is re-introduced by the current government, it will incorporate a more stringent DPA scheme, or exclude it altogether.

The Australian Law Reform Commission (ALRC) also recently considered the current corporate criminal responsibility regime in Australia and identified key recommendations to improve the regime in a report published in April 2020. In par-

ticular, it recommended standardising attribution of criminal responsibility to corporations and simplifying Part 2.5 of the Criminal Code to make it easier for the prosecution, while still allowing corporations to avoid liability by demonstrating that they took reasonable precautions to prevent misconduct. In relation to foreign bribery liability, the ALRC supported the proposed "failure to prevent" offence in the Corporate Crime Bill, and recommended a debarment regime be introduced, to prevent companies that have been found guilty of foreign bribery from obtaining contracts. The ALRC also recommended that the DPA scheme proposed under the Corporate Crime Bill be amended to require approval of DPAs by a current (rather than former) judicial officer. The Australian government is currently considering these recommendations.

The new government has also announced its intention to increase transparency over company ownership, including to introduce a public registry of corporate beneficial ownership. While the focus is to prevent corporate money laundering and tax evasion, this will also have a positive impact upon combatting bribery and corruption. No timeline has yet been established.

Clayton Utz is a leading independent full-service Australian law firm. Its commercial litigation team has 150 litigators operating across Sydney, Perth, Melbourne, Brisbane, Canberra and Darwin. The firm's anti-bribery and corruption and investigations specialists advise multinational and Australian companies on corporate fraud, bribery, corruption, facilitation payments, public and private corruption, antitrust, money laundering, and privileges and immunities. The team is experienced in assessing risk and exposure under domestic and international anti-corruption laws. It assists clients with investigations and remediation, and advises on managing various collateral issues, including whistle-blower provisions, media management, defamation and reputational issues, ASX disclosure rules, directors' reputations and the risk of shareholder litigation. The team's experience includes advising on Australian Federal Police investigations into alleged bribery of foreign officials; being retained in relation to US investigations into alleged breaches of the US Foreign Corrupt Practices Act within Australia, by subsidiaries; and acting for a British multinational whose employees allegedly conspired to defraud tax authorities.

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AUSTRIA

Law and Practice

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Contents

1. Legal Framework for Offences

1.1 International Conventions

Austria has signed and ratified the following conventions.

- The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (ratified by Federal Law Gazette III 176/1999). Active bribery of foreign public officials as stated in Article 1 (1) of the OECD Anti-Bribery Convention has been transposed into law (at least in part) by way of Section 307 of the Austrian Criminal Code (Strafgesetzbuch, StGB) in the version as published in Federal Law Gazette I 153/1998; see also the definition of a "public official" in Section 74 (1) clause 4a of the Austrian Criminal Code.
- The United Nations Convention against Corruption (UNCAC) dated 31 October 2003 (ratified by Federal Law Gazette III 2006/47, transposed into law by way of Federal Law Gazette I 109/2007).
- The Council of Europe's Civil Law Convention on Corruption 1999 (ratified on 30 August 2006).
- The Council of Europe's Criminal Law Convention on Corruption dated 27 January 1999 (ratified on 25 September 2013).
- The Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union dated 26 May 1997 (ratified by Federal Law Gazette III 2000/38, transposed into law in particular by way of Section 74 (1) clause 4a (Section 304/307 (1) clause 1) of the Austrian Criminal Code).
- The Convention on the protection of the European Communities' financial interests dated 26 July 1995; Protocol to the Convention on the protection of the European Communities' financial interests; Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests (ratified by Federal Law Gazette III 267/2002).

Since 1 December 2006, Austria has been a member of the Council of Europe's Group of States against Corruption (GRECO).

1.2 National Legislation

The main provisions of criminal law relating to corruption are contained in Section 22 of the Austrian Criminal Code (criminal offences relating to public officials, corruption and other related criminal offences). Individual offences contained in Section 6 of the Austrian Criminal Code (criminal offences against third-party assets) also represent an attempt to counter corruption, particularly in the private sector.

In addition, the constituent elements of criminal offences as contained in the Austrian Financial Crime Act (*Finanzstrafgesetz*), in the Austrian Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) and in the Austrian Federal Act against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb*) also serve to combat corruption. The Austrian Corporate Liability Act (*Verbandsverantwortlichkeitsgesetz*) governs the responsibility of legal entities and registered partnerships. Any disciplinary consequences for public officials are set out in other legal provisions.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

In theory, there are no guidelines on interpretation. However, in practice, the courts adhere to the case law of the supreme courts.

1.4 Recent Key Amendments to National Legislation

Bitcoin and other virtual currencies have established themselves as a means of exchange on the market. Among other things, this raises questions from a regulatory perspective. Quite recently, the EU Directive 2019/713 (on combating fraud and counterfeiting of non-cash means of payment) and replacing Council Framework Decision 2001/413/JHA (Directive 2019/713) required an amendment to the Austrian Criminal Code.

The required amendments to the Austrian Criminal Code entered into force on 11 December 2021 (Federal Law Gazette I 2021/201), in particular amending the definition of the term "non-cash means of payment" within the meaning of Section 74 (1) clause 10 of the Austrian Criminal Code.

Before the amendment only physical non-cash means of payment were covered by the definition. The EU Directive has the explicit aim of covering incorporeal means of payment and "computer-related fraud". The altered definition is in line with Article 2 lit a of the Directive, which states, "non-cash payment instrument: non-corporeal or corporal devices, objects or records or a combination thereof, other than legal tender, and which alone or in conjunction with a procedure or a set of procedures, enables the holder or user to transfer money or monetary value, including through digital means of exchange".

The amendment eliminated the requirement that the issuer must be identifiable. Furthermore, the requirement for the cash-representative-function or the function of issuing cash, no longer applies.

Virtual currencies are not means of payment per se but are considered as such only if they are accepted by third parties. This does not result from the intended use of virtual currencies by users, but from the legal definition in the Financial-Market-Money-Laundering Act (*Finanzmarkt Geldwäschegesetz*).

The most recent federal law amending the Austrian Criminal Code and the Austrian Payment Services Act 2018 to implement the Directive (EU) 2019/713 (on combating fraud and counterfeiting involving non-cash means of payment) mainly includes the following measures:

- expansion of the definition of non-cash means of payment in Section 74 (1) clause 10 of the Austrian Criminal Code to include non-cash means of payment, including virtual currencies (see above);
- expanding the offenses in:
  - (a) Section 148a Austrian Criminal Code (fraudulent misuse of data processing);
  - (b) Section 241b Austrian Criminal Code (accepting, transferring or possessing false or falsified non-cash means of payment);
  - (c) Section 241c Austrian Criminal Code (preparing to counterfeit non-cash means of payment); and
  - (d) Section 241f StGB (accepting, transferring or possessing alienated non-cash means of payment);
- increasing the penalties in Section 126c of the Austrian Criminal Code (misuse of computer programs or access data), Section 148a of the Austrian Criminal Code, Section 241c of the Austrian Criminal Code, Section 241h of the Austrian Criminal Code (spying on data of a non-cash means of payment); and
- implementation of commission of the crime within the framework of a criminal organisation in Section 147 Austrian Criminal Code (aggravated fraud), Section 148a Austrian Criminal Code, Section 241b Austrian Crimi-

nal Code and Subsection 241f Austrian Criminal Code.

In the last year the investigative measures in the Austrian Code of Criminal Procedure were supplemented by the paragraph regarding "Seizure in authorities and public offices" (Section 112a). This amendment, which was the subject of lively debate in the run-up, entered into force in December 2021, and essentially concerns the rights of authorities and public officers in the event of a seizure of data in the course of a house search. In this case, sensitive intelligence records or data carriers are to be secured and deposited in a suitable manner against unauthorised inspection or modification upon the objection of the person concerned, whereby the decision as to whether the seized or confiscated records and/or data carriers may be used is made by a court.

Moreover, due to the implementation of the EU Directive (EU) 2017/1371 on combating fraud affecting the financial interests of the Union by means of criminal law (PIF Directive), the Federal Law Gazette I 111/2019 adopted corresponding amendments to the Austrian Criminal Code, the Austrian Act on the Federal Agency for Preventing and Combating Corruption and the Austrian Code of Criminal Procedure. In the Austrian Criminal Code, these amendments were anchored in the offences "Expenditure fraud to the detriment of the financial interests of the European Union" (Section 168f) and "Misappropriation of funds and assets to the detriment of the financial interests of the European Union" (Section 168g) after adaptation by the Federal Law Gazette I 94/2021. In addition, the implementation of the Directive was accompanied by an amendment or redefinition of the terms "public official" and "Union official", which also resulted in an addition to the offences of bribery (Section 304), acceptance of advantage (Section 305), bribery (Section 307) and granting of advantage (Section 307a).

The legislature also planned comprehensive changes through the Austrian Criminal Procedural Law Amendment Act 2018. This Act, which for the most part came into force on 1 June 2018, enables law enforcement agencies to use state espionage software (*Bundestrojaner*) to monitor encrypted messages and messenger services such as WhatsApp and Skype.

However, in December 2019, the Austrian Constitutional Court annulled large parts of the Austrian Criminal Procedural Law Amendment Act 2018, including the *Bundestrojaner*, as unconstitutional. Therefore, for the time being, those provisions will not come into force. The legislature might pass a new Amendment Act, but this is not likely to happen in the near future. The Austrian Criminal Law Amendment Act 2018, which came into force on 1 November 2018, extended the catalogue of terrorist offences as well as the domestic jurisdiction related to terrorism.

With the amendment of the Transparency Data Bank Act 2012, which came into force on 7 November 2019 and 1 January 2020, the control of the appropriate use of public funding or support is being improved.

2. Classification and Constituent Elements

2.1 Bribery

Classification and Constituent Elements

A "unitary perpetrator" system applies in Austria. Thus, the direct perpetrator is punished under the same offence (and severity of sentence) as a person who incites the direct perpetrator

or contributes to the offence. Accordingly, for instance, it is not only a civil servant who can commit an abuse of official authority (as could be presumed according to the wording of the law, as further described below), but also any person who incites a civil servant to commit an abuse of authority; by the mere attempt at such incitement, that person is punishable, as well as any person who makes any other contribution to an abuse of official authority on the part of a civil servant.

In principle, a perpetrator is deemed to be acting with intent once he or she seriously considers the realisation of elements constituting a criminal offence to be possible and accepts the situation. Partly, however, there is a requirement that the perpetrator does not consider a particular circumstance or outcome to be merely possible, but deems the existence or occurrence thereof to be certain.

Furthermore, as a general rule, it is not only a completed offence, but a mere attempt at an offence, that is punishable.

The Austrian Criminal Code makes a distinction between civil servants (*Beamte*), public officials (*Amtsräger*) and arbitrators (*Schiedsrichter*). Civil servants are persons who are entrusted in any manner whatsoever with administrative duties. The concept of a "public official" goes further. It covers all persons who undertake legislative, administrative or judicial duties for any public body or another state or for an international organisation, whether as executive officer or employee, as well as those who are authorised to execute official acts on behalf of a public body. In addition, public officials are also deemed to be persons who act as executive officers or employees of a government-related organisation. The decision-makers of an arbitration court (arbitrators) can also come under consideration as perpetrators of corruption offences.

Bribery

With regard to "corruptibility" (Section 304 of the Austrian Criminal Code), a public official or arbitrator renders themselves liable to prosecution if they demand, accept, or accept the promise of an advantage for themselves or for a third party, in return for the exercise of, or the refraining from the exercise of, an official act in violation of their duties. The official act to be performed must in any event constitute a violation of duty. If the public official or arbitrator fulfils all their duties in the correct manner, this constituent element of an offence cannot be fulfilled (however, there may be another offence – see further below).

Experts appointed in proceedings also render themselves liable to prosecution under this provision if they accept an advantage in return for preparing a false expert's report. In respect of these constituent elements, there exists no marginality threshold.

A person who offers, promises or grants a public official, arbitrator or expert an advantage for themselves, or a third party, for the exercise of, or the refraining from the exercise of, an official act in violation of duties shall be committing bribery (Section 307 of the Austrian Criminal Code).

In respect of these two offences, no marginality threshold exists.

2.2 Influence-Peddling

Acceptance of an Advantage (Section 305 of the Austrian Criminal Code) and Offering

an Advantage (Section 307a of the Austrian Criminal Code)

A public official or arbitrator who demands, accepts, or accepts the promise of an advantage for themselves, or a third party for the due exercise of, or refraining from the due exercise of, an official act shall be committing the offence of acceptance of an advantage (Section 305 of the Austrian Criminal Code). The difference between this and corruptibility (Section 304 of the Austrian Criminal Code) lies in the fact that the official act is in principle in compliance with the law and not in violation of duties. If the public official or arbitrator is not proactive – ie, he or she does not demand an advantage, but merely accepts an advantage or accepts the promise of an advantage – then acceptance or acceptance of a corresponding promise is only punishable if the advantage in question is undue.

Advantages not deemed undue are, for instance, those for which acceptance is lawful, as well as minor-value tokens of appreciation such as are usual in the locality or region – this means, generally, tokens of appreciation which have a maximum value of EUR100, provided that the public official or arbitrator does not regularly accept promises of such tokens or does not regularly accept those tokens.

A person who offers, promises or grants a public official or arbitrator an undue advantage for themselves, or for a third party in return for the due exercise of, or refraining from the due exercise of, an official act, renders themselves liable to prosecution for the offence of offering an advantage (Section 307a of the Austrian Criminal Code).

Acceptance of an Advantage for the Purpose of Exerting Influence (Section 306 of the Austrian Criminal Code) and Offering an Advantage for the Purpose of Exerting Influence (Section 307b of the Austrian Criminal Code)

If a public official or arbitrator demands, accepts, or accepts the promise of, an advantage not related to a specific official act, but rather with the intention of allowing themselves to be influenced thereby in their activity as a public official, they are committing the offence of accepting an advantage for the purpose of exerting influence. With this provision, too, cases are excluded in which the public official or arbitrator merely accepts or accepts the promise of a minor advantage; where a demand is made, here again, there exists no marginality threshold.

A person who offers, promises or grants to a public official or arbitrator an undue advantage for themselves, or a third party with the intention of thereby influencing the public official or arbitrator in their activity as a public official, shall render themselves liable to prosecution for the offence of offering an advantage for the purpose of exerting influence (Section 307b of the Austrian Criminal Code).

Illicit Intervention (Section 308 of the Austrian Criminal Code)

Section 308 of the Austrian Criminal Code prohibits the demanding, acceptance, promising or acceptance of a corresponding promise, offering and granting of an advantage for the purpose that the person who receives the advantage exerts undue influence on the decision-making of a public official or arbitrator. Such undue influence is given if it is aimed at the exercise or the refraining from the exercise of an official act in violation of duties or is associated with the offering, promise or granting of an undue advantage. Thus, this particular offence is based on a three-person relationship: the perpetrator offers an

advantage to someone who then exerts undue influence on the public official.

Acceptance of Gifts and Bribery of Employees or Agents (Section 309 of the Austrian Criminal Code)

An employee or agent of a business undertaking who, in the context of business dealings, demands, accepts, or accepts the promise of an advantage for themselves, or a third party, from another person in return for the exercise of, or the refraining from the exercise of, a legal act in violation of their duties, shall be committing the offence of acceptance of gifts and bribery of employees or agents (Section 309 of the Austrian Criminal Code). Under the terms of the same offence, any person who offers, promises or grants an advantage to an employee or agent of a business undertaking in the context of business dealings in return for the exercise of, or refraining from the exercise of, a legal act shall also render themselves liable to prosecution.

Section 309 of the Austrian Criminal Code is intended to prevent corruption in the private sector and thus relates to such conduct in the private economic sector, whereby employees or agents of another business undertaking seek to obtain preferential treatment, constituting a violation of duty through promises or the granting of gifts or other advantages. A similar criminal provision may be found in Section 10 of the Austrian Federal Act against Unfair Competition.

Acceptance of Gifts by Persons Holding a Position of Power (Section 153a of the Austrian Criminal Code)

A person who has accepted a pecuniary advantage that is not merely insignificant in return for the exercise of the power granted to them to effect disposal in respect of third-party assets or of the power to place another person under a duty (such as a managing director of a company) and who does not, in violation of their duty, remit that pecuniary advantage shall be committing the offence of acceptance of gifts by a person holding a position of power (Section 153a of the Austrian Criminal Code).

2.3 Financial Record-Keeping

Falsification of Balance Sheets (Sections 163a et seq of the Austrian Criminal Code)

If, in the case of a legal entity or partnership, the executive bodies or executive officers shall present the balance sheets in an unreasonable manner in false or incomplete form, and if this has the capacity to cause a substantial loss, the executive bodies or executive officers – and possibly also the auditors – shall be committing the offence of falsification of balance sheets (Sections 163a et seq of the Austrian Criminal Code).

This offence thus faces a number of barriers before punishable conduct may actually be deemed to have occurred. Firstly, the presentation must be unreasonable and, secondly, it must have the capacity to cause a substantial loss. The perpetrator's intent must also encompass these aspects.

2.4 Public Officials

Abuse of Official Authority (Section 302 of the Austrian Criminal Code)

A civil servant who knowingly abuses their power to execute official acts on behalf of a public body as the executive officer thereof, and who thereby intends to cause prejudice to the rights of a third party, is committing an abuse of official authority. Such an offender may also consist of the state itself. There is a requirement that the perpetrator must consider the existence of an abuse of power to be certain.

Misuse of Funding (Section 153b of the Austrian Criminal Code)
Any person who uses funding granted improperly for purposes other than those for which it was granted shall render themselves liable to prosecution for misuse of funding (Section 153b of the Austrian Criminal Code).

Agreements Restricting Competition in Procurement Procedures (Section 168b of the Austrian Criminal Code)
If unlawful agreements are made, in the context of a procurement procedure, that are aimed at inducing the principal to accept a particular offer, this constitutes commission of the offence of an agreement restricting competition in a procurement procedure (Section 168b of the Austrian Criminal Code).

2.5 Intermediaries
See **2.1 Bribery**.

3. Scope

3.1 Limitation Period
The limitation period for the prosecution of corruption offences is based primarily on the amount of any loss or illegitimate advantage, whereby, as a rule, the limitation period is five or ten years. Here, it must be borne in mind that particular periods, specifically the majority of a preliminary criminal investigation, are not counted as part of the limitation period.

3.2 Geographical Reach of Applicable Legislation
Austrian criminal laws apply in any event to all offences committed within Austria. Furthermore, Austrian criminal laws apply to criminal offences committed abroad by an Austrian civil servant, public official or Austrian arbitrator, as well as in the case of corruption offences if the perpetrator was an Austrian national at the time of the offence or the offence was committed in favour of an Austrian public official or arbitrator.

Falsification of balance sheets (sections 163a–f of the Austrian Criminal Code) is also subject to penalty under Austrian criminal laws if the principal place of business or registered office of the organisation is situated in Austria. Furthermore, Austrian criminal law comprises other special provisions that could in principle establish punishability under Austrian criminal laws.

3.3 Corporate Liability
The Austrian Corporate Liability Act (*Verbandsverantwortlichkeitsgesetz, VbVG*) sets out the preconditions under which legal entities, registered partnerships and European Economic Interest Groupings (associations) are liable for criminal offences. All offences may be potentially considered criminal offences. An association may – in addition to the natural persons – be held liable for a criminal offence if the act has been committed in favour of the association or duties have been breached through the act of crime in question, which duties relate to the association. Where certain preconditions are given, criminal offences on the part of a decision-maker or an employee of the association may enter into consideration.

The liability of an association for an offence and the punishability of decision-makers or employees in respect of the same act do not preclude one another. By way of legal consequence, the Austrian Corporate Liability Act imposes primarily a fine. Under some circumstances, successors in title may also bear the legal consequences set out in the Austrian Corporate Liability Act. A universal successor in title is in any event affected by the legal consequences; a singular succes-

sor in title is affected if, essentially, the same ownership circumstances exist in respect of the entity and the business operation or activity is essentially being continued.

4. Defences and Exceptions

4.1 Defences

Particularly in the case of crimes against property, a defence may be based purely on the assertion that the objective constituent elements of the offence are not even fulfilled. If – for example, in the case of an allegation of breach of trust (Section 153 of the Austrian Criminal Code) – it is possible to demonstrate straightforwardly that the company suffered no prejudice (for instance, because a payment has a corresponding value for the company) then neither does punishability enter into consideration. Furthermore, within the framework of defence, it is often possible to demonstrate that the perpetrator had no intention to satisfy the constituent elements of an offence (ie, the perpetrator lacked the intent that is a mandatory precondition of punishability).

General grounds under criminal law aimed at justifying and excusing an action (self-defence, mistake of fact meaning an absence of mens rea, etc) play a very secondary role in criminal law relating to corruption. Naturally, the prosecuting authority is under a duty to provide evidence and the presumption of innocence applies to the accused. If there exists any doubt as to their guilt, they must be acquitted (in dubio pro reo).

In the event that the accused has already confessed or wishes to confess, an attempt must be made to compensate for damages to the greatest possible extent, since this not only constitutes a mitigating factor but may enable the possibility of a settlement according to the Austrian Criminal Code (diversion or withdrawal from criminal proceedings). In such a case, where the preconditions are given, it may be possible to work accordingly towards diversion.

4.2 Exceptions

There are no exceptions to the foregoing defences.

4.3 De Minimis Exceptions

As previously set out, some offences are not punishable if no undue advantage is granted or promised. “No undue advantage” means, for instance, an advantage, the acceptance of which is permitted by statute, or tokens of appreciation of minor value such as are usual for a locality or region, which means, in principle, tokens of appreciation that have a value totalling a maximum of EUR100, provided that the public official or arbitrator does not regularly accept such tokens or the promise of such tokens. As soon as a public official or arbitrator demands an advantage, there can be no de minimis exception.

4.4 Exempt Sectors/Industries

No sectors or industries exist that are entirely exempt from corruption offences. It is merely necessary to bear in mind that, depending on the person to whom an advantage is granted (in particular, whether to a public official or an employee in the private sector), differing offences may apply.

4.5 Safe Harbour or Amnesty Programme

Austrian criminal law sets out a number of possibilities that enable prosecution to be avoided, despite a criminal offence having been committed.

Active Repentance
With regard to numerous crimes against property (eg, breach of trust, money laundering), the punishability of the perpetrator is precluded if, before the criminal prosecution authorities have learned of their culpability, they voluntarily make good the entire loss arising from their action, or contractually undertake to indemnify the injured party accordingly for the loss suffered within a particular period, and indeed do so. Active repentance may also be by way of self-indictment, whereby the perpetrator must at the same time make good the loss suffered by way of a deposit with the authority. In the case of corruption offences in relation to public officials/arbitrators (abuse of official authority, bribery, etc), there exists no possibility of active repentance.

Prosecution Witness
The perpetrator shall not be prosecuted if, before being questioned as an accused or before being compelled to testify, the perpetrator voluntarily approaches the public prosecutor's office, gives a repentant confession as to their contribution to an act and discloses their knowledge of new facts or evidence, knowledge of which makes a key contribution to uncovering fully a greater criminal offence over and above their own contribution thereto or to determining a leading party to the offence. Where relevant, particular conditions may be imposed upon them (compensating for loss, charitable contribution, payment of a monetary amount, etc – see also under **Diversion** below).

If the perpetrator is a member of a criminal organisation and if they disclose their knowledge, making a significant contribution to uncovering the criminal offences of that criminal organisation or to determining a leading person involved therein, the perpetrator has the possibility of an exceptional reduced sentence. In such event, the penalty will be substantially below the minimum level. This option is also possible if the perpetrator discloses their knowledge only after already having been heard as an accused or having been compelled to testify.

"Diversion" or "Withdrawal from criminal proceedings"
Under certain circumstances, the possibility exists that the public prosecutor's office/the court withdraws from the prosecution ("diversion" – settlement according to Section 198 (and following) Austrian Criminal Code) and the perpetrator need only fulfil particular conditions (in particular, making good losses, payment of a monetary amount or charitable contributions). In order for diversion to enter into consideration, above all, the facts must be clarified and the perpetrator must assume responsibility therefor (as a rule, a confession is thus required). Furthermore, the degree of the perpetrator's guilt may not be serious and the offence may not be subject to a custodial sentence of more than five years. Therefore, in the case of more major corruption cases, diversion does not enter into consideration. Further restrictions exist in the case of abuse of official authority.

5. Penalties

5.1 Penalties on Conviction
In terms of penalties, Austrian criminal law primarily has monetary fines and custodial sentences. Under criminal law on corruption, custodial sentences in principle range up to ten years (or more, in exceptional instances). Even in the event of several offences, the maximum penalty may only be applied in full on a single occasion.

Indeed, where several offences are adjudged simultaneously, in criminal trials, the "absorp-

tion principle" applies (Section 28 of the Austrian Criminal Code), which states that, despite the commission of several criminal offences, only a single penalty – and not, for instance, a series of individual penalties ("accumulation principle") – is imposed. This penalty is to be determined in accordance with the law that imposes the highest penalty.

If, for instance, a perpetrator commits an offence subject to a custodial sentence of up to one year and a further offence subject to a custodial sentence of between six months and five years then the penalty shall be fixed between the boundaries of six months and five years. Within this framework, the specific penalty shall be imposed in accordance with the general criteria applied to determination of a penalty (regarding the perpetrator's guilt, etc, see Section 32 et seq of the Austrian Criminal Code).

Custodial sentences and monetary fines are thus subject to upper limits ("capped"). The maximum custodial sentence is based directly on the wording of the law (eg, Section 304 (1) of the Austrian Criminal Code: "Custodial sentence of up to three years", but considers the possibility of exceeding the upper limit in Section 39 of the Austrian Criminal Code).

With regard to monetary fines, the Austrian Criminal Code applies the system of daily rates. For instance, commission of a criminal offence is subject to imposition of a certain number of daily rates – 360, or a maximum of 720 (eg, Section 153a: "[…] or a monetary fine of up to 720 daily rates"). This means that the perpetrator must pay a specific monetary amount per day for a specific number of days (a maximum of 720, but according to Section 19 (1) of the Austrian Criminal Code, at least two). While the number of days – as in the case of a custodial sentence – is determined according to the general criteria applied to determination of a penalty, the amount of the individual daily rate is based on the personal circumstances and economic capacity of the perpetrator (Section 19 of the Austrian Criminal Code). The perpetrator is to pay an amount such that what remains amounts to merely a subsistence level. However, here too, the law sets out a maximum limit: the maximum daily rate that may be imposed totals EUR5,000.

Under certain preconditions, custodial sentences may also be imposed conditionally with a probation period. If a custodial sentence totalling a maximum of two years is imposed, this may be served under certain circumstances by way of house arrest (using an electronic ankle tag).

Assets used for the commission of a criminal offence or obtained through the offence may be declared forfeited. This may in some circumstances also pertain to assets that, at the time of the judicial decision, are not (or are no longer) in the ownership of the perpetrator. Accordingly, this is not a penalty in the strict sense.

If a civil servant is sentenced for a corruption offence (or another intentional offence) to a custodial sentence of over one year or a conditional custodial sentence of over six months, the civil servant is dismissed from office (Section 27 (1) of the Austrian Criminal Code).

Sentencing under the Austrian Corporate Liability Act may have certain secondary consequences for an entity, such as a restriction on licences under the Austrian Foreign Trade and Payments Act as well as on participation in procurement procedures.

5.2 Guidelines Applicable to the Assessment of Penalties

A number of corruption offences provide for a minimum penalty, whereby this does not yet mean an unconditional custodial sentence on a mandatory basis (eg, Section 304 (2) of the Austrian Criminal Code: "Custodial sentence of between six months and five years"). The basis for assessment of the penalty is the guilt of the perpetrator. In this context, primarily the demerit (*Unwert*) in terms of the perpetrator's attitude and action, and the outcome of the offence must be taken into account.

The Criminal Code sets out a catalogue of specific aggravating and mitigating factors, whereby aspects not included in this catalogue must also be borne in mind. Particular aggravating factors include circumstances where a perpetrator commits several criminal offences or continues the same over a lengthy period, has received a relevant prior conviction, or where the perpetrator is the instigator or ringleader in relation to an offence. The greatest mitigating factor is a repentant confession.

Further mitigating factors include if the perpetrator has previously led a regular life, if they were only involved in a secondary manner, if the offence is already some time in the past, if the proceedings have taken a disproportionately long time for reasons not attributable to the perpetrator or the perpetrator's defence attorney, if the perpetrator was enticed to commit the offence more due to a particularly attractive opportunity and if they seriously attempted to make good the loss caused or to prevent further detrimental consequences.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

In addition to numerous requirements of business undertakings and legal entities under business enterprise and company law, the Austrian Corporate Liability Act is also intended to establish an adequate control system. For instance, a legal entity/partnership is liable for a criminal offence committed by an employee only if commission of the offence was enabled or significantly facilitated on the basis that decision-makers failed to exercise the requisite and reasonable care appropriate to the circumstances, in particular by omitting significant technical, organisational or personnel measures to prevent the offence.

Numerous business undertakings create internal compliance rules, although they are not under any direct statutory obligation to do so. However, special rules do apply with regard to particular sectors/undertakings, such as appointment of a compliance officer.

In practical terms, for a business undertaking and its executive bodies/officers, it would in any event appear advisable to establish comprehensive preventive measures, including compliance rules, to avoid liability under civil law or liability to prosecution under criminal law.

6.2 Regulation of Lobbying Activities

On 1 January 2013, the Austrian Lobbying and Interest Representation Transparency Act (Austrian Lobbying Act) came into force.

The purpose of the Austrian Lobbying Act, as stated in the legislative materials, namely "to create clear conditions for activities intended to influence the government decision-making pro-

cesses", shall be achieved by three measures. All persons and companies that engage in lobbying:

- must be recorded in the "Lobbying and Interest Representation Register" (Register);
- they must submit to certain obligations of conduct, such as:
  (a) duty to register;
  (b) duties to provide information (including identity, task, concern, duty to tell the truth, for lobbying companies: the expected fee);
  (c) prohibitions (claiming a non-existing commissioned or consulting relationship with a functionary, unfair procurement of information, unfair and inappropriate exertion of pressure); and
  (d) the code of conduct (it should be noted that the code of conduct of the Austrian Lobbying Act is very general and contains a large number of undefined legal terms, which complicates the implementation of the law); and
- they must fear sanctions (administrative penalties of up to EUR20,000, or up to EUR60,000 in the event of a repeated offence) and other legal consequences (deletion from the list, nullity of contracts) in the event of non-compliance.

The scope of application of the Lobby Act concerns activities that are directly aimed at influencing certain decision-making processes in the legislation and enforcement of the federal, provincial government, municipalities and the associations of municipalities.

The Austrian Lobbying Act contains a number of legal definitions.

- "Lobbying activity" means any organised, structured and direct contact with officials for the purpose of influencing certain decision-making processes in legislation or enforcement, private-sector administration of the federal government, the provinces, municipalities and municipal associations.
- "Lobbying mission" is a contract against payment that obliges a contractor to carry out lobbying activities.
- "A lobbyist" is a person who carries out lobbying activities as a body, employee or contractor of a lobbying company or whose duties include this.
- "Lobbying firm" is a company whose business purpose includes the acceptance and performance of a lobbying assignment (no permanency required).
- "Corporate lobbyist" is an executive body or employee of a company whose duties include lobbying activities for this company, unless the duties are professional obligations defined by law.

From a compliance perspective, two paragraphs are particularly relevant.

- According to Section 6 of the Austrian Lobbying Act, which defines the principles of lobbying activities and representation of interests, lobbyists and interest-representatives are obliged:
  (a) to disclose their identity, their task and their specific concerns;
  (b) not to obtain information in an unfair manner;
  (c) to disclose information truthfully;
  (d) to inform themselves about, and comply with, activity restrictions and incompatibility rules; and
  (e) not to exert unfair or inappropriate pressure on functionaries.

- Section 7 of the Austrian Lobbying Act requires lobbying companies or companies that employ corporate lobbyists to base their lobbying activities on a code of conduct, which they must also make public (eg, via a notice on their own website).

The social partners (*Sozialpartner*) and collective agreement institutions are explicitly excluded from the Austrian Lobbying Act. They are solely obligated to register, as are other self-governing bodies and interest groups, although in addition to the registration obligations the conduct obligations apply to them.

Also excluded from the scope of the Austrian Lobbying Act are political parties, church and religious societies that have been legally recognised, the Austrian Association of Municipalities, the Austrian Association of Cities, the statutory social insurance institutions and their main association, as well as interest groups that do not employ employees as interest representatives.

Furthermore, certain activities – listed in a taxonomic manner – are explicitly excluded. The Austrian Lobbying Act does not apply to:

- activities of public officials in the exercise of their duties;
- activities of a person by which they look after non-entrepreneurial interests of their own;
- the representation of the interests of a party or participant concerning administrative or judicial proceedings;
- legal advice or representation by lawyers, notaries, certified public accountants and other persons authorised to do so; and
- the representation of foreign policy interests in diplomatic or consular dealings carried out upon request by a functionary.

One year before the law was introduced, the Austrian Public Affairs Association (ÖPAV) was constituted as a professional group of public affairs officers in companies, associations, NGOs and agencies. Its members now number more than 80 and work as professional lobbyists in their respective organisations. They have subjected themselves to a strict code of conduct (by means of international guidelines) that goes far beyond the requirements defined in the law. According to international observers, the result is the most comprehensive and progressive guideline in all of Europe.

The Austrian Public Affairs Association sends out a clear signal of transparency and quality to politicians, civil society, as well as to clients and the interested public.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

An authority that becomes aware of a suspected criminal offence within its statutory sphere of influence is under a duty to report the matter to the criminal prosecution authorities.

There exists no general obligation under criminal law upon individuals and/or business undertakings to notify breaches of anti-bribery and anti-corruption rules. However, if, for instance, a managing director is aware of a planned or continuing criminal offence and takes no action, although they could do so, it may under certain circumstances be the case that they thereby render themselves guilty of the same offence due to having failed to act as required (Section 2 of the Austrian Criminal Code). Intentionally protecting a perpetrator against criminal prosecution is also prohibited (preferential treatment pursuant to the terms of Section 299 of the Austrian Criminal Code).

6.4 Protection Afforded to Whistle-Blowers

The whistle-blower scheme set out in Section 2a (6) of the Austrian Public Prosecution Act (*Staatsanwaltschaftsgesetz, StAG*) makes it possible to ensure protection of a whistle-blower's anonymity from a technical perspective.

If the whistle-blower has rendered themselves liable to prosecution, the possibility exists of exceptional mitigation or exemption from punishment on the basis of the provision governing prosecution witnesses (see **6.5 Incentives for Whistle-Blowers**).

Otherwise, with regard to whistle-blowers, there exist numerous unresolved issues in Austria in terms of civil law, labour law and criminal law.

6.5 Incentives for Whistle-Blowers

If a whistle-blower has rendered themselves liable to prosecution, the possibility exists that they may be exempted from any penalty as a prosecution witness, or the penalty applied may at least be subject to exceptional mitigation (see **6.4 Protection Afforded to Whistle-Blowers**).

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Section 80 (1) of the Code of Criminal Procedure (*Strafprozessordnung*) sets out the right of any person who becomes aware of commission of a criminal offence to report the offence to the criminal investigation department or the public prosecutor's office.

Under the Austrian Public Prosecution Act (Section 2 a (6)), the whistle-blowing system of the Public Prosecutor's Office for Economic Crime and Corruption has been anchored in statute, as detailed on the website of the Prosecutor's Office.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

In Austria, corruption is fought on several levels. Where a criminal offence is committed, the perpetrator can primarily expect a criminal trial and, subsequently, potentially a monetary fine or custodial sentence. Before a main trial takes place, there is a preliminary investigation, which often takes many years, and which is directed by the public prosecutor's office.

If, as a result of the perpetrator's unlawful actions, a loss has been suffered, the parties who have suffered the loss may, to some degree, have asserted their claims already in the criminal proceedings and, in any event, in separate civil proceedings.

Public-sector employees (particularly civil servants) must additionally anticipate disciplinary proceedings by the administrative authorities.

7.2 Enforcement Body

The criminal prosecution authorities against corruption offences in Austria are primarily the Public Prosecutor's Office for Economic Crime and Corruption, and the Federal Bureau for Anti-Corruption, whereby the ordinary public prosecutor's offices and the police authorities are also permitted to investigate corruption offences. The public prosecutor's office directs the preliminary investigation. It may conduct investigations itself or – as is generally the case – refer them to criminal investigators, particularly the Federal Bureau for Anti-Corruption, instructing them to undertake the requisite investigations. The Austrian Code of Criminal Procedure provides for various investigative measures, such as property searches, the securing of documents and moni-

toring telephone conversations, so that these are available to the criminal prosecution authorities.

The public prosecutor's office has the possibility of suspending a preliminary investigation where there is no prospect of a successful prosecution. In addition, it may offer the accused the possibility of diversion (that is, an alternative procedure) and terminate the proceedings on this basis. It may also decide on exemption from penalty for a prosecution witness. If none of the aforementioned options enters into consideration, it must bring a charge. In the event of a legally valid indictment, a main trial takes place before an independent court. There are no special courts responsible for corruption matters, but within the criminal courts there often exist specialised panels for this purpose.

7.3 Process of Application for Documentation

Most investigation measures are entrusted by the public prosecutor's office to the criminal investigation department and these are then conducted by that department. In the event of imminent danger, the criminal investigation department may conduct particular investigation measures without being instructed to do so by the public prosecutor's office. Instructions concerning investigation measures that encroach upon the fundamental rights of subjects require judicial approval.

7.4 Discretion for Mitigation

In principle, the public prosecutor's office cannot apply any discretion. If the corresponding preconditions are given for discontinuation, diversion, or the status of a prosecution witness, it must proceed accordingly. Only with regard to the question of which diversion measures enter into consideration – and, in the event of payment of a monetary sum, the amount thereof – does it have a degree of scope. In any event, the accused has a legal right to the manner of proceeding. Arrangements between the public prosecutor's office, the court and the accused are strictly prohibited.

7.5 Jurisdictional Reach of the Body/Bodies

The public prosecutor's office is under a duty of objectivity and has a status equal to that of the defendant in the main trial. However, being in charge of the preliminary investigation, de facto it has numerous possibilities which are not open to the accused (for instance, conducting property searches and securing property).

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

There have been no landmark investigations or decisions in respect of bribery or corruption in the very recent past.

7.7 Level of Sanctions Imposed

In theory, the penalty ranges up to a ten-year custodial sentence for natural persons (eg, Section 304 (2) of the Austrian Criminal Code) and a fine of EUR1,3 million for entities, whereby both maximum penalties may indeed be even higher under certain circumstances. It would appear that, for a first offence, the maximum penalties have not yet been applied.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

The evaluation of implementation and enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is undertaken by way of peer reviews, and monitoring consists of

several phases. Several reports have been published, the latest in 2017, by way of a follow-up to the report from 2012. In the 2012 report, the Working Group had recommended that Austria take appropriate steps within its legal system to ensure that nationality jurisdiction applies to Austrian companies that bribe abroad, including by using non-nationals as intermediaries.

Furthermore, the Working Group issued some recommendations regarding the liability of legal persons for the bribery of foreign public officials, the investigation and prosecution of foreign bribery cases, and the liability of legal persons for the bribery of foreign public officials (for greater detail, see the OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Austria, December 2012). The follow-up report from 2017 deals with the changes that have occurred in the intervening period (for instance, the decision of the Constitutional Court in relation to the Austrian Corporate Liability Act, VfSlg 20.112/2016, and the introduction of the electronic register of account information).

However, according to the terms of a report published recently by the anti-corruption organisation Transparency International, Austria has taken only "initial steps" with regard to bribery abroad and has thus performed worse than in the last report.

Within the framework of peer reviews, the GRECO examines observance and implementation of the legal instruments respectively approved by the Council of Europe. With regard to the first two evaluation rounds, the setting up and reinforcement of the Federal Bureau for Anti-Corruption, the Public Prosecutor's Office for Economic Crime and Corruption, and the Anti-Corruption Committee, plus stronger co-operation between various criminal prosecution authorities and the introduction of a code of conduct for civil servants, were all deemed positive. However, it was also noted that Austria has omitted to implement all previous recommendations satisfactorily.

The GRECO's fourth evaluation round commenced on 1 January 2012 and dealt with the topic of "Prevention of corruption in respect of members of parliament, judges and prosecutors". In the evaluation report, the GRECO recommends that Austria implement a series of measures to prevent bribery. While it was considered positive for law-makers to be treated in the same manner as those in other categories of public office in terms of corruption offences, Austria was deemed to rely too much on the deterrent effect of this provision of criminal law. Thus, there needed to be a requirement, for instance, for internal rules and orientation aids within Parliament regarding the acceptance, valuation and disclosure of gifts, hospitality and other advantages, including external sources of support made available to parliamentarians. The recommendations stated in the GRECO report were to be implemented by 30 April 2018.

The fourth evaluation round ("Prevention of corruption among members of parliament, judges and prosecutors") is still ongoing. The related evaluation report was published by GRECO in February 2017; the first implementation report in July 2019. This was followed by two interim implementation reports, the first of which was published in March 2021 and concluded that the low level of compliance with the recommendations remained "globally unsatisfactory" in the meaning of Rule 31 revised, paragraph 8.3 of the Rules of Procedure and asked the head of delegation of Austria to provide a report on the progress in the implementation of the outstanding recommendations at the latest by 30 September 2021. This report was received as requested and

served as a basis for the present Second Interim Compliance Report.

The Second Interim Compliance Report evaluates the progress made in implementing the outstanding recommendations since the previous Interim Report and provides an overall appraisal of the level of Austria's compliance with GRECO recommendations. The report concludes that Austria has now implemented satisfactorily or dealt with in a satisfactory manner three of the 19 recommendations contained in the Fourth Round Evaluation Report. Of the remaining recommendations, nine have been partly implemented and seven have not been implemented.

The fifth evaluation round on "Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies" will continue until at least 2022–23.

The status of implementation of the UNCAC in the member states is also checked by way of peer reviews, whereby the results are summarised in reports and recommendations given. The only, and thus the latest, report on implementation of the Convention by Austria dates from 2014 and reviewed the implementation of Chapter III (Criminalisation and Law Enforcement) and IV (International Co-operation) of the UNCAC. The following items were emphasised as strengths of national corruption provisions implementing the aforementioned chapters of the UNCAC:

- the broad interpretation of the concept of "business activities" when applying;
- the provision on bribery in the private sector;
- the broad range of state authorities protected;
- the availability of "extended forfeiture" for assets that are likely to be proceeds of crime if their legal origin cannot be proven to the satisfaction of the court; and
- the fact that the Austrian legislation not only allows the jurisdiction to prosecute when extradition is denied due to nationality, but also allows that jurisdiction when extradition is denied for other reasons not related to the nature of the offences.

However, a number of challenges were also noted in the context of implementing the Convention, consisting of an absence of measures to ensure the effectiveness of the domestic legislation on the criminal liability of legal persons, or measures to expand the protection of whistle-blowers in the private sector. Furthermore, a number of recommendations were made with regard to improvements to procedural law. For greater detail, see the United Nations Conference of the States Parties to the United Nations Convention against Corruption, Implementation Review Group Fifth session, executive summary, CAC/COSP/IRG/I/3/1/Add.11.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

Due to government reshuffles in Austria, the Tax Fraud Prevention Act did not come into force in 2020. The aim of this legislation was to increase transparency in the area of direct taxation, with the aim of improving the fight against tax avoidance and tax evasion in the internal market. It shall define the obligation to report cross-border notifiable transactions to the Austrian competent authority within a certain period of time and define the automatic exchange of information between the notifications received and the competent authorities of the other member states. In addition, this law should lead to a tightening of tax and customs offences.

In general, the COVID-19 pandemic has not had a substantial influence on the applicable legislation and/or the enforcement body. However, the pandemic is keeping the legislature busy with a range of related questions, so it is questionable when the federal government will be able to tackle in detail other major legislative changes that are not related to the current health crisis.

Rohregger Rechtsanwälte is located in the centre of Vienna and consists of two lawyers, four associates and three paralegals. The firm, which was founded in 2004, primarily advises and represents companies and individuals in the field of white-collar crime, anti-corruption law and compliance. Companies are not only represented in the case of pending procedures, but also advised as a preventive measure with respect to compliance. Furthermore, a variety of training courses are offered, especially on compliance and house searches.

Author

Michael Rohregger is partner of the firm, with a wealth of experience in white-collar crime, anti-corruption law, compliance and human rights' protection. He is an honorary professor at the University of Vienna's Department of Criminal Law, and a member of the Austrian Association of Defence Lawyers, the Commission on Austrian Criminal Law and the Austrian Bar's Working Group on Criminal Law. In addition, he is vice-president of the Vienna Bar Association and holds lectures on anti-corruption law and white-collar crime law at the University of Vienna.

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CANADA

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

On 17 December 1998, Canada ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Canada also agreed to the 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials. In addition to the OECD Convention, Canada is a party to the Inter-American Convention against Corruption (ratified 1 June 2000), and the United Nations Convention against Corruption (ratified 2 October 2007).

1.2 National Legislation

Canada followed through on its obligation under the OECD convention to implement legislation to criminalise bribery of foreign public officials by enacting the federal Corruption of Foreign Public Officials Act (CFPOA) on 14 February 1999. The CFPOA only addresses the bribery of public officials who are outside Canada.

Canada's federal Criminal Code contains a number of domestic offences for bribery, fraud, breach of trust, corruption, and influence-peddling, among other offences, which are applicable to both public officials and private parties. The province of Quebec is the only non-federal jurisdiction in Canada with its own anti-corruption legislation. Its Anti-Corruption Act came into force on 13 June 2011, at a time when allegations of significant corruption in relation to public construction contracts were being investigated.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There is limited official guidance relating to the interpretation and enforcement of Canada's anti-bribery/anti-corruption regime. In May 1999, the federal Department of Justice published The Corruption of Foreign Public Officials Act: A Guide. It provides a general overview and background information about the CFPOA. However, it has not been updated to reflect amendments to the CFPOA since its creation and does not provide significant guidance.

The Public Prosecution Service of Canada (PPSC) is the national prosecuting authority for federal offences, including violations of the CFPOA (offences under the Criminal Code are primarily the responsibility of provincial Attorneys General). The PPSC has a Deskbook that sets out guiding principles as well as directives and guidelines regarding the exercise of federal prosecutorial discretion. The PPSC Deskbook contains a specific guideline for prosecutions under the CFPOA; however, it contains little information of practical use for the non-prosecutor. Similarly, the PPSC's Proposed Best Practices for Prosecuting Fraud Against Governments does not contain information regarding interpretation and enforcement.

1.4 Recent Key Amendments to National Legislation

In response to criticism about low levels of enforcement, the CFPOA was significantly expanded through amending legislation in June 2013. The amendments broadened the scope and application of Canada's anti-bribery of foreign public officials regime, established new offences, and increased penalties, among other changes. More recently, the elimination of an exception in the CFPOA for facilitation payments (arising from the 2013 amending legislation) came into force on 31 October 2017.

Amendments to the Criminal Code authorising the use of remediation agreements (ie, deferred prosecution agreements) became available as

a means of resolving criminal charges against businesses for certain offences under the Criminal Code and other criminal statutes, including the CFPOA. Deferred prosecution agreements have been used twice in Canada since becoming available. Previously they had been a source of considerable controversy in the first instance where such an agreement had been sought. Most recently, Canadian construction and engineering giant SNC-Lavalin Group Inc has been involved in two cases in which remediation agreements have been considered (they are discussed in **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**).

2. Classification and Constituent Elements

2.1 Bribery

Bribery of Foreign Public Officials

Section 3(1) of the CFPOA makes it an offence for anyone

"who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official: (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (b) to induce the official to use his or her position to influence any acts or decision of the foreign state or public international organisation for which the official performs duties or functions."

Definition of a Foreign Public Official

Foreign public officials are defined in Section 2 of the CFPOA as follows:

- a person who holds a legislative, administrative or judicial position in a foreign state;
- a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
- an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

The CFPOA offence of bribing a foreign public official is a full mens rea offence (explained below) where Crown prosecutors need to prove guilt beyond a reasonable doubt.

Bribery of Domestic Public Officials

The Criminal Code contains a number of bribery and corruption offences related to government activity, including bribery of judicial officers (Section 119), bribery of officers, such as police and persons employed in the administration of justice (Section 120), frauds on the government (Section 121), breach of trust by a public officer (Section 122), municipal corruption (Section 123), selling or purchasing public office (Section 124), and influencing or negotiating appointments or dealing in offices (Section 125). The Criminal Code also contains more general offences of fraud (Section 380) and secret commissions (Section 426), which apply to activities between private-sector parties, in addition to conduct involving public officials.

Each of the above-noted Criminal Code offences has different constituent elements; however, generally speaking, the Criminal Code provisions that address bribery and corruption in the public sphere (Sections 119–125) contain simi-

larly broad language to that of Section 3(1) of the CFPOA. As a result, if the conduct involves a public official and is:

- direct or indirect;
- includes a loan, reward, commission, money, valuable consideration, office, or employment, or other advantage or benefit which:
  (a) is given, offered, agreed, demanded, accepted, obtained; and
  (b) relates to an official, an official's family, or to anyone for the benefit of an official;

it is likely to be captured by one or more offences.

The definitions of "office" and "official" in the Criminal Code (Section 118) are broad. They include any office or appointment in the government, a civil or military commission, a position or any employment in a public department, or anyone appointed or elected to discharge a public duty.

For the offences of bribery of judicial officers (Section 119) and bribery of officers (Section 120), it is an element of both offences that the offering, accepting, or soliciting of a bribe must be done "corruptly". There is no definition of the meaning of "corruptly" in these offences in the Criminal Code. However, Canadian courts have held that the term in this context has the same meaning as in the offence of secret commissions (Section 426). It refers to an act done mala fide, not bona fide, and designed, wholly or partially, for the purpose of bringing about the effect forbidden by the offence (see, eg, R v Brown [1956] OR 944, 116 CCC 287 at paras 20–21).

Bribery of judicial officers (Section 119), which includes judges and members of Parliament and provincial legislatures, must be connected to an act by the recipient of the bribe in their official capacity. Bribery of officers (Section 120), which includes police officers and persons employed in the administration of justice, does not have the same requirement; an offence may be committed as long as there is intent to interfere with justice.

The Criminal Code provisions referenced above are full mens rea offences. They require proof of conscious intent – namely, that the accused set out deliberately to commit the prohibited act while having subjective knowledge of the circumstances. In short, the offeror of a bribe must be aware that they are giving or offering to give a bribe to a person who is receiving the bribe because of their position and with the intention of influencing the recipient's conduct. Similarly, the recipient must have subjective knowledge and intention when accepting or offering to accept a bribe in order to possess the necessary mens rea for the commission of an offence.

Bribery in a Commercial/Other Setting

In both the private and public spheres, it is an offence under the Criminal Code, directly or indirectly, corruptly to give, offer or agree to give or offer to an agent or to anyone for the benefit of the agent, any reward, advantage, or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person in relation to the affairs or business of the agent's principal (Section 426). It is also an offence (under the same section) for anyone who is an agent to receive a secret commission by demanding, accepting, offering or agreeing to accept any reward, advantage, or benefit of any kind in exchange for an act described above.

To qualify as an offence:

- an agency relationship must have existed;
- the agent must have received the benefit;
- the benefit must have been provided as consideration for an act to be done or not done in relation to the principal's affairs;
- the agent must have failed to make adequate and timely disclosure of the benefit; and
- the accused must have been aware of the agency relationship and knowingly provided the benefit as consideration for an act to be done or not done in relation to the principal's affairs.

There is no general definition of bribery under Canadian law. As noted above, there are similarities between sections of the Criminal Code and Section 3 of the CFPOA, which generally capture the direct or indirect offer or acceptance of a benefit by a public official or private party, in exchange for the recipient of the benefit doing or not doing something in their official capacity, or related to the affairs or business of their principal.

The Criminal Code does not define the meaning of "benefit", "reward", "advantage" or "valuable consideration". Certain other terms used in the offences describe specific benefits that are more easily defined and understood (eg, commission, money, loan, and employment) or that are defined in the Criminal Code (eg, office).

Decisions by the Supreme Court of Canada have noted the extremely broad scope of the terms "benefit", "advantage", etc, and that they can include non-criminal conduct, such as the giving or receipt of certain gifts or trivial favours (eg, the purchase of a cup of coffee or lunch, or offering someone a ride when they are caught in the rain). As a result, the court has sought to limit the scope of these terms by evaluating on a case-by-case basis whether a benefit, reward, advantage or valuable consideration confers a "material economic advantage". This determination requires an examination of the relationship between the parties and the scope of the benefit. The closer the relationship between the parties (ie, family members or good friends versus business/professional contacts or mere acquaintances), and the smaller the benefit, the less likely it is that a benefit would satisfy the constituent elements of the Criminal Code offences. Ultimately, it is a question of fact for a judge or jury to determine based on all the evidence of a given case (R v Hinchey [1996] 3 SCR 1128, 147 Nfld & PEIR 1, at paras 40–70).

The CFPOA only criminalises the supply side of corruption (ie, the offering of bribes). In contrast, under the Criminal Code, it is also an offence to "accept" or "receive" a bribe (Sections 119, 120, 121, 123, 124, 125 and 426).

The foregoing offences do not depend upon the consideration of whether the intended advantage or outcome for which a bribe was offered or accepted actually occurs. The fact that a bribe is offered or accepted can give rise to an offence.

Hospitality, Gifts and Promotional Expenditures

The CFPOA exempts certain hospitality expenditures, gifts and promotional expenditures that are referenced in a saving provision (Section 3(3)). Lawful gifts typically include items of nominal value (eg, reasonable meals and entertainment expenses proportionate to norms for the industry, cab fare, company promotional items, etc) and reasonable travel and accommodation to allow foreign public officials to inspect distant company facilities or receive required training.

The CFPOA historically contained an exception for facilitation payments made to foreign officials. On 31 October 2017, this exception was repealed. As a result, facilitation payments can give rise to an offence under Section 3(1) of the CFPOA (as they can under the United Kingdom's Bribery Act).

There are no de minimis or other exceptions for the offences in the Criminal Code. However, Canada's federal and provincial governments provide guidance on the acceptable provision of gifts, hospitality and other expenses to certain public officials. For example, the federal Policy on Conflict of Interest and Post-Employment permits public servants to accept "gifts, hospitality and other benefits […] if they are infrequent and of minimal value, within the normal standards of courtesy or protocol, arise out of activities or events related to the official duties of the public servant concerned, and do not compromise or appear to compromise the integrity of the public servant concerned or of his or her organisation" (Appendix B, Requirement 2.3). Similarly, the Ontario conflict of interest rules permit public servants to accept "a gift of nominal value given as an expression of courtesy or hospitality if doing so is reasonable in the circumstances" (Ontario Regulation 382/07, Section 4(2)).

In assessing whether a gift is a benefit or advantage constituting a secret commission, factors of significance include the nature of the gift, the prior relationship, if any, between the giver and the recipient, the manner in which the gift was made, the agent's/employee's function with their principal/employer, the nature of the giver's dealings with the recipient's principal/employer, the connection, if any, between the recipient's job and the giver's dealing, and the state of mind of the giver and the receiver (see, eg, R v Greenwood, 5 OR (3d) 71).

Unlike under the United Kingdom's Bribery Act, failure to prevent bribery is not an offence under Canadian law.

Definition of Public Officials

As previously noted, the CFPOA defines a foreign public official in Section 2 as follows:

- a person who holds a legislative, administrative or judicial position in a foreign state;
- a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
- an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

The second branch of this definition covers many types of government agencies and state-owned enterprises.

For the purposes of the Criminal Code offences that criminalise bribery and corruption in the public sphere (Sections 119–125), the definitions of "office" and "official" in the Criminal Code (Section 118) broadly include anyone holding any office or appointment under the government, a civil or military commission, a position or any employment in a public department, or appointed or elected to discharge a public duty. Employees of Crown corporations (state-owned enterprises in Canada) or arm's-length federal business enterprises are not explicitly captured by the definition of "office" or "official". However, they may be considered public officials if the nature of their position and employment fits within the definitions in the Criminal Code.

Bribery Between Private Parties in a Commercial/Other Setting

As previously noted, bribery of foreign public officials is an indictable criminal offence under Section 3 of the CFPOA.

The CFPOA does not apply to bribery involving private parties in commercial settings.

Bribery between private parties in a commercial setting is captured by the secret commissions offence in the Criminal Code (Section 426) as mentioned above. The general fraud offence in the Criminal Code also covers bribery in the private sphere: it is an offence for anyone to defraud the public or any person, whether ascertained or not, of any property, money, valuable security, or service, by deceit, falsehood or other fraudulent means (Section 380). The Supreme Court of Canada has determined that "other fraudulent means" is a term encompassing all other means which can properly be stigmatised as dishonest (R v Riesberry, 2015 SCC 65, at para 23). The two essential elements that must be established in a successful prosecution by the Crown are "dishonesty" and "deprivation" (R v Olan [1978] 2 SCR 1175, at para 13). Dishonest conduct involves the wrongful use of something in which another person has an interest and has the effect, or risk, of depriving the other person of what is theirs. The use is wrongful if it is conduct that a reasonable decent person would consider dishonest and unscrupulous (R v Zlatic [1993] 2 SCR 29). When the conduct is based on "other fraudulent means", dishonesty is to be measured against the objective standard of what a reasonable person would consider being dishonest without regard for what the accused actually knew (R v Wolsey (2008), 233 CCC (3d) 205 (BCCA)). Actual economic loss is not required for there to be deprivation. This element is satisfied when detriment, prejudice or risk of prejudice to the economic interests of the victim is established (R v Olan [1978] 2 SCR 1175, at para 13).

2.2 Influence-Peddling

The CFPOA does not criminalise influence-peddling.

Rather, Section 121 of the Criminal Code establishes a number of offences involving frauds on the government. Section 121(1)(a) specifically criminalises influence-peddling. The wording of the provision captures both the person supplying or offering a bribe and the public official – as well as the official's family members or anyone for the benefit of the official – receiving or offering to accept a bribe. Whether the official can actually provide the outcome sought in the circumstances is irrelevant.

2.3 Financial Record-Keeping

The CFPOA includes an offence related to record-keeping. Section 4 of the Act criminalises the hiding of payments, the falsification or destruction of records, and the knowing use of false documents for the purpose of either bribing a foreign public official or hiding the bribery of a foreign public official.

The Criminal Code contains an offence that criminalises the destruction or falsification of books and documents with the intent to defraud (Section 397(1)) and there are general offences of forgery and using a false document (Sections 366–368), but there is no financial record-keeping offence specific to bribery or corruption in the Criminal Code. The secret commissions offence in the Criminal Code also contains a narrower offence covering the provision of "a receipt, an account, or other writing" to an agent, or the agent's use of such a record, with the intent of deceiving the agent's principal (see

Section 426(1)(b)). The Income Tax Act and corporate statutes such as the Canada Business Corporations Act also contain provisions related to record-keeping.

2.4 Public Officials

The CFPOA only criminalises the supply side of corruption. The Act does not create any offences, or impose specific obligations, on public officials.

Public officials in Canada are held to a high standard in the exercise of their duties. At all levels of government (federal, provincial/territorial, and municipal) public officials are governed by codes of conduct and conflict of interest rules.

When public officials abuse or take advantage of their position in a manner that amounts to fraud or a breach of trust, they can be charged under Section 122 of the Criminal Code with breach of trust by a public officer. In a 2006 decision, the Supreme Court of Canada clarified the constituent elements of this offence as follows:

- the accused was an official (as defined in Section 118 of the Criminal Code);
- the accused was acting in connection with the duties of their office;
- the accused breached the standard of responsibility and conduct demanded of them by the nature of the office;
- the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
- the accused acted with the intention to use their public office for a purpose other than the public good (for example, for a dishonest, partial, corrupt or oppressive purpose) (R v Boulanger, 2006 SCC 32, at para 58). This fifth element constitutes the mens rea component of the offence of breach of trust by public officer.

Public officials who abuse their position could also be charged with the offence of frauds on the government under Section 121(1)(d) of the Criminal Code. This provision applies if the public official purports to have influence with the government, a minister of the government, or an official, and accepts a bribe as consideration for co-operating, assisting, exercising influence, or an act or omission in connection with business transactions with or relating to the government, claims against the government or benefits the government is authorised or entitled to bestow, or the appointment of a person, including the public official themselves, to an office. In addition, a public official who misappropriates public funds could be charged with theft under Section 330 of the Criminal Code.

2.5 Intermediaries

Section 3 of the CFPOA and many of the Criminal Code provisions noted above establish offences which may be committed directly by the accused, or indirectly by the accused through an intermediary. The use of an intermediary will generally not shield a company or individual from criminal liability.

An intermediary may be charged as a party to the offence committed by another person if they aid or abet the commission of an offence (Section 21 of the Criminal Code). An intermediary could also be charged with conspiracy to commit an offence, which is a separate offence under Section 465(1)(c) of the Criminal Code.

There are also offences for counselling another person to commit an offence (Criminal Code Sections 22 and 464). Counselling has been interpreted to mean, "procure, solicit, or incite"

another person to be a party to an offence. In certain situations, such offences could apply to the intermediary or the party enlisting the intermediary.

3. Scope

3.1 Limitation Period

Under Canadian law, there is no statute of limitations for indictable offences. Proceedings in relation to summary offences (or hybrid offences where the prosecution elects to proceed by way of summary conviction) must generally be instituted within six months of the offence (Section 786(2) of the Criminal Code). All of the bribery and corruption offences under the CFPOA and the Criminal Code discussed in this chapter are indictable offences only, except for the general offence of fraud under Section 380 of the Criminal Code, which is a hybrid offence. Fraud under CAD5,000 can be prosecuted by way of summary conviction.

3.2 Geographical Reach of Applicable Legislation

The default territorial principle underlying Canada's criminal law (which is codified in Section 6(2) of the Criminal Code) is that no one can be convicted of an offence committed outside Canada unless otherwise explicitly specified by Parliament. However, "all that is necessary to make an offence subject to the jurisdiction of the Canadian courts is that a significant portion of the activities constituting that offence took place in Canada" (ie, that there is a "real and substantial connection" to Canada) (R v Libman [1985] 2 SCR 178, at para 74).

The CFPOA originally was based only on territorial jurisdiction (ie, offences where the conduct occurred in Canada or where there was a real and substantial link to Canada). However, the 2013 amendments added a broader nationality basis of jurisdiction. Section 5(1) of the CFPOA specifically provides that Canadian citizens, permanent residents and corporations that commit the offence of bribing a foreign public official, or breaching the accounting provision, outside Canada (or who commit the offence of conspiring or attempting to commit these offences, the offence of being an accessory to these offences after the fact, or the offence of counselling in relation to these offences) are deemed to have committed the offence in Canada. Courts have since confirmed the application of a broader nationality basis to jurisdiction (R v Karigar, 2017 ONCA 576, at paras 27–28).

3.3 Corporate Liability

There is corporate as well as individual liability for bribery and corruption offences under Canadian law. The specific offences created by the CFPOA can be committed by any "person" as defined in Section 2 of the Criminal Code, as can the Criminal Code offences. The definition of "person" includes "organisations", which in turn is defined to encompass various types of entities including corporations.

Section 22.2 of the Criminal Code extends criminal liability to a corporation (or other organisation) when a "senior officer":

- acting within the scope of their authority is a party to an offence;
- having the mental state required to be a party to an offence and acting within the scope of their authority, directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or
- knowing that a representative of the organisation is or is about to be a party to an offence,

does not take all reasonable measures to stop them from being a party to the offence.

A senior officer is not only one of the directing minds of the corporation, but is defined to include a representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities. In the case of a corporation, senior officers include directors, the chief executive officer and the chief financial officer (Section 2 of the Criminal Code). In addition, courts have interpreted mid-level employees with significant managerial responsibility to meet this definition (see R v Pétroles Global Inc, 2015 QCCS 1618).

Whether the acquirer of a business can be held liable for pre-acquisition conduct of a corporation depends upon the manner in which the transaction is structured. In share acquisitions and amalgamations, the potential liabilities continue to exist in the corporation. However, in an asset acquisition, it will be necessary to assess the contract between the parties to determine whether such potential liabilities were assumed by the purchaser or retained by the vendor.

4. Defences and Exceptions

4.1 Defences

The CFPOA and Criminal Code offences discussed in previous sections all require a mental element of knowledge and intent (and certain offences require "corrupt" intent). As such, a number of defences recognised at common law and in the Criminal Code are available for these offences (for example, defences that negate proof of the prohibited act, such as duress, or that negate the proof of the mental element, such as mistake of fact). In addition, defendants may contest any required element of the conduct covered by each offence (ie, actus reus): for example, contesting whether the alleged benefit does, in fact, confer a material economic advantage.

4.2 Exceptions

The CFPOA contains exceptions to the offence of bribing a foreign public official as follows:

- where the benefit given is either permitted or required under the laws of the applicable foreign state or foreign public international organisation; or
- where payment was made to reimburse reasonable expenses incurred in the promotion or demonstration of the person's products and services or the execution or performance of a contract between a person and the foreign state.

None of the Criminal Code bribery or corruption offences contains any exceptions.

4.3 De Minimis Exceptions

Since the repeal of the facilitation payments exception, there are no de minimis exceptions under Canadian law for any of the CFPOA offences. However, as previously discussed, there are certain exceptions under the CFPOA. The Criminal Code bribery and corruption offences also do not contain formal de minimis exceptions.

4.4 Exempt Sectors/Industries

Canada's laws do not exempt any sectors or industries from the CFPOA or the Criminal Code bribery and corruption offences.

4.5 Safe Harbour or Amnesty Programme

No formal safe harbour, amnesty or other self-reporting programmes have been established for bribery or corruption offences by the authorities

that enforce Canada's anti-corruption laws (see **5. Penalties**).

Self-reporting, co-operation with an investigation and compliance or remediation efforts are all potential "mitigating factors" which may be considered in the negotiation of a plea agreement with prosecutors, or by a court during the sentencing process. For example, Griffiths Energy International self-reported a bribe to the RCMP that led to a plea to bribery under the CFPOA. The CAD10.4 million fine imposed by the court reflected the company's self-reporting and co-operation, including the significant sum of money saved by not having to investigate the matter and hold a full-blown trial (see R v Griffiths Energy International [2013] AJ No 412, at paras 15–18, 21).

As noted, Canada also recently enacted a Remediation Agreements regime under Part XXII.1 of the Criminal Code. It allows prosecutors and parties involved in corruption and various other types of offences to negotiate resolutions which do not include a criminal conviction. Self-reporting is a significant factor in the exercise of prosecutorial discretion for such resolutions (see **5. Penalties**).

5. Penalties

5.1 Penalties on Conviction

The maximum penalties under Canada's bribery and corruption laws are very significant. The CFPOA offences and the offences of bribery of judicial officers, bribery of officers and fraud under the Criminal Code can be punished by jail terms of up to 14 years for individuals. Other Criminal Code offences discussed herein are subject to jail terms of up to five years. The CFPOA and the Criminal Code also provide for a fine to be imposed on corporations and individuals in an amount at the discretion of the court.

In addition, corporations convicted of a CFPOA offence or certain Criminal Code offences face debarment from bidding on public sector projects.

The Canadian Government's Integrity Regime debars individuals and corporations from contracting or subcontracting with federal government departments and agencies after being convicted of CFPOA offences or certain Criminal Code offences. The debarment period can range from ten years (with a possible reduction of ineligibility of up to five years) for convictions under the CFPOA and Sections 119, 120 and 426 of the Criminal Code, to an open-ended period of time for convictions under Sections 121, 124 and 380 of the Criminal Code.

Various provincial and municipal governments in Canada have procurement regimes or codes of conduct that include debarment rules. Convictions under the CFPOA or Criminal Code bribery and corruption offences will generally be problematic under such regimes or codes.

CFPOA and the Criminal Code bribery and corruption offences may also have consequences for firms' activities abroad. For example, debarment may arise on projects financed by the World Bank Group pursuant to the Bank's fraud and corruption policies, and cross-debarment by other multilateral development banks pursuant to the Agreement for Mutual Enforcement of Debarment Decisions.

5.2 Guidelines Applicable to the Assessment of Penalties

The general principles and guidelines for sentencing both corporations and individuals in

the Criminal Code (Part XXIII, especially Sections 718, 718.1, 718.2, 718.21, and 718.3) are applicable to the CFPOA as well as the Criminal Code bribery and corruption offences. Generally, there is no minimum or maximum fine for indictable offences. Maximum terms of imprisonment are established by statute (see **5.1 Penalties on Conviction**), but there are no minimums except for Section 380(1.1), which provides for a minimum of two years' imprisonment when the fraud is over CAD1 million.

In determining an appropriate sentence, the court will consider a number of factors, including the gravity of the offence, any advantage realised by the corporation or individual by committing the offence, the degree of planning, duration and complexity of the offence, and whether there are other penalties being imposed, or related consequences.

In accordance with the principles of sentencing, repetition of an offence after a previous conviction generally results in the imposition of a more significant sentence than the sentence previously received (R v Wright (2010), 261 CCC (3d) 333 (Man CA)).

An offender who pleads guilty may present a joint recommendation with the Crown for an appropriate sentence (otherwise known as a plea bargain). The sentencing judge is generally bound to accept the joint recommendation unless they decide that it brings the administration of justice into disrepute or is contrary to the public interest (R v Anthony-Cook, 2016 SCC 43, at para 32). Instances where a sentence judge does not accept a joint recommendation are exceedingly rare.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

The CFPOA and the Criminal Code do not impose on individuals or corporations any compliance programme or other obligations to prevent corruption. As previously noted, failure to prevent bribery is not an offence under Canadian law.

Nevertheless, well-managed companies in Canada will undertake risk assessments and implement compliance programmes to attempt to prevent the serious consequences that may arise from bribery or corruption. Under the Criminal Code, measures taken to reduce the likelihood of committing a subsequent offence are to be considered as a mitigating factor in sentencing a corporation (Section 718.21(j)).

6.2 Regulation of Lobbying Activities

Canadian governments at all levels (federal, provincial/territorial, and municipal) have broadly similar rules governing the lobbying of public officials.

Defining Lobbying

While there are important distinctions between jurisdictions, at its core, Canadian lobbying law is about transparently capturing communication with public officials with a view to influencing their decision-making process in specific areas. All sectors are concerned, as lobbying laws focus on the nature, content and purpose of communications to a public official, not the sector.

Communication can take numerous forms; it can be written or verbal, and in some cases can include a campaign to encourage interested members of the public to lobby (called "grass-

roots lobbying"). Some definitions of lobbying specifically list what is included in the term "communication".

Examples of areas in which communication with public officials could constitute lobbying are communications in respect of:

- the development of any legislative proposal by the government in question;
- the introduction, passage, defeat or amendment of a bill or resolution;
- the making or amendment of a regulation;
- the development, establishment, amendment or termination of any programme, policy, directive or guideline of the government in question, or of a government entity, such as a Crown corporation;
- the granting of a financial benefit or contract by or on behalf of the government in question or a government entity, such as a Crown corporation;
- a decision to transfer from the Crown for consideration all or part of, or any interest in or asset of, any business, enterprise or institution that provides goods or services to the Crown, a public entity or the public;
- a decision to have the private sector instead of the Crown provide goods or services to the government or a public entity; and
- arranging a meeting between a public office holder and any other individual for the purposes of attempting to influence any of the matters captured by the definition of lobbying.

Exclusions

Not all forms of communication with public officials constitute lobbying. Common exclusions from the definition of lobbying (ie, non-reportable communications with public officials) include:

- oral or written submissions that are a matter of public record made to a government body/legislative assembly or committee;
- oral or written communications concerning the enforcement, interpretation or application of any act or regulation by the government or a government entity;
- oral or written communications concerning the implementation or administration of any programme, policy, directive or guideline by the government or a government entity; and
- oral or written communications in response to a request initiated by a public office holder for advice or comment on a matter.

To determine whether a specific act or communication is excluded from the definition of lobbying, the relevant legislation of the jurisdiction must be considered.

Types of Lobbyists

Individuals, corporations and not-for-profit organisations can all lobby the government. The relationship between the lobbyist and the entity that is ultimately responsible for the lobbying activity will determine how some of the rules apply. Note that the applicable categories of lobbyists vary between jurisdictions.

In-house/organisation/enterprise lobbyists

In-house, organisation or enterprise lobbyists ("in-house lobbyists") are salaried employees of for-profit corporations or not-for-profit organisations who lobby on behalf of their employer. In certain jurisdictions, paid directors are also considered to be in-house lobbyists. Importantly, a full-time effort to lobby is not required in order for the rules to apply.

Consultant lobbyists

Consultant lobbyists are individuals (often lawyers, accountants, or government relations/pub-

lic affairs specialists) who are paid to lobby on behalf of a client. This can include independent contractors who are not employees.

Registration Requirements for Lobbyists

The core of all lobbying legislation is the requirement to register. The relevant legislation will outline when registration is required, what information must be disclosed, and who must register. In some jurisdictions, in-house lobbyists are subject to a minimum threshold of lobbying activity before registration requirements apply to them. When registration and reporting is required, the information that must be disclosed, and who must register, varies according to the type of lobbyist.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Under Canadian law, no person has an obligation to report an offence or assist the police voluntarily in their investigation.

The CFPOA and the Criminal Code do not contain any self-reporting requirements. However, under the new remediation agreement regime, whether a corporation self-reported is a factor for the prosecutor to consider in determining whether negotiation of a remediation agreement is in the public interest and appropriate in the circumstances. As previously noted, self-reporting and co-operation with an investigation are also factors under general sentencing principles.

As of June 2015, the Extractive Sector Transparency Measures Act requires that Canadian corporations operating in the extractive sector meet certain threshold conditions to disclose publicly, on a yearly basis, specific payments made to all governments in Canada and abroad. The purpose of the Act is to enhance transparency and deter corruption in the extractive sector. Failure to file a disclosure statement, filing a false or misleading statement, and structuring payments to avoid triggering reporting requirements, are all offences under this legislation, which are punishable on summary conviction by fines of up to CAD250,000.

6.4 Protection Afforded to Whistle-Blowers

There are limited protections for whistle-blowers under Canadian law. Section 425.1(1) of the Criminal Code and certain other specific legislation (such as the federal Public Servants Disclosure Protection Act and Competition Act, and the Public Service of Ontario Act, 2006) prevent employers from threatening or taking retaliatory action to deter or punish whistle-blowing employees.

6.5 Incentives for Whistle-Blowers

The Ontario Securities Commission (OSC) and the Canada Revenue Agency (CRA) operate whistle-blower programmes that provide financial incentives to whistle-blowers under certain conditions. However, Canadian securities commissions and taxation authorities do not have enforcement powers for Canada's bribery or corruption offences.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Provisions regarding whistle-blowing can be found in Section 425.1(1) of the Criminal Code and certain other specific legislation (such as the federal Public Servants Disclosure Protection Act and the Competition Act, and the Public Service of Ontario Act, 2006).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

There is exclusively criminal enforcement of anti-bribery and anti-corruption laws in Canada. There are no civil or administrative enforcement bodies with responsibility for the CFPOA or offences under the Criminal Code.

7.2 Enforcement Body

Canada's national police force, the Royal Canadian Mounted Police (RCMP), has sole authority for enforcing the CFPOA. The RCMP also enforces the Criminal Code and assists other police forces with investigations, typically when enforcement efforts are national, trans-provincial or transnational in scope. The RCMP's jurisdictional powers are set out in the Royal Canadian Mounted Police Act.

At the provincial level, major municipal or provincial police services enforce the Criminal Code corruption and bribery provisions.

Police authorities have broad powers of search, seizure, information-gathering (eg, by production orders or by wire-tapping) and arrest, which are codified in the Criminal Code and are subject to judicial oversight.

Prosecutions of CFPOA offences and Criminal Code offences investigated by the RCMP are handled by the PPSC. The "Crown Attorney" (prosecutor) offices within provincial ministries of attorneys general are generally responsible for the prosecution of Criminal Code offences at the provincial level. Prosecutors review evidence referred to them by police authorities and take independent decisions regarding the laying of charges, conduct of prosecutions, and negotiation of guilty pleas (which are subject to court approval) or remediation agreements.

Prosecutors and police authorities often work together to ensure investigations are complete before charges are laid, so that prosecutors can bring cases to trial promptly. In Canada, an accused person has the right to be tried within a reasonable period. In R v Jordan (2016 SCC 27), the Supreme Court of Canada established that this means a presumptive ceiling beyond which delay – from the charge to the actual or anticipated end of trial – is presumed to be unreasonable. In the absence of exceptional circumstances, the presumptive ceiling is 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts.

7.3 Process of Application for Documentation

Enforcement authorities' powers to gather evidence using search warrants, production orders (subpoenas) and wire-tapping generally require advance authorisation by the courts (see, eg, Criminal Code Sections 185, 487, 487.014). Production orders can only be used to compel records from persons who are not under investigation.

7.4 Discretion for Mitigation

Amendments to the Criminal Code in 2018 created the option of entering into a remediation agreement (essentially a deferred prosecution agreement). This type of resolution, available only for companies and not individuals, is likely to be used for some cases under the CFPOA and for Criminal Code bribery and corruption offences where it may be appropriate to avoid the severity of criminal convictions and automatic debarment consequences under applicable government procurement regimes.

Prosecutors have full discretion to initiate and conduct a prosecution and to negotiate remediation agreements or guilty pleas (which are subject to approval by the court). Even if there is a reasonable prospect of conviction, prosecutors can, at their sole discretion, refuse to conduct a prosecution or stop the proceedings if a prosecution would not best serve the public interest.

7.5 Jurisdictional Reach of the Body/Bodies

The scope of territorial and nationality-based jurisdiction under the CFPOA and applicable Criminal Code provisions is discussed in previous sections. However, Canadian courts cannot exercise personal jurisdiction over individuals or corporations unless they are properly charged and brought before the court in Canada. The RCMP does not have any formal powers to take enforcement action outside Canada.

The RCMP may co-operate with foreign policing agencies, as well as international organisations such as the World Bank, in the investigation and enforcement of the CFPOA and the Criminal Code outside Canada. For example, Canada has mutual legal-assistance treaties with numerous countries that facilitate cross-border criminal investigations. These treaties are implemented pursuant to the Mutual Legal Assistance in Criminal Matters Act.

Canada also has extradition treaties with numerous countries (under the Extradition Act). Such treaties allow Canada to seek the extradition of Canadian citizens or foreigners for purposes of prosecution of offences under Canadian laws, including the CFPOA and the Criminal Code, in certain circumstances.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Canadian construction and engineering giant SNC-Lavalin Group Inc has faced multiple sets of bribery charges in recent years. The company was first charged with criminal fraud under Section 380(1)(a) of the Criminal Code and bribery contrary to Section 3(1)(b) of the CFPOA in February 2015, in connection with millions of dollars of alleged bribes for public officials in Libya.

SNC-Lavalin was not invited to negotiate a remediation agreement and, in May 2019, a judge of the Court of Quebec ruled at a preliminary inquiry that there was enough evidence to send SNC-Lavalin to trial. In December 2019, the construction division of the company pleaded guilty to the charge of criminal fraud and negotiated a penalty of a CAD280 million fine (to be paid over five years) and a three-year probation order. All charges against the parent company and its international unit, and the charges under the CFPOA, were withdrawn as part of the guilty plea and fine, which was approved by the court.

In January 2020, Sami Bebawi, an SNC-Lavalin executive, was sentenced to eight and a half years' imprisonment for fraud, corruption of foreign officials and laundering the proceeds of crime in connection with the company's conduct in Libya. Mr Bebawi was also fined CAD24.6 million in lieu of the seizure of additional proceeds of crime. Failure to pay the fine within six months would result in Mr Bebawi serving an additional ten-year prison sentence. The convictions and sentence are currently under appeal.

SNC-Lavalin was charged along with two former executives in September 2021 with fraud against the government under Section 121 of the Criminal Code, and fraud under Section 380 of the Criminal Code, among other offences. The

charges involve allegations of bribes paid in connection with a 2002 contract to refurbish Montreal's Jacques Cartier Bridge. Unlike the previous case, SNC-Lavalin was invited to negotiate a remediation agreement.

In May 2022, Quebec prosecutors and SNC-Lavalin received court approval of Canada's first remediation agreement that will have SNC-Lavalin pay close to CAD30 million and includes other terms lasting three years. The payment amount will be allocated as follows:

- CAD 1,135,135 paid as a penalty;
- CAD 2,490,721 confiscated as proceeds of crime;
- CAD 3,492,380 paid as compensation to the victim; and
- CAD 5,440,541 paid as victim surcharge.

An independent monitor will monitor the company for compliance with the agreement. The charges will be withdrawn if the conditions of the agreement have been met at the end of the three-year term.

Ultra Electronics Forensic Technology and four of its executives were charged in September 2022 under the CFPOA and the Criminal Code. The charges were laid after an investigation by the RCMP's sensitive and international investigations section that began in 2018. The RCMP alleges that the corporation and the accused individuals "directed local agents in the Philippines to bribe foreign public officials to influence and expedite" a multimillion-dollar contract. The company indicated that it entered into a remediation agreement with the Public Prosecution Service of Canada. The agreement is still subject to approval by the Quebec Superior Court. If it is approved by the court, the agreement with Ultra Electronics would be the second deferred prosecution agreement sanctioned since the new legal mechanism became law in 2018 and the first handled by the federal prosecution service.

Between 2011 and 2015, the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (the Charbonneau Commission) investigated and reported on widespread corruption and collusion in the awarding and management of public construction contracts in Quebec. The final report made 60 recommendations to address the problems exposed during the inquiry. More than 300 people and companies have been charged since 2011 by Quebec's anti-corruption police force, *Unité permanente anti-corruption* (UPAC). In September 2020, the Court of Quebec ordered a stay of proceedings against Nathalie Normandeau, a former cabinet minister in Quebec, on corruption-related charges investigated by the UPAC because the prosecution took too long. As previously noted, the Supreme Court of Canada's 2016 decision in R v Jordan established presumptive time limits between the laying of charges and the completion of a trial. Normandeau had been charged in March 2016 with fraud, corruption, conspiracy, breach of trust and fraud against the government in relation to a contract award for a water-treatment plant.

In September 2020, Ontario's Serious Fraud Office (SFO), a team of investigators and prosecutors dedicated to complex financial crimes, undertook what appears to be its first enforcement activity since the SFO was established in mid-2019. Charles Debono was deported to Canada from the Dominican Republic and convicted to serve seven years in jail for charges of fraud over CAD5,000, laundering crime proceeds, bribery of an agent, personation with intent, and using, dealing and acting on a

forged document in connection with a CAD56-million debit terminal Ponzi scheme. He was also ordered to pay CAD26 million in restitution within five years of being released from prison. He will serve another seven-year sentence if he defaults on paying.

In November 2020, the RCMP charged Damodar Arapakota for bribing a public official from Botswana, contrary to Section 3(1) of the CFPOA. It is alleged that Mr Arapakota, a former executive from IMEX Systems Inc, provided financial benefit for a Botswanan public official and his family. New management of IMEX self-reported the allegations of Mr Arapakota's conduct to the RCMP.

In June 2022, the Cullen Commission of Inquiry into Money Laundering in British Columbia released its final report and recommendations. The Commission was established "in the wake of significant public concern about money laundering in British Columbia." Over 133 days of hearings, the Commission heard the testimony of 199 witnesses and received over 1,000 exhibits. The Report makes 101 recommendations relevant to Canadian businesses.

7.7 Level of Sanctions Imposed

Canada does not yet have an extensive history of prosecutions under the CFPOA. Since the adoption of the legislation, there have been three guilty pleas: a fine of CAD25,000 against Hydro-Kleen Group in 2005, a CAD9.5 million fine and a three-year monitoring order against Niko Resources in 2011, and a CAD10.4 million fine against Griffiths Energy in 2013.

In 2017, the Ontario Court of Appeal upheld a decision convicting Nazir Karigar under the CFPOA for conspiring to bribe a foreign public official. Mr Karigar was the first person to defend charges under the CFPOA at trial and be convicted. He was sentenced to three years' imprisonment. An application for leave to appeal to the Supreme Court of Canada was dismissed in 2018.

In January 2019, Robert Barra and Shailes Govinda were also convicted under the CFPOA in connection with the same conspiracy. Notably, Mr Barra and Mr Govinda are not Canadian and were extradited from the United States and the United Kingdom, respectively, to face trial in Canada. Both received sentences of two and a half years' imprisonment. However, in August 2021 the Ontario Court of Appeal overturned their convictions and ordered new trials.

As previously noted, Sami Bebawi's recent prosecution under the CFPOA resulted in a sentence of eight and a half years (although this sentence was also for convictions on other charges under the Criminal Code, not just the CFPOA).

In a case that went all the way to the Supreme Court of Canada, Bruce Carson, a senior aide to former Prime Minister Stephen Harper, was convicted of influence-peddling for using his government contacts to promote the purchase of water-treatment systems by indigenous communities. In July 2018, Mr Carson was given a suspended sentence, one year of probation, and was ordered to perform 100 hours of community service.

Recently, the Nova Scotia Court of Appeal increased the sentence to 42 months in jail for Harold Dawson, who was convicted in 2019 of conferring an advantage on a government employee (Bry'n Ross) contrary to Section 121(1)(b) of the Criminal Code. Mr Ross was also sentenced, and to 36 months in jail. Mr Dawson had provided Mr Ross with cash to ensure favour-

able contracts for his companies in relation to a Department of National Defence heating plant.

Many individuals have also been prosecuted and found guilty of a range of fraud and bribery offences under the Criminal Code as a result of the Charbonneau Commission and UPAC investigations. Sentences imposed range from conditional sentences, to be served in the community, to six years' imprisonment, depending on the individual's involvement in the offence as well as other aggravating factors.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

The OECD Working Group on Bribery issued its Phase 3 Report on Canada's implementation of the OECD Anti-Bribery Convention in March 2011. The report made a number of recommendations to strengthen the CFPOA and Canada's anti-bribery regime generally. Canada subsequently amended the CFPOA in June 2013, by adding a nationality basis for jurisdiction, establishing new offences and increasing penalties, among other changes. More recently, the elimination of the exception in the CFPOA for facilitation payments was proclaimed into force on 31 October 2017.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

After the enactment of the remediation agreement provisions of the Criminal Code in 2018, there are no changes or additions to Canada's anti-bribery regime on the immediate horizon.

The SNC-Lavalin cases signal both a strong commitment to CFPOA enforcement, even when it involves a major Canadian-owned multinational enterprise, and a turn towards the potential use of remediation agreements in appropriate circumstances. The RCMP has also indicated that it has numerous other CFPOA investigations in progress, but it is not clear how many will lead to prosecutions.

McMillan is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally through its offices in Vancouver, Calgary, Toronto, Ottawa, Montreal and Hong Kong. The firm represents corporations, other organisations and executives at all stages of criminal, quasi-criminal and regulatory investigations and prosecutions for all types of white-collar offences, including fraud, bribery and corruption, money laundering, cartels and price-fixing, insider trading or other securities offences, economic sanctions, export/import controls and tax offences, as well as offences under health and safety, discrimination, immigration, financial services, energy, environmental and other regulatory regimes. The team also manages and defends against search warrants, inspection orders, interviews given under statutory compulsion, wire-tapping orders, and other investigative actions, and advises on risk management, regulatory compliance, reputation management and defamation, among other matters.

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1. Legal Framework for Offences

1.1 International Conventions

Chile has signed up to several anti-bribery and anti-corruption international conventions. Most relevant are the Inter-American Convention Against Corruption of the Organization of American States (OAS), the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against Corruption.

1.2 National Legislation

The main legislation against corruption and bribery is set forth in the Código Penal (Criminal Code), Law No 18,575 on Public Administration, and Law No 18,834 on Statute Applicable to Public Officials. All offences are laid down in legal texts.

For example, bribery is considered a crime in the Criminal Code (Articles 248 to 251 sexies), but the same conduct is also prohibited under laws which regulate the activity of domestic public officials (especially Law No 18,575 and Law No 18,834) and is considered an infringement of the probity and impartiality principles to which public officials are subject, which provide administrative sanctions for such conduct.

It is also worth mentioning that Law No 20,393, on Criminal Liability of Legal Entities, is applicable to a specific list of offences, including among others the crimes of bribery, unlawful negotiation and commercial bribery.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no general guidelines. Judgments are a source of interpretation of the law, but do not constitute precedent. Judgments are only binding in the case in which they are issued and only for the parties involved in that case.

The National Public Prosecutor, which is the entity entrusted with the investigation and enforcement of criminal offences, has recently issued new instructions to which public prosecutors are subject in the context of anti-corruption investigations (*Oficio Fiscalía Nacional* No 472-2020, 29 July 2020).

These instructions are aimed at achieving an effective, coherent and co-ordinated performance of the function of public prosecution. Therefore, they are binding for prosecutors only.

The new instructions refer to relevant matters regarding corruption crimes, such as the concept of public officer, ameliorating and aggravating circumstances of criminal liability, whistleblowing, and several procedural matters, such as the possibility of reaching agreements in order to finish investigations without a trial, ie, through a monetary settlement or deferred prosecution agreements.

1.4 Recent Key Amendments to National Legislation

Legislation on corruption-related crimes has been subject to important amendments over the past decade. The most noteworthy occurred in 2009 and 2018, which were the modifications of the Criminal Code and the enactment of Laws No 19,913, No 20,393 and No 21,121.

In 2009, the Criminal Code was amended to include the bribery of foreign public officials in the context of international business transactions as a criminal offence. During the same year, Law No 20,393 on Criminal Liability of Legal Entities was enacted, which considers bribery as

one of the crimes that may give rise to criminal penalties for such entities. These amendments were a consequence of the adoption by Chilean law of the standards required by the OECD, of which Chile has been a full member since 2010.

On 20 November 2018, Law No 21,121 was published, amending the Criminal Code, Law No 20,393, and Law No 19,913 on money laundering, incorporating several changes regarding bribery, bribery of foreign public officials (following recommendations issued by the OECD), unlawful negotiation and money laundering, including an increase of applicable penalties. However, the most relevant change was the introduction of commercial bribery and disloyal administration as new punishable crimes. Also, Law No 21,121 established the crime of bribery without counter-performance, which solved a common probatory difficulty regarding the connection of the payment with the act performed by the public official.

Additionally, Laws No 21,227 and No 21,240, which were recently passed as a response to the COVID-19 pandemic, established criminal offences that could carry criminal liability of legal entities.

Law No 21,227 (6 April 2020) regulates access to unemployment insurance benefits. Article 14 punishes those who, through simulation or deceit, obtain an economic benefit, such as an unemployment insurance, greater than that to which they are entitled. If the crime is committed in interest or for the benefit of a company, the legal person may be criminally liable, provided that the commission of the crime is a consequence of the breach, by the company, of its duties of direction and supervision over its workers.

Law No 21,240 (20 June 2020) amended the Criminal Code, establishing new and more severe penalties for those who fail to comply with sanitary measures in the event of an epidemic or pandemic. This new regulation incorporated Article 318 ter to the Criminal Code, which penalises companies that order workers under their supervision to attend their workplace when those workers are in quarantine or in mandatory isolation ordered by the health authority. The commission of this crime could also make the legal person criminally liable.

Law No 21,459 (20 June 2022), in effect from December 2022, introduced new informatic crimes to the catalogue of offences for which legal entities can be criminally liable, contained in Article 1 of Law No 20,393. Amongst the new punishable crimes this legislation includes different varieties of hacking and other offences, such as the illegal accessing of computer systems, interference with the transmission of information, attacking the integrity of data, informatic falsehood, informatic receiving, informatic fraud, and the abuse of devices.

2. Classification and Constituent Elements

2.1 Bribery

The Chilean legal system contemplates a wide list of crimes related to corruption and bribery, for which the main and most relevant are embezzlement of public funds, grant fraud, unlawful negotiation, bribery, commercial bribery and influence-peddling.

All these crimes are defined in the Criminal Code and follow the general rules of punishability. In this respect, for an act of that kind to be punishable, it must have been carried out with intent

(the Criminal Code only punishes acts that have been done with recklessness in specific cases, almost none of which are related to corruption and bribery; there is an exception in the case of embezzlement – see **2.4 Public Officials**). In crimes related to corruption and bribery, the Chilean criminal system does not require any kind of motive to be ascribed to the offender in order to impose a sanction.

There is no general legal definition of bribery (or at least not just one). Bribery is punished in different provisions of the Criminal Code (Articles 248, 248 bis, 249 and 250). The criminal conduct is defined as giving, offering or consenting to give an economic benefit or a benefit of any other nature. From the public officer's perspective, it is receiving, offering to receive, or accepting receipt of that benefit, be it in favour of the employee or a third person. All these conducts shall be related, in the original conception of the Criminal Code, to the performance or lack of performance by the public officer of an act according to their duties, against their duties, or a specific crime. However, Law No 21,121 included as a new provision a basic form of bribery consisting in the act of giving, offering, or consenting to a benefit by reason of the position of the public employee, without any request of any conduct by the public officer as a counter-performance for the benefit. In other words, the mere fact of granting/consenting a benefit is sanctioned as bribery.

With respect to the benefit, it can be an economic benefit or of any other kind of benefit (ie, social or sexual).

An exception is stated in Article 251 sexies, according to which in some conducts, such as giving or offering protocol donations, or those of little economic value that customs authorise as manifestations of courtesy and good education, will not be considered as an offence.

Chilean legislation does not include a specific obligation to prevent bribery, nor does it oblige companies to maintain compliance programmes. Nonetheless, Law No 20,393 on Criminal Liability of Legal Entities acknowledges the importance of compliance programmes, as it assumes that management and supervisory duties of the legal entity have been met if, prior to the commission of the offence, the legal entity has implemented a crime-prevention model. A well-functioning compliance programme may be an exculpatory factor for the legal entity.

Article 260 of the Criminal Code contains a broad definition of public official, which applies to all offences committed by them. This concept extends to all those who exercise a "public function", applying to all bodies created or dependent on the State. In this respect, it includes situations that clearly go beyond the restricted technical notion that administrative legislation confers to the term "public official".

Bribery of foreign officials constitutes an exception to the principle of territoriality generally applicable in Chile. In that sense, Chilean courts may have jurisdiction regarding the bribery of a foreign official committed abroad, either by a Chilean national or a foreigner with residence in Chile. The offence consists of the offering or promising of a benefit, of economic or any other nature, to a foreign public official in return for the foreign public official's performance or omission of an act that would provide an unfair advantage in an international transaction (or business deal) to the offeror of the bribe.

One of the main novelties brought about by Law No 21,121 was the criminalisation of commercial

bribery. It punishes an employee or mandatary who requests or accepts receipt of an economic or other benefit, for themself or for a third party, in order to favour or have favoured in the exercise of their tasks the contracting with one bidder over another.

2.2 Influence-Peddling

Influence-peddling is punished in Article 240 bis of the Criminal Code. This rule sanctions the public employee who, being directly or indirectly interested in any kind of contract or operation in which another public employee must intervene, exercises influence on them to obtain a favourable decision for their interests.

In Chilean legislation there is no offence that punishes a private person who seeks to influence the decisions of a foreign public official.

2.3 Financial Record-Keeping

There is no specific criminal sanction related to financial record-keeping. However, there are many administrative rules that impose on corporations an obligation to maintain correct accounts and a duty to provide reliable financial information.

Likewise, there are criminal sanctions regarding partners of external auditing companies that maliciously issue an opinion or provide false information on the financial situation or other matters on which they have expressed their opinion, certification or report. In addition, those who provide services in an external auditing firm and alter, conceal or destroy information of an audited entity in order to obtain a false opinion about its financial situation commit a criminal offence.

The *Comisión para el Mercado Financiero* (Financial Market Commission) is the public entity that supervises corporations in these matters.

There are, nevertheless, specific criminal sanctions for acts that consist of providing false or misleading information to the market (including false information contained in financials delivered to the Financial Markets Commission) in connection with publicly traded securities. The relevance of information in stock transactions is recognised in several provisions of the Securities Market Law (Law No 18,045). This law includes several offences that violate the protection of information in transactions of securities, including adulteration, misuse and concealment or improper disclosure of information to be considered in sales decisions or in the terms of commercial acts involving publicly traded securities.

Articles 59 and 60 of Law No 18,045 contain a catalogue of crimes related to stock market abuse. Article 59 punishes the provision of false information to the market. Article 60 contains a series of offences involving the fraudulent acquisition of shares without making a tender offer in those cases in which it is mandatory to do so, the use or disclosure of privileged information to obtain benefits or avoiding a loss in transactions of public offer values (insider trading), the improper use of values in custody and the deliberate concealment or elimination of accounting records or custody of securities.

The Chilean legal system defines privileged information (insider trading) as any information related to one or more issuers of shares, to their businesses or to one or more shares issued by them, that is not disclosed to the market and the knowledge of which, by its nature, is capable of influencing the quotation of the issued shares, as well as the information held on the acquisition

or disposal operations to be carried out by an institutional investor in the stock market. Law No 18,045 assumes that the directors, managers, administrators, main executives and liquidators of an issuer of securities or an institutional investor are in the possession of privileged information.

2.4 Public Officials

In addition to the different types of bribery, Chilean legislation contemplates a wide catalogue of crimes regarding public officials; the most relevant related to corruption are embezzlement of public funds, grant fraud and unlawful negotiation.

- Embezzlement of public funds includes:
  (a) embezzlement by subtraction, which is a crime committed by a public employee who subtracts, or consents to the subtraction by another, of the funds or effects for which they are responsible (Article 233 of the Criminal Code);
  (b) reckless embezzlement, which is a crime committed by a public employee who, through inexcusable negligence or abandonment, provides an opportunity for another person to subtract the public or private funds or effects under their charge (Article 234 of the Criminal Code); and
  (c) embezzlement by distraction, which is a crime committed by a public employee who applies the proceeds or effects at their charge to their own use (Article 235 of the Criminal Code).
- Grant fraud: a crime committed by a public employee who defrauds or consents to the defrauding of the State, municipalities or public educational or charitable institutions, whether by causing them loss or depriving them of a legitimate profit, in operations in which they intervene by reason of their position (Article 239 of the Criminal Code).
- Unlawful negotiation: this offence punishes public employees who directly or indirectly take an interest in any negotiation, action, contract, operation or management in which they must intervene because of their position. According to the prevailing doctrine, this provision establishes a crime of abstract danger, which is consummated with the mere execution of the conduct, without requiring the verification of a result or damage to the fiscal patrimony (Article 240 No 1 of the Criminal Code).

2.5 Intermediaries

The Chilean Criminal Code distinguishes between two classes of co-operators: (i) the co-perpetrator, legally equated with the perpetrator, although they do not take direct part in the execution of the crime, and (ii) the accomplice in the strict legal sense.

The co-perpetrator is the one who conspires with another and provides the means for the commission of the crime. The accomplice, conversely, is the one who is not included in the definition of co-perpetrator, but who also assists in the execution of the act with previous or simultaneous actions. In the case of the co-perpetrator, they are punished with the same penalty as the perpetrator, while the accomplice is punished with a lower penalty.

3. Scope

3.1 Limitation Period

Limitation periods are established in consideration of the nature of the criminal offence. Crimes (*crímenes*) have a limitation period of 15 years in cases where the law imposes a penalty of life

imprisonment, or ten years in the other cases; misdemeanours (*simples delitos*) are limited to five years, and in the case of offences (*faltas*), six months. The limitation period is suspended once a criminal procedure is directed against the defendant.

Law No 21,212 introduced certain common rules for crimes committed by public officials, one of these being the suspension of the statute of limitations of the crime while the respective official is in office, in order to avoid impunity for the passage of time.

If the accused leaves the country at any time during the limitation period, the limitation period runs at half the speed, ie, two days abroad count as one for the purposes of calculating the limitation period.

3.2 Geographical Reach of Applicable Legislation

In principle, only crimes committed in Chile can be prosecuted before Chilean courts. There are only a few exceptions to this. The extra-territorial reach of Chilean criminal law is specifically regulated in the Código Orgánico de Tribunales (Code of Organisation of Courts), including crimes committed abroad by Chileans against Chileans, if the offender returns to Chile without having been prosecuted abroad, in cases where bribes are accepted by Chilean public officials abroad or the bribery of a foreign public official committed by a Chilean.

In addition, most of Chilean legal literature and jurisprudence understands that the Chilean state can prosecute crimes if the execution of a criminal act begins in Chile, even though its effects occur in another country, or if the execution of a crime begins abroad, but it has consequences in Chile.

3.3 Corporate Liability

Since the enactment of Law No 20,393, the list of offences for which a company can be held criminally liable has been extended several times. Today, companies can be criminally liable for bribery, money laundering, financing of terrorism, receipt of stolen goods, disloyal administration, commercial bribery, unlawful negotiation, misappropriation, certain conducts that are related to water pollution and illegal fishing activities and, from December 2022 onward, computer crimes. As mentioned previously in **1.4 Recent Key Amendments to National Legislation**, Laws No 21,227 and No 21,240 established new crimes in the context of the COVID-19 pandemic, and Law No 21,459 incorporated new offences related to computer crimes, all conducts for which legal entities can be criminally liable.

Regarding all the above-mentioned offences, the public prosecutor may seek both the individual responsibility of those who performed the conduct and the criminal responsibility of the company. However, the Public Prosecutor's Office has no institutional guidelines that state that either individuals or companies must be preferentially prosecuted. Moreover, managers are not criminally responsible for the mere fact that the company is convicted of the crime.

There is no special provision dealing with the possibility of the same lawyers representing the legal entities and the natural persons involved, and joint representation is common, except where the defence strategies are incompatible (the Bar Code of Ethics and the Criminal Procedure Code are applicable).

In the case of a reorganisation, merger, acquisition, division or dissolution of a company where one of the sanctioned crimes was committed,

Law No 20,393 provides that the responsibility for such acts is transmitted to the successor.

4. Defences and Exceptions

4.1 Defences

There are no special defences available for individuals charged in connection with bribery or corruption offences. In that respect, offenders have the same defences available as for other crimes (ie, mitigating circumstances such as not having prior convictions, material collaboration with the investigation, self-indictment, etc). Defendants have ample rights of defence, they are granted access to the file from the beginning of the investigation and have broad access to an attorney, including the Public Criminal Defence.

In connection with legal entities, they may be exempted from criminal liability, inter alia concerning bribery cases, if, before the criminal offence was executed, they adopted an appropriate compliance programme aimed at avoiding the occurrence of that particular crime. Such prevention programmes may be certified by external entities registered for these purposes before the Financial Market Commission.

However, Law No 20,393 on Criminal Liability of Legal Entities expressly makes certain mitigating circumstances available, such as to repair with extreme diligence the damage caused by the offence or the adoption of measures to avoid the reiteration of the offence after the offence has been committed but before the beginning of the trial. Also, self-reporting of the offence by the legal representatives of the company to the authorities before they are aware that a legal proceeding has been initiated against the company may also be argued as a mitigating circumstance.

Effective co-operation with the investigation is a special mitigating circumstance in bribery cases. The co-operation has effectively to serve the purpose of clarifying the investigated case, identifying the offenders, preventing the perpetration of the crime or facilitating the confiscation of goods or assets deriving from the offence. This mitigating circumstance is not available for high-ranking and elected public officers, judges and public prosecutors.

4.2 Exceptions

In general, the Chilean criminal system does not contemplate exceptions of any kind regarding bribery or corruption offences. However, article 251 sexies of the Criminal Code presents a special case.

4.3 De Minimis Exceptions

Article 251 sexies of the Criminal Code incorporates the logic of de minimis exception into the Chilean system. The provision allows conducts that could constitute crimes of bribery or corruption, when they are in respect of official or protocolary donations or of little economic value and are customary as manifestations of courtesy and good manners, leaving trifling conduct without penalty.

However, foreign officials or public servants are explicitly left out of the scope of this provision.

4.4 Exempt Sectors/Industries

The Chilean criminal system does not contemplate restrictions with respect to bribery or corruption offences within the scope of a specific sector or industry.

4.5 Safe Harbour or Amnesty Programme

Companies are not subject to the supervision by regulatory entities for compliance with anti-corruption laws. It is beyond the Prosecutor's

Office to issue regulations or measures to create incentives to self-report a known or suspected violation.

According to Law No 20,393 on Criminal Liability of Legal Entities, self-reporting may constitute a mitigating circumstance if it is performed by the legal representatives of the company before the applicable proceeding is initiated.

5. Penalties

5.1 Penalties on Conviction

For individuals, penalties for bribery, embezzlement, grant fraud and unlawful negotiation are as follows.

- Bribery: the penalty for the briber will mainly depend on the kind of bribery and the economic amount of benefit:
  - (a) for "bribery without counter-performance", ie, the crime that consists of the mere fact of giving, offering, or consenting to a benefit by reason of the position of the public employee, the penalty for the briber is 541 days to three years of imprisonment, where the benefit is offered or given, and 61 to 540 days, where the benefit is consented to. In addition, a fine equal to the benefit must be imposed (where the benefit is not an economic one, the fine is from 25 monthly tax units (UTM) to 250 UTM) and restriction from working as a public employee from three years and one day to five years;
  - (b) for bribery that consists in giving, offering or consenting to a benefit for a public official to perform or for having performed an act proper to their office, the briber will be punished with 541 days to five years of imprisonment, in the case where the benefit is offered or given, and 61 days to three years, in the case where the benefit is consented to. In addition, a fine from 100% to 200% of the benefit (where the benefit is not an economic one, the fine is from 50 UTM to 500 UTM) and restriction from working as a public employee from five years and one day to seven years shall also be imposed;
  - (c) for bribery that consists in omitting or having omitted an act proper to the office of the public employee, or to perform or for having performed an act in breach of the duties of their office, including exercising influence over another public employee in order to obtain a decision that may generate a profit for a third party, penalties range from three years and one day to ten years of imprisonment, if the benefit is offered or given, and 541 days to five years, if the benefit is consented to. In addition, a fine of between 200% and 400% of the benefit (where the benefit is not an economic one, the fine is from 100 UTM to 1,000 UTM) and restriction from working as a public employee from seven years and one day to ten years shall be imposed;
  - (d) for bribery that consists in offering or consenting to a benefit for the public official to commit some specific offences (referred to in Article 249), penalties range from three years and one day to ten years of imprisonment, if the benefit is offered or given, and 541 days to five years, if the benefit is consented to. In addition, a fine must be imposed, equal to 400% of the benefit (if the benefit is not an economic one, the fine is from 150 UTM to 1,500 UTM) and restriction from working as a public employee for life;
  - (e) bribery of foreign officials is sanction-

able with imprisonment from three years and one day to ten years, restriction from working as a public employee from seven years and one day to ten years, and a fine from 200% to 400% of the amount of the bribe. If the benefit offered it is not an economic one, the fines will range from 100 UTM to 1,000 UTM; and

(f) according to Article 251 quater of the Criminal Code, any person that is convicted of the aforementioned crimes will be barred from working in companies that have entered into contracts with the state, or if the state has a majority holding, or in companies that grant a service to the state, or provide a public service.

- Embezzlement of public funds:
  (a) embezzlement by subtraction: penalties depend on the amount of the subtraction. If it is less than USD270, the penalty of imprisonment ranges from 541 days to five years, if it exceeds USD270 and does not reach USD2,700, the penalty is three years and one day to ten years, and if it exceeds USD27,000, the penalty is five years and one day to 15 years. In all cases, a fine of 200% of the amount subtracted and restriction from working as a public employee from five years and one day to seven years must be imposed;
  (b) reckless embezzlement: there is an obligation to return the amount or effects misappropriated and restriction from working as a public employee from 61 days to three years; and
  (c) embezzlement by distraction: it carries a fine of 50% to 100% of the amount of the damage caused and restriction from working as a public employee from five years and one day to seven years. If the refund has not been verified, the penalties indicated in "embezzlement by subtraction" will be applied.
- Grant fraud: the penalty will depend on the amount deceived. The default penalty is from 541 days to five years of imprisonment, but if the damage exceeds USD2,700, the penalty is from three years and one day to ten years; if the damage exceeds USD27,000, the penalty is from five years and one day to 15 years. In any event, it carries a fine of half of the total amount of the damage caused and restriction from working as a public employee from five years and one day to ten years.
- Unlawful negotiation: the penalty associated with the crime is imprisonment from 541 days to five years, a fine of half of the total amount of the damage caused and restriction from working as a public employee from five years and one day to ten years.

It is worth saying that all sentences of more than five years and one day are effectively served in jail (no benefits or agreements with the prosecutor are allowed).

With respect to legal entities, according to Law No 20,393 on Criminal Liability of Legal Entities, the available penalties for corporate entities, in the case of acts of bribery, include the imposition of fines (of up to approximately USD20 million for the worst cases), temporary prohibition to enter into contracts with governmental bodies and/or temporary loss of the right to receive governmental benefits, and even in some cases dissolution of the company.

5.2 Guidelines Applicable to the Assessment of Penalties

As previously stated, each crime has a specific penalty established by law. The Criminal Code contemplates general rules for penalty assessment, including mitigating and aggravating factors, such as recidivism. In that respect, the pen-

alty is determined applying the following factors: the penalty assigned by law to the crime, the degree of development of the crime (attempted crimes have a lower penalty), the kind of criminal intervention (perpetrator, co-operator or accomplice), mitigating and aggravating circumstances, and the extent of the damage caused by the crime.

The law contemplates the possibility of reaching an agreement in order to terminate the case without going to trial, either through a monetary settlement or deferred prosecution agreements.

Plea agreements, however, are available when the conviction sought by the Prosecutor's Office does not exceed five years of imprisonment. When defendants acknowledge the facts for which they are being prosecuted, they may apply for a reduced conviction, with the authorisation of the judge.

There are no other guidelines that judges and/or prosecutors should follow in any of these situations.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Pursuant to Law No 20,393 on Criminal Liability of Legal Entities, the existence of a compliance programme may exempt a company from criminal liability to the extent it fulfils the requirements stated by law.

According to Article 4° of Law No 20,939, compliance programmes should have (for having the aforementioned exemption effect) at least the following elements:

- the designation of a compliance officer;
- a definition of the powers and intervention methods of the compliance officer;
- a programme in order to avoid the commission of crimes inside the company; and
- the definition of a way to supervise and certify the compliance programme.

6.2 Regulation of Lobbying Activities

Lobbying activities are regulated by Law No 20,730 (since 2014), which concerns all the steps taken to promote private interests before public servants and authorities. The basic principles of this regulation are to give publicity to and create the obligation of keeping a registry of the following:

- meetings and audiences requested by lobbyists and particular interest managers that seek to influence public decision-making processes;
- travel undertaken by authorities and public servants in that capacity; and
- gifts received by virtue of their position.

The Law prescribes administrative sanctions for public officials who violate the obligation of registry or publicity as the law requires, providing sanctions such as fines, making the offender's identity known on the official website of the service in question, and giving account of the infraction in the public account rendered by the service, amongst others.

Lastly, the Law explicitly indicates that its provisions do not preclude the eventual criminal liability that the conduct in question may lead to, ie, cases of bribery and incompatible negotiation.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Regarding individuals, self-reporting or substantial co-operation in the context of a criminal investigation may be considered as mitigating factors when considering the extent of criminal responsibility.

Law No 20,393 on Criminal Liability of Legal Entities provides incentive mechanisms for companies to self-denounce. Thus, if the managers of a company report their own misconduct before the start of a criminal prosecution, they will have the right to a reduced sentence.

6.4 Protection Afforded to Whistle-Blowers

In the absence of legal regulation, whistle-blowing is not a widespread practice. The Chilean criminal procedural system allows the prosecutor to enter into agreements with individuals, generally approved by the judge or court, but this is more of a general rule than a direct regulation to protect whistle-blowers.

There is no regulation of the foregoing in the private sector, so individuals who report suspicious or illegal conduct within a company will depend on the company's internal policies. Due to the increased application of compliance programmes in recent years, it has become more common for companies to have systems which protect whistle-blowers.

6.5 Incentives for Whistle-Blowers

There are no protocols or regulations issued by enforcement authorities granting incentives for whistle-blowers specifically in connection with anti-corruption violations. As is the case in all kinds of criminal investigation (and not only anti-corruption cases), individuals or corporate entities may decide to co-operate with the prosecutor to obtain more lenient treatment by entering, for example, into agreements with the Public Prosecutor's Office, which may imply a deferred prosecution or a reduced penalty in the context of a plea agreement. The only limitation on these settlements is determined by law for cases where the possible sanction on the defendant exceeds three years' imprisonment in the case of deferred prosecution agreements and five years of imprisonment in the case of a plea agreement.

To create incentives to obtain information that can boost and strengthen anti-corruption investigations, Law No 21,121 recognises effective co-operation with the investigation as a special mitigating circumstance in bribery cases, which can significantly reduce the applicable penalty. Such co-operation has effectively to serve the purpose of clarifying the investigated case, identifying the offenders, preventing the perpetration of the crime or facilitating the confiscation of goods or assets deriving from the offence.

In connection with administrative sanctions, there are certain provisions aimed at protecting whistle-blowers who hold a public office when reporting crimes or administrative infringements to the competent authorities. However, this protection is very limited, as it only applies to public officers and only considers the suspension of the ability to apply certain disciplinary measures against such persons for a period of up to 90 days after the investigation initiated by the report of the whistle-blower has finished. The identity and the information that the whistle-blower provide have to be kept confidential if requested by the person who provides the information.

However, substantial co-operation with the investigation is considered as a mitigating circumstance that may lower the applicable pen-

alty. In practice, co-operation may also play a role in the willingness of the prosecutor to offer an alternative resolution for the case and not go to trial.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

There have been attempts to include whistle-blower protection in legislation. However, these protections have had a rather limited effect, as they only refer to certain public officers and only consider a suspension of the ability to apply certain disciplinary measures against these persons for a period of up to 90 days after the investigation initiated by the report of the whistle-blower has ended. The whistle-blower may request that their identity and the information that they provide be kept confidential. These provisions, in an administrative way, are regulated in Law No 18,834 on Statute Applicable to Public Officials.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

In general, Chilean law does not provide for administrative sanctions for corporate entities in the case of violation of anti-corruption laws. However, they may face administrative penalties in cases of violation of specific administrative provisions which indirectly aim to avoid potential corruption or conflicts of interest. This is the case, for example, with violations of the recently introduced provision that prohibits corporate entities from financing political campaigns or parties, which may be punished with monetary fines.

Individuals may also face criminal prosecution, risking penalties that include fines, prohibition from exercising a public office and imprisonment.

Administrative liability in the case of individuals is in general only applicable for anti-corruption violations committed by public servants and is enforced by the General Comptroller's Office. However, as is the case for corporate entities, there are certain special administrative penalties that may be applicable to individuals in general in the context of violations to limits applicable to the financing of political campaigns.

The law does not contemplate civil enforcement by government agencies. However, anyone who suffers damage by a conduct – whether committed by entities or individuals – that contravenes anti-corruption laws may file a civil action against that entity, pursuant to general tort law.

7.2 Enforcement Body

The public bodies in charge of the prosecution of the crimes and administrative infractions previously mentioned are the Public Prosecutor's Office and the Comptroller General of the Republic, respectively. The interaction between those two public bodies is not expressly regulated, but each of them falls within its exclusive sphere of competence: the Public Prosecutor investigates and pursues the punishment of the conducts that constitute a crime, and the Comptroller General of the Republic investigates and sanctions the conducts that constitute only an administrative fault.

7.3 Process of Application for Documentation

The process to acquire information or documentation is relatively similar, whether it comes from the Comptroller General of the Republic or the Public Prosecutor. Both agencies direct a request for information to the person or legal

entity, for the delivery of which they will give a deadline. As stated previously, in the case of the Public Prosecutor's Office, if the person denies or delays the delivery of a record the prosecutor may request the competent tribunal to authorise the seizure of them, which entails the aid of public force.

7.4 Discretion for Mitigation

The administrative body – the Comptroller General of the Republic – has little discretion to mitigate the fulfilment of its powers; that is, it must investigate – and punish in its case – any cases of corruption that may arise in accordance with the law. However, as has been described in previous sections, the Public Prosecutor's Office is entitled to mitigate the enforcement of criminal law through different mechanisms (see **1.3 Guidelines for the Interpretation and Enforcement of National Legislation**, **5.2 Guidelines Applicable to the Assessment of Penalties**, and **6.5 Incentives for Whistle-Blowers**).

7.5 Jurisdictional Reach of the Body/Bodies

As previously mentioned, the area of jurisdiction of each public agency depends on whether the acts of corruption constitute only administrative offences (in which case only the Comptroller General of the Republic is involved) or also constitute criminal offences (in which case the Public Prosecutor's Office is involved and litigates before the courts with criminal jurisdiction).

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

As far as landmark decisions go, in 2021 CORPESCA ended leaving many lessons. The case was about the illegal financing of politics and resulted in convictions for the crimes of bribery of public officials and tax fraud.

It was a landmark case because it changed the way in which bribery is understood, to the extent that legal reform followed, in order to adjust the conduct sanctioned, as well as shifting the way in which compliance policies are understood. The tribunal convicted a legal entity (CORPESCA) for its lack of commitment to the prevention of crimes within its structure, which was determined by a deficient compliance policy. This latter circumstance was found to be determinant in the analysis of the crimes for which the executives were convicted, such as Mr Francisco Mujica, who entered into a plea agreement and did not face jail time.

Regarding landmark investigations, the Itelecom case has generated interest regarding investigation of the bribery of several public servants by the executives of a legal entity, involving various municipalities. In this case, the mitigating circumstance of Article 260 quater of the Criminal Code (substantial collaboration with the clarification of the facts) was recognised for the first time since the enactment of the anti-corruption law. This circumstance is a qualified version of the general mitigating circumstance consisting in collaboration with the clarification of the facts, which has to be explicitly recognised by the prosecutor, and Itelecom becomes a model case for the recognition of this circumstance for future cases.

7.7 Level of Sanctions Imposed

Many of the recent cases of bribery or corruption have ended with plea agreements and convicted people were not sentenced to jail, but severe penalties of fines and restrictions were imposed.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

Many of the modifications enacted by Law No 21,121 were adopted with the purpose of fulfilling international commitments in the matter of corruption, and as a reaction to certain cases of corruption that have occurred in recent times in Chile.

The current legislation is severe with corruption and bribery and is expected to be more effective, but it is still too early to give an informed opinion.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

As previously noted, changes in corruption and bribery legislation have been made only recently. In addition, there are two relevant projects in progress.

The first one seeks to establish a new Criminal Code. The current Criminal Code was enacted in 1875 and, although it has undergone constant modification and has had to be complemented by multiple laws that incorporate new crimes, there is consensus among all actors on the need for a modern criminal code. Consequently, since 2013, three drafts of a new criminal code have been presented as part of an initiative driven by the Ministry of Justice, the latest of which was submitted in October 2018. Two commissions in which academics and distinguished practitioners drafted a modern Criminal Code were chaired by Mr Jorge Bofill.

In this context, Congress is currently discussing a legal reform (*Boletin Número* 13.205-07) which aims to systematise economic crimes and offences against the environment. The reform intends to restrict the effect of mitigating and aggravating factors, mostly unrelated to business crime, replacing them with a specific catalogue.

In addition to this, it limits the applicability of alternatives to imprisonment, such as probation, introduces the general confiscation of profits, reforms the system of fines and introduces relevant changes to the statute of liability of legal persons, eliminating the requirement of the benefit of the company, and extending both the catalogue of crimes and of persons whose intervention generates the liability of the legal person.

Finally, modifications are introduced in different economic crimes, including the introduction of the statute of environmental crimes, the regulation of the criminal protection of business secrecy, and a relevant modification to bankruptcy crimes and crimes against the securities market.

Likewise, several crimes currently in force are modified in order to improve their wording and solve the difficulties of interpretation and application that have arisen in practice. Also, a crime of misleading advertising is introduced in the Consumer Law and criminal protection is included against cases of labour exploitation.

Bofill Escobar Silva Abogados is a leading Chilean law firm that focuses on the resolution of complex and cross-border business disputes, before local and foreign courts, governmental authorities, and international arbitration tribunals. The firm is currently active in a wide range of high-profile cases, covering almost all industries and markets, including antitrust, natural resources, energy, mining, construction, finance, and securities. The firm also has vast experience advising clients in white-collar and anti-corruption cases, as well as conducting internal investigations or acting as the external adviser of corporate investigations being carried out by in-house compliance teams. The firm has distinctive experience with disputes involving highly technical matters, with multiple parties, in several languages in numerous jurisdictions, and inter-related litigation, working with experts in multiple fields. The diverse backgrounds and skills of Bofill Escobar Silva's lawyers provide a strategic, comprehensive and innovative approach to conflict resolution, particularly valuable for clients when litigation is not the best option available.

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CHINA

Law and Practice

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Contents

1. Legal Framework for Offences

1.1 International Conventions

In December 2000, the Chinese government signed the United Nations Convention against Transnational Organised Crime (the "Convention"), which took effect in China on 13 October 2003. While the Convention is universally applicable to all transnational organised crimes, corruption is one of its main focuses, requiring States to take measures through legislation and enforcement to promote anti-corruption.

As for the international conventions specially regulating corruption that China has signed up to, the United Nations Convention against Corruption (the "Anti-corruption Convention") officially took effect in China on 12 February 2006. China was actively involved in the formation stage of the Anti-corruption Convention, and was among the first countries to ratify it, except for one reservation on paragraph 2 of Article 66 regarding a dispute-settlement channel. The Anti-corruption Convention is the first and only legally binding universal anti-corruption instrument with the framework established on five pillars: Preventive Measures, Criminalisation and Law Enforcement, International Co-operation, Asset Recovery, and Technical Assistance and Information Exchange. Ten years on form China's ratification of the Anti-Corruption Convention, in 2016, the United Nations Office on Drugs and Crime issued a status review report on China's implementation of the Anti-Corruption Convention, and China's efforts in and dedication to combating corruption through active law enforcement, successive international co-operation and sustainable good practices have been well recognised.

1.2 National Legislation

There is currently no independent and consolidated statute in China that is similar to, for example, the Foreign Corrupt Practices Act (FCPA) or the UK Bribery Act. Bribery and corruption in China are governed by multiple authorities in accordance with various laws and legislation.

The legal framework can be divided into three levels, depending on the severity of the offences and the identity of the individuals involved. Firstly, the Anti-unfair Competition Law and other laws and regulations under civil, administrative, and economic spheres are the foundations for the widespread administrative enforcement against commercial bribery in China. Secondly, the Criminal Law and the corresponding legislative and judicial interpretations, such as the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in Handling of Criminal Cases of Embezzlement and Bribery and the Circular of the Supreme People's Court and the Supreme People's Procuratorate on Issuing Opinions on Issues concerning the Application of Law in Handling of Criminal Cases of Commercial Briberies stipulate criminal violations and criminal offences. Thirdly, there are disciplines and regulations promulgated by the Central Committee of the Communist Party of China (CPC), which are binding on all CPC members and set a much lower threshold for the constitution of corruption-related violations.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no official guidelines on the interpretation and enforcement of anti-corruption laws in China.

Supervisory authorities in various industries would publish certain notices and working plans for the enforcement actions.

1.4 Recent Key Amendments to National Legislation

There have been no significant legislative amendments to the key corruption statutes in 2022.

China enacted the International Criminal Justice Assistance Law (ICJAL) in October 2018. Article 4 of the ICJAL expressly prohibits institutions, organisations and individuals in China from providing evidence materials and assistance provided in this law to foreign countries without the consent of China's competent authorities. Moreover, the ICJAL applies to a variety of activities in criminal proceedings. This has had a significant impact on common internal investigations conducted within companies for foreign law considerations, such as the FCPA.

Another notable amendment is the revision to the Anti-unfair Competition Law in January 2018. In particular, Article 7 has excluded the situation where an entity offers commercial interests (eg, discounts) to its transaction counterparties (as opposed to those transaction counterparties' employees) even in a secret manner (eg, off the book) which was previously recognised as bribery and thus prohibited.

2. Classification and Constituent Elements

2.1 Bribery

Definition of a Bribe

The current administrative law and criminal law have different definitions of bribery, and the connotation of bribery varies from criminal law and administrative law perspectives.

From the criminal law perspective, there are a total of ten crimes relating to bribery, which generally forbid the act of offering a bribe to any state functionary and non-state functionary, and the receiving of that bribe by any state functionary and non-state functionary. For example, any state functionary who extorts property from others by taking advantage of his or her position or illegally accepts others' property in return for securing benefits for them shall be convicted of acceptance of bribes.

From the administrative law perspective, in a broad sense, bribery refers to offering or taking money or goods and other acts conducted for the purpose of offering or obtaining trading opportunities or other economic benefits, in violation of the fair competition principle.

Public Official

The law distinguishes between the bribery of a public official and that of an ordinary individual. There is a specific term for public official in China, which is "state functionary", which means persons who perform a public service in state organs, state-owned enterprises and institutions, and other persons who perform a public service according to law. The Criminal Law defines the boundary of crimes related to the bribery of a state functionary and the bribery of an ordinary individual, and also stipulates different crimes, depending on the involvement of duty or influence of the state functionary. For example, an individual offering bribes to a state functionary will be convicted of the crime of offering bribes to a state functionary, and will be subject to criminal liabilities of up to life-time imprisonment, along with confiscation of property. With respect to the act of offering bribes to

an executive in a private entity, it will constitute the crime of offering bribes to a non-state functionary, and will be subject to criminal liabilities ranging from criminal detention (a less punitive form of imprisonment, involving incarceration at a police station for up to six months with occasional home visits) to imprisonment of up to ten years, along with a monetary fine where the amount of the bribes is large.

Bribery of Foreign Public Officials

Further, according to the Criminal Law, anyone giving any property to a functionary of a foreign country or an official of an international public organisation for any improper commercial benefit will be convicted of the crime of bribery of foreign public officials and international public organisation officials, and will be subject to imprisonment of up to ten years and a monetary fine.

Hospitality Expenditures, Gifts and Promotional Expenditures, and Facilitation Payments

Hospitality and promotional expenditures would not necessarily constitute bribery if they were incurred in ordinary business circumstances such as maintaining a client relationship, or promoting products and services, and are reasonable in scope and accurately recorded in the books and records.

For gifts, small advertising gifts with a value of less than RMB200 are permitted under the Provisional Regulations on the Prohibition of Commercial Bribery and are generally recognised by the enforcement authorities in practice.

There is no official definition for facilitation payments in China. In practice, any payment that is made in exchange for illegal business opportunities, advantages or other interests could potentially be deemed as bribery.

2.2 Influence-Peddling

From a criminal-law perspective, with respect to influence-peddling practices, there are several crimes stipulated in the Criminal Law, the conviction of which needs to take various considerations into account, such as whether the person conducting the influence-peddling is a state or non-state functionary or any person who has a close relationship with the state functionary, and the specific manifestations of the influence on decision-making. For example, any of the close relatives of the state functionary, or other persons closely related to that state functionary, who secure illegitimate benefits for an entrusting person through that state functionary's performance of his or her duties or through another state functionary's performance of his or her duties by taking advantage of that state functionary's functions, powers or position, and extort from the entrusting person or accept the entrusting person's money or property, shall be convicted of the crime of accepting bribes via influence. Anyone who, for the purpose of securing illegitimate benefits, offers bribes to any of the close relatives of the state functionary or other persons closely related to that state functionary, or any state functionaries who have been removed from their positions, their close relatives, or other persons closely related to them, shall be convicted of the crime of offering bribes to persons with influence.

From the administrative-law perspective, influence-peddling is prohibited because it is categorised as a form of commercial bribery in violation of the fair-competition principle. A business operator bribing the organisations or individuals who take advantage of their functional authority or influence to impact a transaction may face a

fine of up to RMB3 million, confiscation of illegal gains, and revocation of their business licence where circumstances are severe.

2.3 Financial Record-Keeping

Inaccurate Corporate Books and Records

With respect to inaccurate corporate records, the Criminal Law stipulates multiple different crimes. For example, anyone concealing or intentionally destroying account books or financial reports that are required to be kept in accordance with the law, if the circumstances are severe (eg, the money involved is more than RMB500,000), shall be sentenced to fixed-term imprisonment of up to five years, and concurrently or separately, a fine of up to RMB200,000. Entities committing the aforesaid crime shall also be fined, with the directly accountable persons being punished. Moreover, if during the process of its liquidation, an enterprise records false information in its balance sheet or inventory of assets, causing serious harm to the interest of the creditors (eg, causing economic losses of more than RMB500,000), that enterprise shall be convicted of the crime of impairing liquidation, and will have a fine of up to RMB200,000 imposed, with its directly accountable persons to be sentenced to fixed-term imprisonment of up to five years. It should be noted that the aforementioned crimes are not necessarily related to corruption, and are separately and independently stipulated under the Criminal Law.

From the perspective of administrative law, companies forging or tampering with accounting documents, account books and other accounting materials, or providing false financial accounting reports, shall be criticised by a notice and may have a fine of up to RMB100,000 imposed, with its directly accountable persons subject to a fine of up to RMB50,000. Likewise, the foregoing legal liabilities exist independently and are not necessarily involved with acts of corruption. In addition, in accordance with the Anti-unfair Competition Law, where a business operator gives a discount to its transaction counterparty or pays a commission to a middleman, it shall truthfully record that discount and commission in its account books. The same requirements also apply to the counterparty or middleman receiving the discount or commission.

Disseminating False Information

In respect of the offences of false information dissemination, from the criminal law perspective, whoever fabricates and spreads false information that adversely affects securities or futures trading, thus disrupting the securities or futures trading market, if the consequences are severe (eg, losses caused to investors exceeding RMB50,000), shall be sentenced to fixed-term imprisonment and will have a fine of up to RMB100,000 imposed.

From the perspective of administrative law, the legal liabilities related to the dissemination of false information are mainly regulated in the Securities Law. Specifically, making use of false or uncertain significant information to induce investors into securities trading is strictly prohibited as a market-manipulating practice, and the violator shall be ordered to dispose of the illegally held securities pursuant to the law, with illegal gains confiscated and a fine imposed. In the case that the aforesaid violator is a company or other organisation, the directly accountable persons will receive a warning and will have a fine of up to RMB5 million imposed concurrently. In addition, anyone disseminating fraudulent information to disrupt the order of the securities market is subject to such legal liabilities as imposition of a fine and confiscation of illegal gains concurrently.

2.4 Public Officials

Misappropriation of public funds by any state functionary as a result of taking advantage of his or her position would result in that state functionary being convicted of the crime of misappropriation of public funds. The crime of misappropriation of public funds contains three specific categories – ie, (i) misappropriation of public funds for the state functionary's own use or for conducting illegal activities, (ii) misappropriating a relatively large amount of public funds for profit-making activities, and (iii) misappropriating a relatively large amount of public funds without returning it after the lapse of three months. The state functionary in question who is convicted of the crime would be sentenced to imprisonment of up to a term of life. Where the aforesaid misappropriated funds or materials were allocated for significant public purposes, such as disaster relief, emergency rescue, flood prevention and control, special care for disabled servicemen and women and the families of revolutionary martyrs and servicemen and women, aid to the poor, migration and social relief, the criminal shall be given a heavier punishment.

In accordance with the Criminal Law, any state functionary who extorts or accepts money or property from another person by taking advantage of his or her position in order to seek benefits for that person, or by illegally accepting rebates or service charges of various descriptions, would be convicted of accepting bribes.

In accordance with the Criminal Law, any state functionary who unlawfully takes public property into his or her possession by embezzlement, theft, fraud or any other means, by taking advantage of his or her position, shall be convicted of corruption; and, where the amount involved is extremely huge (over RMB3 million) and extremely severe losses are caused to the interests of the state and the people, the maximum punishment will be the death penalty.

Under the Criminal Law, favouritism is an aggravating factor (but not an independent crime) when state functionaries commit the crime of abusing power or the crime of negligence of duty. The crime of abusing power refers to the state functionaries' decisions on and handling of matters beyond their authority in violation of the law, and the crime of negligence of duty refers to negligence of duty by state functionaries who are seriously irresponsible and fail to perform or conscientiously perform their duties. The state functionaries committing the crime of abusing power or the crime of negligence of duty, thus causing heavy losses to the interests of the state and the people, could be sentenced to fixed-term imprisonment of up to seven years. With the aggravating factor of favouritism, the term of the imprisonment could be up to ten years. In addition, the Criminal Law also stipulates several crimes committed by state functionaries in specific government functions through practising favouritism, such as the crime of failing to collect or collecting insufficient tax by practising favouritism.

2.5 Intermediaries

With respect to the commission of bribery through an intermediary, depending on the identity of the intermediary and how the intermediary works, the Criminal Law generally stipulates the following three kinds of crimes: (i) the crime of mediatory bribery, (ii) the crime of accepting bribes by using influence, and (iii) the crime of introducing bribes.

The crime of mediatory bribery is a sub-category of the crime of accepting bribery, and the key characteristic of the former is that, when conducting the crime of mediatory bribery, the

state functionary, by taking advantage of his or her own powers or position, secures illegitimate benefits for an entrusting person through another state functionary's performance of duties, (instead of his or her own performance of duty). In this regard, it should be noted that the state functionary whose performance of duty has been taken advantage of should not be aware of the existence of bribery, otherwise he or she would also be convicted of the crime.

The crime of accepting bribery by using influence is an independent crime, the key characteristic of which is that the person accepting the bribery is not a state functionary but the state functionary's close relative or any other person who has a close relationship with that state functionary. As a person who has a close relationship with the state functionary, by using his or her influence, the perpetrator seeks improper benefits through the performance of any duty of the state functionary or any other state functionary.

The crime of introducing a bribe is also an independent crime. Whoever introduces a bribe to a state functionary, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. In practice, where the intermediary is neither a state functionary, nor one who has a close relationship with the state functionary, he or she would be convicted of the crime of introducing bribery by introducing and facilitating a bribery-related transaction.

From the perspective of administrative law, explicitly paying the intermediary a commission which has been truthfully recorded into account books does not fall within the scope of commercial bribery. However, anyone who offers bribery to a third party who has influence on the transaction counterparty, for the purpose of seeking transaction opportunities or competitive advantages, will be subject to administrative penalties, as this would constitute commercial bribery.

3. Scope

3.1 Limitation Period

The statute of limitation in the Criminal Law is stipulated according to the gravity of the maximum legally prescribed punishment and shall be calculated from the date when the crime is completed. The maximum period is 20 years which shall apply to crimes for which the maximum legally prescribed punishment is life imprisonment or the death penalty. For example, for the crime of offering bribery to a state functionary, the period is further divided into three grades: five years, ten years, and 20 years, depending on the maximum legally prescribed punishment. Expiry of the limitation period does not render prosecution entirely impossible. For example, for a crime for which the maximum statutory punishment is life imprisonment or the death penalty, even if 20 years have elapsed, the criminal suspect may still be prosecuted upon the approval of the Supreme People's Procuratorate. In addition, where a criminal suspect commits a new crime after the occurrence of a crime but before the expiry of the limitation period, the limitation period of the former crime shall also be re-calculated from the date of the new crime. Under circumstances where a criminal suspect escapes after the case is filed by relevant judicial authorities or where a victim brings a complaint against a criminal suspect, the limitation period shall not apply.

From the perspective of administrative law, where an act in violation of the administrative law is not discovered within two years from the

date when the illegal act is ended, no administrative penalty shall be imposed.

3.2 Geographical Reach of Applicable Legislation

The Criminal Law mainly adopts the principle of territorial jurisdiction over criminal offences, supplemented by extra-territorial jurisdiction in circumstances where the perpetrator is a Chinese citizen or a foreign national commits a crime against China or a Chinese citizen. Article 10 of the Criminal Law stipulates the principle of Passive Recognition of Foreign Criminal Judgments, stating that any Chinese citizen who commits a crime outside the territory of China may still be investigated for his or her criminal liabilities under Chinese laws, even if he or she has already been tried in a foreign country. However, if he or she has already received criminal punishment in the foreign country, he or she may be exempted from punishment or given a mitigated punishment. Article 8 further specifies the principle of Protective Jurisdiction, indicating that the Criminal Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of China against China or against any Chinese citizens, if, for that crime, this Law prescribes a minimum punishment of fixed-term imprisonment of not less than three years; however, this does not apply to a crime that is not punishable according to the laws of the place where it was committed.

There is generally no extra-territorial application from an administrative law perspective.

3.3 Corporate Liability

On a criminal level, bribery committed by an employee of a company could be deemed as either an individual crime or a unit crime, depending on various factors, including whether the company is engaged in the bribery (specifically, whether it is the company's decision to conduct the bribery), the possession of illegal gains, and whether the bribes are offered in the name of the company or the individual employee. If the charge is raised against the individual employee, the company would not bear legal liabilities. However, if the charge is against the company as a unit crime, the so-called "dual punishment system" would apply – ie, not only would a monetary penalty be imposed on the company, but also the main responsible persons (ie, the legal representative, and other persons in charge) could be subject to criminal detention or imprisonment.

The administrative enforcement differs, as there is a default mechanism in place; namely, that the acts of bribery committed by a company's employees shall be deemed as the acts of the company, unless the company has evidence to prove that such acts of its employees were not made in search of transaction opportunities or competitive advantages for the company. Furthermore, under the newly revised Administrative Penalty Law, where the company concerned has sufficient evidence to prove that it has committed no subjective fault, no administrative penalty shall be imposed on the company. Only the company would have administrative liabilities imposed on it, including a fine ranging from RMB100,000 to RMB3 million, confiscation of illegal gains, and revocation of its business licence where circumstances are severe.

With respect to whether the corporate's legal liabilities will be pursued when it is merged or divided after committing an offence, on the criminal level, as long as an entity that assumes the rights and obligations of that predecessor entity exists, the criminal liability of the predecessor entity and the relevant responsible persons shall still be pursued. The predecessor entity shall still

be listed as the defendant, and the legal representative or the person chiefly in charge of the new entity that succeeds the rights and obligations of the predecessor entity shall be the litigation representative. As for the successor entity, it shall bear the criminal liability of the predecessor entity to the extent of the property it inherited.

In terms of administrative liability, the general principle may be found in the Implementation Regulations of the Customs of the People's Republic of China on Administrative Penalties, which specifies that the predecessor entity shall be the liable subject, and the successor entity that assumes the rights and obligations shall be the person subject to the property penalty. Based on law-enforcement practice, this principle may also be applicable in other areas.

4. Defences and Exceptions

4.1 Defences

For the criminal offence of bribery, the Criminal Law explicitly stipulates that any person who provides benefits to a state functionary as a result of extortion by the state functionary, and does not obtain an undue advantage, would not be criminalised for bribery. In addition, any briber who, before he or she is investigated for criminal liabilities, voluntarily confesses his or her act of offering bribes may be given a mitigated punishment or be exempted from punishment. Even without voluntary surrender, as previously mentioned, a criminal suspect who truthfully confesses his or her crimes may be given a lighter penalty and may be given a mitigated penalty if any extremely severe consequence is avoided due to his or her truthful confession.

In a commercial context, the criteria commonly used by the administrative enforcement agencies for substantiating commercial bribery mainly focus on (i) whether there is any lure of improper interests, and (ii) whether there is any illegal purpose to obtain business opportunities or competitive advantages. The key for differentiating between legitimate interests exchange and inducement for illegitimate interests lies in whether the interests exchanged have potential influence on fair competition in the market, or the interest and benefits of the consumers. Notably, the Anti-unfair Competition Law adopts the new method of listing all the possible scenarios of the statutory bribery-receiving parties, including (i) "employee of a transaction counterparty", (ii) "any entity or individual entrusted by the counterparty", and (iii) "any entity or individual that is likely to take advantage of powers or influence to affect a transaction", and that in its literal meaning excludes the counterparty itself as the bribery-receiving party. Therefore, considering the above-mentioned, the corresponding defences for the company could be based on the nature of the bribery-receiving party, the non-existence of the exchange of illegitimate interests, and the lack of potential influence on fair competition or consumer's interests. In addition, another possible defence for the company could be sustained in the Anti-unfair Competition Law if a company has evidence to prove that such acts of the employee are irrelevant to seeking transaction opportunities or competitive advantages for the company, and under the newly revised Administrative Penalty Law where a company has evidence to prove that it has no subjective fault.

4.2 Exceptions

Although under the Anti-unfair Competition Law, the counterparty of a transaction does not fall into the scope of the bribery-receiving party, due to the stricter requirements in some industry-specific laws and regulations such as the Drug Administration Law, offering unlawful interests

to the counterparty, such as offering interests to public hospitals by a pharmaceutical company, could still be deemed as bribery.

In respect of voluntary surrender or confession of one's crimes, the court is also empowered not to mitigate the penalty in the case that the circumstances of the crime are severe or even flagrant.

4.3 De Minimis Exceptions

The Criminal Law sets forth the threshold for prosecuting bribery and corruption offences. For example, the threshold amount for bribing a non-state functionary is RMB60,000 (USD8,500), and the threshold amount for bribing a state functionary is RMB30,000 (USD4,250).

In comparison, the Anti-unfair Competition Law does not stipulate the threshold of the bribery amount. One relevant exception is in regard to small advertising gifts that are permitted by the Provisional Regulations on the Prohibition of Commercial Bribery, which are usually worth less than RMB200 in practice. Other than that, Article 83 of the Discipline Rules for the Communist Party of China stipulates that payment, cash, or shopping cards that might potentially influence their execution of duty would be strictly prohibited, which seems to set aside an exception for such a payment in a relatively small amount, with less likelihood of it being deemed as bribery.

4.4 Exempt Sectors/Industries

There are no sectors or industries exempt from the aforementioned offences.

4.5 Safe Harbour or Amnesty Programme

According to the Anti-unfair Competition Law, the bribery of employees of a company shall be deemed as the act of the company, unless there is evidence to prove that the bribery of employees is not related to seeking transaction opportunities or competitive advantages for the company. However, no specified regulations or judicial interpretations regarding what evidence would be most valid have been made available. In practice, some multi-national and local companies have already implemented compliance programmes and preventive measures such as providing regular compliance training and requiring employees' written compliance commitment letters in preparation for any potential legal liability concerns. Furthermore, it has been suggested by the enforcement authorities that, if a business operator has formulated legal, compliant and reasonable measures, and has taken effective measures for supervision, and does not connive at the staff's bribery, or do so in a disguised form, the company could be relieved of legal liabilities.

Since March 2020, the Supreme People's Procuratorate has been promoting pilot programmes on corporate compliance reforms, including "non-arrest based on compliance", "non-prosecution based on compliance", and "leniency application based on pleading guilty". In the pilot regions, the People's Procuratorates can conduct compliance visits to the companies involved in the case, reach compliance supervision agreements with the companies, request the companies to establish or improve their compliance systems within a certain period of time, and review and evaluate the results. Based on the circumstances of the case and the results of the review, the People's Procuratorates would determine whether to arrest, prosecute or propose a lighter punishment.

According to a representative case issued by the Supreme People's Procuratorate, the sales team of a company in Shenzhen was investigated for having committed bribery in order to

gain advantage for a transaction. The People's Procuratorate signed a compliance supervision agreement with the company and issued a decision not to prosecute the company's principals. The company subsequently carried out a series of actions to establish and improve compliance systems under the supervision of the People's Procuratorate.

5. Penalties

5.1 Penalties on Conviction

From the perspective of administrative law, where a business operator bribes any other party in violation of the Anti-unfair Competition Law, the supervision and inspection authority shall confiscate its illegal gains, and impose on it a fine of between RMB100,000 and RMB3 million. Where the circumstance is severe, its business licence shall be revoked. Moreover, there is a general article in the Anti-unfair Competition Law stipulating that business operators that have caused damages to others shall be subject to the civil liabilities, but without any further specification of the details. Unlike other jurisdictions such as the United States where the enforcement authorities would implement the civil penalties on the offenders, civil consequences in China are generally resolved through civil disputes where the aggrieved party of the bribery could bring a lawsuit in court or use other alternative dispute-resolution channels.

From the perspective of criminal law, there are ten different crimes regarding commercial bribery stipulated in the Criminal Law, with corresponding criminal penalties for each one. In sum, the consequences of crime include deprivation of liberty and property. For individuals, the consequences include criminal detention or life imprisonment, as well as fines or confiscation of property. Similarly, for crimes committed by an entity, a fine is imposed on the entity itself and criminal detention is imposed on its responsible persons.

5.2 Guidelines Applicable to the Assessment of Penalties

The guidelines to assess criminal liability are mainly based on the provisions of the Criminal Law and relevant judicial interpretations, while, in respect of administrative liability, the assessment guidelines are mainly based on the discretion benchmark for administrative penalties formulated by each province and municipality.

For the same crime, the Criminal Law usually stipulates multiple levels of punishment (with minimum and maximum sentences for each level) according to the gravity of the circumstances – ie, ordinary circumstances, severe circumstances and extremely severe circumstances. Judicial interpretations would provide the details for the level of gravity. To take bribery as an example, the Criminal Law stipulates that anyone who commits the crime of offering bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention, with a fine; if illegal gains are obtained and the circumstances are severe, or severe loss is caused to the interests of the State, he or she shall be sentenced to fixed-term imprisonment ranging from five to ten years and a fine; if the circumstances are extremely severe, or the State has suffered extremely severe loss in its interests, he or she shall be sentenced to fixed-term imprisonment of more than ten years or life imprisonment, a fine, and confiscation of his or her property concurrently. Further, the judicial interpretation provides the determining factors for "severe circumstances" and "extremely severe circumstances", which mainly refer to the amount of the bribes offered.

In addition, the Criminal Law also stipulates the application of heavier or lighter punishment within the limits of the prescribed punishment. For example, the judicial interpretation considers factors such as offering bribes to three or more persons or offering bribes to judicial functionaries to impact judicial decisions as aggravated circumstances, and applies a heavier punishment accordingly. Also, voluntary confession of a crime and adoption of measures actively to reduce the losses caused by the crime would generally be seen as factors for considering a lighter punishment.

As for the administrative punishment, many provinces and cities have formulated their local administrative punishment discretion benchmark within the scope of administrative punishment stipulated by laws and regulations. Taking Shanghai Municipality as an example, at the beginning of 2020, the Shanghai Administration for Market Regulation (AMR) issued the Standards and Factors to Assessing and Determining Administrative Penalty in Market Regulation Enforcement (the "Standards"), which provides practical metrics on how to determine the level of an administrative penalty to an individual and an entity violating the Anti-Unfair Competition Law and other laws that the AMR is responsible for enforcing. The Standards set out three levels of administrative penalty – ie, low, middle, and high. A few factors are taken into account when the AMR evaluates the penalty level, including the number of recipients accepting bribes and the times of that bribery, the duration of illegal acts, the amount of bribery or transaction amount involved, whether such bribery is subject to the risk of causing personal or property damage, and the impact on the whole society.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Early in June 2017, the Shenzhen municipal government published the Shenzhen Standard for Anti-Bribery Management Systems (the "Shenzhen Standard") as a recommended practice. The Shenzhen Standard was drafted based on ISO 37001 Anti-bribery Management Systems, developed by ISO technical committee ISO/TC 309. The recommended elements of an effective corporate compliance programme include due diligence on third parties, financial and operational internal control, standardisation on the gift and entertainment policies, management of business partners, an effective reporting mechanism, a proper investigation process, a crisis-management process, and corrective measures for discovered issues.

In November 2018, the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC), which is the governing authority for all state-owned enterprises in China, released a compliance guidance for all state-owned enterprises governed by the central government. Although the compliance guidance applies primarily to state-owned enterprises governed by the central government, other companies can also use it as a primary reference for establishing sound compliance systems. A wider range of compliance issues are identified as the key focuses, including anti-corruption and bribery, anti-unfair competition and the like. The compliance guidance also outlines specific requirements for policy development, the establishment of risk identification and response systems, audits, accountability, compliance training, compliance assessment and continuous improvement.

Subsequently in August 2022, the SASAC released the Measures for Compliance Management of State-Owned Enterprises Governed by the Central Government which constitutes a compulsory legal regulation. Compared with the aforementioned compliance guidance, it indicates the importance of several aspects, including the enhancement of the leadership of the CPC, adjustment of the organisation and responsibilities regarding compliance management, development of a sound compliance management system, establishment of an overall operating mechanism integrating compliance and legal management, internal control and risk management, etc. It is noteworthy that the promulgation of this regulation could be deemed to be in line with relevant international standards such as ISO 37301:2021 Compliance management systems — Requirements with guidance for use.

The Criminal Law and administrative regulations do not provide specific legal consequences for failure to prevent bribery. Nevertheless, if bribery occurs, it would be subject to corresponding legal liabilities as previously discussed.

6.2 Regulation of Lobbying Activities

This is not applicable in China.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

From the perspective of criminal law, according to the Criminal Procedure Law, any entity or individual, upon discovering the facts of a crime or a criminal suspect, shall have a duty to report the case or provide information to a public security organ, a people's procuratorate or a people's court.

From the perspective of administrative law, there is no explicit requirement for self-disclosing the violations of anti-bribery and anti-corruption provisions. However, if there are administrative or criminal investigations initiated against a listed company, the Securities Law and the Administrative Measures on Information Disclosure by Listed Companies stipulates explicit information-disclosure obligations. In addition, the listed company shall disclose and state the cause, the current status, and the likely effect of the event in a timely manner.

6.4 Protection Afforded to Whistle-Blowers

For the protection of whistle-blowers, some specific rules such as the Rules of the Supreme People's Procuratorate on Protecting the Citizens' Tip-Off Rights were formulated to provide a comprehensive mechanism from both substantial and procedural levels. Enforcement authorities are required to keep confidential the identity of the whistle-blowers throughout the reporting handling process. In addition, the authorities are required to take measures to ensure the safety of the whistle-blower and their close relatives whenever and wherever necessary. Retaliation against the whistle-blowers is entirely prohibited by law, and legal liabilities such as administrative punishment, criminal detention or imprisonment can be imposed.

6.5 Incentives for Whistle-Blowers

On 9 April 2016, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Finance jointly issued the Several Provisions on the Protection and Reward of Whistle-Blowers of Duty-Related Crimes (the "Provisions"), improving the protection and reward system for real-name whistle-blowers of duty-related crimes. According to the Provisions, rewards for whistle-blowers of duty-related crimes shall be granted by the People's Procuratorates. Generally, the amount of reward

for each case shall not exceed RMB200,000; where the informant has made significant contributions, upon approval, a reward of more than RMB200,000 (but not exceeding RMB500,000) may be granted. Where the informant has made particularly significant contributions, upon approval of the Supreme People's Procuratorate, the amount of reward shall not be limited by the aforementioned amount.

On 30 July 2021, the State Administration for Market Regulation and the Ministry of Finance jointly issued the Interim Measures for Rewards for Whistle-blower Reports of Major Violations in the Field of Market Regulation (the "Measures") to improve the system of rewarding whistle-blowing against major violations in the market regulation field. The Measures took effect on 1 December 2021. According to the Measures, rewards for whistle-blowing against major violations in the market regulation field shall be given by market regulatory authorities at all levels. The rewards for whistle-blowing are classified into three grades, based on the facts of the violation, relevant evidence, consistency between the content of the whistle-blowing and the facts, as well as severity of the whistle-blowing matters. Whistle-blowers would to be rewarded with 1%, 3% and 5% of the confiscated fines respectively, depending on the grade. For cases without fines or confiscated funds, the amounts of rewards from Grade I to Grade III shall not be less than RMB5,000, RMB3,000 and RMB1,000 respectively. For any matter reported by employees, the reward criteria may be increased correspondingly. The upper limit of the reward for whistle-blowing for each case is RMB1 million. Compared with the Provisions issued on 9 April 2016, the Measures increases the amounts of rewards for whistle-blowing to encourage the public further actively to report major violations.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

The provisions regarding whistle-blowing can be found in the Constitution, the Criminal Procedure Law, the Anti-unfair Competition Law, the Rules of the Supreme People's Procuratorate on Protecting the Citizens' Tip-Off Rights, and Several Provisions on the Protection and Reward of Whistle-Blowers of Duty-Related Crimes and the Interim Measures for Rewards for Whistle-blower Reports of Major Violations in the Field of Market Regulation.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

There is criminal and administrative enforcement of anti-bribery and anti-corruption in China; civil prosecution of such offences is not applicable in China.

7.2 Enforcement Body

From the perspective of administrative law, offences with respect to bribery and corruption are mainly investigated and penalised by the State Administration for Market Regulation (SAMR). The SAMR was established on 21 March 2018, and merges and undertakes the responsibilities previously held by multiple authorities.

From the perspective of criminal law, illegal acts not involving state functionaries shall be investigated and handled by the Public Security Bureau (PSB) and transferred to the prosecution department of the People's Procuratorate (the "Procuratorate") for prosecution. Criminal cases involving state functionaries were previously investigated and prosecuted by the Procuratorate (of which the anti-corruption division shall be

responsible for investigations, and the prosecution division shall be responsible for prosecution), whilst the authority for criminal investigation has been transitioned to the Supervisory Commission in accordance with the Supervision Law that entered into force on 20 March 2018, with the prosecution duty still being performed by the Procuratorate.

It is worth noting that, for the same misconduct committed by a company, the criminal and administrative regimes are mutually exclusive. The regulatory framework for the conversion between administrative and criminal cases is established by the Regulations on the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Agencies and other relevant regulations. According to these regulations, while investigating an administrative case, if the administrative agency suspects that the case should be prosecuted as a criminal case, based on the required elements, such as the amount involved and the conduct patterns or the consequences, the case must be transferred to a PSB and the PSB will examine the cases transferred. Likewise, if a PSB discovers that a case should not be criminally prosecuted but may be potentially subject to administrative liability, it shall transfer the case to the relevant administrative agency for further investigation and handling.

7.3 Process of Application for Documentation

This is not applicable in China.

7.4 Discretion for Mitigation

Article 67 of the Criminal Law generally encourages self-reporting of criminal activity by stipulating mitigation or even exemption from the criminal penalties under voluntary confession circumstances. Similar principles and approaches may also be found in some other provisions prescribed in the Criminal Law. For example, Article 164 of the Criminal Law provides that any briber who confesses the bribery voluntarily prior to prosecution may be given a mitigated punishment or be exempted from punishment.

For administrative cases, Article 32 of the Administrative Penalty Law provides that any party who eliminates or reduces the harmful consequences of the illegal behaviour, was coerced or tricked by others to commit illegal acts, confesses the illegal behaviour voluntarily, or has performed meritorious service, may be given a mitigated punishment or be exempted from punishment.

7.5 Jurisdictional Reach of the Body/Bodies

Investigation in criminal cases shall be conducted by the PSB, except for a case regarding a crime committed by a state functionary, by taking advantage of his or her functions, and will be investigated by the Supervisory Commission according to the Criminal Law and the Supervision Law.

With respect to the administrative cases, the investigation shall be generally conducted by the Administration for Market Regulation of county level and above. However, for administrative violations involving state functionaries, they shall also be investigated by the Supervisory Commission in accordance with the Supervision Law. Other industrial supervision authorities such as the China Banking and Insurance Supervision and Regulatory Commission are empowered with the investigating powers for specific industries that do not involve state functionaries. Unless the violation is escalated to criminal level upon investigation, it will not involve any further prosecution process.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Over the past few years, as regularly reiterated by China's top leadership, China has had zero tolerance for corruption and bribery, and anti-corruption has been and will be a key area for law enforcement.

The Sixth Plenary Session of the 19th Central Commission for Discipline Inspection reaffirmed the importance of maintaining a strong and persistent crackdown on corruption. The importance of the following actions and sectors was explicitly emphasised: investigating and punishing corruption in infrastructure construction and public resource transactions, continuously promoting corruption governance in the financial sector, deepening anti-corruption efforts in state-owned enterprises, and strengthening special rectification of corruption in areas such as grain purchase and sales. In addition, it was recommended that the implementation of a "blacklist" system for bribe-offerors be explored. The enhancement of international co-operation was also mentioned in this plenary session.

Notably, based on the published criminal judgments from 2013 to 2019, there were more than 3,000 cases against perpetrators in the healthcare industry. In May 2022, the National Health Commission, the Ministry of Industry and Information Technology, the Ministry of Public Security and the other six central government authorities jointly issued the Notice on the Issuance of Work Points for Correcting Unhealthy Practices in the Field of Medical Purchases and Sales and in Medical Services in 2022 (the "Notice"). The Notice clearly proposes to crack down on illegal activities in all aspects of "manufacturing, sales, marketing and use" of medical products. As is reiterated in the Notice, it is imperative to:

- promote the investigation of the offer and acceptance of bribes at the same time;
- make full use of reporting clues;
- timely transfer those clues for the rectification of malpractice found in the work to relevant disciplinary, inspection and supervisory bodies and judicial organs; and
- therefore, accelerate the connection of implementing regulations, disciplines, and laws.

7.7 Level of Sanctions Imposed

From the criminal law perspective, based on the relevant statistics, the average length of a sentence for the crime of offering bribes in the healthcare industry ranges from probation to imprisonment of up to ten years. The average sentence for the crime of offering bribes to non-state functionary ranges from probation to imprisonment of up to three years. For the crime of offering bribery by an entity, the majority of the persons in change would have probation imposed upon them and the minority would be sentenced to criminal detention or imprisonment of up to five years.

From the administrative law perspective, the sanctions imposed on companies in the healthcare industry, for example, have usually included a fine ranging from RMB100,000 to RMB3 million and confiscation of illegal gains. Revocation of a business licence is rarely imposed in practice.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

Each year, the Supreme People's Court and the Supreme People's Procuratorate issue a working report to the National People's Congress, which includes a summary of the number of

anti-corruption cases and focus of their work in the previous year.

According to the publicly available working reports issued throughout the past few years, the general trend of anti-corruption law enforcement has been to maintain a high-handed attitude to punish corruption and accurately to reflect the criminal policy of combining punishment with leniency. In terms of legislation, importance will be attached to the mechanism for the connection between national supervision and criminal justice, and the working mechanism for the commutation, parole and temporary serving of the sentence outside prison for duty-related criminal offenders will be improved, in order to put an end to under-the-table operations. In terms of judicial decisions, punishment of bribery crimes by applying the procedure of confiscation of illegal gains and life imprisonment will be intensified. In addition, attention will be paid to cases involving people's livelihoods, such as embezzlement and land-requisition compensation, subsidies for dilapidated houses and subsidies for agricultural supplies.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

The main legislation efforts that are foreseeable should be reducing inconsistencies among relevant laws and regulations on commercial bribery. For example, before the revision of the Anti-unfair Competition Law in 2018, the Interim Provisions on Prohibition of Commercial Bribery (the "Interim Provisions") was another important legal authority in enforcement actions. However, after the revision in 2018, the Anti-unfair Competition Law now takes a different approach in determining commercial bribery, with conflicting articles against the Interim Provisions. In order to resolve such conflicts in different pieces of legislation, the SAMR has included the revision of the Interim Provisions in the legislative plan in 2019, but this has not yet been promulgated.

In addition, more detailed implementing rules for the Anti-unfair Competition Law, as well as special rules for respective industries, are expected to be formulated by national and local authorities to resolve the issues identified during the enforcement actions.

Notably, the Supreme People's Procuratorate is continuing to promote pilot programmes on corporate compliance reforms, which will help to alleviate the risk of criminal liabilities for a company if it adopts a robust and effective compliance programme. Furthermore, it is expected that such a system would be incorporated into the legislation plan once the pilot programmes have been completed successfully and the related framework takes shape.

Global Law Office dates back to the establishment of the Legal Consultant Office of China Council for the Promotion of International Trade (CCPIT) in 1979, when it became the first Chinese law firm ever approved by the PRC government and has retained the privilege of clients' trust in various areas over four decades. The firm has offices in Shanghai, Beijing, Shenzhen and Chengdu, with 160 partners and over 600 lawyers across China. The firm is experienced in meeting all aspects of public and private enterprises' regulatory compliance needs, including risk assessment, compliance policy, reporting, training and investigation. The firm has resolved dozens of government investigation cases relating to anti-corruption, antitrust, promotion and advertising, insider trading, and food and drug safety by the Chinese authorities, as well as cross-border investigations in multiple jurisdictions.

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Trends and Developments

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Recent Enforcement Trends in PRC Compliance Practice

Several ongoing trends this year that might have a significant impact on companies doing business in China are of particular note in the anti-corruption space. Multinational companies (MNCs) should be cautious regarding adoption of compliance programmes in China, localisation often means much more than simply translating headquarters-issued manuals or codes of conduct; rather, it must be tailored to be cohesive with local laws and customs. A coherent compliance programme should be integral to the business entity from top to bottom and not scattered across multiple departments that may have conflicting interests or procedures.

Penalties for both offering and accepting bribes

Many MNCs have experience with the US Foreign Corrupt Practices Act (FCPA), UK Bribery Act, the French Saipan Act, etc, and formulate their compliance programmes accordingly. However, unlike FCPA enforcement, PRC criminal law targets both the briber and the bribed recipients who may or may not be government officials. Additionally, the PRC Anti-unfair Competition Law includes administrative sanctions on both commercial bribes offered to government officials and private sector bribes or kickback receivers.

Traditionally, PRC law enforcement has practised a policy of being lenient on the offeror of bribes to encourage co-operation in the investigation of bribery crimes involving government officials; however, this may no longer be the case as the focus shifts to prohibiting bribery in its entirety by penalising both the offer and acceptance of bribes.

As highlighted in the Notice by the National Supervisory Commission and the Supreme People's Procuratorate of Issuing Model Cases Involving Crimes of Offering Bribes, published on 31 March 2022, the offering of bribes can be punished by imprisonment, fines, forfeiture of illegal gains, and the suspension of future bidding rights in government procurement programmes.

Non-prosecution pilot programme for corporate compliance

The Supreme People's Procuratorate started a pilot programme for the non-prosecution of corporate compliance matters in 2020 for select cities. After two years of trials, it has recently been announced that the pilot programme shall be scheduled for widespread adoption in China.

The pilot programme offers leniency or non-prosecution of minor offences provided that the companies involved plea for leniency through admission of the offences, along with instituting procedures or programmes that ensure future compliance, such as retaining third-party auditors to supervise the implementation of such programmes. This leniency pilot programme may pave the way for companies that could otherwise find their IPO dreams wrecked by criminal convictions on non-compliance matters.

Mandatory compliance programmes for state-owned enterprises

The State-Owned Assets Supervision and Administration Commission has recently published the Measures for the Compliance Management of Central Enterprises, effective from 1 October 2022. The measures require all central state-owned enterprises to implement compliance programmes that become integral to business management and for general counsels to serve concurrently as chief compliance officers. Following the requirement at the national level, this trend will likely trickle down to local levels, provincial and municipal state-owned enterprises as well as private enterprises have also adopted compliance programmes.

Continuing to combat corruption

After the conclusion of the 20th National Congress of the Chinese Communist Party, the Chinese government reaffirmed its efforts to combat corruption and it has continued to proceed with several high-profile cases such as the arrest of Shanghai's chief prosecutor and the removal of the deputy governor of the People's Bank of China.

The Central Commission for Discipline Inspection (CCDI) of the Chinese Communist Party has released rules for permanently integrating CCDI investigators in government agencies in June. Multiple provinces and municipalities have responded that they will fully co-operate with CCDI investigations and will actively conduct retrospective reviews of previous officials, going back up to 30 years.

Tighter US export control policies and possible PRC countermeasures

The Bureau of Industry and Security (BIS) announced new measures to tighten export control on advanced computing and semiconductor manufacturing in China. Perhaps the most shocking change is the prohibition of US persons supporting such commercial projects. Currently, it is unclear how the BIS intends to implement such permit programmes for US personnel already working in China.

Major US semiconductor equipment manufacturers have significant business interests in China; however, they have suspended equipment support operations in China following the BIS announcement on October 7, 2022. Their stock prices have fallen significantly since. Some US semiconductor manufacturers have responded by creating specific products for the PRC market by lowering technical specifications.

It is also unclear how China will respond. Previously, China has promulgated data protection laws and the Anti-Foreign Sanctions Law which may create extra challenges for multinational corporations operating in China and attempting to ensure compliance in both countries. For example, if a PRC entity wishes to comply with BIS on-site audit requests to be removed from the Unverified List, it may find itself pitted against the Data Security Law and other national security concerns raised by various PRC government agencies. Trying to navigate through these legal minefields between multiple competing jurisdictions or authorities would likely require local expertise working together with the impacted entity.

In sum, compliance is becoming a more important area, not just for MNCs doing business in China, but also for Chinese companies, whether or not they are state-owned. Becoming more transparent and cleaner in the business arena will reduce corruption and unfair business practices and so safeguard a fair competition environment.

Han Kun Law Offices is a leading full-service law firm in China. Over the years, Han Kun has been widely recognised as a leader in complex cross-border and domestic transactions. Han Kun's practice areas include private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, antitrust/competition, banking and finance, aviation finance, foreign direct investment, compliance, data protection, private client/wealth management, intellectual property and dispute resolution. Han Kun has more than 700 professionals located in six offices in Beijing, Shanghai, Shenzhen, Haikou, Wuhan and Hong Kong. The firm's lawyers are graduates of top universities and have extensive experience in complex cross-border transactions and dispute resolution as counsel to both Chinese and foreign clients.

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COLOMBIA

Law and Practice

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Contents

1. Legal Framework for Offences

1.1 International Conventions

Colombia has endorsed the following anti-corruption conventions:

- the United Nations Convention against Corruption – UNODC;
- Inter-American Convention Against Corruption;
- OECD Anti-Bribery Convention.

1.2 National Legislation

The national legislation anti-corruption is mainly found in Law 1474 of 2014 (the "Anti-Corruption Statute"). In this Statute there are measures of a criminal, contractual and administrative nature and from public policy intended to fight this deplorable phenomenon. Regarding offences related to corruption, this Law amends or adds provisions to the Criminal Code (Law 599 of 2000): therefore, all criminal conduct, including that referred to, can be consulted in the Code.

Law 1778 of 2016 established rules on the administrative accountability of legal persons for acts of corruption. The Law enables Superintendency of Corporations in order to investigate and administratively sanction these offences.

Finally, Law 2195 of 2022 was established whereby action was taken with regard to transparency, prevention and the fight against corruption; and other provisions are established where administrative, criminal and public policy are implemented to complement the Anti-Corruption Statute.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The United Nations Office on Drugs and Crime and the Office of the Attorney General drafted an investigative guide for the offences related to corruption. The document sets out the context of the corruption phenomenon and several investigative and procedural instruments were developed to assist the attorney in prosecuting these offences. It is worth stating that the guide is not a standard, and it is not legally binding for the investigation and prosecution of this type of offences.

On the other hand, precedent of the Supreme Court of Justice – Criminal Appellate Division grants valuable tools for the interpretation of the different criminal definitions. For example, the Court has established that for offences against public administration, interpretation should be made from the civil service perspective and its relationship with the offence and not from the "formal" quality that the active subject (individual or public official) may hold.

1.4 Recent Key Amendments to National Legislation

As indicated in **1.2 National Legislation,** the Law 2195 of 2022 was issued. This Law intends to implement provisions for preventing corruption through strengthening in the structuring and coordination of public institutions, promoting the legality culture and creating effective regulatory mechanisms for reparation for damages caused by acts of corruption.

2. Classification and Constituent Elements

2.1 Bribery

In Colombia there are four types of bribery.

- Active bribery: public official prosecuted for accepting or receiving any bribe in return for

delaying or omitting an activity in their position.
- Passive bribery: public official prosecuted for accepting or receiving any bribe in return for making an activity in their position.
- Bribery by giving or offering: the individual is prosecuted for offering money to a public official for delaying, omitting or making an activity in their position.
- Tacit bribery: the individual is prosecuted for bribing a public official on an issue of interest to the individual; the public official who accepts the bribe is prosecuted.

Article 20 of the criminal law establishes that public officials are "members of public corporation, employees and State workers and their decentralised territorial entities and by services, for these purposes the public officials are members of public force, individuals that exercise public functions permanently or temporarily, officers and workers of Banco de la República, the members of the National Citizens Commission for the Fight against Corruption".

Every particular case should involve analysis of whether the public functions of the active individual are related to the bribe purpose. It should be considered whether the bribe offered has the potential of corrupting the public official.

Finally, it should be indicated that Article 433 of the criminal law prosecutes the transactional bribe.

2.2 Influence-Peddling

Articles 411 and 411-A of the criminal law prosecutes influence-peddling. The first provision is directed against a public official who uses the influence derived from their position or tasks to obtain benefits from a public official for their benefit or for a third party. The second prosecutes individuals who influence a public official in order to obtain economic benefits. In the latter case, this means that if the individual seeks non-economic benefits, the conduct is not punishable.

Influence-peddling by foreign public officials is not considered as criminal in Colombia. Nevertheless, those acts can be administratively prosecuted by the Superintendency of Corporations under Law 1778 of 2016.

2.3 Financial Record-Keeping

Document forgery is established in Section III of Header IX Criminal Code. Depending on the entity's nature, the forgery can be public or private. Using forged documents to obtain an administrative or legal decision is a procedural violation.

2.4 Public Officials

Section I of Header XV Criminal Code sets out the different modes of embezzlement.

- Embezzlement by appropriation: consists in the public official, by virtue of their role, seizing government or individual property entrusted for management or possession.
- Embezzlement by usage: consists in the public official improperly using government or individual property given to them by virtue of their role.
- Embezzlement by different official application: this mode occurs when the public official uses government or individual property given to them by virtue of their role for a different use than established.
- Culpable embezzlement: consists in the public official by negligence allowing loss and damage on government or individual property entrusted to them by virtue of their role.

2.5 Intermediaries

Commission of an offence can occur through an intermediary. The perpetrator is considered as anyone who uses a third party as an instrument for the commission of an offence, provided that at least one of the following three conditions occurs:

- the person used as an instrument should act under error;
- the person used as an instrument is immune from prosecution; or
- an organised power apparatus was used.

In addition, the actual perpetrator is criminally accountable for coercing the perpetrator as well as those who help to commit the offence, no matter if they are not a public official.

3. Scope

3.1 Limitation Period

The statutory limitation is estimated in accordance with the maximum sentence for the offence. The limitation starts from the date the events occurred. Where the defendant is a public official, the limitation will be increased by half; the limitation will not exceed 20 years.

It should be mentioned that if a charge is allocated, the limitation is suspended and will be counted by half. When judgment is established and an appeal for cassation is filed, the limitation will be suspended for five years.

3.2 Geographical Reach of Applicable Legislation

The Colombian criminal law governs nationwide. However, it can govern abroad in the following circumstances.

- There are offences against national security and the existence of the state, against the constitutional system, against the social economic order, or of national currency counterfeiting, terrorism financing, and resources management for terrorism, even if there were acquittal or conviction abroad of a sentence more minor than established in Colombian Law.
- The person serving the Colombian State has immunity acknowledged by international law and commits an offence abroad.
- The person serving the Colombian State does not have immunity and has not been judged abroad for that offence.
- The citizen, in either of the situations mentioned above, is in Colombia after committing an offence abroad, when Colombian criminal law has convicted them with a term of imprisonment whose minimum is not less than two years and they have not been judged abroad.

3.3 Corporate Liability

In Colombia there is no criminal accountability for a legal person, but that does not mean there are no consequences. Article 91 of Law 906 of 2004 (Criminal Procedure Code) establishes suspension and liquidation of the legal person when used for punishable acts.

4. Defences and Exceptions

4.1 Defences

Defences for this type of offence depend on the circumstances of the case. Usually, what is sought is to discredit the materiality of the conduct, in other words, prove that the defendant acted according to law. Another defence is to distort the defendant's deceit by establishing that the offender did not have knowledge about the offence: for instance, the offender did not

know that the public funds were lost. An individual with public tasks might have a viable defence by proving that their official tasks are not linked with the alleged offence.

4.2 Exceptions

As indicated above, there are no specific defences for this type of offences, as they depend on the circumstances of the case. To this effect, it depends on the factual framework and the evidence obtained in order to discredit the defences. Nevertheless, there are no legal constraints for not having a defence.

4.3 De Minimis Exceptions

Colombian criminal law has the principle of detriment as limit; therefore, the criminal law is not relevant when there is no real damage or real danger to the public administration. This can be seen when a public official appropriates property of little value. For instance:

- taking stationery items;
- breaking a good of little value through minimal negligence and the public official fixes it; or
- accepting a socially acceptable gift which has no potential to corrupt (a candy, a coffee, a pencil, etc).

4.4 Exempt Sectors/Industries

There is no industry exempt from committing this type of offences.

4.5 Safe Harbour or Amnesty Programme

Law 906 of 2004 has the legal concept of discretionary principle, which can be applied in the following cases:

- when the defendant until before starting the trial commits to serve as witness against the other defendants, under total or partial immunity; and
- when the perpetrator or participant in bribery makes the relevant denunciation which acts as the origin of the criminal investigation, providing useful evidence for the trial and serving as witness, as long as they voluntarily and comprehensively repair the damage caused.

5. Penalties

5.1 Penalties on Conviction

Penalties are established in the criminal code. For this type of offences, the penalties are mainly prison and a fine.

For bribery by appropriation, the penalties vary between 64 and 540 months of imprisonment and a fine up to 50.000 statutory monthly minimum wage depending on the amount. In case of bribery, the penalties are from 48 to 144 months of imprisonment and a fine from 66.66 to 150 statutory monthly minimum wage depending on modality.

5.2 Guidelines Applicable to the Assessment of Penalties

The penalties for all offences have a scope for mobility. The Criminal Code establishes some guidelines based on proportionality, reasonableness, damage caused, severity of deceit or guilt for establishing a fair penalty. In accordance with Law 2197 of 2022, guidelines establish the penalty if the defendant has been convicted of a fraudulent offence within the previous 60 months.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Law 1778 of 2016 establishes that the Superintendency of Corporations has liability for promoting the implementation of transparency and business ethics programmes that include mechanisms and standards for internal audits and the prevention of transnational bribery.

Through external circular letter, the Superintendency of Corporations issued a "Guide oriented on implementing compliance programmes for preventing offences established in Article 2 of Law 1778 of 2016". It established:

- liability of implementing compliance programmes based on:
  - (a) identification and segmentation of risks;
  - (b) risks measurement;
  - (c) development of policies in accordance with risks;
  - (d) policies assessment; and
  - (e) upgrading of policies;
- implementation of reporting channels;
- personnel training;
- protection for employees who decide not to participate in any transnational bribery offence; and
- assignment of specific liabilities to employees exposed to transnational bribery.

The infringement of those liabilities in no way constitutes an offence. However, a company can be subjected to financial penalties by the Superintendency of Corporations. If an offence of transnational bribery is committed and the company's directors know about the situation and do not report it, they will be accountable for favouring which has a penalty ranging from 16 to 72 months of imprisonment.

6.2 Regulation of Lobbying Activities

Lobbying activities are not specially regulated by domestic law. However, when doing these activities, the crime regulations should be observed in order to avoiding committing the offences of influence-peddling or bribery.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Article 67 of the Criminal Procedure Code establishes the liability of reporting, meaning every person should report to the authorities about any known offences that should be investigated.

6.4 Protection Afforded to Whistle-Blowers

Constitutional Article 250 establishes the liability of the Attorney for protecting victims and witnesses. The Criminal Procedure Code allows for the imposition of preventive custody when there is risk to the victim or witnesses. Decree 63 of 2007 established the witness protection law in criminal prosecution. This allows implementation of the following measures:

- restraining of the risks;
- temporary or permanent relocation of the witness inside or outside the country;
- change of identity;
- modification of physical features; and
- other necessary measures for protecting their life, as well as physical, psychological, and working safety.

6.5 Incentives for Whistle-Blowers

As a general rule, there are no incentives for whistle-blowers in cases of bribery or corruption, excepting when there are rewards programmes from authorities for prosecution of criminal offences.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

The relevant provisions for making reports of irregularities are established in the Criminal Procedure Code and Criminal Code.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Enforcement is implemented administratively and criminally:

- in criminal jurisdiction through criminal prosecutions established in Law 600 of 2000, and 906 of 2004; and
- administratively, laws are applied under administrative, disciplinary and fiscal responsibility.

7.2 Enforcement Body

The enforcement bodies are as follows.

- Attorney General's Office: entity in charge of investigating and prosecuting the commission of offences.
- General Procurator of the Nation: investigates, prosecutes and disciplines public officials.
- Comptroller General of the Republic: in charge of carrying out fiscal accountability proceedings.
- Superintendency of Corporations: carries out inspections and monitors companies that should implement compliance programmes for the prevention of transnational bribery.
- General Auditing Office: in charge of surveillance of fiscal management.

7.3 Process of Application for Documentation

Every entity has investigation powers for fulfilling their constitutional and legal liabilities. If necessary, they can impose requirements on companies for collecting information/documentation, verification, and questioning, among other activities.

7.4 Discretion for Mitigation

Every entity has the option of offering incentives for those who report, compensate, and serve as witness, in order to solve corruption offences. These incentives might be reduction of the penalty until partial or total immunity from prosecution.

7.5 Jurisdictional Reach of the Body/Bodies

The Attorney General's Office is an authority belonging to the judicial branch. However, it cannot make substantive decisions regarding criminal liability, as this is within the jurisdiction of criminal judges. The other entities have an administrative nature.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

The current jurisprudence relevant to corruption offences is from 25 May 2022 under file number 54153. In this proceeding a local attorney from Tumaco (Nariño) was investigated for committing bribery and breach of public duty. According to the judgment, the attorney received money for: (i) granting release to people captured for influence-peddling, (ii) accusing defendants of a lesser offence, and (iii) giving a money seizure. The court established that the reception of bribes can be proven through evidence; when analysing the convergence of the indicated offences, it could be inferred that the public official received bribes.

Recently, a former congressman was convicted for bribing a judge of the Supreme Court of Justice and sentenced to 72 months of imprisonment. For the same acts a former judge bribed was convicted and sentenced to 116 months and 12 days of imprisonment and a fine of 94.48 statutory monthly minimum wage.

7.7 Level of Sanctions Imposed

As indicated in earlier sections, criminal accountability is exclusive to natural persons without limiting reference to Article 91 of the Criminal Procedure Code that establishes suspension of legal persons used for committing an offence. The penalty for this type of offence for natural persons is a term of imprisonment, with no possibility of penal alternatives. The offences have penalties of up to 50,000 statutory monthly minimum wage. In any case, if the criminal behaviour affects national assets, the defendant will be subject to permanent disqualification from exercising public tasks or obtaining state contracts.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

In 2020, the OECD carried out a report named "Exporting Corruption" where Colombia's situation was assessed regarding the fight against corruption. In that assessment, although there was recognition of progress in inter-institutional co-operation and the efforts of the Attorney General's Office for securing convictions for these offences, the truth is that the assessment was not positive. The OECD found weaknesses in the completeness of the information as there are no databases with figures regarding transnational bribery; the court and administrative rulings are issued too late; there are no public records of the final recipients, effective or real, of the company, despite being established by Law 2010 of 2019.

Combining the above findings, the report makes some suggestions:

- improvement of information systems;
- improvement of issuing time for court and administrative rulings;
- establishing legislation for improving the protection of natural and legal persons that report acts of corruption; and
- increasing public discussion about the criminal accountability of legal persons.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

It is likely that there will be changes to the anti-corruption legislation. Unfortunately, this criminal phenomenon is the one that has affected the Colombian community the most; acts of corruption exposed by the media cause uneasiness in public opinion. The Colombian legislative culture is characterised by using criminal law to fight acts of criminality, usually with more repressive measures. Therefore, it is likely that new criminal definitions will be established or benefits might be limited for this type of offences.

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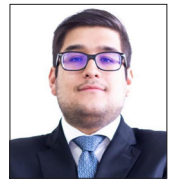

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Trends and Developments

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The Eternal Fight Against Corruption in Colombia

Corruption is a globalised phenomenon from which Colombia does not escape, and which has forced the design of strategies, internal as well as of adoption of international instruments, aimed at controlling this scourge that crosses national borders.

Corruption is a phenomenon of perception, as are most criminal phenomena; the ease of access to the media today makes this phenomenon more strident and generates a social and moral sanction that requires the State to adopt more efficient mitigation and control measures to demonstrate a forceful fight against corruption.

The different forms of corruption have required the adoption of efficient systems to combat them and, above all, to prevent normalisation within society. A range of binding constitutional values for both individuals and public servants, such as the principles of administrative function, constitute the basis in Colombia's legal system for the adoption of sanctioning regimes, whether administrative or criminal, without, on some occasions, one excluding the other.

This breadth in the concept of corruption means a breadth of actors, sectors and behaviours that in their entirety make up corruption. This implies the adoption of measures, whether legislative, administrative, international instruments or conventional control. These measures result in the fulfilment of state tasks, either as an actor (public corruption) or as a guard of the national economy, protecting free competition and autonomy of will.

The structure of the Colombian State as set forth in the Political Constitution denotes a state founded on values that advocate human dignity, solidarity, equality "within a legal, democratic and participatory framework that guarantees a just political, economic and social order..."; this means that all actions of public servants as instruments to fulfil state purposes and individuals as a people subject to a series of imperative and dispositive mandates, are aimed at the transparency of behaviour in pursuit of the common good.

Colombia has assumed a series of international commitments through agreements, monitoring mechanisms and follow-up on commitments. This denotes its commitment as an international actor in the fight against corruption. We have the United Nations Convention against Corruption – UNCAC, the Inter-American Convention Against Corruption, the OECD Anti-Bribery Convention and its Recommendation to Strengthen the Fight Against Corruption of Foreign Public Officials in International Business Transactions, among other instruments.

Within this normative framework, both constitutional and of international instruments, in compliance with the principle of conventionality, Colombia has adopted a series of legislative measures to address this phenomenon, whether through the creation of entities, laws, or criminal, administrative and fiscal sanctions, which for several years have been strengthened.

In Colombia there is no definition of corruption in any of the laws that can be taken as a reference to understand what behaviours can be considered as conduct constituting corruption. While many of these laws refer to conduct that constitutes corruption, there is no clarity on its definition. We can find elements common to the concept of public and private corruption:

From an extensive review of literature, it was concluded that among the essential elements of corruption there are at least: (i) the abuse or misuse of entrusted power, which can be public or private; and (ii) private benefit or gain, which may be personal or for a third party, and which does not necessarily have to be monetary. On the contrary, there is still no unanimity in relation to the need for: (i) the existence of interaction between a public and a private actor; and (ii) direct damage to the general interest being generated or not. In any case, the current trend is to gradually reduce the elements of the essence of the concept, in order to achieve a dynamic conception of the phenomenon of corruption, which takes into account the great capacity for mutation of the forms in which corruption takes shape. (Newman Pont, Vivian and Ángel Arango, and María Paula, *On corruption in Colombia: conceptual framework, diagnosis and policy proposals* (2017).

The phenomenon of corruption is of long standing in Colombia, from its foundation as a Republic to the present. The constitutional designs and legislation based on these constitutions are intended, more in public than in private, to control abusive behaviours implying deviation from the pursuit of the general interest. In the evolution of the Colombian State, from a state of law to a social and democratic state of law, with a marked pluralist and participatory approach, it seeks to generate transparency in the actions of the public function and the participation of citizens in the construction of public policies and in the daily work of the administration. Its tools include the right of petition, popular actions, citizen oversight, the principles of administrative function such as administrative morality, government programmes, development plans, and the planned execution of public resources. As normative aspects of the Political Constitution: the system of checks and balances of the branches of public power, the control bodies that no longer depend on the executive power, administrative decentralisation, the popular election of leaders of territorial entities, among others. In short, the human being as the first and last reason for the action of the state.

At the level of rules, Colombia has the Disciplinary Code and the Code of Fiscal Responsibility, the first sanctioning the behaviour of public servants in accordance with their functional duty, and the Code of Fiscal Responsibility intended for the protection of public resources by public servants. These two Codes are part of the ius puniendiof the state and are closely linked to the fight against corruption. Likewise, we have the Code of Extinction of Ownership, which is an in rem action that pursues the property of people who have enriched themselves through the commission of crimes, whether they have used the property for the execution of the crimes, or they have acquired it with money from such criminal conduct, or for compensation due to the impossibility of pursuing the aforementioned property.

However, the most serious sanctions adopted are those defined in the Criminal Code, which as ultima ratioimplies the greatest interference in the fundamental rights of the human being, such as freedom. Although there is no protected legal right in the Colombian Criminal Code called "corruption *",* we do find crimes that have, in a

direct manner, the objective of combating corruption, such as those provided for in crimes against public administration.

Among these we find the crimes of Proper Bribery, Improper Bribery, Illicit Enrichment, Prevarication by Action, Prevarication by Omission, Embezzlement by Appropriation, and crimes related to state contracting, such as Undue Interest in the Conclusion of Contracts and Contract Without the Fulfilment of Legal Requirements, and Influence-Peddling, among others.

Additionally, in the execution of sentences of public servants and intervening parties convicted of crimes against public administration, the laws have hardened the access to benefits and pre-agreements, such as house imprisonment or conditional suspension of sentence, to the point of denying them for these crimes. Likewise, administrative sanctions such as the permanent inability to contract with the state. The principle of negative general prevention of punishment applies.

Since these crimes are related to the functional duty of public servants, statutes have been legally created, such as those for public procurement, processing of urban planning licences, and the Organic Statute of the Public Budget, to mention a few, which regulate the procedure that public servants must follow in order to reduce the discretion of their actions, constituting a limitation on the exorbitant power of the state.

Mention must also be made of the construction of public ethics derived from Article 209 of the Constitution, for which an Internal Management Control system was created, aimed at creating and strengthening the issue of morality and ethics as the basis of the public servant's actions, making compatible two concepts that were traditionally considered separate: morality and law.

As for Private Corruption, this concept has been developed in recent times because the concept of corruption had formerly been associated only with public administration. In this way, the fight against corruption has been extended to the private sphere, either by association with public servants or between private persons.

Article 333 of the Political Constitution enshrines the freedom of economic activity and of private initiative "within the limits of the common good". For this purpose, free competition is a right. In this sense, rules have been developed to prevent abuses of dominant position in the market or to prevent the entry of new competitors.

The Constitutional framework for the economic activity of private persons has allowed the development of a series of instruments to punish, either administratively or criminally, conduct that violates the legal system. The Criminal Code, which has not made progress in criminalising the conduct of legal persons, has adopted measures to punish the administrators of legal persons involved in the commission of crimes. Based on the doctrine of acting for another, Article 29 of the Criminal Code allows the prosecution of members of representative bodies authorised in accordance with the corporate by-laws.

Law 2195 of 2022, "By means of which measures are adopted in matters of transparency, prevention and fight against corruption", was recently issued, adopting administrative sanctioning measures against legal persons, including branches of foreign companies, in three events, for crimes committed directly or indirectly: conviction or firm principle of opportunity for crimes against public administration, the environment,

the economic and social order; financing of terrorism and organised crime groups; administration of resources related to terrorist and organised crime activities; private corruption; unfair administration, among others.

As already mentioned, the penalties provided for in the Criminal Code for legal persons are applicable when the crimes have been committed by members of the management bodies. It is understood that the provisions of this law apply when the indicated crimes are committed by such employees, that is, by those who have decision-making capacity within the companies.

The second event proceeds when the legal person benefits directly or indirectly from the commission of the crime for a conduct committed by its administrators or officials. In this event, the base of employees who can engage the administrative liability of the legal entity is broadened.

The third event is generated when the company tolerated the commission of the conduct by action or omission in the application of its risk controls, that is, the self-management system of prevention of the risk of asset laundering, prevention of terrorism and other behaviours. The principle of due diligence must be applied.

These sanctions are intended to prevent legal persons from being used as an instrument or front for the commission of crimes. Having legislation where only natural persons are responsible for criminal behaviour, it is necessary to move towards criminalisation of the conduct deployed by legal persons, which undoubtedly generates serious dogmatic problems that countries such as Spain have already overcome; but such provisions are still not incorporated in Colombian legislation. That is why sanctions on legal persons are regulated in the administrative sanctioning law, since although guarantees of ius puniendi are applied, they are more flexible in administrative sanctioning law than in criminal law.

In the year 2011, the so-called Anti-Corruption Statute, Law 1474, was issued, introducing a series of administrative and judicial measures to prevent and punish corrupt acts. These measures are both administrative and criminal. Notably, this law creates crimes such as Private Corruption, Unfair Administration, and Use of Privileged Information, among others. These three crimes have in common that they occur in the corporate sphere.

Private corruption arises for giving or offering to *managers, administrators, employees or advisers of a company, association or foundation a gift or any unjustified benefit to favour the person or a third party, to the detriment of the company, association of foundation*. The same penalty applies to the employee, adviser, manager or administrator who has the initiative of requesting the gift or benefit.

With this crime, the crime of Bribery is transferred to the private context and its purpose is to prevent the employees of a company from deploying a conduct that violates the interests of the company and to have them behave in accordance with the role that corresponds to them, that is, to strive, in contracting processes or negotiations of any kind, to obtain benefits and profits for the company. Therefore (i) that a gift or benefit is sought, and (ii) that damage is caused to the company, are defined as normative elements of the crime.

The crime of Unfair Administration is also intended to protect companies. Loyalty and due diligence of employees of any level in the management of the business are sought. The

difficulty of the crime consists in that the action (incurring obligations or disposing fraudulently) is established on property of the company but the assessable damage is on the equity of the partners. It is forgotten in the definition of the conduct that to damage the property of the partners, the company property must be damaged, without this damage being part of the crime and, therefore, of the criminal sanction, so that an improper administration that only damages the company equity does not generate a sanction.

To conclude the three crimes mentioned, we have the crime of Use of Privileged Information, that is, confidential information that has been known by the employee in the exercise of the employee's role within the company. This crime does not require damage to the company equity. Such information must be used, but the use must also be improper. This crime includes the use of information by those persons who work with shares, securities or instruments registered in the National Securities Registry.

The configuration of these crimes demonstrates the progress of the state in combating corruption on all fronts, in both the public and the private, at the level of natural persons as well as in the corporate sphere. This means that the phenomenon of corruption is shaping the way of legislating and the need to establish new forms of unlawful acts, whether administrative or criminal, to avert this form of delinquency.

Finally, it is important to highlight the crime of transnational bribery, a conduct that is established as a criminal offence as well as an administrative offence. In our legal system, it was criminalised in Article 433 of the Criminal Code in order to punish bribery of international public servants. This is a product of the globalisation of the economy given the opening of borders, technological advances, science and telecommunications, which have modified international trade and the relationships derived from it, with the consequent transnationalisation of crime. Economic growth led to the need to create supranational crimes to protect legal assets of interest to criminal law.

This implies developing mechanisms of cooperation between states and jointly signing international instruments to sanction this type of conduct, but it will always depend on the will of the states, the sanctions to be imposed and the constitutionally established form of the state. It must be noted that the sentences handed down abroad for this crime do not have the force of res judicata in Colombia, so that investigations may be carried out for these same facts.

Likewise, through Law 1778 of 2016, administrative liability rules were issued against legal persons for transnational bribery. This includes sanctions against parent companies for actions of their affiliates and, similarly, affiliates are sanctioned for acts of their parent companies. It must be noted that this action is autonomous and independent and does not depend on the results of other proceedings.

Colombia has adopted a series of measures at the international level and in domestic law to prevent and combat acts of corruption, in the public and private spheres, by acts of natural or legal persons. It can be considered that the measures adopted are insufficient in the face of the increasing acts of corruption, which are made visible by the ease of access to the media, but the outlined measures that have been adopted correspond to a constitutional and domestic order architecture based on human dignity and the common interest that are affected by

all these behaviours diverted to benefit in a particular way the active subjects of the behaviours.

There are many sectors in which corruption is present and that have forced the adoption of combating measures. Although not mentioned in the article, it does not mean that instruments have not been adopted to attack corruption. As indicated, the advance of acts of corruption has modified the legal assets that the state must protect, and therefore legislation and the legal system must be creative in generating controls and measures that may be adapted to the continuous changes in interpersonal and commercial relationships.

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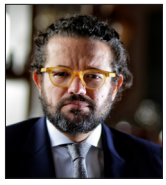

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FRANCE

Law and Practice

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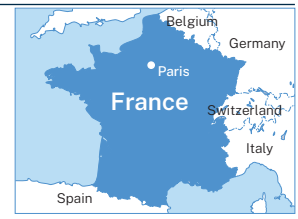

Contents

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1. Legal Framework for Offences

1.1 International Conventions

France has ratified a number of international treaties relating to bribery and corruption, including the following key agreements:

- the EU Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (signed by France on 26 May 1997, approved by Law No 99-423 of 27 May 1999 and ratified on 4 August 2000);
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed by France on 17 December 1997, approved by Law No 99-424 of 27 May 1999 and ratified on 31 July 2000);
- the Council of Europe Criminal Law Convention on Corruption of 27 January 1999 (signed by France on 9 September 1999, approved by Law No 2005-104 of 11 February 2005 and ratified on 25 April 2008);
- the Council of Europe Civil Law Convention on Corruption of 4 November 1999 (signed by France on 26 November 1999, approved by Law No 2005-103 of 11 February 2005 and ratified on 25 April 2008);
- the Additional Protocol to the Criminal Law Convention on Corruption (signed by France on 15 May 2003, approved by Law No 2007-1154 of 1 August 2007 and ratified on 25 April 2008); and
- the United Nations Convention Against Corruption of 31 October 2003 (signed by France on 9 December 2003, approved by Law No 2005-743 of 4 July 2005 and ratified on 11 July 2005).

1.2 National Legislation

The main national legal provisions relating to anti-bribery and anti-corruption are enshrined in the Penal Code and the Code of Criminal Procedure.

Law No 2016-1691 (the "Sapin II Law") was signed on 9 December 2016 and entered into force on 11 December 2016 in respect of most of its provisions. The Sapin II Law strove to make further progress in the fight against corruption by:

- introducing a new duty to prevent bribery or influence-peddling in France or abroad for chairs, chief executives and managers of large private and public companies in the form of setting up a comprehensive compliance programme;
- creating the French Anti-corruption Agency (*Agence Française Anticorruption*, or AFA) to monitor the quality and efficiency of compliance measures implemented within the companies and public entities concerned;
- introducing the offence of influence-peddling of foreign public officials, along with a new ancillary penalty consisting of a compliance programme (*programme de mise en conformité*);
- extending French judges' jurisdiction over acts of bribery and influence-peddling committed abroad;
- introducing a new ADR mechanism known as a "judicial public interest agreement" (*convention judiciaire d'intérêt public*, or CJIP) for legal entities suspected of acts of bribery, influence-peddling, or laundering of tax fraud proceeds (extended to tax fraud in 2018 and to environmental offences in 2020 by Law No 2020-1672); and
- strengthening the protection of whistle-blowers – this was further reinforced by Law No

2022-401 aimed at improving the protection of whistle-blowers.

Law No 2020-1672 relating to the European Public Prosecutor's Office, environmental justice and specialised criminal justice was signed on 24 December 2020, entered into force on 26 December 2020, and provided for the following.

- The implementation of the European Public Prosecutor's Office (EPPO), which is responsible for investigating, prosecuting and bringing to justice the perpetrators of – and accomplices to – criminal offences affecting the financial interests of the EU, which are provided for in Directive (EU) 2017/1371 and include:
  (a) misappropriation of EU funds;
  (b) active and passive bribery;
  (c) transnational VAT fraud when at least two EU member states are involved and more than EUR10 million are at stake;
  (d) customs offences and related money laundering.
- The abolition of the requirement for legal entities to acknowledge facts and criminal qualification upon reaching a judicial public interest agreement at the end of the judicial investigation. The removal of such a requirement, which only existed within the framework of a judicial investigation, fully asserts the autonomy of the CJIP procedure in relation to that of the "appearance on prior admission of guilt" procedure (*comparution sur reconnaissance préalable de culpabilité*, or CRPC).

More recently, Law No 2021-1729 of 22 December 2021 for confidence in the judicial institution regulated the time limits for preliminary investigations, which are now limited to two years for ordinary cases. A one-year extension can be authorised by the Public Prosecutor. Nonetheless, these time limits may be suspended, especially in the event of a request for international judicial assistance.

Under the same law, in the event of a police search of a law firm, legal privilege is not enforceable against investigative measures concerning tax fraud, influence-peddling, corruption and laundering if the documents shared by the lawyer or their client were used for the purpose of committing (or facilitating the commission of) the aforementioned offences.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

On 26 June 2019, the AFA and the National Financial Prosecutor's Office released the first joint guidelines on the application of CJIPs, with the aim of encouraging legal entities to adopt such a co-operative approach towards the French authorities.

In its first decision (rendered on 4 July 2019), the Enforcement Committee of the AFA confirmed that AFA recommendations are not legally binding – even though public institutions and companies are encouraged to follow them.

On 12 January 2021, the AFA published new recommendations, which are based on three inseparable pillars:

- the commitment of the management body to preventing corruption;
- the use of risk-mapping to acknowledge the risks of corruption to which the company is exposed through a risk map; and
- the internal management of such risks through the measures implemented by the Sapin II Law.

On 7 March 2022, the AFA and the National Financial Prosecutor's Office jointly released a practical guide to anti-corruption internal investigations, which aims to contribute to:

- the effectiveness of an internal alert within companies and institutions; and
- the quality of their compliance programmes as a whole.

In April 2022, the AFA published a guide that addressed anti-corruption accounting controls, which should be established by deepening or complementing existing accounting controls in order to target risk scenarios highlighted in the risk map.

In July 2022, ahead of France hosting the 2023 Rugby World Cup and the 2024 Olympic Games, the AFA and the Ministry for Sports released two joint guides aimed at helping sports federations and the Ministry of Sport to prevent and detect probity offences during the organisation of competitions or the conduct of public policies promoting sport.

The AFA released a guide entitled *Public Officials: The Risks Of Breaches Of Probity Concerning Gifts And Invitations* on 15 September 2022 to help public officials identify the risk scenarios to which they may be exposed when accepting hospitality and define a set of appropriate rules to protect themselves against such.

1.4 Recent Key Amendments to National Legislation

The EPPO commenced its activities on 1 June 2021. The supranational prosecutor's office operates on two levels.

- The central level, located in Luxembourg, comprises the European Chief Prosecutor and a college of 22 European Prosecutors. The French European Prosecutor is Frédéric Baab.
- The decentralised level is made up of European Delegated Prosecutors (EDPs), who are located in each of the participating EU countries and in charge of investigating, prosecuting and bringing to judgment cases where the financial interests of the EU are at stake. Among the 82 EDPs appointed, four have been appointed in France (namely Emmanuel Chirat, Mona Popescu Boulin, Cécile Soriano and Savid Touvet). Law No 2020-1672 dated 24 December 2020 created an unprecedented procedural framework in France, mixing investigations (*enquête*) and judicial inquiry (*instruction*). The four EDPs carry out the duties of the Public Prosecutor, in addition to those of the advocates general at the court of appeal.

Indeed, the EDP replaces the investigating judge (*juge d'instruction*), who is no longer involved. The EDP takes the judge's place in making the necessary decisions regarding indictment (*mise en examen*), interviews and confrontations, hearing of witnesses, admissibility of civil claims and hearing of the plaintiff (*recevabilité de la constitution de partie civile et audition de la partie civile*), transport, letters rogatory (*commission rogatoire*), forensic investigations, judicial supervision (*contrôle judiciaire*), search warrants and summons.

However, the power to place under house arrest (*assignation à résidence*) or to issue arrest warrants (*mandats d'arrêt*) is assigned to the custody judge (*juge des libertés et de la détention*), who also retains jurisdiction over pre-trial custody.

At the end of the inquiry, the EDP will decide on the direction of the case and issue an order – in much the same way as an investigation judge – under the supervision of a Permanent Chamber, which consists of the Chief Prosecutor and two European Prosecutors. In accordance with the decision taken by the Permanent Chamber, the EDP can close the case, bring the case before the Criminal Court of Paris, or propose alternative measures to prosecution.

2. Classification and Constituent Elements

2.1 Bribery

Under French criminal law, the prosecution of bribery revolves around the status of the person bribed so that a specific offence exists for each type of person. The French legislator has criminalised bribery of domestic public officials (Articles 433-1 and 432-11 of the Penal Code), bribery of domestic judicial staff (Article 434-9 of the Penal Code), bribery of domestic private individuals (Articles 445-1 and 445-2 of the Penal Code), bribery of foreign or international public officials (Articles 435-1 and 435-3 of the Penal Code) and bribery of foreign or international judicial staff (Articles 435-7 and 435-9 of the Penal Code).

A bribe can be defined as any offer, promise, donation, gift or reward unlawfully offered or requested that will induce or reward the performance or the non-performance by a person of an act pertaining to their position.

The scope of bribery is extensive under French law, covering all kinds of advantages irrespective of their magnitude. In a decision handed down in 2018 (Paris Court of Appeal, 10 April 2018, No 16/11182), the Paris Court of Appeal instituted the "bundle of indicators" method (*méthode du faisceau d'indices*) to determine the existence of a bribe. The following indicators were therefore considered relevant in a case involving three litigious consultancy contracts:

- the absence or inadequacy of precise and conclusive documents;
- the inadequacy of the consultant's material and human resources in relation to the importance of the work claimed;
- the percentage-based remuneration; and
- the unjustified obtaining of the contract by the consultant's client.

The same Court of Appeal specified that the bundle of indicators identified in this decision is not exhaustive and that the court may consider other elements in order to determine whether a bribe took place (Paris Court of Appeal, 15 September 2020, No 19/09058).

In each situation, a distinction is made between active bribery and passive bribery, which allows for the separate prosecution of the bribe-giver and the bribe-taker.

Active bribery is the act of:

- unlawfully offering advantages directly or indirectly to a public official, judicial official or private individual for the benefit of that person (or a third party) in order to induce them to perform or refrain from performing – or because they have performed or refrained from performing – any act pertaining to their position, duties, mandate or activities (or facilitated thereby); or
- accepting the proposal of a person who unlawfully requests – directly or indirectly at any time – any such advantages in exchange for these acts.

In contrast, passive bribery is the act whereby a public official, judicial official or private individual unlawfully requests or accepts advantages on their own or a third party's behalf either directly or indirectly in order to perform or refrain from performing – or because that person has performed or refrained from performing – any act pertaining to their position, duties, mandate or activities (or facilitated thereby). The mere receipt of a bribe thus constitutes an offence in itself.

Bribery is also punishable when it only involves private parties.

The scope of French anti-bribery law encompasses all managers, employees, volunteers and learned professionals, regardless of the entity to which those persons are attached (be it an individual, legal entity, or grouping without legal personality).

2.2 Influence-Peddling

influence-peddling (*trafic d'influence*) is an offence that occurs when any private person or official, who has real or apparent influence on the decision-making of an authority, exchanges this influence for an undue advantage (ie, an offer, promise, donation, gift or reward). The French legislator has criminalised active and passive influence-peddling where the decision-maker is:

- a domestic authority or public administration (Article 433-2 of the Penal Code);
- a domestic judicial official (Article 434-9-1 of the Penal Code);
- public official from a public international organisation (Articles 435-4 and 435-2 of the Penal Code);
- a judicial official from an international court (Articles 435-8 and 435-10 of the Penal Code); or
- following the Sapin II Law, a public official from a foreign state (Articles 435-4 and 435-2 of the Penal Code).

Furthermore, the Penal Code provides for specific offences if the influence-peddler is a public official and the decision-maker is a domestic authority or public administration (Articles 433-1 and 432-11-2° of the Penal Code).

2.3 Financial Record-Keeping

In practice, corruption may lead to accounting stratagems that involve using false invoices in order to conceal the benefits obtained or paid in financial statements. Therefore, it is also an offence for the chair, directors, members of the executive or supervisory board, de jure or de facto managers to publish or provide the shareholders with annual accounts that do not accurately reflect the company's results. Individuals may incur a prison term of up to five years and a fine of up to EUR375,000 and additional penalties (Article L.241-3-3° and Article L.242-6-2° of the Commercial Code), whereas legal entities may incur a fine of up to EUR1.876 million.

2.4 Public Officials

The following behaviours by public officials may constitute criminal offences under French anti-corruption law:

- embezzlement of public funds (*concussion*) (Article 432-10 of the Penal Code);
- unlawful taking of interests (*prise illégale d'intérêts*) (Article 432-12 of the Penal Code);
- misappropriation of public funds (*détournement de fonds publics*) (Article 432-15 of the Penal Code); and
- favouritism (*favoritisme*) (Article 432-14 of the Penal Code).

Following the High Authority for Transparency in Public Life (HATVP)'s proposal, the definition of the offence of unlawful taking of interests was modified by Law No 2021-1729, as follows: "*The act, by a person in charge of public authority or entrusted with a public service mission or by a person invested with a public elective mandate, of taking, receiving or keeping, directly or indirectly, an interest likely to compromise their impartiality, independence or objectivity in a company or in a transaction for which they have, at the time of the act, in whole or in part, the responsibility of ensuring the supervision, administration, liquidation or payment.*"

Therefore, in order to warrant prosecution, the interest in question must be "likely to compromise their impartiality, independence or objectivity", whereas the previous law referred to "any interest" (Article 432-12 of the Penal Code).

2.5 Intermediaries

Prosecution may concern parties (other than the bribe-giver and the bribe-taker) who were involved to varying degrees in committing the offence. Specifically, under French criminal law, an individual or legal entity who knowingly – by providing aid or assistance – facilitates the preparation or commission of an offence, or induces through any advantage or gives instructions to commit an offence, is considered to be an accomplice to that offence and is subject to the same penalties as the principal perpetrator of the offence (Articles 121-6 and 121-7 of the Penal Code).

Furthermore, individuals and legal entities that engage in the concealment (Articles 321-1 and 321-12 of the Penal Code) or the laundering (Articles 324-1 and 324-9 of the Penal Code) of corruption offences may also be prosecuted.

3. Scope

3.1 Limitation Period

As of 1 March 2017, the limitation period for corruption offences was increased from three years to six years after the date the offence was committed (Article 8 of the Code of Criminal Procedure).

In addition, to enable prosecution, the starting point of the limitation period for secret (*occultes*) and concealed (*dissimulées*) offences has been delayed to the date on which they were or could have been discovered (Article 9-1 of the Code of Criminal Procedure). Nonetheless, in any event, prosecution against offences such as bribery would be time-barred 12 years after the date on which the offence was committed.

3.2 Geographical Reach of Applicable Legislation

As a general rule, the perpetrator of an offence can be subject to criminal prosecution in France when:

- the offence or any of its constituent elements is committed in French territory;
- the victim is French;
- the perpetrator is French and a similar offence exists in the country in which it is committed; or
- jurisdiction is granted to French courts by an international convention to which France is a party.

With regard to bribery and influence-peddling, the third condition was considerably softened by the Sapin II Law. The dual criminality requirement (Article 113-6 of the Penal Code) was abolished. Since the entry into force of the Sapin II Law, any French person who has committed bribery – whether as a bribe-taker and/or a bribe-giver

– or influence-peddling outside French territory can now be prosecuted in France in all circumstances. Moreover, French courts still have jurisdiction over an indicted foreigner who did not commit any unlawful act in French territory, as long as their acts had inextricable links with acts committed by other indicted persons in France (Court of Cassation, Criminal Chamber, 20 September 2016, No 16-84.026).

In addition, application by French courts of the principle of non bis in idem regarding countries outside the EU differs according to the basis of their jurisdiction.

- In the case of extraterritorial jurisdiction, this principle applies to foreign decisions and agreements that have become final (Article 113-9 of the Code of Criminal Procedure).
- In the case of territorial jurisdiction, the French Court of Cassation rejects the application of the non bis in idem principle to foreign decisions and agreements.

The principle of non bis in idem may be invoked in intra-EU relations, regardless of the territorial or extraterritorial basis of French jurisdiction.

Whenever one of the constituent elements of the corruption offence has been committed in France, French courts have jurisdiction (Court of Cassation, Criminal Chamber, 17 January 2018, No 16-86.491; Court of Cassation, Criminal Chamber, 14 March 2018, No 16-82.117; Paris Court of Appeal, 15 May 2020, No 18/03310).

3.3 Corporate Liability

Legal entities may also be criminally liable for all criminal offences, including corruption offences, provided that the offences are committed on their behalf by their corporate bodies or representatives (Article 121-2 of the Penal Code). Public Prosecutors must first establish the material existence of the offence committed by an individual and then demonstrate that the perpetrator was a body or representative of the legal entity.

However, the liability of legal entities does not preclude individuals from also being liable if they are perpetrators of or accomplices to an offence. Prosecution against an individual occurs independently of any prosecution that may be initiated against the legal entity.

There is also a risk of civil liability under Article 1240 and/or Article 1242 paragraph 5 of the Civil Code in the event of a sentence for corruption.

A compensation claim may be carried out by:

- any person who has suffered damage resulting from corruption (eg, a competitor of the offending company); or
- approved anti-corruption associations, such as Transparency International France, Anticor and Sherpa (so far), which are entitled to act as a civil party in any criminal proceedings relating to corruption (Article 2-23 of the Code of Criminal Procedure).

Legal entities may be required to pay compensation even in the event that a CJIP is reached.

In the event of a merger by absorption, the French Court of Cassation has ruled for the first time that the acquiring company can be criminally liable for an offence committed by the organs or representatives of the absorbed company prior to the merger (Court of Cassation, Criminal Chamber, 25 November 2020, No 18-86.955). This new interpretation, in line with ECJ case law, is applicable to:

- mergers concluded as of 25 November 2020; or
- mergers concluded at any date if their objective was expressly to avoid the absorbed company's criminal liability (French Court of Cassation, 13 April 2022, No 21-80.653).

4. Defences and Exceptions

4.1 Defences

The French anti-corruption law does not provide for any specific defences.

Nevertheless, per Article 132-59 of the Penal Code, the perpetrator may be exempted from penalties, provided that:

- their social rehabilitation has been established;
- the damage caused by the offence has been remedied; and
- the disturbance arisen from the offence has ceased.

The judge has full discretion in granting any such exemption.

4.2 Exceptions

As explained in **4.1 Defences**, the French anti-corruption law does not provide for any specific defences.

4.3 De Minimis Exceptions

Conviction for corruption is possible even where the amounts at stake are small. However, this may be viewed as a mitigating factor when the court determines the quantum of the penalty to be imposed.

4.4 Exempt Sectors/Industries

In France, no sector is excluded from the scope of corruption law.

4.5 Safe Harbour or Amnesty Programme

Co-operation with Investigators

Under French law, perpetrators of offences who co-operate with investigators and prosecutors are not entitled to special treatment. However, the court may consider the co-operation of the accused person during the investigation and throughout the proceedings – and, in the case of legal entities, the adoption of compliance measures – to be mitigating factors in determining the quantum of the penalty to be imposed.

Self-Reporting

The Sapin II Law introduced the opportunity for perpetrators of, or accomplices to, the bribery of public officials or judicial staff to have their penalties reduced by half if – by informing the administrative or judicial authorities – they made it possible to put a stop to the offence or identify any other perpetrators or accomplices (Articles 432-11-1, 433-2-1, 434-9-2, 435-6-1 and 435-11-1 of the Penal Code). This does not apply in cases of private bribery.

Leniency

French anti-corruption law does not provide for any leniency measures, apart from the aforementioned self-reporting regime. However, the court is free to adjust the penalty by taking various factors into account.

Admission of Guilt

French law does not yet have an equivalent to the US process of plea-bargaining. However, Law No 2011-1862 of 13 December 2011 extended the scope of the CRPC to corruption offences. Under this procedure, the Public Prosecutor's Office is entitled to offer directly and

without a trial – either on its own initiative or at the request of the accused (or their lawyer) – one or more penalties to a natural or legal person who acknowledges the acts of which they are accused (Article 495-7 of the Code of Criminal Procedure).

If the accused accepts the sanction(s) proposed, such sanction(s) still have to be approved by the presiding judge of the High Court. (For an example of a recent case where the CRPC was not approved, see **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**.) The court judgment is deemed a conviction.

On 17 May 2022, the Criminal Chamber of the Court of Cassation confirmed the decision of the President of the Paris High Court to declare inadmissible the second homologation request submitted by the Public Prosecutor's Office following the President's refusal to approve the penalty proposed by the Public Prosecutor (French Court of Cassation, 17 May 2022, No 21-86.131). In this case, three months after the President refused, the Public Prosecutor had referred a new penalty proposal to the President, which the latter declared inadmissible. The Public Prosecutor's Office then appealed to the Court of Cassation, which stated that the prosecuting authorities are unable to submit a new request for approval following the first refusal to approve a CRPC and must refer the case to an investigating judge or directly to a court.

Settlement

According to the circular issued by the French Department of Justice on 2 June 2020, the opportunity to enter into a CJIP depends on the following factors:

- the legal entity's lack of criminal record;
- the voluntary disclosure of the facts by the legal entity;
- the degree of co-operation with the judicial authority demonstrated by the managers of the legal entity (particularly with regard to enabling the identification of the persons involved in the act of corruption in question).

For legal entities, the main benefit of the CJIP is the absence of any acknowledgement of guilt, which also means the absence of any mention in the judicial record (contrary to the CRPC procedure). Another advantage is protection from the risk of exclusion from public procurement procedures – a risk to which they would be exposed in the event of conviction by a court for bribery of domestic or foreign public officials (Article 131-39 of the Penal Code and Article L.2141-1 of the Code of Public Procurement).

Under this procedure, the Public Prosecutor and the investigating magistrate are entitled to initiate a settlement before the initiation of prosecution or before the end of the investigation respectively (Article 180-2 of the Code of Criminal Procedure). (This must be at the request of, or in agreement with, the Public Prosecutor in the latter case.)

The accused legal entity is then offered the chance to enter into an agreement containing the obligation(s) to:

- set up a compliance programme for a maximum of three years under the supervision of the AFA;
- compensate any identified victims in an amount and following modalities determined in the convention; and/or
- pay a public interest fine that is:

(a) proportionate to the advantages gained from the offences;
(b) limited to 30% of the annual average turnover (calculated on the basis of the last three turnovers available); and
(c) presented with the option to spread the penalty over a maximum period of one year.

During a subsequent validation hearing, the judge decides whether to validate the proposed agreement. Once validated, the legal entity has ten days to withdraw from the agreement. Following Law No 2020-1672 dated 24 December 2020, each CJIP shall be published on the Ministry for Justice and Ministry for Economy's websites. The AFA relays these publications on its website for conventions dealing with corruption.

5. Penalties

5.1 Penalties on Conviction

Individuals who commit the offences of active bribery and passive bribery of domestic public officials and judicial staff may be imprisoned for a term of up to ten years, as well as ordered to pay a fine of up to EUR1 million. The fine may be increased to double the proceeds generated by the offence (Articles 433-1-1°, 432-11-1°, 434-9 of the Penal Code). From 20 September 2019, individuals face a fine up of up to EUR2 million if they commit such offences:

- in an organised gang; and
- with an impact on the revenue collected or the expenditure incurred by any EU office or institution.

Ancillary penalties may also be imposed, such as prohibitions from:

- holding public office;
- engaging in the professional or social activity – during the performance of which, or in connection with the performance of which, the offence was committed – for a period of up to five years;
- directing, administering, managing or controlling a company in any capacity, permanently or for a period of up to 15 years.

Additionally, publication of the judgment may be ordered and the item that was (intended to be) used to commit the offence – or any item that is a proceed of the offence – may be confiscated (Articles 433-22, 433-23, 432-17, 434-44 of the Penal Code).

Legal entities are liable for a fine of EUR5 million, which may be increased to double the proceeds generated by the offence, and ancillary penalties (Articles 433-25 and 434-47 of the Penal Code).

Bribery of domestic judicial staff for the benefit or to the detriment of a person who is the subject of criminal prosecution is punishable by a 15-year term of imprisonment (Article 434-9 of the Penal Code).

Bribery of Foreign Officials

Active or passive bribery of foreign public officials or international judicial staff is punishable by penalties that are similar to the ones provided for bribery of domestic officials (Articles 435-3, 435-1, 435-14 and 435-15, 435-9, 435-7 and 435-15 of the Penal Code).

Bribery of Private Individuals

Active and passive bribery of private individuals by other individuals is punishable by a five-year term of imprisonment and a fine of EUR500,000, which may be increased to double the proceeds generated by the offence (Articles 445-1 and

445-2 of the Penal Code), as well as ancillary penalties (Article 445-3 of the Penal Code). Legal entities are liable for a fine of EUR2.5 million, which may be increased to double the proceeds generated by the offence, as well as ancillary penalties (Article 445-4 of the Penal Code).

Influence-Peddling

Penalties similar to bribery are provided for influence-peddling (Articles 433-2, 434-9-1, 434-9-1, 435-4, 435-2, 435-8 and 435-10 of the Penal Code).

Unlawful Taking of Interests

Unlawful taking of interests remains punishable by a five-year term of imprisonment and a fine of EUR500,000, which may be increased to double the proceeds generated by the offence (Article 432-12 of the Penal Code).

Repeated Offences

In the event of a repeated offence, the maximum penalties incurred are doubled. As regards individuals, this applies when:

- the perpetrator of acts of corruption punishable by a ten-year prison term has been convicted in the past for a felony or any misdemeanour punishable by a ten-year prison term and fewer than ten years have elapsed between the expiry or prescription date of the first penalty and the date on which the new offence was committed (Article 132-9, Section 9 of the Penal Code);
- the perpetrator of acts of corruption punishable by a term of imprisonment of more than one year and less than ten years has been convicted in the past for a felony or any misdemeanour punishable by a ten-year prison term and fewer than five years have elapsed between the expiry or prescription date of the first penalty and the date on which the new offence was committed (Article 132-9 §2 of the Penal Code); and
- the perpetrator of acts of corruption has been convicted in the past for the same corruption offence and fewer than five years have elapsed between the expiry or prescription date of the first penalty and the date on which the offence was repeated (Article 132-10 of the Penal Code).

Similar provisions apply to legal entities that have been convicted for a felony or misdemeanour prior to committing acts of bribery (Articles 132-13 and 132-14 of the Penal Code).

Public Interest Fines in the Event of a Judicial Public Interest Agreement

The amount of the public interest fine may be increased in the event of bribery of public officials or when the company has:

- already been convicted of bribery;
- used its resources to conceal acts of corruption; or
- committed repeated and systematic acts of bribery.

However, the amount of the public interest fine may be reduced if the company has:

- spontaneously disclosed acts of corruption before the opening of an investigation and within a reasonable time;
- co-operated extensively with the Public Prosecutor;
- carried out internal investigations; or
- implemented corrective measures.

5.2 Guidelines Applicable to the Assessment of Penalties

The discretion of judges to determine penalties is one of the fundamental principles of French

criminal law. The judge therefore has full discretion to choose whichever penalties they deem appropriate from those applicable to the offence and to determine their quantum. There are no minimum sentences, with the only restriction being the maximum prescribed by law.

In all cases, however, the judge must explain the grounds for their decision if they impose a prison sentence that is not suspended and do not allow for adjustments to the penalty.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Article 17 of the Sapin II Law requires the implementation of a corruption prevention plan for:

- chairpersons, general managers and company managers;
- members of the management boards of public limited companies; and
- chairpersons and general managers of public industrial and commercial establishments that either:
  (a) employ at least 500 employees; or
  (b) belong to a group with a registered head office in France and a turnover (or consolidated turnover) in excess of EUR100 million.

Persons subject to this obligation must therefore take measures under the supervision of the AFA to prevent and detect the commission – in France or abroad – of acts of corruption or influence-peddling by:

- adopting a code of conduct, in which the behaviour to be prohibited is described, and integrating such code into the internal regulations;
- implementing an internal alert system;
- establishing a risk map detailing possible external solicitations, according to the sector and geographical areas;
- implementing a procedure for evaluating customers, first-tier suppliers and intermediaries;
- carrying out internal or external accounting controls;
- providing training to the most exposed managers and staff;
- introducing disciplinary sanctions; and
- establishing a system for internal monitoring and evaluation of the measures taken.

The legislator has empowered the AFA to assess the quality and effectiveness of the preventive measures. In the event of non-compliance, its enforcement committee has the authority to impose graduated sanctions (ranging from warnings to fines of up to EUR200,000 for individuals and EUR1 million for legal entities) and injunction procedures to bring internal procedures into line – irrespective of whether any finding of a criminal offence in relation to acts of corruption or influence-peddling is communicated to the Public Prosecutor.

6.2 Regulation of Lobbying Activities

Article 25 of the Sapin II Law sets out the legal regime applicable to lobbying activities in France. The objectives were to identify individuals and companies which should be considered as lobbyists and to provide a framework for their intervention by imposing ethical obligations and sanctions on them.

According to the HATVP's guide published in June 2022, three cumulative conditions are necessary to be qualified as a lobbyist.

- Being:
  - (a) a legal entity (private law entity, public establishment) whose director, employees or members carry out a lobbying activity; or
  - (b) an individual who professionally carries out a lobbying activity on an individual basis.
- Carrying out a lobbying activity as:
  - (a) a main activity – ie, more than half of an individual's time over six months; or
  - (b) a regular activity – ie, at least ten communications over the last 12 months.
- Taking the initiative to contact a public official to influence a public decision.

Companies and individuals meeting the above-mentioned conditions must register with a dedicated digital register.

Since 1 July 2022, the scope of this registration obligation has been extended at the HATVP's initiative to lobbyists involved with other public officials holding certain local executive functions (such as presidents of regional or departmental councils, mayors of municipalities with more than 100,000 inhabitants and directors of hospitals).

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

In the public sector, Article 40 of the Code of Criminal Procedure requires all public officials and civil servants who – in the course of performing their duties – become aware of a felony or misdemeanour to inform the Public Prosecutor's Office and provide it with all relevant information. In 2020, the AFA notified three cases involving acts of bribery, embezzlement of public funds, favouritism or unlawful taking of interests to the National Financial Prosecutor's Office and the Prosecutor's Office in Bordeaux and Basse-Terre after they were revealed during controls.

Per Article L.561-2 12° of the Monetary and Financial Code, public officials and civil servants are also required to report to Tracfin (the agency responsible for dealing with illegal financial circuits) all transactions involving sums that they know or suspect – or have good reason to suspect – either:

- originate from an offence punishable by a prison sentence of more than one year; or
- contribute to financing terrorism.

In the private sector, statutory auditors are required – under criminal penalties (Article L.820-7 of the Commercial Code) – to report any criminal acts of which they become aware to the Public Prosecutor.

6.4 Protection Afforded to Whistle-Blowers

Since the Sapin II Law, under certain conditions whistle-blowers benefit from immunity against retaliatory measures by their employer (Article L.1132-3-3, Section 2 of the Employment Code) and against criminal prosecution for breach of secrecy (Article 122-9 of the Penal Code).

Law No 2022-401 of 21 March 2022 aimed at strengthening the protection of whistle-blowers entered into force on 1 September 2022. It corrected some of the limitations of the protection system introduced by the Sapin II Law that were highlighted in a report of July 2021 (see **8.1 Assessment of the Applicable Enforced Legislation**).

Broadening the Definition of a Whistle-Blower

Firstly, this law modified the definition provided for in the Sapin II Law, as follows:

" *An individual who reveals or discloses, without direct financial compensation and in good faith, information relating to:*

- *a crime or misdemeanour;*
- *a threat or harm to the general interest;*
- *a breach or an attempt to conceal a breach of:*
  (a) *an international commitment properly ratified or approved by France;*
  (b) *a unilateral act issued by an international organisation on this basis; or*
  (c) *EU law or a national law or regulation*".

The definition of a whistle-blower was made more flexible as it is no longer necessary for whistle-blowers to act in a "*disinterested manner*" (which was an ambiguous notion, particularly in cases of conflict between the whistle-blower and their employer); instead, they must act without "direct financial compensation". Moreover, in a professional context, the whistle-blower is no longer required to have personal knowledge of the facts subject to their report.

Revamping the Reporting Process

Secondly, Law No 2022-401 revamped the reporting process. A whistle-blower is no longer compelled to report within organisation as a priority. Instead, they may choose to report either internally to the supervisor, the employer or any designated adviser or externally to an administrative, judicial or professional authority (Article 8, II of the Sapin II Law).

The report would only be directly made public if:

- no appropriate action has been taken within:
  (a) three months of making an external alert (regardless of whether it was preceded by an internal alert); or
  (b) six months of reporting the alert to the judicial authority or to a European or national institution);
- there is an imminent and serious danger;
- referring the matter to one of the competent authorities would put the whistle-blower at risk of reprisals or would not allow the subject of the disclosure to be effectively remedied, owing to the particular circumstances of the case – in particular, if evidence may be concealed or destroyed or if the whistle-blower has serious grounds for believing that the authority may have a conflict of interest or be in collusion with the reporter of the facts or implicated in those facts (Article 8, III of the Sapin II Law).

Strengthening Whistle-Blower Protection

Thirdly, in order to facilitate reports, Law No 2022-401 improved whistle-blowers' protection by extending the list of prohibited retaliation measures – for example, intimidation and damage to reputation, especially on social media networks (Article 10-1, III of the Sapin II Law).

The non-liability of whistle-blowers due to their report was also extended. They cannot be held liable for any damage caused by their good faith report. Nor can they be held criminally liable for intercepting or removing confidential documents that contain information to which they had lawful access (Article 10-1 of the Sapin II Law).

The maximum fine that may be imposed on plaintiffs for abusive or dilatory complaints was increased from EUR30,000 to EUR60,000 (Article 13 of the Sapin II Law).

On 3 October 2022, France issued Decree No 2022-1284 governing procedures for collecting and processing whistle-blowers' reports. This provides guidance on the application of Law No 2022-401 to those entities – ie, companies with

more than 50 employees, municipalities with more than 10,000 inhabitants, and state administrations – that are under an obligation to set up appropriate alert management procedures to escalate reports from members of the personnel or external staff (Article 8 of the Sapin II Law).

The above-mentioned entities shall set up a channel for receiving alerts, which allows any person to send an alert in writing or orally. The channel permits the transmission of any element – whatever its form or medium – that is likely to support the alert.

The procedure provides that the author of the alert must be informed in writing of the receipt of the alert within seven working days.

The entity shall also inform the author of the alert in writing of the measures envisaged or taken to assess the accuracy of the allegations and, where appropriate, to remedy the subject matter of the alert, as well as the reasons for such measures. The author of the alert must be informed of these measures within a reasonable period of time – ie, not more than three months after the acknowledgement of receipt of the alert or, in the absence of such acknowledgement, within three months of the expiry of a period of seven working days following the alert.

The author of the alert will be informed in writing of the closure of the file.

The channel must guarantee the impartial handling of the report and ensure the confidentiality of the information collected, particularly with regard to the whistle-blower's identity. In this respect, Article 9 of the Sapin II Law seeks to guarantee the strict anonymity of the whistle-blower and the information provided throughout the reporting process. The unlawful disclosure of such information is punishable by two years' imprisonment and a EUR30,000 fine.

Decree No 2022-1284 also provides for a list of the public authorities that shall establish such a procedure, depending on the field concerned. Each authority shall review its procedure at least every three years, taking into account its experience and that of other competent authorities.

The AFA is responsible for dealing with reports of corruption acts.

6.5 Incentives for Whistle-Blowers

The protective measures against dismissal, obstruction, identity disclosure and criminal prosecution for breach of secrecy listed in **6.4 Protection Afforded to Whistle-Blowers** can be viewed as sufficient incentives to report misdemeanours. Other incentives, such as financial rewards, do not apply – except in the field of tax fraud.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

The main national legal provisions relating to whistle-blowing are enshrined in the Penal Code (Article 122-9) and the Employment Code (Article L.1132-3-3, Section 2).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

See **1. Legal Framework for Offences**.

7.2 Enforcement Body

In French criminal law, the powers to prosecute and convict perpetrators of acts of corruption belong to judicial authorities and are not granted to administrative bodies.

The Public Prosecutor's Office is empowered to decide whether it is appropriate to institute proceedings, although civil claimants may also initiate prosecution.

On 1 February 2014, a National Financial Prosecutor was created to specialise in economic and financial matters and, more specifically, in corruption and tax fraud matters.

Cases investigated and prosecuted by the National Financial Prosecutor are brought to an investigating magistrate in Paris for deeper investigation and/or directly to the dedicated Criminal Chamber of the Paris High Court (32nd Chamber) for trial.

Aside from those specific powers, prosecutors at eight inter-regional specialised courts are also granted expanded territorial jurisdiction over a certain number of economic and financial offences, including some corruption offences, in highly complex matters. After carrying out a pre-trial investigation, the prosecutor may bring the case to an investigating magistrate from the same inter-regional specialised court for deeper investigation and/or directly to a specialised criminal chamber of this court for trial.

The various prosecutorial bodies are assisted by a specialised investigative service, the Central Office for the Fight Against Corruption and Financial and Tax Offences (*Office Central de Lutte contre la Corruption et les Infractions Financières et Fiscales*, or OCLCIFF), which was created in 2013.

A number of administrative bodies have also been created to deal with tasks that may relate to corruption issues. An Agency for the Management and Recovery of Seized and Confiscated Assets in Criminal Matters (*Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués en Matière Pénale*, or AGRASC) was created by Law No 2010-768 of 9 July 2010. The AGRASC's duties include recovering assets seized in criminal proceedings and conducting pre-judgment sales of confiscated assets when they are no longer needed as evidence or if they may lose value (2,453 goods were sold in 2021, representing EUR13.2 million). Tracfin is the sole centre for collecting suspicions reported by the professions regulated by the AML measures. It receives all reports concerning suspected acts of corruption.

As mentioned in **6.1 National Legislation and Duties to Prevent Corruption**, the AFA is entitled to inform the Public Prosecutor about any act of corruption of which it might become aware (Article 3, Section 6 of the Sapin II Law). In addition, it monitors the proper implementation of the new ancillary penalty that can be imposed by judges on legal entities under Article 131-39-2 of the Penal Code (ie, setting up a compliance programme).

For the execution of their tasks, AFA agents are entitled to request the communication of any professional document (in any format) or any information held by the entity controlled. They can verify on the spot the accuracy of the provided information and interview any person who might be helpful. Any obstruction may be punished by a fine of EUR30,000 (Article 4 of the Sapin II Law).

In 2021, the AFA carried out 34 new controls, comprising six "enforcement controls" – including one "compliance programme" control during the execution of a CJIP signed on 9 February 2021 between a French major multinational transport and logistics company and the Nation-

al Financial Prosecutor's Office – and 28 "own-initiative" controls.

Born from the observation of an unmet need for co-operation with anti-corruption authorities at the operational level, the AFA – together with the Italian National Anti-corruption Authority (ANAC) and the Serbian Anti-corruption Agency – launched an international network of corruption-prevention authorities known as the NCPA Network. Their initiative aims to provide an international operational platform for the exchange of technical information and the sharing of good practices. In December 2021, the ANAC released a study entitled *Using Innovative Tools and Technologies to Prevent and Detect Corruption*, which contains contributions from NCPA members and brings together practical examples of best practice in the use of information and communication technologies for the prevention of corruption.

Following the European Colloquium on Ethics and Transparency, which was organised in Paris on 9 June 2022 by the HATVP in the context of the French Presidency of the Council of the European Union, 11 public ethics authorities from EU member states adopted a joint declaration and created the European Public Ethics Network. Its members intend to adopt a founding charter in the coming months and plan to meet in autumn 2022 to discuss the issue of mobility between the public and private sectors.

7.3 Process of Application for Documentation

Requests for information from the Public Prosecutor or a police officer can be sent to the holder of relevant information "by any means" (Articles 60-1 and 77-1-1 of the Code of Criminal Procedure).

Pursuant to Decree No 2017-329 of 14 March 2017, AFA-empowered agents are provided with an authorisation card when they carry out on-the-spot checks, which can only take place in business premises (excluding the private person's home) and during working hours. The representative of the entity must be informed that they can be assisted by the person of their choice.

7.4 Discretion for Mitigation

The Public Prosecutor is free to initiate prosecution against a person suspected of an offence, pursuant to the principle of discretionary prosecution (Article 40 of the Code of Criminal Procedure) and in light of the criminal policy defined by the Ministry for Justice and the General Prosecutor (Article 39-1 of the Code of Criminal Procedure). In any given matter, the Public Prosecutor can discretionarily decide whether to:

- initiate prosecution by summoning the accused person directly before a criminal court or by asking an investigating magistrate to carry out deeper investigations;
- implement alternatives to prosecution (such as a CRPC or a judicial public interest agreement); or
- drop the case (Article 40-1 of the Code of Criminal Procedure).

7.5 Jurisdictional Reach of the Body/Bodies

See **7.4 Discretion for Mitigation**.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

In a decision handed down on 1 March 2021 by the 32nd Chamber of the Paris High Court, a former French President, his lawyer and a former magistrate were convicted of bribery of judicial staff and influence-peddling. In this

case, investigations focused on the conclusion of a bribery pact: it was alleged by the Financial National Prosecutor that the magistrate had given information on a procedure pending before the Criminal Chamber of the Court of Cassation in exchange for a position at the Monaco Council of State.

The court found evidence of a bribery pact in the "body of serious, precise and concordant indicators resulting from the very close ties of friendship between the protagonists, business relations reinforcing these ties, common interests tending towards the same goal – namely, the obtaining of a decision favourable to the interests of the former French President – and telephone taps demonstrating the acts carried out and the compensation offered".

The three defendants were sentenced to three years' imprisonment (two of which were suspended). The former French President and his lawyer appealed this decision (Paris High Court, 1 May 2021, No 14056000872).

In a decision handed down on 21 January 2022 by the 32nd Chamber of the Paris High Court, four individuals belonging to the same former French President's inner circle were convicted of favouritism, misappropriation of public funds, complicity and concealment of these offences. This judgment followed an investigation into the alleged irregularity of public contracts agreed between the Presidency of the French Republic and several polling firms in violation of the rules of the Public Procurement Code. Although four out of six defendants were convicted in this case, the former French President was never involved as he remained covered by presidential immunity as guaranteed in the French Constitution. However, he was summoned to appear as a witness during a hearing, where he refused to answer questions of the Paris High Court's President.

On 7 September 2022, the President of the French Rugby Federation was charged before the 32nd Chamber of the Paris High Court with the offences of passive bribery and influence-peddling. He was accused of using his influence to ensure the awarding of a jersey sponsor contract for the French national team to his co-defendant (the owner of Montpellier Hérault Rugby Club) and obtain a reduction in the sanctions initially imposed by the National Rugby League Disciplinary Committee against Montpellier in exchange for, notably, an image contract between his company and that of his co-defendant.

The Public Prosecutor requested that both defendants be punished by a three-year term of imprisonment (including one non-suspended year) and fines amounting to EUR50,000 and EUR200,000 against the French Rugby Federation President and his co-defendant respectively.

On 13 December 2022, the Paris High Court sentenced the President of the French Rugby Federation (who announced that he would appeal the decision) to two years' suspended imprisonment and his co-defendant to eighteen months' suspended imprisonment.

On 8 November 2022, three former inmates of the Fresnes prison went on trial before the Créteil High Court for bribery of a public official (the former prison director, who was prosecuted for passive bribery). They were accused of having obtained, in exchange for money, services to improve their ordinary prison life – for example, no searches, daily showers, freedom of movement, and benevolence in the event of disciplinary problems. The director admitted to accept-

ing EUR5,000 offered by one of the defendants in exchange for information on his case and a guarantee that everything would be fine were he to be re-incarcerated. The Public Prosecutor requested that a penalty of four years' imprisonment be imposed upon the public official. The judgment will be rendered on 11 January 2023.

On 2 December 2022, the Marseille High Court sentenced one former director of the Bouches-du-Rhône departmental council (between 2008 and 2016) to five years' imprisonment, after he was found guilty of bribery, favouritism and criminal association. The proceedings established that he had traded privileged information and confidential documents in the context of the award of public contracts.

In a case where the court of appeal had invalidated the prosecution of individuals for bribery on the grounds that the reasonable time limit had not been respected and the right to a fair trial, the adversarial principle, and the balance of the rights of the parties had all been infringed, the Court of Cassation – in its most solemn session – ruled on 9 November 2022 that the excessive length of a procedure cannot lead to its invalidation when every other aspect of the procedure is regular. However, courts must take into account the effects of the time that has elapsed on the merits of the case (French Court of Cassation, 9 November 2022, No 21-85.655).

As regards non-trial resolutions, a judicial public interest agreement was reached on 9 February 2021 between the National Financial Prosecutor's Office and two companies belonging to a major transport, logistics and communication group. The CJIP concerned acts of bribery of foreign officials and complicity in the misuse of corporate assets between 2009 and 2011 in relation to communications consulting services provided by a subsidiary of the group to Togolese presidential candidates in exchange for container terminal concessions in the port of Lomé. The parent company committed to:

- pay a public interest fine of EUR12 million; and
- submit, for two years, to audits that will be carried out by the AFA on the existence and relevance of the company's anti-corruption programme (with the stipulation that the costs incurred will be borne by the company up to a maximum of EUR4 million).

The CJIP was validated by the homologating judge of the Paris High Court during a public hearing (Validation Order of the Paris High Court, 26 February 2021, No 28/2021).

Three company's executives appeared at the same public hearing for the homologation of their CRPCs, as individuals are excluded from the legal scope of the CJIP procedure. They admitted their guilt, acknowledged criminal qualifications and agreed to pay the maximum incurred fine of EUR375,000.

However, the judge refused to homologate the CRPCs, finding that the alleged offences "seriously undermined public economic order" and "undermined Togo's sovereignty" (Paris High Court, 26 February 2021).

This case illustrates the difficulty of co-ordinating negotiated justice procedures in France. Although Article 495-14 of the French Code of Criminal Procedure provides that parties cannot mention the failed CRPC nor the content of the negotiation during the subsequent trial, defendants who already admitted their guilt during the CRPC procedure are in practice deprived of their right to defend their case in court, espe-

cially when the hearing was highly mediated. The lack of an effective appeal against the refusal to homologate the CRPC reinforces this self-incrimination risk.

On 7 July 2022, the President of the Paris Court validated two judicial public interest agreements reached between the National Financial Prosecutor's Office and two French companies with regard to the offence of bribery of foreign officials. The CJIP of 9 June 2022 followed a preliminary investigation into executives of a French engineering conglomerate who were charged with bribing public officials in order to obtain contracts with a major Angolan state-owned company operating in the oil industry. The company committed to pay a public interest fine of EUR3.5 million.

The CJIP of 20 June 2022 followed a preliminary investigation into alleged bribes estimated at EUR6 million that would have been paid by the company at the request of its local subcontractor in order to corrupt a government official within the framework of a project designed to establish a new national identification system in Bangladesh. The company agreed to pay a public interest fine of nearly EUR8 million.

7.7 Level of Sanctions Imposed

See **5. Penalties**.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

Key figures for the year 2021 have been published. In 2021, Transparency International ranked France was ranked 22nd in Transparency International's Corruption Perceptions Index for the public sector, thereby gaining one place since 2020. France was awarded a score of 71 on a scale of 0 to 100 (where 0 is highly corrupt).

According to the 2021 AFA annual report, prosecutors handled 834 proceedings relating to probity offences in 2020. Finally, 359 of the prosecuted probity offences resulted in a definitive conviction.

Assessment of the Sapin II Law

On 7 July 2021, an information report by two Members of Parliament was released, aiming to evaluate the Sapin II Law.

The first part was devoted to the prevention and detection of corruption as a whole and especially to the AFA's action. The report found that private players had adopted the obligations issued by the Sapin II Law whereas dissemination of the system remained very limited in the public sector. Besides, the report noted that the results of the extraterritorial application of these new tools – and, in particular, the prosecution of acts of corruption of foreign public officials by foreign companies carrying out part of their activity in France – were non-existent. They therefore suggested that the obligations of Article 17 should be imposed on subsidiaries of foreign groups established in France.

The second part concerned the CJIP procedure. In this respect, the authors of the report were not in favour of applying the CJIP procedure to individuals because, in their view, such an extension would make it possible to exempt the perpetrators of acts of corruption – thus placing acts of corruption into a separate category of offences even though they are particularly serious.

The third part was devoted to the protection of whistle-blowers. To the authors of the report, the status of whistle-blowers seemed insufficiently

protective and could be consolidated by transposing the Directive (EU) 2019/1937 of 23 October 2019. In particular, they noted that:

- the criteria of disinterestedness and good faith excluded many whistle-blowers from the protection provided by the law; and
- the hierarchy of reporting channels often exposed whistle-blowers to reprisals.

The French legislator has taken these findings into account by the enactment of Law No 2022-401 aimed at improving the protection of whistle-blowers on 21 March 2022.

The fourth part concerned the register of interest representatives (lobbyists) implemented by Decree No 2017-867 of 9 May 2017.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

On 9 December 2021, the OECD Working Group on Bribery published its France Phase 4 report, according to which: "France has undertaken major legislative and institutional reforms since Phase 3 in 2012 and made significant progress in enforcing the foreign bribery offence. However, these recent advances are being jeopardised by structural resource issues affecting the entire criminal justice system. Furthermore, two recent bills – one of which will impose a three-year limit on preliminary investigations into economic and financial crimes [the above-mentioned Law No 2021-1729 of 22 December 2021], including foreign bribery – raise concerns about France's ability to make further progress."

The OECD Working Group on Bribery welcomed the significant increase in the number of investigations opened. Between late 2012 and September 2021, 108 investigations were opened (in comparison with only 33 between 2000 and late 2012).

However, the OECD emphasised the relatively low number of cases resolved in light of the country's economic situation and trade profile, as well as the number of foreign bribery allegations reported in the media. Therefore, it made the following recommendations to:

- take the necessary legislative measures to extend the duration of preliminary investigations in foreign bribery cases and thereby enable the effective enforcement of the foreign bribery offence;
- preserve the role and expertise of the National Financial Prosecutor's Office in the investigation, prosecution and resolution of foreign bribery cases;
- ensure that sufficient resources for fighting white-collar crime are allocated to the relevant parts of the criminal justice system;
- clarify the conditions for triggering corporate liability and continue efforts to develop effective and co-ordinated non-trial resolutions for natural and legal persons; and
- maintain the role, mandates and resources currently assigned to the AFA in the development and monitoring of compliance measures by companies.

In December 2022, France is expected to submit an oral report on its implementation of essential measures to maintain the progress made since Phase 3 to the OECD Working Group on Bribery. In addition, a written report on the implementation of all recommendations and enforcement efforts in France will be submitted in December 2023. The follow-up reports will be publicly available.

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Bougartchev Moyne Associés was formed in January 2017, when Kiril Bougartchev and Emmanuel Moyne joined forces to create a law firm that combined all disciplines of business litigation while specialising in criminal law. They are supported by a team of approximately ten lawyers. As litigators recognised throughout their profession, the founders and their team assist public and private enterprises such as banks, financial institutions and insurance companies – as well as their executives and other prominent figures – in all disputes, whether they concern white-collar crime, civil and commercial law, or regulatory matters. With wide experience of emergency, complex, cross-border and multi-jurisdictional proceedings, Bougartchev Moyne Associés' lawyers assist their clients both in France and internationally, and benefit from privileged relations with counterpart law firms on all continents. Primary practice areas are white-collar crime, civil and commercial litigation, regulatory disputes, compliance and investigations – as well as crisis and reputational injury management.

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Trends and Developments

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Anti-corruption in France

France's stance against corruption and the wider group of offences that fall within the scope of "integrity" violations (*probité* in French) has been reinforced significantly over the past decade. Whilst France was sometimes seen, for example in some Organisation for Economic Co-operation and Development (OECD) reports, as a country which was not doing enough and lacked the legal instruments to investigate and prosecute such offences, major changes have occurred, particularly during the past five years, which have modernised and shaped its ambitious agenda.

The Development of a New Integrity Paradigm in France

Several regulatory authorities were created in the first half of the 2010s to monitor, investigate and sentence violations in relation to "integrity". The laws of 11 October 2013 on transparency in public life created the High Authority for Transparency in Public Life (HATVP), from which materialised the need to provide an authority with sufficient powers to control the declaration of assets and interests of public and elected officials. It was followed by the setting-up of the Financial Prosecutor: the "*Parquet National Financier*" (PNF) by Law No 2013-1117 of 6 December 2013 on tax fraud and serious financial crime and organic Law No 2013-1115 of 6 December 2013 on the Financial Prosecutor. The PNF was explicitly designed to investigate and prosecute the most serious and complex economic crimes, understood as covering four categories of offences: public finances offences, integrity offences (which include corruption and influence-peddling), market abuses and violations in relation to competition laws.

A major addition to the French anti-corruption system came after the enactment of Law No 2016-1691, relating to transparency, the fight against corruption and the modernisation of economic life, on 9 December 2016 (the "Sapin II Law"). Inspired by the legislation that already existed in the US (Foreign Corrupt Practices Act) and in the UK (UK Bribery Act 2010), the Sapin II Law built on features that existed in Anglo-Saxon anti-corruption mechanisms and adapted them to the French judicial system. For instance, the law integrated an important prevention aspect into the anti-corruption framework by requiring companies to adopt robust compliance programmes and, thus, become more proactive in the fight against corruption and influence-peddling. The creation of such compliance programmes became mandatory for companies which have at least 500 employees and a turnover that exceeds EUR100 million. Corporates that fall within the scope of the law have to:

- design a code of conduct;
- set up internal alert mechanisms;
- conduct a risk-mapping system that analyses and provides a hierarchy of risks of corruption within its business sectors;
- conduct due diligence on entities they do business with, including suppliers and intermediaries;
- set up internal or external accounting control procedures;

- provide training on compliance and anti-corruption topics to their personnel who may be exposed to such risks;
- set up a disciplinary system to sanction violations of the code of ethics; and
- create internal control mechanisms to audit the measures implemented.

Furthermore, it significantly increased the sanctions available against companies and individuals found guilty of corruption or influence-peddling and it added an extra-territorial reach to the law by integrating into its scope individuals and entities which usually reside in France or have all or part of their activity on French territory. Finally, the law borrowed aspects of the US' negotiated justice by creating the "*Convention Judiciaire d'Intérêt Public*" or CJIP (Judicial convention of public interest). Drawing from the Deferred Prosecution Agreement (DPA), a CJIP differs from that mechanism in particular in that it is an instrument open to legal entities only. It was set up to encourage companies to co-operate with the authorities in exchange for a more favourable settlement. In this regard, companies may be offered the opportunity to negotiate with the prosecutor a settlement under which they accept the requirement to pay a fine, often for a very high amount, and to implement a compliance programme, while avoiding criminal charges. The proposal is then submitted to a judge who decides whether to ratify the agreement.

In addition to the previous elements, the Sapin II Law increased the protection of whistle-blowers and also created the French Anti-corruption Agency (AFA), which is in charge of preventing and detecting acts of corruption, influence-peddling, misappropriation of public funds and favouritism.

The Role of the AFA on the Evolution of the French Anti-corruption System

The AFA is responsible for controlling the concrete implementation of efficient anti-corruption measures and compliance programmes within entities that fall within the scope of the Sapin II Law. Entities subject to an AFA control receive a notification from the agency, which provides the subject and scope of the control. Several exchanges, including documentation analysis, interviews, and on-site visits, usually take place between the entity subjected to the control and the agency. The AFA then submits its report and concludes on the efficiency of the compliance programme implemented by the company. The company has two months to respond to the AFA, and to request a meeting with AFA agents if need be. Depending on the case, a warning can be issued to the entity. If the violations are really serious, the case is referred to the Sanctions Commissions of the AFA.

The AFA also has an important normative role in the French anti-corruption system. It provides recommendations and practical guides which, in addition to the Sapin II Law and application decrees, constitute the "French anti-corruption referential". So far, the AFA has published two recommendations, the first set in December 2017 and the latest on 12 January 2021. The 2021 recommendations marked an interesting shift from the previous requirements as regards the implementation of anti-corruption programmes. The AFA adopted a three-pillar approach centred on (i) the involvement of executives and top managers in designing and implementing a corporate culture that complies with anti-corruption requirements, (ii) a risk-based approach that starts with the companies' risk-mapping, and which leads to elaborating (iii) risk-management processes to prevent risks, detect potential misconducts, and elaborate sanctions

to repress any such misconducts. These processes also include the internal control and audit mechanisms that companies must set up in order to control the anti-corruption measures that are set forth.

The publication of these documents allows companies to have more visibility on what is expected of them with regard to the measures that they should implement and the factors that will be taken into account when the AFA assesses the efficiency of their compliance programmes. It is worth noting that, whilst the agency mentions in its recommendations that these recommendations are not binding on companies that fall within the scope of the Sapin II Law, the AFA also states that entities that apply the mechanisms set out in the recommendations benefit from a presumption of compliance. If a company departs from those recommendations, the burden of proof is automatically reversed and the entity has to justify its approach and present evidence that the anti-corruption mechanisms that it implemented are compliant with the legislation. Thus, the normative power of the AFA and its ability to impose changes in anti-corruption practices cannot be understated.

The Place of Individuals in the Current Legal Framework

Several issues regarding the role of individuals in the current framework remain unanswered. For instance, as previously mentioned, the CJIP is only available to legal entities. Individuals have access to the "*Comparution sur Reconnaissance Préalable de Culpabilité*", or CRPC (Convention on prior recognition of guilt), which, unlike the CJIP, requires the individual to acknowledge their guilt in order to be ratified by a judge. The articulation of CJIPs and CRPCs remains a sensitive and complex topic. In February 2021, a court ratified the CJIP concluded with a company, but refused to ratify the CRPC negotiated with several of the company's executives.

Other areas should be clarified as well. Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law was adopted on 23 October 2019. It provides a harmonised system of protection of whistle-blowers that EU member states had to transpose by 17 December 2021 for provisions in relation to the public sector and companies with more than 249 employees, while provisions regarding companies of the private sector with 50 to 249 employees must be transposed by 17 December 2023. Law No 2022-401 of 21 March 2022 on the enhancement of whistle-blower protection was subsequently adopted and came into force on 1 September 2022. The law, among other things, better defines the concept of whistle-blower and widens its scope ("an individual who reports or discloses, without direct financial compensation and in good faith, information relating to a crime or misdemeanour, a threat or harm to the general interest, a violation or an attempt to conceal the violation of an international agreement"). It also sets out more effective reporting mechanisms as well as increased protection for whistle-blowers.

Conclusions

Finally, the role of corporate internal investigations in uncovering and analysing facts in relation to integrity violations is an important topic that is still evolving, specifically with regard to the rights of individuals. Thus, it should be noted that the anti-corruption framework previously described encourages companies to cooperate with public authorities and to conduct internal investigations to shed light on potential misconducts brought to their attention. Whilst such a practice is not really new, the increase of these investigations and the fact that they have

some roots in a different legal system – namely, the US – still proves challenging at times. In particular, rules regarding the admissibility of evidence must be complied with at all times – for instance, especially if an employer wants to terminate the employment of an employee following an internal investigation that uncovered compelling evidence of wrongdoing, it is of the utmost importance that all applicable employment laws and data protection laws are fully observed during the internal investigation process. The same requirements of rigour, loyalty and proportionality must be applied, in particular when conducting interviews with employees, in order to preserve the rights of defence and the presumption of innocence, among other essential legal principles in democratic societies.

DLA Piper France LLP is one of very few international law firms with a dedicated compliance, global investigations and white-collar defence cross-border team of several dozen lawyers; the Paris practice comprises one partner, a team of two counsels and four dedicated associates. The team works closely with DLA Piper lawyers worldwide (Europe, US, Middle East, Asia Pacific) as well as the other teams in the Paris office (M&A, competition, public affairs, intellectual property and data privacy, labour and employment, banking and finance, tax). With its vast network of international lawyers (around 80 offices in 40 countries), the firm can provide legal assistance to its clients, regardless of the sector or geographic area in which they operate. DLA Piper strives to offer robust, rigorous and operational solutions while delivering quality and respecting high standards in all matters, using the most advanced technologies to manage broad and multi-jurisdictional investigations successfully.

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GREECE

Law and Practice

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ANAGNOSTOPOULOS see p.175

Contents

1. Legal Framework for Offences

1.1 International Conventions

Greece has ratified all major anti-bribery and anti-corruption international conventions:

- the UN Convention Against Corruption (Law 3666/2008);
- the Council of Europe Criminal Law Convention on Corruption and Additional Protocol (Law 3560/2007);
- the Council of Europe Civil Law Convention on Corruption (Law 2957/2001);
- the EU Convention on the Protection of the European Communities' Financial Interests (Law 2803/2000);
- the EU Convention Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (Official Journal C195 of 25 June 1997) (Law 2802/2000); and
- the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Law 2656/1998).

1.2 National Legislation

The main anti-bribery and anti-corruption provisions of Greek legislation are to be found in the Greek Criminal Code (GCC) (Articles 159–159A and 235–238) as well as in the anti-money laundering legislation (Law 4557/2018).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Although not binding, the case law of the Greek Supreme Court (Areios Pagos) may be used as a means of interpreting the Greek criminal provisions. Moreover, several enforcement agencies and regulatory bodies have issued guidelines over the years in respect of anti-corruption regulation, best practices, signs of irregularity of transactions, etc. In addition to the guidelines issued by regulatory bodies (eg, the Bank of Greece, the Hellenic Financial Intelligence Unit (FIU), the Capital Market Commission), business associations in sensitive industries (eg, healthcare) are proposing guidelines to their members, recommending best practices, evaluating market statistics, sharing experience from other jurisdictions, etc.

1.4 Recent Key Amendments to National Legislation

On 1 July 2019, a new criminal code and a new code of criminal procedure came into force in Greece. Both are the result of a decade of work by three law commissions with changing membership. The new criminal code's aim is to modernise and rationalise the country's core criminal legislation. In this context, it abolishes a number of obsolete or petty offences under the old code, which dated from 1950, and introduces some new offences better suited to address current challenges, such as the offence of dangerous driving or a broad subsidies fraud offence.

In respect of bribery, the new code establishes five offences. Notably, there are separate provisions on:

- bribery of politicians or other state officers, both domestic and international;
- bribery of judges or arbitrators;
- bribery of other public employees;
- bribery in the private sector; and
- trading of influence.

Sentences for these offences vary, depending on the nature of the offences, the perpetrator's capacity or the act for which the bribery occurred. The code takes a more severe approach towards passive bribery in the public

sector, while active bribery is a more serious offence where the bribed person is a politician or a judge, as opposed to an ordinary public official. Moreover, bribery for illegal acts is punished more severely than bribery aimed at speeding up lawful actions (so-called "grease" payments).

On this basis, active bribery where the receiver of the bribe is a politician or a state officer or a judge or arbitrator is classified as a felony punishable with a custody sentence of up to ten years' imprisonment. If the receiver is an ordinary public employee, bribery for unlawful acts is a felony punishable by imprisonment for five to eight years, whereas bribery for lawful acts constitutes a serious misdemeanour punishable by imprisonment for up to five years or a monetary sentence.

Trading in influence and bribery in the private sector are also classified as misdemeanours, with sentences of up to five years.

It should be noted that sentences longer than three years have to be served wholly or partly in prison. This is an important feature of the new code as opposed to the old one, where sentences of up to five years' imprisonment were either suspended or converted into fines.

Overall, the new code provides more rational and proportional sanctions and it is no less efficient than the old one, where both disproportionate and nominal sentences were frequent. The old law could see those convicted of bribery be put away for life in cases where the Greek state was the victim. That law was passed by parliament in turbulent times – months after the end of a civil war between communist-led rebels and the National Army and against the backdrop of a big contraband scandal (smuggling of gold, foreign currency and luxury items) involving coastguard officers, businessmen and diplomats, which had shaken the country. The law's abolishment was long overdue as it was discordant with the hierarchy of values protected by modern criminal legislation and stood in sharp contrast to the fundamental principle of proportionality enshrined in Article 49(3) of the EU Charter on Fundamental Rights. Indeed, in a liberal legal order, life sentences must be reserved for the most heinous crimes such as murder, and not for financial offences.

It is worth noting that, under Greek law, whoever commits active bribery is also held responsible, as a rule, for money laundering. Indeed, according to established domestic case law, the act of giving bribes using the financial system is considered to be money laundering, not only for the receiver of the bribe, but also for the person who gives the bribe. In terms of punishment, this means that the perpetrator of active bribery would normally also be pursued for the felony offence of money laundering, for which potential sentences range from five to 15 years. Prosecution for money laundering is allowed even when the predicate offence (bribery or other) is time-barred. Moreover, in cases where the bribed public official proceeds with an illegal act in exchange for the bribe (eg, breach of fiduciary duties, issuing of a false certificate), the person who bribed them would also be, as a rule, held responsible for instigation of this act, which again would carry an additional serious sentence.

2. Classification and Constituent Elements

2.1 Bribery

Bribery

Bribery in the public sector, which is provided for by Articles 235 and 236 of the Greek Criminal Code (GCC), is an act of giving (or receiving) or promising (or accepting), directly or through third parties or intermediaries, undue benefits or gain to/from a public official for committing or omitting an act in the course of one's duties or against one's duties. The act of the public official may be concluded, or expected to be concluded, in the future. The perpetrator must act with intent (as opposed to with negligence). Active and passive bribery in the public sector is punishable with imprisonment ranging from ten days to 15 years, depending on whether the act for which the bribe was given was in the course of, or against, the public official's duties.

Bribery of Judges

Bribery of judges is provided for by Article 237 of the GCC, which covers the offences of active and passive bribery of such persons. Bribery of judges is punishable with imprisonment ranging from five to 15 years. The perpetrator must act with intent (as opposed to with negligence). Company executives, or any other person with decision-making or supervisory powers within the company, who fail through negligence to prevent active bribery of judicial officials are punished with imprisonment ranging from ten days to five years.

Bribery of Political Officials

Bribery of political officials is provided for by Articles 159 and 159A of the GCC, which stipulate the offences of active and passive bribery of political officials, such as the prime minister, ministers, heads of municipal regions (prefects and mayors) and other officials, including members of the European Parliament and the European Commission. These Articles cover the act of giving/receiving and promising/accepting unlawful benefits for committing or omitting an act as well as for abstaining from voting, or voting in a particular manner, or supporting a specific resolution. The perpetrator must act with intent (as opposed to with negligence). These offences are punishable with imprisonment ranging from five to 15 years. Company executives, or any other person with decision-making or supervisory powers, who fail through negligence to prevent active political bribery are punished with imprisonment for between ten days and five years.

Bribery of Public Officials

Article 13 of the GCC defines "public official" as a person entrusted permanently or temporarily with the exercise of duties directly related to the state or public law entities. However, Articles 159 paragraph 4, 159A paragraph 4, 235 paragraph 5 and 236 paragraph 4 of the GCC expand the above-mentioned definition and stipulate that public officials are also individuals who hold office permanently or temporarily under any capacity or status as follows:

- in bodies or organisations of the EU, including the European Commission, the ECJ and the ECA;
- officers or other employees of any international or transnational organisation in which Greece participates, as well as any individual with power to act on behalf of such an organisation;
- members of parliamentary assemblies of international or transnational organisations of which Greece is a member;
- those who exercise judicial or arbitration powers with international courts in which Greece participates;

- any person in public office or service for foreign countries, including judges, jurors and arbitrators; and
- members of parliament or assembly of local governments of other countries.

Therefore, bribery of the above-mentioned foreign public officials is criminalised by the GCC. Moreover, Article 237B of the Greek Criminal Code stipulates that, for bribery offences, employees of state-owned or state-controlled companies or other entities are also considered to be public officials.

Bribery in the Private Sector

Bribery in the private sector, which is provided for by Article 396 of the GCC, is an act of giving (or receiving) unlawful benefits or gain, directly or indirectly, as an exchange for an action or omission contrary to one's duties (as defined by law, contract, agreement, etc). The perpetrator must act with intent (as opposed to with negligence). This offence is punishable with imprisonment ranging from one to five years.

Bribery in Sport

Bribery in sports is provided for by Article 132 paragraph 2 of Law 2725/1999 on "the professional and amateur sports", which prohibits the act of requesting/receiving and giving/promising benefits to players, coaches or referees or to other third persons, in order to influence the outcome of a sport's game. Such bribery is punishable with imprisonment for up to five years. In a case where the sport's game was actually influenced, the offence is punishable by imprisonment for up to ten years.

Gains, Benefits and Gifts

Gains and benefits are not only cash/cash equivalents but also intangible benefits (eg, promotion or favourable transfer to a better position). The unlawfulness of such gains/benefits is judged on an ad hoc basis. However, a benefit may generally be considered unlawful if it goes beyond the standards of proper social and/or professional conduct. Facilitation payments are generally treated as bribes.

Despite the wording of the relevant law, which is broad and may include at first sight all of the above, anti-bribery legislation would not apply to symbolic gifts or gifts of courtesy. The difference lies primarily in the scope of the gift and the openness of offering such a gift. However, the application of regulations and laws on corruption to cases of systematic use of such gifts (eg, travel expenses, meals, entertainment) cannot be excluded in the general context of seeking to influence a public official.

Grease payments are prohibited. Such payments are not recognised under account and book-keeping regulation as legitimate expenses. All payments and expenses must be duly registered and supported by relevant documentation (proper invoicing, contract agreements, etc). If not duly registered, such payments would be considered questionable or even fictitious, and potentially as direct or indirect payments for gifts or benefits through third parties. This type of payment is also in breach of the relevant tax provisions and may trigger (depending on the circumstances and value) criminal liability for related tax offences.

2.2 Influence-Peddling

Article 237A (trading in influence) describes as punishable the act of requesting or receiving directly or indirectly through third persons, in favour of oneself or others, benefits of any nature or accepting a promise of such benefits in exchange for exerting improper influence over officials described in Articles 159A, 235 para-

graph 1 and 237 paragraph 1 of the GCC, as well as members of parliamentary assemblies of international or transnational organisations of which Greece is a member.

2.3 Financial Record-Keeping

Law 4174/2013 (tax code and tax standards as amended by Law 4819/2021) provides criminal penalties for false registrations in accounting books or for non-registration of transactions. There are also provisions in legislation for companies limited by shares (Law 4548/2018, which reformed company law) for criminal sanctions for inaccurate or false balance sheets, false or inaccurate declarations on the financial status of the company, etc. Moreover, Law 4443/2016 on Capital Markets provides for criminal sanctions in a case where someone knowingly disseminates misleading or false information through the media or the internet, which could affect the stock price of a listed company and, thus, manipulate the Greek stock market. These acts are punishable when committed with intent (as opposed to with negligence). Levels of intent may vary, depending on the applicable law.

2.4 Public Officials

Article 244 of the GCC stipulates that any public official who knowingly certifies or collects undue taxes, duties fees, taxation fees, judicial fees, or any other monetary obligations towards the Greek state, may be punished by imprisonment for up to three years.

Article 375 of the GCC stipulates that embezzlement is committed when the perpetrator, knowing that (due to a legal provision, eg, as manager, trustee) they are in charge of the property of another person or entity, acts as if they were the owner of the property by incorporating it into their own assets. This act of embezzlement is punishable by up to five years' imprisonment. If the embezzled assets exceed the amount of EUR120,000, the offence is characterised as a felony and it is punishable with a sentence ranging from five to ten years' imprisonment. If the property belongs to the Greek state or to any public legal entity and the value of the embezzled assets exceeds EUR120,000, this constitutes an aggravating factor and the perpetrator of the offence shall be punished with a sentence ranging from ten to 15 years' imprisonment.

Article 259 of the GCC stipulates that the offence of breach of official duties is committed when a public official, who intentionally breaches their office duties, with the intent to benefit themselves or a third person unlawfully or to harm the Greek state or a third person unlawfully, shall be punished with imprisonment for up to two years, unless the offence committed is punishable in accordance with another more severe criminal provision.

2.5 Intermediaries

The broad wording of Articles 235 and 236 of the GCC (passive and active bribery) covers gifts or financial benefits given in a direct or indirect way in favour of the perpetrator or others. In addition, both provisions make special reference to intermediaries to a bribe. In this respect, intermediaries or third parties may be held criminally liable if these transactions are carried out within the context of corruption. It is noted that payments through intermediaries may also be questionable in respect to proper book-keeping and taxation law.

3. Scope

3.1 Limitation Period

The general rules of limitation periods are set out in Articles 111–116 of the GCC. The limita-

tion time for serious financial crimes against the state or state-owned entities is 20 years. Felonies punishable with imprisonment (five to 15 years) are time-barred after 15 years, and misdemeanours punishable with sentences of up to five years are time-barred after five years. As a matter of principle, calculation of these times is made from the time of the act, unless there is a special legal rule that provides otherwise.

Limitation times are suspended for five years (for felonies) or three years (for misdemeanours) while the case is pending before a court and until a final decision is delivered or if there are legal grounds that do not allow the prosecution and/or its continuation. This five-year extension is not valid in cases where there is suspension of the proceedings by law, following certain provisions of the Greek Code of Civil Procedure (GCCP). There are special provisions for cases relating either to the country's international affairs (Article 29 of the GCCP) or cases that are very closely connected to other criminal cases already pending, and their outcome is of major importance to the suspended criminal case (Article 59 of the GCCP).

3.2 Geographical Reach of Applicable Legislation

Article 8 of the GCC stipulates that Greek legislation is always applicable for offences committed abroad by public officials of the Greek state, or by officials of EU bodies and organisations which are seated in Greece. According to the same provision, Greek legislation is always applicable in a case where the crime committed abroad was directed against, or addressed to, a public official of the Greek state, or a Greek officer of an EU body or organisation, during or in relation to the exercise of their duties.

Moreover, Articles 159 paragraph 4, 159A paragraph 4, 235 paragraph 5 and 236 paragraph 4 of the GCC, which have expanded the definition of "public official" in order to cover foreign public officials, as already previously mentioned, stipulate that active and passive bribery of foreign public officials is punishable when committed abroad, irrespective of dual criminality.

3.3 Corporate Liability

Greek law provides that only individuals may be held liable for a criminal act, thus being subject to classic punishments (eg, imprisonment). Since 1998, after the passing of Law No 2656/1998, there has been a specific provision for penalties, in the form of administrative fines, for legal entities benefiting from acts of bribery of foreign public officials. A company (legal entity) bears liability for acts of bribery and corruption in the form of administrative penalties.

Article 45 of Law No 4557/2018 (anti-money laundering regulation) provides for the liability of legal entities if the acts of active and passive bribery of public officials, political officials or judges are committed in the legal entities' favour by individuals empowered to act on their behalf (as managers or directors) or to make decisions in relation to the company's activities, etc, and provides for a series of administrative penalties (eg, fines, prohibition of business activities, ban from public tenders). This provision is applicable to perpetrators, accessories and instigators alike.

Liability of a successor entity could arise in cases where individuals managing the target entity are held criminally liable for acts of corruption and the target entity has benefited from these acts. Given the fact that the sanctions imposed on an entity are of an administrative nature (fines, suspension of activities, ban from public

tenders), it is highly likely that these sanctions will be imposed on the successor entity as well. It is noted that, with respect to administrative sanctions, the procedure followed resembles the procedure of imposing tax-related fines and sanctions. For these purposes, a legal entity is considered as a whole (ie, the successor has all the liabilities and rights of the target entity).

4. Defences and Exceptions

4.1 Defences

Under Greek law, it is the prosecuting authorities that collect evidence and prove their case. Depending on the phase of the procedure (preliminary inquiry, investigation, pre-indictment), the prosecuting authorities need to satisfy general standards to enable further process of a case file (usually the existence of sufficient evidence to justify further investigation or recommendation to open a formal investigation or recommendation for trial referral).

The defendant is entitled to challenge the prosecuting authorities' case even at the earliest stages (during the preliminary inquiry and the investigation) on all points, ie, points of law and on the merits. In view of this, the defendant is entitled to request file documents from the authorities carrying out specific investigations, and to request the examination of specific witnesses, expert opinions, etc. The investigating procedure (preliminary and official) is always reviewed by a Council of Judges (three judges), which is competent to examine any procedural objections raised by the defendant.

4.2 Exceptions

There are no exceptions to these defences.

4.3 De Minimis Exceptions

There are no de minimis exceptions for the offences described in **2. Classification and Constituent Elements**.

4.4 Exempt Sectors/Industries

No sectors or industries are exempt from the aforementioned offences.

4.5 Safe Harbour or Amnesty Programme

Article 263A of the GCC provides leniency measures applicable to the perpetrators of active bribery. If individuals who have participated in active bribery report the criminal conduct of the bribed official to the authorities and make substantial disclosures as to the official's criminal acts, they are eligible either to receive a lesser sentence, or to be granted a suspension of criminal proceedings against them by virtue of a decision of the indicting court until the validity of the information they provided is verified, or to be granted suspension of their sentence. There is no general provision for leniency measures applicable to companies or legal entities with respect to acts of corruption. It is possible, however, in view of the ability of the authorities to choose which administrative penalties will be imposed, to apply the minimum fine and no other penalties.

5. Penalties

5.1 Penalties on Conviction

Criminal penalties are imposed solely on individuals and consist mainly of imprisonment and monetary fines. Potential sentences range from ten days' to 15 years' imprisonment.

5.2 Guidelines Applicable to the Assessment of Penalties

The legal provisions applicable to each case define the range of the sentence to be imposed

by the court (ie, the minimum and maximum duration of imprisonment). The GCC (Articles 79–85) sets out the guidelines for imposition and calculation of sentences, within the range mentioned in **5.1 Penalties on Conviction**. In particular, the court has to consider various factors, such as the severity of the act and the personality of the defendant. The court also examines – following a request by the defence – whether any mitigating circumstances apply, which could lead to a lesser sentence. Such circumstances include lack of prior involvement in criminal acts, good behaviour after the act, showing true remorse after the act, and making efforts to amend or lessen the negative impacts of their actions. However, the courts also take into account previous final convictions when calculating the sentence which will be imposed on the individual.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Although the GCC does not establish detailed duties to prevent corruption, Articles 236 paragraph 3, 237 paragraph 3 and 159A paragraph 3 of the GCC provide for the punishment of company executives, or any other persons with decision-making or supervisory powers within the company, who fail through negligence to prevent acts of corruption. Moreover, the need to comply with stricter regulations and the changes taking place in all aspects of corporate activities have led to significant changes in the way organisations deal with such matters, realising that detecting and exposing corruption practices helps to reduce and/or eliminate market distortions and improve business practices.

Following a series of amendments in tax legislation, which provide for stricter rules in book-keeping, payments and money transfers, combined with changes in AML legislation, organisations are making a serious effort to comply with such obligations. In addition, certain industries have been more active in promoting best practices guidelines and monitoring the market. Most medium-to-large-scale businesses have an internal control programme in place, and train their employees in anti-corruption procedures on a regular basis, and, during the last three to four years, more businesses have been integrating procedures to encourage reporting of corruption (whistle-blowing).

Moreover, the recent Law 4706/2020 On Corporate Governance and Capital Market Modernisation (published on 17 July 2020) stipulates that a corporation is obliged to have an effective compliance programme in place, as part of its Regulation of Internal Operations. Guidance is provided by the regulating bodies of each sector (such as the Bank of Greece), which issue by-laws with the minimum requirements of compliance.

6.2 Regulation of Lobbying Activities

Lobbying activities are regulated by Law 4829/2021, which was passed last year by the Parliament. The aim of this law is to ensure integrity and transparency when exercising lobbying activities. To this end, a Transparency Registrar was established to which all natural and legal persons who exercise lobbying activities for a fee, through communications with institutional bodies (ie, the bodies exercising a legislative or executive function, their members or employees, whether acting individually or collectively), must register by providing information about their identity and activities. On an annual basis, their representatives must file a declaration with the

National Transparency Agency, stating, amongst others, the policy area and type of decision that was influenced, the details of the person who exercised influence, as well as of their client, the time and manner in which the lobbying activity was carried out, the institutional body to which the lobbying activity was addressed, and, finally, the intended result.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Public officials who become aware, during the exercise of their duties, that a criminal act (of those prosecuted ex officio) has been committed, are under obligation to report it to the authorities. Failure to report is punishable as a criminal offence.

Private individuals are not under the same obligation, but rather, they have the right to report a criminal act to the authorities. Although anti-bribery laws do not explicitly demand disclosure of violations, in the context of money-laundering regulations, compliance and internal audit control, there are obligations to expose and report irregularities related to financial records or suspicious transactions. In this respect, individuals who are obliged by law to contribute to transparency and corporate ethics may be faced with a dilemma when coming across a possible case of bribery. Leniency measures are meant to facilitate disclosure of violations or irregularities. They apply in principle to individuals who expose corrupt practices and relate to their status as defendants in criminal cases. Corporations may still be liable from a tax point of view; however, they are entitled to initiate procedures for an amicable (tax) settlement, which can significantly reduce any fines to be imposed.

6.4 Protection Afforded to Whistle-Blowers

Recently, Law 4990/2022 was passed by the Parliament, which transposed 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. This is the first law that creates a framework for the protection of whistle-blowers in Greece and aims to establish a system of internal and external reporting of violations of Union law, to specify the procedure for submitting, receiving and monitoring such reports, to offer broad protection to the persons who report such violations, and to provide for sanctions in case of violation of its provisions.

In relation to the protection whistle-blowers enjoy, the said law provides for the prohibition of retaliation against whistle-blowers (eg, their employment or business status should not be negatively affected, imposition of any disciplinary measure is prohibited as well as any discrimination, disadvantageous or unfair treatment), measures for their support (eg, legal aid and psychological support), and measures for protection against retaliation (eg, they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach, suspension of any criminal, administrative or civil proceedings that may have been initiated due to the whistle-blower's disclosure of information).

As these are new provisions, there is not yet enough information available in order to comment on their applicability and effectiveness.

6.5 Incentives for Whistle-Blowers

There are no financial incentive schemes for whistle-blowers.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Article 47 of the Greek Code of Criminal Procedure provides for "witnesses of public interest": see **6.4 Protection Afforded to Whistle-Blowers**.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Enforcement of anti-bribery and anti-corruption law is mainly criminal and administrative.

7.2 Enforcement Body

Role of the Prosecutor's Office

Prosecution is always initiated by the Prosecutor's Office. There is one Prosecutor's Office for every first-instance court (which roughly covers a prefecture). There are also prosecutors with the Court of Appeal (12 circuits), and there is a prosecutor with the Supreme Court. An investigation is always supervised by a prosecutor. The majority of cases are handled by prosecutors of the first-instance court (who may receive guidelines or orders for specific investigations from their superiors). In exceptional cases, a prosecutor with the Court of Appeal may step in and conduct or co-ordinate the proceedings. In recent years, the Prosecutor of Economic Crime has been established (Articles 33–36 of Greek Code of Criminal Procedure) with powers to prosecute and supervise investigations of financial fraud, criminal tax offences, and financial and economic crimes against the state, state-owned entities or of broader public interest.

The above-mentioned prosecutor is a higher-ranking Court of Appeal prosecutor and may request the co-operation of public prosecutors with the first-instance court, the police, the regulatory authorities, other administrative authorities and/or other enforcement agencies in the course of their investigations.

Role of Other Enforcement Agencies

Other enforcement agencies act in co-operation with and under the orders of the prosecutor(s). It is most common for the Economic and Financial Crime Unit to do the necessary preliminary investigations, evidence-gathering, report-writing, etc, following a prosecutorial order. In cases of money laundering, the Hellenic FIU gathers all the necessary information and evidence, and if they believe that there is enough to support a criminal case, they forward it to the Prosecutor's Office. The prosecutor opens a case against the natural persons or officers of an entity, following standard criminal procedure, ie, conducting a preliminary investigation and opening a formal investigation (conducted by an investigating judge).

The timeframe for executing these procedural steps varies depending on the nature of the case. It is not unusual in serious and complex cases (eg, corruption, large-scale money laundering and fraud cases) for enforcement agencies and the prosecutor to take action in order to secure evidence (by issuing a warrant for search and seizure, or issuing freezing orders), before the actual filing of charges and before persons of interest are called for questioning. On some occasions, regulatory bodies (eg, the Hellenic Capital Market Commission or the Competition Commission) conduct their investigations in respect of breach of regulations within their competence, and, if they also come across evidence of criminal conduct, they gather evidence

and send a report to the prosecutor to decide on further steps. Regulatory bodies conduct investigations (during which certain provisions for criminal investigations apply, ie, examination of witnesses, evidence-gathering, etc) but they cannot initiate criminal charges. This responsibility always lies with the prosecutor. In principle, it is the responsibility of the Prosecutor's Office to decide which body investigates under the prosecutor's supervision, unless there are specific provisions by law (Prosecutor for Financial and Economic Crime).

It is usual to have civil or administrative enforcement, either by means of the private pursuit of claims (eg, the civil claim of one entity or person against another) or by means of the law in cases of tax offences, subsidies fraud, money laundering, securities fraud, bribery and cartel offences. These measures are imposed by the competent agency according to the entity's status (eg, the Capital Market Commission, the Revenue Service, special departments of the Ministry of Finance). As a general rule, the competent agency for imposing these types of sanctions is the one supervising the entity's registration, licences, regulation, etc.

7.3 Process of Application for Documentation

In most cases, the authorities will send a written request to a company to forward certain information or documents. In principle, a company must co-operate with the authorities, at least in terms of providing requested information and documentation. Failure to comply with such a request usually has no direct consequences (unless otherwise provided for by law) but may lead to an unfavourable report by the authorities or an on-site search and seizure to obtain requested material.

In all cases, the company may object to handing over certain documents or material (eg, privileged commercial information or correspondence) and may refer to the prosecutor to resolve the issue. In practice, when an on-site search is in progress, the company may not refuse to hand over material but may raise its objections regarding the nature of the material taken (eg, privileged information) when signing the confiscation documents, in which case the material is sealed and taken by the agency, pending resolution of the issue by the courts.

On some occasions (depending on the scope and nature of the investigation), the company may be requested to submit its views in respect of the issues under investigation or to offer evidence in its defence (of any type: witnesses, bank records and correspondence, among others) contesting the views of the investigating authority (usually included in a draft report).

Dawn raids may take place in emergency situations (for instance, to secure evidence) and home searches are conducted in the presence of a prosecutor or magistrate.

7.4 Discretion for Mitigation

Article 263A provides for leniency for individuals who inform and/or assist the prosecuting authorities on corruption cases, depending on the procedural stage of the case and on the level of their assistance. Notably, if during the investigation the perpetrator of an act of bribery contributes substantial information regarding the participation of a public official, they will receive a reduced, or even suspended, sentence.

7.5 Jurisdictional Reach of the Body/Bodies

Jurisdiction rules are set out expressly by the Greek Code of Criminal Procedure and are oblig-

atory. Depending on the place where the offence was committed, the corresponding Prosecutor's Office will initially have jurisdiction over the case. It should, however, be noted that the Prosecutor's Office for Financial and Economic Crime may claim jurisdiction over major corruption and bribery cases. In such instances, they will handle the case during the preliminary inquiry but, at later stages of the criminal proceedings, jurisdiction will return to the competent criminal authorities (eg, the investigating judge, the judicial council and the court) of the place of the commission of the offence.

Moreover, it should be highlighted that the prosecuting authorities may also proceed with overseas mutual legal assistance requests with the aim of retrieving information located abroad, as well as with spontaneous exchange of information with their corresponding authorities.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Based on the findings of a financial investigation conducted by third parties, it was revealed that, from 2001 to 2017, the management of a Greek-based international company that designs, manufactures and distributes luxury jewellery and watches had falsified its financial statements by inflating its sales, profits and equity, through virtual purchases and sales. These fictitious transactions allegedly took place between 27 companies in different parts of the world, mainly in Asia. After the conclusion of a preliminary inquiry and a main investigation, the Judicial Council with the Court of Misdemeanours of Athens decided on the indictment of the former CEO and other defendants, including the founder of the company, on charges of forming a criminal organisation, falsifying the company's financial statements, market abuse, money laundering and embezzlement.

Other major investigations have been conducted in relation to multinational companies that have reportedly been systematically giving money to public officials to secure awards of multi-million-euro government contracts, in respect of advanced communication systems, medical supplies and military expenditure (such as Siemens, Johnson & Johnson/DePuy, HDW/Ferrostaal, STN). Investigations have also targeted acts of corruption of former government officials in relation to facilitating payments and tax-fraud schemes through real estate deals.

7.7 Level of Sanctions Imposed

If an individual is convicted, the court has a broad margin in deciding their sentence. The length of the sentence depends on a variety of "personal" factors, such as the individual's role in the criminal act, their criminal past, their family and personal status, etc. The amount of the bribe and the reason for which the bribe was given or promised is also taken into consideration. It should be noted that, under the previous legal regime, ie, until the introduction of the new Criminal Code on 1 July 2019, people found guilty of bribery sometimes received sentences exceeding 15 years' imprisonment, or even received life imprisonment. However, during the appellate proceedings, such sentences were usually reduced to more reasonable terms, which had to be partly served.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

In its latest "Phase 3bis follow-up: Additional written report" of 2018, the Organisation for Economic Co-operation and Development (OECD) observes that Greece has fully implemented all the recommendations, based on the conclusions

of the two-year written follow-up report of June 2017.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

A law was recently voted by the Parliament, which included some amendments to bribery legislation, with a view to expanding the jurisdiction of Greek courts on bribery acts committed abroad and restricting leniency measures with regard to bribery.

ANAGNOSTOPOULOS is a leading practice, established in 1986, which offers high-value services in managing criminal and regulatory risks to corporates and selected individuals. The firm is noted for combining sophisticated advice with forceful litigation in a wide variety of practice areas. Over the years, Anagnostopoulos has built a strong reputation as a team of high-end specialists in which all members take a holistic and creative approach to complex cases and are fully committed to the clients' needs, whilst upholding high standards of ethics and professional integrity. The firm responds to the emerging needs of corporate clients, drawing upon a solid knowledge base in corporate criminal liability, internal company investigations, compliance procedures, corruption practices and cartel offences.

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Trends and Developments

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Introduction

Under Greek law there is no legal obligation for companies (or groups of companies) to carry out internal investigations. The Greek Code of Criminal Procedure does not provide any information regarding the permitted or prohibited nature of private investigations. As a result, the area of corporate or intra-group investigations in the Greek legal system can be regarded as a legal vacuum. However, it is accepted that the investigation of crimes is not exclusively granted to the state, which gives private internal investigations a permissible character.

Conduct of Internal Investigations in Greece

There is still not a specific legal framework in Greece concerning the conduct of internal investigations and the Greek Code of Criminal Procedure does not provide any information on the nature of (private) internal investigations. Therefore, there is a lack of standardisation of the procedure for both the collection and the recording of the investigative findings.

It appears that more and more criminal cases from Greek legal practice are based on material collected and evaluated by means of internal investigations. Under the Greek legal system, investigations within the company can take place either voluntarily, after a Board of Directors' decision, or on the initiative of the state authorities. In the former case, the purpose of self-regulation is not to avoid criminal conduct, but to uncover and punish it later. In the latter case, certain public authorities, such as the Capital Market Commission in the case of listed companies, have the authority to commission private bodies, such as an auditing or legal firm, to carry out an internal investigation. Of course, there is also the classical way, ie, the internal investigation can be led by the Public Prosecutor's Office, which carries out the investigations with the help of state authorities, such as the Financial Police, the Economic Crimes Department of the Tax Office, etc.

Recent judicial practice has shown that conducting an internal investigation at an early stage of a criminal case is crucial for the effective gathering of evidence and a speedy trial. So, there are many benefits from this practice, not only for the company that commissions the internal investigation but also for the state:

- First, an objective third party, with sufficient human resources, relevant expertise and appropriate means depending on the particularities of each case, collects and assesses the evidence in an efficient manner. In this way, it becomes clear from the outset whether or not there is sufficient evidence of the commission of a particular offence and the referral of cases that have not been sufficiently processed in the pre-trial stage is thus avoided.
- Prosecutors' and investigative offices, as well as supervisory authorities, often lack the necessary resources to effectively pursue a complex criminal case. Therefore, conducting an internal investigation either at the initiative of the company concerned or the Prosecutor's Office would lead to savings of critical state

resources and would also prevent the risk of an incomplete investigation of the case.
- The practice of internal investigations will help speed up all stages of the criminal procedure. Such a development would be beneficial on many levels for a country like Greece, where there are serious delays in the administration of justice.

Importance of Internal Investigations Under the Greek Legal System

The Greek legal system does not contain any specific provisions that focus on a reaction to the violations of rules that have already been committed with the aim of clarifying them and limiting their consequences. However, that does not mean that the practice of internal investigations is foreign or unknown to the Greek legal order.

First of all, a new "general provision" (Article 405 of the Greek Criminal Code) was introduced into the Criminal Code as the last article in the chapter on property crimes, according to which in most property crimes (ie, fraud, computer fraud, embezzlement against credit institutions) – irrespective of the amount of the damage – prosecution only occurs at the request of the injured party. This provision concerns the core of the matter of economic criminal law.

A company can also be considered an injured party. Legal entities can lodge criminal complaints and participate in the criminal proceedings as civil prosecutors. It goes without saying that after this fundamental legal change, the companies concerned hire external consultants or investigators – in practice, mostly specialised lawyers – to prepare a report to clarify possible criminal conduct as well as to determine the circle of potential offenders. On the basis of the report, the decision is made on the part of the company whether to file a criminal complaint – and, if so, against whom this complaint will be filed. In order to prepare the report, an internal investigation is carried out in the company, based on the entirety of the available material, such as email correspondence, records, documents, balance sheet rolls, interviews, etc. The most crucial part of the report is the legal assessment and proposal regarding the criminal misconduct that was investigated. The practical relevance of internal investigations after the reform of the Economic Criminal Law in Greece is thus evident.

Internal investigations can also be crucial for the purpose of determining the amount of the damage caused by a criminal conduct against the interests of the company or by an agent of the company. This is particularly important in view of the introduction of alternative procedural forms for settling criminal trial in the Greek legal order, ie, criminal conciliation (Articles 301, 302 Greek Code of Criminal Procedure), plea bargaining (Article 303 Greek Code of Criminal Procedure) and satisfaction of the harmed person (Article 405 (2) (3)). That way the conduct of an internal investigation, even after the commencement of criminal prosecution, can simplify and accelerate the proceedings, which is critical because of the serious delays in the administration of justice in Greece.

Furthermore, Article 102 of the Greek Companies Act is equally fundamental in relation to the conduct of internal investigations. Article 102 (1) states that the members of the board of directors shall be liable to the company for any damage incurred as a result of their acts or omissions contrary to their duties. Pursuant to Article 102 (4), the liability of the members of the board of directors may be excluded if such acts or omissions are based on expert opinion

or assessment of an external, independent third party who has relevant expertise.

Board members are often faced with a tough dilemma, when there is a suspicion of certain illegal conduct within the legal entity, but it is not sufficiently substantiated. The filing of an unsubstantiated complaint, especially if it is directed against a specific person, carries the risk of incriminating board members for the offences of defamation (Article 363 of the Greek Criminal Code) and false accusation (Article 229 of the Greek Criminal Code). At the same time, failure to lodge a criminal and/or civil complaint runs the risk that claims may be brought against the members of the Board under Article 102 of the Greek Companies Act or even that criminal liability for the offence of abuse of trust (Article 390 of the Greek Criminal Code) may be incurred. In this case, an internal investigation by a law firm specialising in criminal law is a one-way street. Based on the findings and legal assessments of the final report, board members will act without the risk of incurring civil or criminal liability.

It thus turns out that the investigator' s final report is important in two respects:

- for the prosecution of potential criminal offences within the company; and
- to avoid possible legal consequences for the members of the board of directors.

Furthermore, Article 45 of the Money Laundering Act of 2018 is of importance. Under this article, the imposition of administrative fines and other administrative sanctions on legal persons can occur as a secondary effect of a criminal punishment for money laundering, if the money laundering or the predicate offence was committed for the benefit of the legal person. The same applies if the money laundering was only made possible due to a lack of or inadequate supervision of the perpetrator on the part of the legal entity. Administrative sanctions can be very high (sanctions range from EUR50,000 to EUR10 million and temporary suspension of operations between one month and two years – possibly even permanent suspension of operations).

Article 45 (4) of the Money Laundering Act provides, inter alia, that the cumulative or alternative imposition of the above sanctions, as well as the corresponding sanction assessment, depend on the actions of the company after the unlawful act. This provision sufficiently demonstrates that potential internal company investigations with regard to violations of rules relevant under criminal law can lead to a mitigation of the prescribed sanctions for the legal entity.

In addition, Article 263A of the Greek Criminal Code provides for leniency measures for persons who contribute to the disclosure of acts of corruption, while according to Article 396 (2A) of the Greek Criminal Code the punishability of the acceptance and offer of an advantage in the private sector (Article 396 (1) (2) of the Greek Criminal Code) is expunged if the responsible person, of their own volition and before being examined in any way by the authorities, reports their act to the judicial authorities by means of a written report. Ordering an internal investigation and submitting a thorough final report to the competent judicial authorities can therefore have significant benefits for all parties involved.

From the presentation of the above provisions, it can be concluded that, despite the fact that in Greek law internal investigations are not explicitly regulated, they can have a substantial (positive) effect on the possible legal consequences for both the company and the members of the board of directors.

Order for an Internal Investigation by Supervisory Authorities

It is common for Greek supervisory authorities to commission law firms or auditing companies to conduct an internal investigation. Especially in capital market cases, the Greek supervisory authority, the Hellenic Capital Market Commission, has ordered the conduct of an internal investigation in order to save money and manpower, especially when the company under investigation refuses to respond to an initial summons. In this case, the cost of the investigation shall be borne by the listed company under investigation and the final report is primarily addressed to the company and also to the supervisory authority because the administrative investigations must remain secret. However, it is rather common for minority shareholders to demand access to the report in order to bring criminal and/or civil charges against the executive board of the company. To this end, the report can only be kept secret after invoking the attorney–client privilege, which applies when the investigation is carried out by a law firm.

Conduct of Internal Investigations by Lawyers Specialising in White-Collar Criminal Law

It is fundamental for the efficient conduct of an internal investigation to involve external investigators or consultants. In practice, the persons involved are, for the most part, specialist lawyers in criminal law, and in some cases also auditors who act on behalf of the company concerned.

In the context of this co-operation, lawyers specialising in white-collar criminal law or law firms in general have the following comparative advantages compared to auditing firms or in-house lawyers.

- The attorney specialising in white-collar criminal law can control the investigation in accordance with the rule of law and avoid mistakes that could jeopardise the use of the material obtained.
- The attorney–client privilege is protected under Greek law. Any kind of communication between lawyer and client is protected. For this purpose, reporting will also be able to remain part of the client–lawyer relationship. In this sense, a report cannot be filed without the client's consent.
- The interrogation of persons will be properly conducted; the listing of findings will remain fact-related. Certain – normative – assessments against suspects will be avoided at this time if possible. A fair trial will be ensured.
- Data protection law shall be considered in the collection and evaluation of the material. Thus, it must be ensured both that the material remains usable in court in the future and that the company board of management does not run any risk under criminal law when conducting an internal investigation.
- On the basis of expertise and experience, they can accurately evaluate the findings from the point of view of criminal law. This is especially important when offences are investigated that can only be prosecuted at the request of the injured party (for example, most property crimes) and it applies both in cases where an application for criminal prosecution is to be made to the public prosecutor's office and (primarily) when this is waived. For example, in a recent internal investigation concerning a large pharmaceutical company, the incorrect legal assessment of acts preceding the predicate offence as acts of money laundering resulted in an unnecessary extension of the scope of the criminal prosecution. The adverse consequences of such an error are obvious.
- A specialised criminal lawyer always reckons with the possibility that the contents of their

final report can be assessed in other legal systems by means of mutual legal assistance, while also being able to evaluate properly the evidence already supplied, by means of mutual legal assistance from foreign legal orders (especially under the scope of the principle of speciality).
- As an external, independent evaluator, they are able to ensure more favourable treatment by the authorities towards the board members following the specialist lawyer's advice.

It should not be forgotten that, although the area of internal investigations is to be regarded as a legal vacuum, the investigators are not operating in a lawless space. In addition to data protection law, supplementary penal provisions also pose a number of hurdles that must be taken into consideration at all costs in order to avoid criminal liability, claims for damages because of the internal investigation and possible grounds for nullity.

The relevant criminal provisions focus on protecting individual interests of employees in individual investigative measures. The conflict between the duty to testify under labour law and the nemo tenetur principle comes to the fore here. The lawyer's duty of confidentiality and other professional duties, which are established for the protection of the client, should also be considered.

Internal Investigations: A Modern Practice, Which Will Also Prevail in Modernising Greece

The assessment that this practice will prevail in Greece is based on the following facts and thoughts.

- After a dramatic decade of great recession and political instability, which almost led the country out of the Eurozone as well as the European Union, Greece is implementing a well-structured modernisation programme. This programme has been approved by the relevant European institutions as a financing programme of the Greek economy through the EU recovery fund (next generation EU). Due to the fact that the last evaluations of the rating agencies as well as the economic organisations are particularly positive for Greece, it seems that the Greek modernisation programme is also receiving recognition in the international markets for investments.
- Greece, according to general opinion, is entering a phase of change and modernisation of the production model in various sectors. According to the National Recovery Plan under the title "Greece 2.0", Greece will receive from the Recovery Fund, which aims to support economic recovery after the COVID-19 crisis, for the period from 2021 to 2025, EUR32 billion. Furthermore, for this purpose, it is necessary to take into account the economic resources provided by European development programmes, as well as private investments required for the large investment projects. In total, a national capital of EUR59 billion will be created, which will completely change the Greek economy. The investment pillars of this plan are the following:
  (a) green energy in the context of climate change and the energy crisis;
  (b) digitalisation, co-ordination and interconnection of public services;
  (c) large infrastructural works, such as enlargement of the U-ban network, highways, underwater electrical connection between the islands; and
  (d) in this direction, the already announced investments of Microsoft, Google, Amazon, Pfizer (in Thessaloniki), Volkswagen (green island in Astypalaia), Digital realty,

Royal sugar, and of course Hellinikon (approx. EUR8 billion) etc, are of symbolic importance.

- In addition, circumstances are favourable for Greece, as stagnant global capital is looking for attractive investment areas, regardless of the fact that such areas may have high levels of public debt. Furthermore, the resurgence of American corporations must be included.
- Thus, the question now arises to what extent the foregoing considerations can be linked to the topic of intra-corporate investigations. It goes without saying that the already mentioned ambitious development and infrastructure projects are taken over by large, international groups, which have the corresponding "know-how" and the necessary experience in the respective area. It is also understandable that, as far as the economic situation in Greece in the coming years is concerned, these groups will come to the fore. Since such groups are very familiar with the concept, with the benefits as well as with the practice of internal investigations – at least in comparison with the small, medium or larger companies in Greece – and since these investigations are considered part of corporate governance, it is to be expected that their active presence will accelerate the adaptation of this practice in the Greek market in general. It is quite clear that the new Law 4706/2020 on corporate governance will be supplemented, either in the direction of a mandatory carrying out of investigations in the company by an external, independent body (mainly in the case of listed companies), or in the direction of a general, voluntary practice on the part of the companies, which will realise the benefits of such an option. In a corporate world in which both the authorities and the companies are becoming increasingly familiar with the benefits of internal investigations, it is safe to expect that, on the one hand, the corporations themselves will voluntarily undertake such investigations by independent carriers, such as law firms or audit firms, to clarify unlawful internal corporate actions; on the other hand, the authorities themselves will be interested in entrusting law firms or audit firms with this task. As already described, this was the case with the Folli-Follie, MLS, Siemens, Novartis and Atlas proceedings.
- The activity of international companies in Greece may result in the application of not only Greek but also foreign administrative and/or criminal provisions, such as those included in the German Administrative Offences Act (OWiG), the UK Bribery Act and the US Foreign Corrupt Practices Act, which encourage (and reward) the conduct of an internal investigation.
- Last but not least: conducting a quality internal investigation at an early stage of the criminal proceedings can make a significant contribution to speeding up the administration of justice. This is because, as practice has repeatedly demonstrated in a number of cases, conducting a targeted internal investigation by a team of experienced professionals (criminal lawyers) at an early stage significantly reduces the risk of serious deficiencies in the evidence and in the structure and substantiation of the accusation, which will result in both a delay in the trial of the case and in the dismissal of the accusation. The extension of the application of internal investigations will therefore have another important advantage for Greek affairs with institutional value, to the extent that it can contribute substantially to the fight against the basic pathogenesis of the Greek criminal justice system, which is unfortunately the long time required for the administration of criminal justice.

Ovvadias S. Namias Law Firm is located in Athens and was established in 2006. The firm consists of ten partners and associates and has dealt with major penal cases of national and global interest for crimes relating to the banking sector, stock exchange, tax and customs office sector, money laundering, extradition, and mutual legal assistance. The firm provides, to natural persons and legal entities, legal services that extend to the whole spectrum of penal law, with particular emphasis on financial penal law and international court assistance in penal cases. The firm is also experienced in conducting and evaluating criminal internal investigations. The firm offers to domestic and foreign legal entities its wide knowledge and experience in issues concerning corporate penal liability and compliance with the provisions of penal law. The experience and the scientific training of its members correspond to the contemporary requirements of the national and international legislative framework.

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Contents

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1. Legal Framework for Offences

1.1 International Conventions

Italy is a signatory to several international conventions on bribery and corruption, including:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed in Paris on 17 December 1997 and ratified on 15 December 2000);
- the Convention drafted on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (signed in Brussels on 26 May 1997 and ratified on 6 March 2003);
- the United Nations Convention against Corruption (signed in New York on 31 October 2003 and ratified on 5 October 2010);
- the Council of Europe's Criminal Law Convention on Corruption (signed in Strasbourg on 27 January 1999 and ratified on 13 June 2013); and
- the Council of Europe's Civil Law Convention on Corruption (signed in Strasbourg on 4 November 1999 and ratified on 13 June 2013).

1.2 National Legislation

In the Italian legal system, the legislation concerning corruption offences is provided for in the section dedicated to offences against the public administration in the Criminal Code and in the Code of Criminal Procedure.

However, some fundamental provisions specifically applicable to bribery offences can also be found in Legislative Decree No 231/2001 (referring to the administrative liability of legal entities – see **3.3 Corporate Liability**) and in the Civil Code (which proscribes bribery in the private sector – see **2.1 Bribery**).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The interpretation and enforcement of anti-corruption provisions is requested of the Italian courts, whose activity is facilitated by the contributions of legal doctrine. Although Italy does not adopt a stare decisis principle, some important case-law rulings play a significantly persuasive role in the interpretation of anti-corruption rules.

On the administrative side, the National Anti-Corruption Authority has published numerous recommendations and guidelines, which, despite many of them not being binding, do assist in the interpretation and enforcement of the rules on the prevention of corruption (eg, regarding legal services or prevention of corruption in state-owned companies).

1.4 Recent Key Amendments to National Legislation

Since 2012, Italy has embarked on a path of broad-ranging structural reforms, directly or indirectly relating to anti-corruption provisions, which have significantly amended the Italian Criminal Code (ICC), the Code of Criminal Procedure and even the Penitentiary System.

The most effective amendments to the anti-corruption measures were introduced in 2019 by Law No 3/2019 (the so-called Bribe Destroyer Act), which takes a significant step towards further advancing the repression of bribery.

This positive process has continued in 2020 and further innovations have been introduced.

Specifically, it is worth highlighting the 14 July 2020 Legislative Decree No 75 (effective since

30 July 2020) entitled "Implementation of the EU Directive No 2017/1371 (so-called PIF Directive) concerning the contrast, by means of criminal law, of frauds affecting Union's financial interests".

With specific reference to anti-corruption measures, the Decree:

- introduced paragraph no 5-quinquies in Article 322-bis of the ICC, which extends liability for the offences of embezzlement (Article 314 of the ICC), embezzlement by taking advantage of third parties' error (Article 316 of the ICC), blackmail by a public official (Article 317 of the ICC), undue induction to give or promise benefits (Article 319-quater of the ICC), active and passive bribery (Articles 318, 319, 319-ter, 320 and 321 of the ICC), incitement to bribe (Article 322 of the ICC) persons exercising functions or activities corresponding to those of public officials and persons in charge of a public service in states which are not part of the European Union, when the fact affects the EU's financial interests;
- increased the sanctions provided for the crimes of embezzlement by taking advantage of third parties' error (Article 316 of the ICC), undue receipt of funds to the detriment of the state (Article 316-ter of the ICC) and undue induction to give or promise benefits (Article 319-quater of the ICC) in the event that the offence concerns money or another advantage diverted from financial statements of the EU or its bodies if the subsequent damage is over EUR100,000; and
- listed under Article 25 Legislative Decree No 231/01 the offences of embezzlement (Article 314 of the ICC), embezzlement by taking advantage of third parties' error (Article 316 of the ICC) and abuse in office (Article 323 of the ICC) when the facts affect the EU's financial interest.

Furthermore, Law Decree No 76 of 16 July 2020 (converted into Law No 120 on 11 September 2020) amended the crime of abuse in office (Article 323 of the ICC) in order to restrict the conduct which may be potentially relevant under that provision.

In greater detail, the Decree replaced the words "violations of either rules of Law or secondary regulations" with "violation of specific rules of conduct expressly set forth by rules of either Law or equivalent legislations which are not discretionary".

This modification of the legal provision determined three consequences that are connected to each other:

- violations of secondary regulations are no longer relevant for the crime of abuse in office to be perpetrated;
- only violations that are both specific and expressly provided by the Law rules of conduct are able to trigger the crime at issue. This means that the offence pursuant to Article 323 of the ICC cannot be perpetrated by merely violating general principles of the legal system (eg, Article 97 of the Italian Constitution, which states the duties of impartiality and sound management of the public administration); and
- only violations of non-discretionary rules of conduct can be considered for charges of abuse in office. This implies that the abuse of power (which may occur when, in discretionary acts, power is used for a purpose which is different from that for which it was granted) can no longer be regarded as criminal.

It follows that the reform at issue determined a partial abolitio criminis with reference to the violations which are no longer included in the legal provision, pursuant to Article 323 of the ICC.

As far as the criminal enforcement of anti-corruption laws is concerned, the institution of the European Public Prosecutor's Office (EPPO) which started operating on 1 June 2021 (see **7.2. Enforcement Body** and **7.3 Process of Application for Documentation**) is also worthy of note.

Finally, it is important to highlight that on 17 October 2022, Legislative Decree No 150 was published in the Italian Official Journal, with the purpose of implementing reform of the Italian criminal justice system (the so-called Cartabia Reform) in accordance with the principles contained in Law No 134/2021.

The reform is basically aimed at speeding up the criminal trial and provides many modifications to the actual system, such as:

- implementation of telematic criminal trial;
- amendments to the rules on notifications to the defendants after the first notification;
- time limit of the preliminary investigations;
- redefinition of time limits for the preliminary investigations and of the conditions and for extensions;
- modification of the rule of judgment of the preliminary hearing;
- introduction of a pre-trial appearance hearing in the proceedings with decree for direct summons to trial (without preliminary hearing);
- reform of appeal judgments;
- amendments of criminal penalties (ie, substitute penalties for short-term imprisonment, financial penalties, terms for probation);
- regulation of reparative justice measures; and
- reform of the statute of limitations.

2. Classification and Constituent Elements

2.1 Bribery

The Italian legislator punishes corruption offences by means of a complex regulatory system aimed at dealing with different types of crimes, which are provided for in Articles 318, 319, 319-ter and 320 (passive bribery) and Articles 321 and 322 (active bribery) of the ICC.

More specifically, the ICC considers as a criminal offence the conduct of a public official or person performing a public service:

- who, to exercise their functions or powers, unduly receives, for themself or a third party, money or another advantage, or accepts a promise of them (Article 318 – bribery for the exercise of a function);
- who receives money or any other advantage, or the promise thereof, for themself or a third party, to omit or delay, or for having omitted or delayed acts relating to their office, or to perform or for having performed acts in breach of their official duties (Article 319 – bribery for the performance of acts in breach of official duties); or
- who commits the offences described in the first two points in favour of or against a party to civil, criminal or administrative proceedings (Article 319-ter – bribery in judicial proceedings).

Punishment for passive bribery shall also apply to whoever gives or promises money or any other advantage to a public official or person performing a public service if the promise is accepted (Article 321 – active bribery).

Conversely, if the offer, promise or request of a bribe is not accepted, the mere conduct of incitement to corruption is considered as a minor criminal offence (pursuant to Article 322, punishment provided for in Articles 318 or 319 is reduced by one third).

Under Italian legislation, bribery offences do not just include cases where the public official performs an act in accordance with or contrary to their official duties because of a previous agreement with the bribe giver. In fact, even the mere agreement (or the mere solicitation) to perform or not perform the functions of a public official in return for a bribe also constitutes conduct punishable under criminal law. In other words, there is no requirement for the results expected by the perpetrators actually to occur.

It is important to note that the Criminal Code does not distinguish between a bribe (money or other advantage) and gifts, promotional expenditures or other facilitation payments. For this reason, even a small amount of money can trigger criminal provisions concerning corruption if related to the exercise of a public function by the receiver.

However, many companies and public authorities have adopted codes of conduct that specifically address this issue by regulating the conditions and extent of facilitation payments.

Finally, it is worth mentioning that the Italian criminal law system does not contemplate the conduct of individuals who fail to prevent bribery as an offence. In fact, the general provision set out in Article 40 of the ICC, for cases in which omitting to avert a result is treated as an active act, does not cover corruption offences.

Public Official

The definition of "public official" is provided by Article 357 of the Criminal Code as those who perform a legislative, judicial or administrative public function (ie, an administrative function) that is:

- regulated by the public law provisions and acts of an authority; and
- characterised by the formation and statement of the public administration's will or by its implementation by means of authority and certifying powers.

In addition to that figure, anti-corruption provisions also cover acts committed by a "person performing a public service", which, under Article 358 of the ICC, is defined as whoever performs any activity that is governed in accordance with the same modalities as a public function, excluding the performance of merely ordinary tasks and exclusively manual work.

Moreover, according to international conventions ratified by Italy, Article 322-bis of the ICC extends the provisions applicable to domestic public officials to foreign public officials. More specifically, the offences of embezzlement (Article 314 of the ICC), embezzlement by taking advantage of third parties' error (Article 316 of the ICC), blackmail by a public official (Article 317 of the ICC), undue induction to give or promise benefits (Article 319-quater of the ICC), active and passive bribery (Articles 318, 319, 319-ter, 320 and 321 of the ICC), and incitement to bribery (Article 322 of the ICC) are triggered in all cases when involving:

- members of European Union institutions;
- contracted officials and agents in accordance with either staff regulations applying to

European Union officials or to the provisions applying to European Union agents;
- any person seconded to the European Union by the Member States or by any public or private body which carries out functions corresponding to those performed by the officials or agents of the European Union;
- members and servants of bodies created on the basis of founding Treaties of the European Union;
- those who, within European Union Member States, carry out functions or activities corresponding to those performed by public officials or persons performing a public service;
- members of the International Criminal Court;
- persons exercising public functions or activities within the framework of international public organisations and members of international parliamentary assemblies or of an international or supranational organisation, and judges and officials of international courts (paragraph introduced by Law No 3/2019); or
- persons exercising functions or activities corresponding to those of public officials and persons in charge of a public service in states which are not part of the European Union, when the fact affects the Union's financial interests (paragraph introduced by Legislative Decree No 75/2020).

Private Bribery

In accordance with the Council of Europe's Criminal Law Convention on Corruption, the Italian legislator criminalises the conduct of bribery between private parties.

More specifically, Article 2635 of the Italian Civil Code punishes directors, general managers, managers responsible for preparing a company's financial reports, statutory auditors, liquidators or any other employees of private entities who solicit or receive undue money or other advantages (or accept the promise thereof) to perform or omit an act in breach of their duties.

The same sanctions also apply to whoever, even through an intermediary, offers, promises or gives money or other undue benefits to the persons mentioned in the paragraph above.

It is important to note that Anti-corruption Law No 3/2019 has introduced the opportunity to punish ex officio bribery in the private sector by eliminating the procedural requirement of a complaint by the victim.

2.2 Influence-Peddling

In addition to corruption offences, the Criminal Code also punishes the conduct of active and passive trading in influence.

In particular, under Article 346-bis of the ICC, the conduct of any private person or official who, by exploiting or claiming a real or apparent influence on a public official or a person in charge of a public service, unduly receives money or other financial advantage, as the price for their own illicit mediation or for the payment of the public official, to act in contrast to their duties or to omit or delay an act of their duties, is considered criminal.

As a result of Anti-corruption Law No 3/2019, Article 346-bis of the ICC has extended its scope to the influence-peddling of foreign public officials as defined by Article 322-bis of the ICC (see **2.1 Bribery**).

2.3 Financial Record-Keeping

As required by international conventions, the Italian legislator criminalises certain conduct deemed preparatory to bribery offences.

For this reason, Article 2621 of the Civil Code punishes directors, general managers, and managers responsible for preparing the company's financial reports, and statutory auditors and liquidators who, in order to obtain an undue profit for themselves or for others, falsify financial statements, reports or other corporate communications addressed to shareholders or the public, by presenting a misleading picture of the financial situation of the company (or group).

More severe penalties are envisaged for accounting fraud regarding listed companies (Article 2622 of the Civil Code).

2.4 Public Officials

Within the Criminal Code, the misappropriation of public funds carried out by a public official is relevant under the offence of embezzlement, set forth by Article 314 of the ICC.

In greater detail, this offence expressly punishes the public official who, having possession, or in any case having available, money or other things by reason of their functions, makes them their own.

In this case, no unlawful request or order must arise from the public official, whose behaviour is limited to embezzling money or other things of which they have possession.

However, the potentially unlawful taking of interest or showing of illicit favouritism by a public official might trigger, respectively, the crime of abuse in office or the endangerment of fairness of tenders.

Abuse in Office

In the Italian legal system, public officials have the general duty to abstain in the case of a personal conflict of interests (or in the event of a relative's conflict of interests) and failure to do so may fall under the crime of abuse in office, as set forth in Article 323 of the ICC.

However, mere inobservance of the duty to abstain is sufficient to be deemed abuse in office (the other conduct described by the legal provision is breach of the rules of conduct expressly set forth by rules of either law or equivalent legislations which are not discretionary law or regulations), but is not enough to trigger the offence at issue.

Indeed, for the occurrence of the offence under Article 323 of the ICC, the law also requires:

- an undue financial advantage for the public official or others or, alternatively, an unjust detriment to others; and
- the specific intention of the public official who must act in order to obtain an undue advantage for themself or others, or to cause a detriment to a third party.

According to this provision, the public official is punished whenever they act intentionally in breaching the law or, otherwise, fail to abstain in circumstances of conflict of interests (relevant even in the case of a third-party's interest), obtaining – in this way – an undue profit for themself (or for others) or, alternatively, causing a detriment to others.

Endangerment of Fairness of Tenders

The conduct linked to favouritism on the part of a public official, who guarantees an undue advantage to a third party by acting in breach of the law ensuring free and equal access to bidders for the granting of contracts, is relevant from a criminal law perspective and is punished by two different provisions included in the Criminal Code.

The offence under Article 353 of the ICC (disturbing the fairness of tenders) punishes anyone who, by means of violence or threat, gifts, promises, collusion or other fraudulent means, prevents or disrupts the fair course of the tender, or prevents tenderers from competing in it.

Moreover, in the event such conduct is carried out by a person designated by law or a public authority to manage the tender, the sanctions (fine and imprisonment) are increased. In this case, the designated person is considered to hold the office of a public official.

The second offence to be considered is the crime or offence of "Disrupting the fairness of the procedure for choosing a bidder" as set forth in Article 353-bis of the ICC.

This legal provision punishes anyone who, by means of violence or threat, gifts, promises, collusion or other fraudulent means, alters the administrative proceedings intended to determine the content of the call for bids, or any other equivalent notice, pursuing the intention to influence the methods adopted by the Tender Authority for choosing the successful bidder.

2.5 Intermediaries

Some of the specific offences against the Public Administration (ie, Articles 317, 318, 319, 319-quater, 323 of the ICC) provide for the liability of a public official, both in the event that the act is committed by them, and in the event that the advantage or money (as forms of payment for the performance or omission of the due or undue act, or merely as a result of the role the public official holds) is received by a third party.

Furthermore, all the above-mentioned offences may hypothetically be committed through an intermediary: indeed, the criminal system states a general rule, set forth in Article 110 of the ICC, according to which any person who participates in the commission of a crime (through conscious behaviour and causally linked to the fact) is liable for it. In this way, any third party who acts together with the agent is equally liable for the crime committed.

3. Scope

3.1 Limitation Period

As a general rule, under Italian criminal law any crime is extinguished after a period corresponding to the maximum prison term provided for each offence and, in any case, after a period of not less than six years, starting from the day the offence is committed (Article 157 of the ICC).

According to Articles 160 and 161 of the ICC, the limitation period can be suspended by one of the procedural acts specifically determined by the law (eg, the request for committal to trial) and may be extended by up to one quarter of its ordinary duration. Suspension for limitation period may be longer for corruption crimes under Articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis of the ICC, for which the extension term is doubled.

The statute of limitations was widely amended by Law No 9/2019 (Bonafede Reform, after the former Minister of Justice), introducing a "freezing clause" for the statute of limitations after the first-instance judgment for all crimes committed from 1 January 2020 (meaning that, for these crimes, the limitation period ends with the issue of the first-instance verdict).

This new clause was recently confirmed by Law No 134/2021 (Cartabia Reform), which also sets maximum time limits for appeal proceedings and

for proceedings before the Supreme Court with regard to all crimes committed from 1 January 2020. The limits are:

- two years (extensible for one further year in the event of a particularly complex trail) for appeal proceedings; and
- one year (extensible for six further months in the event of a particularly complex trial) for proceedings before the Supreme Court.

Both time limits run 90 days after the deadline for filing the grounds of the judgment.

After these maximum time limits have passed, criminal action is time-barred and the trial is extinguished (Article 344-bis of the ICPC).

As for administrative liability of legal entities, the limitation period under Article 22 of Legislative Decree No 231/01 is five years after the crime was committed.

This term can be suspended by a request to apply precautionary measures and by an entity being charged with having committed the administrative offence. In the latter event, the statute of limitations does not run until the final judgment becomes enforceable.

3.2 Geographical Reach of Applicable Legislation

Italian criminal law applies to crimes committed on Italian territory. More specifically, under Article 6 of the ICC, territorial jurisdiction is established (i) over conduct which occurred either wholly or partially within the territory of the state, or (ii) even in those circumstances where the offence is wholly committed abroad but its effects take place in the national territory.

Nevertheless, with regard to certain serious offences such as corruption, Articles 9 and 10 of the Criminal Code establish national or universal jurisdiction over cases not covered by the above-mentioned Article 6.

Specifically, Italy has extraterritorial jurisdiction over conduct wholly committed abroad which does not have any effect in the national territory when three conditions are met:

- the perpetrator is within Italian territory;
- the double-criminality principle is satisfied; and
- a request for punishment is made by the Minister of Justice or the injured party.

However, it should be mentioned that Anti-corruption Law No 3/2019 has recently facilitated the prosecution of corruption offences committed by a national or foreign citizen by eliminating the condition that a request for punishment for such crimes should be made by the Minister of Justice or the injured party.

3.3 Corporate Liability

Legislative Decree No 231/2001 introduced administrative liability against legal entities in the event that any of the crimes listed in Legislative Decree No 231/2001 (including crimes against public administration) are perpetrated by directors, managers or employees for the benefit of or in the interest of the company.

This is an autonomous liability of the legal entity (so-called organisational negligence) for not having adopted organisational models capable of preventing the crimes listed in the Decree from being committed (for further details, see **4.5 Safe Harbour or Amnesty Programme** and **6.1 National Legislation and Duties to Prevent Corruption**).

In connection with this point, it is worth mentioning that a company's liability arising from crimes committed is completely independent of corporate events following the perpetration of the crimes. Indeed, according to Articles 28, 29 and 30 of Legislative Decree No 231/01, in the case of changes to a legal entity's organisational structure, the company remains liable for the offences committed before the date on which the changes took effect; in the same way, in the event of a merger or takeover, the resulting legal entity is liable for the offences for which the previous entities were responsible before the merger or takeover. However, in the event of a partial split-up, the divided company remains liable for crimes committed before the split.

4. Defences and Exceptions

4.1 Defences

In general terms, the Italian criminal system is founded on the presumption of innocence, so that the burden of proof in demonstrating that a crime has been committed lies with the prosecutor. This means that, if there is any doubt about the defendant's guilt, they must be acquitted in accordance with the in dubio pro reo rule.

With regard to an individual's liability, the first defence for any crime (not only bribery or other crimes against the public administration) may be based on the demonstration that the so-called objective elements of the offence have not been satisfied or sufficiently proved by the prosecutor.

Furthermore, another defence strategy may consist in attempting to demonstrate the lack of intent by the defendant to commit a crime (lack of mens rea), which is a mandatory condition for punishment.

Another argument that may be used as a defence for the above-mentioned offences relates to so-called mitigating or exonerating circumstances (see **7.4 Discretion for Mitigation** and **4.5 Safe Harbour or Amnesty Programme**).

Regarding the legal entity's liability, see **6. Compliance and Disclosure**.

4.2 Exceptions

There are no exceptions to the aforementioned defences.

4.3 De Minimis Exceptions

In general, there are no de minimis exceptions under Italian Law: a bribe of any value will constitute an offence.

The only exception – the relevance of which is, in any case, subject to the court – can be configured if the "advantage" is permitted by the law or if its value is very small as, for instance, in the case of a mere courtesy gift (the so-called *munuscula*). Please note that Decree No 62/2013 provides exceptions for *munuscula* or donations of modest value to be identified, for public employees, to the amount of EUR150.

The value of the bribe could also be taken into account by the court as a mitigating factor in determining the quantum of sanction to be imposed: according to the mitigating circumstance provided by Article 323-bis of the ICC, if the offences under Articles 314, 316, 316-bis, 316-ter, 317, 318, 319, 319-quater, 320, 322, 322-bis and 323 of the ICC are particularly slight, the sanction is reduced by up to one third.

4.4 Exempt Sectors/Industries

In Italy, no sectors or industries are exempt from corruption offences.

It is, however, important to bear in mind that most of the offences described require, as an "objective element" of the crime, the fact that the unlawful advantage is granted or promised to a public official or a public service-provider.

4.5 Safe Harbour or Amnesty Programme

With reference to corruption crimes, a new exonerating circumstance – introduced by Law No 3/2019 – is provided by Article 323-ter of the Criminal Code in the event of self-incrimination and effective co-operation with the judicial authority.

For more details, see **7.4 Discretion for Mitigation**.

Regarding the specific exonerating consequence for legal entities, arising from the adoption of an adequate compliance system, see **6.1 National Legislation and Duties to Prevent Corruption**.

5. Penalties

5.1 Penalties on Conviction

Penalties upon conviction for the above offences are different for individuals and legal entities.

With specific regard to penalties provided for legal entities, penalties arising from crimes can be "financial" or "disqualifying"; according to Article 10 of Decree No 231/2001, financial penalties are always applied for administrative offences arising from a crime and are applied in terms of not less than 100 units (the so-called quotas) and not more than 1,000 units. The amount of each unit is not below EUR258 and not above EUR1,549, according to Article 11 of Decree No 231/2001.

Penalties for the following offences when committed by individuals or legal entities are:

- for the crime of misappropriation pursuant to Article 314 of the Criminal Code:
  - (a) individuals: imprisonment from four to ten years and six months (imprisonment from six months to three years in the event of temporary misappropriation); or
  - (b) legal entities: fine of up to 200 units (when the act affects EU financial interests);
- for the crime of blackmail by a public official pursuant to Article 317 of the Criminal Code:
  - (a) individuals: imprisonment from six to 12 years; or
  - (b) legal entities: fine from 300 to 800 units and disqualifying penalties (Article 9, paragraph 2, Decree 231);
- for the crime of bribery pursuant to Article 318 of the Criminal Code:
  - (a) individuals: imprisonment from three to eight years; or
  - (b) legal entities: financial penalty of up to 200 units;
- for the crime of bribery pursuant to Article 319 of the Criminal Code:
  - (a) individuals: imprisonment from six to ten years; or
  - (b) legal entities: fine from 200 to 600 units (from 300 to 800 units in the event of significant profit by the company as a consequence of the crime) and disqualifying sanctions (Article 9, paragraph 2, Decree 231);
- for the crime of bribery in relation to judicial acts pursuant to Article 319-ter of the Criminal Code:
  - (a) individuals: imprisonment from six to 12 years; or
  - (b) legal entities: fine from 200 to 600 units (from 300 to 800 units in the event of

significant profit by the company as a consequence of the crime) and disqualifying sanctions (Article 9, paragraph 2, Decree 231);
- for the crime of undue inducement to give or promise benefits pursuant to Article 319-quater of the Criminal Code:
  (a) individuals: imprisonment from six to ten years and six months for the public officer. Imprisonment of up to three years (or up to four years when the act affects EU financial interests and the damage or profit is greater than EUR100,000) for the corruptor; or
  (b) legal entities: fine from 300 to 800 units and disqualifying of "suspension or revocation of authorisations, licences or concessions functional to the commission of the crime";
- for the crime of misconduct by a public official pursuant to Article 323 of the Criminal Code:
  (a) individuals: imprisonment from one to four years; or
  (b) legal entities: fine of up to 200 units (when the act affects EU financial interests);
- for the crime of influence-peddling pursuant to Article 346-bis of the Criminal Code:
  (a) individuals: imprisonment from one to four years and six months; or
  (b) legal entities: fine of up to 200 units;
- for the crime of keeping inaccurate corporate books and records pursuant to Article 2621 of the Civil Code:
  (a) individuals: imprisonment from one to five years; or
  (b) legal entities: fine from 200 to 400 units;
- for the crime of keeping inaccurate corporate books and records in listed companies pursuant to Article 2622 of the Civil Code:
  (a) individuals: imprisonment from three to eight years; or
  (b) legal entities: fine from 400 to 600 units; and
- for the crime of private corruption pursuant to Article 2635 of the Civil Code:
  (a) individuals: imprisonment from one to three years; or
  (b) legal entities: fine from 400 to 600 units and disqualifying sanctions (Article 9, paragraph 2, Decree 231).

5.2 Guidelines Applicable to the Assessment of Penalties

The only guidelines or principles applicable to the assessment of the penalties are provided by the "general part" of the Criminal Code in Articles 132 and 133. The first legal provision states that the application of penalties shall be at the judge's discretion, within the limits (minimum and maximum) established by the law for each crime; the second one specifies the principles to be applied by the judge in the exercise of their discretionary power (eg, the judge has to take into account the seriousness of the offence and the individual's attitude to the crime). Sanctions are increased in the event of a repeat of the crime, in accordance with Article 99 of the ICC.

Articles 11, 14 and 20 of Legislative Decree No 231/2001 state similar principles for the administrative liability of legal entities.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Legislative Decree No 231/01 states an autonomous administrative liability of legal entities, in the event that one of the crimes listed in the Decree (including bribery and corruption offences) is perpetrated in the interest or to the benefit

of the company by persons who have representative, administrative or management functions or by persons under the direction or supervision of one of these persons.

All such provisions are enforced by the Criminal Court (following an initiative put in place by the prosecutor), which has the duty to assess – usually in the same proceedings – both individual and corporate liabilities and, as a consequence, issue judgments of acquittal or conviction.

In order to avoid liability in the event that a crime has been committed in the interest or to the benefit of the company, according to Articles 6 and 7 of Legislative Decree No 231/2001, entities may adopt the so-called organisational models in order to prevent the crimes listed in the Decree from being committed.

According to Legislative Decree No 231/2001, the model must be considered "effective"; this means that, according to Article 6 paragraph 2 of the Decree, the model must:

- identify the activities in which the crimes listed in the Decree could be committed;
- provide specific protocols designed to assist the company in formulating and implementing company decisions, in relation to the crimes to be prevented;
- identify procedures for managing the financial resources needed to prevent crimes from being committed;
- provide obligations of disclosure to the supervisory board; and
- provide a suitable disciplinary system.

The adoption of the model is not mandatory for the company but is a necessary condition to avail of the exonerating circumstance provided for by Legislative Decree No 231/2001.

Indeed, as highlighted in **3.3 Corporate Liability**, the company has a duty to prevent bribery as an offence (as well as all the other crimes listed in Legislative Decree No 231/2001) and, in the event of failure of that obligation, an autonomous liability might arise for not having adopted organisational models capable of preventing the crimes listed in the Decree from being committed.

Other essential tools for the implementation of the model – as usually stated by the courts – are disclosure of the content of the model and staff training:

- communication is usually reserved to HR functions and is necessary in order to ensure employees are completely aware of the organisational model and the Code of Ethics; and
- training is crucial in order to comply with the requirement of Article 6 of the Decree 231/2001, according to which, in order to be able to determine an "exonerating effect" in favour of the company, the model must be "effectively implemented".

It should be noted that, for public and private entities subject to Italian law, the organisational model may be complemented by the ISO 37001 "Anti-Bribery Management Systems", which represents the first international standard designed to prevent, detect and address bribery involving the company, its personnel and its business partners.

The ISO 37001 standard is therefore designed to help legal entities to implement and maintain a proactive anti-bribery management system, by establishing procedures, policies and controls which companies are urged to implement to prevent bribery or at least to respond to it promptly.

6.2 Regulation of Lobbying Activities

Italian legislation does not provide for a uniform regulation of lobbying activities; however, such activities have been subject to multiple initiatives at both national and regional level through the issuing of regulatory acts (eg, Toscana Regional Law No 5/2002, Molise Regional Law No 24/2004, Lombardia Regional Law No 17/2016; Chambers of Deputies: Code of Conduct, 12 April 2016 and Resolution, 26 April 2016; Ministry for Economic Development and Ministry of Labour and Social Policy: Directive, 24 September 2018; Ministry of Ecological Transition: Decree No 258, 1 August 2018).

At the same time, it is worth mentioning that a Draft Law (called "Discipline of interest representation activities") aimed at regulating lobbying activities was approved by the Chamber of Deputies on 12 January 2022.

The most relevant innovation of the new Law would be the Register for Transparency of Interest Representatives, in which all those who intend to carry out the activity of lobbying are obliged to be registered and keep note of the meetings with the public decision-makers. Furthermore, the new legislation would provide for specific rights, prohibitions and obligations for lobbyists, the violation of which may lead to the application of administrative sanctions.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

In the Italian criminal system, there is no obligation for individuals (who are not public officials) or companies to report bribery or other crimes against the public administration, of which they become aware, to the judicial authority.

6.4 Protection Afforded to Whistle-Blowers

Law No 179/2017 – which came into force on 29 December 2017 – introduced a public and private system of protection for whistle-blowers in Italy.

In the Public Sector

Starting from the public sector, according to the law, a public employee who, in the interest of the integrity of the public administration, reports to the "person responsible for preventing corruption and transparency" (pursuant to Article 1, paragraph 7, of Law No 190, 6 November 2012), or to the National Anti-Corruption Authority (ANAC), or by complaint to the ordinary judicial authority or the accounting authority, unlawful conduct of which they have become aware due to their employment relationship, cannot be sanctioned, demoted, dismissed, transferred, or subjected to any other organisational measure with detrimental effects, direct or indirect, on their working conditions determined by the report.

Furthermore, the law guarantees protection for the whistle-blower by providing for two sanctioning powers by ANAC:

- a fine of up to EUR30,000 for those who adopt retaliatory measures against the whistle-blower; and/or
- a fine of up to EUR50,000 for the person responsible for transparency and anti-corruption who failed to examine the report received from the public employee.

With Resolution No 469 of 25 June 2021, the ANAC has approved the new guidelines on the protection of whistle-blowers in the public sector to strengthen the protective measures for employees who report illegal conducts.

In Private Legal Entities
From the standpoint of private legal entities, the law provides specific protection to whistle-blowers according to Decree No 231/2001 (but only for those companies which have adopted an organisational model).

In greater detail, according to Article 6, paragraph 2-bis, of Decree No 231/2001, companies are required to provide:

- one or more channels enabling senior managers and subordinates to raise detailed disclosures of unlawful conduct pursuant to Decree No 231/2001 and based on precise and congruous facts, or breaches of the organisational model of the company, which they witnessed in the performance of their functions. Such channels must assure confidentiality over the identity of the whistle-blower when handling the disclosure;
- at least one alternative reporting channel suitable to assure, through IT, the confidentiality of the identity of the whistle-blower;
- prohibition against retaliation or discriminatory acts, whether direct or indirect, towards the whistle-blower for reasons, directly or indirectly, connected to the disclosure; and
- within the disciplinary system adopted, sanctions against those infringing the measures for the protection of the whistle-blower, as well as those making disclosures, maliciously or negligently, that turn out to be unfounded.

Such legislation is currently being revised. See **6.6 Location of Relevant Provisions Regarding Whistle-Blowing**.

6.5 Incentives for Whistle-Blowers

No incentive is offered to whistle-blowers as a consequence of reporting bribery or corruption.

The only "incentive" – actually, a sort of "protection" for the whistle-blower – is the one provided by Article 3 of Law No 179/2017, which qualifies the complaint of the whistle-blower, if the "interest of the integrity of the public administration" is pursued by them, as a "justified cause" of disclosure of professional secrets. Therefore, Article 3 provides for an exonerating circumstance for the crimes of "disclosure and use of official secrets" (Article 326 of the ICC), "disclosure of professional secrets" (Article 622 of the ICC), "disclosure of scientific and industrial secrets" (Article 623 of the ICC) and "breach of the duty of loyalty" (Article 2105 of the Civil Code).

With reference to the new exonerating circumstance provided by Article 323-ter of the ICC in the event of self-incrimination and effective co-operation with the judicial authority, see **4.5 Safe Harbour or Amnesty Programme**.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Provisions regarding whistle-blowers in the public sector are set out in Article 54-bis of Legislative Decree No 165/2001; provisions regarding the private sector are set out in Article 6 of Legislative Decree No 231/2001.

As mentioned in **6.4 Protection Afforded to Whistle-Blowers**, both decrees have been amended by Law No 179/2017 entitled "Provisions for the protection of whistle-blowers who report offences or irregularities which have come to their attention in the context of a public or private employment relationship".

As above-mentioned in **6.4 Protection Afforded to Whistle-Blowers**, the Whistle-Blowing discipline is currently under review and update.

On 19 April 2021, the Italian Senate approved Law No 53/2021 ("Legge di delegazione europea 2019–2020"), delegating the Italian Government to transpose (by 17 December 2021) the European Whistle-Blower Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (commonly referred to as the "EU Whistle-Blowing Directive"). Nonetheless, noting the Government's inaction in implementing the first delegation, the Parliament renewed the delegation itself by means of Law No 127 of 4 August 2022. The law was published in the Official Gazette and the measure is effective as of 10 September 2022.

The Italian Government will have to:

- amend national legislation, in accordance with the framework of the EU Whistle-Blowing Directive;
- guarantee co-ordination with current national provisions, ensuring a high level of protection to whistle-blowers; and
- introduce or keep provisions more favourable to the rights of whistle-blowers in order to ensure the highest level of protection for them.

The EU Whistle-Blower Directive sets out common minimum standards across EU member states for the protection of persons who report information about threats or harm to the public interest obtained in the context of their work-related activities.

Most importantly, it provides that the member states must:

- ensure EU-wide protection for those who report breaches of EU legislation in some specific fields (eg, public procurement, financial services, money laundering, and terrorist financing, product safety, transport safety, financial interests of the Union);
- broaden the scope of people who enjoy such protection, including, for example, self-employed workers, contractors, volunteers, non-executive directors, facilitators, consultants, trainees, board members, former employees and job applicants, colleagues or relatives of the reporting persons;
- extend the protection to those who had reasonable grounds to believe that the information on breaches reported was true at the time of reporting, irrespective of whether those breaches are substantiated;
- require that legal entities implement specific internal and external reporting channels to ensure that the whistle-blower's identity is kept confidential (no longer only by companies that have adopted the Models pursuant to Legislative Decree 231/2001 but now by all companies with at least 50 workers, regardless of the nature of their activity);
- designate the authorities competent to receive, give feedback and follow up on reports;
- prohibit all forms of retaliation against whistle-blowers; and
- provide for effective, proportionate and dissuasive penalties for persons that hinder reporting, retaliate against whistle-blowers, or otherwise breach the duties outlined in the EU Whistle-Blowing Directive.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

See **7.3 Process of Application for Documentation**.

7.2 Enforcement Body

See **7.3 Process of Application for Documentation**.

7.3 Process of Application for Documentation

As mentioned previously, in the Italian jurisdiction, the main anti-bribery and anti-corruption provisions are included in the Criminal Code, which describes conduct that may trigger the relevant crimes and provides for the correlative sanctions.

At the same time, Legislative Decree No 231/2001 establishes an autonomous administrative liability for legal entities, in the event that one of the crimes listed in the Decree (including bribery and corruption offences) is perpetrated in the interest or to the advantage of a company.

All such provisions are enforced by the Criminal Court (following an initiative put in place by the prosecutor), which has a duty to assess individual and corporate liabilities and, as a consequence, deliver judgments of acquittal or conviction.

However, Law No 190/2012 established the National Anti-Corruption Authority (ANAC), which is an administrative authority aimed at preventing corruption in public administrations. The ANAC has a broad range of powers (listed also under the ANAC in Legislative Decree No 90/2014 and No 50/2016), which may be summarised as follows:

- analysis of the causes that facilitate corruption, identifying prevention initiatives (for this purpose the authority issues the annual National Anti-Corruption Plan, which assesses the risk of corruption related to the office and points out the potential initiatives to be carried out to mitigate the risk);
- inspections by requesting information, acts and documents, and the execution of the initiatives required by the National Anti-Corruption Plan;
- supervision of public contracts and public tenders;
- reporting to the Public Prosecutor's Office in the event of crimes or to the Court of Auditors in the event of detriment to the Treasury;
- regulation by issuing guidelines (also having a binding value);
- management of the national database of public contracts, digital record of public contracts and national register of evaluation commission members;
- imposition of disqualifying and pecuniary sanctions in the event of failure, without justified reason, to provide the information requested by the ANAC or contracting authorities, or in the event of providing false information or documents;
- incentive reporting through a whistle-blowing channel and imposition of pecuniary sanctions against:
  - (a) those who take revengeful initiatives against the reporters; and
  - (b) Corruption Prevention and Transparency Officials who fail to assess the reports received; and
- in the event of prosecution of any of the crimes under Articles 317, 318, 319, 319-bis, 319-ter, 319-quater, 320, 322, 322-bis, 346-bis, 353 and 353-bis of the ICC or in the event of potential unlawful conduct referable to a successful tenderer, the ANAC will inform the Prosecutor's Office and propose to the Prefect to:
  - (a) order the replacement of the persons involved in the investigation in corporate bodies and, if the company fails to com-

ply, impose extraordinary and temporary management of the company with specific reference to the execution of the public contract related to the potential unlawful conduct; or

(b) impose extraordinary and temporary management of the company with specific reference to the execution of the public contract related to the potential unlawful conduct.

On 1 June 2021, the European Public Prosecutor's Office (commonly referred to as EPPO), started its investigatory and prosecutorial tasks. The EPPO is an independent and decentralised prosecution office of the European Union, with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud and corruption.

Pursuant to EU Regulation No 2017/1939 and to EU Directive No 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the so-called PIF Directive), which sets forth the minimum provisions that must be adopted and transposed into national law by the participating member states, the EPPO is empowered to investigate and prosecute the following offences against EU financial interests:

- fraud relating to EU expenditures and revenues;
- cross-border value-added tax (VAT) fraud involving total damages of at least EUR10 million;
- passive and active corruption (covering both requesting/receiving bribes by a public official and offering/giving bribes to a public official) that damages, or is likely to damage, the EU's financial interests;
- misappropriation of EU funds or assets by a public official;
- money laundering involving property derived from one of the above-listed offences; and
- incitement, aiding and abetting, or attempted commission of the above-listed offences.

7.4 Discretion for Mitigation

With reference to mitigation powers, it is important to highlight that they concern two different fields: administrative law and criminal law.

From the administrative perspective, it is worth mentioning the ANAC Resolution No 949/2017, which introduced the possibility of extinguishing the administrative pecuniary sanctions issued by the ANAC, in the event that no disqualifying sanctions are applicable, by means of the payment of a reduced fine.

Payment of the fine is due within 60 days from the notification of the violation, at a rate of EUR500 in the case of failure to provide the information requested and EUR1,000 in the case of providing false information.

However, regarding potential mitigation powers in the criminal field, the Criminal Code and the Criminal Procedure Code provide for three different mitigation measures which may be applied by the Criminal Courts to reduce the sanctions described in **5.1 Penalties on Conviction**.

Plea Bargain Proceedings

According to Articles 444 and following of the Criminal Procedure Code, individuals may settle the charge through a plea-bargain agreement, with the prosecutor setting out the pecuniary sanctions (fines) and the duration of imprisonment.

The main positive outcomes of plea bargain proceedings are as follows:

- the sanctions agreed with the prosecutor are reduced by a maximum of one third;
- if the judgment does not exceed two years of imprisonment (or two years of imprisonment combined with a financial penalty), the judgment itself does not entail the cost of the proceedings or the application of ancillary penalties and security measures, except for confiscation in cases set forth by Article 240 of the ICC; and
- if the judgment does not exceed two years of imprisonment (or two years of imprisonment combined with a financial penalty), the offence shall be extinguished if, within five years (if the judgment concerns a crime) or two years (if the judgment concerns a misdemeanour), the accused does not commit a crime or misdemeanour of the same kind.

Note that, as set forth by Article 444 paragraph 1-ter of the Criminal Procedure Code, in the event of prosecution of any of the crimes set forth in Articles 314, 317, 318, 319, 319-ter, 319-quater and 322-bis of the ICC, the request for plea-bargain proceedings is subject to the full restitution of the price or the profit arising from the offence.

The court assesses whether the latter condition is met and, in general terms, whether the plea-bargain agreement complies with the law. If the evaluation is positive, the court delivers the plea-bargain sentence.

Furthermore, Law No 3/2019 added paragraph No 3-bis to Article 444 of the Criminal Procedure Code, which states that, in the event of prosecution for any of the crimes provided for by Articles 314 paragraph 1, 317, 318, 319, 319-ter, 319-quater paragraph 1, 320, 321, 322, 322-bis and 346-bis of the ICC, the plea-bargain request may be subject to the exclusion or suspension of the accessory penalties provided for by Article 317-bis of the ICC. Should the court deem it mandatory to apply these accessory penalties, it shall reject the plea-bargain request.

Finally, it is important to highlight that, pursuant to Article 63 of Legislative Decree No 231/2001, administrative liability may also be settled through a plea-bargain agreement. Indeed, the company is entitled to settle its potential administrative liability with an agreement on pecuniary sanctions and on the duration of disqualifying measures (if applicable).

Two Special Mitigating Circumstances Set Forth by Article 323-bis of the ICC

The special mitigating circumstance under the first paragraph is met when the offences under Articles 314, 316, 316-bis, 316-ter, 317, 318, 319, 319-quater, 320, 322, 322-bis and 323 of the ICC are particularly slight. In such an event the sanction is reduced by up to one third.

In greater detail, such a mitigating circumstance occurs when the whole offence is barely offensive and, therefore, not very serious, with reference to the conduct carried out, the amount of economic damage or profit attained, the subjective attitude of the perpetrator and the event (see latest Court of Cassation, Section VI, 23 May 2019, No 30178). Therefore, the application of such a mitigating circumstance cannot be determined by the mere slightness of the advantage gained by the perpetrator.

The second mitigating circumstance has been introduced by Law No 69/2015 and occurs if the perpetrator made effective efforts to:

- prevent any further consequences of the criminal activity;

- provide evidence of criminal offences and identify other perpetrators; or
- allow the seizure of the profits.

In accordance with Article 25, paragraph 5-bis, Legislative Decree No 231/2001, the same mitigating measure is applicable to the benefit of the legal entity which meets all the above-mentioned conditions and adopts an organisational model suitable to prevent crimes of the same type.

This circumstance (which is applicable only with reference to the offences under Articles 318, 319, 319-ter, 319-quater, 320, 322, 322-bis and 323 of the ICC) is a kind of active repentance post delictum and determines a reduction of from one third to two thirds of the penalties.

It is important to point out that, in accordance with the case law referred to, similar legal provisions (see Court of Cassation, Section IV, 14 April 2016, No 32520) state that any such mitigating circumstance cannot be granted in the case of reticence, even if only partial, on the part of the perpetrator, as collaboration is required to be full and effective.

Non-punishable Clause Set Forth by Article 323-ter of the ICC

Law No 3/2019 introduced a special non-punishable clause in the event of self-incrimination and effective co-operation with the judicial authority.

In greater detail, this clause requires that:

- one of the offences pursuant to Articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis, 353, 353-bis and 356 of the ICC is perpetrated;
- the author voluntarily reports the crime to the authority, provides evidence of the crime and helps to identify the other perpetrators; and
- the perpetrator discloses the crime before being informed that they are under investigation and within four months of the offence being perpetrated.

Furthermore, the perpetrator is required to make available the benefit received or, where this is not possible, make available a sum of money of equivalent value, or provide useful information to identify the beneficial owner of the advantage. This initiative must also be carried out within four months of perpetration of the crime.

The non-punishable clause is not applicable if the self-incrimination is aimed at perpetrating the crime reported or at uncovering the agent who has acted in breach of the law.

Exonerating Circumstance for Legal Entities

Article 17 of Legislative Decree No 231/2001 states that disqualifying sanctions are not applicable if, after the unlawful behaviour but before the beginning of the trial, the company is able to meet three requirements:

- full compensation for damage and the removal of any detrimental or dangerous consequence of the crime;
- removal of the organisational inefficiencies that determined the crime through the adoption and implementation of an organisational model pursuant to Legislative Decree No 231/2001; and
- making available the “profit” arising from the crime for it to be confiscated.

7.5 Jurisdictional Reach of the Body/Bodies

See **7.4 Discretion for Mitigation**.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

In recent Italian judicial news, there are many cases of corruption which could be considered as landmarks in case law.

On 17 March 2021, the Milan Criminal Court acquitted two important energy groups, the chief executive and managers of USD1.1 billion corruption charges related to the 2011 acquisition of OPL-245, a Nigerian offshore oil-prospecting licence. Italian prosecutors argued that parts of the purchase price were bribes that landed in the pockets of middlemen and politicians, including the Nigerian former oil minister. The Criminal Court acquitted the defendants as there was no case to answer because there was no evidence that the money was channelled to politicians and intermediaries. Italian prosecutors and the Nigerian State appealed against the acquittal. In July 2022, the Public Prosecutor's Office at the Court of Appeal of Milan revoked its appeal against the acquittal judgment, which therefore became legally binding.

Another recent and important case – currently pending at the Court of Milan – is the so-called Ruby-ter criminal proceeding against the former Prime Minister, Mr Silvio Berlusconi, and other defendants charged of bribery in judicial proceedings, pursuant to Article 319-ter of the Criminal Code, for having paid money and other benefits with the aim of inducing some witnesses to give false testimony in other criminal proceedings.

With regard to the crime of "trading in influence", pursuant to Article 346-bis of the Criminal Code, in January 2022 the Court of Cassation dealt with a case involving the purchase and sale of Chinese surgical masks in the first phase of the pandemic emergency due to the worldwide spread of COVID-19, addressing, in particular, the issue of the conditions for establishing the lawfulness or unlawfulness of the so-called "onerous mediation". The Court held that, in the absence of a legal regulation of the activity of lobbying groups, the unlawfulness of the mediation can only be derived from the purpose of the influence, which must consist in the commission of a criminal offence capable of producing advantages for the principal.

It is also worth mentioning that the Criminal Court of Cassation has recently had the opportunity to examine some issues related to whistleblowing. In greater detail, two different principles are regularly affirmed by the case law:

- in the event that an employee carries out investigative activity aimed at filing a whistleblowing complaint and this activity – breaching the law – could trigger a crime, this conduct cannot be justified by the rules protecting the whistle-blower (30 November 2017, Law No 179); and
- confidentiality over the identity of the whistleblower is for disciplinary purposes only, but in the criminal field it cannot be guaranteed in a case where the report becomes an accusatory statement and the identification of the whistle-blower is absolutely essential for the defendant's defence.

7.7 Level of Sanctions Imposed

See **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

Italian legislation is regularly monitored and periodically assessed both by National Authorities (such as the Ministry of Justice and the Supreme Court) and by bodies of several International Organisations. The last reports on bribery and corruption in Italy have been provided by the OECD and by the GRECO, as well as by the National Anti-Corruption Authority (ANAC).

OECD

On 18 October 2022, the OECD (Organisation for Economic Co-operation and Development) published its Phase 4 Report – Italy, which assesses Italy's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 1997). The report shows that Italy has considerably strengthened its regulatory system for combating this type of corruption, by lengthening the statute of limitations of the offence, increasing imprisonment and disqualification penalties, and introducing a protection system for whistle-blowers. It has also made considerable investments in the digitisation and modernisation of the judicial system, extremely useful in the fight against bribery. According to the report, new challenges for Italy will concern the issues of the liability of entities, greater protection for whistle-blowers, the extension of the application of the confiscation of the profit of the crime and disqualification penalties, as well as in raising public awareness of the phenomenon.

GRECO

In the last compliance report published on 14 September 2022, the GRECO focused on the status of implementation of the Council of Europe Anti-bribery Conventions in Italy, with regard to corruption of parliamentary members, judges and public prosecutors. On this issue, the report concluded that Italy has implemented satisfactorily four of seven pending recommendations contained in the previous round's evaluation report [(a) introduction of the code of conduct in the Internal Rules of the Chamber of Deputies and the Senate of the Republic; (b) limitation of subsidies, gifts, hospitality, favours and other benefits for Members of Parliament; (c) restrictions on the prevention of conflicts of interest to be applied to former Members of Parliament; (d) the introduction by law of the incompatibility between the simultaneous exercise of Judiciary office and of member of a local authority].

In general terms, the update recognised the effectiveness of the initiatives following the recommendations concerning the status of magistrates, while a similar result has yet to be achieved regarding Members of Parliament, due to the persistent absence of codes of conduct for Chambers.

ANAC Report

In the annual report published in June 2022, the Italian Anti-corruption Authority (ANAC) assessed the current enforcement law on bribery and corruption-related crimes, highlighting its strengths and areas for improvement.

The report stated that the effects of the COVID-19 pandemic and the recent events in Eastern Europe have forced institutions to deploy extraordinary resources, resulting in the need to reorganise public spending actions and identify priorities deemed essential to meet the needs and requirements of the community, bearing in mind the new risks of corruption that may result. In these new risk areas, an essential strategic point is the innovative use of information technologies in the service of the modernisation of

public administration through digital transformation.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

See 6.2 Regulation of Lobbying Activities.

Pistochini Avvocati Studio Legale was founded in 2020 and has a team of ten legal professionals based in Milan, Italy. The firm provides corporate criminal law assistance to leading Italian and international clients and law firms. The firm's lawyers have postgraduate specialisations in criminal law and advise companies and individuals on preventive steps and, in the judicial phase, on criminal business law issues. In light of this specialisation, Pistochini Avvocati has been involved in many relevant cases concerning crimes in the areas of public administration, tax, finance, the environment and the criminal liability of legal entities under Legislative Decree No 231/2001.

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Andrea Gaudio joined Studio Crippa Pistochini in 2016 and was named partner of Pistochini Avvocati Studio Legale in 2020. He has gained significant experience in specialised areas of criminal corporate law, in particular public administration, environment, tax and property crimes. Andrea also deals with all the main issues concerning the administrative liability of legal persons and holds appointments as chairman in various supervisory bodies of leading companies pursuant to Legislative Decree No 231/2001. He has been enrolled in the Milan Bar Association since 2013.

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Trends and Developments

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General Outlook

Corruption is usually considered as an old die-hard disease of Italian society, which dates back to the beginning of the past century at least. This is why the Italian Code of Criminal Law (introduced in 1930 and still in force) has always provided a wide and substantial regulation of crimes against the public administration, and why such regulation has been subjected to a number of legislative reforms across the years. In recent times, the regulation of crimes against the public administration has been consistently strengthened.

Today, crimes such as bribery, bid-rigging and others are among the criminal offences punished with the highest penalties in the field of white-collar crimes in Italy. Moreover, the regulation of corruption has been amended through the extension of criminal law provisions originally introduced to fight organised crime (as in mafia-type organisations).

The approach of the prosecutors' offices has also changed over the years. The evolution of the prosecutors' approach can be categorised in terms of a constant, progressive aggression towards corruption in all fields of society. In the course of the 20th century, the fight against corruption was basically limited to the ambit of public administration (for instance, bribery of public officials, as employees of public bodies).

"Mani Pulite"

At the end of the 20th century, there came a turning point with the so-called "hands-clean operation", carried out by the Prosecutor's Office of Milan, that literally destroyed a large part of Italian political parties, leading to the end of a historical phase of Italian politics. At that point in time, the paradigm of anti-corruption changed forever: the execution of extensive investigative activities (in the form of massive wire taps and cross-border investigations) and the striking use (in many cases, the abuse) of pre-trial detention finally managed to obtain both confessions from the defendants and accusations against other individuals that left a deep scar in the Italian legal framework (and in the social framework as well), which is still far from healing. From that moment on, a fracture took place between, on the one hand, the need to properly prosecute corruption – which, as a matter of fact, dramatically affected Italy – and the need to act in compliance with the Rule of Law and the fundamental right to defence.

In recent times, the fight against corruption has focused on new horizons, including:

- so-called academic corruption (ie, corruption among university professors in order to get chairs, publications, etc);
- corruption in the pharmaceutical corporations field;
- international corruption; and
- private corruption.

In a nutshell, when we deal with Italian anti-corruption regulation, we deal with a constantly moving and changing juridical issue, with both old-time roots and innovative perspectives,

always in the framework of a severe and rigid court practice.

Changes in Legislation

Corruption and bribery crimes are regulated in the Second Title of the Second Book of the Italian Criminal Code (ICC). Such regulation is made up of two parts:

- crimes of public officials against the public administration; and
- crimes of private citizens against the public administration.

This regulation went through several changes over the years from 1990, 60 years after the publication of the ICC in the 1930 Kingdom of Italy Official Gazette of Laws and Decrees.

The aim of the said changes was to adjust the criminal provisions to fit the new social and economic trends and, therefore, to effectively punish those behaviours which had a large impact on the state, by ensuring the correct functioning and fairness of the Italian public administration compared to international and European public administrations.

The first relevant amendment came into force with Law 86/1990. This law introduced new provisions into the ICC:

- Section 316-bis (crime of embezzlement against the Italian state); and
- Section 319-ter (crime of bribery in judicial actions).

Amendments in several sections, already in force in the ambit of crimes against the public administration, were also introduced.

After the 1995 PFI Convention (on the protection of communities' financial interests), in 2000 the Italian legislature introduced Section 316-ter into the ICC: the crime of misappropriation of funds to the detriment of the state, or other public entities, or the EU.

Later on, in 2012 a new law (Law 190/2012) introduced further modifications, such as increasing the period of detention set out for crimes of bribery. This law also introduced a new provision: Section 319-quater, wrongful inducement to give or promise any utility, and the crime of unlawful illicit influences. Furthermore, this law amended Section 2635 of the ICC, now named commercial (private) bribery, which can be both active and passive.

The reform at hand also introduced amendments to Legislative Decree 231/2001, the law that defines the liability of a legal entity for a crime perpetrated by an individual within the company.

Section 318 of the ICC was also modified by providing that, in this form of bribery (so-called proper bribery), public officials do not have to perform a specific act related to their office – the crime will also be considered committed when public officials make themselves available to private interests in exchange for money or other utilities without the perpetration of a specific act.

After the 2012 reform, another important change occurred, with Law No 69/2015, which greatly increased the time of custodial sentence of the criminal provisions for bribery and corruption set out in the ICC. For instance, detention provided for the crime of misappropriation, committed by public officials, of money or other goods available to them due to their office or service (Section 314 of the ICC), was increased from four

to ten years and six months (while the previous penalty had ranged from four to ten years).

In 2019, the legislature approved Law No 3/2019, which introduced new paragraphs and amended others in the existing criminal provisions. For instance, the crime of corruption for the exercise of a function, pursuant to Section 318 of the ICC, is now punished with a custodial sentence ranging from three to eight years (instead of the previous penalty, which had ranged from one to six years of imprisonment).

It is worth noting that, on 28 September 2022, the Italian National Anti-Corruption Authority issued the approval of guidelines regulating the "implementation – also in progressive stages – of the qualification system of contracting stations and central purchasing bodies to be placed at the basis of the new qualification system that will be made operational when the reform of public contract regulations comes into force."

Relevant Developments in Court Law

There have been no particular developments in Court law during 2022 relating to corruption. On the one hand, some criminal proceedings are still subject to judicial evaluation (as in the well-known ATM case before the Court of Milan, concerning Milan's municipal public transport company). On the other hand, other inquiries are stuck in procedural clashes (the "Academic corruption" case, after three different changes of venue, having eventually been moved before the Criminal Court of Venice).

That said, a new case of "Academic corruption" erupted at the Milan Prosecutor's Office, involving famous professors at various universities. Dozens of searches were triggered throughout Italy in what appears to be a new scandal affecting the university world. Prosecutors allegedly identified a systematic conditioning of procedures for the assignment of the titles of researcher and full and associate professor within the Faculty of Medicine and Surgery of the University of Milan. According to the prosecution, collusion and other methods of disruption that systematically polluted the regularity of selection procedures emerged, substituting clientelist logic for the meritocratic method and the principle of impartiality that should guide public administration.

Several types of conduct were indicated by the investigators: "in some cases, there is the appointment of compliant colleagues who are aware ex ante that they should favour a particular candidate," in other cases "the evaluation criteria are tailored to the profile of the person who is intended to benefit." And again, "on other occasions, the determination of the evaluation criteria and even the awarding of scores are entrusted to the same candidate whom it is intended to favour." In other situations, "the most deserving candidates are discouraged, inviting them not to participate or to withdraw the submitted application, with veiled threats or promises of future benefits." And there would be cases in which "other candidates were also asked to participate, with the backroom agreement that they would withdraw only at the final stage of the process, all in order to simulate strong competition and discourage other undesirable candidates."

International Co-operation and the EPPO

International co-operation and corruption have become closely linked since a new independent EU body came into being in June 2021: the European Public Prosecutor's Office (EPPO), based in Luxembourg. Currently, 22 EU member states participate in the enhanced co-operation (excepting Hungary, Poland, Sweden, Denmark and Ireland).

As outlined in Council Regulation 2017/1939 of 12 October 2017 implementing enhanced co-operation on the establishment of the European Public Prosecutor's Office, the EPPO has the competence to investigate, prosecute and bring to judgment crimes against the EU budget: "the EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of". As outlined in its "mission and tasks", some severe crimes fall within the area of competence of the EPPO:

- cross-border VAT fraud involving total damages of at least EUR10million;
- other types of fraud affecting the EU's financial interests;
- corruption that damages, or is likely to damage, the EU's financial interests;
- misappropriation of EU funds or assets by a public official; and
- money laundering and organised crime, as well as other offences inextricably linked to one of the previous categories.

Italy has implemented the Council Regulation with a recent legislative development, Legislative Decree 9/2021, defining the general rules in order to adapt national legislation to conform with the European legislation.

As said above, corruption and international co-operation are strictly linked given the effects that this crime could also have also outside national borders. The EPPO aims to become an effective tool to concretely fight corruption by investigating, prosecuting and enforcing this kind of crime whenever EU financial interests are involved. The first results of this approach are already visible: in July 2021, the Italian press published news of the commencement of an investigation against four Croatian citizens regarding criminal offences of active and passive corruption and abuse of functions. This investigation started after a criminal report had been filed by the Croatian National Police Office for the Suppression of Corruption and Organised Crime. According to the information available, the mayor of a Croatian city had received bribes from a company manager in exchange for tampering with documentation to procure the assignment of a project co-financed by EU funds.

The EPPO, therefore, has the significant objective of managing the prosecution of crimes – such as corruption – that affect the financial interest of the EU, and to make concrete efforts to guarantee international co-operation.

Nowadays, indeed, co-operation means avoiding duplication of investigation and prosecution, and should start from the relationship between the EPPO and the Italian authorities. As stated by the Council Regulation, in compliance with the principle of sincere co-operation, "both the EPPO and the competent national authorities should support and inform each other with the aim of efficiently combatting the crimes falling under the competence of the EPPO". Sharing the information available over the course of an investigation is key in order to effectively achieve investigative results.

Moreover, effective co-operation has to be safeguarded between the EPPO and pre-existing international institutions. For instance, the Council Regulation provides that "the EPPO should be

established from Eurojust", with the aim mutual co-operation. All the relevant EU bodies – including Eurojust, Europol and OLAF – "should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case". An effective co-operation could in fact avoid duplications of investigations and prosecution, and the violation of the ne bis in idem principle – thus avoiding not only a waste of EU/public funds but also detriment to the defendant under investigation.

Trends for the Future

A first trend for the future is the tendency of the Italian Prosecution Services to identify corruption (more precisely, bribery crimes) in those fields of social life that historically – at least according to common perception – had not been affected by such criminal activities.

Particular attention should be paid to "academic corruption", a neologism that describes new forms of bribery implemented in the world of universities. Such new category of corruption has been brought to judgment in three important criminal investigations, still ongoing but at different degrees of trial by, respectively, Florence's Prosecution Service, Catania's Prosecution Service and Milan's Prosecution Service.

The innovative characteristics of this form of corruption are, in fact, that:

- academics are considered public officials when they act for particular bodies; for instance, as part of commissions for the appointment of professors;
- agreements drafted as a result of corruption are considered as final if drafted during academic activities; for instance, agreements between professors aimed at assigning full-time professor roles, agreements aimed at supporting another group within the university, etc; and
- the currency of corruption is no longer represented merely by money but by other commodities; eg, publications in university journals, participation in conferences and symposiums, and career progression of researchers and PhD students.

The lesson to be learnt here is that Prosecutor's Offices should start to identify – and therefore prevent – new and unexpected forms of corruption that may occur in fields of public life never previously touched by this kind of criminal activity. Such a perspective leads to strong consideration of the issue of prevention.

A second trend for the future is represented by the tendency of the Italian system to move towards a "negotiated justice" system, at least with reference to the criminal liability of legal entities (Law No 231/2001). Currently, the Italian legal framework does not set out any kind of self-reporting or non-prosecution, or deferred prosecution, agreement. The great obstacle is represented by the fact that prosecution, according to the Italian Constitution, is mandatory. This is possibly a very different scenario from the one present, for instance, in the USA or the UK: in Italy, a company cannot perform an internal anti-corruption investigation to avoid prosecution, but only following prosecution with the purpose of mitigating the potential damage arising from criminal proceedings.

This topic has started a wide debate; more specifically, it has been questioned whether the criminal liability of legal entities – as regulated by Law No 231/2001 – should be subjected to

the same "mandatory rule" of prosecution as are private individuals, or if a sort of discretional power could be somehow attributed to the Public Prosecutor. One thing is sure: the Italian criminal law system as a whole is, in fact, going in the direction mentioned above, by introducing special causes for non-punishment, mitigating circumstances, conditions to have access to special proceedings, etc, all related to forms of self-reporting, compensation of damages or remedial initiatives.

A third trend for the future should be the application of prevention measures for matters of corruption. In the Italian legal framework, talking about the "recovery of criminal property" does not mean only talking about traditional and ordinary recovery measures, such as freezing and confiscation, since the Italian legal system has introduced the additional category of prevention measures.

In a nutshell, prevention measures are extraordinary precautionary measures. Patrimonial prevention measures, such as the anticipated seizure and confiscation of assets, were introduced by the Italian Parliament as anti-mafia legal instruments in 1982. The particular characteristic of these prevention measures is the fact that they can be issued on the mere assumption of the apparent "social danger of the defendant". This is a crucial point, since such pre-condition leaves a great discretional power to the judge in deciding whether the prevention measure should be issued or not.

Through the years, prevention measures have been constantly and progressively applied and amended by the Italian legislature. Law No 161/2017, for instance, carried out a significant reform of the so-called anti-mafia code; this reform extended the possibility to apply personal and patrimonial prevention measures against people under investigation in relation to crimes against the public administration such as bribery and corruption in public tenders.

The Italian legal doctrine has hardly criticised this reform: with the extension of prevention measures for crimes against the public administration, the Italian legislature has expressed the concept that the mafia and corruption are the same thing and, consequently, they should be treated in the same way legally.

Cagnola & Associati Studio Legale was established in July 2016 in Milan and provides legal assistance throughout Italy. The firm specialises in corporate criminal law, tax criminal law, environmental criminal law, banking and financial criminal law, corporate and bankruptcy criminal law, anti-corruption and anti-money laundering, and its expert team of lawyers has participated in some of the most relevant national and international trials in these fields. The firm is composed of 15 staff, among whom are lawyers who have gained considerable experience providing advisory services as well as legal defence to both individuals and corporate international clients in criminal proceedings.

Authors

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NIGERIA

Law and Practice

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Contents

1. Legal Framework for Offences

1.1 International Conventions

Nigeria signed the United Nations Convention Against Corruption on 9 December 2003 and ratified it on 24 October 2004. It also adopted the African Union Convention on Preventing and Combating Corruption on 12 December 2003 and ratified it on 26 September 2006.

1.2 National Legislation

Legislation

Nigeria has a myriad of legislation relating to anti-corruption, anti-money laundering, anti-bribery and related matters. The two principal laws, however, are the Independent Corrupt Practices and Other Related Offences Act 2000 (ICPC) and the Economic and Financial Crimes Commission Act 2004 (EFCC).

Offences

All relevant offences are not laid down in a single text but are spread over different sources, such as:

- the Money Laundering Act 1995;
- the Money Laundering (Prohibition) Act 2011;
- the Money Laundering (Prohibition) Act 2022;
- the Advance Fee Fraud and Other Fraud Related Offences Act 1995;
- the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994;
- the Banks and Other Institutions Act 1991; and
- the Miscellaneous Offences Act 1984.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There have not been any specific guidelines produced for the interpretation and enforcement of the principal national legislation, namely the ICPC and the EFCC. The two agencies derived from this legislation nevertheless have the responsibility of administering the Acts and offenders are charged to the courts (principally by the EFCC), which will decide the fate of individuals or corporate organisations.

1.4 Recent Key Amendments to National Legislation

There have not been any key amendments in 2022 to the principal legislation, namely the EFCC or the ICPC. However, there was an amendment to the Money Laundering Act 2011 which made it mandatory for money deposit institutions to report to the Special Control Unit Against Money Laundering under the EFCC any single lodgement in excess of NGN5 million in the case of an individual, and NGN10 million for a corporate body.

2. Classification and Constituent Elements

2.1 Bribery

Definition of Bribery

Under Nigerian legislation, bribery refers to the offering, giving, soliciting, or receiving of any item of value as a means of influencing the actions of an individual holding a public or legal duty.

Specifically, the ICPC prohibits direct or indirect giving/offering and receipt of bribes or gratification for the purpose of influencing official acts related to official duties. The various instances under which the bribes may be given or received are also treated under the ICPC.

The receipt, as well as the giving of a bribe, is an offence under relevant Nigerian legislation.

Components of Bribery

The components of bribery include:

- accepting undue gratification;
- giving or accepting undue gratification through an agent;
- fraudulently acquiring property;
- fraudulently receiving property;
- committing offences through the postal system;
- offering gratification by or through agents;
- bribing public officers;
- using an office or position for undue gratification;
- bribery in relation to auctions;
- bribing someone to provide assistance with, for example, contracts; and
- dealing with property acquired through gratification.

Classification of Hospitality Expenses
There are no specific prohibitions regarding hospitality expenses. Nevertheless, the law covers obtaining property or any benefit of any kind in the discharge of official duties.

Facilitating Payments
There are no rules under Nigerian law relating specifically to facilitation of payments. Nevertheless, any form of gift given to a public official in the course of carrying out their duties is strictly prohibited by the Code of Conduct for Public Officers, as contained in the 1999 Constitution.

Definition of a public official
A public official is defined under the ICPC as a person employed or engaged in any capacity in the public service of the federation, state or local government, public corporations or private companies wholly or jointly floated by any government or its agency, including the subsidiary of any such company, whether located within or outside Nigeria and includes judicial officers serving in magistrate, area or customary courts or tribunals.

State-controlled companies
The above definition of a public official will apply to individuals working in a state-controlled company or companies.

Bribery of Foreign Officials
Although the anti-corruption and anti-bribery legislation does not specifically criminalise the bribing of foreign officials in the same way the United States of America Foreign Corrupt Practices Act and the United Kingdom Bribery Act do, the extension of the definition of a public official to individuals working outside the country in a subsidiary of a state-owned or state-controlled company can be considered to prohibit bribery of foreign officials.

Bribery in Private Commercial Settings
Bribery between individuals or companies in a private commercial setting is also covered by the EFCC, which criminalises such acts.

2.2 Influence-Peddling
There is no specific or known offence relating to influence-peddling under Nigerian law, although it is an act that is highly decried and deprecated.

There is also no known or specific criminalisation of influence-peddling of foreign public officials under Nigerian law, although it is neither actively nor passively encouraged or supported.

2.3 Financial Record-Keeping
In Section 435, the Nigerian Criminal Code (NCC) makes it an offence for directors of a company to knowingly, and with intent to defraud, allow the keeping of inaccurate books. The offence is punishable by seven years imprisonment, upon conviction.

In addition, Section 436 of the NCC criminalises the making, circulating or publishing of any writ-

ten statement or account which in any material particular, is to one's knowledge false, with intent to deceive or defraud any member of the company or public. On being found guilty of this felony, one would be liable to imprisonment for seven years.

2.4 Public Officials

The ICPC, the EFCC and the NCC criminalise misappropriation of public funds by a public official, prohibit the unlawful taking of interest by a public official and define embezzlement by a public official as an economic and financial crime.

There is, however, no express or implied prohibition or criminalisation of favouritism by a public official, although such practice is officially denounced and discouraged.

2.5 Intermediaries

There are provisions in Nigerian law for the commission of the offence of corruption through intermediaries or agents.

Specifically, by virtue of Section 7 of the Criminal Code Act, parties to a crime include accessories before the fact, accessories to the fact and accessories after the fact.

3. Scope

3.1 Limitation Period

There is presently no statute of limitation under Nigerian law that applies to the commission of the above offences.

3.2 Geographical Reach of Applicable Legislation

Although Nigeria's legislation relating to bribery and corruption does not have extraterritorial jurisdiction, the money laundering laws have extraterritorial reach.

Under Section 15(2) of the Money Laundering Act, the offence of money laundering has been extended to apply to natural or legal persons outside of Nigeria, whilst the laundering of the proceeds of foreign crimes is also punishable in Nigeria.

3.3 Corporate Liability

Corporate Liability

Companies can be held liable, as the definition of "persons" under the ICPC includes natural persons, juristic persons and any persons of a body corporate. Further, the definition of "persons" under the Criminal Code Act includes corporations within the purview of criminal liability.

Joint Liability

Under sections 11, 18 and 19 of the Money Laundering (Prohibition) Act, individuals and companies can be held liable for the same offence.

Liability of Successor Companies

There is no specific provision in the relevant legislation in Nigeria dealing with anti-corruption, anti-bribery and money laundering for successor companies to be held liable for the offences committed by an acquired or target company.

4. Defences and Exceptions

4.1 Defences

The relevant Nigerian laws relating to corruption and bribery do not generally provide a defence for those found liable. Nevertheless, where proceeds from bribery and corruption have been returned, the courts reserve the right or possess inherent powers to reduce sentences.

4.2 Exceptions
As stated above, there are presently no available defences to the identified offences and, as such, no exceptions to a defence.

4.3 De Minimis Exceptions
There are no de minimis exceptions for the above offences under Nigerian law, particularly under the NCC.

However, under the Penal Code Act, applicable in the northern part of the country, there is a recognition of the de minimis exception, which states that an offence can be too trifle or trivial for the law to be concerned with it.

An example of this is the prosecution of a man by the EFCC in the northern part of the country for a cybercrime fraud which fetched him NGN100. The court determined that the amount was minimal and the offender had already made restitution and was asked to pay an additional NGN250.

4.4 Exempt Sectors/Industries
There are presently no sectors/industries in Nigeria exempt from the offences relating to anti-corruption, bribery and money laundering.

4.5 Safe Harbour or Amnesty Programme
Safe Harbour/Amnesty Programme
There are no specific provisions in the relevant laws in Nigeria for any form of safe harbour or amnesty programme based on self-reporting or adequate compliance procedures or remediation efforts.

Private Initiatives
Corporate entities can, however, formulate policies which require persons to report to the relevant government agencies whenever undue gratification is required from them. Corporate bodies can also put procedures in place to:

- identify customers' identities and businesses;
- monitor transactions;
- perform customer due diligence;
- conduct background checks on employees; and
- operate a continuous monitoring system.

5. Penalties

5.1 Penalties on Conviction
Offences by Individuals
The penalties upon conviction for the above offences for individuals are mainly fines and imprisonment. Offences such as demanding a bribe, fraudulent acquisition or receipt of property and frustrating investigations are classified as felonies and can attract penalties of three or more years' imprisonment.

Offences by Companies
The penalties upon conviction for the above offences for companies are mainly fines. Offences such as soliciting and receiving a bribe, fraudulent acquisition or receipt of property and frustrating investigations can result in imprisonment for the officers of the companies involved in the acts. Nevertheless, companies are usually required to pay a fine.

5.2 Guidelines Applicable to the Assessment of Penalties
Guidelines for Assessment of Appropriate Penalties
There are currently no guidelines for the assessment of appropriate penalties.

Minimum Sentences
Some offences have minimum and maximum penalties stated, and the court usually cannot go below the minimum or go above the maximum allowable penalties.

There are also offences that have provision for imposition of a monetary fine and/or a term of imprisonment or a combination of both.

The relevant legislation allows the enforcement agency – the EFCC – to ask for the offence to be compounded, so that only monetary payment is accepted in an amount not less than the maximum allowable.

Repeated Offences
Repeated offences are often punished more severely by the courts.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Duties to Prevent Corruption
The expectation of all the relevant legislation regarding corruption, bribery, money laundering and the enforcement agencies is that individuals and companies have an obligation or duty to prevent corruption by setting up a compliance programme.

Compliance programmes
The Anti-Money Laundering Act requires that the following compliance and control mechanisms be established:

- designation of an anti-money laundering (AML) chief compliance officer at management level;
- identifying AML regulations and offences;
- highlighting the nature of money laundering;
- identifying money laundering "red flags" and suspicious transactions;
- setting out reporting requirements;
- conducting customer due diligence;
- taking a risk-based approach to AML; and
- having a record-keeping and retention policy in place.

6.2 Regulation of Lobbying Activities

There is no formal national legislation for the regulation of lobbying activities in Nigeria, as there is in some other jurisdictions.

There is a Bill in force for an Act for the Registration of Lobbyists in Nigeria and for Matters Connected Thereto 2016, which has been pending in the Nigerian National Assembly since 2016.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Section 23 of the ICPC imposes a duty on both public officers and private individuals to report bribery transactions. While it imposes a duty on a public officer to whom a bribe is offered to report the incidence to the ICPC or the police, it also imposes a similar duty on private individuals from whom bribery is demanded. Failure to report such an incidence without reasonable excuse is an offence punishable with imprisonment and/or a fine.

6.4 Protection Afforded to Whistle-Blowers

Protection Mechanisms for Whistle-Blowers
Nigeria lacks a designated whistle-blower law that protects employees and citizens from retaliation if they report crime, corruption or public health threats.

Furthermore, Nigerian law does not recognise people who make such reports as whistle-blow-

ers. Consequently, there are no legal mechanisms to protect whistle-blowers from retaliation.

There is no government agency that receives and investigates reports from workplace whistle-blowers, lends support or legal advice to whistle-blowers, or offers them protection from retaliation and adverse consequences.

Freedom of Information Act

Part of the few provisions in Nigerian law somewhat related to whistle-blowing are found in one paragraph in the Freedom of Information Act 2011.

The law requires public employees to disclose information in the public interest, including related to mismanagement, gross waste of funds, fraud, abuse of authority, and public health and safety dangers.

The law includes protections for public officials and people acting on behalf of public institutions from civil or criminal proceedings if they disclose information under the law – even if the disclosure would otherwise violate the Criminal Code, Penal Code, Official Secrets Act or another law. The Freedom of Information Act does not apply to the private sector.

6.5 Incentives for Whistle-Blowers

There are incentives for whistle-blowers in Nigeria to report bribery and corruption. These incentives are mainly monetary and include the Whistle-Blower Policy of the Federal Ministry of Finance, which entitles the whistle-blower to between 2,5–5% of any sum recovered due to the information provided.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

There is a whistle-blower policy in place, issued by the Federal Ministry of Finance. The Whistle-Blower Protection Bill has been before the Nigerian National Assembly since 2016.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

The enforcement of the anti-bribery and anti-corruption laws in Nigeria is purely a criminal process. The offences are considered criminal in nature and the system is not yet so sophisticated to allow for civil or administrative enforcement.

7.2 Enforcement Body

Enforcement Bodies

The EFCC and the ICPC are the two principal bodies which have the responsibility of enforcement of anti-bribery and anti-corruption provisions in both public and private sectors.

Their jurisdiction also extends to enforcement of failure to prevent or report corruption or bribery, as the case might be.

Interaction Between Enforcement Bodies

The co-operation between EFCC and ICPC, whilst in existence, is not as robust as it should be.

In the first place, although the ICPC primarily has the responsibility of investigating corruption and bribery cases amongst public officials, it does not have the powers to prosecute offenders.

The EFCC, on the other hand, has both the powers to investigate private and public officials for

corruption, bribery and money laundering, and to prosecute them.

Enforcement Bodies Areas of Competence and Authority

The EFCC is in charge of the following:

- investigating and prosecuting economic and financial crimes (the relevant legislation sets out financial crimes to cover several areas such as bank fraud, tax evasion, capital market fraud and futures market fraud);
- acting as the nationwide co-ordinator for Nigeria's anti-money laundering drive;
- acting as the designated Nigerian Financial Intelligence Unit; and
- implementing the Advance Fee Fraud Act, the Failed Banks Decree, the Money Laundering Act and the Banks and other Financial Institutions Decree.

The ICPC has the following key functions:

- investigating reports of corruption – with specific reference to government and public officials;
- investigating government establishments and the public's susceptibility to corruption; and
- educating and enlightening the public on corruption, with a view to enlisting and fostering public support for its anti-corruption campaign.

The Special Fraud Unit of the Nigerian Police Force

The special fraud unit and anti-fraud section of the Nigeria police force investigates high-profile local and international fraud cases.

The Code of Conduct Bureau/Tribunal

The Code of Conduct Tribunal enforces disciplinary measures against government and public officials who are found to have breached the Code of Conduct for public officials.

7.3 Process of Application for Documentation

The respective legislation on anti-corruption, anti-bribery and anti-money laundering makes it mandatory for the enforcement bodies to be provided with information or documentation, once they request it.

Failure to provide the requested information or documentation to the enforcement bodies is considered an offence punishable with a fine or a term of imprisonment, or both.

7.4 Discretion for Mitigation

Mitigation by Enforcing Powers

The EFCC is the enforcement body that has the legal power to also prosecute offenders, and is empowered by the law to exercise its discretion for mitigation in enforcing its powers.

In this regard, the EFCC can choose to compound an offence that is punishable by both the payment of a monetary fine and a term of imprisonment, to only the payment of a monetary fine that would not exceed the maximum fine allowable for the offence.

Examples of mitigation

The EFCC can elect to compound an offence and request the courts to impose only a monetary fine and not a term of imprisonment, in the case of a first-time offender or someone who co-operated in the course of investigation.

The EFCC can adopt a plea bargain arrangement where the offender is given a lighter sentence for return of the proceeds of corruption, bribe or money laundering.

Nigeria does not have in place a system of non-prosecution or deferred prosecution arrangement for offenders.

7.5 Jurisdictional Reach of the Body/Bodies

The jurisdictional reach of the EFCC is both local, national and international. For instance, Nigeria's anti-money laundering laws have extraterritorial reach. Section 15(2) of the Money Laundering Act states that the offence of money laundering has been extended to apply to natural or legal persons outside of Nigeria.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Landmark Investigations

- The investigation by EFCC of alleged collusion and corrupt practices between Nigerian government officials and a company known as Process and Industries Development Limited over a contractual agreement that resulted in the arbitral award of NGN8,9 billion against Nigeria.
- The investigation by EFCC of a former Nigerian Minister of Petroleum Resources over alleged acquisition of properties, assets and theft of cash in excess of NGN350 billion through corrupt means.
- The investigation by EFCC of Marine Assets and Offshore Equipment Limited over alleged conspiracy, money laundering and stealing in relation to a sum in excess of NGN15 billion, paid into the company's bank accounts.
- The investigation by the EFCC of a company promoter who is alleged to have absconded with depositors' funds in excess of NGN120 billion.
- The investigation by the EFCC of four government officials for alleged fraud and corrupt enrichment in excess of NGN45 billion.
- The investigation of the former governor of a state over corrupt enrichment and fraud in the sum of NGN35 billion.
- The investigation of a former governor of a state over corrupt enrichment in the sum of NGN150 billion.
- The investigation of the former Accountant General of the Federation over fraud and embezzlement in excess of NGN109 billion.

Landmark Decisions

- The conviction of a former managing director of Fidelity Bank for embezzling a depositor's funds in excess of NGN50 billion.
- The decision by the Supreme Court upholding the interim forfeiture to the federal government the sum of NGN6 billion belonging to a former First Lady of the country as constituting questionable wealth.
- The decision by the Federal High Court ordering the final forfeiture of houses and vehicles worth about NGN2,5 billion belonging to a former Nigerian Minister of Petroleum Resources being proceeds of corruption.

7.7 Level of Sanctions Imposed

The level of sanctions imposed for the above offences on individuals and legal entities has ranged from monetary fines involving restitution, to forfeiture of the proceeds of corruption and bribery and to imposition of varying terms of imprisonment for officers of legal entities who were the directing minds in the commission of the offences.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

The Conference of the States Parties to the United Nations Convention Against Corruption

assesses Nigeria's compliance with international requirements and also the strength of the legislation and policies established.

Key strengths have been identified in the areas of legislation, establishment of bodies and agencies to enforce the country's anti-corruption and anti-bribery legislation.

Weaknesses have been highlighted in the areas of training personnel and public officials on global best practices and ethics.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

There are no foreseeable changes to the applicable legislation or the enforcement bodies. Although in May 2022, the President of the country signed into law the Proceeds of Crime (Recovery and Management of Assets) Act which sets up another agency or body to deal with the tracing and recovery of proceeds linked to corruption and bribery.

Both the EFCC and ICPC have complained that this new agency will duplicate their current responsibilities, create bureaucratic bottlenecks and dilute their powers.

Threshing Fields Law is a full-service commercial law firm, with its main office in the commercial centre of Lagos in Nigeria. It has proven expertise in corporate/commercial practice, commercial litigation and arbitration, energy and natural resources law, anti-bribery and anti-corruption practice, government regulatory/compliance, employment and labour issues, local content, maritime and shipping, immigration, customs issues and taxation.
It has an excellent team of highly qualified and experienced partners who have impeccable and outstanding reviews in their respective areas of practice, as well as associates who are rising stars in their areas of specialisation. The firm's anti-corruption and anti-bribery specialist unit within the government regulatory department is a six-member strong team of specialist lawyers. Threshing Fields Law has an excellent reputation for its extensive knowledge and pragmatic approach in dealing with clients' instructions.

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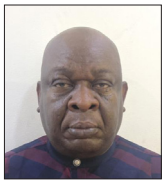

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NORWAY

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

Norway has ratified the following international conventions relating to anti-bribery and anti-corruption:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);
- the Council of Europe Criminal Law Convention on Corruption (1999);
- the Council of Europe Civil Law Convention on Corruption (1999);
- the Additional Protocol to the Council of Europe Criminal Law Convention on Corruption (2003); and
- the United Nations Convention against Corruption (2003).

1.2 National Legislation

In 2003, general criminal provisions prohibiting bribery and corruption were included in the Norwegian Penal Code. In the current Penal Code of 2005 (the "Penal Code"), the relevant provisions are Sections 387, 388 and 389 (the "Anti-corruption Provisions"). Section 387 covers "corruption". Section 388 stipulates a higher penalty for aggravated or gross corruption and describes factors to be taken into consideration in deciding whether the corruption is aggravated. Section 389 covers "trading in influence".

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no guidelines produced for the interpretation and enforcement of the Anti-corruption Provisions specifically. In general, the preparatory works to the Penal Code, as well as case law from the Norwegian Supreme Court, provide the most important guidance for the interpretation of the law, including the Anti-corruption Provisions.

1.4 Recent Key Amendments to National Legislation

There were no significant amendments to the Anti-corruption Provisions in 2022.

2. Classification and Constituent Elements

2.1 Bribery

Bribery and Corruption

The Anti-corruption Provisions are broad and general in scope, in the sense that they cover active and passive corruption, corruption in the public and private sectors and corruption committed in Norway and abroad. The Anti-corruption Provisions do not expressly use the term "bribery", but bribes are considered corrupt acts and are thus covered by the definition in the Penal Code.

Passive corruption occurs when a person, for themselves or others, demands, receives or accepts an offer of an "improper advantage" in "connection with" the conduct of their "position, office or performance of an assignment" in Norway or abroad (Section 387, first paragraph, letter a).

Accordingly, active corruption occurs when a person gives or offers any person an "improper advantage" in "connection with" the conduct of the passive party's "position, office or performance of an assignment" in Norway or abroad (Section 387, first paragraph, letter b).

A description of the relevant requirements follows below.

Improper Advantage

It follows from the above that Section 387 prohibits the giving, offering, receiving or accepting of "improper advantages".

The term "advantage" is understood to mean anything of value that the passive party finds to be in their interest, or from which a benefit can be derived. Usually, advantages would be of economic value, such as payments, goods, services or entertainment. However, benefits of no economic value could also be considered to be advantages within the meaning of Section 387, such as something that confers a positive reputational impact, or being accepted into a private association.

In order to constitute corruption, the advantage must be considered "improper", which means that the advantage must be clearly blameworthy, as opposed to merely criticisable.

Whether an advantage is considered "improper" must in each case be determined by a concrete assessment of the totality of the case at hand, based on a number of factors. Although it is not strictly necessary that the advantage is offered or given with the intent of influencing the passive party in their performance of duties, purpose or intent would nonetheless be an important factor when determining impropriety. Only in exceptional cases will there be grounds for criminal liability if there is no such intent. Other relevant factors would, inter alia, be the nature and value of the advantage, whether the act involves public officials, whether the advantage is given openly and transparently, and whether there has been a breach of internal ethical rules of the company or of practices within the relevant industry.

Gifts and Hospitality, etc

Hospitality expenditure, gifts and promotional expenditure may, in principle, be considered corruption. However, the threshold for such advantages to be considered as an "improper advantage" would be rather high.

Relevant sources of law do not define any minimum threshold amount that must be exceeded in order for hospitality expenditure, gifts and promotional expenditure to be considered "improper". In general, nominal or modest gifts and hospitality would not be considered "improper" unless they can be considered excessive due to recurrence and/or improper due to contextual circumstances, such as an ongoing tender process in which the parties participate. Also, according to case law, when a benefit (typically hospitality) is not of a lasting nature, but is consumed in connection with an event that in itself is relevant to an employee's (the passive party's) position and the employee participates in the event openly, it will normally not be considered as an improper benefit under the corruption provision.

"In Connection With" the Receiver's "Position, Office or Performance of an Assignment"

It is a condition that the improper advantage is offered, given, received or accepted "in connection with" the "position, office or performance of an assignment" of the passive party. Advantages offered to, or accepted by, the passive party in their role as a private individual fall outside the scope of Section 387.

The term "position, office or performance of an assignment" shall be interpreted broadly. It includes all types of public and private employment or authority, including board positions,

political duties or the performance of consultancy services.

Normally, the improper advantage is provided in return for something that the receiver does or omits to do in the performance of their professional duties, to benefit the active party or someone they wish to favour. However, the advantage does not have to be related to a specific act or omission. Consequently, pure "greasing" may also be covered by Section 387.

Furthermore, Section 387 does not require that the passive party actually conducts any of the acts they have been encouraged to perform, or that they are in a position to do so.

Finally, it should be noted that advantages offered, given, received or accepted after the passive party has (potentially) acted in connection with their position, office or assignment are also included.

Facilitation Payments

The Penal Code does not expressly mention facilitation payments. Still, it follows from the preparatory works that offering, giving, receiving or accepting facilitation payments may be considered as "corruption" under Section 387, provided that all the conditions for criminal liability are met.

Normally, the threshold for deeming facilitation payments to constitute an "improper advantage" would be rather high, given that the payment would typically be for services that the active person is entitled to receive. Relevant elements in the impropriety assessment would, inter alia, be the value of the advantage provided (eg, amount paid), whether the payment is in line with local business practices, and whether the situation may be characterised or perceived as extortion (eg, if a person, when travelling abroad, feels compelled to pay a foreign public official a small payment for the return of their passport). Payments in such extortion situations will generally not be considered as corruption under Norwegian law.

Aggravated Corruption

Elements to be taken into consideration in determining whether the corruption is "aggravated" are set out in Section 388, letters a–d, which includes whether:

- the act was carried out by or towards a public official or in any other way violates the special trust attached to a position, office or assignment;
- the act resulted, or could have resulted, in a considerable financial advantage;
- there was a risk of considerable harm; and
- false accounting information or documentation was recorded or prepared.

Public Officials

The Anti-corruption Provisions cover corruption within the private and public sectors, including bribery of public officials. In general, corruption involving public officials would be considered more aggravating than commercial bribery. As noted above, the involvement of public officials is relevant when assessing whether the corruption shall be considered "aggravated".

The Anti-corruption Provisions of the Penal Code do not include a definition of "public official". However, the term is interpreted broadly, and at least comprises individuals employed or otherwise engaged by, or instructed by, the government and state or municipal agencies in addition to individuals holding positions of "public officials" as defined in other provisions of the Penal Code or by laws other than the Penal

Code. Under the circumstances, the term may also include individuals employed or engaged with state-owned entities.

Trading in Influence

Trading in influence is criminalised by Section 389 of the Penal Code (see **2.2 Influence-Peddling**).

Culpability

The Anti-corruption Provisions apply to intentional violations (Sections 21 and 22 of the Penal Code). Furthermore, the provisions apply to any person (including companies) who contributes to (aids and abets) the offence (Section 15). Attempts to violate the Anti-corruption Provisions may also be punishable (Section 17).

Violations of the Anti-corruption Provisions may give grounds for corporate criminal liability, provided that the violations were committed by persons "acting on behalf" of the company (see **3.3 Corporate Liability**).

Failure to Prevent Corruption

Failure to prevent violations of the Anti-corruption Provisions is not an offence (see **6.1 National Legislation and Duties to Prevent Corruption**).

2.2 Influence-Peddling

Section 389 of the Penal Code criminalises "trading in influence". As noted in **2.1 Bribery**, this offence covers active and passive trading in influence, in the public and private sector, committed in Norway or abroad.

According to Section 389, first paragraph, letters a and b, trading in influence occurs when a person:

- for themselves or others "demands, receives or accepts an offer" of an "improper advantage" in "return for influencing the conduct of" a third party's "position, office or performance of an assignment"; or
- gives or offers any person an "improper advantage" in "return for influencing the conduct of" a third party's "position, office or performance of an assignment".

Typically, trading in influence occurs when an influencing agent secretly requests, receives or accepts an offer of an advantage in return for exerting influence on a third person's (ie, the decision-maker's) professional conduct – who is not aware of the scheme and does not obtain any benefits from it. Both the influencing agent and the person offering or giving the advantage would be exposed to liability. However, Section 389 does not require that the influencing agent actually has the capacity/powers to influence the decision-maker. Furthermore, Section 389 does not require that any advantage has been attained.

When assessing whether the advantage is "improper" within the meaning of Section 389, particular importance is placed on whether the influencing agent – for example, a lobbyist – openly informs the decision-maker that they are acting on behalf of another person. If the influencing agent is not transparent about representing another person, such conduct may be regarded as improper. If so, the act would be punishable under Section 389 provided that the other conditions for criminal liability are met.

2.3 Financial Record-Keeping

The Accounting Act (1998) and the Bookkeeping Act (2004) require companies to keep adequate books and records.

According to the Penal Code, Sections 392–394, violations of provisions regarding bookkeeping

and the documentation of accounting information, annual accounts, annual reports or storing accounts are criminally punishable.

The penalty provisions are general in nature and apply to violations of all provisions relating to accounting and bookkeeping. Thus, the provisions do not only apply to violations of the Accounting and Bookkeeping Acts, but also, for example, to violations of accounting rules in tax legislation.

2.4 Public Officials

The Penal Code does not contain any provisions that specifically address the misappropriation of public funds by a public official, the unlawful taking of interest by a public official, embezzlement of public funds by a public official or favouritism by a public official.

However, the general provisions related to, for example, the misappropriation of funds, fraud, or breach of financial trust (Sections 324, 371 and 390 respectively) may be applicable. In respect of the latter, the penal provision for breach of financial trust also specifically mentions that it would be considered an aggravating factor that the act was carried out by a public official (Section 390, second paragraph).

It should also be noted that, according to the general rules on the determination of penalties, it is an aggravating circumstance that a criminal offence was committed in the course of public service (Section 77 of the Penal Code).

2.5 Intermediaries

It is commonly understood that the wording of Sections 387 and 388 of the Penal Code is wide enough to include the channelling of bribes through third parties such as family members, nominee companies, agents or other intermediaries. Case law shows that both legal and natural persons have been held liable for violations of Sections 387 and 388 by engaging third parties to participate in bribery or other corrupt transactions on their behalf.

Third parties involved in such offences may be held liable for criminal complicity (Section 15 of the Penal Code).

3. Scope

3.1 Limitation Period

Criminal acts are not punishable when the limitation periods included in the Penal Code have expired (Section 85 of the Penal Code).

The limitation period(s) for criminal liability under Norwegian law depend/depends on the maximum statutory penalty prescribed for the various criminal offences.

According to Section 86 of the Penal Code, the limitation period for violations of the Anti-corruption Provisions committed by individuals are as follows:

- corruption (Section 387) – five years;
- aggravated corruption (Section 388) – ten years; and
- trading in influence (Section 389) – five years.

With respect to corporate criminal liability, the limitation period shall be calculated on the basis of the limitation period that would be applicable if the act was committed by an individual (Section 89 of the Penal Code).

Provisions concerning the start and interruption of limitation periods are included in Chapter 15

of the Penal Code; see, especially, Sections 87, 88 and 89.

3.2 Geographical Reach of Applicable Legislation

According to the principle of territoriality under Section 4 of the Norwegian Penal Code, as a main rule, Norwegian criminal law, including violations of the Anti-corruption Provisions, applies to criminal acts conducted in Norway (including in Svalbard and on Jan Mayen) and in certain specified places such as the Exclusive Economic Zone and on Norwegian vessels.

The extraterritorial effect of Norwegian criminal law is mainly set out in Section 5 of the Penal Code. The Penal Code applies to violations of the Anti-corruption Provisions committed abroad by persons who are Norwegian nationals or domiciled in Norway, and to violations committed abroad on behalf of a corporate entity registered in Norway (Section 5, first paragraph, No 12). In addition, the Anti-corruption Provisions may apply retroactively to acts committed abroad; inter alia, to acts committed on behalf of a foreign entity that after the time of the act has transferred the entirety of its operations to Norway (Section 5, second paragraph). Thus, the Anti-corruption Provisions have extraterritorial reach.

Notably, such acts committed abroad may be prosecuted in Norway pursuant to the Penal Code, even if the activity does not constitute a criminal offence under local law. This is a consequence of the amendments made to Section 5 of the Penal Code as of 1 July 2020, which exempted foreign violations of, inter alia, the Anti-corruption Provisions from the general requirement of dual criminality. For example, the amendment makes clear that Norwegian companies may be held responsible for violations of the Anti-corruption Provisions committed by a foreign national acting on behalf of the company abroad, also when such actions would not constitute a criminal offence in the country in which they took place.

The Penal Code also generally applies to acts that Norway has a right or an obligation to prosecute pursuant to agreements with foreign states or otherwise pursuant to international law (Section 6).

In addition, Section 7 of the Penal Code provides that when the criminality of an act is contingent on, or affected by, an actual or intended effect, the act is also deemed to have been committed at the place where the effect has occurred or was intended to be caused.

3.3 Corporate Liability

Corporate criminal liability for violations of the Anti-corruption Provisions follows from the general provisions included in Sections 27 and 28 of the Penal Code. The Supreme Court has stated that corruption offences lie within the core area of corporate criminal liability.

The Affiliation Requirement (“on Behalf of”)

A corporate entity may be held criminally liable when a penal provision is violated by a person “acting on behalf” of a “company”. The term “company” is interpreted broadly, and includes companies, associations, foundations, organisations and public bodies. According to case law and the preparatory works to the Penal Code, a person would be “acting on behalf” of the company only if both the offender and the act have a certain connection with the company.

Complicity

According to Section 15 of the Norwegian Penal Code, a penal provision also applies to any per-

son (including companies, in accordance with Section 27 of the Penal Code) who contributes to (aids and abets) the offence, unless otherwise provided.

Prosecutorial and Judicial Discretion

The imposition of corporate liability is subject to discretion (prosecutorial and of the courts) (Sections 27 and 28). This means that even if the conditions of Section 27 are satisfied, there is no general presumption of corporate liability under Norwegian law; ie, the imposition of a corporate penalty depends on all the circumstances of the case.

When deciding whether to impose liability on a company (and if so, the level of sanctions), the prosecutors and courts will conduct a broad overall assessment primarily based on the (non-exhaustive) list of factors set out in Section 28, including:

- the severity of the offence;
- the preventative effect of the penalty;
- whether the company could have prevented the offence by use of guidelines, instruction, training, checks or other measures;
- whether the offence has been committed in order to promote the interests of the company; and
- the financial capacity of the company.

In addition, according to case law, it is also relevant to assess whether the company has taken appropriate measures to remedy the violation after becoming aware of it (so-called self-cleaning).

Individual and Corporate Liability for the Same Offence

Individuals and companies may – and often will – be held liable for the same offence. However, whether a penalty is imposed on any individual person is a relevant factor when assessing whether a penalty should be imposed against the company (Section 28, letter g).

Culpability

Companies may also be penalised if the individual who committed the offence is not prosecuted or convicted. In fact, the wording of Section 27 allows for corporate liability even if the subjective culpability or accountability requirements of the Penal Code are not met for the individual who committed the offence on behalf of the company. This would, in practice, mean that the Penal Code allows for penalising a company on the basis of strict liability; ie, even if no individual may be found guilty of, or charged with, the offence.

However, the Norwegian Supreme Court found, in its judgment of 15 April 2021, that such a strict liability requirement was not in conformity with the European Convention on Human Rights and case law from the European Court of Human Rights. Therefore, going forward, demonstrating subjective culpability (a “mental link”) will be required in order to impose corporate liability. The Supreme Court’s judgment necessitates changes to the corporate criminal liability provision. A proposal for new wording is currently under consideration; see **8. Review**.

Successor Liability

Under Norwegian law, a successor entity may be held liable for criminal offences by the target entity that occurred prior to, for example, a merger or acquisition.

If a company undergoes “identity changes” after a criminal offence has been committed, criminal liability shall be placed at the company on behalf of which the offence was committed. This is cur-

rently not further regulated by law and depends on a complex assessment, where the guidelines are set out in case law and legal theory.

In summary, the main rule is that the criminal liability follows the company's formal identity; ie, as it is established in accordance with the rules that apply to the type of company in question. This means that, for example, the transfer of shares in a company does not change which subject is criminally liable (Supreme Court Ruling of 2002 on p1722). In such cases, criminal liability would transfer with the target entity (ie, the entity being sold).

In the event of an asset sale where the activity in the original company is transferred to another company but the original company still formally exists, the acquiring company will, on the other hand and as a general rule, not be held criminally liable for any prior criminal offence. There may, however, be exceptions to this rule if the purchaser has taken over a complete division of a company with all activities, employees and contracts.

4. Defences and Exceptions

4.1 Defences

The Penal Code does not contain any concrete defences that apply specifically to the Anti-corruption Provisions.

Any of the general defences within the Penal Code may apply as defences for violations of the Anti-corruption Provisions. For example, it would be a defence against violations of an Anti-corruption Provision if the violation is committed on grounds of necessity (Section 17) or self-defence (Section 18).

In respect of corporate criminal liability, some of the discretional elements to be considered when determining whether corporate liability should be imposed contain defence-related elements (Section 28, and see **3.3 Corporate Liability**). In particular, it would be relevant to assess whether the company could have prevented the offence by the use of guidelines, instruction, training, checks or other compliance measures (Section 28, letter c). A defence against liability for corruption violations committed "on behalf of" the company could therefore be to demonstrate that the company had in place an effective anti-corruption compliance programme at the time of the violation, and that the company could not reasonably have acted differently in its efforts to prevent the violation.

It is important to note, however, that the assessment of such defence is subject to (prosecutorial/judicial) discretion, and would not automatically absolve the company of corporate liability.

4.2 Exceptions

As there are no formal defences available to violations of the Anti-corruption Provisions of the Penal Code, there are no such exceptions.

4.3 De Minimis Exceptions

There are no de minimis exceptions for the Anti-corruption Provisions of the Penal Code.

4.4 Exempt Sectors/Industries

The Anti-corruption Provisions of the Penal Code apply to all natural and legal persons acting within the jurisdiction of the Penal Code (see **3.2 Geographical Reach of Applicable Legislation**), without exception. Consequently, no sectors or industries are exempt from these offences.

4.5 Safe Harbour or Amnesty Programme

Under Norwegian law, there is no formal system of safe harbours or amnesty programmes based on self-reporting or having in place adequate compliance procedures or remediation efforts.

However, self-reporting may reduce the penalty imposed for the violation (see **5.2 Guidelines Applicable to the Assessment of Penalties**, **6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions** and **7.4 Discretion for Mitigation**). Moreover, efforts to remedy the violation after becoming aware of it (ie, self-cleaning) are relevant when determining whether corporate liability should be imposed, and, if so, when determining the level of sanctions imposed (see **3.3 Corporate Liability** and **5.2 Guidelines Applicable to the Assessment of Penalties**).

5. Penalties

5.1 Penalties on Conviction

When committed by individuals, the penalties for corruption (Section 387 of the Penal Code) and trading in influence (Section 389 of the Penal Code) may be imprisonment for a term of up to three years and/or a fine. For legal persons, the corporate penalty for such offences would be a fine, which may be combined with loss of the right to operate or prohibitions on operation in certain forms.

In respect of penalties upon conviction for aggravated corruption (violation of Section 388 of the Penal Code), the penalties for natural persons may be a term of imprisonment up to ten years. For legal persons, the penalty may be a fine (unlimited amount), which may be combined with loss of the right to operate or prohibitions on operation in certain forms.

In addition, both natural and legal persons may face measures such as the confiscation of proceeds arising from the violation (Sections 66–76 of the Penal Code).

5.2 Guidelines Applicable to the Assessment of Penalties

As further described in **5.1 Penalties on Conviction**, the penalties for violations of the Anti-corruption Provisions are fines (no minimum or maximum limit) and/or imprisonment for certain maximum terms. The minimum term of imprisonment for such violations is 14 days (Section 31, second paragraph).

Within these minimum and maximum limits, Norwegian courts have much leeway in the determination of appropriate penalties.

General Statutory Guidelines

As a starting point, Sections 77 and 78 of the Penal Code contain general guidelines that apply to the determination of appropriate penalties for violations of the Penal Code within the applicable minimum and maximum limits. In addition, Sections 79 and 80 provide a basis for increasing or decreasing the maximum and minimum penalties, respectively, on a case-by-case basis.

In respect of general aggravating circumstances to be given particular consideration, Section 77 includes factors such as whether the offence:

- carried a considerable potential for harm;
- was intended to have a substantially more serious outcome;
- was committed by multiple persons acting together;
- was committed in the course of public service; or
- was perpetrated by violating a special trust.

In respect of general mitigating circumstances to be given particular consideration, Section 78 includes factors such as whether the offender:

- has prevented, reversed or limited the harm or loss caused by the offence, or sought to do so;
- made an unreserved confession, or contributed significantly to solving other offences; or
- acted on the basis of a dependent relationship to another participant.

Additionally, Section 78 provides a basis for prosecutors and courts to reduce the penalty due to the offender's self-reporting (including giving an unconditional confession); see also **6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions**. As regards the size of such "discount", the Director of Public Prosecutions has expressed that, in general, a discount of between a quarter and a third would be considered appropriate. However, an overall assessment of all the relevant circumstances of the case must always be made.

Moreover, Section 80 provides a list of circumstances that would allow for the imposition of a penalty below the minimum penalty or a less severe type of penalty. Inter alia, this may be done when the offender, without knowing that they were under suspicion, has, to a significant degree, prevented or reversed the harm caused by the offence, or has made an unreserved confession.

In general, repeated offences may be more severely punished. Section 77, letter k, provides that an aggravating factor when determining an appropriate penalty is whether the act was committed by a person who has previously been the subject of a criminal sanction for similar acts or other acts of relevance to the case. Moreover, Section 79, which allows for the imposition of penalties exceeding the maximum penalty for the offence, provides that a sentence of imprisonment may be increased up to double length; inter alia, when a previously convicted person has again committed a criminal act of the same nature as one for which they have previously been convicted.

In respect of fines, Section 53 provides that when assessing the size of the fine to be imposed, particular weight shall, in general, be given, in addition to such factors that are generally given weight in assessing penalties, to the offender's income, assets, responsibility for dependants, debt burden and other circumstances affecting financial capacity.

Corporate Criminal Liability

With respect to corporate criminal liability, the size of the fine to be imposed is determined based on the non-exhaustive list of factors set out in Section 28 of the Penal Code (see **3.3 Corporate Liability**).

Law Enforcement/Case Law

In addition, the Norwegian National Authority of Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) will publish information regarding the factors ØKOKRIM considers when issuing a penalty notice, including the size of the fine.

Also, case law may provide guidance for the assessment of appropriate penalties for corruption offences. For example, the Supreme Court has emphasised that the preventative effect of a penalty is of particular importance when determining appropriate penalties for corruption committed in the course of public service.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Norwegian legislation does not provide a legal duty to prevent corruption by setting up a compliance programme (or similar preventative measures). Consequently, a failure to prevent corruption is not an offence under Norwegian law.

Having said that, whether the company could have prevented a corruption offence by the use of internal guidelines, instruction, training, checks or other measures is an important factor when determining whether corporate liability should be imposed, and, if so, the size of the fine (Section 28 of the Penal Code, and see **3.3 Corporate Liability** and **4.1 Defences**). Implementing effective anti-corruption compliance programmes may therefore reduce the risk of criminal liability.

ØKOKRIM has expressed certain (soft-law) expectations with respect to the measures companies should implement to prevent corruption related to their business. Inter alia, ØKOKRIM suggests that companies look to the DOJ Evaluation of Corporate Compliance Programs (from the US Department of Justice) and the UK Ministry of Justice's guidance to the UK Bribery Act for inspiration in relation to compliance programmes.

6.2 Regulation of Lobbying Activities

Lobbying activities are not directly regulated by Norwegian legislation.

However, the Quarantine Act (LOV 2015-06-19-70) sets out rules on quarantine in certain situations when politicians, public officials/government employees transfer to new positions, for example, to companies in the private sector that carry out lobbying activities. The Quarantine Act also has rules on the obligation to provide information in connection with transfers covered by the act.

Also, as noted in **2.1 Bribery**, Section 389 of the Penal Code criminalises active and passive "trading in influence" in the public and private sector, committed in Norway or abroad.

Typically, trading in influence occurs when an influencing agent (eg, a lobbyist) demands, receives or accepts an offer of an improper advantage in return for secretly exerting influence on a third person's (ie, a decision-maker's) professional conduct. Both the influencing agent (eg, a lobbyist) and the person offering or giving the advantage are exposed to criminal liability, see **2.2 Influence-Peddling**.

When assessing whether the advantage is "improper" within the meaning of Section 389, particular importance is placed on whether the influencing agent (eg, a lobbyist) openly informs the decision-maker that they are acting on behalf of another person. If the influencing agent is not transparent about representing another person (by clearly informing the decision-maker of this fact), and does not have reason to believe that the decision-maker otherwise has knowledge of this, such conduct will often be regarded as "improper".

However, it is stated in the preparatory works to Section 389 that the influencing agent is generally not required to inform the decision maker about who they are acting on behalf of, or of the type or value of the advantage they have demanded, received or accepted in this regard.

Other relevant circumstances when assessing whether the advantage was "improper" is typically the value and type of advantage that is demanded, received or accepted by the influencing agent, and who the decision-maker is (eg, whether the decision-maker holds a position or office that is especially important to safeguard from improper influence, such as members of the national assembly or the Supreme Court).

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Norwegian law does not require individuals or companies to report any violations, or suspicion of violations, of the Anti-corruption Provisions.

However, as further described in **5.2 Guidelines Applicable to the Assessment of Penalties** and **7.4 Discretion for Mitigation**, self-reporting/admission of guilt could be of significant importance, both in the determination of whether to prosecute and at the sentencing stage.

Companies are encouraged by the enforcement authorities (such as ØKOKRIM) to disclose any suspicions of – eg, economic crime, and to do so as early and thoroughly as possible. For example, companies are encouraged to share the results of any internal investigations relating to the (suspected) violation. Should a criminal investigation be opened, companies are encouraged to co-operate with the investigative authorities.

In general, the timing and extent of the willingness to disclose information and co-operate with the authorities will be taken into account when the authorities exercise procedural discretion related to the case. For example:

- when considering whether to initiate investigative steps such as searching the company's premises or seizing documents;
- whether to prosecute, and, if so, the nature of the charges; and
- when assessing company liability and deciding the amount of penalty to be imposed.

6.4 Protection Afforded to Whistle-Blowers

Right to Report Objectionable Conduct

There is protection afforded to whistle-blowers in Norway.

The protection of whistle-blowers follows from the Norwegian Act relating to the working environment, working hours and employment protection, etc, of 2005 No 62 (the "Working Environment Act").

According to Section 2 A-1 (1) of the Working Environment Act, an employee has the right to report "censurable conditions" (ie, matters of concern, hereinafter referred to as "objectionable conduct") relating to the employer's business. From the same paragraph, it follows that this right is also granted to hired workers.

The legislation confers a right to report "objectionable conduct", which means conditions in contravention of legal rules, written ethical guidelines or broadly accepted ethical norms in society (Section 2 A-1 (2)). Examples of "objectionable conduct" include:

- danger to life or health;
- danger to the environment or climate;
- corruption or other economic crimes;
- abuse of authority;
- unsatisfactory working environment; and
- breach of data privacy.

A notification may be made anonymously, and the employer would, to the extent possible, also be required to follow up on anonymous notifications.

The right to report objectionable conduct does not extend to matters that solely concern the employee's own working conditions, unless such matters relate to conduct clearly defined as objectionable in Section 2 A-1 (2), as set out above. Examples of matters that would not normally be considered "objectionable conduct" within the meaning of the Working Environment Act include dissatisfaction about one's salary, workload, distribution of work or occupational disagreements.

Procedure for Notifications

An employee may report concerns through various channels, including internally to the employer or a representative of the employer, in accordance with internal reporting procedures, in accordance with relevant reporting obligations or via a health and safety, union or legal representative (Section 2 A-2 of the Working Environment Act). An employee may also report externally to a public supervisory authority or other public authority. In certain (albeit more limited) circumstances, an employee may also report directly to the media or the public.

Prohibition Against Retaliation

The right to report concerns is safeguarded by way of a prohibition against retaliation.

It follows from Section 2 A-4 of the Working Environment Act that retaliation against an employee or hired worker who notifies their employer or hirer of any objectionable conduct, in accordance with the procedure set out above, is prohibited. The prohibition against retaliation also applies in cases where the employee or hired worker has signalled their future intention to report; for instance, by providing information about objectionable conduct.

In this context, retaliation would include any detrimental act, practice or omission that is a consequence of, or reaction to, the employee or hired worker's report. Examples of "detrimental acts" include:

- threats, harassment, arbitrary discrimination, social exclusion or other improper conduct;
- warnings, change of duties, relocation or demotion; and
- suspension, dismissal, summary discharge or disciplinary action.

6.5 Incentives for Whistle-Blowers

There are no general financial incentives for whistle-blowers to report bribery or corruption in Norway.

However, an employee may, in certain circumstances, have an obligation to notify their employer of objectionable conduct in cases where the employee becomes aware of circumstances such as (Section 2–3 of the Working Environment Act):

- faults or defects that may involve a danger to life or health;
- harassment or discrimination in the workplace; or
- an employee suffering injury at work or diseases believed to be a result of the work or working conditions.

Please note that there are also some regulated professions that have an obligation to notify relevant authorities of suspicious transactions or activities, such as auditors and employees of financial institutions.

There is also an obligation for companies subject to the requirements of the Norwegian Act relating to measures to combat money laundering and terrorist financing of 1 June 2018 No 23 (the "Anti-Money Laundering Act") to report circumstances giving grounds for suspicion of money laundering or terrorist financing to the authorities (Section 26 of the Anti-Money Laundering Act). This obligation also applies personally to board members, management representatives, employees and others acting on behalf of the company.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

The key whistle-blowing provisions are found in Chapter 2 A of the Working Environment Act, as detailed in **6.4 Protection Afforded to Whistle-Blowers**. They include:

- Section 2 A-1 on the right to report objectionable conduct (see **6.4 Protection Afforded to Whistle-Blowers**);
- Section 2 A-2 on the procedure for reporting concerns (see **6.4 Protection Afforded to Whistle-Blowers**);
- Section 2 A-3 on the employer's duty to act in response to reported concerns;
- Section 2 A-4 on the prohibition against retaliation (see **6.4 Protection Afforded to Whistle-Blowers**);
- Section 2 A-5 on redress and compensation in cases of breach of the prohibition against retaliation;
- Section 2 A-6 on the requirement for employers to prepare procedures for internal reporting, applicable to companies with at least five employees;
- Section 2 A-7 on the duty of confidentiality in connection with external reporting to public authorities; and
- Section 2 A-8 on the role of the Discrimination Tribunal in disputes relating to breaches of the prohibition against retaliation of whistle-blowers.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Under Norwegian law, enforcement of violations of the Anti-corruption Provisions of the Penal Code is a criminal matter, governed by the Norwegian Criminal Procedure Act (1981).

7.2 Enforcement Body

ØKOKRIM is the Norwegian national authority for the investigation and prosecution of economic and environmental crimes, including violations of the Anti-corruption Provisions. ØKOKRIM is simultaneously a public prosecutors' office reporting to the Director of Public Prosecutions, as well as a centralised specialist police agency, organised under the National Police Directorate.

In practice, cases involving corruption offences may also be handled by the specialist teams for economic crimes in the local police districts.

In such cases, the police districts may – if necessary – request investigatory support from ØKOKRIM's designated Assistance Team. The nature and extent of the support is determined on a case-by-case basis. By way of its support and guidance, ØKOKRIM contributes to building and maintaining competency in the police districts as well as to solving the cases. ØKOKRIM may also support the various special police agencies, such as the Norwegian Bureau for the Investigation of Police Affairs, which investigates criminal offences committed by police officers.

Particularly serious violations of economic crimes are handled by ØKOKRIM itself. In this regard, it should be noted that ØKOKRIM (unlike the police districts) has discretionary power to decide which cases to investigate. Its decision in this regard shall, in particular, be based on:

- the scope and complexity of the investigation/its economic size;
- whether the case is international/cross-border; and
- whether the nature of the case is such that an investigation should be opened as a matter of principle.

In respect of court proceedings, there are no specialised courts or judges for criminal cases in the Norwegian courts system. All courts and judges competent to handle criminal cases may handle cases involving violations of the Anti-corruption Provisions.

7.3 Process of Application for Documentation

The Norwegian Criminal Procedure Act also applies to the investigation of corruption cases.

Due to the fact that aggravated corruption can be punished with ten years' imprisonment, the police may – in addition to search and seizure of evidence – in such cases also use coercive measures, such as different forms of surveillance.

7.4 Discretion for Mitigation

Norwegian criminal procedure does not currently contain any formal system for non-trial resolutions such as plea agreements, deferred prosecution agreements and non-prosecution agreements. However, criminal cases may be resolved through penalty notices; ie, resolution of a case without court proceedings (Chapter 20 of the Criminal Procedure Act).

Penalty notices are frequently used in cases regarding corporate criminal liability; eg, in corruption and other economic crime cases. If the penalty notice is not accepted by the company (or person) charged, the notice will serve as an indictment and court proceedings will be initiated.

In practice, and as mentioned in **6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions**, the willingness to self-report/admit guilt and co-operate with the authorities will be taken into account; eg, in the prosecutorial discretion on whether to impose corporate liability and with respect to the level of the fine.

Furthermore, self-reporting and admission of guilt may also be considered by the court when determining an appropriate penalty (see **5.2 Guidelines Applicable to the Assessment of Penalties**).

7.5 Jurisdictional Reach of the Body/Bodies

Norwegian law enforcement has the authority to investigate and prosecute crimes that fall within Norwegian jurisdiction (see **3.2 Geographical Reach of Applicable Legislation**).

As mentioned in **7.2 Enforcement Body**, ØKOKRIM has primary responsibility for the enforcement of international cases.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Some examples of recent cases involving violations of the Anti-corruption Provisions are included below.

First, two recent decisions (the Tjøme case and the Nittedal case) clarify the content of the condition in the corruption provision (Section 387 of the Penal Code) that a benefit must be granted "on the occasion of" the recipient's position, office, or assignment to be considered corruption.

The Tjøme Case

The Supreme Court decision (HR-2022-1278-A) concerned an architect who had provided free architectural services to a municipal planning official.

Both the architect and the official were charged with gross corruption and initially sentenced to eight months' imprisonment for aggravated corruption in the local district court. On appeal, they were however acquitted and the Court of Appeal held that evidence had to be provided for a causal link between the benefit and the recipient's position. Based on the evidence in the case, the court held that it could not be ruled out that the services were provided to the official in his capacity as a private individual, unrelated to his position.

The Supreme Court stated that the term "on the occasion" indicates a requirement of connection between the performance of a benefit and the position the recipient holds. But even if such connection or link must have a certain strength and be clear, there is no requirement for a direct causal connection between the benefit provided and the recipient's position. Consequently, the Supreme Court overturned the acquittal.

The case is scheduled for retrial before the Court of Appeal following the Supreme Court's ruling.

The Nittedal Case

Late in 2020, a local mayor and a local businessman were indicted for aggravated corruption related to a benefit the mayor had received in connection with a private business relationship. The businessman had paid NOK125,000 to a company that was 50% owned by the mayor and in the view of the prosecution, the payment was made in connection with the mayor's position/office; ie, her role in approving a construction project in which the businessman had significant interests.

Both the mayor and the businessman were acquitted by the Court of Appeal in July 2022.

The Court of Appeal found that the benefit in this case had not been granted "on the occasion" of the recipient's office as mayor. The Court of Appeal stated that evidence must be shown that the benefit provided is in fact related to the recipient's performance of a position, office or assignment and clarified relevant assessment criteria in this regard.

The prosecuting authority did not appeal the case, which means the acquittal is final.

The Stendi Case

In April 2022, three previous regional directors of the private care provider Stendi AS were sentenced by the Oslo district court to prison sentences of between one year and nine months, and three years, for aggravated corruption. The manager of certain companies that provided services to Stendi AS was sentenced to four years and three months' prison time for aggravated corruption.

The directors had significant influence on Stendi AS's selection of suppliers and purchases. The manager had over some time given the directors

improper advantages, including by renovating one director's house free of charge, and giving another free disposal of two cars and a boat.

In connection with the sentencing, Oslo district court underlined that corruption in the public sector has particularly harmful effects on society, and that "Stendi AS ran welfare and care services to vulnerable user groups and received their assignments from public authorities. The business was particularly reliant on trust from both users and clients".

All four have appealed their cases and the convictions are not final.

Corruption in the Municipal Sector

In April 2022, four individuals were convicted by the Oslo district court to imprisonment for corruption relating to the sale of real estate to the municipality of Oslo. A purchaser hired by a municipal real estate company was convicted for passive corruption, for accepting money and other improper advantages from private investors in connection with their sale of real estate at inflated values to the municipal company. The remaining three individuals were convicted for active corruption, for non-transparently paying the consultant money, including kickbacks, in connection with the sales. The terms of imprisonment vary from six months to three-and-a-half years. A fifth individual was convicted of laundering the proceeds from the crimes.

ØKOKRIM has stated that the case illustrates the seriousness of corruption in the municipal sector and in particular in public procurement, where private and public sectors intersect. ØKOKRIM has underlined that it will focus on investigating corruption, particularly in the public sector, going forward. At least one of the convicted individuals have indicated that he will appeal the case.

7.7 Level of Sanctions Imposed

Fines imposed on individuals for violations of the Anti-corruption Provisions have been in the range of NOK6,000 to NOK450,000 (statistics from Transparency International Norway for 2003–2021). The longest prison sentence in a corruption case is the maximum sentence of 21 years in case against a former policeman (the Jensen case). Note, however, that the sentence also included other serious charges (ie, not just corruption charges).

In respect of corporate criminal liability, the highest penalty imposed on a company for violation of the Anti-corruption Provisions is the NOK270 million fine imposed on Yara International ASA in 2017. In addition to the fine, an amount of NOK25 million was confiscated.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

The enforcement of the Anti-corruption Provisions has not been officially assessed in 2022. However, in May 2021, the Ministry of Justice and Public Security published an evaluation, conducted by Knut Høivik (PhD), of the Norwegian legislation governing corporate criminal liability (Sections 27 and 28 of the Penal Code) and the Anti-corruption Provisions (Sections 387, 388 and 389 of the Penal Code) (the "Høivik Evaluation"). This evaluation is under review by the Ministry (see **8.2 Likely Changes to the Applicable Legislation of the Enforcement Body**).

In his study, Høivik conducted a comprehensive evaluation and proposed a revision of the rules on corporate liability in light of the fact that it is 30 years since the general legal basis for cor-

porate liability was introduced in 1991. Furthermore, Høivik assessed whether there is a need for changes to the Anti-corruption Provisions to ensure an effective fight against corruption in line with Norway's international obligations.

In brief, the Høivik Evaluation provided, inter alia, the following suggestions for legislative changes:

- introduce requirements regarding subjective guilt (culpability) for corporate criminal liability;
- clarify which connection should be required between the company and the offence(s) in order for the company to be criminally liable;
- remove the discretionary nature of corporate criminal liability;
- clarify that indirect corruption through the use of intermediaries is covered by the Anti-corruption Provisions;
- criminalise gross negligent complicity to corruption;
- limit the scope of the "trading in influence" to only cover influencing public decisions;
- introduce regulatory requirements for preventative anti-corruption work and rules specifically addressing the effect of companies self-reporting and co-operating with the enforcement authorities; and
- make changes to ensure that fines are calculated in a transparent and more predictable manner, including changes to provide more information to the public about the use and terms of penalty notices.

The Ministry of Justice and Public Security has not (yet) provided their views of the Høivik Evaluation (as further commented on in **8.2 Likely Changes to the Applicable Legislation of the Enforcement Body**).

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

The Høivik Evaluation, mentioned in **8.1 Assessment of the Applicable Enforced Legislation**, is under consideration by the Ministry of Justice and Public Security. The evaluation was sent on a public hearing (consultation round) from 12 October 2021 to 11 January 2022. Within this timeframe, any natural or legal person had the opportunity to provide the Ministry with their comments on the evaluation and the changes proposed therein.

The Ministry has not (yet) presented any propositions to the Norwegian Parliament based on the Høivik Evaluation's suggestions for changes to the legislation governing the Anti-corruption Provisions (Sections 387, 388 and 389 of the Penal Code) and corporate criminal liability (Sections 27 and 28 of the Penal Code). The Ministry has not confirmed that such proposition(s) will be prepared and has not provided any time frames for when such follow-up may happen.

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Wikborg Rein Advokatfirma AS is headquartered in Oslo and offers a full range of legal services to domestic and international clients. The firm also has offices in Bergen, London, Shanghai and Singapore. As Norway's most international law firm, it is, together with its international offices and collaborating law firms, able to offer top-quality legal advice worldwide. Wikborg Rein's Compliance and Crisis Management team assists private and public entities in preventing and detecting corruption and other economic crime or misconduct, both in Norway and abroad. The firm provides advice on corporate governance and assists in the development of compliance programmes within different areas of law. It also conducts integrity due diligence of various types of business partners and conduct, advises on internal investigations and provides legal assistance to companies faced with potential corporate criminal liability. At the Oslo office, the team consists of ten lawyers. Wikborg Rein is the preferred law firm for the Norwegian government (the Norwegian Ministry of Foreign Affairs) for compliance matters worldwide.

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POLAND

Trends and Developments

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The Law That is to Tighten up Criminal Liability for the Crime of Bribing a Public Officer is Going to Enter into Force?

Corruption and bribery are multi-dimensional phenomena that penetrate various spheres of social life. These phenomena take various forms, making it very difficult to define them precisely. Polish law does not have one overall legal definition of "bribery" or "corruption" that would be binding within the entire legal regime. However, the statutory definition of "corruption" provided in Article 1 Section 3a of the Act on the Central Anti-corruption Bureau of 9 June 2006, could be treated as a point of reference, since the Central Anti-corruption Bureau is constituted of special intelligence forces established to fight corruption in public and economic life, in particular to identify, prevent and reveal corruption-related crimes in the areas of state institutions and local government bodies, economic trade, the organisation of elections and referendums, the financing of political parties, sporting competitions and the trade in medicines and medicinal products, as well as to investigate the perpetrators of such crimes. Pursuant to this definition, corruption is an act:

- involving any person, directly or indirectly, promising, offering or giving any unauthorised benefits to a public official in return for this person, or any other person, performing an act or omitting to perform an act in the functions they perform;
- involving a public official, directly or indirectly, demanding or accepting any unauthorised benefits for themselves or any other person, or accepting an offer or a promise of such benefits, in consideration for performing an act or omitting to perform an act in the functions they perform;
- undertaken in the course of business activities that involve performing certain obligations towards a public authority (institution) in connection with directly or indirectly promising, offering or giving any unauthorised benefits to a person leading a non-public finance unit, or working for any such unit in any capacity, or to any other person, in consideration for performing an act or omitting to perform an act, in breach of their obligations and constituting a reciprocity that would be detrimental to society; or
- undertaken in the course of business activities that involves performing certain obligations towards a public authority (institution) in connection with a person leading a non-public finance unit, or working for any such unit in any capacity, demanding or accepting, directly or indirectly, any unauthorised benefits, or accepting an offer or promise of such benefits for themselves or for any other person, in consideration for performing an act or omitting to perform an act in breach of their obligations and which constitutes a reciprocity that would be detrimental to society.

In view of the high social harmfulness, various legal regimes fight back against corruption and bribery using various measures, including legal ones. As part of the legal solutions that, directly or indirectly, aim to counteract corruption and

bribery or reduce the risk of corruptive phenomena, both systemic and specific, criminal law measures play a very important role. They include legal solutions setting out frameworks for identifying, detecting and investigating the crimes of bribery and corruption, and then punishing the perpetrators of these crimes.

In Poland, as in many other countries, various types of bribery or corruption, characteristic of various spheres of public and economic life, have been criminalised – either in the Polish Criminal Code of 6 June 1997 (the CC) or in other acts. As far as bribery is concerned, the scope of criminalisation includes, in particular, the crime of bribing a public official (Articles 228, 229 § 1-5 of the CC), electoral bribery (Article 250a § 1-2 of the CC), bribery in business transactions (Article 296a § 1-4 of the CC), bribery in connection with insolvency proceedings or seeking to prevent bankruptcy (Article 302 § 2-3 of the CC), bribery in sports (Articles 46-48 of the Act on Sports of 25 June 2010) and bribery in the area of marketing medicines and medical devices (Article 54 of the Act on Refunding of Medicines, Special Dietary Product and Medical Devices of 12 May 2011). In all these instances, the substance of bribery is defined as accepting a material or personal benefit, or a promise of such a benefit from another person, or requesting such a benefit in exchange for a certain conduct, and granting or promising to another person a material or personal benefit in exchange for certain conduct.

Although all forms of criminalisation of bribery include various spheres of social life, the average Polish citizen would associate bribery as a basis of criminal liability, with bribery of public officials in the first place. This is reflected not only in the everyday language, but also in the language used by lawyers: in Polish, both in a common and legal sense, "bribery" is often used to mean such acts for which the perpetrator may face criminal liability under Articles 228 and 229 of the CC. This is because of two factors: i) undoubtedly, for the state and society, it is the most destructive, and hence the most shameful type of corruption; and ii) the criminalisation of bribery in this sector of public life has the longest history in Poland.

On 7 July 2022, the Polish Sejm (lower chamber of Parliament), at the government's initiative, resolved on the amendment introducing material modifications to the Criminal Code ("NCC Amendment"). The Senat (higher chamber of Parliament) requested that the NCC Amendment be rejected in full but the Sejm rejected the reservations of the Senat and on 2 December 2022 the President signed it. The NCC Amendment will enter into force after the expiry of three months following its announcement in the Journal of Laws. One of many modifications constitutes the tightening of criminal liability when the bribery of public officials concerns material benefits with a value exceeding PLN200,000 (approximately EUR42,500).

Acts related to the bribery of public officials are currently criminalised in the provisions of Article 228 and Article 229 § 1-5 of the CC. The scope of criminalisation includes the acts of a public official in relation to the function they perform, consisting of: accepting a material or personal benefit, or a promise of such a benefit, or demanding such a benefit, or making the performance of a professional duty dependent on receiving such a benefit, or its promise, and acts consisting of granting or promising to grant a material or personal benefit to a public official in relation to the function they perform. The concept of a person performing a public function is quite broad. According to the statutory definition contained in Article 115 §19 of

the CC, the people performing a public function include public officials, members of a local self-governing authority, anyone employed in an organisational unit with public funds, unless they perform only service-related activities, as well as anyone else whose rights and obligations with respect to public activities are defined or recognised by law or an international agreement binding on the Republic of Poland. The concepts of material and personal benefit are also broadly defined. A benefit is anything that can satisfy human needs (money, objects or services, as well as distinction, honourable title, etc), and it is generally accepted that it concerns a benefit that is "fraudulent", "undue", "unlawful", etc. It does not matter whether it concerns a benefit for the offender themselves, or for someone else. The provisions of Articles 228–229 of the CC apply both to the bribery of Polish public officials and the bribery of public officials of foreign countries or international organisations.

The criminal consequences of bribing a public officer in Poland depend on the type of bribery.

The basic types of this offence include acts consisting of a public official accepting a material or personal benefit, or a promise thereof, in relation to performing their function, and acts consisting of granting or promising to grant a material or personal benefit to a public official in relation to performing their function. Anyone who grants a bribe to a public official (Article 229 § 1 of the CC), along with any public official who accepts a bribe (Article 228 § 1 of the CC), commits an offence punishable by imprisonment from six months to eight years.

In cases of lesser gravity, when the social harmfulness of the act is not so material (for instance, where the subject of the bribe constitutes a material benefit of a minor value), the perpetrators are treated in a less severe way – they are punished with a fine, the restriction of liberty or imprisonment from one month to two years (Article 228 § 2 of the CC and Article 229 § 2 of the CC respectively). However, if a public official accepts a bribe or a promise of a bribe in consideration for a conduct in breach of the law, or makes the performance of a professional duty conditional upon receipt of a bribe or a promise of a bribe, or demands a bribe, then these actions are subject to more severe liability, namely, imprisonment from one to ten years (Article 228 § 3 and 4 of the CC). An equally severe punishment is imposed on individuals who grant a bribe, or promise to grant a bribe, in order to persuade a public official to breach the provisions of law, as well as on individuals granting or promising a bribe to a public official for the breaching thereof (Article 229 § 3 of the CC). Finally, where the object of the bribe is a "benefit of substantial value", the penalty is the most severe and may be from two to 12 years' imprisonment, which applies both to a public official who accepts a bribe (Article 228 § 5 of the CC) and anyone who grants a bribe to that person (Article 229 § 4 of the CC). While "benefit of substantial value" is not defined in the CC, the prevailing view in the literature on the subject is that it should be the same criterion as Article 115 § 6 of the CC provides for "property of substantial value" – ie, PLN200,000 (approximately EUR42,500).

Similar principles apply to the bribery of public officials of foreign countries or international organisations (Article 228 § 6 of the CC and Article 229 § 5 of the CC respectively).

In the event of a conviction for those offences, the court is obliged, regardless of the penalty, to order the forfeiture of the subject-matter of the bribe, or its equivalent, and may also order certain punitive measures against the offender

(including a prohibition on holding a specific post, on pursuing a particular profession or economic activity, the publication of the judgment and the award of a cash sum for a particular social purpose), as well as the forfeiture of any items directly derived from the offence and benefits (or their equivalent).

The NCC Amendment provides for two material modifications to the provisions of the CC, criminalising bribery of both Polish public officials and public officials of foreign countries or international organisations. First of all, the NCC Amendment increases the upper limit of imprisonment provided for in Article 228 § 5 and Article 229 § 4 of the CC, applicable when the object of the bribe is a "benefit of substantial value" – from the current 12 years to 15 years. The second, and more significant change is that the NCC Amendment excludes the situations when the object of the bribe is a "benefit of great value" from the application of Article 228 § 5 and Article 229 § 4 of the CC, and makes them subject to newly introduced provisions of law – just added to the CC as its Article 228 § 5a and Article 229 § 4a respectively. This modification aims materially to tighten up the criminal liability. The provisions of Article 228 § 5a and Article 229 § 4a of the CC provide for a sentence of imprisonment from three to 20 years. When these provisions of law enter into force, the penalty that the perpetrators face for the offence will be almost twice as high as it is currently. The rather loosely specified term, "benefit of great value", has not yet been defined in the CC, and the NCC Amendment does not introduce a statutory definition of this term. From the official justification of the bill of the NCC Amendment prepared by the Polish government, it can be inferred that the drafters assume that a "benefit of great value" mentioned in the planned provisions would be understood similarly to a "property of great value" as defined in Article 115 § 7 of the CC – ie, that the material benefit of great value will be interpreted as a benefit valued in excess of PLN1 million (approximately EUR212,500).

The idea behind introducing these changes was justified by their authors in a very general and succinct way. They argue that new types of the offence of bribery, provided for in Article 228 § 5a and Article 229 § 4a of the CC, are to be introduced due to the need to rationalise the criminal liability for the bribery of public officials, while at the same time they emphasise that the existing solutions lack internal coherence and do not properly reflect the great difference in the level of social harmfulness between bribery concerning a material benefit of slightly more than PLN200,000 (EUR42,500) and bribery concerning a material benefit counted in millions of PLN.

The authors of the bill do not really try to explain why criminal liability would also be tightened up for acts concerning material benefits with a value exceeding PLN200,000 (EUR42,500) – ie, such acts that, pursuant to the NCC Amendment, will be, as before, covered by the provisions of Article 228 § 5 and Article 229 § 4 of the CC, explaining it away as being merely an adjustment modification.

Upon analysing the NCC Amendment, it seems clear that the main purpose of the modifications provided for therein is materially to tighten up criminal liability for many types of the offence. The modification to Articles 228 and 229 of the CC as adopted by the Sejm nicely illustrates this attempt. The changes introduced to the criminal law by the NCC Amendment seem to be taking Poland in the wrong direction. No significant arguments have been raised to justify the general tightening-up of criminal liability, especially given that Polish criminal law is already quite strict.

DeBenedetti Majewski Szcześniak Kancelaria Prawnicza Sp.k. (DMS) is a transactional-litigation boutique firm with 21 lawyers in Warsaw, Poland. The firm specialises in corporate law, private equity, M&A, bankruptcy/restructuring, litigation and mediation, as well as in criminal law. The firm's experience in drafting complicated transactions, tailored to the needs of very demanding clients, means that it is the go-to firm for any difficult commercial situations, both in Poland and abroad. DMS acts as subcontractor for many international law firms without a Warsaw office, assisting with cross-border M&A transactions, advising on local aspects of Foreign Corrupt Practices Act (FCPA)/Bribery Act claims, and amending contracts in order to reflect aspects of Polish law and business.

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PORTUGAL

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

Portugal has signed a number of conventions related to corruption and bribery, the most relevant being:

- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);
- the European Union Convention on the fight against corruption involving officials of the EU or EU Member States (1997);
- the European Union Convention on the Protection of the Financial Interests of the Communities and Protocols;
- the Council of Europe Criminal Law Convention on Corruption (1999);
- the United Nations Convention against Transnational Organized Crime (2000); and
- the United Nations Convention against Corruption (2003).

Since 1 January 2002, Portugal has been a member of the Council of Europe's Group of States against Corruption (GRECO).

1.2 National Legislation

Portuguese legislation recognises the following basic criminal offences in the areas of bribery and corruption:

- undue receipt of an advantage by a public official, punishable under Article 372 of the Criminal Code;
- passive and active corruption in the public sector, punishable under Articles 373 and 374 of the Criminal Code;
- influence-peddling, punishable under Article 335 of the Criminal Code;
- undue receipt of an advantage by a political or high public official, punishable under Article 16 of Law 34/87, of July 16th;
- passive and active corruption of political and high public officials, punishable under Articles 17 and 18 of Law 34/87, of July 16th;
- active corruption in international trade and passive and active corruption in the private sector, punishable under Articles 7, 8 and 9 of Law 20/2008 (29 January 2008), respectively;
- undue receipt of an advantage and passive and active corruption in the context of sport competitions, punishable under Articles 8, 9 and 10-A of Law 50/2007, of August 31st, respectively;
- passive corruption of an individual serving in the armed forces or other military forces for the performance of an illicit action, punishable under Article 36 of Law 100/2003, of November 15th;
- active corruption of an individual serving in the armed forces or other military forces, punishable under Article 37 of Law 100/2003, of November 15th; and
- submission of fraudulent accounts by the manager or administrator of a commercial company, punishable under Article 519-A of Law 262/86, of September 2nd.

Passive corruption can be defined as the request or acceptance of an undue advantage – patrimonial or not – conditional on the performance of a certain action or omission (quid pro quo). Active corruption is characterised by the offer or promise of an advantage of the same nature with the same purpose.

Corruption provisions apply, regardless of the actual rendition of the undue advantage by the corruptor or of its acceptance by the public official, politician, private worker, sportsperson, or military official. The undue advantage may also

be granted through an intermediary if there is consent or ratification by the passive agent. The intended recipient of the undue advantage is irrelevant. The provisions apply, regardless of whether that advantage is intended for the public official, politician, private worker, sportsperson, military official or for a third party, by indication of the former or with their knowledge.

Corruption provisions are also applicable whether the action or omission contemplated by the corruptor is lawful – aligned with the passive agent's official duties – or unlawful – contrary to those duties. The penalty is, however, more severe in the latter case.

Criminal offences of undue receipt of advantage and corruption, whether active or passive, display a unilateral and instantaneous structure, meaning that the crime is performed merely by the action of each individual, regardless of the recipient's acceptance. Along the same lines, when it comes to crimes of corruption, consummation is not dependent on the occurrence of the action or omission intended by the corruptor, deriving solely from the offer or promise of an advantage – active corruption – or from the solicitation or acceptance of that advantage – passive corruption.

These conclusions derive from Articles 372, 373 and 374 of the Criminal Code, Articles 16, 17 and 18 of the law on corruption of political and high public officials and Articles 8, 9 and 10-A of Law 50/2007, of August 31st, regarding bribery in the context of sport competitions.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no specific guidelines regarding the interpretation and enforcement of national legislation, although case law and doctrine should be borne in mind.

Article 372, paragraph 3, of the Criminal Code and Article 16 of the Law 34/87, of July 16th, establishes that the provisions are not applicable when the conduct is socially adequate or in conformity with common customs and habits.

Even though there is no formal definition of what conduct is socially adequate, it is possible to identify a growing quantification of the offered advantages or invitations allowed in some sectors of activity.

Following some extent of media debate, the Portuguese government issued its own Code of Conduct – approved by Resolution 53/2016, of September 21st, and updated by Resolution 184/2019, of December 3rd, both from the Ministers' Council – establishing guidelines for the acceptance of gifts and invitations by members of government and of their respective cabinets, among others. According to these guidelines, an offer or invitation is considered capable of affecting the impartiality and integrity required in the exercise of official duties if it has a value equal or superior to a benchmark figure of EUR150, regarding one calendar year.

Law 52/2019, of July 31st, regulating the conduct of political and high public officials, establishes similar guidelines regarding institutional offers and hospitalities.

Notwithstanding, guidelines include special provisions in respect of invitations seen as consolidated, normal social and political practices, invitations to events where the presence of a member of the government is of relevant public interest and occasions involving official representation of the Portuguese state.

Another example of quantifications can be found in the Code of Conduct of the Portuguese Football Federation's Arbitration Council, which prevents referees and other members of the national arbitration structure from accepting offers equal to or greater than EUR150 in national championships, or EUR300 in international ones.

1.4 Recent Key Amendments to National Legislation

As a result of the work of the Parliamentary Commission for Transparency, Law 52/2019, of July 31st, put forward an exclusivity obligation while in public office which applies to political or high public officials. This same law also established a duty to present, in a single document to be accessible online, a declaration of all income, assets and liabilities, including every act and activity that could lead to incompatibilities and impediments.

Law 58/2021, of August 31st, the recently altered Law 52/2019, of July 31st, add to the list of mandatory revelations for individuals on the affiliation or any sort of participation in entities of an associative nature, as long as that announcement does not imply the divulgement of constitutionally protected data, namely, related to the political or high public official's health, sexual orientation, union membership and religious or political convictions (circumstances in which the revelation is merely voluntary).

Under the Organic Law 4/2019, of September 13th, the Entity for Transparency was officially created as the body responsible for, among other tasks, the monitoring and assessment of the truthfulness of the previously indicated income and asset declarations issued by holders of Political Positions and High Public Offices.

Recently, Article 5 of Decree 167/XIV, approved by Parliament, was deemed unconstitutional by the Constitutional Court. This decree, by altering the Cybercrime Law – Law 109/2009, of September 15th – aimed to transpose the Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment. Article 5 would modify the current Article 17 of that law, by granting the Public Prosecution powers to seize email messages in the course of investigations. Following the request of a preemptive constitutional review by the President, grounded notably on the lack of judicial intervention, the Constitutional Court deemed that norm to be unconstitutional, due to the violation of the fundamental right of confidentiality of correspondence and of the right to privacy, in articulation of the proportionality principle and the constitutional guarantees of defence in criminal proceedings. Furthermore, after a lengthy formulation process, the Portuguese Council of Ministers has recently approved the National Anti-corruption Strategy 2020–2024 (*Estratégia Nacional de Combate à Corrupção* 2020–2024) Resolution 37/2021, of April 6th. The document provides a set of programmatic preventative and repressive measures that aim to ensure a more uniform and efficient application of anti-corruption mechanisms, anticipating the publication of several and significant legislative alterations. It has now been transposed into legislation through the approval and entry into force of Law 94/2021, of December 21st, which revises and amends several laws relevant to the anti-corruption regime.

Some relevant examples of the measures included in the National Anti-corruption Strategy are:

• Preventative measures:

(a) the implementation of educational programmes for active citizenship, through the introduction of the subject in primary and secondary school curriculums;
(b) the adoption of maintained and continued programmes of public compliance within the public administration, including the establishment of reporting channels;
(c) the creation of the Preventative Mechanism of Corruption and related offences (*Mecanismo de Prevenção da Corrupção e da Criminalidade Conexa*), an independent entity with monitoring and sanctioning faculties, destined to assure the efficiency of the national preventative anti-corruption policies. Law 109-E/2021, of December 9th created and established the general regime of this mechanism; and
(d) reinforcement of the powers granted to the Court of Auditors (*Tribunal de Contas*), namely, through the expansion of its jurisdiction before entities whose activities are mainly financed by public funding.

• Repressive measures:
(a) the creation of specific procedural regulations for legal persons, namely, regarding enforcement measures;
(b) definition of the criminal liability of legal persons for the crimes of undue receipt of advantage, and active and passive corruption committed by political or high public officials, punishable under Law 34/87, of July 16th;
(c) the uniformisation of the general regime of criminal liability of legal persons;
(d) extension of the statute of limitation for some criminal offences;
(e) extension of the scope of the provisional suspension of criminal procedures, provided for by Article 9 of Law 36/94, of September 29th, in order to include the crimes of undue receipt of advantage and corruption;
(f) implementation of a plea-bargaining mechanism during the trial stage, rooted in a free, global and unreserved confession of the facts for which the defendant was charged;
(g) the uniformisation of the possibilities of waiving the penalty, making it mandatory when the crime is denounced before the beginning of the criminal procedure;
(h) the uniformisation of the instances of penalty mitigation, applicable to the accused who decisively co-operates in the discovery of the truth;
(i) amendment of the Cybercrime Law (*Lei do Cibercrime*) with the intention of regulating investigative methods in a digital setting, namely, online searches; and
(j) transposition of the Directive (EU) 2019/1153 of the European Parliament and of the Council, of 20 June 2019, that aims to facilitate the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences.

As depicted by the foregoing list, the implementation of the aforementioned strategy has introduced significant changes to the current criminal procedure panorama, and will continue to do so, particularly in the field of criminal compliance, corporate criminal liability and plea-bargaining mechanisms.

As forecasted by the National Anti-corruption Strategy and as required by EU law, the rightful legislative process of transposition of the Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law – the so-called "whistle-blowers" – has taken place, through Law 93/2021, of December 20th, which has recently come into force in June 2022. It entails

several innovative duties for legal persons based in Portugal with over 50 employees, including, inter alia, the duty to develop and implement an internal code of conduct, a training programme and reporting channels.

2. Classification and Constituent Elements

2.1 Bribery

A bribe – an undue advantage – can be defined as a patrimonial or non-patrimonial advantage, regardless of its nature, that aims to benefit the one who receives it without any legal ground or justification.

As noted in **1.2 National Legislation**, the undue advantage may be offered or given by the corruptor, or an intermediary, directly to the person intended to be corrupted – the public official, politician or private worker. However, it can also be entrusted to a third party, when requested or consented by the corrupted person.

As described in **1.2 National Legislation**, the solicitation or acceptance of a bribe is deemed to be passive corruption.

When public officials or political figures are involved, bribery may qualify as an undue receipt of an advantage, punishable under Article 372 of the Criminal Code and Article 16 of the Law on Crimes of the Responsibility of Political Officials. In this scenario, the criminalised behaviour is always unilateral and instantaneous; it is not a condition that the promise or offer, solicitation or acceptance be predetermined to the attainment of a certain action or omission on behalf of the public official.

Hospitality and promotional expenditures, as well as facilitation payments, may fall within the category of a bribe, particularly in contexts where they may be regarded as compensation for the action or omission to be performed.

In **1.3 Guidelines for the Interpretation and Enforcement of National Legislation**, some remarks were made about the demand of social inadequacy of the undue advantage. As previously noted, certain types of conduct are excluded from criminal relevance if they are considered to be socially adequate and in line with habits and normal practices. Each advantage must be analysed in a case-by-case assessment, under a "reasonableness" standard, bearing in mind the concrete circumstances of the case, namely, the sector in question, the context and the parties involved.

Failure to prevent a bribe is not a criminal offence per se, but if an individual provides material or moral aid to the perpetrator of the offence, they may be criminally liable for undue receipt of advantage or corruption as an accomplice. In addition, as established by Article 11, paragraph 2 of the Criminal Code, companies may be held responsible for bribery-related offences if those offences occurred within their organisation (ie, if they did not have appropriate mechanisms in place to prevent such an offence from occurring).

While there had existed a disconnection between the Criminal Code and Law 34/87, of July 16th, which prevented legal persons from being criminally liable in cases when the undue receipt or acceptance of advantage is solicited or accepted by a political or high public official, an amendment by Law 94/2021, of December 21st, has solved this incongruity.

Article 6-A of this law prescribes that legal persons may be held liable for receiving or offering unlawful advantages, applied in conjunction with Article 16 which criminalises bribes in this context (as well as for crimes of active corruption, in conjunction with Article 18). This change was brought about by the implementation of the National Anti-corruption Strategy 2020-2024.

It is important to add that bribery of foreign public officials is also criminalised. Under Article 7 of Law 20/2008, of April 21st, active corruption is punishable in the context of international commerce whenever an individual, acting on their own behalf or through an intermediary, gives or promises an undue advantage to a national or foreign public official, to an official from an international organisation, or to a third party with consent or ratification from the corrupted person themselves, as a means to obtain or maintain a business, a contract or another undue advantage in international commerce. However, it should be noted that Transparency International has identified the enforcement of foreign bribery legislation as one of the weaknesses of Portugal's anti-corruption legislation, in their report titled Exporting Corruption 2022.

Under Article 8 of the same law, passive corruption is punishable whenever a private-sector worker, acting on their own behalf or through an intermediary, demands or accepts, for themselves or for a third person, an undue advantage, or the promise thereof, to perform an action or an omission constituting a violation of their professional duties.

Bribery between private parties in a commercial setting, or any other, is also covered under Article 9 of the same law. Active corruption is punishable whenever an individual, acting on their own or through an intermediary, gives or promises an undue advantage to a private-sector worker, or to a third party with their consent or ratification in order to obtain an action or omission constituting a violation of the private worker's professional duties. Attempted corruption is punishable in this situation. When the action or omission performed by the private-sector worker in return for the undue advantage is liable to distort competition or cause economic losses for third parties, the maximum penalty is applicable.

2.2 Influence-Peddling

Influence-peddling, provided for in Article 335 of the Criminal Code, is a criminal offence of a general nature for which any person – public official or not – may be held liable.

This crime is committed by the subject who, directly or through an intermediary, promises to offer to, or offers, an advantage to a third person – the "peddler" – so that they abuse their influence, actual or supposed, before any public entity. The crime is equally committed by the subject who, directly or through an intermediary, solicits or accepts such an advantage as compensation for the abuse of their actual or supposed influence before any public entity.

Law 94/2021, of December 21st, has broadened the scope of this criminal offence by clarifying that public entities, either national or international, are included, as well as by further criminalising the giving or promising of such advantages, whether these constitute patrimonial assets or not.

2.3 Financial Record-Keeping

Other than the crime of document forgery, provided for in Article 256 of the Criminal Code and punishable by imprisonment for a period of up to five years, Article 379-E of the Portuguese Securities Code currently includes the crime of

capital investment fraud, which encompasses the use of false or wrongful information in capital investment operations launched by public companies (ie, companies whose shares are listed and traded on a stock exchange market). The maximum penalty amounts to eight years. Negligent behaviour is also punishable, although it leads to a reduction of the applicable penalty by half.

The General Regime for Credit Institutions and Financial Companies establishes as a regulatory offence (Article 211 (1-g)) the forgery of accounting and the lack of organised accounting, as well as the breach of the applicable accounting rules determined by law or by the Bank of Portugal.

The Commercial Societies Code has also included an amendment, through Law 94/2021, of December 21st, introducing the crime of submission of fraudulent accounts by the manager or administrator of a commercial company, now provided for in Article 519-A.

2.4 Public Officials

Article 386 of the Criminal Code provides a very broad definition of "public official" for crime-related purposes, even more so than in the previous version, now amended by Law 94/2021, of December 21st.

This vast concept encompasses not only politicians, civil servants, administrative agents, arbitrators, jurors and experts, but also members of managing or supervisory bodies or workers of state-owned or state-related companies – including private companies whose capital is mainly held by the state or state-owned entities. Furthermore, with the recent amendment in the context of the National Anti-corruption Strategy 2020-2024, the concept was extended to those serving in the military, those fulfilling a public role due to a special bond, judiciary professionals and those working in its supervisory organs, arbiters, interpreters and others working in the context of the justice system. Also included in this definition are workers of companies operating public services under a concession agreement, of regulatory entities, of other states and of international organisations governed by public international law, regardless of their nationality, as well as anyone who holds office who is employed temporarily by a public administrative or jurisdictional authority.

It is crucial to be aware of the leading role played by public officials in some relevant crimes.

- Embezzlement (*peculato*) is a specific crime (ie, a crime which can only be punished by an author of certain characteristics), punishable by up to eight years of imprisonment under Article 375 of the Criminal Code. This offence may be committed by public officials who unlawfully appropriate, for their own or someone else's gain, money or any movable or immovable property or animal, either public or private, that is in their possession or is accessible to them due to their public functions.
- Extortion by a public official (*concussão*), provided for in Article 379 of the Criminal Code, is punishable by up to two years of imprisonment.
  - (a) This crime is committed by a public official who, while performing their duties or exercising powers deriving therefrom, by themselves or through an intermediary, receives any undue compensation for themselves, for the state or for a third party, by inducement of error or exploitation of a victim's mistake.
  - (b) Article 377 of the Criminal Code criminalises the conduct of taking an economic advantage while in public office, punish-

ing it by up to five years of imprisonment. This crime may be committed by a public official who, during a legal transaction, and with the intention of obtaining an unlawful economic participation for themselves or a third party, wholly or partially damages the public interest that they have the duty to manage, supervise, defend or carry out.

- Although there is no specific offence addressing the issue of "favouritism" on behalf of public officials, the general crime of abuse of power, as provided for in Article 382 of the Criminal Code, determines that any public official who abuses their official powers in order to secure an unlawful advantage for themselves or a third party, or to damage another, is to be punished by up to three years of imprisonment (if no other more severe penalty is applicable under other provisions).

2.5 Intermediaries

According to the general principles that govern Portuguese criminal law, provided for in Articles 26 and 27 of the Criminal Code, intermediaries may qualify as joint principals, subject to the same maximum penalty provided for the perpetrator, or accomplices, in which case the maximum and minimum limits of the sentence provided for the principal, shall be reduced by one third, depending on their level of involvement in the commission of the offence.

3. Scope

3.1 Limitation Period

The crimes referred to in **1.2 National Legislation** have a general limitation period of 15 years. These limitation periods are, however, subject to normal suspension and interruption clauses.

There has been some recent controversy, catalysed by the media coverage of highly publicised cases, regarding the beginning of the running of the limitation period in relation to crimes of corruption. Briefly put, some public prosecutors and courts have interpreted the Criminal Code as providing that the limitation period in crimes of corruption only starts to run from the moment of the rendition of the undue advantage to the corrupted agent, and not from the moment of the promise of that rendition; ie, when that promise occurs. The Portuguese Constitutional Court, in the context of a concrete constitutional review, has deemed the relevant legal norms, when subject to this second interpretation, as unconstitutional, for violating the constitutional principle of criminal legality. Nonetheless, any such decision does not have a general binding effect.

3.2 Geographical Reach of Applicable Legislation

As a rule, Portuguese criminal law is applicable to all acts committed in Portuguese territory, regardless of the offender's nationality, according to Article 4 of the Criminal Code.

Law 20/2008, of April 21st, which created the criminal regime for corruption in international commerce and in the private sector, is also applicable to:

- the crime of active corruption to the detriment of international commerce, to acts committed by Portuguese or foreign citizens who are found in Portugal, regardless of the location where the punishable action took place; and
- the crimes of passive and active corruption in the private sector, regardless of the location where the action took place, when the

perpetrator who gives, promises, demands or accepts the bribe or the promise of a bribe is a public official or a political official or, if of Portuguese nationality, is an official of an international organisation.

Other than the specific rules that govern Portuguese legislation on the bribery of foreign public officials within international commerce (which only require the active perpetrator to be of Portuguese nationality), Portuguese law shall apply, notably, when the crime:

- is perpetrated by Portuguese citizens against other Portuguese citizens who live in Portugal;
- is perpetrated by Portuguese citizens or by foreigners against Portuguese citizens, if the perpetrator is to be found in Portugal and if the facts are punishable in the territory where they took place (unless the punitive power is not carried out in that place) and the extradition cannot be performed or if it is decided not to surrender the offender as a result of a European arrest warrant or other international agreement binding Portugal; or
- is perpetrated by or against a legal person with its headquarters in Portuguese territory.

Portuguese criminal law is also applicable to acts committed abroad in cases affected by international conventions to which Portugal is bound.

3.3 Corporate Liability

While the general regime, despite exceptions, used to provide that only individuals would be criminally responsible, the recent amendment introduced by Law 94/2021 of December 21st has established the regime of criminal responsibility of legal persons, and thus has clarified and broadened the scope of the norms on corporate liability. Article 6-A of Law 34/87 of July 16th now states that legal persons and similar entities may be liable for the offences of receiving or offering an undue advantage, as well as the crime of passive corruption.

Article 11 of the Criminal Code remains the core disposition when it comes to the criminal responsibility of legal persons. It has been through several amendments in the past years, including that of Law 34/87. It includes an extended list of crimes for which legal persons may be liable. This list must be completed with provisions included in separate legislation.

In these offences, corporate liability may coexist with individual criminal responsibility, applied to exactly the same set of facts. A legal person may be held liable (without excluding the individual liability of the material perpetrators) if the relevant offence is committed in their name and according to the collective interest by individuals who occupy a position of leadership, or by an individual who acts under the authority of someone occupying a position of leadership, due to a violation of the monitoring and control duties pertaining to the latter.

Irrespective of its former or current owners or shareholders, corporate liability is held by the same legal entity through which an offence has been committed. This liability may not be transmitted to another entity, due to the constitutional principle according to which punitive liability is personal and non-transferable. Nonetheless, the division or fusion of the criminally liable legal person does not determine the extinction of that liability, which is transferred to the resulting legal person.

It is also relevant to note that in some circumstances the people occupying a leadership posi-

tion in the relevant company may be asked to pay the fine for which the company was convicted, in subsidiary terms, if the latter does not have the financial capacity to do so.

Despite these amendments, Transparency International's report "Exporting Corruption 2022 – Assessing Enforcement of the OECD Anti-Bribery Convention" still identifies deficiencies in the law on the liability of legal persons as one of the main handicaps of national legislation when it comes to the anti-bribery regime.

4. Defences and Exceptions

4.1 Defences

A defendant charged with corruption under the Criminal Procedure Code has the same defence rights as any another defendant in criminal proceedings, based on the fundamental principle of the presumption of innocence and its interplay with the in dubio pro reo principle.

However, as further explained in **6.5 Incentives for Whistle-Blowers**, Article 374-B of the Criminal Code, regarding crimes of undue receipt of an advantage and corruption in the public sector, establishes that, under certain conditions, penalties can be mitigated or waived altogether. Law 93/2021 has furthermore transposed the EU Whistleblower Protection Directive into national law, as will be explored further below.

The criminal liability of legal persons may be excluded when the material perpetrator has acted against express orders or instructions given by people with proper authority within the organisation. Legal persons may also mitigate the penalties they will incur if they demonstrate that they have adopted an internal compliance programme, according to Article 90-B of the Criminal Code.

A company may also avoid liability if it is able to demonstrate that the criminally relevant act or omission was not perpetrated in its name or according to collective interest and that there were no violations of any duties of due vigilance or control by the people with responsible leadership positions.

As mentioned in **1.3 Guidelines for the Interpretation and Enforcement of National Legislation** and **2.1 Bribery**, conduct is excluded from criminal legal relevance if it is considered to be socially adequate and in line with habits and normal practices.

4.2 Exceptions

Law 93/2021 of December 20th introduces one exception to the defence of whistle-blowers, clarifying that they may be criminally liable upon divulging an infraction, if they have obtained or accessed the information on the matter through criminal means, as stated by Article 24.

When it comes to members of parliament, as well as regional government members of parliament and government members, their detention or imprisonment for these crimes is dependent on permission from the competent Parliamentary body.

4.3 De Minimis Exceptions

There are no exceptions to the defences stated in **4.1 Defences**.

4.4 Exempt Sectors/Industries

There are no sectors or industries exempt from the aforementioned offences, apart from those which have been previously detailed relating to the state and public legal persons (eg, in **1.3**

Guidelines for the Interpretation and Enforcement of National Legislation).

4.5 Safe Harbour or Amnesty Programme

There are no sectors or industries exempt from the aforementioned offences, apart from those which have been previously detailed relating to the state and public legal persons.

5. Penalties

5.1 Penalties on Conviction

Public Sector

Undue advantage in the public sector

- For individuals who solicit or accept an undue advantage – imprisonment for up to five years, in the case of political office holders, or a fine of up to 600 days.
- For legal persons who solicit or accept an undue advantage – a fine of up to 600 days.
- For individuals who give or promise to give an undue advantage – imprisonment for up to three years or a fine of up to 360 days.
- For political officeholders who give or promise to give other political office holders an undue advantage – imprisonment for up to five years.
- For legal persons who give or promise to give an undue advantage – a fine of up to 360 days.
- For individuals who cause harm to a matter they are in charge of managing or overseeing in the context of their public duties – imprisonment for up to five years.

There are provisions aggravating these penalties in certain circumstances.

Additionally, public officials may also be banned from public office from two to eight years, if they commit a crime which has a penalty of over three years of imprisonment, and other aggravating circumstances are present.

Passive corruption crime in the public sector

If the undue advantage is conditional on the obtainment of an illicit act or omission by the public official:

- for individuals – imprisonment between two and eight years; and
- for legal persons – a fine of between 120 and 960 days.

If the undue advantage is conditional on the obtainment of an act or omission which is not illicit by the public official:

- for individuals – imprisonment for between two and five years; and
- for legal persons – a fine of between 120 and 600 days.

There are provisions aggravating these penalties in certain circumstances.

Active corruption crime in the public sector

If the undue advantage is conditional on the obtainment of an illicit act or omission by the public official:

- for individuals – imprisonment for between two and five years; and
- for legal persons – a fine of between 120 and 600 days.

If the undue advantage is conditional on the obtainment of an act or omission which is not illicit by the public official:

- for individuals – imprisonment for up to five years or a fine of up to 360 days; and
- for legal persons – a fine of up to 360 days.

Attempted active corruption is punishable. There are provisions aggravating these penalties in certain circumstances.

Private Sector

Passive corruption crime in the private sector

If the undue advantage is conditional on the obtainment of an act or omission against professional duties:

- for individuals – imprisonment for up to five years or a fine of up to 600 days; and
- for legal persons – a fine of up to 600 days.

If the action or omission on which the advantage is conditional is suitable to cause a distortion of competition or an economic loss for third parties:

- for individuals – imprisonment for between one and eight years; and
- for legal persons – a fine of between 120 and 960 days.

For legal persons, an additional penalty enforcing the adoption of a compliance programme may be determined.

Active corruption crime in the private sector

If the undue advantage is conditional on the obtainment of an act or omission contrary to professional duties:

- for individuals – imprisonment for up to three years or a fine of up to 360 days; and
- for legal persons – a fine of up to 360 days.

If the action or omission on which the advantage is conditional is suitable to cause a distortion of competition or an economic loss for third parties:

- for individuals – imprisonment for up to five years or a fine of up to 600 days; and
- for legal persons – a fine of up to 600 days.

Attempted active corruption is punishable.

For legal persons, an additional penalty enforcing the adoption of a compliance programme may be determined.

International Commerce

Active corruption crime in international commerce

- For individuals – imprisonment for between one and eight years.
- For legal persons – a fine of between 120 and 960 days.

Political or High Public Officials

Undue advantage to a political or high public official

- Soliciting or accepting an undue advantage is punishable by imprisonment for between one and five years.
- Offering or promising to offer an undue advantage to a political or high public official is punishable by imprisonment for up to five years or with a fine of up to 600 days.

Passive corruption crime by a political or high public official

- Soliciting or accepting an undue advantage intended as compensation for the practice of an illicit action or omission is punishable by imprisonment for between two and eight years.
- Soliciting or accepting an undue advantage conditional on the obtainment of an action or omission that is not illicit is punishable by imprisonment for between two and five years.

Active corruption crime by a political or high public official

- Offering or promising to offer an undue advantage to a political or high public official conditional on the obtainment of an illicit action or omission is punishable by imprisonment for between two and five years.
- Offering or promising to offer an undue advantage conditional on the obtainment of an action or omission which is not illicit is punishable by imprisonment for up to five years.
- The crime of active corruption committed by a political or high public official is punishable with the same penalties as those ascribed to the crime of passive corruption.

Armed Forces and Military Officials

Passive corruption by a member of the armed forces or a military official

- Soliciting or accepting an undue advantage conditional on the practice of an action or omission contrary to military duties and resulting in peril to national security is punishable by imprisonment for between two and ten years.
- If the corrupted agent, before performing the targetted action or omission, voluntarily rejects the offer of advantage or its promise or returns it, the penalty will be waived.

Active corruption by a member of the armed forces or a military official

- Offering or promising to offer an undue advantage to a person in the armed forces, conditional on the obtainment of an action or omission contrary to military duties and resulting in peril to national security is punishable by imprisonment for between one and six years.
- If the corrupting agent is an official of superior rank to the official who they attempted to corrupt or who they have corrupted, or an official who hierarchically exercises a position of command, the minimum of the applicable penalty will be doubled.

Sports

Undue advantage in sports

- For a sports agent who, in the exercise of its tasks or because of them, solicits or accepts an undue advantage or its promise – imprisonment for up to five years or a fine of up to 600 days.
- For legal persons, qualified as sports agents, who solicit or accept an undue advantage – a fine of up to 600 days.
- For individuals who offer or promise to offer an undue advantage to a sports agent – imprisonment for up to three years or a fine of up to 360 days.
- For legal persons who offer or promise to give an undue advantage to a sports agent – a fine of up to 360 days.

Passive corruption in sports

- For a sports agent who solicits or accepts and undue advantage or its promise conditional on the obtainment of an action or omission intended to secure the alteration or falsification of a result in a sport competition – imprisonment for between one and eight years.
- The minimum and maximum limits of the penalties is aggravated by a third if the perpetrator is a sports director, referee, sports businessperson or legal person.

Active corruption in sports

- Offering or promising to offer an undue advantage to a sports agent conditional on the obtainment of an action or omission intended to secure the alteration or falsifi-

cation of a result in a sports competition – imprisonment for between one and five years.
- The limits of the penalties are aggravated by a third if the undue advantage is intended for a sports director, referee, sports businessperson or legal person.

(For individual perpetrators, under Article 47 of the Criminal Code, each day of the fine may correspond to an amount between EUR5 and EUR500, which the court determines according to the economic and financial situation and personal expenses of the convicted individual. For legal persons, Article 90-B of the Criminal Code establishes that each day of the fine corresponds to an amount between EUR100 and EUR10,000, which the court determines according to the economic and financial situation of the convicted legal person and its expenses with workers. In cases where the criminal provision does not contemplate days of fine, but solely imprisonment, the rule regarding legal persons is that one month of a prison sentence corresponds to ten days of a fine.)

5.2 Guidelines Applicable to the Assessment of Penalties

The minimum and maximum limits of penalties may be aggravated if the bribe or undue advantage offered is of a high or considerably high value. In certain circumstances, penalties may also be mitigated.

For instance, regarding the crimes of undue receipt of advantage and passive or active corruption of public officials, the criminal code provides that the sentence may be waived when the perpetrator denounces the crime within 30 days of its occurrence, before the opening of criminal procedures, as long as they voluntarily return the advantage given to them.

For more on this matter, see also the note on Article 47 of the Criminal Code in **5.1 Penalties on Conviction**.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

With the implementation of the National Anti-corruption Strategy 2020-2024 in Law 94/2021 of December 21st, several provisions altering various legislative pieces highlight the importance of implementing internal compliance programmes in companies, both as deterrents to criminal activity and as means to diminish the risk of repeated criminal activity, when it has occurred, thus arising as a particularly important preventative measure. The existence of such programmes may, for instance, serve as a mitigating circumstance for the penalties to be applied to the legal person.

6.2 Regulation of Lobbying Activities

Lobbying activities have historically not been regulated in Portugal, with the discussion considering the topic politically relevant recently gaining traction. In 2021, three legislative projects were introduced in Parliament as suggestions for a lobbying regulation. Due to the end of the legislative term and the new elections for Parliament, these projects did not see the end of the legislative lifecycle. Another project was introduced in 2022 that attempts to regulate lobbying.

A Commission on Transparency and the Statute of Members of Parliament has been created in 2019 with the incumbency of, among other tasks, preventing conflicts of interest when private entities wish to participate in defining and implementing public policies and legislation – ie,

lobbying. The Commission terminated its mandate in March 2022, with no legislation on lobbying having yet been issued.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Portuguese law does not provide a general duty to report or denunciate private entities or individuals. Nevertheless, the failure to report imminent bribery or corruption practices by those who assume a leading position within organisations, and who are therefore bound by law to prevent such unlawful outputs, may lead to the liability of the company itself and/or of the omitting agent.

The Portuguese Companies Code provides that the company's statutory auditor and the members of its supervisory board, as well as the chairman of the audit committee of companies with limited liability by shares, must disclose before the Public Prosecution office any criminal suspicions which have come to their knowledge that may have relevance as crimes of a procedural public nature, such as corruption.

In some circumstances, the disclosure of criminal suspicions to relevant authorities and/or internal supervisory bodies may be construed as the essential content of the duty to act that discharges agents of possible criminal liability for their omissions.

6.4 Protection Afforded to Whistle-Blowers

There are several legal provisions granting a waiver or mitigating the penalty for perpetrators who, under certain conditions, report the crime, under limited timeframes, or who have decisively contributed to the gathering of evidence which allows for the identification and capture of others who are criminally liable.

Furthermore, recent Law 93/2021, of December 20th, has transposed the EU's Whistleblower Protection Directive into national law, which entered into force in June 2022. This new regime encompasses all persons who, in the context of their professional activity, regardless of nature, sector or remuneration, pass on criminally relevant information to the authorities.

Measures for the development and implementation of reporting channels, internal to companies or external, are further specified in the new regime. External reporting channels must be made available by the criminal police forces, the Bank of Portugal, municipalities, the public prosecution office, and other obliged entities.

Law 93/99, of July 14th, establishes generic special measures for the protection of witnesses under criminal procedure that may be applicable to those acting as whistle-blowers.

Article 4 of Law 19/2008, of April 21st, determines that workers of the public administration and of state-owned companies, as well as private-sector workers, who report offences they become aware of in the course of their work or because of the exercise of their duties cannot be jeopardised in any way, including by means of non-voluntary transfer or dismissal. These workers have the right to remain anonymous until a charge is brought and to request an irrefusable transfer to a different position once a charge is brought.

The Central Department for Investigation and Penal Action (*Departamento Central de Investigação e Acção Penal*) has created a digital platform that allows the filing of anonymous complaints of crimes of fraud or corruption.

6.5 Incentives for Whistle-Blowers

New Law 93/2021 of December 20th entails several protective measures which aim to incentivise the use of reporting channels. The identity of the whistle-blower is anonymised, protection against retaliation is provided and, if retaliation occurs, it is deemed as a punishable offence. Whistle-blowers may also benefit from witness protection measures, in general terms.

Article 8 of Law 36/94, of September 29th, regarding measures to combat corruption and economic and financial crime, establishes a mitigation of penalty for corruption cases where a defendant aids the investigation, gathering decisive evidence for the identification and capture of others who are criminally liable.

Likewise, Article 374-B of the Criminal Code, regarding crimes of undue receipt of an advantage and corruption in the public sector establishes that, under certain conditions, penalties can be mitigated or waived altogether.

The penalty may be waived when the perpetrator:

- in the crime of passive corruption, has not practised acts or omissions contrary to the duties of the office they have solicited the advantage to, and voluntarily returns the advantage or restores its value;
- in the crime of unlawful receiving or giving of advantage, voluntarily returns the advantage or restores its value;
- voluntarily renounces the undue advantage previously accepted or returns it before the act or omission intended by the corruptor takes place;
- withdraws their promise, refuses its offering or requests its restitution before the act or omission intended by the corruptor takes place; or
- as a political office holder, committing the crimes provided for in Law 34/87, of July 17th, reports the crime before criminal proceedings are initiated, according to Article 19-A.

The penalty is specially mitigated when the perpetrator:

- until the conclusion of the court hearing, specifically aids the investigation in gathering or producing decisive evidence for the identification or capture of others responsible;
- had performed the criminal act at the request of a public official, either directly or by means of an intermediary; or
- is a legal person that has implemented an internal compliance programme.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Law 93/2021 has transposed the EU Whistleblower Protection Directive into national law.

Of the previously referred provisions relating to the waiver or penalty mitigation, the following are worth mentioning: Article 374-B of the Criminal Code, Article 8 of Law 36/94, of September 29th, Article 5 of Law 20/2008, of April 21st 2008, and Article 19-A of Law 34/87, of July 16th, 1987.

The Data Protection Enforcement Agency (CNPD) has issued a resolution (765/2009), granting special protection to whistle-blowers in relation to all sorts of criminal offences, not just bribery and corruption.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

First and foremost, anti-bribery and anti-corruption laws are subject to criminal enforcement. There is an independent administrative entity called the Council for the Prevention of Bribery, created under the umbrella of the Court of Auditors, with the purpose of developing measures in the field of the prevention of bribery and related offences. The Council, empowered merely with soft-law powers, has issued several instructions and recommendations, namely, asking public entities to prepare, apply and publicise bribery-prevention plans, as well as demonstrating how they should assess potential conflicts of interest.

According to data from Directorate-General of Justice Policies, between 2017 and 2021 there was a 42% increase in investigations of corruption.

7.2 Enforcement Body

By their nature, criminal laws against corruption are enforced in the courts of law. The Public Prosecutor's office is the competent body to investigate any suspected corruption or bribery offences, aided by the Judiciary Police, particularly by the National Anti-Corruption Unit.

Currently, there is no specific enforcement body or entity specialised in these types of crime. Public Prosecutors bear the general powers attributed to them by law to investigate any acts that may constitute a criminal offence in Portuguese territory, without compromising the application of rules that govern extraterritorial jurisdiction of Portuguese law.

Usually, the investigation of crimes of a violent nature, particularly complex or highly organised, including bribery and corruption-related offences, is carried out by the Central Department of Investigation and Prosecution (*Departamento Central de Investigação e Ação Penal*), which has nationwide jurisdiction to co-ordinate and direct the investigation.

National Anti-corruption Strategy 2020-2024 has anticipated the creation of the Preventative Mechanism of Corruption and Related Offences (*Mecanismo de Prevenção da Corrupção e da Criminalidade Conexa*), an independent entity with monitoring and sanctioning faculties, designed to assure the efficiency of the national preventative anti-corruption policies, working in co-operation with investigative units. It has, however, not yet been specifically legislated on or started its activity.

7.3 Process of Application for Documentation

In addition to the powers generally endowed to the Public Prosecutor's office in any criminal investigation, there are special provisions regarding the investigation entailing the breach of secrecy of financial institutions, warranting a more effective collection of evidence by means of requesting documentation and information (Law 5/2002, of January 11th). Under Law 5/2002, of January 11th, any breach of banking and professional secrecy must be ordered by the judiciary authority conducting the proceedings. This order must identify the envisaged individuals and specify the information and documents to be surrendered, even if generically. The request may also be made with reference to the accounts or transactions in relation to which information is needed.

The enforcement body has complete access to the tax administration database. Financial institutions are required to provide the information

requested within a period of five days (if the information is available as computer data), or 30 days (if the information is not available as computer data). The latter timeframe is reduced to 15 days if the suspects are detained in custody. All documents not voluntarily rendered can be apprehended by court order.

7.4 Discretion for Mitigation

Portuguese law provides a mechanism of provisional suspension of the enforcement procedure, under Articles 281 and 282 of the Criminal Procedure Code and Article 9 of Law 36/94, of September 29th.

This mechanism is agreed between the Public Prosecutor and the defendant, with a judge's concurrence, and it determines that the procedure will be suspended upon the defendant adhering to injunctions and specific rules of conduct. The conditions that must be met in order to achieve that agreement are:

- the crime must be punishable with imprisonment for less than five years, or with a penalty other than imprisonment;
- the agreement of both the defendant and the offended party (when the offended party is part of the procedure);
- the absence of a previous conviction for a crime of the same nature;
- the absence of previous provisional suspension for a crime of the same nature;
- the absence of institutionalisation as a safety measure;
- the absence of a high level of guilt; and
- it must be foreseeable that the compliance with the injunctions and the rules of conduct imposed is sufficiently deterrent to achieve the prevention demanded in the concrete case.

In cases involving active corruption crimes in the public sector, Article 9 of Law 36/94, of September 29th, establishes that the provisional suspension of the procedure may be offered to a defendant when they have reported the crime or when the Public Prosecutor considers them to have made a decisive contribution towards the unveiling of the truth. The suspension in such cases requires fewer conditions; other than the defendant's contribution, it is necessary only that they are in agreement with that suspension and that it is foreseeable that the compliance with the injunction and the rules of conduct imposed will be sufficiently deterrent to achieve the prevention demands in the concrete case.

The suspension of the procedure can last up to two years, during which time the running of the limitation period is also suspended. If the defendant complies with the set of injunctions and rules of conduct prescribed, the Public Prosecutor dismisses the proceedings. In contrast, failure to comply with the terms agreed, or recidivism, causes the process to resume its course.

7.5 Jurisdictional Reach of the Body/Bodies

See **7.2 Enforcement Body**.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

In recent years, there have been several prominent and high-profile cases of bribery or corruption prosecuted and tried in Portuguese courts.

- In "Operation Marquês", considered by many to be the biggest corruption case in Portugal's modern history, a former Prime Minister and the former CEO of one of the largest Portuguese private banks (among other corporate elites, namely, former chief executives

of Portugal Telecom), were formally charged with several counts of corruption, money laundering, document forgery and tax fraud, which were the charges significantly reduced in the pre-trial decision.
- The "E-Toupeira" operation, related to alleged corruption practices in sports, began with the involvement of a major Portuguese football club that was later entirely dismissed from any liability in the pre-trial stage.
- In the "Lex" operation, related to alleged corruption practices in the judicial system, two former judges of the Lisbon Court of Appeals were formally indicted.
- The "CMEC" case, related to alleged corruption practices in the energy sector, involved top managers from major Portuguese companies operating in the energy sector and former ministers and secretaries of state from the Portuguese government.
- The "Tutti-Frutti" investigation encompassed many alleged crimes, such as corruption, influence-peddling, abuse of power and embezzlement, involving various Portuguese central and municipal political figures, several companies and a known university professor.

7.7 Level of Sanctions Imposed

Final decisions – with a res judicata effect – have not yet been reached in the cases referred to in **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**. Another relevant and landmark case, "Face Oculta", already concluded, concerned an alleged corruption ring designed to favour a private business group linked to waste management, also involving relevant public officials, where the most severe penalty imposed was imprisonment for 13 years.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

On 28 June 2019, the GRECO, which is the Council of Europe's anti-corruption body, published a compliance report on Portugal, assessing the implementation of the 15 recommendations it issued in a report adopted in December 2015. The GRECO concluded that minor improvements had been made by Portugal and that only one of the 15 recommendations had been implemented satisfactorily. The GRECO therefore concluded that the low level of compliance with the recommendations remained "globally unsatisfactory".

The Second GRECO Interim Compliance Report, assessing the measures taken by the authorities of Portugal to implement the recommendations issued in the Fourth Evaluation Report on that country, was published on 12 April 2021. In that report, it was once again concluded that Portugal had achieved only minor progress in the fulfilment of recommendations previously offered; only three of the 15 recommendations had been implemented satisfactorily and, of the remaining recommendations, seven had now been partly implemented and five remained not implemented. The GRECO therefore concluded that the current slightly improved level of compliance with the recommendations is no longer "globally unsatisfactory".

A Second Compliance Report by GRECO, issued in June 2022, assesses the measures taken by the authorities of Portugal to implement the recommendations made in the Fourth Round Evaluation Report on Portugal, regarding corruption prevention in respect of members of parliament, judges and prosecutors. The report addresses 15 recommendations made to Portugal. It notes that the Committee for Transparency

and the Statute of Members of Parliament has made progress in ensuring the independence of members of parliament, as well as on other aspects under the oversight of the Council of Europe, while some recommendations are only partly implemented, or not implemented at all.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

The National Anti-corruption Strategy 2020–2024 will continue to be implemented as, for instance, the Preventative Mechanism of Corruption and related offences (*Mecanismo de Prevenção da Corrupção e da Criminalidade Conexa*) is expected to come into force.

The European Commission has sent a letter of formal notice to Portugal for incorrectly transposing the fourth EU Anti-Money Laundering Directive in 2021. It is to be expected that the Directive will be duly transposed, and it must also be taken into account that the EU's Anti-Money Laundering Package is expected to be published soon, which will need to be reflected in national legislation. The standstill on lobbying regulation will likely continue to be discussed, after a commission, which was created for the purpose of developing standards on handling matters related to the independence of members of parliament and of the Parliament, has terminated its mandate without having issued any legislation or guidelines to regulate lobbying activities. At least one legislative project, already presented, will be discussed in Parliament within the current legislative session.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, Morais Leitão is referred to in several branches and sectors of the law at a national and international level. The firm's reputation amongst both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by its unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices. With a team of over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon and has additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Cape Verde (VPQ Advogados) and Mozambique (MDR Advogados).

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ROMANIA

Trends and Developments

Contributed by:
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General Outlook

The 2023 fight against corruption looks set to continue under the same auspices as per 2022, with justice reforms remaining a priority on the political agenda throughout the past year. Many EU member states have initiated important reforms in order to strengthen the independence of the judiciary, including reforms that affect the composition and attributes of judicial councils, improve appointment procedures or reinforce the autonomy of criminal prosecution bodies.

EU member states have also introduced measures to enhance efficiency and quality through further digitisation of their justice systems and thereby facilitate access to justice in light of the COVID-19 pandemic. In this respect, the Romanian government has published several draft laws concerning the status of magistrates, judicial organisation and the draft law on the Superior Council of the Magistracy.

In line with other member states, Romania has adopted the 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 (commonly known as the "EU Whistleblowing Directive") into national law, although this has yet to enter into force. On 29 June 2022, the EU Whistleblowing Directive was transposed into national law and the Law on the Protection of Whistleblowers in the Public Interest ("Whistleblower Protection Law") was adopted by Parliament.

As such, within 60 days of the Whistleblower Protection Law entering into force, all public and private companies located in Romania with more than 249 employees must design internal reporting methods and channels. This obligation is also applicable to companies with 50—249 employees, but these companies have between one and two years to submit to the reporting obligation instead.

Laura Codruta Kovesi (in her capacity as Chief Prosecutor of the European Public Prosecutor's Office) had a slightly negative reaction to this legislative process as a result. Kovesi stated that "the provision could have a demobilising effect, discouraging potential whistle-blowers in Romania and negatively affecting the level of fraud detection in EU".

Unlike previous years, in which the trend was mainly for fighting organised and violent criminality, 2022 saw the focus of the judiciary environment in Romania shift to the discovery, prevention and fight against corporate crimes following the adoption of the EU Whistleblowing Directive.

However, also in 2022, a former Member of Parliament (MP) was finally indicted for trading in influence and forgery of private documents more than five years after criminal proceedings began. Specifically, the former MP allegedly demanded and received various sums of money between 2010 and 2014 from representatives of an IT company in order to induce the decision-mak-

ers and public officials he claimed or implied he could influence to:

- award public procurement contracts to that company; or
- allow previously signed contracts to be carried out in good conditions.

Another criminal case with political implications is the "Colectiv Club" case, in which Cristian Popescu Piedone (the mayor of the Fifth District of Bucharest) was finally sentenced to four years in prison almost seven years after the tragedy in which 65 people lost their lives. Judges at the Bucharest Court of Appeal also sentenced the Colectiv Club's three owners to six, eight and 11 years in prison respectively.

Furthermore, after more than six years of trials, a case brought by the National Anti-corruption Directorate (*Direcția Națională Anticorupție*, or DNA) in November 2015 was finally resolved when the Bucharest Court of Appeal convicted Sorin Oprescu in 2022. The court sentenced the former mayor of Bucharest to:

- six-and-a-half years in prison for the aggravated version of the offence of setting up an organised criminal group;
- six years in prison for taking bribe;
- three years in prison for abuse of office; and
- three-and-a-half years in prison for money laundering.

After combining the sentences into one concurrent sentence of six-and-a-half years, the court added the mandatory additional four years and two months – thus resulting in a prison sentence of ten years and eight months.

Another famous criminal case brought to the attention of the public in 2022 is that of the Minister of Tourism, Elena Udrea, whose appeal against a 2018 conviction for corruption offences was rejected by the High Court. Other investigations against her are also ongoing.

Controversies Surrounding the Statute of Limitations

This topic of limitation periods for criminal liability has undoubtedly aroused particular interest across the Romanian legal landscape in recent years. The Constitutional Court ruled in Decision No 358/2022 that Article 155 para 1 of the Romanian Criminal Code does not comply with constitutional law, thus giving rise to heated debates in the legal field and also to different interpretations by the courts.

In essence, Article 155 para 1 of the Criminal Code stated that the limitation period for criminal liability could be interrupted by "any procedural act in the case". These regulations were not considered predictable by the Constitutional Court. They were also deemed contrary to the criminal procedure's principle of legality on the grounds that the phrase "any procedural act" also refers to acts that were not communicated to the suspect or defendant – thereby making them unaware of the interruption of the limitation period and the start of a new limitation period for their criminal liability.

Ultimately, the direct application of this decision will trigger the closing of a number of criminal cases currently being prosecuted and lead to the acquittal of number of defendants already on trial. Therefore, by applying the principle of mitior lex, individuals may refer the court to Decision No 358/2022 and ask the court to apply the general limitation period if the offence was committed before 30 May 2022.

Although Constitutional Court decisions are binding and immediately applicable, the Bucharest Court of Appeal decided to initiate a request to the High Court to resolve certain questions of law related to the applicability of this decision. On 25 October 2022, the High Court transposed this debate and ruled in Decision No 66/2022 that the legislation in force between 9 August 2018 and 30 May 2022, which did not provide for any cases of interruption of the statute of limitations, constitutes a more favourable law as per the mitior lex principle. Numerous criminal cases have been closed, either during the prosecution or trial stage, as a result of this decision. Many will follow suit in the next several months, depending on the status of their procedures.

The representatives of the General Prosecutor's Office argue that they do not agree with the applicability of Decision No 66/2022, as there is – among other things – the possibility of a "disguised amnesty".

The DNA stated that the direct application of the decisions will have consequences for 557 cases, either under criminal prosecution or at trial stage, in which the total estimated damage amounts to EUR1.2 billion.

The DNA also announced that they will submit the matter to the ECJ in order to assess whether these decisions are consistent with the rules and the jurisprudence of the ECJ, which obligate the Romanian State to investigate and sanction acts of corruption and fraud of EU funds effectively.

The Directorate for Investigating Organised Crime and Terrorism (*Direcția de Investigare a Infracțiunilor de Criminalitate Organizată și Terorism*, or DIICOT) also stated that they identified a total of 605 criminal cases that could be closed as a result of these decisions.

Although there are still debates concerning their desirability, the authors believe that these decisions were also intended to sanction the prosecution bodies that allowed a multitude of criminal files to remain unresolved for more than a decade.

For the time being, the special statute of limitations is regulated by government emergency ordinance (GEO) No 71/2022, according to which "the course of the limitation period for criminal liability shall be interrupted by the performance of any procedural act in the file that, according to the law, must be communicated to the suspect or defendant". GEO No 71/2022 was adopted in the context of Decision No 358/2022 of the Constitutional Court, which states that "for the period between June 25, 2018 and until the entry into force of a normative act clarifying the norm (30 May 2022, date of publication of GEO No 71/2022), by expressly regulating the cases capable of interrupting the course of the term of prescription of criminal liability, the active substance of the legislation does not contain any case that would allow the interruption of the course of prescription of criminal liability".

The Main Authorities Involved in the Fight Against Corruption

In Romania, the legislative and institutional framework for the fight against corruption is – in a broad sense – well established. However, the national anti-corruption strategy for 2020–24 is still to be applied – a process that is co-ordinated by the Ministry of Justice.

The National Anti-corruption Directorate

The criminal prosecution organisation that specialises in the fight against corruption is the DNA. It has the authority and competence to investigate medium-to-large corruption cases, whereas the (regular) Public Prosecutor's

Office investigates all other corruption cases. In contrast to previous years, there was a slight increase the number of cases registered on the dockets of the DNA following the removal of all restrictions related to COVID-19.

According to the DNA's 2021 Activity Report, the institution aims to record an increase in the intensity and quality of the activity carried out in the coming years. The DNA also aims to make efficient use of the reports it receives from individuals or legal persons.

In 2016, the Romanian Constitutional Court ruled that the Romanian Intelligence Service (*Serviciul Român de Informații*, or SRI) can no longer perform wire tapping on behalf of the DNA – nor can the DNA use any such evidence or SRI investigators in its performance of criminal investigations. Thus, the execution of the technical supervision mandates ordered in the criminal trials is carried out exclusively by judicial police officers from the DNA's Technical Department. The DNA has publicly complained that it lacks the technical resources and knowhow – as well as sufficient personnel – to do this.

There are currently approximately 150 prosecutors and 310 judicial police officers and specialists working for the DNA; however, these numbers are considered insufficient. A new project to increase the number of prosecutors and police officers in the DNA is being debated publicly.

Recent criminal investigations have focused on crimes involving the production, importation and distribution by companies of medical masks and other devices. Prosecutors performed several searches at the headquarters of companies and some criminal cases have also appeared before the court.

Additionally, the National Agency for the Administration of Seized Goods (*Agenția Națională de Administrare a Bunurilor Indisponibilizate*, or ANABI) ensures the management of assets that have been seized and confiscated as a result of crimes.

The new National Defence Strategy

According to a press release by the presidential adviser from the Department for National Security, the fight against corruption is being approached through multiple sections of the National Defence Strategy for 2020–2024 (the "Strategy"). The Strategy places great emphasis on the social component of national security, especially with regard to:

- increasing resilience and reducing internal vulnerabilities (including through the fight against corruption);
- the proper functioning of democracy and the rule of law; and
- strengthening administrative capacity.

In the new Strategy, corruption does not only represent a vulnerability (as per previous strategies); it is now placed under the category of "security risk". Thus, all stages of the corruption process – from the establishment of illegitimate interest groups to the risk of overturning decisions made by the authorities of the state – are addressed respectively in multiple sections of the Strategy.

Furthermore, in the President's view, the fight against corruption must proceed without impediment and with concomitant awareness-raising concerning the fundamental values of society. This is the crux of creating a culture of integrity in the public sector – for only in this way will it be possible to eradicate the root causes of the corruption phenomenon.

The Section for the Investigation of Judicial Crimes

On 11 March 2022, Law No 49/2022 regarding the dismantling of the SIIJ entered into force, following promises by current politicians to disband the Section for the Investigation of Judicial Crimes (*Secția pentru Investigarea Infracțiunilor din Justiție*, or SIIJ) since their election.

From March 14, 2022, the prosecutors within the SIIJ (including those with management positions) returned to the regular prosecutors' offices. The crimes that until now were under jurisdiction of the SIIJ are to be resolved by the Public Prosecutor's Office with the High Court of Cassation and Justice and the Court of Appeal.

The Fight Against Fraud Department

Attempts by the European Anti-Fraud Office (*Office européen de Lutte Antifraude*, or OLAF) to combat corruption in Romania through the Fight Against Fraud Department (*Departamentul pentru Lupta Antifraudă*, or DLAF) should also be mentioned as an important component of the measures against defrauding EU subsidies. Thus, Romania is the first EU member state to be included in the latest OLAF report with regard to corruption investigations and tip-offs concerning EU funds, which strengthens the role of the DLAF in this area.

The National Integrity Agency

The National Integrity Agency (*Agenția Națională de Integritate*, or ANI) is responsible for the investigation of administrative conflicts of interest, incompatibilities and unjustified assets.

Its operation has produced positive results so far, as the sanctioning of incompatibilities and of conflicts of interest is an important element of combating and preventing corruption.

The ANI continues to deliver good results, including a total of 2,827 public procurement procedures that were analysed through the computer system PREVENT between April and June 2021. Of these procedures, around 20% relate to contracts financed by EU funds. At the same time, approximately a third of the total procedures involve 16,288 subsequent contracts. Moreover, during the same period, three integrity warnings were issued concerning a total amount of RON6.6 million.

The ANI has also developed powerful tools for preventing administrative conflicts of interest (particularly in the field of public procurement) and has carried out awareness-raising campaigns in national and local elections. Previous Co-operation and Verification Mechanism (*Mecanismul de Cooperare și Verificare*, or MCV) reports have highlighted the persistent issues faced by the legislative framework in terms of integrity and the need for stability and clarity.

The ANI proposed that the Ministry of Justice work with stakeholders to review legislation concerning integrity and strive towards developing a coherent and strengthened legislative framework. Even though the ANI has a substantially higher workload during election time, its budget has been reduced.

The European Public Prosecutor's Office

The European Public Prosecutor's Office (EPPO) was established by Regulation (EU) 2017/1939 as an independent body of the EU. The EPPO is the first EU body that can investigate and prosecute criminal offences.

The EPPO also has the power to investigate, prosecute and punish perpetrators of offences against the EU's financial interests (as set out in Directive (EU) 2017/1371 and laid down in Regu-

lation (EU) 2017/1939). Cases prosecuted by the EPPO are referred to the competent courts in the EU member states.

The EPPO will work in close co-operation with national judicial and law enforcement authorities. It will also work closely with other EU bodies such as OLAF, Eurojust and Europol.

Given the EPPO's jurisdiction, an investigation has already been launched into alleged fraud with EU funds, with damages of over EUR3 million. The EPPO suspects three people of setting up an organised criminal group at the beginning of 2018, with the aim of defrauding EU funds intended for the development of the Danube Delta. To this end, the suspects set up a fraud scheme through seven companies, which they controlled either directly or through intermediaries.

Trends for the Future

As was the case in 2022, it is expected that the fight against corruption will continue throughout 2023 in a more intense fashion than previous periods as people are interested in relevant outcomes in this area. Even so, the criminal investigation authorities still look set to struggle with some problems in their day-to-day activities due to understaffing and political pressures on the justice system.

Nonetheless, every authority that handles corruption cases is anticipated to continue its activity with full force. As mentioned earlier, the DNA plans to intensify its activities and increase the quality of those carried out. One way to achieve these goals, as stated in DNA's 2021 Activity Report, is by recruiting DNA members as prosecutors.

As for the opinion of the general public when it comes to the efforts of anti-corruption authorities, the public now tends to be more concerned about the fight against violent criminality – for example, human trafficking (as a result of a case that horrified the public) and drug trafficking (there is a draft law in Parliament that will increase penalties). As such, the focus is not on the results of the anti-corruption authorities and criminal investigations at the moment.

However, corruption among high officials has been heavily criticised in the media for being the reason why the fight against criminal networks and the handling of the pandemic was poorly managed. So the fight against corruption is sure to remain a constant in the efforts to ensure justice in Romania – especially as the MCV is yet to be rescinded, even though efforts are being made at an administrative, political and judicial level to persuade the EU decision-makers that this supervision is no longer necessary.

However, as regards the adoption of the Whistleblower Protection Law, the authors believe that there will be a lot of challenges in terms of the EU Whistleblowing Directive's requirement to establish or maintain internal reporting channels and procedures within public institutions or private companies. The EU Whistleblowing Directive, obviously, imposes measures to ensure the appropriate protection of persons reporting crimes within their companies, such as:

- the establishment of safe reporting channels; and
- protection against dismissal or other forms of retaliation.

Owing to contradictions in the national legislation transposing the EU Whistleblowing Directive, companies will have a hard time implement-

ing these measures to support people who take risks in uncovering crimes such as fraud and corruption.

The Whistleblower Protection Law, which was recently adopted and sent for promulgation, significantly diminishes mechanisms that protect the integrity of whistle-blowers. As such, this transposition law will reduce opportunities for whistle-blowers to report the irregularities they find anonymously and will also affect the process of discovering crimes committed by the authorities.

The form of the national legislation transposing the EU Whistleblowing Directive has many deficiencies, which will undoubtedly lead to a lot of public controversy. However, the draft law on whistle-blower protection has been sent by the President of Romania to the Senate for reconsideration in order to remedy these shortcomings.

A number of constitutional provisions are also violated by this national law, so the authors believe that criticisms of the form it takes are justified. Overall, the Whistleblower Protection Law contains some vague, interpretable or even contradictory provisions.

Whistle-blowers will continue to be discouraged from reporting perceived illegal actions unless the Senate revises national legislation and establishes a legal framework in line with the EU Whistleblowing Directive. Whistle-blowers will also remain under the impression that they are not properly protected by national authorities, as the transposition law does not provide sufficient protection in terms of anonymous reporting, confidentiality, etc.

Moreover, the Whistleblower Protection Law approved by Parliament even has consequences for the private sector, as anonymous reporting is an effective method of preventing and detecting fraud in private companies.

It can be concluded that the fight against corruption in the public and private sector may be hindered if the legislator does not revise the transposition law as soon as possible. In this respect, it is important to mention that the ECHR recently found an infringement in the case Poienaru v Romania. Essentially, the ECHR stated that the national courts failed to analyse the extent to which the claimant benefited from the legal protection of whistle-blowers.

Enache Pirtea & Asociatii (EPA) stands for extraordinary professionalism applied to the requirements and needs of the clients, which is the main drive and focus of the law firm. This is best encapsulated by the firm's motto ("We go the extra mile"), as well as in its mission ("inside the business and outside the box") and vision (to provide businesses with integrated practical solutions for ethically moving forward and shaping the future). EPA was set up in 2018 in Bucharest following the merger of the specialised law boutique offices of two highly reputed "new wave" business criminal law attorneys, Simona Pirtea and Mădălin Enache. Both have extensive experience of white-collar criminality cases, but also in business crime matters of considerable importance. The firm's focal area of activity, in which the main partners have more than 15 years' professional experience, is criminal law – including its two main components (criminal investigation and litigation) – as well as business crime consultancy and counselling in relation to business ethics and integrity.

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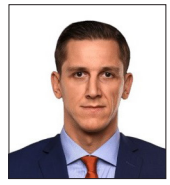

Mădălin Enache is the co-founder of Enache Pirtea & Asociatii and brings to the firm first-class professional expertise acquired during some of the most difficult and media-scrutinised criminal investigations and trials. He has practised extensively in high-level white-collar criminal cases since 2006, building a solid reputation as a leading criminal law attorney, and is now known as one of the most highly skilled practitioners in this field. Mădălin has counselled, assisted and represented renowned international and Romanian corporate clients, key-figure businesspeople and executives and high-profile politicians who have been involved in a wide range of white-collar criminal cases. Mădălin is also a highly regarded and valued lecturer on criminal law topics, who has published specialised articles in national and international publications on the subject of business crime.

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SINGAPORE

Law and Practice

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Contents

1. Legal Framework for Offences

1.1 International Conventions

Singapore is a signatory to the United Nations Convention against Corruption (signed on 11 November 2005, ratified on 6 November 2009), and to the United Nations Convention against Transnational Organized Crime (signed on 13 December 2000, ratified on 28 August 2007).

In addition, Singapore has been a member of the Financial Action Task Force (FATF) since 1992, and is one of the founding members of the Asia/Pacific Group on Money Laundering (APG).

Singapore's Corrupt Practices Investigations Bureau (CPIB), the agency responsible for the investigation and prevention of corruption in Singapore, also represents Singapore at various anti-corruption fora, such as:

- Asian Development Bank (ADB) – Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative for Asia and Pacific;
- Asia-Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Experts' Working Group (ACTWG);
- Economic Crime Agencies Network (ECAN);
- G20 Anti-Corruption Working Group (ACWG);
- International Association of Anti-Corruption Authorities (IAACA); and
- South-East Asia – Parties Against Corruption (SEA-PAC).

1.2 National Legislation

The primary legislation governing bribery and corruption in Singapore is the Prevention of Corruption Act 1960 (PCA). The main offences under the PCA are set out in Sections 5 and 6, which apply to both the private and public sector, and prohibit both active and passive bribery.

The Penal Code 1871 (Penal Code) contains further provisions relating to bribery and corruption. This includes offences related to the bribery of domestic "public servants" under Sections 161 to 165 of the Penal Code. In practice, however, the offences under the Penal Code are rarely used for the prosecution of corruption offences. Prosecutors usually rely on the offences under the PCA instead.

The Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act 1992 (CDSA) is another legislation aimed at combating corruption. The CDSA criminalises the acquisition, possession, use, concealment and/or transfer of the benefits from criminal conduct (such as corruption), and allows for the confiscation of such benefits.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no official guidelines on the interpretation and enforcement of Singapore's anti-corruption legislation.

However, the CPIB has published on its website some answers to frequently asked questions relating to anti-corruption and bribery laws in Singapore: https://www.cpib.gov.sg/faq/corruption-related/.

In 2017, the CPIB and SPRING (now Enterprise Singapore – a government agency championing enterprise development) also launched the Singapore Standard (SS) ISO 37001 on anti-bribery management systems. This voluntary standard is based on internationally recognised good practices. It provides guidelines to help Singapore companies strengthen their anti-bribery compliance systems and processes and ensure compliance with anti-bribery laws.

Further, also in 2017, the CPIB published PACT – its Practical Anti-Corruption Guide for Businesses in Singapore. PACT provides guidance for business owners on how to develop and implement an anti-corruption system. The elements of an effective corporate compliance programme as stated in PACT include:

- setting the tone from the top to promote a corporate culture of compliance;
- implementation of clear, visible and easy to understand anti-corruption policies and a code of conduct;
- guidance on common corruption risk areas including corporate gifts and entertainment, conflicts of interests, and contributions and sponsorship;
- conducting bribery and corruption risk assessments;
- the implementation of effective internal controls;
- the availability of effective reporting and whistle-blower systems; and
- regular monitoring of the compliance system.

1.4 Recent Key Amendments to National Legislation

One of the key amendments to the national legislation was the introduction of the Deferred Prosecution Agreements (DPA) regime in 2018.

A DPA is a voluntary alternative in which a prosecutor agrees to grant amnesty in exchange for a defendant agreeing to fulfil certain requirements and specific conditions, such as, implementing compliance programmes, and/or co-operating in investigations into wrongdoing by individuals.

Under this regime, corporations can potentially enter into DPAs with Singapore's Attorney-General's Chambers in respect of certain corruption and corruption-related offences.

2. Classification and Constituent Elements

2.1 Bribery

Bribery is defined very widely under the PCA.

Section 5 of the PCA provides that it is an offence for anyone to:

(a) "corruptly solicit or receive, or agree to receive for themselves, or for any other person; or
(b) corruptly give, promise or offer to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or reward for, or otherwise on account of —

(a) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or
(b) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned […]"

Further, Section 6 of the PCA provides that it is an offence for an agent to corruptly accept or obtain any gratification in relation to the acts or performance of their principal. This may, for example, involve an employee corruptly accepting or obtaining gratification in the course of their employment with their company and/or in relation to the acts of their company.

Further, Sections 11 and 12 of the PCA provide that it is an offence to offer gratification to domestic public officials (such as members of parliament or members of a public body). In turn, a public body is defined as any corporation,

board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of any written law.

Hospitality Expenditures, Gifts and Promotional Expenditures

Under the PCA, "gratification" has a very wide definition, which includes:

- money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
- any office, employment or contract;
- any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;
- any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- any offer, undertaking or promise of any gratification within the meaning of the bullet points set out above.

Hospitality expenditures (travel expenses, meals), gifts and promotional expenditures are therefore likely to fall under this very wide definition of gratification under the PCA. Whether or not the giving or acceptance of such gratification amounts to the offence of bribery will therefore depend on the state of mind of the giver/receiver and the purpose for giving/receiving such gratification.

Facilitation Payments

Facilitation payments may be defined as payments which are made to public officials to speed up an administrative process where the outcome is already pre-determined.

Where such payments are concerned, these are not specifically regulated in Singapore – in particular, there is no exemption or defence applicable to such payments similar to that provided under the United States Foreign Corrupt Practices Act 1977 (FCPA).

However, regard should be had to Section 12 of the PCA. That Section prohibits, among others, the giving, solicitation and/or accepting of gratification for a member of a public body's performing or abstaining from performing, or their aid in procuring, expediting, delaying, hindering or preventing the performance of any official act.

Bribery of a Public Official

The primary corruption offences under Sections 5 and 6 of the PCA apply to both the private and public sectors.

However, the law distinguishes between bribery of a public official and private persons in that there is a presumption of corruption in certain cases involving the bribery of public officials. In this regard, Section 8 of the PCA provides as follows:

"Where in any proceedings against a person for an offence under Section 5 or 6, it is proved that any gratification has been paid or given to or received by a person in the employment of the government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the government or any department thereof or any public body, that gratification shall be

deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved."

Aside from this, the law also distinguishes between bribery of a public official and private persons in that there are specific offences under the PCA and the Penal Code that relate to the public sector.

In particular, under the PCA, it is an offence to:

- corruptly procure the withdrawal from a government tender (Section 10 of the PCA);
- bribe a member of parliament, or to accept such a bribe as a member of parliament (Section 11 of the PCA); and
- bribe a member of a public body, or to accept such a bribe as a member of a public body (Section 12 of the PCA).

Further, under the Penal Code, the following are offences (amongst others):

- the acceptance by a public servant of a gratification or anything of value as a reward for doing any official act, outside of legal remuneration (Section 161 of the Penal Code);
- the acceptance of a gratification by any person in order to influence or to exercise personal influence over a public servant (Sections 162-63 of the Penal Code); and
- the acceptance by a public servant of a gratification or anything of value without any or adequate consideration (Section 165 of the Penal Code).

In this regard, it should be noted that a "public servant" is defined differently from the definition of a "member of a public body" under the PCA. Whereas the definition of the latter is set out above, the former is defined under Section 21 of the Penal Code as including:

- an officer in the Singapore Armed Forces;
- a judge;
- an officer of a court of justice;
- an assessor assisting a court of justice;
- an arbitrator or other person to whom any cause or matter has been referred for decision;
- an office holder who holds powers to confine other persons;
- an officer of the Singapore government;
- an officer who acts on behalf of the government; or
- a member of the Public Service or Legal Service Commission.

Bribery of Foreign Public Officials

There are no legislative provisions that specifically deal with the potential bribery of foreign public officials.

However, Section 37 of the PCA states that if a Singapore citizen commits an offence under the PCA in any place outside of Singapore, they may be dealt with in respect of that offence as if it had been committed within Singapore. Section 4 of the Penal Code also provides that public servants who commit offences outside of Singapore are deemed to have committed that offence in Singapore.

The sum total of this is that the various prohibitions for corruption-related offences under the PCA and Penal Code can apply to cases involving foreign public officials and, in some cases, even apply where the acts of corruption occur outside of Singapore.

In fact, it should also be noted that the Singapore courts have held that the fact that a corruption

offence involves the corruption of foreign public officials is an aggravating factor: see PP v Tan Kok Ming Michael [2019] 5 SLR 926 at [73]-[93].

2.2 Influence-Peddling

As stated at **2.1 Bribery**, the PCA defines gratification very widely and includes "any office, employment or contract", as well as "any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty".

Therefore, influence-peddling (ie, the use of one's positional or political influence in exchange for undue advantages) is likely to constitute an offence under Sections 5 or 6 of the PCA. Further, influence peddling by citizens of Singapore of foreign public officials is likely to come within Section 12 of the PCA, read with Section 37(1) of the PCA.

Apart from the PCA, Section 161 of the PC provides that it is an offence for a person, being or expecting to be a public servant, to accept or obtain (or agree to accept or obtain) any gratification other than a legal renumeration as a motive or reward for, among others, doing or forbearing to do any official act.

In a similar vein, Section 163 of the PC provides that it is an offence for a person to accept or obtain gratification for exercising personal influence on a public servant to do or forbear to do any official act.

2.3 Financial Record-Keeping

Obligation of Companies in Respect of Record-Keeping

Under Section 199(1) of the Companies Act (CA), every company is required to keep accounting and other records "sufficiently explain the transactions and financial position of the company and enable true and fair financial statements and any documents required to be attached thereto to be prepared from time to time".

Such records must be kept for a period of not less than five years from the end of the financial year in which the transactions or operations to which those records relate are completed.

If a company fails to do so, the company and every officer of the company who is in default will be guilty of an offence under Section 199(6) of the CA.

Falsification of Accounts/False Documentation

Section 477A of the PC criminalises the falsification of accounts. The section provides as follows:

"Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, intentionally and with intent to defraud destroys, alters, conceals, mutilates or falsifies any book, electronic record, paper, writing, valuable security or account or a set thereof which belongs to or is in the possession of their employer, or has been received by them for or on behalf of their employer, or intentionally and with intent to defraud makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book, electronic record, paper, writing, valuable security or account or a set thereof, shall be punished with imprisonment

for a term which may extend to 10 years, or with fine, or with both."

Aside from this, the PC also sets out various offences relating to documents and electronic records (such as forgery under Section 463 of the PCA and making a false document or false electronic record under Section 464 of the PC). These offences can also potentially apply to situations involving inaccurate corporate books and records.

Dissemination of False Information

As for the dissemination of false information of a harmful thing, Section 268A of the PC criminalises the communication of information containing a reference to the presence in any place or location or in any conveyance or means of transportation of any thing that is likely to cause hurt or damage to property by any means which the person knows to be false or fabricated.

As for the dissemination of false information online, Singapore recently enacted the Protection from Online Falsehoods and Manipulation Act 2019 (Act No 18 of 2019) (POFMA).

Amongst other things, POFMA criminalises the doing of an act within or outside Singapore in order to communicate in Singapore a statement knowing, or having reason to believe, that the statement is a false statement of fact; and its communication of that statement in Singapore is likely to:

- be prejudicial to the security of Singapore or any part of Singapore;
- be prejudicial to public health, public safety, public tranquillity or public finances;
- be prejudicial to the friendly relations of Singapore with other countries;
- influence the outcome of an election to the office of President, a general election of members of parliament, a by-election of a member of parliament, or a referendum;
- incite feelings of enmity, hatred or ill will between different groups of persons; or
- diminish public confidence in the performance of any duty or function of, or in the exercise of any power by, the government, an organ of state, a statutory board, or a part of the government, an organ of state or a statutory board.

2.4 Public Officials

Under Section 405 of the PC, any person who misappropriates property they are entrusted with will be liable for criminal breach of trust. Where such breach of trust is committed by, inter alia, a public servant, Section 409 of the PC provides for enhanced penalties, namely, imprisonment for life, or imprisonment for a term which may extend to 20 years, and liability to a fine.

There are, however, no specific provisions which relate to the unlawful taking of interest by a public official and/or favouritism by a public official. In such situations, the general provisions under the PCA and PC would potentially apply.

2.5 Intermediaries

Under Section 5 of the PCA, it is an offence for any person to give or receive bribes "by themselves or by or in conjunction with any other person". This is wide enough to cover situations where a person commits a bribery offence through an intermediary.

Further, under Section 6 of the PCA, it is an offence for an agent to corruptly accept or obtain any gratification in relation to the acts or performance of their principal. For example, this may involve an employee corruptly accepting or

obtaining any gratification in relation to the acts of their company. In addition, Section 6(b) also criminalises the giving or agreement to give any gratification to any agent.

3. Scope

3.1 Limitation Period

Under Singapore law, there is no limitation period for enforcing or prosecuting criminal offences.

3.2 Geographical Reach of Applicable Legislation

Section 37 of the PCA provides extraterritorial reach for the provisions of the PCA provided that the offences in question are committed by a citizen of Singapore overseas.

In addition, under Section 4 of the PC, every public servant who, being a citizen or a permanent resident of Singapore, when acting or purporting to act in the course of their employment, commits an act or omission outside Singapore that if committed in Singapore would constitute an offence under the law in force in Singapore, is deemed to have committed that act or omission in Singapore.

3.3 Corporate Liability

Both individuals and corporate entities may be held liable for bribery. The primary bribery offences under Sections 5 and 6 of the PCA apply to all "persons". The term "person" is defined in the Interpretation Act as including "any company or association of body of persons, corporate or unincorporated."

In practice, however, the authorities' enforcement efforts have focused predominantly on individuals, with prosecutions against corporate entities for corruption offences being rare to date.

4. Defences and Exceptions

4.1 Defences

There are no statutory defences to bribery under the PCA. The accused will therefore need to rely on negating each element of the charge against them.

Chapter IV of the PC sets out the various general defences available against a criminal charge under the PC. However, these defences are unlikely to be applicable in the vast majority of corruption offences.

4.2 Exceptions

Several of the general defences under Chapter IV of the PC are subject to exceptions (such as the defence of duress). However, as stated at **4.1 Defences**, these defences are unlikely to be applicable in the vast majority of corruption offences.

4.3 De Minimis Exceptions

The general defences in Chapter IV of the PC include a defence of de minimis. The relevant section is Section 95 of the PC, which states as follows: "Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm."

It is unlikely that this general defence will be applicable to corruption offences as the strict policy approach taken by lawmakers and the CPIB towards the implementation and enforcement of corruption offences in Singapore means that any bribe, no matter how small, will not be considered de minimis. There is also some doubt as to whether the defence of de minimis applies to offences outside of the PC.

However, the issue has yet to come before the Singapore courts.

4.4 Exempt Sectors/Industries

There are no sectors or industries exempt from bribery and corruption offences under the PCA.

Further, under Section 23 of the PCA, in any civil or criminal proceedings under the PCA, evidence to show that any gratification is customary in the profession, trade, vocation or calling shall not be admissible.

4.5 Safe Harbour or Amnesty Programme

There is no safe harbour or amnesty programme based on the self-reporting of corruption offences.

However, the DPA scheme may allow companies to highlight effective anti-bribery compliance programmes as part of their negotiations on any DPA to be entered into with the AGC. At present, there are no publicly available guidelines on when the AGC will enter into a DPA with a corporate entity.

5. Penalties

5.1 Penalties on Conviction

In general, the maximum penalties prescribed under the relevant statutes are as follows:

- Section 5, PCA – a fine not exceeding SGD100,000 or imprisonment not exceeding five years, or both;
- Section 6, PCA – a fine not exceeding SGD100,000 or imprisonment not exceeding five years, or both;
- Section 7, PCA (increase of maximum penalty in cases where the offence related to a contractor a proposal for a contract with the government or any department thereof or with any public body or a subcontract to execute any work comprised in such a contract) – a fine not exceeding SGD100,000 or imprisonment not exceeding seven years, or both;
- Section 10, PCA (corruptly procuring withdrawal of tenders) – a fine not exceeding SGD100,000 or imprisonment not exceeding seven years, or both;
- Section 11, PCA (bribery of member of parliament) – a fine not exceeding SGD100,000 or imprisonment not exceeding seven years, or both; and
- Section 12, PCA (bribery of member of public body) – a fine not exceeding SGD100,000 or imprisonment not exceeding seven years, or both.

In addition, where the offender has received a bribe, under Section 13 of the PCA, the court may order the person to pay a penalty equivalent to the amount of gratification received, in addition to the penalties stipulated above.

5.2 Guidelines Applicable to the Assessment of Penalties

In PP v Tan Kok Ming Michael [2019] 5 SLR 926, the High Court of Singapore (now the General Division of the High Court of Singapore) held that the main overarching sentencing considerations in corruption cases are deterrence and retribution (at [99]).

Further, in Takaaki Masui v PP [2020] SGHC 265, the High Court also observed that there were four broad categories of corruption under the general offences set out in Sections 5, 6 and 7 of the PCA.

- Category 1 – corruption in the public sector which involves government servants or officers of public bodies. A custodial sentence

is the norm for such cases in the light of the strong public interest in stamping out corruption in the public sector.
- Category 2 – corruption in the private sector which engages the public service rationale. For clarity, this refers to the "public interest in preventing a loss of confidence in Singapore's public administration". This sentencing principle is presumed to apply in cases of public sector corruption but has been extended to cases where private agents handle public money, supply public services or are involved in government contracts. This category also includes private sector offences that concern regulatory or oversight roles such as marine surveying. In such cases, a custodial sentence is often the norm.
- Category 3 – corruption in the private sector which does not engage the public service rationale, ie, private sector agents performing purely commercial functions. While there is no norm in favour of non-custodial sentences in such cases, the general trend indicates that where private sector agents performing purely commercial functions are concerned, offences which register a lower level of overall criminal culpability may be dealt with through the imposition of fines. However, whether or not the custody threshold is breached will depend greatly on the specific nature of corruption.
- Category 4 – corruption cases for which there are established sentencing guidelines. This is an open category that has been included to accommodate any present and future judgments that provide sentencing guidelines tailored to a specific type of fact scenario. At present, the only types of cases falling within this category are: (a) those relating to sports-betting and match-fixing; and (b) cases involving offenders prosecuted under Section 6 read with Section 7 of the PCA.

Nonetheless, these are not immutable or fixed categories. There are no prescribed sentencing formulae, and the issue of sentencing in corruption cases will often turn on the specific facts of each case.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

There are no statutorily mandated compliance programmes.

However, in 2017, Singapore introduced both the Singapore Standard (SS) ISO 37001 on anti-bribery management systems, and published PACT – the CPIB's Practical Anti-Corruption Guide for Businesses in Singapore (see **1.3 Guidelines for the Interpretation and Enforcement of National Legislation**).

6.2 Regulation of Lobbying Activities

Lobbying activities in Singapore are primarily regulated through the Political Donations Act 2000 (PDA).

Under the PDA, political associations and candidates can only accept contributions from permissible donors – that is, Singapore citizens not less than 21 years of age, Singapore-controlled companies carrying on business mainly in Singapore, or a candidate's political party. If donations come from anonymous donors, such donations from anonymous donors may not exceed SGD5,000 per financial year.

Further, Section 12 of the PDA mandates that every political association must prepare and send a donation report to the Registrar of Political Donations.

Donation reports should state details such as the identity of donors, value of donations and circumstances in which donations were made. Further, donation reports must also contain details of every donation where:

- the donation is not less than SGD10,000; or
- if added to any other donation from the same permissible donor, the aggregate amount of the donations is not less than SGD10,000.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Under Section 424 of Criminal Procedure Code (CPC), individuals are obliged to report the commission or the intention of any other person to commit certain offences under the PC. These offences include some offences under the PC which relate to the corruption of public servants (ie, offences under Sections 161 to 164 of the PC).

The PCA itself, however, does not criminalise a person's failure to disclose violations of anti-bribery and anti-corruption provisions at the outset. That said, Section 27 of the PCA obliges an individual or company required by the CPIB to give information on any subject of inquiry by the CPIB.

In addition, under Section 39 of the CDSA, individuals and companies may be liable for failing to report a suspicion that any property represents the proceeds of, or was used in connection with, any criminal offence.

6.4 Protection Afforded to Whistle-Blowers

There is currently no specific omnibus legislation to provide protection to whistle-blowers in Singapore.

However, some protection is offered by the PCA – in particular, Section 36 of the PCA renders any complaints under the PCA inadmissible as evidence in any civil or criminal proceedings. Further, no witness is obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to their discovery.

There is growing pressure for the introduction of such specific legislation.

6.5 Incentives for Whistle-Blowers

There are no specific legislative provisions that provide for incentives for whistle-blowers. Nonetheless, if criminal charges are brought against a whistle-blower, the Singapore courts may potentially give mitigating weight to the fact that the whistle-blower voluntarily gave information to the authorities at the outset.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

See **6.4 Protection Afforded to Whistle-Blowers**.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Both criminal and civil enforcement are statutorily provided for under the PCA.

Criminal Enforcement

Offences under the PCA (for example, those set out in Sections 5-7 of the PCA) are punishable by imprisonment, fines or both (see **5.1 Penalties on Conviction**).

Civil Enforcement

As for civil enforcement, pursuant to Section 14 of the PCA, where a bribe has been given by any person to an agent, the agent's principal may recover the value of the bribe as a civil debt. This would allow, for example, a company to seek damages from a former director or employee who paid corrupt payments on account of their dealings on behalf of the company. Any such civil liability would be in addition to any penalty or fine imposed as part of a criminal sentence.

In addition to the civil recovery proceedings permitted by the PCA, other types of civil actions are available. For example, in certain circumstances, it is possible for a company to bring a civil action for conspiracy against its employee(s) who orchestrated and/or participated in the giving/receiving of bribes.

7.2 Enforcement Body

The CPIB is the agency responsible for the investigation and prevention of corruption in Singapore. The CPIB is under the Prime Minister's Office (PMO) and reports directly to the Prime Minister. The Attorney General's Chambers (AGC) is the agency responsible for the prosecution of offences.

7.3 Process of Application for Documentation

Under Section 17 of the PCA, the director or a special investigator of the CPIB may, without the order of the public prosecutor, exercise all or any of the powers in relation to police investigations that are provided for under the CPC. Such powers include the powers of search and seizure as well as the power to examine witnesses.

7.4 Discretion for Mitigation

The Attorney General has the power, exercisable at their direction, to institute, conduct or discontinue any proceedings for any criminal offence. This is provided for in Article 35(8) of the Constitution of the Republic of Singapore and Section 11 of the CPC.

Accordingly, the AGC has unfettered discretion to extend any plea or sentencing offer to the offender concerned. The same would apply to any plea or sentencing agreement arrived at subsequent to negotiations with the offender or their legal counsel.

There are no published or standard guidelines on the factors that may be taken into account by the AGC in such offers or negotiations.

One of the fairly recent introductions in enforcement is the DPA regime. As stated at **1.4 Recent Key Amendments to National Legislation**, a DPA is a voluntary alternative in which a prosecutor agrees to grant amnesty in exchange for a defendant agreeing to fulfil certain requirements and specific conditions, such as implementing compliance programmes and/or co-operating in investigations into wrongdoing by individuals.

For now there are no publicly available prosecution guidelines on when the AGC will enter into a DPA with a corporate entity and it remains to be seen how the DPA regime will affect trends in investigations. Nonetheless this is a new option that the AGC can consider in exercising its prosecutorial discretion.

However the introduction of DPAs in Singapore may be an indication of an increased focus on corporate entities by the Singapore government. This is since the Singapore Ministry of Law stated that the DPA regime serves two main purposes: (i) to encourage corporate reform to prevent future offending and (ii) to facilitate investiga-

tions into wrongdoing both by the company and by individuals.

7.5 Jurisdictional Reach of the Body/Bodies

The CPIB can investigate offences committed by any person within Singapore. For Singaporean citizens, the CPIB is empowered, by virtue of Section 37 of the PCA, to investigate offences committed outside Singapore.

Where offences committed outside of Singapore are concerned, the CPIB can potentially work with the relevant jurisdiction to investigate the matter. In this regard, the Mutual Assistance in Criminal Matters Act, Chapter 65A, provides that Singapore may, in some circumstances, request legal assistance from a foreign country. Such assistance includes the taking of evidence, search and seizure, and locating or identifying persons of interest.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

On 14 April 2022, 12 individuals were charged for, among others, corruption offences in connection with a long-term and large scale conspiracy to misappropriate oil from Shell Eastern Petroleum's (Shell) Pulau Bukom site.

The conspiracy involved a complex arrangement which included, among others, configuring the flow of misappropriated gas oil through routes that would avoid custody transfer meters, ensuring that multiple pumps and tanks were moving at the same time and ensuring production of oil into tanks from which oil was being misappropriated. All these steps were carried out to mask the misappropriation of oil.

Shell's external surveyors were also involved in this conspiracy. Their role involved, among others, forbearing to accurately report the amount of oil that Shell had loaded onto various vessels (so as to mask the fact that misappropriated oil had been loaded onto these vessels). In exchange, these surveyors received bribes.

On 31 March 2022, the General Division of the High Court sentenced one of the masterminds of this conspiracy, Juandi bin Pungot: see PP v Juandi bin Pungot [2022] SGHC 70. For his role in the conspiracy, Mr Pungot was sentenced to 29 years' imprisonment. Aside from Mr Pungot, other co-conspirators were separately sentenced to imprisonment terms varying with their levels of involvement in the scheme.

Another noteworthy recent decision is the High Court's decision in Takaaki Masui v PP [2020] SGHC 265. That matter concerned one of Singapore's largest private sector corruption cases to date. In that case, the two accused persons were convicted of conspiring to obtain nearly SGD2 million in bribes from a flour distributor.

7.7 Level of Sanctions Imposed

The courts determine each case on its unique facts, taking into account a myriad of factors. Amongst other things, the courts will take into account the offender's level of culpability, as well as the harm caused by the act.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

The CPIB publishes an annual report which, amongst other things, highlights the key developments and trends in Singapore for the previous year in the field of anti-corruption.

Based on statistics that were released on 5 May 2022, the CPIB received 249 corruption-related reports – a 4% increase from the 239 corruption-related reports received in 2020.

These same statistics also showed that of the 249 said corruption-related reports, the CPIB registered 83 reports as new cases for investigation. That is, that the CPIB considered the information received by way of these reports to be pursuable.

Moreover, of these new cases registered for investigation, the majority of these cases involved the private sector (89%), and this figure has remained relatively constant since 2017. In a similar vein, the majority of individuals prosecuted in court in 2021 were from the private sector (93%), and this figure has remained relatively constant since 2017.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

There have not been any recent announcements regarding changes to the relevant legislation or to the CPIB. Nonetheless, it can be expected that the CPIB will need to assess its practices and protocols in light of the constantly evolving COVID-19 situation.

This is especially pertinent as Singapore approaches and/or transitions into a post-COVID-19 world, where many global economies, industries and workplaces have seen significant transformations.

For example, there is an increasingly prevalent trend of decentralised/remote working arrangements in many economies, industries and workplaces. In fact, some companies may even have employees working in an entirely different country from its physical offices. This gives rise to fresh and evolving challenges relating to the detection of corruption and the ability of investigators to effectively and efficiently investigate potential offences.

Drew & Napier LLC is well-placed to help clients navigate potential pitfalls and handle the full range of proceedings that may arise when businesses globally are increasingly being exposed to governmental and regulatory investigations and enforcement action, resulting in civil, criminal and regulatory risk. The firm is experienced in handling cross-border investigations concerning bribery, fraud, anti-money laundering, whistle-blower complaints, tax and financial services offences. These include conducting internal investigations as well as representing clients in investigations or enforcement proceedings brought by external bodies, including public and law enforcement authorities. In 2020, Drew & Napier united with some of the most influential leading law firms in Southeast Asia to form a network of blue-chip law firms – Drew Network Asia (DNA), which operates as "a firm of firms" with international perspective and strong local expertise. The investigations team is regularly instructed by multinationals and listed companies from a broad range of industries.

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Trends and Developments

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General Anti-corruption Outlook in Singapore in 2022

Singapore's anti-corruption efforts continue to be well regarded internationally. Transparency International ranked Singapore fourth out of 180 countries in the 2021 Corruption Perceptions Index. The Political and Economic Risk Consultancy ranked Singapore as the least corrupt country in its 2022 Report on Perceptions of Corruption in Asia, the US and Australia. In the World Justice Project Rule of Law Index 2021, Singapore was ranked third for absence of corruption in government, and was the top Asian nation out of 139 countries ranked.

In the domestic sphere, Singapore performed similarly well in its anti-corruption efforts. In 2021, the enforcement agency empowered to investigate corruption offences in Singapore, the Corrupt Practices Investigation Bureau (CPIB), received 249 corruption-related reports. While this is a relatively low number, it is still a slight increase from the 239 corruption-related reports received in 2020. A plausible explanation for the slight increase in the number of corruption-related reports could be the rise in business activities as Singapore's economy recovers from the impact of the COVID-19 pandemic.

Notwithstanding Singapore's overall success in fighting corruption, corruption in the private sector remains a live concern. In 2021, 89% of the cases registered for investigation with the CPIB originated in the private sector. Similarly, in 2021, out of the 165 individuals prosecuted in court for offences investigated by CPIB, 93% were private sector individuals while the remaining 7% were public sector employees.

Over the past year, several high-profile corruption-related prosecutions involving the private sector were also widely publicised in the media. These cases involved Singapore's strategic industries, such as the bunkering and maritime sector. For instance on 6 October 2022, 3 bunker clerks from Sentek Marine & Trading Pte Ltd ("Sentek") were charged for, amongst other offences, receiving bribes to remain out of Singapore in order to avoid investigations by the Singapore authorities into the suspected involvement of Sentek and others in the receipt of misappropriated gas oil from Shell Eastern Petroleum (Pte) Ltd's facility.

Developments in Singapore's Jurisprudence in Respect of Corruption-Related Prosecutions

Lack of judicial endorsement for the sentencing framework in Takaaki Masui v Public Prosecutor and another appeal and other matters [2021] 4 SLR 160

At the end of 2020, the Singapore High Court introduced a new sentencing framework for private corruption offences under Sections 6(a) and 6(b) of the Prevention of Corruption Act 1960 (PCA) in Takaaki Masui v Public Prosecutor and another appeal and other matters [2021] 4 SLR 160 ("Masui HC"). Masui HC was a significant decision as the High Court adopted, for the first time, an analytical two-stage, five-step framework premised on parameters of harm and culpability to derive a comprehensive sentencing framework. The Masui HC sentencing frame-

work was also novel as it involved prescriptive steps to derive an indicative sentencing range or sentence while still retaining judicial discretion in meting out individualised sentences bearing in mind offender-specific and offence-specific factors in each case.

Following Masui HC, the courts in subsequent cases applied this sentencing framework for all private corruption offences. Both the Attorney-General's Chambers (or the state prosecutors) and the defence in Masui HC also filed criminal references to refer questions of law of public interest to the Court of Appeal, the apex court in Singapore.

On 30 December 2021, the Court of Appeal rendered its decision on the criminal references in Public Prosecutor v Takaaki Masui and another and other matters [2022] 1 SLR 1033 ("Masui CA"). While the sentencing framework in Masui HC was not an issue before the court, the Court of Appeal cautioned in its written grounds of decision that the sentencing framework in Masui HC was "excessively complex" and "technical sentencing frameworks are prone to cause confusion and uncertainty, which are the very antithesis of a sound sentencing framework". It was further observed that "sentencing frameworks are never intended to achieve mathematically precise sentences" and the Court of Appeal thus concluded that the Masui HC sentencing framework was not endorsed.

The Court of Appeal's comments in Masui CA are a timely reminder that sentencing frameworks should only introduce as much complexity as is necessary to make the framework theoretically just. The sentencing process ought to be individualised and should not be reduced to an overly prescriptive and arithmetical exercise. The sentencing framework in Masui HC was, however, aimed at achieving mathematical precision that might unduly fetter the court's discretion when sentencing should instead be determined based on a balanced assessment of various considerations.

Most recently, on 12 October 2022, the Singapore High Court rendered the written grounds for its decision in Goh Ngak Eng v Public Prosecutor [2022] SGHC 254 ("Goh Ngak Eng") where a new sentencing framework for private sector corruption offences under Sections 6(a) and 6(b) of the PCA was introduced. In doing so, the High Court declined to adopt the sentencing framework adopted in Masui HC.

While the Court of Appeal has yet to make any observations on the sentencing framework in Goh Ngak Eng, the new sentencing framework envisages a simpler five-step analysis for a sentencing court to derive an appropriate sentence for private sector corruption cases.

Sentencing trends have departed from the prevailing conception that private sector corruption should typically attract a non-custodial sentence

Regardless of the sentencing framework adopted, recent decisions indicate that private sector corruption can also attract stiff custodial sentences. This reflects Singapore's tough stance towards all corruption-related prosecutions, regardless of whether such corruption emanates from the public or private sector. In this regard, this paper will examine the case of Goh Ngak Eng. In Goh Ngak Eng, the High Court enhanced the appellant's global sentence of 17 months and three weeks' imprisonment for private sector corruption offences relating to Sections 6(a) and 6(b) of the PCA, to 37 months, three weeks' imprisonment. This is despite the fact that it was the appellant who had appealed against the sen-

tence on the basis that the sentence was manifestly excessive. The prosecution had not filed a cross-appeal against the sentences imposed in the lower court.

Significantly, the case involved the maritime industry, which the Court considered to be a strategic industry. The case has also important takeaways for criminal defence lawyers, as well as for companies seeking to enhance their anti-corruption and bribery policies.

The Decision in Goh Ngak Eng

Facts of Goh Ngak Eng

In Goh Ngak Eng, the co-accused persons conspired to cause the amounts paid by Keppel FEL shipyard (KFELS) to be inflated in order to fund the bribes ultimately paid to the co-accused persons. The appellant was the director of Megamarine Services Pte Ltd ("Megamarine"). The appellant was approached by a co-accused, Raj, who said that he would be able to refer jobs from KFELS to vendors. Raj explained that he knew the other co-accused, Lim, who was employed by KFELS and was in a position to recommend to whom the jobs were to be awarded.

Raj and the appellant then decided that they would seek vendors for jobs in KFELS and would ask for their invoices to be marked up by more than 15%. The mark-up was to be shared between Lim, Raj, and the appellant. The total amount of corrupt gratification obtained by the co-accused persons from the vendors was SGD879,853.63. In turn, KFELS paid SGD566,289.15, in wrongful mark-ups in respect of the invoices.

The appellant subsequently pleaded guilty to 15 charges of abetment by engaging in a conspiracy with two others to corruptly obtain gratification under Section 6(a) read with Section 29(a) of the PCA ("conspiracy charges"). The appellant also pleaded guilty to four other charges of corruptly giving gratification under Section 6(b) of the PCA, involving Raj and one other party, Ong ("non-conspiracy charges"). A total of 40 remaining conspiracy charges and non-conspiracy charges were taken into consideration for the purposes of sentencing.

The District Judge imposed custodial terms ranging from one week to nine months' imprisonment for each of the offences. The aggregate sentence that was imposed was 17 months and three weeks' imprisonment. The appellant appealed against the sentence on the basis that the sentence was manifestly excessive.

Sentencing framework in Goh Ngak Eng

In Goh Ngak Eng, the High Court declined to adopt the sentencing framework in Masui HC for the reasons set out by the Court of Appeal in Masui (CA). The High Court instead took the view that a less complex sentencing framework should be adopted based on the two-stage, five-step framework in a prior decision by the High Court in Logachev Vladislav v Public Prosecutor [2018] 4 SLR 609, which was a case concerning cheating in a casino.

The High Court in Goh Ngak Eng was also of the view that this sentencing framework should not be extended to Section 5 of the PCA (which do not relate to agents) or to cases of public sector corruption such as those involving public servants and public bodies.

The sentencing framework in Goh Ngak Eng is summarised below.

Step 1

At Step 1, the sentencing court identifies the level of harm and culpability based on the offence-

specific factors present in that case. In turn, the offence-specific factors are categorised into factors going towards harm, and factors going towards culpability.

Factors going towards harm:

- actual loss caused to principal;
- benefit to the giver of gratification;
- type and extent of loss to third parties;
- public disquiet;
- offences committed as part of a group or syndicate;
- involvement of a transnational element;
- whether the public service rationale is engaged;
- presence of public health or public safety risks;
- involvement of strategic industry or sector; and
- bribery of a foreign public official.

Factors going towards culpability:

- amount of gratification given or received;
- degree of planning and premeditation;
- level of sophistication;
- duration of offending;
- extent of the offender's abuse of position and breach of trust;
- offender's motive in committing the offence;
- presence of threats, pressure or coercion; and
- the role played by the offender in the corrupt transaction.

The High Court also indicated at [65] of its written judgment that "harm caused to a giver of gratification" may be an offence-specific factor in certain cases, but left it to a future occasion to determine whether this factor should be a harm-related or culpability-related offence-specific factor.

Step 2

At Step 2, the applicable indicative sentencing range would have to be identified. The High Court set out the following indicative starting sentences for an accused person who is convicted after trial.

- For cases of slight harm and low culpability: a fine or up to six months' imprisonment.
- For cases of slight harm and medium culpability: six to 12 months' imprisonment.
- For cases of slight harm and high culpability: one to two years' imprisonment.
- For cases of moderate harm and low culpability: six to 12 months' imprisonment.
- For cases of moderate harm and medium culpability: one to two years' imprisonment.
- For cases of moderate harm and high culpability: two to three years' imprisonment.
- For cases of severe harm and low culpability: one to two years' imprisonment.
- For cases of severe harm and medium culpability: two to three years' imprisonment.
- For cases of severe harm and high culpability: three to five years' imprisonment.

Step 3

The third step is to identify the appropriate starting point within the indicative sentencing range. In doing so, the court has regard to the offence-specific factors and considers the harm and culpability levels associated with the offending conduct.

Step 4

The fourth step involves adjusting the indicative starting point to take into account offender-specific factors – ie, established aggravating and mitigating factors personal to the offender.

Step 5
At the fifth step, where an offender has been convicted of multiple charges, the court will consider the need to make further adjustments to take into account the totality principle.

Application of the sentencing framework in Goh Ngak Eng
Applying the first step of the framework, the High Court found at [106] that that the following harm-related offence-specific factors were present for the conspiracy charges.

Actual loss caused to the principal
KFELS suffered the harm of being made to pay more than it ought to have in order to fund the illicit gains of the conspirators. These wrongful payments amounted to SGD566,289.15. There was also the potential harm caused as the offences compromised the fair and safe procurement process at KFELS. An unsuitable vendor could lead to disastrous consequences given the nature of KFEL's business. In this regard, the High Court held that the District Judge erred by finding that the conspiracy only resulted in potential harm, and not actual harm.

Benefit to the givers of gratification
The givers of gratification were able to successfully secure contracts with KFELS, which they otherwise would not have been awarded.

Type and extent of loss to third parties
The third-party contractors were deprived of an opportunity to quote for jobs with KFELS, which they might otherwise have had, if not for the conspiracy.

The offences were committed as part of a group
Self-evidently the case given the conspiracy that existed between Raj, Lim and the appellant.

Involvement of a strategic industry
The offences involved a strategic industry. The economic ramifications would be considerable should corruption take root in the maritime industry, which was observed in 2015 to account for up to 7% of Singapore's gross domestic product and 170,000 jobs.

The High Court found that the following culpability-related offence specific factors were present.

Amount of gratification given or received
SGD566,289.15, as stated above.

Degree of planning and premeditation
Evident in the manner in which the bribes were sought.

Duration of offending
The offending took place on numerous occasions over three years.

Offender's motive in committing the offence
While a portion of the gratification was used for Megamarine's corporate tax, the appellant still received SGD191,115.89 in respect of the conspiracy charges. Thus, the District Judge in the lower court correctly observed that the appellant "was not acting out of altruistic reasons when he committed the offences".

The High Court also considered the offence-specific factors for the non-conspiracy charges. For the charges involving Ong, the appellant had initiated a corrupt scheme, and had asked Ong to prepare fictitious invoices in return for a percentage of the invoiced amount.

At the second stage of the framework, the High Court found that the District Judge erred in finding that the conspiracy charges involved slight harm/medium culpability. The High Court found

that the correct assessment of the conspiracy charges was one of moderate harm/medium culpability, with the result that the indicative starting sentence for each of the conspiracy charges would be one to two years' imprisonment. As for the non-conspiracy charges, the Court found that these involved slight harm/low culpability.

At the third stage of the framework, having regard to the various offence-specific factors, particularly the significant amount of loss caused to KFELS, the High Court found the following.

- For the charge involving a gratification of SGD107,000 – the appellant's sentence should fall within the middle to high level of the indicative sentencing range; thus, a starting sentence of 21 months' imprisonment should be imposed.
- For the charges involving lower amounts of gratification between SGD21,835.41 to SGD46,170.50 – the starting sentence was adjusted downwards to 14 to 16 months' imprisonment per charge, as the appellant's culpability in respect of those charges would be correspondingly lesser.
- For the non-conspiracy charges – for the charge involving Raj, this involved a small gratification sum of SGD3,000, and did not cross the custodial threshold; the High Court found that an indicative starting sentence of one month's imprisonment was appropriate for the charges involving Ong, bearing in mind the appellant's higher culpability in initiating the corrupt scheme.

At the fourth stage of the framework, adjustments are to be made to the starting point to account for offender-specific factors. Applying the specific facts in the Goh Ngak Eng case, the High Court found that the relevant aggravating factor to be taken into account was the 40 charges that had been taken into consideration for the purpose of sentencing. The significant mitigating factors were the appellant's full co-operation with the CPIB and his early plea of guilt.

The High Court agreed that a reduction of around 25% from the indicative starting sentences was justified on account of the appellant's early plea of guilt. Accordingly, the High Court held that:

- for the charge involving a gratification of SGD107,000, the sentence would be reduced to about 15 months' imprisonment;
- for the charges involving lower amounts of gratification of between SGD21,835.41 to SGD46,170.50, the sentences would be reduced to about ten to 12 months' imprisonment; and
- for the non-conspiracy charges involving Ong, this may be reduced to three weeks' imprisonment per charge.

At the fifth stage of the application of the framework, the High Court was required to consider whether the sentences ought to be adjusted on account of the totality principle. In Goh Ngak Eng, the Court considered whether the effect of the sentence on the offender would be crushing and not in accordance with his past record and future prospects.

The High Court considered it appropriate to order the appellant's sentences to run as the District Judge had ordered – ie, that one sentence from the charges relating to each vendor, one sentence from the charges relating to Ong, and one sentence from the charge relating to Raj run consecutively. Comparing the aggregate sentence as imposed by the District Judge (17 months and three weeks' imprisonment), against the sentence derived by the High Court (37

months and three weeks' imprisonment as well as a fine), the High Court found that the District Judge's decision was lenient and could not be said to be manifestly excessive.

Given the substantial divergence between the sentences imposed by the District Judge and that which the High Court had arrived at, a question arose as to whether the sentences ought to be enhanced. This is notwithstanding that the prosecution did not file a cross-appeal against the sentences. The High Court was satisfied that the sentences imposed by the District Judge were manifestly inadequate and that an enhancement of the sentences for each of the conspiracy charges was necessary to fit the severity of the subject offences.

Accordingly, the High Court dismissed the appeal, and the aggregate sentence imposed was enhanced to 37 months and three weeks' imprisonment.

Implication of Goh Ngak Eng on Singapore's Enforcement and Legal Landscape

The authors believe that in bolstering anti-corruption efforts/corporate compliance programmes, companies should have regard to the offence-specific factors identified in Goh Ngak Eng. This is especially so for companies that play a public or quasi-public regulatory or oversight role, or companies in strategic sectors (eg, maritime and bunkering, banking and finance).

Where the public sector rationale is engaged in a particular offence, or where a strategic industry is involved, a stiffer sentence would be called for. The public sector rationale refers to the public interest in preventing a loss of confidence in Singapore's public administration. Insofar as Singapore's strategic industries are concerned, the policy rationale is to prevent harm that may be caused to society arising from potential detriment to the development of strategic industries. This in turn creates a greater need for companies operating in strategic sectors to ramp up their anti-corruption initiatives.

It is also noteworthy that in Goh Ngak Eng, the High Court was prepared to view the harm caused from a broad perspective. Apart from the harm caused to KFELS (ie, KFELS had to pay an inflated amount arising from the bribes), the offences compromised a fair and safe procurement process at KFELS. Further, the High Court also rejected the appellant's argument that the vendors had paid a competitive price to KFELS. The Court found this argument irrelevant in the context of an offence under Section 6 of the PCA, which is to prevent the relationship between an agent and his or her principal from being undermined.

The case of Goh Ngak Eng calls for companies to tighten their compliance measures. Companies should adopt a comprehensive host of compliance measures, including leveraging data analytics, ensuring that there is a clear code of conduct and anti-fraud standards, as well as implementing process controls as well as other reliable whistle-blower mechanisms.

Rajah & Tann Singapore has built a white-collar crime team that has earned a reputation as a leading practice both regionally and domestically, with an extensive portfolio that spans a spectrum of white-collar defence work, fraud investigations and advisory work. The team's notable cases include advising corporations, financial institutions and individuals in complex, multi-jurisdictional matters such as the Petrobras Brazilian bribery scandal, the Malaysian 1MDB scandal and the Wirecard scandal. This team forms an integral component of the firm's fraud, asset recovery, investigations and crisis management team, which has been globally recognised. Rajah & Tann Singapore is a member firm of Rajah & Tann Asia, a network of over 800 fee earners across ten jurisdictions; it has the reach and resources to deliver excellent service to clients in the region including Singapore-based regional desks focusing on Brunei, Japan and South Asia.

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Contents

1. Legal Framework for Offences

1.1 International Conventions

Spain is a party to the following international conventions relating to anti-bribery and anti-corruption:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997): ratified on 14 January 2000;
- the United Nations Convention against Corruption (2003): ratified on 19 June 2006;
- the Council of Europe Civil Law Convention on Corruption (1999): ratified on 16 December 2009;
- the Council of Europe Criminal Law Convention on Corruption (1999): ratified on 28 April 2010;
- the Additional Protocol to the Criminal Law Convention on Corruption (2003): ratified on 17 January 2011; and
- the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

1.2 National Legislation

All relevant corruption-related criminal offences are contained in the Spanish Criminal Code (SCC) (*Ley Orgánica 10/1995, de 23 de noviembre*). Administrative offences may be found in the Organic Law 6/2002 on Political Parties (*Ley Orgánica 6/2020, de Partidos Políticos*), the Law 5/2006 on conflicts of interest of members of the government and senior officials of the general state administration (*Ley 5/2006, de regulación de los conlfictos de intereses de los miembros de Gobierno y de los Altos Cargos del a Administración General del Estado*) and the Law 19/2013 on Transparency, Access to Public Information and Good Governance (*Ley 19/2013, de transparencia, acceso a la información pública y buen gobierno*).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Interpretation and enforcement of criminal offences is carried out by the judiciary. In accordance with Article 1 of the Spanish Civil Code, law, custom and general principles of law are established as a source of law. Settled case law (precedent) of the Supreme Court complements the law. However, tribunals are bound by the jurisprudence of the Constitutional Court, under Article 5 of the Organic Law on the Judiciary (L.O 6/1985). Likewise, international law is part of Spanish legislation and directly applicable insofar as the relevant international treaty has been published in the Spanish Official State Gazette (*Boletín Oficial del Estado*) (Article 96 of the Spanish Constitution).

1.4 Recent Key Amendments to National Legislation

Spain has transposed Directive (EU) 2018/843 (the Fifth Money Laundering Directive) through Royal Decree 7/2021. In addition, through Organic Law 6/2021, Spain has reformed its Criminal Code in line with the content of Directive (EU) 2018/1673 (the Sixth Money Laundering Directive). In the context of anti-corruption, notable developments include the imposition of increased penalties where assets that are being laundered are identified as the proceeds of certain offences, including business corruption.

An additional amendment of the SCC concerning corruption-related criminal offences took effect via the Organic Law 1/2019 of February 20th (*Ley Orgánica 1/2019, por la que se modifica la Ley Orgánica 10/1995, del Código Penal, para transponer Directivas del a Unión Europea*

en los ámbitos financiero y de terrorismo, y abordar cuestiones de índole internacional). Specifically, Organic Law 1/2019 includes amendments to corruption offences committed in the private sphere and expands the conduct of corruption offences to foreign public officials of national public institutions or international organisations, jurors and arbitrators and legal entities, in accordance with the recommendations of the Council of Europe's anti-corruption body: the Group of States Against Corruption (GRECO).

2. Classification and Constituent Elements

2.1 Bribery

Bribery Involving Public Officials

Bribery of public officials is provided for in Article 419 of the SCC. This provision punishes a public official who, acting within their competence, requests, receives or accepts a gift, favour or payment of any kind either to act, to act against their duties, or unfairly to delay an act that must be carried out (passive bribery). Receiving and requesting rewards by an authority or public official is also punished. The definition of bribe also includes admitting receipt of a gift because of the role or function of the authority or public official.

It also criminalises the offer or giving of a gift or payment of any kind to the authority or public official (active bribery).

The crime may be committed by an authority or public official. A public official is broadly defined (Articles 423 and 427 of the SCC) as any person who participates in the exercise of public functions, including foreign public officials, national and international jurors and arbitrators, mediators, expert witnesses, administrators appointed by a court and liquidators. Only employees of state-controlled companies providing services in the public interest are included in this definition.

The definition of public officials also includes:

- any person employed or exercising functions within the legislative branch, the government or the judiciary, both within and outside the European Union;
- persons exercising public functions to a European Union member state or any other country, for the European Union or a public international organisation;
- public officials or agents of the European Union or a public international organisation; and
- any person who manages European Union financial interests or takes decisions on related matters, within or without the European Union.

Bribery Involving Private Parties

Article 286bis of the SCC also punishes bribery in business by private parties. The offence may be committed by any person who promises, offers or grants an unfair benefit or advantage in exchange for undue favour in the acquisition or selling of commodities, engagement of professional services or business relationships, and/or by managers, administrators, employees or collaborators of a company or legal entity that receives, requests or accepts any such unfair benefit or advantage.

2.2 Influence-Peddling

Influence-peddling is criminalised in Articles 428 to 431 of the SCC. The crime may be committed by an authority, public official or a private individual who improperly influences another public official to issue a decision that economically benefits the former, or anyone else. Those who

request or accept gifts or payments of any kind, or who promise or offer in order to influence another improperly, are also criminally liable.

In order to be criminally liable, abuse of power is required from the public officials or the private individuals improperly influencing the decision, whether due to their position or a special relationship.

The definition of public official includes national and foreign public officials as defined in Article 24 SCC and for the criminal offence of bribery (Article 427 SCC) (see **2.1 Bribery**).

2.3 Financial Record-Keeping

Article 433 of the SCC punishes the following criminal conduct related to financial record-keeping committed by authorities or public officials:

- falsifying their accounting;
- creating or using accounting documents or records containing false or incomplete information; and
- providing false information on the financial situation.

The same definition of a public official as is used for the definition for bribery applies to these offences (Articles 24 and 427 of the SCC). See **2.1 Bribery**. It also extends to liquidators, trustees of assets confiscated by public authorities and individuals entrusted with public funds. These offences may be also committed by legal entities.

2.4 Public Officials

Mismanagement of public funds is punished by Article 432.1 of the SCC. It may be committed by a public official or authority that has been entrusted with the management of public funds. The offence requires patrimonial damage and use of the funds by that person, thus failing to observe their duties. Examples of this offence include, for instance, making payments for services never carried out, authorising unapproved operations or not claiming credits in favour of the public administration.

Misappropriation of public funds is provided for by Article 432.2 of the SCC. The definition includes public officials or authorities entrusted with public funds that have taken funds for themselves or a third person, or have denied having received the public funds. There must be an obligation to deliver or return the public funds.

The aggravated conduct of these offences includes either of the following circumstances:

- serious damage or obstruction of a public service; and
- where the value of the damage or appropriated assets is more than EUR50,000.

Where the value of the damage or appropriated assets is more than EUR250,000, this is considered super-aggravated conduct.

A lesser penalty is provided for when the damage or appropriated asset/s amounts to less than EUR4,000.

The same definition of public official as that used for bribery applies to these offences (Articles 24 and 427 of the SCC). See **2.1 Bribery**. It also extends to liquidators, trustees of assets confiscated by public authorities and individuals entrusted with public funds. These offences may be also committed by legal entities.

Chapter VIII of the SCC also punishes public officials or authorities that:

- collude with private individuals to defraud in matters of public procurement or liquidations of public assets (Article 436 of the SCC);
- demand, directly or indirectly, fares or tariffs not due or higher than legally established (Article 437 of the SCC);
- swindle or defraud Social Security by abusing their position (Article 438 of the SCC).

2.5 Intermediaries

Articles 419 to 422 of the SCC also punish the receipt, request or admission of gift or payment of any kind through intermediaries.

3. Scope

3.1 Limitation Period

In the Spanish system, statutes of limitations are determined based on the maximum penalty provided for the criminal offence (Article 131 of the SCC), namely:

- 20 years for offences with more than 15 years of imprisonment;
- 15 years for offences with more than ten and less than 15 years of imprisonment and more than ten years of professional disqualification;
- ten years for offences with more than five and less than ten years of imprisonment or professional disqualification;
- five years for offences with up to five years of imprisonment or professional disqualification; and
- one year for minor offences.

In cases where the conduct amounts to two or more criminal offences, or in the case of connected offences, the limitation period would be the one provided for the most serious offence.

3.2 Geographical Reach of Applicable Legislation

Spanish courts and tribunals have jurisdiction over criminal offences committed in Spain, notwithstanding Spain's obligations pursuant to international conventions to which it is a party (Article 23.1 of the SCC). In this respect, Spain has jurisdiction over any criminal offence if it is so provided by an international convention to which it is a party or by legislation from an international organisation of which Spain is a member.

Criminal jurisdiction is also established over offences committed by Spanish nationals abroad (the active personality principle) in so far as the following requirements concur:

- double criminality, unless it is not required by applicable international law;
- a criminal complaint has been lodged by the victim or the office of the prosecutor; and
- the person criminally responsible has not been acquitted, convicted or pardoned in a foreign country (in the case of conviction, if the sentence has been partially served, a reduction of the sentence will be considered).

As for the matter concerned, Article 23.4 of the Spanish Organic Act on the Judiciary (*Ley Orgánica 6/1985 del Poder Judicial*) expressly establishes jurisdiction over corruption in the private sector or international economic transactions, provided that:

- the criminal proceeding is instituted against a Spanish national;
- the criminal proceeding is instituted against a foreign national resident in Spain;
- the offence has been committed by a manager, administrator, employee or collaborator within a company or legal entity; and

- the offence has been committed by a legal entity, company, organisation, or by groups or any kind of association of persons with its headquarters or registered office in Spain.

3.3 Corporate Liability

The SCC provides for corporate liability for corruption-related offences, namely, bribery (Article 427bis of the SCC), influence-peddling (Article 430 of the SCC), misappropriation of funds, as well as embezzlement and financial record-keeping (Article 435.5 of the SCC).

Legal entities are criminally responsible if the offence is committed in the name or on behalf of them, or by those under their supervision in performing the activities of the legal entity. Both individuals and companies can be held liable for the same offence. Also, the legal entity may be held responsible even if the individual criminally responsible has not been found and no criminal proceeding has been opened against them. Likewise, directors may also be criminally responsible, even if the offence was not committed directly by them.

4. Defences and Exceptions

4.1 Defences

General defences are found in Article 20 of the SCC and include insanity, intoxication, self-defence, necessity, insurmountable fear and legal duty/lawful capacity of office.

In the case of insanity or intoxication, penalties other than imprisonment may be imposed, namely, internment in a psychiatric institution, a detoxification centre or a special education centre, depending on the circumstances.

Mistake of fact and mistake of law also exclude criminal liability if the mistake could not be avoided. Otherwise, the offence would be considered committed by negligence in the case of mistake of fact, or as having mitigating circumstance in the case of mistake of law.

Regarding offences committed by directives or persons representing the legal entity, Article 31bis of the SCC provides the following defences for legal entities:

- directors have devised and implemented effective prevention measures;
- an independent department is in charge of monitoring internal controls;
- the individuals have committed the crime circumventing the prevention and control mechanisms; and
- the monitoring and oversight of the internal affairs department has been sufficient.

As for offences committed by subordinates of directors or legal representatives, legal entities shall be exempted from criminal liability if an appropriate management and organisation system is in place to prevent the offence.

4.2 Exceptions

No exemptions are established to the aforementioned offences.

4.3 De Minimis Exceptions

No de minimis exceptions are provided for the aforementioned offences.

4.4 Exempt Sectors/Industries

No particular sectors or industries are exempted from the aforementioned offences.

4.5 Safe Harbour or Amnesty Programme

Under Spanish legislation, there are no safe harbour or amnesty programmes that exclude criminal liability of legal entities. However, the following circumstances are established as mitigating circumstances (Article 31 quater of the SCC):

- self-reporting – confessing the commission of the offence before becoming aware that legal proceedings have been opened;
- collaborating with authorities by providing relevant evidence that helps identify those criminally responsible;
- repairing, in whole or in part, the damage caused; and
- establishing, before the trial starts, compliance procedures to prevent and discover criminal offences.

As for individuals, in the case of bribery, Article 426 of the SCC provides that an individual who reports an offence, before the criminal proceedings are opened and within two months from the date the criminal offence was committed, will not be held criminally responsible.

In addition, reparation of the damage caused and active collaboration with authorities is also expressly provided as a mitigating circumstance for misappropriation of funds, embezzlement and accounting offences by public officials (Article 434 of the SCC).

Reparations and self-reporting are also established as a general mitigating circumstance for individuals (Articles 21.4 and 5 of the SCC).

5. Penalties

5.1 Penalties on Conviction

Generally speaking, penalties for corruption-related offences include imprisonment, prevention from public employment or role, prevention from passive suffrage, and a fine.

Specifically, the following penalties are imposed.

Bribery committed within the private sector:

- imprisonment – six months to four years;
- professional disqualification – one to six years; and
- fine – up to three times the amount of the benefit or advantage.

Bribery by public officials (acting against duties, not acting or unfairly delaying an act):

- three to six years of imprisonment; and
- disqualification for public employment and passive suffrage – nine to 12 years.

Bribery by public officials (acting within functions in exchange for a gift, payment, offer or promise):

- imprisonment – two to four years;
- fine – 12 to 24 months; and
- disqualification from public employment and passive suffrage – five to nine years.

Bribery (accepting a gift):

- imprisonment – six months to one year; and
- disqualification from public employment – one to three years.

Active bribery (offering or giving gifts or payment) is punished with the same penalties. Likewise, in

cases where the act of the public official relates to procurement procedures, subsidies or auctions, a penalty of disqualification from obtaining them or tax or social security benefits from five to ten years shall be imposed on the individual or legal entity.

Legal entities shall be punished with a fine of an amount depending on the term of imprisonment provided for persons:

- two to five years, or three to five times the benefit obtained when the term of imprisonment is more than five years;
- one to three years, or two to four times the benefit obtained for a term of imprisonment from two to five years; and
- six months to two years, or two to three times the benefit obtained for up to two years of imprisonment.

Influence-peddling by a public official:

- imprisonment – six months to two years;
- a fine – up to twice the benefit obtained; and
- disqualification from public employment and passive suffrage – five to nine years.

Influence-peddling by a private individual:

- imprisonment – six months to two years;
- a fine – up to twice the benefit obtained; and
- disqualification from obtaining subsidies or tax or social security benefits: six to ten years.

Offering influence-peddling:

- imprisonment – six months to two years;
- for public officials – disqualification from public employment and passive suffrage one to four years; and
- disqualification from obtaining subsidies or tax or social security benefits for six to ten years.

Misappropriation and mismanagement of public funds by a public official:

- imprisonment – two to six years; and
- disqualification from public employment and passive suffrage – six to ten years.

Aggravated misappropriation and mismanagement of public funds:

- imprisonment – four to eight years; and
- permanent disqualification – ten to 20 years.

Misappropriation and mismanagement of public funds of less than EUR4,000:

- imprisonment – one to two years; and
- disqualification from public employment and passive suffrage for one to five years.

Accounting fraud without damage:

- disqualification from public employment and passive suffrage for one to ten years; and
- fine – 12 to 24 months.

Accounting fraud with damage:

- imprisonment – one to four years;
- disqualification from public employment and passive suffrage – three to ten years; and
- a fine – 12 to 24 months.

5.2 Guidelines Applicable to the Assessment of Penalties

Guidelines to determine the penalty to be imposed are established in the First Book, Title III, Chapter 2 of the SCC. Judges and tribunals

must provide the reason for the sentence being imposed.

When it comes to completed offences, the sentence must be imposed considering the particular circumstances of the perpetrator and the seriousness of the offence.

A number of rules are stipulated as to when mitigating and aggravating circumstances apply. Thus, if there is one mitigating circumstance, the sentence imposed cannot go beyond the first half of the penalty range. If two or more mitigating circumstances concur, the range of the penalty to be imposed would go from half of the minimum up to the minimum. Conversely, when an aggravating circumstance applies, the sentence is imposed within the second half of the penalty range. If two or more aggravating circumstances concur, up to one and a half times the maximum penalty established for the offence is imposed.

If aggravating and mitigating circumstances concur, the judge must assess whether qualifying mitigating or aggravating circumstances exist.

If the person has been convicted at least three times for offences of the same nature, a sentence may be imposed of up to one and a half times the maximum.

In the case of an attempt, the judge must assess the risk and the stage of execution of the offence.

Penalties for accomplices range from half the minimum penalty established by law up to the minimum.

For legal entities, the same rules apply. The following criteria shall be taken into account:

- the need to prevent the continuous criminal activity;
- social and economic consequences;
- the position of the individual who failed to comply with their duty of control; and
- penalties for legal entities cannot exceed the maximum established for individuals. Penalties of more than two years may be imposed only if the legal entity is a repeat offender or the entity is used mainly to commit criminal offences.

The penalty of liquidation of legal entities for more than five years (or permanent) prohibition against performing certain activities or preventing obtaining financial aid, procurement contracts or tax or social security benefits of more than five years, can only be imposed if any of the following requirements apply:

- the legal entity has been convicted at least three times for offences of the same nature; and
- the legal entity is used mainly to commit criminal offences.

Imprisonment of less than three months shall always be replaced by a fine, community service or house arrest. Each prison day of imprisonment is replaced by two days of fine or a day of community service or house arrest.

Generally, the maximum time to be served is 20 years, except if one of the offences is punished with up to 20 years of imprisonment (serving a maximum of 25 years), one of the offences is punished with more than 20 years of imprisonment (serving a maximum 30 years), two or more offences are punished with more than 20 years of imprisonment (serving a maximum of 40 years). In the case of terrorism, when one of the offences is punished with more than 20 years of

imprisonment, 40 years is also established as a maximum.

When the same conduct amounts to two or more offences, the sentence imposed must be within the second half of the penalty provided for the most serious offence, unless it is higher than the sum of the penalties of the offences separately.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Articles 31 bis and 31 quater of the SCC provide for the extinction and the mitigation of criminal liability for legal entities that have devised and implemented an effective compliance programme. However, the failure to set up a compliance programme does not attract a legal consequence.

Legal entities will benefit from a complete exemption of criminal liability if:

- before the commission of the criminal offence, the administrative body has adopted and effectively implemented organisational and management models that include the appropriate monitoring and control measures to prevent crimes of the same nature or to reduce significantly the risk of their commission;
- the supervision of the functioning and execution of the compliance model has been entrusted to an independent body of the legal entity with autonomous initiative and control powers;
- the authors have committed the crime by fraudulently evading the organisational and management models; and
- there has been no omission or insufficient exercise of the supervision independent body.

In addition, organisational and management systems must:

- identify the activities in which the offences to be prevented may happen;
- establish protocols or procedures defining the decision-making process of the legal entity and the execution of such decisions;
- implement adequate financial management models;
- impose the obligation to report potential risks and breaches to the supervising compliance body;
- establish a disciplinary system sanctioning the failure to comply with the measures established by the model; and
- impose periodic verification of and possible amendments to the model when there have been significant violations of its provisions, or when organisational changes take place in the control structure or activity developed by the entity.

In this regard, the Spanish Prosecutor's Office has issued its guidelines to Spanish prosecutors on criminal prosecution of legal entities (*Circular 1/2016 sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1-2015*). These guidelines identify the criteria to assess the efficiency of compliance programmes in light of the rules established in the SCC.

Among others, the effectiveness with which such programmes prevent crimes is considered as a main criterion.

Finally, the fact that a legal entity has implemented a compliance programme before the beginning of the trial hearing will be considered as a mitigating circumstance.

6.2 Regulation of Lobbying Activities

Lobbying activities are currently not regulated in Spain by the central government. Some regional communities have enacted their own laws to regulate lobbying while others have introduced transparency registers as a way of regulating interactions between interest groups and senior government officials (these include Cataluña, Madrid, Valencia and Castilla la Mancha).

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

There are no specific provisions imposing the disclosure of anti-bribery and anti-corruption violations. However, under Spanish legislation, individuals have the obligation to report crimes of which they become aware. Articles 259 and 262 of the Spanish Criminal Procedure Code (*Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*) require that those who witness a public criminal offence, or who become aware of its commission because of their position, profession or job, report the offence to the public authorities. These provisions also apply to bribery and other corruption cases.

The penalty provided for the breach of the reporting obligation amounts to the imposition of a fine of up to 250 pesetas (EUR1.5). The legislature has not converted this low amount into euros, since in practice the provisions are not enforced.

In addition, the implementation of a compliance programme imposing the obligation to report potential risks and breaches is one of the conditions for the exemption of criminal liability of legal entities Thus, this would include the reporting of anti-bribery and anti-corruption violations.

6.4 Protection Afforded to Whistle-Blowers

There is no specific law on whistle-blowers' protection in Spain. However, the Spanish Prosecution Office, in its Circular 1/2016 (see **6.1 National Legislation and Duties to Prevent Corruption**), has indicated that the obligation to report in compliance programmes cannot be imposed without the establishment of whistle-blowers' protective measures.

In addition, the Supreme Court and the Constitutional Court have found wrongful dismissals, both under the right to freedom of information (Article 20.1.d of the Spanish Constitution) and the right to freedom of expression (Article 20.1.a of the Spanish Constitution), when the employer has dismissed the employee after they have reported criminal offences.

Following the European Court of Human Rights jurisprudence, the Spanish Supreme Court has also accepted anonymous complaints as a basis to open criminal investigations.

Finally, data protection legislation protects the identity of the individual reporting offences in the private sector.

6.5 Incentives for Whistle-Blowers

There are no incentives for whistle-blowers to report bribery or corruption offences in Spain.

For instance, Roberto Macias leaked files involving corruption made by the trade union UGT (General Union of Workers) in Andalucía. In May 2020, he was charged with revealing workplace secrets and sentenced to two years of imprisonment. He was denied immunity as a whistle-blower, since Spanish legislation does not provide for this protection.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

There are no specific provisions regarding whistle-blowers in Spanish criminal legislation. There are some provisions regarding whistle-blowers in administrative legislation, for instance, in the Private Insurance Organisation and Supervision Act (*Ley 20/2015, de ordenación, supervision y solvencia de las entidades aseguradoras y reaseguradoras*), and in the Organic Law on Data Protection and Guarantee of Digital Rights (*Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales*).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

In Spain, there are no specific anti-bribery and anti-corruption laws. As mentioned in **1. Legal Framework for Offences**, corruption-related offences are provided for in the SCC.

Administrative offences may be found in the Organic Law 6/2002 on Political Parties (*Ley Orgánica 6/2020, de Partidos Políticos*), Law 5/2006 on conflicts of interest of members of the government and senior officials of the general state administration (*Ley 5/2006, de regulación de los conflictos de intereses de los miembros de Gobierno y de los Altos Cargos del a Administración General del Estado*) and Law 19/2013 on Transparency, Access to Public Information and Good Governance (*Ley 19/2013, de transparencia, acceso a la información pública y buen gobierno*).

Law 19/2003 establishes a sanctions regime structured in three areas: infringements in matters of conflict of interest, in matters of economic-budgetary management and in the disciplinary sphere. Sanctions provided for include the dismissal from the public office held by the offender, prevention from receiving compensatory pensions, the obligation to restore the amounts unduly received and the obligation to compensate the Public Treasury. Furthermore, it is provided that perpetrators of very serious offences may not be appointed to occupy certain public positions for a period of between five and ten years.

7.2 Enforcement Body

In Spain, investigative phases are conducted by examining magistrates and any public prosecutor has the competency to prosecute corruption cases.

In addition, there is a specialised Anti-Corruption Prosecution Office (*Fiscalia Especial contra la Corrupcion y la Criminalidad Organizada*). This office is competent to investigate particularly important cases of economic crimes and corruption-related crimes committed by public officials in the exercise of their official duties. It has real investigative capacities accomplished by tax inspectors, auditors and members of the National Police, and the Civil Guard (*Guardia Civil*). It is composed of 29 prosecutors. The Anti-Corruption Prosecutor's Office can also intervene directly in any criminal proceeding concerning corruption cases of special importance in the first instance or in appeal. The Attorney General (*Fiscal General del Estado*) evaluates whether a case is of special importance requiring the intervention or investigation by the Anti-Corruption Prosecutor's Office.

Concerning administrative bodies, there is no national anti-corruption agency. In this respect, Spain does not have a general anti-corruption strategy. However, some local and autonomous communities have created anti-corruption agen-

cies with investigatory powers, such as the Anti-Fraud Office of Cataluña, the Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community, the Office for the Prevention and Fight against Corruption in the Balearic Islands, the Accounts Council of Galicia, and the Municipal Office against Fraud and Corruption of the Madrid City Council.

Some of those agencies have only investigatory powers, whereas others can also impose administrative sanctions based on their statutes. For instance, the Valencian Agency can impose administrative sanctions on any person who obstructs whistle-blowers' actions or provides untrue information.

Regarding administrative offences, the Council of Ministers and the Ministry of Finance and Public Administration are competent to institute disciplinary proceedings and impose sanctions, depending on the position of the offender and the seriousness of the offence. The Conflict of Interests Office is competent to investigate in certain cases.

7.3 Process of Application for Documentation

In Spain, prosecutors have limited powers concerning the gathering of information. Prosecutors may start an investigation after receiving a complaint from a private person or an administration, but they may also act ex officio. Following a preliminary investigation, prosecutors have to decide whether to dismiss the case or to refer it to the competent examining magistrate to carry out further preliminary proceedings. In turn, the examining magistrate has a broad range of tools to gather information and documents concerning the offence. In this case, prosecutors may only request the adoption of precautionary measures or investigative measures by the judge.

7.4 Discretion for Mitigation

Spanish criminal legislation does not recognise pre-trial diversion, deferred prosecution agreements or other similar settlement mechanisms. As such, only Article 31 quater of the SCC provides that the self-reporting of a criminal offence or the collaboration in the investigation are considered as mitigating circumstances.

Although nothing is provided in the Spanish legislation, the prosecutor may offer a more lenient sentence in exchange for the defendant pleading guilty.

Pursuant to the Spanish Criminal Procedure Code (SCPC) guilty pleas apply only if the penalty does not exceed six years of imprisonment. In any case, guilty pleas have to be approved by the competent court. If accepted, the trial does not take place and the court issues a judgment imposing the accepted sentence (Articles 781 and 655 of the SCPC).

Legal entities may plead guilty by nominating a specially designated person with a special power of attorney.

A court may not accept a guilty plea if it considers that the sentence should be higher in the case of minor sentences (Article 655 of the CPC), or to correct the qualification of the crime and impose an appropriate sentence in accordance with the law prior to acceptance of the pleading (Article 787.3 of the SCPC) in cases of prison sentences.

7.5 Jurisdictional Reach of the Body/Bodies

Any bribery or corruption act committed in Spain can be investigated by Spanish authorities.

Moreover, Article 23 of the Spanish Organic Act on the Judiciary (*Ley Orgánica 6/1985 del Poder Judicial*) establishes the rules for Spanish extra-territorial jurisdiction. Acts abroad may be investigated by Spanish courts if:

- they are committed by Spanish citizens;
- the acts are also punishable at the place of execution (or there is an international treaty allowing the prosecution);
- a criminal complaint has been filed by the public prosecutor or the aggrieved party; and
- the criminal adjudication has not been made abroad.

For corruption in international business and economic transactions committed by Spanish citizens or foreigners abroad, extra-territorial prosecution is also allowed if:

- the criminal procedure is directed against a Spanish citizen;
- the criminal procedure is brought against a foreign citizen residing in Spain;
- the offence has been committed by the executive, administrator, employee, or collaborator of a corporation, company, association, foundation or organisation that has its headquarters or registered address in Spain; or
- the offence has been committed by a legal person, company, organisation, groups or any other kind of entity or group of people that has its headquarters or registered address in Spain.

Traditionally, Spain has used its extra-territorial jurisdiction to prosecute terrorism, torture, genocide, and crimes against humanity. However, recently, extra-territorial jurisdiction has been used to prosecute corruption and money laundering.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

There are several high-profile cases concerning corruption charges in Spain. Some notable cases are outlined below.

- Trial hearings began on 13 October 2021 against a Spanish former police officer for blackmail and corruption. The allegations against him include spying and blackmailing notorious politicians, businessman and organisations in Spain on behalf of wealthy clients. Prominent figures and organisations have also been accused of using the police officer's services, including the ex-Executive Chairman of Spanish bank BBVA and Spain's top energy firm's (Iberdrola) chairman and CEO.
- The *Azud* case is a criminal case involving corruption of public officials of the local government of the city of Valencia in relation to urban constructions.
- In the so-called *Taula* case, 49 city councillors have recently been indicted with corruption offences. The political party *Partido Popular*, as a legal entity, has also been indicted within the criminal proceedings.
- The *Gurtel* case is a political corruption case which implicated the Spanish People's Party (PP). This case is considered as "Spain's Watergate" involving EUR123 million and 200 suspects. It was found that there existed a corrupt bribes-for-contracts network that operated across six Spanish regions between 1999 and 2005. Last October 2020, Spain's Supreme Court confirmed criminal penalties, including charges for corruption, against 29

individuals and upheld the civil liability of the People's Party.

- The *ERE* case is another prominent political corruption case which involved Spain's Socialist Party (PSOE) in the region of Andalucia. High-ranking PSOE officials (including two of Andalucia's ex-presidents) were found to be involved in a corrupt scheme where funds meant for the unemployed and struggling companies were granted instead to persons and entities with close ties to the PSOE members involved. It was found that at least EUR680 million of public funds were diverted through the corrupt scheme between 2000 and 2009. On 19 November 2020, the Provincial Court of Sevilla (*Audiencia Provincial de Sevilla*) convicted 19 former high-ranking officials of misconduct and the misuse of public funds.
- The *Palau de la Música* case is a case involving bribes in public contracts amounting to EUR6.6 million between 2000 and 2009, directed by the president of the Catalan Palace of Music. In April 2020, the Supreme Court confirmed the sentences of the former president of the Catalan Palace of Music and its manager.
- The *Púnica* case also involves the People's Party in corruption charges. The investigation is based on alleged commission in the exchange of public contracts in the Communities of Madrid and Valencia. The total amount defrauded amounted to EUR250 million over two years. The investigation implicated 50 officials and is still ongoing.
- Spain's former king Juan Carlos is also under investigation, which is being carried out by the Prosecutor's Office of the Supreme Court, over his alleged role in a deal under which a Spanish consortium won a EUR6.7 billion contract to build a high-speed rail line in Saudi Arabia. The Spanish former king is suspected to have received EUR88 million as a commission from Saudi Arabia's king Abdullah. On 3 November 2020, the Prosecutor's Office of the Supreme Court also assumed another investigation against the former king and other royal members. The facts are unclear, but the investigation is based on corruption facts.

7.7 Level of Sanctions Imposed

The Supreme Court has recently confirmed the conviction of the political party "PP" and 29 individuals in the Gurtel case. The political party has been found civilly responsible. The minimum sentence has been five months of imprisonment and the most serious sentence imposed on one of the defendants has been 51 years of imprisonment. The other four defendants' sentences range between 27 and 40 years of imprisonment. Six defendants' sentences range between 12 and 18 years of imprisonment. The rest of the defendants' punishments range between six months and nine years of imprisonment.

In the *ERE* case, the Provincial Court of Sevilla (*Audiencia Provincial de Sevilla*) convicted 19 out of the 21 of the accused individuals. Two individuals were sentenced to nine years of special disqualification. Sentences of imprisonment ranged from a minimum of six years to a maximum of seven.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

The last OECD report on the implementation of the OECD Anti-Bribery Convention by Spain dated from 2015, when Spain had not yet amended its anti-bribery provisions. Among other things,

the OECD was concerned by the lack of prosecution-based corruption charges.

In 2019, the GRECO, monitoring states' compliance with anti-corruption standards, published two reports evaluating Spain on: i) "preventing corruption and promoting integrity in central Governments (top executive functions) and law enforcement agencies" and ii) "corruption-prevention in respect of members of parliament, judges and prosecutors." The GRECO noted that Spain was implementing certain recommendations, such as the adoption of a Code of Conduct for the members of the Congress of Deputies. However, the GRECO recommended reinforcing the regime applicable to top executive functions, the police, and the Civil Guard. The GRECO also recommended that Spanish authorities prioritise the creation of a co-ordinated strategy against corruption.

In March 2021, GRECO issued its second compliance report on Spain. It stated that Spain had complied with six out of eleven recommendations issued by GRECO in 2013. It concluded that Spain had partially complied with four recommendations.

- The introduction of rules on how members of Parliament engage with lobbyists and other third parties who seek to influence the legislative process.
- That objective criteria and evaluation requirements be laid down in law for the appointment of the higher ranks of the judiciary (ie, Presidents of Provincial Courts, High Courts of Justice, the National Court and Supreme Court judges), in order to ensure that these appointments do not cast any doubt on the independence, impartiality and transparency of this process, by:
  (a) reconsidering the method of selection and the term of tenure of the Prosecutor General;
  (b) establishing clear requirements and procedures in law to increase transparency of communication between the Prosecutor General and the government;
  (c) exploring further ways to provide for greater autonomy in the management of the means of the prosecution services;
  (d) developing a specific regulatory framework for disciplinary matters in the prosecution service, which is vested with appropriate guarantees of fairness and effectiveness and is subject to independent and impartial review.

In addition, the GRECO concluded that Spain has not complied with the recommendation of carrying out an evaluation of the legislative framework governing the General Council of the Judiciary (CGPJ) and of its effects on the real and perceived independence of this body from any undue influence, with a view to remedying any shortcomings identified.

Additionally, in 2019, Transparency International ranked Spain 30th out of 180 countries with a 62/100 score in its corruption perception index in the public sector.

Finally, in 2018, the European Green Party released the report "The cost of corruption across the EU" which indicated that in Spain corruption costs amount to EUR90 billion annually, representing 8% of its GDP.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

Spain, as any other EU member state, is required to transpose 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, by 17 December 2021. The Directive protects persons who report certain infringements of Union law, irrespective of how national law classifies them, whether administrative or criminal. This includes the reporting of anti-bribery and anti-corruption violations. Spain has already started work on preparing this transposition.

It must be noted that, in June 2020, the Spanish Parliament voted down a law proposal on anti-corruption (*Ley integral de lucha contra la corrupción y proteccion al denunciante*) which established, for the first time in Spain, a legal framework of anti-corruption provisions for both the public and private sectors. Under the regime, whistle-blowers benefited from immunity against retaliatory measures carried as a consequence of their reporting.

The law proposal included the following titles:

- the first title provided the protection of persons who report anti-corruption violations and their rights;
- the second title created an "independent public-integrity authority" which controlled and monitored the compliance by the authorities and personnel of the public sector with their obligations concerning conflicts of interest, incompatibility regimes and good governance; and
- the third title provided the legal regime of the infractions and sanctions that were committed because of their non-compliance with the law.

In addition, in April 2020, the Ministry of Justice started drafting a proposed legislation to amend the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*). Among others, it is under consideration to allow prosecutors in the pre-trial stage to carry out judicial investigations without an examining magistrate. Under the current system, the examining magistrate has the power to conduct the investigation and prosecutors may only request the adoption of precautionary measures or investigative measures by the judge.

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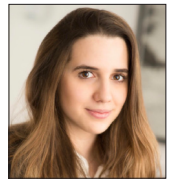

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Trends and Developments

Contributed by:
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Introduction

On 29 March 2022, the Group of States against Corruption (GRECO), the Council of Europe's anti-corruption monitoring body, published its Fifth Evaluation Round Compliance Report on Spain (the "2022 Report"), dealing with preventing corruption and promoting integrity in central government (top executive functions) and law enforcement agencies.

This 2022 Report analyses the measures taken by Spain to implement the recommendations contained in GRECO's Fourth Round Evaluation Report (the "2019 Report"), published on 13 November 2019. In this manner, it serves as an evaluation tool to monitor Spain's progress in the improvement of its anti-corruption legislative framework, as well as the measures that still need to be adopted.

GRECO concluded that Spain did not implement any of the 19 recommendations contained in its 2019 Report; only seven recommendations were partially implemented. This, however, does not mean that progress is not being made. Spain continues to make progress in its anti-corruption legislative agenda and notable progress has been made since the completion of GRECO's report. This is, in turn, reflected in Transparency International's Corruption Perception Index of 2021, where Spain scored 61/100 and ranked tenth in the European Union and 34th globally, compared to 62/100 in 2020 and 58/100 in 2018.

The present article provides a summary and commentary of GRECO's most relevant recommendations and findings and, where relevant, what progress has been made since the publication of GRECO's report.

GRECO's Fifth Evaluation Round Compliance Report on Spain

As stated above, the 2022 Report sought to evaluate and examine the implementation status and the level of compliance of each of the 19 recommendations made in the 2019 Report.

The Report is divided into two sections which evaluate the implementation status of the recommendations made in relation to "Preventing corruption and promoting integrity in central governments (top executive functions)" and "Preventing corruption and promoting integrity in law enforcement agencies", respectively.

Below is an overview of GRECO's key findings.

Preventing corruption and promoting integrity in central governments (top executive functions)

This section covers recommendations i–x. Of those recommendations four have been partially implemented (recommendations iii, iv, viii and ix) and six have yet to be implemented (i, ii, v, vi, vii and x).

Partially implemented recommendations

Partially implemented recommendations concerned:

- the enactment of a code of code of conduct for persons with top executive functions as well as practical measures for its implementation;

- advancing the implementation of Law 19/2013 on Transparency, Access to Public Information and Good Governance;
- widening the scope of publication requirements of financial disclosures to include detailed information and considering reducing reporting and publication timeframes; and
- the strengthening of "the advisory, supervisory and enforcement regime regarding conflicts of interest of persons with top executive functions."

In the context of progress made in these areas, GRECO makes reference to the government of Spain's IV Open Government Plan (2020–2024), "particularly, regarding transparency, accountability in the public sector across the line, as well as the development of a more strategic and holistic anti-corruption approach." It is worth noting that the European Commission, in its 2022 Rule of Law Report (Country Chapter on the rule of law situation in Spain), mirrors GRECO's support of the Open Government Plan and its commitment to "strengthen the system to prevent conflicts of interests and incompatibilities including improved conflicts of interests rules."

GRECO especially welcomes the "intensified advisory and supervisory role of the Office for Conflicts of Interest (OCI)" while reiterating the importance of the reinforcement of the OCI's independence, autonomy and available resources.

Recommendations that have not been implemented

Recommendations that have not been implemented include:

- reinforcing the transparency and integrity regime applicable to advisors;
- devising a strategy to analyse and mitigate risk areas involving conflicting interests and corruption of persons with top executive functions and to formulate a plan of action accordingly;
- advancing the implementation of Law 19/2013 on Transparency, Access to Information and Good Governance and raising awareness among the general public of their rights of access;
- providing the Council for Transparency and Good Governance with further independence, authority and resources;
- the regulation of lobbying; and
- review by an independent body of the legislation governing post-employment restrictions.

The failure to implement the recommendation regarding the issue of "*aforamiento*" – the alternative justice system for criminal responsibility to which members of government, including the president, ministers, deputies and senators, are subject, deserves special mention. This is a contentious issue in Spain, especially in view of the political corruption that has prompted the arrest and conviction of high-ranking government officials within Spain's two main parties: the *Partido Popular* (PP) and *Partido Socialista Obrero Español* (PSOE). Notably, various autonomous regions (including Balearas, Canarias, Cantabria, Murcia, La Rioja and Aragon) have either abolished or are in the process of abolishing the application of this alternative criminal responsibility system in the executive and legislative branches. GRECO explains that the authorities in Spain have informed it of some initiatives to "restrict the scope of *aforamiento* to acts committed in the exercise of office" while at the same time underscoring "the inherent difficulties of a constitutional amendment and the need for a very broad parliamentary agreement". GRECO is aware and appreciates the "challenge of a legal

reform in this area"; nonetheless, and understandably, it "calls on the authorities to push for effective action" so that "it does not hamper the criminal justice process in respect of Members of Government suspected of having committed corruption related offences".

An additional recommendation that has not been implemented but where progress has been made is the introduction of a legal framework to regulate lobbying activities. Specifically, "how persons entrusted with top executive functions engage in contacts with lobbyists and other third parties […] and that sufficient information about the purpose of these contacts be disclosed". Indeed, and despite this recommendation, lobbying activities are still not regulated in Spain by the central government. Some regional communities have enacted their own laws to regulate lobbying while others have introduced transparency registers as a way of regulating interactions between interest groups and senior government officials (these include Cataluña, Madrid, Valencia and Castilla la Mancha). GRECO mentions and welcomes certain developments aimed to regulate lobbying, including a preliminary draft bill. This law proposal – the Law of Transparency and Integrity in the Activities of Interest Groups (*Ley de Transparencia y de Integridad en las Actividades de los Grupos de Interés*) – was indeed presented and approved by Spain's Council of Ministers on 8 November 2022. The proposed law will go through a series of public hearings after which it will go to Parliament for final approval.

Preventing corruption and promoting integrity in law enforcement agencies

This section covers recommendations xi–xix. Of those recommendations two have been partially implemented (recommendations xii and xv) and seven not been implemented (xi, xiii, xiv, xvi, xvii, xviii and xix).

Partially implemented recommendations

Partially implemented implementations concern:

- the adoption of a code of conduct by the Civil Guard and the completion of the Civil Guard and National Police's code of conduct with guidelines and practical measures for its implementation; and
- a review by the National Police and the Civil Guard of career-related internal processes.

GRECO applauds improvement in the Civil Guard's ethics infrastructure, especially the drafting of a new code of conduct, which had not yet been adopted at the time of completion of GRECO's report. In this regard, there has been notable progress and the code of conduct for Civil Guard staff was published on 4 March 2022.

GRECO also welcomes "the development of targeted policies in the Police and Civil Guard to promote gender equality" and acknowledges "the steps taken by the Civil Guard to review its career internal processes" and concludes that the Civil Guard has met the pertinent recommendation but not the National Police, which "has yet to substantiate further progress". It is important to point out, however, that progress has been made since the Completion of GRECO's report: a new National Office for Human Rights Guarantees was set up in February 2022 in order to strengthen integrity both within the National Police and the Civil Guard.

Recommendations that have not been implemented

Recommendations that have not been implemented include:

- that the National Police and Civil guard conduct a strategic risk assessment of corruption-prone areas and that the resulting data be used for the design of an integrity and anti-corruption strategy;
- "reassessing the system of entry quotas for the offspring of the Civil Guard";
- strengthening the vetting processes in the National Police and the Civil Guard;
- "reviewing criteria and procedures for the allocation and withdrawal of allowances, bonuses and other benefits […] and introducing adequate controls and monitoring";
- that the National Police and the Civil Guard conduct a study regarding the risk of conflicts of interest in service and post-employment and develop targeted regulations;
- a full review of whistle-blower procedures within the National Police and Civil Guard; and
- reviewing the disciplinary regime of the National Police and the Civil Guard.

GRECO starkly stated that "the situation regarding law enforcement authorities is disappointing" and underscored that Spain's non-compliance necessitates an assessment of the implementation of its recommendations and that, instead, Spanish authorities have, "for the most part, reiterated the rules which were already in place in 2019" and have failed to show meaningful action or progress in the implementation of GRECO's recommendations.

GRECO's Conclusion

GRECO has concluded that Spain needs to make further progress "to demonstrate an acceptable level of compliance within the next 18 months". This is not surprising, given that Spain has failed to implement a single one of GRECO's recommendations in its entirety. However, it is important to contextualise Spain's performance in view of events in recent years. Indeed, at the outset of its report, GRECO highlights that Spain's authorities recall that there were two general elections in 2019, and that just a few weeks after the new government took office a state of alarm was declared due to the COVID-19 global pandemic, thereby significantly restricting legislative activities and national actions and policies to implement the recommendations contained in the 2019 Report. While this is a plausible explanation, Spain will not be able to rely on such mitigating circumstances in the coming months and years. Meaningful reform must be shown by Spanish authorities to demonstrate progress and the effective implementation of GRECO's recommendations throughout its next compliance procedure, especially with regard to law enforcement agencies.

There is reason to be optimistic; as of November 2022, Spain has already made progress in the implementation of several of GRECO's recommendations. This is also recognised by the European Commission in its 2022 Rule of Law Report (Country Chapter on the rule of law situation in Spain), which states that "Spain continues to implement a set of measures to fight and prevent corruption […] Spain continues to develop a strong integrity framework for the public administration, including to prevent conflicts of interest and incompatibility rules".

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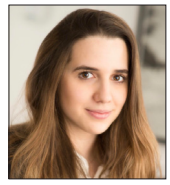

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SWITZERLAND

Law and Practice

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Contents

1. Legal Framework for Offences

1.1 International Conventions

Switzerland is signed up to the following international conventions relating to anti-bribery and anti-corruption:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997;
- the Council of Europe Criminal Law Convention on Corruption of 27 January 1999, as well as its Additional Protocol of 15 May 2003; and
- the United Nations Convention against Corruption of 31 October 2003.

1.2 National Legislation

The main national legislation in the area of anti-bribery and anti-corruption in Switzerland is the Swiss Criminal Code (SCC). The provisions relating to anti-bribery and anti-corruption are governed by Articles 322ter to 322decies of the SCC, which are divided into four sections:

- bribery of Swiss public officials (Articles 322ter to 322sexies);
- bribery of foreign public officials (Article 322septies);
- bribery of private individuals (Articles 322octies and 322novies); and
- general provisions (Article 322decies).

All types of bribery include active and passive bribery. Bribery of Swiss public officials goes beyond active and passive bribery, which are governed by Articles 322ter and 322quater of the SCC, to the granting to and the accepting by Swiss public officials of an undue advantage (Articles 322quinquies and 322sexies of the SCC). Article 322decies of the SCC sets out the advantages that are not undue, as well as the equality between private individuals (who fulfil official duties) and public officials.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The provisions relating to anti-bribery and anti-corruption are interpreted and enforced by the Swiss courts. In addition, legal doctrine contributes to their interpretation.

In 2017, the Swiss State Secretariat for Economic Affairs (SECO) published the third edition of a brochure entitled *Preventing Corruption – Information for Swiss Businesses Operating Abroad*, which is designed to:

- help Swiss companies operating abroad cope with the pertinent regulations in Swiss criminal law;
- highlight the effects of corruption on their business; and
- provide advice on how to prevent and combat corruption.

1.4 Recent Key Amendments to National Legislation

Prior to 1 July 2016, the criminal offences of active and passive bribery of private individuals were governed by Article 4a in conjunction with Article 23 para 1 of the Swiss Unfair Competition Act (SUCA). Since 1 July 2016, the offences of active and passive bribery in the private sector have been governed by Articles 322octies and 322novies of the SCC.

2. Classification and Constituent Elements

2.1 Bribery

Bribery

In Swiss criminal law, no distinction is made between bribery and corruption. As outlined in **1.2 National Legislation**, the relevant provisions in the SCC are divided into the following four sections:

- bribery of Swiss public officials;
- bribery of foreign public officials;
- bribery of private individuals; and
- general provisions.

The provisions governing the bribery of Swiss public officials do not only include the active and passive bribery of Swiss public officials but also the granting to and acceptance by Swiss public officials of an undue advantage.

In accordance with the classification of the SCC, the discussion here will distinguish between these four categories.

Preliminary Remarks

In abstract terms, according to Swiss criminal law (Articles 322ter, 322quater, 322septies, 322octies and 322novies of the SCC), the objective elements of active and passive bribery consist of the following:

- a bribing person;
- a bribed person – either a Swiss public official, a foreign public official or a private individual;
- a bribe – an undue advantage;
- a prohibited act – either active bribery (ie, offering, promising or giving an undue advantage) or passive bribery (ie, demanding, securing the promise of, or accepting an undue advantage); and
- a purpose – the bribing person offers, promises or gives to the bribed person a bribe to cause the latter to carry out (or to fail to carry out) an act in connection with their official activity that is contrary to their duty or dependent on their discretion (ie, the principle of equivalence).

Subjectively, all types of bribery require that the offender act with intent – ie, the offender must carry out the act in the knowledge of what they are doing and in accordance with their will. Conditional intent (dolus eventualis) is sufficient. Therefore, if the offender regards the realisation of the act – in this case, bribery – as being possible and accepts this, they act with conditional intent.

An undue advantage, within the meaning of the provisions relating to anti-bribery and anti-corruption in Switzerland, may be tangible or intangible. A tangible advantage is any measurable improvement, be it a cash payment, a payment in kind or a legal improvement. Intangible advantages are, for example, social or professional advantages. The advantage is undue if the offender is not authorised to accept it.

As mentioned earlier, active and passive bribery require that the undue advantage be offered, promised or given to cause the bribed person to carry out (or to fail to carry out) an act in connection with their official activity that is contrary to their duty or dependent on their discretion. Therefore, the following conditions are necessary:

- the bribed person's act must be carried out (or fail to be carried out) in connection with their official activity;

- the act must be contrary to the bribed person's duty or dependent on their discretion; and
- the undue advantage must be offered, promised or given in order for the bribed person to carry out (or to fail to carry out) the act that is contrary to their duty.

A connection with the official activity of the bribed person exists where they are acting in their official capacity or violate official duties through the act in question. A breach of duty is established if the bribed person violates a provision under public law (ie, under labour law and their employment contract describing their dutiful conduct). Alternatively, this condition is also met if the bribed person's act is dependent on their discretion. The bribed person's determinable consideration is deemed an undue advantage if there is a sufficient connection between the bribed person's behaviour and the undue advantage granted by the bribing person.

As regards all types of bribery, the undue advantage does not need to be offered, promised or given to the bribed person – it can also be offered, promised or given to a third party. Additionally, for the offender to be punishable, it is sufficient that the undue advantage is offered, promised or given to the bribed person – regardless of whether the results expected by the involved persons actually occur.

Under Swiss criminal law, the failure to prevent bribery is not an offence. However, a company may also be punished for a bribery offence committed in the company – irrespective of the criminal liability of any natural persons – if the company did not undertake all requisite and reasonable organisational precautions necessary to prevent bribery (Article 102 para 2 of the SCC). In addition, principals can be held liable for having failed to prevent bribery committed by employees under their supervision.

Bribery of Swiss Public Officials

Four offences can be distinguished in relation to the bribery of Swiss public officials:

- active bribery of Swiss public officials (Article 322ter of the SCC);
- passive bribery by Swiss public officials (Article 322quater of the SCC);
- the granting of an undue advantage to Swiss public officials (Article 322quinquies of the SCC); and
- the acceptance of an undue advantage by Swiss public officials (Article 322sexies of the SCC).

With regard to the constituent elements common to all types of bribery, reference should be made to the preliminary remarks. The following discussion is limited to elements that are specific to the bribery of Swiss public officials.

In addition to public officials, the notion of a Swiss public official encompasses:

- members of a judicial or other authority;
- officially appointed experts, translators or interpreters;
- arbitrators; or
- members of the armed forces.

Article 110 para 3 of the SCC defines public officials as:

- the officials and employees of a public administrative authority or of an authority for the administration of justice;
- persons who hold office temporarily at – or are employed temporarily by – a public

administrative authority or an authority for the administration of justice; or
- persons who carry out official functions temporarily.

In Swiss anti-corruption law, the position of a public official is assessed on the basis of the functional notion of a public official. Employees of state-controlled companies are therefore included in such notion.

In contrast to active bribery, passive bribery does not include members of the armed forces. The same is valid for the acceptance by Swiss public officials of an undue advantage. By mirroring the offering, promising or giving, the Swiss public official demands, secures the promise of, or accepts the undue advantage.

Per Articles 322quinquies and 322sexies of the SCC, the granting to – and acceptance by – Swiss public officials of an undue advantage differs from active and passive bribery in so far as the undue advantage must be offered, promised or given in order that the Swiss public official carries out their official duties. Thus, in contrast to active and passive bribery, the offering, promising or giving of an undue advantage is not linked to a concrete – or at least determinable – consideration of the Swiss public official. Nevertheless, the undue advantage granted needs to be suitable (or enough) to influence the carrying out of the Swiss public official's official duties.

In contrast to active and passive bribery pursuant to Articles 322ter and 322quater of the SCC, the granting to – and acceptance by – Swiss public officials of an undue advantage refers only to the future exercise of the public official's official duties.

It worth noting that the granting to and acceptance by Swiss public officials of an undue advantage (as per Articles 322quinquies and 322sexies of the SCC) only applies to Swiss public officials and does not involve third parties.

Facilitation payments – that is, smaller payments made to secure or expedite the performance of a routine or necessary action to which the payer has legal or other entitlement – could, in principle, fall within the scope of the offences of granting to and acceptance by Swiss public officials of an undue advantage. However, negligible advantages that are common social practice do not constitute undue advantages (Article 322decies para 1(b) of the SCC).

Bribery of Foreign Public Officials

The active and passive bribery of foreign public officials is a punishable offence pursuant to Article 322septies of the SCC.

With regard to the constituent elements common to all types of bribery, reference should be made to the preliminary remarks.

The active and passive bribery of foreign public officials occurs when an undue advantage is offered, given or promised to – or respectively demanded, accepted or (the promise of which is) secured by – the following where they are acting for a foreign state or international organisation:

- members of a judicial or other authority;
- public officials;
- officially appointed experts, translators or interpreters;
- arbitrators; or
- members of the armed forces.

Bribery of Private Individuals

Not only has the active and passive bribery of Swiss (Articles 322ter and 322quater of the SCC) and foreign public officials (Article 322septies of the SCC) been forbidden since 2016, butthe active and passive bribery of private individuals is also forbidden (as per Articles 322octies and 322novies of the SCC).

Pursuant to Article 322octies para 1 of the SCC, any person is criminally liable if said person offers, promises or gives an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage in order that they carry out (or fail to carry out) an act in connection with their official activities that is contrary to their duties or dependent on their discretion.

As the constituent elements correspond with bribery of public officials, reference should be made to the preliminary remarks.

It is nevertheless noteworthy that the requirements for the active and passive bribery of private individuals (as defined in Articles 322octies and 322novies of the SCC) also apply to the bribery of foreign private individuals. Furthermore, in minor cases, active and passive bribery of private individuals is only prosecuted upon complaint. Cases could be considered minor if:

- the sum in tort is not extensive;
- the security and health of third parties are not affected by the offence;
- there is no multiple or repeated commission of the offence by a member of a group; or
- no document fraud has been committed in connection with the bribery.

General Provisions

The general provisions contained in Article 322decies of the SCC are applicable to every form of bribery in Swiss law. According to Article 322decies para 1 of the SCC, the following are not undue advantages:

- advantages permitted under public employment law or contractually approved by a third party; and
- negligible advantages that are common social practice.

Advantages that are negligible, but clearly an attempt at bribery, are not covered by Article 322decies para 1(b) of the SCC. The threshold for negligible advantages that are common social practice lies in their capacity to influence the person accepting the advantage. For federal personnel, the limit for negligible advantages is regulated by law at CHF200.

In addition, pursuant to Article 52 of the SCC, the competent authority shall refrain from prosecuting the offender, bringing them to court, or punishing them if the level of culpability and consequences of the offence are negligible.

Article 322decies para 2 of the SCC provides that private individuals who fulfil official duties are subject to the same provisions as public officials.

Money Laundering

Active and passive bribery of Swiss or foreign public officials (as per Articles 322ter, 322quater and 322septies of the SCC) qualify as felonies and are thus predicate offences to money laundering, according to Article 305bis of the SCC.

In contrast, active and passive bribery of private individuals (as per Articles 322octies and

322novies of the SCC) are qualified as misdemeanours and are thus not predicate offences to money laundering. The same is true for the granting to and acceptance by Swiss public officials of an undue advantage (as per Articles 322quinquies and 322sexies of the SCC).

2.2 Influence-Peddling

By trading in influence, a person misuses their influence over a decision-maker (typically a public official) for a third party in return for any undue advantage.

Swiss law does not detail a specific offence with regard to trading in influence. However, if the intermediary is a public official, they could be held liable for passive bribery or accepting an undue advantage if they accept an undue advantage to influence another public official. The third party giving the undue advantage could be held liable for active bribery or granting an undue advantage. However, the undue advantage must be linked to the official activity of the intermediary. It is important to note that, under Swiss law, the granting to and acceptance by public officials of an undue advantage only applies to Swiss public officials.

If the intermediary is a private individual, and the public official whose decision is to be influenced participates in the corruptive scheme and at least implicitly accepts the undue advantage from the intermediary, active and passive bribery could be fulfilled. Depending on the explicit or implicit agreement between the parties, the third party could be held liable for complicity or incitement to active bribery, the intermediary for active bribery (or complicity in active bribery) and the public official for passive bribery.

2.3 Financial Record-Keeping

Under Swiss criminal law, it is a punishable offence if a debtor fails to comply with a statutory obligation to keep and preserve business accounts or draw up a balance sheet – with the result that their financial position is not ascertainable or not fully ascertainable – when bankruptcy proceedings are commenced against them (Article 166 of the SCC). Moreover, as per Article 325 of the SCC, a person is criminally liable if they wilfully (or through negligence) fail to comply with the statutory duty to:

- keep proper accounts; or
- preserve accounts, business correspondence and business telegrams.

Forgery of documents is covered by Article 251 of the SCC, which punishes the production and the use of a false or falsified document. If the offender is a public official or a person acting in an official capacity, Article 317 of the SCC (regarding forgery of a document by a public official) is applicable.

2.4 Public Officials

Under Swiss law, there are several provisions pertaining to the criminally relevant behaviour of public officials.

Pursuant to Article 313 of the SCC, any public official who – for unlawful gain – levies taxes, fees or other charges that are not due (or that exceed the statutory rates) is criminally liable.

Likewise, any member of an authority or public official who damages the public interests that they have a duty to safeguard in the course of a legal transaction – and with a view to obtaining an unlawful advantage for themself or another – is liable to prosecution for misconduct in public office (Article 314 of the SCC).

Per Article 138 of the SCC, a public official is criminally liable for:

- the appropriation of moveable property belonging to another but entrusted to said public official; and
- the unlawful use of financial assets entrusted to said public official for their own or another's benefit.

Finally, any member of an authority or a public official who abuses their official powers to secure an unlawful advantage for themself or another – or to cause prejudice to another – is liable to prosecution for abuse of public office (Article 312 of the SCC).

2.5 Intermediaries

As previously mentioned in **2.1 Bribery**, Articles 322ter to 322novies of the SCC explicitly provide that the undue advantage does not need to be offered, promised or given to the public official – it can also be offered, promised or given to a third party. Apart from that, the general provisions concerning complicity, incitement and assistance are applicable, as the case may be.

3. Scope

3.1 Limitation Period

Swiss criminal law distinguishes between the limitation of prosecution rights and the limitation period for the execution of a sentence. Whereas the former has the effect of hindering the authorities in prosecuting, the latter prevents a sentence from being executed.

Limitation of prosecution rights depends on the maximum sentence provided for in the respective offence. According to Article 97 para 1(b) of the SCC, the right to prosecute is subject to a time limit of 15 years if the offence carries a custodial sentence of more than three years. This is the case for active and passive bribery of a Swiss or foreign public official (Articles 322ter, 322quater, 322septies of the SCC).

Article 97 para 1(c) of the SCC provides that the right to prosecute is subject to a time limit of ten years for the offences of:

- granting to and acceptance by Swiss public officials of an undue advantage (pursuant to Articles 322quinquies and 322sexies of the SCC); and
- active and passive bribery of private individuals (pursuant to Articles 322octies and 322novies of the SCC).

If a judgment is issued by a court of first instance before the limitation period expires, the time limit no longer applies (Article 97 para 3 of the SCC).

Depending on the sentence imposed, the right to execute a sentence in connection with a bribery offence is subject to a limitation period of five, 15 or 20 years (Article 99 para 1 of the SCC).

3.2 Geographical Reach of Applicable Legislation

According to Article 3 para 1 of the SCC, any person who commits an offence in Switzerland is subject to the SCC. Article 8 para 1 of the SCC clarifies what is meant by the place of commission by stating that an offence is considered to be committed at:

- the place where the person concerned commits it or unlawfully omits to act; and
- the place where the offence has taken effect.

If the offence is only partly committed in Switzerland, this is sufficient for the Swiss authori-

ties to assert jurisdiction. With regard to bribery, Swiss jurisdiction can arguably be established if the bribe money has been transferred to or from a bank account in Switzerland – regardless of whether the bribing or the bribed person has been to Switzerland.

Notwithstanding the foregoing, Swiss legislation has extraterritorial reach under certain conditions. Pursuant to Article 6 para 1 of the SCC, a person is subject to the SCC if they commit an offence abroad that Switzerland is obliged to prosecute in terms of an international convention, provided that:

- the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission; and
- the person concerned remains in Switzerland and is not extradited to the foreign country.

Furthermore, Article 7 para 1 of the SCC provides that a person who commits an offence abroad – where the requirements of, in particular, Article 6 of the SCC are not fulfilled – is subject to the SCC if:

- the offence is also liable to prosecution at the place of commission or the place of commission is not subject to criminal law jurisdiction;
- the person concerned is in Switzerland or is extradited to Switzerland owing to the offence; and
- under Swiss law, extradition is permitted for the offence, but the person concerned is not being extradited.

If the person concerned is not Swiss and if the offence was not committed against a Swiss person, Article 7 para 1 of the SCC applies only if the request for extradition was refused for a reason unrelated to the nature of the offence (as per Article 7 para 2(a) of the SCC).

3.3 Corporate Liability

As explained in **2.1 Bribery**, under Swiss criminal law (Article 102 para 2 of the SCC), a company will be penalised for an offence committed by an individual within the company – irrespective of the criminal liability of any natural persons – if the company failed to take all the reasonable organisational measures necessary to prevent such an offence.

In corporate groups, criminal liability can only be attributed to the group company in which the offence was committed. As such, the mother company is – in principle – not responsible for the offences committed in the subsidiary company unless it had operative control over the latter and is therefore deemed responsible for the lack of organisational measures in the subsidiary.

4. Defences and Exceptions

4.1 Defences

Generally speaking, a person or corporation accused of bribery can raise defences that pertain to the objective and subjective requirements of the relevant provision (see **2. Classification and Constituent Elements**). In particular, it can be argued that:

- a minor gift does not qualify as an undue advantage in the sense of Article 322ter of the SCC;
- whoever was offered or demanded the undue advantage does not have the status of a foreign public official (as per Article 322septies of the SCC;

- the undue advantage was not offered "in order to cause" the public official to act contrary to their duties (lack of "equivalence link");
- the public official who was offered or demanded the undue advantage did not have any influence on the carrying out of the relevant official act;
- the offender did not act with intent – or at least not with conditional intent (dolus eventualis) – in relation to all objective requirements of the offence;
- in the case of corporate liability, the corporation took all reasonable organisational measures required to prevent the offence; or
- in the case of insufficient organisational measures, the lack of such measures did not lead to the commission of the offence.

4.2 Exceptions

There are no exceptions to the defences mentioned under **4.1 Defences**.

4.3 De Minimis Exceptions

As outlined in **2. Classification and Constituent Elements**, Article 322decies para 1(b) and 52 of the SCC set out certain de minimis exceptions.

4.4 Exempt Sectors/Industries

There are no sectors or industries that are exempt from the offences previously discussed.

4.5 Safe Harbour or Amnesty Programme

Swiss law does not contain specific provisions that reward spontaneous reports of irregularities by natural persons or corporations. However, self-reporting followed by co-operation during proceedings may be taken into account by the criminal authorities when determining a sentence (Article 102 paras 3, 47 and 48 of the SCC).

According to Article 53 of the SCC, if an offender has made reparation for the loss, damage or injury (or made every reasonable effort to right the wrong that they have caused), the competent authority shall refrain from prosecuting them, bringing them to court, or punishing them if:

- the requirements for a suspended sentence are fulfilled; and
- the interests of the general public and of the persons harmed in the case are negligible.

Alternatively, if the aforementioned requirements are not met, but the facts are acknowledged in a spontaneous report or during the subsequent investigation, the offender may apply for a so-called accelerated proceeding and thus avoid a long trial. Typically, the sanctions imposed in such accelerated proceedings are not as severe.

5. Penalties

5.1 Penalties on Conviction

The maximum penalty for an individual convicted of the active or passive bribing of (either Swiss or foreign) public officials is five years' imprisonment or a monetary penalty. The maximum penalty for granting or accepting an undue advantage is three years' imprisonment or a monetary penalty. Bribery in the private sector carries a sentence of up to three years of imprisonment or a monetary penalty. The maximum monetary penalty is CHF540,000. Depending on the circumstances of the case, penalties may also include a ban on exercising professional activities or a revocation of a residence permit for foreigners. A legal entity may be sanctioned with a fine of up to CHF5 million.

As a further significant sanction, the court may order the forfeiture of illegal profits obtained

through corrupt acts or assets intended to commission or reward the offender (Article 70 of the SCC). If the assets subject to forfeiture are no longer available, the court may uphold a claim for compensation by the State in respect of a sum of equivalent value (Article 71 of the SCC). There is no cap on the amount of money for such forfeiture or compensation claims.

Often bribery will include concomitant violations of accounting or bookkeeping obligations, or falsification of accounting documents, and sometimes tax offences. Such violations may lead to the same or similar criminal sanctions as bribery (ie, imprisonment or monetary sanctions), as well as administrative sanctions in certain regulated sectors. Lastly, Swiss criminal procedure law provides that any individual who has suffered harm from bribery or corruption may file a civil claim as a private claimant in the criminal proceedings.

5.2 Guidelines Applicable to the Assessment of Penalties

Swiss criminal law does not provide general guidelines on the assessment of appropriate penalties. Rather, based on the SCC, the authorities have broad discretion when determining the appropriate sanction. Factors to be considered include the degree of fault, previous convictions, the personal circumstances of the offender, and the impact of the sanction on their life (Article 47 of the SCC).

In order to determine the amount of the monetary penalty for an individual, the court specifically takes into account the offender's personal and financial circumstances at the time of conviction (Article 34 of the SCC). In order to determine the amount of the fine in the case of a conviction of a corporation, the court takes into account the seriousness of the offence, the degree of the organisational inadequacies, the damage caused, and the economic capability of the company (Article 102 para 3 of the SCC).

Repeated offences will lead to an increase of the sentence by up to 50% based on the most serious offence (Article 49 para 1 of the SCC). Although Swiss law generally does not contain provisions to reward spontaneous reports of irregularities, self-reporting followed by co-operation during criminal proceedings may be taken into account when the sentence is determined (see **7.4 Discretion for Mitigation**).

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

In Transparency International's 2021 "Corruption Perception Index" (CPI), Switzerland ranked eighth out of 180 countries. Although Switzerland is not seen as being one of the most corrupt countries in the world, it is still affected by corruption. In Switzerland, the anti-corruption law is set out in the SCC (see **1.2 National Legislation**).

The failure of a company to prevent bribery does not qualify as an offence in itself. However, corporate criminal liability exists where a felony or misdemeanour is committed in a corporation and it is not possible to attribute such an act to any specific natural person owing to the inadequate organisation of the corporation (Article 102 para 1 of the SCC).

Furthermore, a company may also be punished – irrespective of the criminal liability of any natural persons – if the enterprise did not undertake all the necessary and reasonable organisational precautions required to prevent bribery (Article 102 para 2 of the SCC). Therefore, criminal liabil-

ity applies to a legal entity that fails to prevent bribery from occurring. Such precautions may consist of risk analysis, training, internal controls and internal policies.

Accordingly, if a company lacks an adequate compliance programme, the company may become criminally liable. In any case, and depending on the circumstances, an effective compliance programme may at least help to mitigate the criminal liability of the corporation. If convicted, a legal entity may be sanctioned with a fine of up to CHF5 million.

Swiss AML legislation contributes to the detection of bribery in the sense that all Swiss financial intermediaries are required to inform the Money Laundering Reporting Office Switzerland (MROS) immediately if they become aware (or have "reasonable grounds" to suspect) that assets involved in a business relationship fall under at least one of the criteria set out in the Anti-Money Laundering Act (AMLA) – especially if they originate from a predicate offence to money laundering (Article 9 AMLA). Corruption of public officials, in contrast to corruption in the private sector, qualifies as a felony and is thus a predicate offence for money laundering (Article 305bis of the SCC). In fact, it is one of the predicate offences that most frequently underline reports of suspicious transactions to the MROS.

Once the cases have been processed by the MROS, they are forwarded to the Federal Office of the Attorney General of Switzerland (OAG) or cantonal attorneys' general offices (as appropriate). The MROS is the most frequent source of information leading to criminal proceedings for international corruption, followed by international mutual legal assistance.

6.2 Regulation of Lobbying Activities

Although lobbying can be a positive force in democracy, it can also be a mechanism for powerful groups to influence laws and regulations at the expense of the public interest. According to a study by Transparency International (2019), lobbyists in Switzerland are particularly active behind the scenes in administrative procedures, in parliamentary committees and in areas where they share common interests with parliamentarians. There is a lack of federal rules and regulations governing lobbyists in Switzerland.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Suspected or actual misconduct in the business domain of a corporation requires senior management (ie, the board of directors or an executive committee) to initiate an internal investigation and, if the internal investigation results in evidence of misconduct, the corporation has to decide whether to self-report the misconduct. There is, however, no duty to disclose violations of anti-bribery and anti-corruption provisions in Switzerland. Swiss law does not explicitly provide for credit or leniency during a criminal investigation, either – although self-reporting followed by co-operation during criminal proceedings may be taken into account when the sentence is determined.

6.4 Protection Afforded to Whistle-Blowers

Currently, there is no specific Swiss law granting protection to whistle-blowers in the private sector. However, in July 2022, the OECD declared that it will commence preparations for a high-level mission to Switzerland in December 2022 if Switzerland does not take concrete steps toward implementing whistle-blower protections.

In the meantime, the competent courts decide on a case-by-case basis whether the reporting of irregularities is legitimate. Swiss courts apply a balancing of interests' test to assess whether the employee's notification of an irregularity to the employer, the authorities or the media was lawful and examine the facts of each individual case (primarily in relation to the employee's duty of loyalty).

However, it is regarded as best practice to have reporting mechanisms in place that adequately protect the whistle-blower from negative consequences. The termination of an employee solely on the grounds of lodging a complaint may constitute an unfair dismissal under Swiss law. In the public sector, under the relevant cantonal or federal Personnel Acts, Swiss officials may be required to report crimes and offences to their supervisors or directly to the criminal authorities.

The EU Whistleblowing Directive

The 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 (commonly known as the "EU Whistleblowing Directive") entered into force in December 2019, and EU member states were required to implement the requirements resulting from the EU Whistleblowing Directive into national law by December 2021. As Switzerland is not an EU member state, there is no obligation to implement the EU Whistleblowing Directive into national law. Nevertheless, Swiss companies with business branches in the EU, which have at least 50 employees, may fall within the scope of the EU Whistleblowing Directive. Compliance with the requirements of the EU Whistleblowing Directive can therefore also be of great importance to Swiss companies.

6.5 Incentives for Whistle-Blowers

There are no specific incentives for whistle-blowers to report bribery or corruption in Switzerland.

In practice, many corporations have established mechanisms for employees to report suspected or actual misconduct to an independent person, and corporations sometimes encourage or oblige employees to report suspicions of bribery to the compliance department, an external lawyer or a specific whistle-blower portal. Upon such reporting, an employer may choose to waive its right to take civil action against the reporter, even if said reporter is involved in the bribery or corruption. An employer's waiver, however, does not protect the employee from prosecution by the criminal authorities.

For the public sector, the Swiss Federal Audit Office (SFAO) maintains a whistle-blowing website where private individuals and federal employees can report suspected irregularities and acts of corruption within the administrative units of the Federal Administration.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Currently, under Swiss law, there is no specific protection afforded to whistle-blowers in the private sector. (For the public sector, see **6.5 Incentives for Whistle-Blowers**.)

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Anti-bribery and anti-corruption laws are, in principle, enforced by criminal authorities and – to a certain extent and less directly – by administrative bodies such as the Swiss Financial Market

Supervisory Authority (FINMA) and the MROS (see **7.2 Enforcement Body**).

Furthermore, an individual who has suffered harm from bribery or corruption may file a civil claim for compensation of damages or surrender of profits based on the Federal Law on Unfair Competition. They can file the civil claim in separate civil proceedings or as a private claimant in the criminal proceedings (see **5.1 Penalties on Conviction**).

7.2 Enforcement Body

The enforcement of anti-bribery and anti-corruption offences lies principally with the prosecutor's office at the cantonal or federal level. The OAG will lead the investigation if the offence has been committed to a substantial extent abroad or in more than one canton (where no single canton is the clear focus of the criminal activity). An agreement is in place between the cantonal prosecution authorities and the OAG, which governs the question of jurisdiction. Remaining conflicts of competence are decided by the Swiss Federal Criminal Court.

In relation to banks and other financial intermediaries, the FINMA is authorised to enforce its supervisory powers independently from any criminal investigation led by the prosecution authorities. In a landmark case, the FINMA ordered a bank to terminate its activities in view of the bank's involvement in corruption. In other cases, the procedures led to sanctions such as:

- the confiscation of illegal proceeds;
- naming and shaming;
- restriction or termination of activities; or
- a ban on practising for several years for certain individuals.

The FINMA and the competent prosecution authorities have broad competences to co-operate and exchange the information that they require in the context of their collaboration.

The MROS also plays an important role in the enforcement process. It receives suspicious activity reports from financial intermediaries and, after analysis, forwards them to the criminal authorities for follow-up action. Such suspicious activity reports may relate to corruption as a predicate offence for money laundering, in particular (see **6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions**). In 2021, 8.1% of the predicate offences that led to reports to the MROS concerned the bribery of foreign public officials.

7.3 Process of Application for Documentation

In a criminal investigation for bribery, the prosecution authorities may use all coercive measures provided for by the Swiss Criminal Procedure Code (SCPC). Specifically, they may order interrogations of witnesses and suspects, house searches or – against non-suspect third parties (eg, banks and other financial intermediaries) – the disclosure of documents and/or information.

The right against self-incrimination – that is, the principle of nemo tenetur se ipsum accusare – provides a ground for refusing to co-operate (including the right to remain silent or not to disclose documents) with the prosecution authorities. In addition, documents covered by attorney–client privilege or obtained by illegal means are not admissible in criminal proceedings. It is worth noting, however, that attorney–client privilege does not extend to in-house counsels. In case of doubt, documents may be sealed and a judicial authority must rule on their admissibility (Article 248 of the SCP).

In contrast, based on Article 29 of the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), financial intermediaries supervised by the FINMA are obliged to provide the FINMA with all documents and information that the FINMA deems necessary to fulfil its supervisory duties.

7.4 Discretion for Mitigation

The enforcing bodies act ex officio and are thus obliged to investigate and sanction bribery without exception. Swiss law does not provide for plea agreements, deferred prosecution agreements and non-prosecution agreements exactly equivalent to such instruments in other jurisdictions. However, Swiss law provides for the following mechanisms to achieve similar results.

- According to Article 53 of the SCC, the competent authority shall refrain from prosecuting or punishing an individual or corporation if:
  (a) the offender "admits the facts" and "has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong";
  (b) the interests of the general public and of the person harmed are negligible; and
  (c) the requirements for a suspended sentence of not more than one year are fulfilled.
- In such cases, the reparation requested can be discussed ex ante between the prosecution and the defence, and could, for example, consist of a payment to a charitable organisation.
- Articles 352 et seq of the SCP provide that, if the offender admits the facts brought against them or if the facts are "otherwise sufficiently established", the prosecution authorities may issue a summary penalty order. This can be appealed to the court and is therefore, so to speak, a plea agreement offer by the prosecution authorities. The offer may be the result of discussions between the prosecutor and the defence.
- Articles 358 et seq of the SCP provide that an offender who admits the relevant facts brought against him or her and accepts civil claims raised by damaged parties may apply for so-called accelerated proceedings, which may involve "sentence bargaining" between the prosecutor and the defence. The sentence is reduced and a long trial avoided in return for the offender admitting the relevant facts.
- Article 48(d) of the SCC provides for mitigation of a sanction if the offender has shown sincere remorse for their actions and, in particular, has made reparation for the damage (in so far as this may be expected of them). This provision can be applied, for example, in the case of self-reporting and/or improvement of the company's compliance and governance practice.

As regards FINMA investigations, the FINMA has a wide discretion to mitigate sanctions in light of the financial intermediary's co-operation during the investigation (including efforts for reparation).

7.5 Jurisdictional Reach of the Body/Bodies

According to Article 3 of the SCC, the Swiss criminal authorities have the authority to prosecute corruption committed in Switzerland. According to Article 8 of the SCC, a bribery offence is considered to be committed both at the place where the person concerned acts or unlawfully omits to act and at the place where the offence has taken effect (see **3.2 Geographical Reach of Applicable Legislation**).

The place of commission is broadly construed. Arguably, corruptive payments to or from a Swiss bank account are enough to create Swiss jurisdiction, even if all persons involved act outside Switzerland.

In the case of corporate liability (Article 102 para 2 of the SCC), the bribery offence itself need not have been committed by a Swiss corporation in Switzerland. It is sufficient that a lack of organisation occurred (at least partially) in Switzerland, which may be the case if a subsidiary, affiliate or branch located in Switzerland is responsible for the compliance of the group of companies.

The FINMA is authorised to issue administrative orders relating to corruption against persons and entities that are required to be licensed, recognised or registered by the FINMA.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

The following recent landmark investigations or decisions involve bribery or corruption in Switzerland.

Alstom Case

In November 2011, after three years of investigation, the OAG issued a summary punishment order against Alstom Network Schweiz AG for breach of Article 102 para 2 of the SCC in conjunction with Article 322septies of the SCC. The OAG fined the company CHF2.5 million and imposed a compensatory claim of CHF36.4 million. Alstom Network Schweiz AG – the company responsible for the compliance of the group but not otherwise involved in the bribe payments – was convicted of not having taken all necessary and reasonable organisational precautions to prevent bribery of foreign public officials in Latvia, Tunisia and Malaysia. The investigation into the parent company, Alstom SA, was closed without punishment (based on Article 53 of the SCC) in return for a reparation payment.

SIT Case

In November 2013, the OAG concluded a criminal investigation into the Swedish company Siemens Industrial Turbomachinery (SIT). The case concerned illegal payments to senior executives at Gazprom in relation to a contract for gas turbines for the pipeline linking Russia's Yamal peninsula to Western Europe. The investigation was closed, based on Article 53 of the SCC, after SIT admitted inadequate enforcement of compliance regulations in relation to Yamal pipeline projects and paid reparations of CHF125,000 in the form of a donation to the International Committee of the Red Cross. SIT also paid compensation of USD10.6 million for unlawfully obtained profits.

As for the individuals involved, two years later the Federal Criminal Court (FCC) issued an acquittal on the grounds that the Gazprom senior executives who received the commissions were not public officials in the sense of Article 322septies of the SCC.

Fertiliser Case

By a summary punishment order of 31 May 2016, the OAG convicted the Swiss subsidiary of the Swiss agro-business multinational enterprise Ameropa of failure to take reasonable and necessary organisational measures to prevent corrupt payments to foreign public officials and ordered it to pay a fine of CHF750,000 for the corrupt payment of USD1.5 million to a senior Libyan official (ie, the Minister for Oil) in exchange for the right to build a fertiliser plant in Libya.

Construction 1 Case

The Construction 1 case concerns charges of bribing foreign public officials against a former senior executive of a Canadian construction

company. Inducements were given to the son of the late Libyan dictator Muammar Gaddafi in order to secure contracts that were valued at more than USD21 million and generated assets worth more than EUR70 million. The former executive was the beneficial owner of companies that allegedly made illicit profits of more EUR30 million.

After launching a criminal investigation on 11 May 2011 against the former executive, the OAG filed a simplified-procedure indictment against the Canadian group and its former executive on 18 July 2014. On 1 October 2014, the FCC upheld the judgment recommended by the OAG. With regard to another aspect of the procedure (ie, retrocessions to the senior executive), the Canadian company was acknowledged as the injured party in this case. The FCC held that the former executive's breach of his duty of due diligence had caused damage to the company.

The former executive was sentenced to three years' custody. Some of his assets were confiscated and he was ordered to pay damages amounting to CHF12 million plus interest to the Canadian company, which passed this amount on to Switzerland.

Construction 2 Case

A businessman belonging to an eminent North African family had acted as intermediary in a corruption case in Libya involving a Canadian engineering group (see Construction 1 Case). He was convicted by the OAG of complicity in the bribery of foreign public officials in a summary punishment order dated 22 March 2016 and given a suspended pecuniary day-fine of 150 days at CHF2,500 (ie, a total of CHF375,000). Assets in the amount of CHF425,264 were confiscated.

Port Infrastructure Case

In four summary punishment orders of 1 May 2017, the OAG convicted a Belgian company and its subsidiary, who were specialists in port infrastructure development, for failure to take reasonable and necessary organisational measures to prevent bribes to foreign public officials (Article 102 para 2 of the SCC). The investigation revealed a financial set-up whereby the Belgian subsidiary and two individuals paid funds to public officials in Nigeria – in part through companies whose beneficiaries were politically exposed persons (PEPs). These payments were moved through three letterbox companies domiciled in the British Virgin Islands. More than CHF20 million was allegedly paid in bribes between 2005 and 2013. The subsidiary was fined CHF1 million and had to make a compensation payment of CHF36.7 million. The parent company was fined CHF1.

Odebrecht/CNO Case

In a summary punishment order of 21 December 2016, the OAG convicted the Brazilian company Odebrecht SA and its subsidiary Construtora Norberto Odebrecht SA (CNO) for not having taken all reasonable and necessary organisational measures to prevent bribery and money laundering in connection with the Petrobras affair. The conviction, which took the form of a summary punishment order, is part of a co-ordinated conclusion of the proceedings that was initiated by Switzerland but also involved Brazil and the USA.

Odebrecht and CNO were held jointly and severally liable by the OAG to pay CHF117 million to Switzerland in an equivalent claim; the subsidiary was sentenced to a fine of CHF4.5 million and the parent company Odebrecht SA to a fine of CHF0. The reason for imposing a penalty of zero francs on the parent company in this case

was that the company had already been fined USD1 billion for bribery in the USA. This prompted the OAG to waive punishment on the basis of Article 49 para 2 of the SCC.

The company Braskem SA had also paid bribes via the same channels as Odebrecht SA and CNO. Proceedings in Switzerland against Braskem SA have been abandoned, as the company is being held accountable in the USA. However, the Swiss decision to abandon the proceedings involved the company paying compensation of CHF94.5 million in Switzerland. Altogether, the claims against the companies – which were based in Brazil on civil proceedings, in the USA on a guilty plea and in Switzerland on the summary penalty order – amounted to around USD2 billion.

Banknotes Case

Company DD, a subsidiary of company D (a world leader in manufacturing machinery for the printing of banknotes), self-reported a possible breach of Article 102 para 2 in conjunction with Article 322septies SCC in connection with a deal in Nigeria to the OAG on 19 November 2015. This spontaneous initiative was followed in April 2016 by the reporting of further suspicions concerning other deals in Morocco, Brazil and Kazakhstan. The value of the contracts secured by the company in these four countries was CHF626 million and the total paid in bribes was CHF24.6 million. In a summary punishment order of 23 March 2017, company DD was convicted and fined CHF1. It was also required to make a compensation payment of CHF35 million, of which CHF5 million was paid into a fund for the improvement of compliance standards in the banknotes industry.

Gunvor Case

In a summary penalty order from October 2019, the OAG convicted the Geneva commodities trader Gunvor of failing to take all the organisational measures that were reasonable and necessary to prevent its employees and agents from bribing public officials (Article 102 para 2 in conjunction with Article 322septies of the SCC). The investigation revealed that Gunvor's employees and agents bribed public officials in the Republic of Congo and Ivory Coast to gain access to their petroleum markets. The company failed to prevent these acts of corruption owing to serious deficiencies in its internal organisation. Gunvor was fined CHF4 million, which took into account the efforts that had been made since 2012 to improve their compliance and governance practice. In addition, Gunvor must pay compensation of almost CHF90 million, which corresponds to the total profit that Gunvor made from the business in question in the Republic of Congo and Ivory Coast.

SECO Case

In September 2021, the FCC in Bellinzona sentenced a former SECO employee to four years and four months' imprisonment. The OAG had demanded four years. The criminal division found the former SECO employee guilty of multiple forgeries of official documents, multiple taking of bribes, and forgery of documents. The bribery affair came to light in 2014 and is regarded as one of the biggest cases of corruption within the federal administration. The then-head of department at SECO had awarded overpriced IT contracts from 2004 to 2014 and received money, VIP football tickets and travel invitations in return. IT contracts worth almost CHF100 million were involved. In return, the former civil servant allegedly received benefits totalling more than CHF1.7 million.

Three co-accused entrepreneurs, whose companies had profited from the contracts, received conditional prison sentences of up to 22 months and fines.

7.7 Level of Sanctions Imposed

Based on the SCC, the authorities have broad discretion when determining the appropriate sanction. Factors to be considered include the degree of fault, previous convictions, the offender's personal circumstances, and the impact of the sanction on their life (Article 47 of the SCC). By way of an example, in the Port Infrastructure case – which was discussed in **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption** and featured a bribe of more than USD20 million – the accused individuals were convicted to suspended day-fines of between CHF8,500 and CHF360,000. In addition, the OAG confiscated from the accused individuals an amount equivalent to their bonuses.

As for the sanctions imposed on legal entities, reference should be made to the cases discussed in **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**. Although the maximum fine for companies is limited to CHF5 million, a significant sanction may come in the form of an order by the court to forfeit illegal profits obtained through corrupt acts or assets intended to induce or reward the offender (Article 70 of the SCC). If the assets subject to forfeiture are no longer available, the court may uphold a claim for compensation by the State in respect of a sum of equivalent value (Article 71 of the SCC). There is no cap on the amount of money for such forfeiture or compensation claims.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

In 2000, Switzerland signed up to the OECD Convention on Combating Bribery of Foreign Public Officials and in 2006 to the Council of Europe's Criminal Law Convention on Corruption (see **1. Legal Framework for Offences**). Against this backdrop, Switzerland has revised the criminal provisions that relate to the bribing of foreign and domestic officials, as well as to bribery in the private sector.

In September 2017, Switzerland was assessed by the OECD Working Group (referred to as Phase 4 country monitoring). The OECD Working Group detailed the specific achievements and challenges of Switzerland regarding bribery in international business transactions. As an example of positive progress, it outlined the rise in the number of prosecutions and the significant level of enforcement by the OAG.

The OECD Working Group expressed its appreciation of the work of the MROS for its role in detecting cases of foreign bribery in connection with money laundering and the proactive policy on seizure and confiscation. The active involvement of Switzerland in mutual legal assistance and the measures taken to improve co-operation (eg, proactive mutual legal assistance) also received a positive mention.

Nevertheless, they expect Switzerland to improve its enforcement with regard to the bribery of foreign public officials. Several court decisions favouring a restrictive interpretation of bribery offences and the provisions on corporate liability – as well the large number of cases that have been resolved outside court proceedings – were assessed as being negative factors. Fur-

thermore, the OECD Working Group regrets that the AMLA does not apply to lawyers, notaries, accountants and auditors.

The OECD Working Group made various recommendations – among others, to initiate a legal and institutional framework to protect whistleblowers in the private sector. In February 2021, the OECD Working Group published its Phase 4 two-year follow-up report on Switzerland, concluding that Switzerland has:

- fully implemented 11 recommendations;
- partially implemented 18 recommendations; and
- not implemented 17 recommendations.

The OECD Working Group was very pleased with some of the progress made but regrets that Switzerland has not deployed sufficient efforts to implement the recommendations of Phase 4 – in particular, those that also concern whistleblower protection.

Furthermore, in June 2021, the Group of States Against Corruption (GRECO) published the second compliance report during its fourth evaluation round. This second conformity report evaluates the measures taken by the Swiss authorities to implement the recommendations of the fourth evaluation round with regard to preventing corruption when it comes to members of parliament, judges and prosecutors. GRECO concluded that Switzerland has complied with five of the 12 recommendations of the fourth evaluation round in a satisfactory manner. Of the other recommendations, five have been partially implemented and two have not been implemented at all. The two recommendations that have not been implemented concern:

- measures to strengthen and improve quality and objectivity when recruiting federal court judges; and
- the establishment of a disciplinary system to sanction any breaches by federal court judges of their professional duties.

In April 2019, the Interdepartmental Co-ordination Group on Combating Money Laundering and Terrorist Financing (CGMT) published a report on corruption as a predicate offence to money laundering. The expert group came to the conclusion that there is a risk of money laundering from domestic corruption, but this is nonetheless well controlled. The CGMT found that corruption in Switzerland is very low and usually limited to attempted corruption.

The greatest corruption-related risk of money laundering for the Swiss financial centre comes from the corruption of foreign public officials – in particular, those from South America and Western Europe. The Swiss financial centre is assumed to be mainly used for the transfer of assets. Banks are therefore particularly susceptible to this risk of money laundering. Switzerland intends to take various measures to reduce the risk further – for example, the attractiveness of Swiss domiciliary companies is to be reduced by abolishing tax privileges.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

In September 2018, the Federal Council of Switzerland adopted a legislative message to amend the Swiss Code of Obligations and to introduce clear rules and procedures for whistle-blowers (see **6.4 Incentives for Whistle-Blowers**). The proposal was definitively rejected by the National Council (see **6.3. Protection Afforded to Whistle-Blowers**). The majority considered the proposal to be too complex and not effective

enough – and especially impractical and unsuitable for SMEs.

The protection for whistle-blowers in Switzerland will therefore remain inadequate for the next few years. Whistle-blowers will continue to expose themselves to the risk that a court could qualify their report as a breach of:

- the duty of loyalty under labour law; or
- confidentiality obligations of the employee.

Internationally, however, there is growing pressure on Switzerland to create a legal framework for the protection of whistle-blowers and against their wrongful dismissal (see **8.1 Assessment of the Applicable Enforced Legislation**). It is anticipated that Switzerland will have to improve legal protection for whistle-blowers in a few years.

On 31 October 2017, a popular initiative for more transparency in the financing of political activities was launched. Thereupon, the State Political Commission of the Council of States decided to draw up legal regulations providing for the disclosure of the financing of political activities. It took a long time for the Federal Assembly to agree in spring 2021 on new rules aiming to establish transparency regulations for parties' election and voting committees.

In the future, individual donations to parties and committees must be disclosed if they exceed CHF15,000. Campaign funds must also be declared if the voting or election campaign has a budget of more than CHF50,000. In addition, monetary donations from abroad and anonymous donations will be prohibited in the future. As a result of these developments, the initiative committee has decided to withdraw the transparency initiative. It is currently planned that the new rules will be applied for the first time during the National Council elections in autumn 2023. The new legal provisions are specified in an ordinance. The Federal Council proposes that the SFAO should be responsible for the examination and publication of the information and documents that are disclosed.

Kellerhals Carrard has more than 200 professionals working in offices in Basel, Bern, Lausanne, Lugano, Sion, Zurich and Geneva, as well as representation offices in Shanghai and Tokyo. The law firm is one of the largest in Switzerland, with a rich tradition going back to 1885. Its continually expanding white-collar crime, investigation and compliance team has 15 professionals who conduct internal and regulatory investigations – particularly in healthcare, the pharma and life sciences sector, the public sector, and with regard to anti-bribery and AML compliance – as well as supervision in the financial services industry. In 2018, the team led the highly publicised investigation into Postbus. The white-collar crime department has extensive experience in providing advice and court representation for a wide variety of business crime matters. Kellerhals Carrard's compliance specialists have broad experience of advising companies from various industries on proper measures to address any compliance deficiencies, including with regard to anti-bribery and anti-corruption.

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Trends and Developments

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What (and Who) is a De Facto Foreign Public Official? Recent Swiss Case Law Reaches A Verdict

The main anti-corruption development in Swiss case law in 2022 concerns the definition of a de facto foreign public official.

In Decision BB.2022.3 of 18 July 2022, the Lower Appeals Chamber of the Federal Criminal Court (FCC) reasserted the conditions under which a family member of a high-ranking official (in this instance, Gulnara Karimova, daughter of Islam Karimov, President of Uzbekistan from 1991 until his death in 2016) may be considered as a de facto foreign public official under Article 322septies of the Swiss Criminal Code (SCC) (punishing foreign bribery). From a procedural perspective, this decision also brings to light the tools used by Swiss authorities in prosecuting the laundering of proceeds of foreign bribery and raises the issue of the limits of relying on foreign decisions and criminal orders in that context.

Decision BB.2022.3 was issued in the context of a criminal investigation initiated on 5 July 2012 by the Office of the Attorney General of Switzerland (OAG) against several Uzbek nationals for forgery of documents (Article 251 of the SCC) and money laundering (Article 305bis of the SCC), which it subsequently extended to include Gulnara Karimova for money laundering (Article 305bis of the SCC) and disloyal management (Article 158 of the SCC).

By criminal order of 22 May 2018, the OAG found one of the Uzbek nationals guilty of the offenses of forgery of documents (Article 251 of the SCC) and money laundering (Article 305bis of the SCC) and sentenced her to a monetary penalty. In the same decision, it also ordered the forfeiture of the assets deposited in several bank accounts, including USD373 million in a Swiss bank account in the name of a Gibraltar company named Takilant Ltd, of which Gulnara Karimova was allegedly the ultimate beneficial owner.

Under Article 352 of the Swiss Criminal Procedure Code (SCPC), the public prosecutor may issue a criminal order if the person under investigation has accepted responsibility for the offence in the preliminary proceedings – or if that responsibility has otherwise been satisfactorily established – and the public prosecutor regards any of the following sentences as appropriate:

- a fine;
- a monetary penalty of no more than 180 daily penalty units; or
- a custodial sentence of no more than six months.

Forfeiture orders may be issued as part of the criminal order.

Criminal orders are not public and are not subject to judicial review unless one of the parties (or a person affected by the order) objects to the order – in which case, the order becomes the indictment before the criminal court of first instance.

Even though the legislator had intended to use another procedure (the accelerated procedure)

for plea bargaining, it should be noted that – in practice – criminal orders are very often used in white-collar crime proceedings to conclude settlements between the public prosecutor and the person under investigation. In that context, the facts admitted by the accused are often negotiated with the public prosecutors.

In contrast, the accelerated procedure of Article 358ff of the SCPC may be instituted provided that:

- the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims; and
- the public prosecutor requests a custodial sentence of up to five years.

In the accelerated procedure, the criminal court of first instance must assess the evidence at hand and be convinced that the offences were indeed committed and the sentencing is reasonable. Judgments issued in accelerated procedures are public, even though the name of the parties are usually redacted.

In the case in question, Takilant – which had not participated in the negotiation of the 22 May 2018 criminal order – objected to the criminal order inasmuch as it ordered the forfeiture of its bank account, and the proceedings continued before the Criminal Chamber of the FCC.

In order to assess whether the forfeiture order should be confirmed, the Criminal Chamber had to determine whether Takilant's assets were the proceeds of money laundering (Article 305bis of the SCC). In that context, the alleged predicate offence was bribery of a foreign public official under Article 322septies (namely, that – in her capacity as a de facto public official for the Republic of Uzbekistan – Gulnara Karimova had extorted bribes from international telecommunications companies to allow them to enter into the Uzbek telecommunications market between 2004 and 2012).

It its 86-page order SK.2020.49 dated 17 December 2021, the Criminal Chamber found that Gulnara Karimova should be considered a de facto foreign public official.

The criteria to apply, according to the Criminal Chamber (recital 4.2.1, page 40), were as follows:

- "a de facto public official is a person who performs a task assigned to the State, without a legal link between the two. He derives the power he exercises over the state decision-making process from the personal link, particularly of kinship, which unites him to the political authority, which favours or at least tolerates this situation";
- "[t]his power of appreciation stems from the privileged relationship he has with the person who directs the public body concerned"; and
- "[t]his situation may arise particularly in authoritarian (or, a fortiori, totalitarian) regimes where the rule of law is deficient and power is monopolised by one person (the autocrat) or a group of individuals (the oligarchs)".

In reaching its conclusion that Gulnara Karimova was a de facto public official, the Criminal Chamber essentially relied on foreign criminal investigations (notably, in Sweden, the Netherlands, France and the USA) – as well as criminal orders issued by the OAG against other Uzbek nationals.

However, the Criminal Chamber only confirmed part of the forfeiture order (USD293.6 million) and ordered the restitution to Takilant of

USD69.2 million, which were not demonstrated to be proceeds of passive foreign bribery.

Takilant appealed against the 17 December 2021 order to the Lower Appeals Chamber of the FCC.

In a decision dated 18 July 2022, the Lower Appeals Chamber admitted the appeal and referred the case back to the Criminal Chamber.

The Lower Appeals Chamber found that the Criminal Chamber had made too broad an interpretation of the concept of a de facto public official, in that it went beyond the two precedents upon which it had relied – namely, SK.2014.24 of 1 October 2014 and SK.2018.38 of 28 August 2018. These were criminal judgments issued in the context of accelerated proceedings, which respectively concerned:

- the son of Libya's former ruler Muammar Khadafi; and
- the nephew of the Democratic Republic of the Congo's President Joseph Kabila.

In both precedents, the head of states' relatives held both de facto and de iure functions in the State apparatus and were in a position to effectively influence the decisions in question.

According to the Lower Appeals Chamber, this was not the case for Gulnara Karimova: "The notion of the performance of a public task by [Gulnara Karimova] in the field of telecommunications is not established to the satisfaction of the law, so that the latter's status as a de facto public official is not established either."

The following excerpts are from the Lower Appeals Chamber's summary of The Criminal Chamber's findings.

- "As for the concept of de facto public official, the Criminal Chamber accepted it, based on several foreign judgments and decisions. Thus, according to the recitals of the Criminal Chamber order dealing with the acts in question (regardless of their probative value), the de facto public official status of [Gulnara Karimova] would allegedly derive from the fact that, through her family relationship with the then President of Uzbekistan, she had influence over the telecommunications market. Her power was based on her privileged relationship with her father (recital 4.2.3.1.2, page 43). As for the other acts and passages of these acts cited, they merely state that [Gulnara Karimova] had the status of a de facto public official, was a "member of the government" or a "civil servant", without explaining why. [Gulnara Karimova] also held "various official functions within the Uzbek state as well as with the United Nations as the Permanent Representative of the Republic of Uzbekistan, making her – according to the Criminal Chamber – a de jure public official at the time of the alleged facts. The Criminal Chamber adds that [Gulnara Karimova] is the daughter of a former autocrat, whose regime is generally conducive to the emergence of de facto public officials. Referring to one of the definitions of a politically exposed person (PEP) contained in the federal law of 10 October 1997 concerning the fight against money laundering and the financing of terrorism, the Criminal Chamber admits that [Gulnara Karimova] must certainly have been considered as such and concludes that it was firmly convinced that [Gulnara Karimova] was a public official. The relevance of the use of one of the legal definitions of the notion of PEP escapes the Chamber of Appeal's comprehension. Such a demonstration and, in particular, the firm belief of the Criminal Chamber are insuffi-

cient to establish [Gulnara Karimova]'s status as a de facto or de jure public official in the Uzbek telecommunications market between 2005 and 2012. There is no evidence of a concrete state role in the telecommunications sector. The only example is the one attributed to it by the Criminal Chamber, through its understanding of the concept of de facto public official." (Recitals, 2.7.1.)
- "However, these elements do not allow to establish that the counterpart expected from and/or provided by [Gulnara Karimova] was an act (or an omission) in relation to an otherwise undetermined state activity that she had exercised and that depended on her discretionary power – ie, on her decision-making power. As it stands, they do not allow us to exclude that [Gulnara Karimova]'s role was anything other than that of a private intermediary to influence the decisions of the UzACI's public officials." (Recitals, 2.7.3.)

Consequently, the Lower Appeals Chamber found that Gulnara Karimova was not a de facto foreign public official and that foreign passive bribery could thus not constitute a predicate offence for the offence of money laundering that led to the forfeiture of Takilant's assets.

However, the Lower Appeals Chamber indicated that the Criminal Chamber should have examined whether or not Gulnara Karimova had committed acts of active bribery of Uzbek officials, as these may – if proven – constitute a predicate offence to money laundering.

Therefore, when admitting the appeal, the Lower Appeals Chamber referred the case back the case to the Criminal Chamber for a new decision.

This decision deals with three issues:

- the definition of a de facto public official;
- the use of foreign proceedings to prove bribery; and
- the effect of criminal orders on third parties.

Regarding the concept of a de facto foreign public official, it should be noted that the two instances where it was admitted (in 2014 and 2018) were accelerated procedures before the Criminal Chamber and were unopposed. Decision BB.2022.3 was thus the first time that the issue of a de facto foreign public official was brought before the Lower Appeals Chamber. The decision gives a firmer standing to the definitions and concepts developed in judgments SK.2014.24 of 1 October 2014 and SK.2018.38 of 28 August 2018. It also reinforces how high the bar is for establishing that the relative of a high-ranking public official is a de facto public official, as it must be demonstrated that the relative is in a position to:

- effectively influence the foreign state's decisions; and
- perform a public task in the context of that decision-making process.

Decision BB.2022.3 also brings to light the risk of proving foreign bribery by reference to foreign proceedings, as they may have a different definition of a de facto public official. The Criminal Chamber discussed at length the decisions reached in France, Sweden, the Netherlands and the USA, in which Gulnara Karimova was found to be a de facto public official. The Lower Appeals Chamber gave very little regard to those decisions, however, and focused on the definitions issued in the 2014 and 2018 judgments.

Lastly, decision BB.2022.3 raises the question of the use of criminal orders and their effects on third parties. The criminal order of 22 May 2018

(which is not a public document but which content was reported in the media) was negotiated with the convicted person's lawyer without the participation of Takilant, even though the order forfeited its assets. The Criminal Chamber relied notably on evidence given by individuals who negotiated criminal orders with the OAG and admitted to laundering the proceeds of corrupt activities; however, they did not provide details on the specific crimes committed.

As mentioned earlier, criminal orders are not public and undergo no judicial review. Therefore, although they are easier to issue than going through an accelerated procedure, this case is a good example of their ultimate lack of evidentiary power when contested by third parties.

Monfrini Bitton Klein (MBK) was founded in Geneva by Enrico Monfrini in 1978 and became renowned in international business law, complex litigation and arbitration. From the end of the 1990s The firm began to focus on asset recovery and white-collar crime from the late 1990s onwards and went on to represent individuals and liquidators in bankruptcies and victims of fraud and Ponzi schemes – as well as representing foreign governments in grand corruption asset-recovery proceedings, companies. The firm changed its name to Monfrini Bitton Klein in 2017 and became a litigation-only practice in order to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime, anti-corruption and cross-border bankruptcy, in addition to the enforcement of foreign judgments and arbitral awards. MBK is the representative for Switzerland in ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialist correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

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1. Legal Framework for Offences

1.1 International Conventions

The UK is a signatory of the United Nations Convention against Corruption, which is the only legally binding universal anti-corruption instrument.

The UK is also signed up to the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), which focuses on the "supply side" of bribery.

Furthermore, despite its departure from the European Union, the UK remains a party to the Council of Europe's Criminal Law Convention on Corruption, and the EU Convention against Corruption involving Officials.

1.2 National Legislation

The Bribery Act 2010 is the main statute for corruption offences by individuals or companies.

In contrast to the US Foreign Corrupt Practices Act 1977 (FCPA), the Bribery Act covers bribery in both the private and public sectors, and prohibits any facilitation payments. The Bribery Act is often described as the leading global standard for anti-corruption law and is therefore important to multinational companies.

Since the Bribery Act became law, other reforms include the introduction of Deferred Prosecution Agreements (DPAs) (through the Serious Crime and Courts Act 2013) and a series of aggressive enforcement actions against corporates. To date, the Serious Fraud Office (SFO) has secured 12 DPAs.

The most significant feature of the current framework is the strict liability corporate offence of failure to prevent bribery (Section 7 of the Bribery Act). This represented a break from tradition in English law, which had only imposed criminal liability on corporates where it could be shown that the organisation's directors or senior management knew of the criminal conduct at the relevant time.

Typically, investigations into bribery interact with the money laundering regime, which is governed by the Proceeds of Crime Act 2002 (POCA). Any benefit flowing from a bribe is likely to constitute "criminal property" under POCA; consequently, any company or individual dealing with the proceeds of bribery may be exposed under POCA. Those engaged in the regulated sector – including financial services firms, accountants and lawyers – have onerous obligations and direct liability under POCA as they must report known or suspected money laundering by third parties; failure to do so is itself a criminal offence. Individuals in the regulated sector may be convicted under POCA even where they did not subjectively suspect money laundering but where, objectively, they had reasonable grounds for doing so.

The Criminal Finances Act 2017 created additional powers to investigate potential proceeds of crime, including the introduction of the unexplained wealth order (UWO) regime (see **8.2 Likely Changes to the Applicable Legislation of the Enforcement Body**) and additional civil powers to recover proceeds of crime. It also extended UK anti-money laundering laws to tackle terrorist funding, and created corporate offences for facilitating tax evasion.

Bribery cases often also involve subsidiary issues regarding fraud (Fraud Act 2006), com-

mon law conspiracy to defraud and/or false accounting (Theft Act 1968).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The key guidance is as follows:

- the Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with them from Bribing (Section 9 of The Bribery Act 2010), published by the Ministry of Justice in March 2011 (the MoJ Guidance);
- the Bribery Act 2010: Joint Prosecution Guidance of The Director of The Serious Fraud Office and The Director of Public Prosecutions, published March 2011 (the Joint Prosecution Guidance);
- the Code for Crown Prosecutors, October 2018;
- the Sentencing Council Fraud, Bribery and Money Laundering Offences: Definitive Guideline, effective 1 October 2014; and
- the SFO/DPP Joint Guidance on Corporate Prosecutions and the Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013, published 2014 (the DPA Code of Practice).

1.4 Recent Key Amendments to National Legislation

In April 2021, the UK implemented the Global Anti-Corruption Sanctions Regulations 2021. The new sanctions regime was foreshadowed by the UK Anti-Corruption Plan 2017–2022. Specifically, the Regulations enable the UK government to impose asset freezes and travel bans on individuals and entities determined to have committed, or to have been involved in, serious corruption – specifically the bribing or misappropriation of property from a foreign public official, or benefiting from such bribery and misappropriation. To date, sanctions under this regime have been imposed on 27 individuals from Russia, South Africa, India and a number of South American nations.

More recently, the Economic Crime (Transparency and Enforcement) Act 2022 (Economic Crime Act) received royal assent in March 2022 and introduced registration and information requirements for overseas entities buying or holding UK property, in an effort to improve the transparency of UK property ownership and to deter criminals seeking to launder and hide proceeds of crime within the UK. It also updated the financial sanctions and UWO regimes.

The UK government has also recently published its proposed Economic Crime and Corporate Transparency Bill. If passed, the bill will likely enter into force in 2023, setting out enhanced powers for regulators and law enforcement, including the SFO and the National Crime Agency (NCA). It will also reform Companies House powers, establish additional verification requirements for company ownership and control, and create new powers to seize and recover crypto-assets.

2. Classification and Constituent Elements

2.1 Bribery

The Bribery Act sets out four main offences:

- bribery (Section 1) – the offering, promising or giving of a bribe (commonly referred to as "active bribery");
- requesting or receiving a bribe (Section 2) – the requesting, agreeing to receive or

accepting of a bribe (commonly referred to as "passive bribery");
- bribery of a foreign public official (Section 6) – bribery of a foreign public official to obtain or retain business, or a business advantage; and
- failure to prevent bribery (Section 7) – a corporate offence of failing to prevent bribery by an associated person on behalf of a relevant commercial organisation. This is a strict liability offence, meaning that the prosecutor need not prove that the company, acting through its senior management, possessed any particular state of mind at the time of the bribery offence.

Bribery and Requesting or Receiving a Bribe

It is an offence under Section 1 for a person to offer, promise or give a bribe. It is equally an offence under Section 2 to ask for, agree to or receive a bribe.

A bribe is a financial or other advantage given to another person, and it must be intended that the bribe should induce or reward improper conduct, or that the acceptance of the bribe in itself would be improper conduct. The improper conduct must relate to the exercise of a public function or be carried out in a business or employment context. The conduct must also be in breach of an expectation to act in good faith, impartially or in breach of an expectation arising out of the person's position of trust (see Sections 3, 4 and 5 of the Bribery Act).

It is important to note that:

- the offence can arise even where no financial or other advantage is actually given or received;
- both offences can be committed indirectly – ie, through third parties. The bribe can be offered or accepted through an intermediary, and the person performing the improper conduct need not be the same person to whom the bribe is offered or given; and
- the offences apply to conduct outside the UK – the Bribery Act has wide extra-territorial effect. The bribe does not need to be agreed, paid or received in the UK and the conduct that is, or is intended to be, performed improperly need not be performed in the UK.

Definition of a Bribe

A bribe is "a financial or other advantage", which is not defined in the Bribery Act but, according to the Joint Prosecution Guidance and the explanatory notes to the Act, the term is a matter of fact for the jury to determine, based on its ordinary meaning.

Facilitation Payments

Although some jurisdictions (eg, the USA) tolerate genuine facilitation payments, they remain unlawful in the UK, and can be an offence under Sections 1 or 6 of the Bribery Act. Where that offending involves a corporate entity, it will be exposed to Section 7. However, it is important to note that prosecutors retain an element of discretion. In deciding whether to prosecute for a facilitation payment, authorities will consider the Full Code Test set out in the Code for Crown Prosecutors, the Joint Prosecution Guidance and, where relevant, the joint Guidance on Corporate Prosecutions.

The Full Code Test requires that prosecutors consider whether there is sufficient evidence to provide a realistic prospect of conviction and, if so, whether a prosecution is required in the public interest. The prosecution should proceed only if both stages of the Full Code Test are met. The Joint Prosecution Guidance sets out specific public interest considerations in relation to facilitation payments and factors tending in

favour of and against prosecution. Factors tending in favour of prosecution include:

- large or repeated payments;
- payments that are planned or a standard way of conducting business;
- payments that indicate an element of active corruption of the official; and
- where an appropriate policy regarding facilitation payments was not correctly followed.

Factors tending against prosecution include:

- a single small payment likely to result in only a nominal penalty;
- payments identified through a genuinely proactive approach involving self-reporting and remedial action;
- where a clear and appropriate policy regarding facilitation payments was correctly followed; and
- where the payer was in a vulnerable position given the circumstances in which the payment was demanded.

The MoJ Guidance recognises (at paragraph 48) that there may be circumstances in which a person has no realistic alternative but to make payments, and suggests the common law defence of duress is available where payments are made to prevent "loss of life, limb or liberty". Whilst those are narrow circumstances, companies operating in relevant industries and/or locations should ensure that their anti-bribery policies and training include clear guidance on duress.

Failure to Prevent Bribery

Section 7 of the Bribery Act introduced strict corporate criminal liability for any corporate entity (specifically, a "relevant commercial organisation" – an RCO, discussed below) where bribery is committed by an "associated person" (AP) of that business. The only defence is to demonstrate that the RCO had "adequate procedures" to prevent bribery by its associated persons.

To convict under Section 7, the prosecution must prove that:

- a person was associated with a relevant commercial organisation (an AP of an RCO);
- the AP committed a bribery offence; and
- in doing so, the AP intended to obtain or retain business or a business advantage for the RCO.

The Section 7 offence only relates to the failure to prevent acts of bribery under Sections 1 and 6; it does not apply to the demand side of bribery – ie, the request or receipt of a bribe under Section 2.

The RCO can be liable under Section 7 even where the AP was not convicted of the underlying offence. However, there must be sufficient evidence to prove that an offence under Section 1 or 6 of the Bribery Act was committed.

All UK companies, and foreign companies that carry on part of a business in the UK, are caught by the definition of an RCO. Courts in the UK will have jurisdiction over an RCO regardless of where in the world the underlying bribery was committed.

A person is associated with the RCO if they perform services for or on behalf of the RCO, in whatever capacity. The definition of an AP (in Section 8 of the Bribery Act) is broad and includes an employee, agent or subsidiary. Whether that person "performs services for or on behalf of" the RCO will be a matter of fact in each case, depending upon the circumstances. The law presumes that an employee of an

RCO is an AP; that presumption is rebuttable. The MoJ Guidance (at paragraphs 42 and 43) emphasises the importance of evidence as to what the associated person intended when committing the bribery.

Bribery of Foreign Public Officials

It is an offence to bribe a foreign public official (which is defined broadly in Section 6) with the intention to influence that person in their official capacity, but only where the bribe is intended to obtain or retain business or a business advantage.

If the written law applicable to the foreign public official allows or requires them to be influenced by a financial or other advantage, no offence will be committed.

This offence can be committed where the bribe is offered through a third party. Note that a Section 6 offence does not require intention by the briber that the foreign public official should perform their role improperly; if the evidence shows that the briber intended to influence the official to obtain or retain a business advantage then the briber will be guilty of the offence.

Hospitality and Promotional Expenditures

The MoJ Guidance recognises that bona fide, reasonable and proportionate hospitality and promotional expenditure is an important part of doing business. However, such expenditure can constitute a bribe if it is intended to induce or encourage improper performance by the recipient or, in the case of foreign public officials, if it is intended to influence the recipient in their official role to secure a business advantage. The Joint Prosecution Guidance notes that prosecutors need to consider the full circumstances of each case; where hospitality is lavish and beyond what may be reasonable in those circumstances, or where there were attempts to conceal it, there will be a greater inference that it was intended as a bribe.

Bribery Between Private Parties in a Commercial Setting

Sections 1, 2 and 7 of the Bribery Act (see above) apply to bribery whether it occurs in the public sector or between private parties in a commercial setting. Section 16 of the Bribery Act specifically provides that the Act "applies to individuals in the public service of the Crown as it applies to other individuals".

2.2 Influence-Peddling

As previously noted, the definition of bribery in the substantive offences includes "financial or other advantage". Similarly, the definition of the bribe recipient's intended "improper performance" could well catch "influence-peddling". It would, however, be a matter of fact to be determined by a court as to whether any exchange of influence amounted to some kind of "other advantage".

2.3 Financial Record-Keeping

The Bribery Act contains no specific accounting or book-keeping offences, but the Companies Act 2006 requires companies to keep adequate books and records. Specifically, failure to keep adequate accounting records constitutes an offence under Sections 386 and 387 of the Companies Act 2006.

In addition, the way bribes are accounted for will often constitute a false-accounting offence under Section 17(1) of the Theft Act 1968 – ie, the falsification of accounting records with the intent to gain for oneself, or to cause loss to another.

2.4 Public Officials

Public officials who misappropriate or misuse funds are liable to be prosecuted for several crimes, including offences under the Fraud Act 2006. They may also be charged with misconduct in public office, which is a complex and archaic offence that has recently been subject to scrutiny by the Law Commission. The offence of misconduct in public office arises where a public officer, acting as such, wilfully neglects to perform their duty and/or wilfully misconducts themselves to such a degree as to amount to an abuse of the public's trust in the office-holder without reasonable excuse or justification.

A public officer may find themselves charged with fraud (if they benefited in some way from their alleged criminality) or with misconduct in public office. If charged with a fraud offence, their status as a public official will be considered as an aggravating factor, justifying a higher sentence than for a private citizen.

2.5 Intermediaries

The use of intermediaries is an important, and often pivotal, issue in many corruption cases. Each of the Bribery Act offences could arise through the use of an intermediary. The Section 1, 2 and 6 offences expressly include use of a third party for bribery, requesting or receiving a bribe or bribery of a foreign public official. Whilst each case will turn upon its own facts, intermediaries are likely to be "associated persons" for the purposes of Section 7, thereby creating corporate liability.

3. Scope

3.1 Limitation Period

There are no limitation periods for the prosecution of indictable offences. However, only offences occurring on or after 1 July 2011 will be prosecuted under the Bribery Act; offences committed before that date are covered by the common law and statutory offences, including the (now repealed) Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.

Cases such as the Rolls-Royce DPA demonstrate that conduct of a historic nature can and will be pursued; the Statement of Facts in that case covered criminal conduct spanning the period between 1989 and 2013.

3.2 Geographical Reach of Applicable Legislation

The Bribery Act has extensive extra-territorial jurisdiction; it catches circumstances where the alleged offending occurred wholly outside the UK.

If the person committing the act or omission has a "close connection" with the UK, it is irrelevant that their conduct occurred entirely outside the UK. Under Section 12(4), a close connection with the UK includes where the person is a British national, a British citizen, ordinarily resident in the UK, or a body incorporated under UK law.

The corporate offence (Section 7) applies to any RCO (wherever incorporated) that carries on any part of its business in the UK. An RCO could be prosecuted for failure to prevent bribery even where the bribery takes place wholly outside the UK and the benefit or advantage to the company is intended to accrue outside the UK.

However, the Bribery Act does not define what constitutes "part of a business", although the MoJ Guidance states (at paragraph 36) that organisations need a "demonstrable business presence" in the UK. The MoJ Guidance notes,

for example, that either having a UK subsidiary or being listed on the LSE would not in itself mean a company was carrying on a business or part of a business in the UK for the purposes of Section 7.

The following are examples of Section 7 cases that centred upon conduct overseas, often through an overseas office or subsidiary of the UK company.

- Sweett Group plc, the first corporate convicted under Section 7, pleaded guilty in December 2015. Its subsidiary in the United Arab Emirates had made corrupt payments to two senior directors at Al Ain Ahlia Insurance Company to secure a contract for construction of the Rotana Hotel in Abu Dhabi.
- Standard Bank plc entered into a DPA in relation to its Tanzanian sister company, Stanbic, and payments to a local partner in Tanzania. Although Standard Bank had no interest in, oversight or control over Stanbic, the latter was an AP because it was performing services on Standard Bank's behalf and for its benefit; both companies stood to benefit from the transaction in relation to which the bribe was paid.
- Rolls-Royce plc and Rolls-Royce Energy Systems, Inc entered into a DPA in January 2017 in respect of a suspended charge under Section 7 (amongst other charges) regarding bribes paid by intermediaries and Rolls-Royce employees in Indonesia, Nigeria, China and Malaysia.
- In January 2020, the SFO secured a DPA with Airbus SE. The DPA charged Airbus with five counts of the failure to prevent offence across five jurisdictions.
- In July 2021, the SFO entered into a DPA with Amec Foster Wheeler Energy Limited (AFWEL). AFWEL admitted ten offences of corruption relating to the use of corrupt agents in the oil and gas sector by its legacy business. The offences spanned from 1996 to 2014 and took place across the world, in Nigeria, Saudi Arabia, Malaysia, India and Brazil. Under the terms of the DPA, AFWEL agreed to pay a financial penalty and costs amounting to GBP103 million in the UK, which formed part of the USD177 million global settlement with UK, US and Brazilian authorities.
- In October 2021, London-based energy company Petrofac Limited pleaded guilty to failing to prevent executives from using agents to bribe officials to win oil contracts in Iraq, Saudi Arabia and the United Arab Emirates between 2011 and 2017. The company admitted several counts of failing to prevent bribery contrary to Section 7 of the Bribery Act and was ordered to pay a confiscation order of GBP22,836,985 and a financial penalty in excess of GBP47 million.
- In June 2022, Glencore Energy (UK) Ltd pleaded guilty to five counts of bribery under Section 1 of the Bribery Act and two counts of the Section 7 failure to prevent offence. The offences related to the company's operations in Cameroon, Equatorial Guinea, Ivory Coast, Nigeria and South Sudan.

3.3 Corporate Liability

Individuals and corporates can commit the offences of active bribery, passive bribery and bribery of a foreign public official under Sections 1, 2 and 6 of the Bribery Act.

Because these offences require mens rea, the liability of a corporate for the offences must be established through the "identification principle", which establishes that only the acts and state of mind of those who represent the "directing mind and will of the corporation" can be imputed to the corporation itself (Lennard

v Asiatic Petroleum [1915] AC 705). The case of Tesco Supermarkets Ltd v Nattrass [1972] AC 153 defined the directing mind and will of a company as extending to the "board of directors, the managing director and perhaps other superior officers of the company who carry out functions of management and speak and act as the company". Under the Bribery Act, where the directing mind and will of the company have the necessary criminal intent, the corporate will be directly liable for the offences under Sections 1, 2 and 6. That contrasts with the strict corporate liability under Section 7.

Where an offence under Section 1, 2 or 6 of the Bribery Act is committed by a body corporate and it can be proved that the offence was committed with the consent or connivance of a senior officer or a person purporting to act in that capacity, that individual is also guilty of the offence under Section 14. However, where the offending was outside the UK, they will only be liable if they have a "close connection" to the UK under Section 12 of the Bribery Act.

By contrast, only an RCO can be liable for the offence of failure to prevent bribery by an associated person under Section 7. The RCO will incur liability for an offence or offences by the AP unless it can prove it had adequate procedures in place to prevent bribery, even where it was not aware of the offence. See **4.1 Defences** for further information.

DPAs remain an attractive option for organisations, as they avoid a time-consuming, costly and damaging prosecution and trial. In essence, a DPA allows an organisation to take a one-off financial hit, remove uncertainty around its future and avoid an adverse impact on its share price.

4. Defences and Exceptions

4.1 Defences

For the adequate procedures defence (Section 7(2) of the Bribery Act) to succeed, the court must be satisfied that the company had adequate procedures in place to prevent bribery at the time of the relevant conduct.

Those procedures must be proportionate to that organisation's bribery risks and to the nature, scale and complexity of its activities. The MoJ Guidance recognises that no anti-corruption measures can prevent all instances of bribery, and specifies the six principles that should inform the procedures implemented by a relevant commercial organisation:

- proportionate procedures;
- top-level commitment;
- risk assessment;
- due diligence;
- communication (including training); and
- monitoring and review.

It is critical that the procedures in place are effective in practice.

In March 2018, Skansen Interiors Limited was the first contested prosecution of a corporate defendant for offences under Section 7 of the Bribery Act. In that case, the company unsuccessfully relied on the defence of adequate procedures. Skansen contended that, although it did not have a specific anti-bribery and corruption policy in place at the time of the alleged offending, there were a number of procedures for maintaining transparency and integrity in its business transactions. There were also anti-bribery clauses in the company's relevant contracts, and the system for approving and settling invoices required multiple levels of internal

approval. Furthermore, evidence adduced at trial demonstrated that the company's employees were aware that bribery was prohibited. Skansen therefore argued that these checks and balances were sufficient for a company of its size (30 employees), given its localised operation. The jury, however, decided that the controls in place were insufficient and returned a guilty verdict.

As previously mentioned, the common law defence of duress is available where payments are made to prevent "loss of life, limb or liberty".

4.2 Exceptions

There are no further exceptions to the statutory defences outlined in **4.1 Defences**.

4.3 De Minimis Exceptions

There are no de minimis exceptions to the offences in the Bribery Act. However, when considering whether prosecution is in the public interest, a prosecutor may decide against enforcement where the bribe was of a low value. As previously noted in relation to facilitation payments, the Joint Prosecution Guidance includes "a single small payment likely to result in only a nominal penalty" amongst the factors tending against prosecution.

4.4 Exempt Sectors/Industries

There are no sector or industry exemptions.

4.5 Safe Harbour or Amnesty Programme

See the defence of adequate procedures under **4.1 Defences** and the outline of the self-reporting regime and DPAs under **5.1 Penalties on Conviction**.

5. Penalties

5.1 Penalties on Conviction

The maximum penalty for an individual convicted on indictment under the Bribery Act is ten years' imprisonment and/or an unlimited fine.

A corporate convicted of an offence under the Bribery Act faces an unlimited fine. Conviction is likely to result in a compensation order for any loss resulting from the offence and/or the confiscation of any criminal proceeds. An order to reimburse the cost of the investigation and prosecution of the offence is also likely.

When considering what penalty to impose, a court must follow any sentencing guidelines issued by the Sentencing Council or its predecessor, the Sentencing Guidelines Council. The Sentencing Council has, for example, issued guidelines in relation to three of the offences created by the Bribery Act, and a sentencing court will be bound to apply them. Where there is no sentencing guideline in existence, courts must follow any guidance provided by the Court of Appeal (Criminal Division) and consider the factors outlined in Part 12 of the Criminal Justice Act 2003.

Even where there are no criminal proceedings, it is open to a prosecutor to apply for a civil recovery order under Part 5 of POCA in order to recover property obtained through unlawful conduct. In practice, however, it will rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order because it would be inconsistent with the basic principles of justice for the criminality of corporations to be glossed over by the imposition of a civil (as opposed to a criminal) sanction.

The DPA Code of Conduct suggests that the appropriateness of a civil recovery order should be considered where neither limb of the evidential stage can be met by the conclusion of DPA negotiations, and it is not considered appropriate to continue the criminal investigation.

Previous Corporate Penalties

In July 2016, the SFO entered into a DPA with Sarclad Ltd, a UK technology company based in Rotherham, regarding the failure to prevent a bribery offence. Sarclad paid a total of GBP6,553,085, comprised of disgorgement of gross profits of GBP6,201,085 and a GBP352,000 financial penalty.

In January 2017, Rolls Royce plc paid a total of GBP497.25 million plus interest and the SFO's costs of GBP13 million (as well as large sums in settlement with enforcement authorities in the US and Brazil) in relation to offences including conspiracy to corrupt, false accounting and failure to prevent bribery. In that case, the conduct covered by the DPA spanned three decades, involved multiple parts of the business and took place across seven jurisdictions.

In April 2017, Tesco Stores Limited entered into a DPA with the SFO in relation to creating a false account of its financial position. Tesco paid a total of GBP128,992,500 and the SFO's costs of GBP3,069,951.

In July 2019, the SFO entered into a DPA with Serco Geografix Ltd in relation to fraud and false accounting offences that concerned misleading the Ministry of Justice about the Serco parent company's profits. Serco paid a financial penalty of GBP19.2 million and the SFO's costs of GBP3.7 million. This was in addition to the GBP12.8 million paid by Serco to the Ministry of Justice as part of a civil settlement in 2013.

In October 2019, the SFO agreed a DPA with Güralp Systems Ltd (GSL), covering the offence of conspiracy to make corrupt payments, contrary to Section 1 of the Criminal Law Act 1971. The terms of the agreement required GSL to pay over GBP2 million and to co-operate with the SFO to ensure compliance with the Bribery Act.

In January 2020, the SFO agreed a record-breaking DPA with Airbus SE relating to five counts of the failure to prevent offence across five jurisdictions. The DPA is the world's largest resolution for bribery, amounting to a total penalty of almost EUR3.6 billion, EUR991 million of which was to be paid to the SFO by way of disgorgement of profits, a fine and the SFO's legal costs. It is also thought to be the first co-ordinated settlement agreement between the UK, US and French authorities.

In October 2020, the SFO entered into a DPA with Airline Services Limited (ASL), under which ASL accepted responsibility for three counts of failing to prevent bribery contrary to Section 7 of the Bribery Act, arising from the company's use of an agent to win three contracts to refit commercial airliners for Lufthansa, worth more than GBP7.3 million. The agent acting for ASL was also working as a project manager for Lufthansa and was therefore privy to commercially sensitive information about potential competitors to ASL and exploited this information to influence and advantage ASL's own tender bids. Under the DPA, ASL was required to pay GBP2,979,685, consisting of a financial penalty of GBP1,238,714, disgorgement of profits representing the gain of the criminal conduct of GBP990,971, and a contribution to the SFO's costs of GBP750,000. The company is also obliged to co-operate fully with the SFO and any other domestic or foreign law enforcement agency.

On 19 July 2021, the SFO entered into two DPAs with two UK companies (which at the time of writing have not been named due to reporting restrictions) for bribery offences contrary to Sections 1 and 7 of the Bribery Act. Under the DPAs, the companies are required to pay GBP2,510,065, by way of disgorgement of profits and financial penalty in relation to bribery connected with multimillion-pound UK contracts.

The conviction of Skansen in April 2018 for failure to prevent bribery represents an anomaly in corporate sentencing. Skansen was a dormant company that had, prior to 2014, traded in office interior design. Following a change of senior management in early 2014, the company discovered a number of irregular payments in respect of a number of its contracts. The subsequent internal investigation resulted in a self-report to the City of London Police and other law enforcement authorities. Although the company ceased to trade shortly thereafter, the Crown Prosecution Service (CPS) elected to prosecute, despite the company's proactive approach to (and assistance in) the investigation. Because Skansen was a dormant company with no assets, the court could only impose an absolute discharge, which immediately became spent. The rationale for prosecution of a dormant company where there is no prospect of any meaningful penalty on conviction has been the subject of debate. The CPS, however, justified the prosecution on the basis that it would send a message to the industry about the importance of putting anti-bribery procedures in place.

Skansen should not, however, be viewed as an indicator of the penalties likely to be imposed on trading companies that are convicted for Section 7 offences. Other consequences may include disqualification of an individual to act as a company director and exclusion from projects funded by the World Bank or its partner development banks and cross-debarment. A conviction under Section 1, 2 or 6 of the Bribery Act will lead to the mandatory exclusion of an economic operator (defined in Section 2 of the Public Contracts Regulations 2015) from participation in public tenders, under the Public Contracts Regulations 2015. The Section 7 offence of failure to prevent bribery will not trigger mandatory exclusion but may give rise to grounds in support of a discretionary exclusion under the Public Contracts Regulations 2015. Clearly, such debarments could prove fatal to any company with a significant portion of revenues derived from public contracts.

Public contracts would have been a relevant concern for G4S in its July 2020 DPA with the SFO for fraud offences. Although this was not a corruption case, it is instructive for practitioners in this area generally, including with regard to the company's delayed approach to co-operation with the SFO and the consequential effect of that delay upon the relatively limited discount applied to the ultimate financial penalty.

5.2 Guidelines Applicable to the Assessment of Penalties

The range of sentences appropriate for each offence under the Bribery Act is specified by the Sentencing Council's Corporate Offenders: Fraud, Bribery and Money Laundering Offences Guideline. For each offence, the Council has specified categories with sentencing ranges reflecting varying degrees of seriousness and a starting point for each category. Once the starting point is determined, the court will take into account aggravating and mitigating factors set out in the guidance.

For corporate offenders, the starting point will generally be the gross profit arising from the

contract(s) obtained (or otherwise affected) by the criminal conduct. That figure is then multiplied by a prescribed percentage, depending on whether there is low, medium or high culpability. The figure is then adjusted upwards or downwards, based on the presence of aggravating and/or mitigating factors. A court is also required to consider the totality and proportionality of its sentence, with the Guideline stating that the "combination of orders made, compensation, confiscation and fine ought to achieve the removal of all gain, appropriate additional punishment, and deterrence".

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Section 7 of the Bribery Act 2010 creates a specific defence for corporations that can demonstrate they had "adequate procedures" in place to prevent bribery; see **4.1 Defences**.

6.2 Regulation of Lobbying Activities

The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (Lobbying Act) regulates lobbying in the UK. Under the Lobbying Act, consultant lobbyists are required to be registered; carrying on the business of consultant lobbying whilst unregistered is an offence. It is also an offence to fail to provide certain information when required by the Registrar of consultant lobbyists. Furthermore, donations received by political parties are controlled by the Political Parties, Elections and Referendums Act 2000, and registered parties may only accept donations from "permissible donors".

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Regarding disclosure, individuals and corporates operating in the "regulated sector" (ie, financial institutions, professionals and those dealing with high-value transactions) also have concurrent duties to report and prevent money laundering under POCA. These duties require those in the regulated sector to report activities and transactions they reasonably consider to be suspicious. Failure to do so may result in that individual or corporation being prosecuted in their own right under the "failure to disclose" offence.

In August 2019, the SFO published Corporate Co-operation Guidance, aimed at providing organisations and their legal advisers with transparency about what to expect if they self-report bribery to the SFO.

6.4 Protection Afforded to Whistle-Blowers

Whistle-blowing protection is afforded to UK workers under the Employment Rights Act 1996 (ERA), as amended by the Public Interest Disclosure Act 1998 (PIDA) and the Enterprise and Regulatory Reform Act 2013 (ERRA). The ERA was introduced to protect employees from being unfairly dismissed, or otherwise subjected to detriment, where they had made a "protected disclosure" – ie, disclosed information about an alleged wrongdoing in certain defined circumstances.

To qualify for protection, numerous requirements need to be met.

The ERRA strengthened the whistle-blowing protections under the ERA in 2013 by introducing personal liability for co-workers, or agents of an employer, who subject a whistle-blower to detriment in the course of their employment

because they have made a protected disclosure. Employers also have vicarious liability where other workers or agents subject a whistle-blower to detriment, unless the employer has taken all reasonable steps to prevent that behaviour.

6.5 Incentives for Whistle-Blowers

There are no financial incentives for whistle-blowers to report bribery or corruption in the UK, although, in exceptional circumstances, the Competition and Markets Authority offers incentives of up to GBP100,000 for information that leads to the successful investigation and prosecution of cartels.

Where a person admits to offending and agrees formally to co-operate with a criminal investigation and any subsequent prosecution, they may be eligible to enter a "SOCPA agreement" with the prosecutor under the Serious Organised Crime and Police Act 2005 (SOCPA). In exceptional cases, a person might receive immunity from prosecution in exchange for their co-operation. In practice, however, it is more common to see co-operation lead to a reduction in sentence, separately and in addition to the usual discount a defendant receives upon entering a guilty plea.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

See **6.4 Protection Afforded to Whistle-Blowers**.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Please see **7.2 Enforcement Body** regarding civil, criminal and/or administrative enforcement of anti-bribery and anti-corruption laws in the UK.

7.2 Enforcement Body

In England, Wales and Northern Ireland, the SFO is the lead prosecution body for offences under the Bribery Act. It was established under the Criminal Justice Act 1987 (CJA 1987) to investigate and prosecute offences involving serious and complex fraud. In deciding whether to pursue a particular case, the Director of the SFO considers whether the criminal conduct undermines UK commercial or financial interests, the scale of the actual or potential financial loss and whether there is a significant public interest issue. In Scotland, the primary prosecutor is the Lord Advocate. The CPS also pursues cases brought by individual police forces around the UK.

The other major enforcement bodies are the NCA (a criminal investigative agency) and the Financial Conduct Authority (FCA). The NCA's economic crime division contains a specific international corruption unit, which has a particular focus on money laundering offences arising from corruption overseas and recovering the proceeds of crime. The NCA investigates cases for subsequent prosecution by the CPS. By contrast, the FCA does not typically prosecute offences under the Bribery Act, but it has a wide remit for regulating the financial services industry, which includes the imposition of rules and requirements for systems and controls to prevent financial crime, including bribery and corruption. The interplay between the FCA and the SFO is often critical to the outcome of a financial services investigation, particularly in relation to any agreement as to the scope of each respective agency's investigation.

The National Economic Crime Centre (NECC) was launched in 2018, with the primary function of co-ordinating the national response to fraud and corruption in the UK. It brings together law

enforcement and justice agencies, government departments, regulatory bodies and the private sector. It has both a law enforcement and a crime prevention role. The NECC is able to direct the SFO to investigate corruption cases, among other matters.

7.3 Process of Application for Documentation

Under Section 2 of the CJA 1987, the SFO has extensive and intrusive powers to compel the production of information.

Put simply, the SFO need only issue a formal letter of demand specifying the categories of information, including documents, that it requires from the recipient. In practice, investigators often start from the premise of issuing a broad demand for documents. Recipients of any such notice should carefully consider its scope, and engage promptly with the SFO to negotiate the scope of the demand and the timeframe for response (wherever possible).

Wide-ranging demands present significant practical difficulties for companies, which may hold data for thousands of affected contracts or employees and store the data in various locations, including overseas. The legal issues that this presents include a potential clash with data privacy laws; various jurisdictions require specific informed consent before personally identifiable information is processed for specific purposes, such as a criminal investigation. Similarly, the company should be alive to its potential legal risk in other jurisdictions where its disclosure of documents to the SFO would run contrary to any banking secrecy statutes, blocking statutes or state secrecy laws.

The SFO also has limited pre-investigation powers under Section 2A of the CJA 1987, enabling it to receive documents and compel witnesses to answer questions before opening a formal investigation in relation to cases of suspected international bribery. The Economic Crime and Corporate Transparency Bill, however, proposes an expansion of the scope of the pre-investigation powers to include all cases within the SFO's remit involving serious or complex fraud, bribery and corruption.

The extra-territorial effect of Section 2 powers is considered further in **7.5 Jurisdictional Reach of the Body/Bodies**.

7.4 Discretion for Mitigation

A prosecuting agency is responsible (alongside the defence) for informing the sentencing court of any relevant mitigating and aggravating factors that are present in the case.

Plea agreements are available to individuals in certain circumstances. When considering a plea agreement, prosecutors must adhere to specific guidance in the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud (published November 2012) and the Criminal Procedure Rules. The general principles of the Guidelines are that, when conducting plea discussions, prosecutors must act openly, fairly and in the interests of justice.

Those principles require the prosecutor to ensure:

- that the defendant has sufficient information to participate in the plea discussions;
- that there is transparency before the court – ie, that any agreement put to the court fully and fairly reflects the terms agreed; and
- fairness in its dealings with the defendant – ie, not putting any improper pressure on them or misrepresenting the strength of the

prosecution case, and acting in the interests of justice, meaning that the plea agreement reflects the severity and extent of the offending behaviour, and pays careful attention to the impact of the plea agreement on the victims and on the chances of bringing a successful prosecution against any other person involved in the underlying offences.

7.5 Jurisdictional Reach of the Body/Bodies

As outlined in **7.2 Enforcement Body**, the SFO's Section 2 powers have limited extra-jurisdictional effect where the "sufficient connection test" is met.

In 2018, the extra-territorial reach of the SFO's legislative powers was tested in KBR v SFO [2018] EWHC 2368 (Admin). In that case, the SFO had initiated an investigation into suspected bribery at KBR Ltd, a UK subsidiary of KBR Inc, a US-registered company. The SFO issued KBR Ltd with a Section 2 notice and subsequently served a further notice upon two officers of KBR Inc who were visiting the UK. KBR challenged the legality of that Section 2 notice by way of judicial review, arguing that the SFO did not have the power to require a non-UK company to produce materials held outside of the jurisdiction.

The High Court held that the SFO's powers under Section 2(3) of the CJA were intended to have some extra-territorial application but that it could compel foreign companies to produce documents held overseas only when there is a "sufficient connection" between the company and the UK. On the facts, there was a sufficient connection between KBR US and the UK, as the payments made by KBR UK appeared to have been approved by KBR US. KBR appealed the decision directly to the Supreme Court.

The Supreme Court unanimously allowed the appeal. Its starting point was the presumption that domestic legislation is not generally intended to have extra-territorial effect. This presumption reflects the requirement that states should not infringe each other's sovereignty and the concept of international comity. Furthermore, there was no reason why the presumption should be displaced in relation to Section 2(3) of the CJA, either by the language of the statute or by the intention of Parliament and the availability of mutual legal assistance schemes.

The SFO (amongst others) may seek mutual legal assistance from overseas authorities via the Crime (International Co-operation) Act 2003. Under that statute, the SFO may utilise the assistance of overseas authorities to serve various documents (eg, summonses, Section 2 notices), obtain evidence (including witness statements, documentary and banking evidence) and execute search and seizures.

The Crime (Overseas Production Orders) Act 2019 (the COPO Act) gives law enforcement agencies such as the SFO and prosecutors the power to obtain electronic data directly from an overseas communications service provider. The UK government has stated that those extensive powers will be subject to robust judicial oversight, and emphasised the relevant statutory protections for legally privileged or journalistic material.

In mid-2020, the UK-US Bilateral Data Access Agreement (the Bilateral Agreement) became effective. The legislative background for that treaty is the COPO Act and the US Clarifying Lawful Overseas Use of Data Act. In brief overview, the Bilateral Agreement seeks to improve cross-border co-operation by allowing direct access, upon application, to "covered data" (ie,

communications content, metadata and traffic data) held by a "covered communications provider" (ie, any business that provides data communication, processing or storage to the public).

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Since late 2018, the SFO has discontinued more investigations than it has commenced. Notably, it has discontinued several high-profile and long-running investigations, most recently (June 2022) closing a four-year investigation into defence technology company Chemring. The SFO had been investigating bribery, corruption and money laundering arising from Chemring's business following a self-report from the company.

Despite the closure of a number of historic investigations, the SFO continues to investigate a number of fraud and bribery matters. In April 2022, it announced that it was "stepping up" its investigation into suspected fraud, fraudulent trading and money laundering relating to companies within the Gupta Family Group Alliance, including financing arrangements with Greensill Capital UK Ltd.

7.7 Level of Sanctions Imposed

Following the prosecution of Skansen (see **4.1 Defences**) in 2018, the company's former managing director and another individual (the recipient of Skansen's bribes) received custodial sentences of 20 months and 12 months respectively. Both individuals had pleaded guilty to bribery and their sentences reflect a discount. Ancillary orders were also used, with one individual being disqualified from acting as a company director for seven years.

In June 2019, the former managing director and owner of UK company ALCA Fasteners Limited was sentenced to two years' imprisonment for paying GBP300,000 in bribes to a purchasing manager employed by one of ALCA's customers in order to secure contracts valued at GBP12 million. In addition to the custodial sentence, a seven-year Company Director Disqualification Order was imposed, and the individual was required to pay a Confiscation Order in the amount GBP4,494,541 and prosecution costs to the SFO in the amount of GBP478,351.

More recently, in October 2021, David Lufkin, a former executive of Petrofac, received a sentence of two years' imprisonment (suspended for 18 months), having entered earlier guilty pleas to a total of 14 counts of bribery contrary to Sections 1 and 2 of the Bribery Act. The offences admitted by Mr Lufkin related to the making of corrupt payments to influence the award of contracts to Petrofac worth in excess of USD730 million in Iraq and in excess of USD3.5 billion in Saudi Arabia. In addition to his guilty pleas, Mr Lufkin had provided extensive assistance to the SFO in its investigation.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

In March 2019, the House of Lords Select Committee published its report entitled "The Bribery Act 2010: Post-legislative Scrutiny", which considered whether the Act was fulfilling its intended purpose. The report concluded that the Bribery Act is an "excellent" piece of legislation, with offences that are clear and all-embracing. It noted that the availability of the corporate failure to prevent offence (Section 7) is particularly effective at encouraging company management to conduct business in an ethical manner.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

In September 2022, SFO Director Lisa Osofsky delivered a speech in which she reflected on priorities for the SFO she had set out in 2018. Osofsky stated that she will continue to push those priorities:

- proactive and confident case progression;
- smart use of technology in investigations;
- enhanced international co-operation; and
- an intelligence, evidence-led approach.

She further stated that one of the biggest challenges currently faced by the SFO is disclosure, and that another priority for the year ahead will therefore be rebalancing the system for justice by recognising the challenges that the SFO faces in document-heavy investigations.

Brown Rudnick LLP represents clients in relation to the full range of financial crime investigation and enforcement issues, including domestic and international bribery and corruption. The firm is frequently instructed by individuals and corporations subject to investigation and/or enforcement proceedings involving allegations of bribery. Brown Rudnick provides an integrated strategy for clients facing concurrent liability from civil action, administrative sanction and criminal prosecution. The firm is also routinely instructed to conduct corporate internal investigations, with a view to advising corporations and their senior management regarding the merits of self-reporting to the authorities. The team has extensive experience in working with the US Foreign Corrupt Practices Act, the UK Bribery Act, the OECD Anti-Bribery Convention and other anti-corruption laws, in the context of investigations, litigation and corporate transactions.

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Contents

1. Legal Framework for Offences

1.1 International Conventions

The United States has ratified the OECD Convention on Combating Bribery of Foreign Public Officials and the UN Convention Against Corruption. It has signed, but not ratified, the Council of Europe Criminal Law Convention on Corruption.

1.2 National Legislation

The Foreign Corrupt Practices Act (FCPA) is the main federal legislation relating to foreign bribery.

A variety of domestic statutes (see **1.3 Guidelines for the Interpretation and Enforcement of National Legislation**) govern domestic bribery or other corruption involving state or federal government officials and employees. Most of the relevant federal statutes are found in Title 18 of the United States code. Each state has its own criminal laws prohibiting bribery or corruption-related offences. Some local or municipal governments may have anti-corruption or ethics regulations.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The most important federal anti-corruption agencies actively issue and revise public guidance documents, which are important resources but are not legally binding.

The two most relevant sources of guidance are detailed below.

The FCPA Resource Guide

A joint publication by the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), this document provides an overview of the FCPA and the agencies' approaches to key questions about the FCPA's scope and application (eg, successor liability, parent-subsidiary relationships, and individual liability).

In 2020, the DOJ issued the first significant revision of the FCPA Resource Guide since it was first published in 2012. The key updates cover:

- the FCPA's extraterritorial application (discussed in detail below);
- the factors US courts may consider in determining whether a non-US person is a "foreign official" for the purposes of the FCPA;
- recent judicial decisions limiting the SEC's ability to obtain disgorgement as a remedy for violations of securities law; and
- emphasising the importance of effective compliance programmes, including:
  (a) pre-M&A due diligence; and
  (b) robust investigation, analysis, and remediation when misconduct is identified.

The Justice Manual

This document sets out DOJ policy and practice regarding how to charge and prosecute violations of most federal criminal statutes. The Justice Manual is a useful reference for understanding the DOJ's interpretation of the law and the factors it considers when making decisions regarding (for example) whether to file charges, what penalties to seek, and how to treat co-operating witnesses and defendants.

The Justice Manual includes a section on the DOJ's Principles of Federal Prosecution of Business Organizations, which lays out the agency's approach to investigating and prosecuting corporations. The Principles feature important information about how prosecutors approach businesses that co-operate with federal investigations.

In addition to revisions of official guidance, such as the Justice Manual and the FCPA Resource Guide, new enforcement approaches may be announced on an ad hoc basis through memoranda, public statements by agency officials, or other publications. State agencies sometimes take a similar approach.

1.4 Recent Key Amendments to National Legislation

There have not been significant legislative amendments to the key federal corruption statutes in 2022.

2. Classification and Constituent Elements

2.1 Bribery

The list below identifies the federal criminal statutes that are frequently used to prosecute bribery and corruption. Individual states may have similar statutes.

- The Foreign Corrupt Practices Act is codified at 15 U.S.C. Sections 78dd-1 et seq. The statute prohibits "corruptly" giving "anything of value" to "foreign official[s]" or political party members for the purpose of:
  - (a) influencing the foreign official's acts or decisions;
  - (b) inducing the foreign official to act contrary to their lawful duty;
  - (c) securing "any improper advantage"; or
  - (d) inducing the foreign official to influence a foreign government "in order to assist... in obtaining or retaining business for or with, or directing business to, any person."
- The general prohibition on bribing US officials is codified at 18 U.S.C. Section 201(b). This statute prohibits "corruptly" giving or receiving (or offering, demanding, etc) anything of value in return for an official act or omission by a public official. This law also prohibits exchanging things of value for an act of fraud by the public official (or for the public official's assistance in a fraud).
- The "gratuities" law, codified at 18 U.S.C. Section 201(c), prohibits giving "anything of value" to a current, former, or future public official "because of any official act" (unless such an act is provided for by law). This statute is broader than the "bribes" law at 18 U.S.C. Section 201(b) because it does not require "corrupt" intent or an explicit quid pro quo.
- 18 U.S.C. Sections 207–08, the federal criminal conflict of interest statutes, restrict the conduct of federal officers and employees during and after their federal service. In general, federal officials must not engage in official acts that could affect their personal financial interests (or those of their family members, their future employers, or certain affiliated organisations). These offences are strict liability, although wilful violations expose an official to more severe penalties.
- 18 U.S.C. Sections 641, 654, and 666 broadly prohibit theft, wrongful conversion, embezzlement, or bribery involving federal property or programmes funded by federal money. Generally speaking, the acts must be committed "knowingly" or with a "corrupt intent" for criminal liability to apply.
- Federal fraud statutes, especially the mail and wire fraud statutes at 18 U.S.C. Sections 1341 and 1343, are frequently used in corruption prosecutions. 18 U.S.C. Section 1346 authorises prosecutors to file charges under these statutes based on an "honest services" theory – ie, that a corrupt official deprived the government of its intangible right to his or her uncompromised judgment, discretion, etc (ie, their "honest services"). These charges

require a specific intent to deprive the government of honest services, property, etc.
- Other federal statutes are often also used to charge conduct related to a bribery scheme, although they are not specifically related to corruption. For example, prosecutors may charge corrupt officials (or their co-conspirators) with:
  (a) extortion (18 U.S.C. Section 1951) for obtaining property (eg, a bribe) "under colour of official right";
  (b) travelling in interstate or foreign commerce (or sending interstate emails, phone calls, etc) to "promote" or "carry on" unlawful activity, including violations of state bribery laws (18 U.S.C. Section 1952, also called the "Travel Act"); or
  (c) money laundering (18 U.S.C. Sections 1956-57) for monetary transactions involving the bribe funds or the proceeds of a bribery scheme. Conspiring to violate any of these statutes, or aiding and abetting violations, may be separately charged under 18 U.S.C. Sections 2, 371, and/or 1961–68.

Bribery

A bribe may be "anything of value" under the FCPA and domestic statutes. "Things of value" have included cash payments, benefits in kind, lavish gifts, excessive hospitality, charitable donations, contracts, or employment relationships.

The receipt of a bribe is an offence for domestic bribery under 18 U.S.C. Section 201, but not under the FCPA. The US government has employed other laws (such as money-laundering statutes) to prosecute foreign officials who receive bribes, however.

Merely proposing or accepting an improper advantage may constitute an offence. Generally, US anti-corruption statutes do not require that the desired results occur, as long as the perpetrator acted with the requisite intent. Indeed, US authorities often criminally prosecute defendants under broad conspiracy statutes in situations where it would be impossible for the expected results to occur – for example, by using undercover law-enforcement agents who are only pretending to be public officials or connected to public officials.

Hospitality, travel, gifts and promotions

Under domestic bribery laws, federal and state officials, including elected political figures and career employees, are generally restricted in the gifts and hospitality they may receive from sources outside the government. Some officials, such as members of Congress, may be required to disclose the gifts they receive to the public. For federal employees, gifts over USD20 are generally prohibited (and they generally may not accept more than USD50 in a year from a single non-government source). Travel expenses are a separate, complicated area of law and also require an analysis of internal government ethics rules. Whether or not a government employee's travel may be funded by a non-government source often depends on the purpose of the trip and the specific rules of the agency where they work.

The FCPA does not limit foreign officials' ability to accept gifts, hospitality, etc, but such expenses can be "things of value" that can give rise to FCPA liability.

Gratuities

The FCPA permits persons subject to its jurisdiction to make "facilitating or expediting payment[s]... the purpose of which is to expe-

dite or to secure the performance of a routine governmental action" by a foreign official. In practice, this exemption is read very narrowly.

The domestic bribery statute does not have an equivalent provision. It is a separate crime to pay a "gratuity", which is a facilitation payment made on account of an official act but not with an intent to influence it. Courts have held that if an official demands payment to perform a routine duty, a defendant may raise an economic coercion defence to the bribery charge.

Failing to prevent bribery is not a specific offence under US law (and US law generally does not criminalise failures to prevent a crime).

FCPA

The FCPA defines the term "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation."

The FCPA Resource Guide advises that state-owned or state-controlled companies may be "instrumentalities", so that their employees could be considered "foreign officials". Many factors are relevant in determining whether such a company is an "instrumentality", including "the foreign state's extent of ownership of the entity; the foreign state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials); the foreign state's characterisation of the entity and its employees; the purpose of the entity's activities; the entity's obligations and privileges under the foreign state's law and the general perception that the entity is performing official or governmental functions".

In practice, criminal and civil FCPA charges often involve payments or gifts to employees at state-owned or state-controlled enterprises.

Domestic statutes

18 U.S.C. Section 201 defines a "public official" as a "Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror." State statutes feature similar definitions.

The bribery of foreign public officials is also criminalised. The FCPA prohibits corrupt payments to foreign public officials for the purpose of obtaining or retaining business opportunities. Likewise, foreign bribery may be prosecuted under the Travel Act.

Commercial bribery is primarily regulated by state rather than federal law. For example, New York Penal Law Section 180.00 provides that "[a] person is guilty of commercial bribing in the second degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs". Because several US states have criminalised commercial bribery, the DOJ has taken the position that violations of such state commercial bribery laws can be predicate offences under the Travel Act.

Federal prosecutors may also charge private bribery or kickback schemes as mail or wire fraud under an "honest services fraud" theory.

2.2 Influence-Peddling

No federal criminal statute uses the term "influence-peddling".

As noted elsewhere, conduct involving improper use of official authority, especially where a private party receives an "undue advantage", may violate a variety of federal or state laws, including the federal fraud and conflict of interest statutes, abuse-of-power laws, or lobbying regulations.

The FCPA specifically prohibits giving things of value to a foreign official for purposes of "securing any improper advantage" in connection with obtaining or retaining business.

Conduct involving foreign officials may also implicate federal or state laws on fraud, conflicts of interest, or lobbying. Acting on behalf of foreign officials may also violate the US law requiring foreign government agents to register with the federal government.

2.3 Financial Record-Keeping

The FCPA requires "issuers" (generally speaking, entities whose securities are registered with the SEC and/or entities that are required to file periodic reports with the SEC) to keep accurate books and records and to establish and maintain a system of internal controls adequate to ensure that the company's assets are managed in compliance with management's instructions. For accounting violations, the SEC may impose civil penalties, seek injunctive relief, enter a cease-and-desist order and require disgorgement of tainted gains. Civil fines may be up to a maximum of USD963,837 for a corporation or USD192,768 for an individual, or the gross amount of the pecuniary gain per violation. Neither materiality nor knowledge is required to establish civil liability.

The DOJ has authority over criminal accounting violations (ie, where persons "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account" required to be maintained under the FCPA). Penalties for criminal violations of the FCPA's accounting provisions are set forth below.

2.4 Public Officials

Numerous federal statutes cover public officials' conduct. For example, prosecutors may charge corrupt public officials for conduct related to:

- theft, wrongful conversion, embezzlement, or bribery related to or involving federal property or federally funded programmes (18 U.S.C. Sections 641, 654, and 666);
- conflicts of interest, generally caused by federal officials engaging in official acts that could affect their personal financial interests (or those of their family members, their future employers, or certain affiliated organisations (18 U.S.C. Sections 207–08)); and
- acting with the specific intent to deprive the government of its intangible right to "honest services", such as the public official's uncompromised judgment, discretion, etc (18 U.S.C. Section 1346).

2.5 Intermediaries

The FCPA and domestic statutes apply to offences committed through an intermediary.

Liability against a principal may arise for payments made by an agent or intermediary if the principal "knew" about the misconduct. This includes when the principal was aware of a high

probability that the agent was making improper payments, even if the principal did not know about a specific payment or consciously avoided learning about the payment (ie, remained "wilfully blind" to it).

Companies subject to US jurisdiction commonly conduct due diligence on prospective intermediaries to mitigate these risks. For example, "red flags" in this type of diligence may include commission payments to the intermediary in excess of market value, a family or other relationships between an agent and a government official, or a recommendation of a particular agent by a government official.

3. Scope

3.1 Limitation Period

Most federal crimes are subject to a five-year statute of limitations, although criminal violations of the FCPA's accounting provisions are subject to a six-year limitations period. In some circumstances, prosecutors may be legally permitted to charge defendants for conduct that pre-dates the limitations period. For example, if the conduct is part of an ongoing scheme or conspiracy, the limitations period begins to run at the end of the scheme. However, as long as one act in furtherance of the conspiracy occurred within the five-year period, a conspiracy charge would still be timely.

State statutes of limitations vary between jurisdictions.

3.2 Geographical Reach of Applicable Legislation

Defendants are often prosecuted in the USA even where most of the criminal conduct was committed abroad, but extraterritorial jurisdiction varies from one statute to another.

Non-US conduct may be covered by US law where either the specific statute applies extraterritorially, or there is a US nexus (eg, the scheme involves a US bank account).

Extraterritoriality

US law on extraterritoriality is complex and changes with judicial decisions and legislative action. Different statutes apply outside the USA in different ways. US statutes are presumed not to have extraterritorial effect unless they include a "clear indication" to the contrary. Without a "clear indication", courts examine the statute's "focus" to determine whether an alleged violation is "domestic". The law continues to change in this area; some courts have found that domestic conduct is necessary, but not sufficient, to apply US law to claims that mostly arise overseas.

As an initial point, US law applies on US soil – so if individuals are visiting the US (for business or pleasure), they face increased US legal risk over any business they do while on their trip. Secondly, US law often applies to US citizens, permanent residents (ie, "green card" holders), and entities organised under US law anywhere in the world. Non-US transactions could be exposed to US legal risk because some of the personnel are US nationals.

FCPA

Criminal conduct outside the USA could result in FCPA liability under one of four theories: issuer liability, domestic concern liability, liability as an agent of an issuer or domestic concern, and, potentially, conspiracy/accomplice liability.

Issuers

If a legal entity is an issuer of registered US securities (regardless of where the entity is headquartered), the entity may be held liable for violations of the FCPA's anti-bribery provisions committed anywhere in the world, provided that there is a connection to the USA (eg, an email that touches the USA). If an issuer is organised under US laws, the entity may be held liable for FCPA violations, irrespective of any other connection to the US.

Issuers are also subject to the FCPA's accounting provisions everywhere in the world.

Domestic concerns

US domestic concerns (ie, US nationals and businesses incorporated under US law or headquartered in the USA and their employees, agents, etc) are required to comply with the FCPA's anti-bribery provisions, regardless of where their operations may be located. Such entities may be held liable for violations of the FCPA outside the USA.

Agent liability

A person or legal entity acting as an agent of an issuer or domestic concern can face FCPA liability for engaging in conduct in furtherance of an improper payment, even when the issuer/domestic concern did not expressly direct or authorise the improper payment. This type of liability may apply without regard to where the improper payments were made if the conduct involves a US person or there is a connection to the USA.

Conspiracy and accomplice liability

If a non-US company acts in concert with another company or person, and jurisdiction can be established for that company or person (eg, because they are a domestic concern), it is possible that the non-US company could be held liable for either conspiring with or aiding and abetting the US person or legal entity that is directly subject to the FCPA, or wilfully causing the US person or legal entity to violate the FCPA. As with direct liability for issuers and domestic concerns, this type of liability may apply without regard to where any improper payments were made, as long as the co-conspirator is organised under the laws of the USA or any state in the USA, or there is a connection to the USA.

The United States Court of Appeals for the Second Circuit, however, recently ruled that a non-resident foreign national may not be charged with conspiracy to violate the FCPA or with aiding and abetting an FCPA violation unless the foreign national acted as an agent of an "issuer" or a "domestic concern" or was physically present in the US. The Second Circuit is only one of 11 intermediate federal appellate courts, and at least one other district court has decided differently.

Domestic statutes

As noted, US courts presume that most US criminal statutes do not apply extraterritorially. For example, courts have ruled that 18 U.S.C. Sections 666, 1341, 1343, and 1346 do not apply extraterritorially.

It is important to note, however, that even if specific statutes are not applied extraterritorially, non-US conduct may fall under the scope of a statute that does, such as the Travel Act or some charges under 18 U.S.C. Section 371. For example, a court has ruled that a defendant who allegedly accepted a bribe in Paris violated the Travel Act, regardless of whether 18 U.S.C. Section 201 applied extraterritorially.

Moreover, statutes involving domestic bribery – that is, bribes paid to US officials – are likely to have a US nexus. Authorities are more likely to rely on a US nexus for jurisdictional arguments than a potentially complex extraterritoriality theory.

US Nexus

Even US laws that do not have extraterritorial effect may apply in cases involving foreign conduct if certain US connections exist, including emails sent through a US server, telephone calls placed to or from the United States, or US dollar-denominated transactions clearing through US correspondent bank accounts.

3.3 Corporate Liability

Under general principles of US law:

- corporations may be held criminally liable, including for violations of the FCPA or domestic bribery statutes;
- individuals and corporations may be held liable for the same offence; and
- successor entities may be held liable for offences by the target entity prior to the merger or acquisition.

Corporate Liability

Under the doctrine of respondeat superior, a corporation may be held criminally liable for the acts of its employees, agents, officers, etc, provided that:

- those acts were undertaken within the scope of their employment (even if such actions were against corporate policy); and
- they were intended, at least in part, to benefit the corporation.

Corporate prosecutions are more common for FCPA violations than domestic bribery, but both are possible.

High-level directors, officers, etc, need not be involved for corporate criminal liability to apply. Any employee or third-party contractor can incur liability on behalf of a corporation.

Finally, a subsidiary's criminal conduct may be imputed to its parent corporation, if the subsidiary is the parent's agent. To make this determination, US authorities evaluate whether the parent controls the subsidiary, including through knowing about and/or directing the subsidiary's actions.

Parallel Individual and Corporate Liability

While no individual need be convicted in order for a company to face liability, DOJ policy emphasises individual accountability. Authorities often look favourably on co-operating companies that identify key individuals involved in misconduct, and may consider such efforts when assessing a company's co-operation (and any related reduction in penalties).

Successor Liability

When one company merges with or acquires another, the successor generally assumes the predecessor's liabilities under US law, including criminal liabilities. Prosecutors and regulators, however, sometimes decline to act against companies that conducted comprehensive pre-acquisition due diligence and voluntarily disclosed and remediated any potentially problematic conduct identified during the diligence.

The DOJ has held successor companies liable for the acts of predecessor companies following mergers and acquisitions when the misconduct continued after the transaction, however. Author-

ities may still take action against the predecessor (if they would have had jurisdiction over it), but the FCPA Resource Guide emphasises the value in a company with a robust compliance programme acquiring a company without one.

4. Defences and Exceptions

4.1 Defences

The FCPA includes two affirmative defences to anti-bribery charges, codified at 15 U.S.C. Section 78dd-1(c). First, there is a defence if the payment, offer, etc "was lawful under the written laws and regulations of the... [relevant foreign] country." A recent case held that this defence only applies where the payment is affirmatively authorised by local law (ie, the defence does not apply where the payment is simply not prohibited by local law).

The second defence provides that "reasonable and bona fide expenditures, such as travel and lodging expenses... was directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract" with a foreign government.

In practice, defendants also commonly claim that they lacked the requisite intent to commit a corruption crime, that the conduct did not involve an "official act" by a government official, or that there was no quid pro quo in which a benefit was offered in exchange for an official act.

The FCPA does not recognise a formal defence based on adequate procedures, but, as a practical matter, prosecutors and SEC enforcement attorneys may take the adequacy of compliance controls into account when making charging decisions.

4.2 Exceptions

As with the defences themselves, exceptions to US criminal defences generally arise from common law, rather than specific statutory provisions. For example, a person may not be able to rely on an "advice-of-counsel" defence where the advice was obtained in bad faith (eg, they withheld key facts from outside counsel).

4.3 De Minimis Exceptions

In general, there are no statutory de minimis exceptions for violations of US criminal laws (although, as previously noted, US laws permit certain de minimis gifts for government officials). Because of US authorities' considerable prosecutorial discretion, however, enforcement may be less likely where only de minimis amounts are involved. As noted, small payments related to routine government actions may fall within the FCPA's narrow exception for so-called facilitation payments.

4.4 Exempt Sectors/Industries

The key US anti-bribery and anti-corruption laws do not exempt any industry or sector.

A potential defendant's industry or sector may informally be factored into decisions about how the government resolves a potential violation, however. For example, government authorities may be willing to consider how to investigate defence companies without publicising sensitive national security information.

4.5 Safe Harbour or Amnesty Programme

The Justice Manual and the US Sentencing Guidelines (USSG), a set of advisory rules designed to inform judges' discretion when imposing criminal sentences, both encourage companies to self-disclose misconduct by offering "credit" for such co-operation. Co-operation credit is a key aspect of US criminal and regula-

tory defence, and it often features prominently in authorities' decisions about whether and what type of action to bring, as well as providing a basis for reductions in penalties and other negative consequences of enforcement actions.

The Justice Manual and Compliance Guidance

In addition to the USSG, both the Justice Manual and the FCPA Resource Guide discuss self-reporting and co-operating with law enforcement, and the DOJ has provided guidance on the types of factors it considers in assessing a company's compliance programme when investigating a corporate entity (the "US Compliance Guidance"). The DOJ is not legally obliged to follow the US Compliance Guidance, which is similarly not binding on other US government authorities. Even so, the DOJ and others generally take these factors (or similar ones) into account.

The DOJ takes a functional approach to the US Compliance Guidance — the agency does not simply verify whether a compliance programme includes certain components (eg, a whistleblower programme). Instead, the US Compliance Guidance emphasises that the DOJ will make an individualised assessment of a company's compliance programme based on that company's particular risk profile and specific context. Indeed, the US Compliance Guidance notes that there is no "rigid formula" for assessing compliance programmes and that the topics it addresses are not exhaustive.

While recognising that a compliance programme must be tailored to a company's particular risk profile, the Compliance Guidance identifies best practices that are common to effective compliance programmes. These practices include, but are not limited to:

- a commitment from senior management to a "culture of compliance";
- a clearly articulated policy against corruption and a code of conduct;
- the assignment of responsibility for oversight and implementation of the anti-bribery and corruption compliance programme to a senior executive with appropriate experience, sufficient autonomy from management, and resources to ensure the programme is implemented effectively;
- assessing the risks faced by the company so that the company can take a risk-based approach in designing and implementing its anti-bribery and corruption compliance programme; and
- periodically testing and reviewing the anti-bribery and corruption compliance programme.

The Justice Manual also includes the FCPA Corporate Enforcement Policy (CEP). The CEP establishes a rebuttable presumption that the DOJ will decline to prosecute a company for FCPA violations if the company:

- voluntarily self-discloses misconduct;
- fully co-operates with the DOJ's investigation; and
- takes timely and appropriate remedial action.

The CEP provides insight into how the DOJ assesses compliance and remediation and potential penalty reductions for co-operating companies that do not qualify for a declination. Recent DOJ actions indicate that it will apply the approach to leniency set out in the CEP to other kinds of misconduct, beyond FCPA violations.

CEP Revisions

In 2019, the DOJ revised the CEP to reflect changes in DOJ policy and practice, including the following points.

- Successor liability: a "comment" in the CEP states that, where a buyer "uncovers misconduct through thorough and timely due diligence" or via post-acquisition efforts and voluntarily self-discloses and remediates the misconduct, "there will be a presumption of a declination in accordance with and subject to the other requirements of this Policy".
- Business records: to receive full remediation credit, a company must demonstrate that it "[a]ppropriate[ly]" retains "business records", even if the company does not specifically prohibit employees from using instant messaging platforms or other communications technologies that may be periodically erased.
- Individual accountability: to receive credit for voluntarily self-disclosing misconduct, a company must disclose "all relevant facts known to it at the time of the disclosure" relating to "any individuals substantially involved in or responsible for the misconduct at issue". These changes recognise that companies may not know every detail about all individuals involved in misconduct at the time of a voluntary self-disclosure.

5. Penalties

5.1 Penalties on Conviction

FCPA

Violating the FCPA's substantive anti-bribery provisions may result in up to five years' imprisonment and/or a fine of up to USD250,000 for each offence committed by an individual. Corporations may be punished by fines of up to USD2 million per violation.

Wilful violations of the accounting provisions may result in criminal fines of up to USD25 million for a legal entity. Individuals may be required to pay fines of up to USD5 million and/or serve as many as 20 years in prison. Moreover, the DOJ is authorised to seek a fine of up to twice the benefit that the defendant obtained by making the corrupt payment(s), which often represents a far greater amount than the maximum fines previously noted.

Defendants may be required to pay civil monetary penalties of USD10,000 for each violation of the anti-bribery provisions, whether by an individual or legal person. The DOJ and the SEC may also seek civil disgorgement penalties for books and records violations.

Domestic Bribery

Penalties for violating domestic bribery or fraud laws vary by jurisdiction.

For example, violations of the federal mail or wire fraud statutes may result in fines and up to 20 years' imprisonment (or 30 years' imprisonment in some circumstances). The maximum penalty for violating 18 U.S.C. Section 201(b) is 15 years in prison and/or substantial monetary fines; 18 U.S.C. Section 201(c) has a maximum prison sentence of two years and/or fines.

Collateral Consequences

Aside from imprisonment and monetary fines/penalties, an anti-corruption investigation (or even allegations that a company has violated bribery or corruption laws) could lead to several collateral consequences that could prove extremely damaging to a business or individual. Such an investigation could lead to debarment from contracting with the US government or international financial institutions, loss of impor-

tant regulatory statuses under US law, and/or termination of commercial relationships.

5.2 Guidelines Applicable to the Assessment of Penalties

As previously noted, the Justice Manual, FCPA Resource Guide, and other publications provide important guidance on how agencies assess penalties.

The US Sentencing Commission Guidelines (USSG) review a number of factors that may warrant enhanced or mitigated sentences. For example, the greater the monetary loss caused by a corrupt scheme, the more severe the recommended sentence will be. Generally speaking, bribery and other white-collar crimes do not have mandatory minimum sentences, but repeated offences would be more severely punished.

The USSG permit courts to reduce criminal penalties where a company has an effective compliance programme; the DOJ often uses the USSG as a baseline to assess penalties in corporate resolutions. Chapter 8 of the USSG provides guidelines for sentencing organisations that have been convicted of a crime. This chapter establishes the elements of an "effective" compliance programme; companies with such programmes may be eligible for substantial reductions from the sentence that the USSG would otherwise recommend.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

The national legislation does not establish an affirmative duty to prevent corruption (although, as noted elsewhere, US "issuers" are required to maintain an adequate system of internal controls and accurate books and records).

6.2 Regulation of Lobbying Activities

The national legislation obligates firms and individuals across industry sectors to disclose efforts to influence public officials. There are two key statutes that concern domestic and foreign lobbying activities.

The Lobbying Disclosure Act (LDA) is codified at 2 U.S.C Sections 1601 et seq. The LDA defines a "lobbyist" as an individual who spends more than 20% of their time each quarter on "lobbying activities", which encompass communications that seek to influence federal legislation, regulation, administration, and nomination processes. It does not apply to media organisations. The LDA requires lobbying entities to register and provide quarterly reports on lobbying activities. The Clerk of the House and Secretary of the Senate administer the law. The penalties include fines of up to USD200,000 per violation and, in some cases, up to five years in prison. Since 1995, the Secretary of the Senate has referred 24,500 cases of non-compliance to the US Attorney for the District of Columbia, which enforces the law.

In turn, the Foreign Agent Registration Act (FARA) is codified at 22 U.S.C. Section 611 et seq. FARA defines a "foreign agent" as an individual who, on behalf of a "foreign principal", engages in political activities, acts in a public relations capacity, solicits or dispenses anything of value, or provides representation before any US government agency or official. A "foreign principal" is a foreign government or political party, a person outside the US (unless a US national), or group of persons organised under the law of or having its principal place of business in a foreign country. It does not apply

to certain religious entities, academic groups, and legal representatives in legal proceedings. Foreign agents must register with the Attorney General within ten days of starting their activities, even if there is no monetary compensation for their work, and they must comply with semi-annual reporting obligations. The penalties include fines of up to USD250,000 for each violation and up to five years in prison.

6.3 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

In general, there is no such duty to disclose these violations, in US law. Depending on the specifics of a particular violation, however, US individuals and/or companies may be exposed to liability for failing to disclose the violations (eg, if a violation exposes a US securities issuer to "material" risks, the issuer may face civil or criminal liability for failing to disclose the risk to its shareholders).

As discussed elsewhere, disclosure and co-operation with a subsequent government investigation often helps a company or individual reduce a potential penalty.

6.4 Protection Afforded to Whistle-Blowers

The US has an extensive body of law regarding whistle-blowing. Broadly speaking, US law generally protects whistle-blowers from retaliatory action taken against them for reporting their reasonable belief of a possible violation of many federal or state laws, including violations of federal securities or commodities laws or other types of violations covered. The scope of protected whistle-blower activity varies, depending on the setting and US jurisdiction.

For example, the Sarbanes-Oxley Act (SOX) protects employees of publicly traded companies and their affiliates from retaliation for reporting alleged mail, wire, bank or securities fraud and related violations.

The details of a permissible whistle-blower protection claim (such as the statute of limitations) vary from one statute to another. For example, SOX requires an employee to file a written complaint within 180 days after an alleged retaliation, while the Dodd-Frank Act permits claims for up to ten years.

6.5 Incentives for Whistle-Blowers

The SEC and CFTC have programmes to pay monetary awards to whistle-blowers who voluntarily provide original information about a violation of relevant laws (including bribery or corruption-related offences) that leads to a successful enforcement action. Whistle-blowers may be entitled to an award if the agency recovers a monetary sanction over USD1 million. The SEC and CFTC are required to give all entitled whistle-blowers an award of at least 10% and as much as 30% of the penalties collected in the enforcement action.

Likewise, a whistle-blower who files a civil action under the False Claims Act or similar state laws alleging false representations in connection with a government-funded programme may be entitled to receive a substantial award based on the damages suffered by the relevant government agency. These suits may involve corruption-related allegations (eg, that a government contract was awarded based on a false representation that the contractor was not affiliated with any public officials). The state or federal government generally has the option to intervene in these actions, but the suits may proceed to judgment without any such intervention.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

The list below details the key statutory whistle-blowing provisions at the federal level, along with citations.

- Sarbanes-Oxley (SOX) Act (principally 18 U.S.C. Section 1514).
- Dodd-Frank Wall Street Reform and Consumer Protection Act (7 U.S.C. Section 26).
- SEC Whistleblower Statute (15 U.S.C. Section 78u-6).
- SEC Whistleblower Rules (17 C.F.R. Section 240.21F).
- CFTC Whistleblower Rules (17 C.F.R. Section 165 et seq).
- Federal False Claims Act (31 U.S.C. Sections 3729–3733).

For further detail, the websites for the SEC and CFTC whistle-blower programmes are: https://www.sec.gov/whistleblower (SEC) and https://www.whistleblower.gov/ (CFTC).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

There is no US federal government agency tasked exclusively with enforcing anti-bribery and anti-corruption laws, although a variety of federal agencies share authority over various aspects of US anti-corruption issues.

State and local governments may have specific anti-bribery and anti-corruption agencies, although most state anti-corruption efforts reflect the federal approach, with criminal enforcement given to prosecutors and broader oversight and/or civil enforcement powers granted to state ethics agencies, inspectors general, election regulators, etc.

7.2 Enforcement Body

There are multiple anti-bribery and anti-corruption enforcement bodies in the US.

The DOJ is the most prominent criminal authority and generally prosecutes all federal crimes, including violations of the FCPA and domestic anti-bribery statutes. State prosecutors or attorneys general may also have authority to prosecute criminal violations of state anti-bribery or anti-corruption laws. The DOJ's "piling on" policy, announced in May 2018, instructs DOJ employees to co-ordinate with one another and with other domestic and foreign authorities to avoid "a risk of repeated punishments that may exceed what is necessary to rectify the harm and deter future violations".

The SEC, which is generally charged with administering federal securities laws, civilly enforces violations of the FCPA involving US securities issuers. The CFTC (the federal commodities regulator) has also claimed authority to take civil enforcement actions based on foreign corruption impacting US commodities markets and entities trading on those markets.

Domestic anti-bribery and anti-corruption laws are civilly administered by a wide variety of agencies and authorities. For example, at the federal level, the Department of Justice's civil division may civilly enforce aspects of federal ethics laws (eg, the Ethics in Government Act). The Office of Special Counsel and the Office of Government Ethics, as well as agency- or branch-specific ethics bodies, also play a role in formulating, administering, and enforcing anti-corruption laws and regulations. Generally speaking, states

have similar bodies that govern state government functions.

There are other civil enforcement agencies that, although not specifically charged with enforcing anti-corruption or anti-bribery laws, have authority over related areas of law that anti-corruption practitioners may wish to note. For example, the Federal Election Commission pursues civil penalties against corporations that donate to political campaigns in violation of federal campaign finance laws.

7.3 Process of Application for Documentation

The process of self-disclosure and/or applying for co-operation credit is likely to be highly fact-specific and varies from one agency to another. Reporting violations of the FCPA to the DOJ or SEC, for example, may involve a written or oral outreach to the relevant personnel at DOJ or SEC Enforcement Division following an internal investigation. Ongoing co-operation may require providing documents or witnesses to the enforcement agency, making presentations to the enforcement agency, and providing estimates of the scheme's impact (eg, the company's gains or losses arising from a corruption scheme).

7.4 Discretion for Mitigation

As discussed above, US authorities have extensive discretion to grant defendants credit for self-reporting and other forms of co-operation, up to and including declining to bring enforcement actions entirely.

US enforcement agencies also have discretion to resolve violations of law through negotiated agreements. These agreements account for the vast majority of criminal resolutions in the US. There are three main types of negotiated agreements: non-prosecution agreements (NPAs), deferred prosecution agreements (DPAs), and plea or settlement agreements.

- NPAs: in NPAs, the agency agrees not to prosecute on the condition that the individual or company will co-operate with the agency in its investigations of other individuals or entities and abide by other conditions (fines, monitorships, etc).
- DPAs: the agency defers filing charges, sometimes indefinitely, based on the defendant's compliance with certain conditions. Importantly, neither DPAs nor NPAs require a defendant to admit wrongdoing. This can be an important point, as it may affect a defendant's potential civil liability to private parties.
- Plea/settlement agreements: the agency files charges and reaches an agreement with the defendant to end the enforcement action after it has already begun. As part of these agreements, the agency may agree to dismiss one or more of the charges, which often reduces the penalty the defendant will face.

State and federal criminal prosecutors all have the authority to enter into plea agreements. DPAs and NPAs are available at the federal level and may be available in some states, depending on local laws and the powers of the relevant agency. Regardless of the precise form, negotiated resolutions are extremely common in most, if not all, US enforcement contexts. Negotiated resolutions (especially corporate resolutions) often include features such as:

- a fixed term of years during which the defendant must comply with the terms of the agreement or risk the government pursuing a formal action;
- monetary penalties;

- obligations to cease ongoing violations, remediate harm caused to victims, and improve internal processes to prevent future violations;
- reporting requirements (eg, the company must report any violations of law or the negotiated resolution directly to the enforcement agency); and
- often, compliance monitors, who are appointed as neutral third parties to oversee the defendant's compliance with the law and the agreement, report to the government on the defendant's activities, and review and audit the defendant's activities.

Plea agreements are used in criminal cases and require the defendant to acknowledge guilt. Pleas must be approved by a judge and result in the entry of a conviction against the defendant. In practice, courts rarely modify or reject plea agreements proposed by the parties, but it is possible for them to do so.

Civil regulators like the SEC use settlement agreements to the same effect. A settlement agreement does not necessarily require an admission of liability or wrongdoing (although the regulator may demand one). Nor does a settlement agreement necessarily need to be approved by a court or automatically result in the entry of a judgment against the defendant in the same way that a plea agreement results in a conviction.

7.5 Jurisdictional Reach of the Body/Bodies

See **3.2 Geographical Reach of Applicable Legislation**. US enforcement agencies' jurisdiction generally reaches as far as the statutes they enforce. Civil regulators' subject-matter jurisdiction is generally more circumscribed than that of criminal authorities. For example, the SEC can only take civil enforcement actions based on conduct affecting US securities issuers or their personnel, the CFTC can only civilly enforce laws relating to US commodities markets, and the DOJ can enforce criminal violations affecting either securities or commodities markets.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Landmark Investigations and Decisions

Glencore

In May 2022, Glencore paid USD1,5 billion to US, UK, and Brazilian authorities to resolve investigations that included FCPA and market manipulation allegations arising from more than USD100 million in payments to foreign officials in various African and Latin American countries. As part of the US resolution, Glencore agreed to a three-year compliance monitor in connection with the FCPA resolution and a separate three-year compliance monitor in connection with the market manipulation resolution.

Credit Suisse

In October 2021, Credit Suisse paid USD475 million to US and UK authorities to resolve investigations that included FCPA, securities fraud, and wire fraud allegations arising from USD2 billion in loans to state-backed tuna fishing ventures in Mozambique. As part of the US resolution, a Credit Suisse subsidiary pleaded guilty in federal court to criminal conspiracy to commit wire fraud. In addition, as part of the UK resolution, Credit Suisse agreed to provide USD200 million in debt forgiveness to Mozambique.

Hoskins

In a landmark decision in 2018, the Second Circuit held that former Alstom executive Lawrence Hoskins (a UK national formally employed by a British Alstom entity and working for a French subsidiary of Alstom) could not be convicted

for violating the FCPA based on conspiracy or aiding and abetting theories, but could be liable if he acted as an agent of a US domestic concern. The case proceeded to trial, where a jury convicted him of violating the FCPA. In February 2020, however, a US District Judge granted Hoskins' motion for acquittal as to the FCPA counts, concluding that he had not acted as an agent of Alstom's US subsidiary. The court upheld Hoskins' conviction on related money-laundering counts, sentencing him to 15 months in prison and a USD30,000 fine. In August 2022, the Second Circuit affirmed the district court decision to acquit on the FCPA counts.

Coburn & Schwartz

Two former executives at Cognizant Technology Solutions Corporation were charged in 2019 with conspiring to bribe a government official in India to secure a construction permit for a planned office campus there. In February 2020, a federal district court determined that individual communications, not corrupt payments or quid pro quo agreements, are the appropriate "unit of prosecution" under the FCPA (ie, a defendant may be charged with a separate count of violating the FCPA for each email/communication sent in furtherance of a corrupt scheme). A jury trial is currently scheduled for March 2023 in the case.

Domestic Corruption Statutes

There have also been a few high-profile developments involving domestic corruption statutes in recent years, including:

- a Supreme Court opinion in the "Bridgegate" case, concluding that state officials who made a regulatory decision for a political purpose could not be prosecuted for violating 18 U.S.C. Section 666 or 1343 unless they had actually converted federal government property or defrauded the federal government; and
- a pending Supreme Court review of a case involving the conviction of a top aide to the former Governor of New York following that aide's conviction for taking bribes while he was working for the former governor's office and re-election campaign.

Enforcement Trends

The 2021 annual report of the DOJ's Fraud Section states that the FCPA Unit charged 26 individuals in 2021, 19 of whom were convicted by guilty plea or after trial; in the same year, the FCPA Unit at the Fraud Section reached three corporate resolutions involving the imposition of USD649 million in fines, penalties, and forfeiture.

7.7 Level of Sanctions Imposed

FCPA resolutions have included some of the biggest monetary penalties in US criminal or regulatory history. Many penalties have reached into the hundreds of millions of dollars.

Individuals, too, can pay a substantial monetary fine or serve prison sentences for bribery or corruption schemes. Typical prison terms for these crimes are often less than ten years but have ranged as high as 15 years for an FCPA violation and longer for domestic statutes.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

Anti-bribery and corruption enforcement in the USA is routinely subject to assessment by the US government itself, as well as civil society organisations and international institutions.

OECD Evaluation

In November 2020, the OECD released an updated evaluation of US anti-bribery and corruption enforcement – the first such update since 2012. The OECD generally commended the USA's anti-bribery and corruption programmes, noting its ability to "conclude foreign bribery matters comprehensively with effective, proportionate, and dissuasive sanctions, while also providing legal certainty to the companies involved", but also included a few potential future improvements.

Among the USA's strengths, the OECD stated that US enforcement authorities have increasingly addressed the "demand side" of bribery by charging foreign public officials and their associates with money laundering or other offences when they use US financial institutions in corrupt schemes or otherwise fall under US jurisdiction. The OECD positively noted other policies and trends in anti-bribery prevention and enforcement, including the US commitment to co-ordinating multi-jurisdictional investigations with agencies in other countries.

While the OECD's report was largely positive, it nonetheless provided recommendations in three key areas.

- Detection of foreign bribery – the OECD recommended that the USA:
  - (a) report on the sources of allegations leading to foreign bribery investigations; and
  - (b) enhance protections for whistle-blowers.
- Investigation and prosecution of foreign bribery – the OECD recommended that the DOJ and SEC continue to harmonise their enforcement approaches and review the effectiveness of the DOJ's Corporate Enforcement Policy.
- Sanctions – the OECD recommended that the USA collect data on debarment in foreign bribery cases and encourage public contracting authorities responsible for those granting arms export licences to implement reviews of debarment lists of multilateral financial institutions.

The European Court of Human Rights and GRECO

In April 2021, the Council of Europe Directorate General Human Rights and Rule of Law Corruption – Group of States Against Corruption (GRECO) issued a report assessing anti-corruption laws and practices in the USA. The report noted areas where the USA had made progress since previous evaluations, but identified additional points for improvement. For example, it recommended additional protections against undisclosed conflicts of interest for congressional representatives.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

US government authorities frequently revise enforcement policies and priorities. Significantly, in September 2022, Deputy Attorney General Lisa Monaco emphasised that the DOJ's "number one priority is individual accountability" and explained that DOJ expects companies to voluntarily self-disclose and timely produce documents related to all involved individuals during investigations. At the same time, Monaco issued a memorandum that describes new corporate criminal enforcement policies, including streamlined guidance regarding credit for companies that voluntarily disclose, co-operate with authorities, and remediate misconduct. The memorandum provides further guidance on how the DOJ will evaluate a company's history of misconduct, a company's internal compliance programmes, and the application of external monitors during future criminal resolutions. These policies will enhance, but not substantially alter, the scope and practice of federal anti-corruption laws.

Freshfields Bruckhaus Deringer LLP has a white-collar defence team that is highly skilled in advising cross-border businesses on anti-bribery and corruption risks arising anywhere in the world. The firm's US white-collar partners, most of whom are former federal prosecutors, lead a team with more than 75 US lawyers working in close co-ordination with Freshfields offices in Europe, the Middle East, and Asia. Freshfields helps clients respond to simultaneous inquiries from the US DOJ, the US SEC and CFTC, the UK Serious Fraud Office, and other regulators, in connection with allegations of bribery and corruption. Freshfields lawyers develop multi-pronged defence strategies to navigate the varied expectations of regulators around the globe. The firm regularly conducts international anti-bribery compliance programme reviews and provides due diligence and transactional advice for some of the world's leading investors, banks, and multi-nationals. Recent anti-corruption work has included securing the first declination with disgorgement under the DOJ's Corporate Enforcement Policy.

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Trends and Developments

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Last year, we predicted an increase in corporate enforcement with the beginning of the Biden administration.

However, while Biden administration officials have continued to emphasise the centrality of anti-corruption efforts, the total number of white-collar prosecutions remains sharply down compared to ten or even five years ago, with fraud in federal programmes remaining the largest source of federal white-collar crime prosecutions. The total number of federal criminal prosecutions is slightly down as well.

As described below, part of this decline may stem from investigators and prosecutors taking advantage of new, extended, statute of limitations periods for certain types of fraud, including fraud in loan applications under the Paycheck Protection Program. The effects of the coronavirus pandemic also continue to echo in the financial industry, with the SEC collecting billions of dollars in fines against major banks in connection with the use of personal devices by employees.

In other developments, regulators have also aggressively moved into new areas of enforcement, particularly cryptocurrencies. The Department of Justice (DOJ) has expanded on its previous approaches to corporate responsibility, with an emphasis on criminal liability for individuals and swift reporting by affected corporations. The Internal Revenue Service (IRS) received a substantial increase in its budget for enforcement, with a likely focus on audits of high net worth individuals. After several years of relatively robust Foreign Corrupt Practices Act (FCPA) settlements and prosecutions, the DOJ and the SEC are looking at reporting their second consecutive down year for FCPA cases. Finally, the Supreme Court seems likely to continue its push-back against the expansion of theories of prosecution in governmental corruption cases.

Trends to Watch

The statute of limitations for prosecutions under the Coronavirus Aid, Relief, and Economic Security (CARES) Act has been significantly lengthened

Many observers last year anticipated a wave of prosecutions for fraud committed in connection with applications under the 2020 CARES Act, and in particular for government aid granted under the Paycheck Protection Program. The latter offered forgivable loans to small businesses and certain larger businesses for up to eight weeks of payroll expenses, so long as employees were not laid off during that same period. The Economic Injury Disaster Loan Program allowed businesses to receive emergency loans to meet daily business operation goals. These two programmes collectively provided more than a trillion USD in relief, primarily to small businesses and their creditors.

Safe to say, those prosecutions, at least on the scale anticipated, have not materialised. While some estimates put fraud in connection with these programmes at more than USD30 billion, prosecutions have been, at least in comparison to the potential losses, relatively limited. The extension of the statute of limitations presages a significantly ramped-up prosecution effort,

with a likely focus on fintech, the source of much of the fraud in these programmes, particularly those involving non-bank lenders.

SEC imposes USD1 billion in fines as part of personal devices investigations

While the SEC moved into new areas of regulation in 2022 (as described below), it also took major actions in its traditional enforcement areas. In one of the broadest-reaching and most significant regulatory acts of 2022, it engaged in an effective sweep of major Wall Street banks and their compliance with SEC rules regarding the use of personal devices.

Long an area of irregular enforcement, the SEC's prohibition against the use of unmonitored personal communication devices and electronic communication services was thrust into centre stage in 2022. Because employees typically do not back up such communications, these communications can violate SEC record-keeping requirements. During the coronavirus pandemic, work from home made it more challenging for broker-dealers to keep up with communications by their employees, not only with the use of personal devices but with the numerous chat and social media platforms available. After many months of internal investigations, and sanctions against individual employees for violations of bank policies, 15 different broker dealers and one registered investment adviser, including many of Wall Street's biggest names – Goldman Sachs, Morgan Stanley, Barclays, Jefferies, Nomura – settled with the SEC, acknowledging the violations, committing to improved policies, and paying fines collectively in excess of USD1 billion.

The SEC moves aggressively into regulation of cryptocurrency, joining other regulators

In 2022 US government regulators were active in the fast-developing cryptocurrency markets.

The SEC moved aggressively into enforcement actions against both issuers and individuals in the cryptocurrency space, notwithstanding substantial questions about its jurisdiction, which defendants were quick to challenge. In SEC v Ripple, the issuer had used the statements of a former SEC official to question whether the cryptocurrency at issue, XRP, is a security that falls within SEC jurisdiction. In another case, SEC v Wahi, the SEC further expanded its jurisdictional reach, asserting that nine different cryptocurrencies were in fact unregistered securities. Significantly, the SEC has not, or at least not yet, brought actions against any of the issuers of those alleged securities or the platform on which they were traded, Coinbase.

Unsurprisingly, these actions have roiled the cryptocurrency market. They have also drawn criticism not only from the crypto community but from other regulators. Commodity Futures Trading Commission (CFTC) Commissioner Caroline D Pham sharply criticised the SEC's action in SEC v Wahi, calling it "regulation by enforcement", stating that "[m]ajor questions are best addressed through a transparent process that engages the public to develop appropriate policy with expert input – through notice-and-comment rule-making pursuant to the Administrative Procedure Act".

In considerably less-disputed exercises of authority, the CFTC continued its active engagement in the crypto space, imposing more than USD2,5 billion in fines as part of 82 different investigations in FY 2022, with cryptocurrency investigations representing more than

20% of its enforcement actions. The CFTC has brought actions against large crypto brokerage platforms, such as Gemini, and against novel crypto-derived entities, like the Ooki Distributed Autonomous Organization (DAO).

The CFTC may ultimately prevail in this regulatory turf war, with the Responsible Financial Innovation Act (RFIA) currently under consideration in Congress. While the bill would define as "securities" under the '33 and the '34 act cryptocurrencies that provide certain equity- or bond-like rights to their holders, the CFTC would be the primary regulator for both "digital assets" and "digital asset exchanges".

The DOJ brought its first actions in the cryptocurrency space in 2022, indicting a former employee of Ozone Networks, the owner of the Open Sea NFT exchange platform in June 2022 and a former Coinbase employee and two others in July 2022. However, unlike the SEC, the DOJ did not rely on statutes that on their face require the digital assets at issue to satisfy the requirements of a security or commodity, and instead relied on "misappropriation theory" for wire fraud. While this theory is not without its issues, insofar as there are real questions about whether the information allegedly misappropriated was either "confidential" or "property" as the law requires, this represents a significantly more measured approach than the SEC's.

Corporate prosecutions continue to emphasise personal responsibility

In 2021, Deputy Attorney General Lisa Monaco announced that the DOJ was revising its policy on prosecuting corporate entities, signalling a focus on corporate criminal liability and individual accountability. While continuing this message in 2022, the DOJ's latest announcement expands on the importance of individual, criminal liability, while at the same time trying to provide incentives for corporations to self-report soon after discovering potential problems.

On 15 September 2022, Monaco announced revisions to the DOJ's corporate criminal enforcement policies that seek to put pressure on companies to implement effective compliance policies and to self-report if there are indications of criminal activity. The key points are laid out below.

- Corporations must identify individuals quickly: Monaco noted that corporations must disclose "all relevant, non-privileged facts and evidence about individual misconduct" in a timely fashion, particularly if corporations want to receive co-operation credit. Additionally, the DOJ now will "require co-operating companies to come forward with important evidence" to prosecutors "more quickly". Thus, she emphasised that "if a co-operating company discovers hot documents or evidence [during a government investigation], its first reaction should be to notify the prosecutors".
- Clear benefits to aggressive corporate disclosure: As explained by Principal Associate Deputy Attorney General Marshall Miller on 20 September 2022, "[E]very Justice Department component that prosecutes corporate crime cases, including the US attorney community, will now have a voluntary self-disclosure policy that defines its terms and identifies its rewards... any company that self-discloses promptly will not be required to enter a guilty plea – absent aggravating factors – and will not be assessed a monitor, if it has remediated, implemented and tested an effective compliance programme".
- Updated compliance policies relating to personal devices and social media: Compa-

nies must implement "effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved". This can affect co-operation credit.
- Corporate track record: Moderating previous statements from the Biden administration about the importance of past misconduct, the DOJ has indicated that less emphasis will be placed against a history of regulatory sanctions that are more than ten years old or, in highly regulated industries, typical in that industry. However, the DOJ will continue to "disfavour multiple, successive non-prosecution or deferred prosecution agreements with the same company" when deciding how to resolve an investigation. That said, the updated guidance emphasises that this policy should not disincentivise corporations that have been the subject of prior resolutions from voluntary and timely self-disclosures of current or prior conduct.

How this plays out in practice remains to be seen. Self-reporting criminal acts by employees is not required by law in the US. Further, company counsel can generally invoke the attorney-client privilege to shield decision-making on such issues, sparing companies from a potentially embarrassing revelation about a decision not to report. As a result, these decisions are generally driven by business considerations, with the potential of a reduced punishment following a self-report weighed against expense, public relations consequences, and other difficulties associated with notifying the government of activity that may never otherwise come under scrutiny.

IRS enforcement receives substantial budget increases

After numerous previous attempts, in August of 2022, the IRS finally received a long-promised increase to its enforcement budget as part of the Inflation Reduction Act. An additional USD80 billion over ten years has been slated, to the end of recapturing an estimated USD600 billion in annual evaded taxes. Practitioners should expect significantly closer scrutiny of personal tax returns of high net worth individuals. Tax enforcement has, however, become an increasingly partisan issue in recent years and it is certainly possible that this change in enforcement will not survive a change in administration.

FCPA prosecutions continue to decline

The FCPA is prosecuted by the DOJ and SEC to prevent US companies and individuals from engaging in corruption of foreign government officials to advance their interests. Applying to issuers of securities on US exchanges (including ADRs) and US-based persons and companies, the FCPA contains anti-bribery sections, typically enforced by the DOJ, and accounting and record-keeping provisions applicable to issuers of US securities, typically enforced by the SEC.

After several years of relatively robust enforcement in 2018, 2019, and 2020, with 39, 54, and 35 combined DOJ/SEC actions in each of those respective years, there were 15 such actions in 2021 and 14 in the first eight months of 2022. While the number of publicly filed enforcement actions is not an exact proxy of enforcement efforts, and the DOJ in January 2022 reported a "very robust pipeline" of enforcement actions, the slowdown in such actions seems to have established itself as a trend.

Supreme Court likely to trim back prosecutorial expansion of "right to control" and "honest services" fraud prosecutions

In 2020, a unanimous Supreme Court decision vacated fraud convictions arising from actions by New Jersey government officials to cause traffic delays to punish a political opponent in Kelly v United States (known as "Bridgegate") because the defendants had not obtained or tried to obtain "property", at least not in any recognisable form.

While no decision has yet been issued, it looks likely that the US Supreme Court will continue to trim back aggressive criminal prosecution of public corruption by limiting other expansive legal theories under which the government has brought public corruption charges. In the "Buffalo Billion" cases, prosecutors had advanced two relatively novel legal theories: first, that by depriving state officials of key information in a "request for proposal" process, defendants had defrauded those officials of the "right to control" the relevant information; and second, that another defendant, although a private citizen at the time of the relevant conduct, had defrauded New York residents of the "right to honest services" by accepting money to lobby state officials on the terms of a contract. Both of these theories will now come under review by a Supreme Court that has been sceptical of the use of fraud theories in public corruption cases.

Conclusion

The year 2022 saw several changes to the regulatory and enforcement environment for white collar investigations and enforcement actions, and 2023 promises more of the same.

While market participants have expected more aggressive enforcement efforts across the board from the Biden administration, that expectation has by and large not been met, with US government regulators pursuing a relatively small handful of high-profile actions, while at the same time deferring (as in the CARES Act prosecutions) or reducing (as in the FCPA context) criminal prosecutions.

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