



**C L I F F O R D**  
**C H A N C E**

Anti-Bribery and Corruption Review  
May 2016



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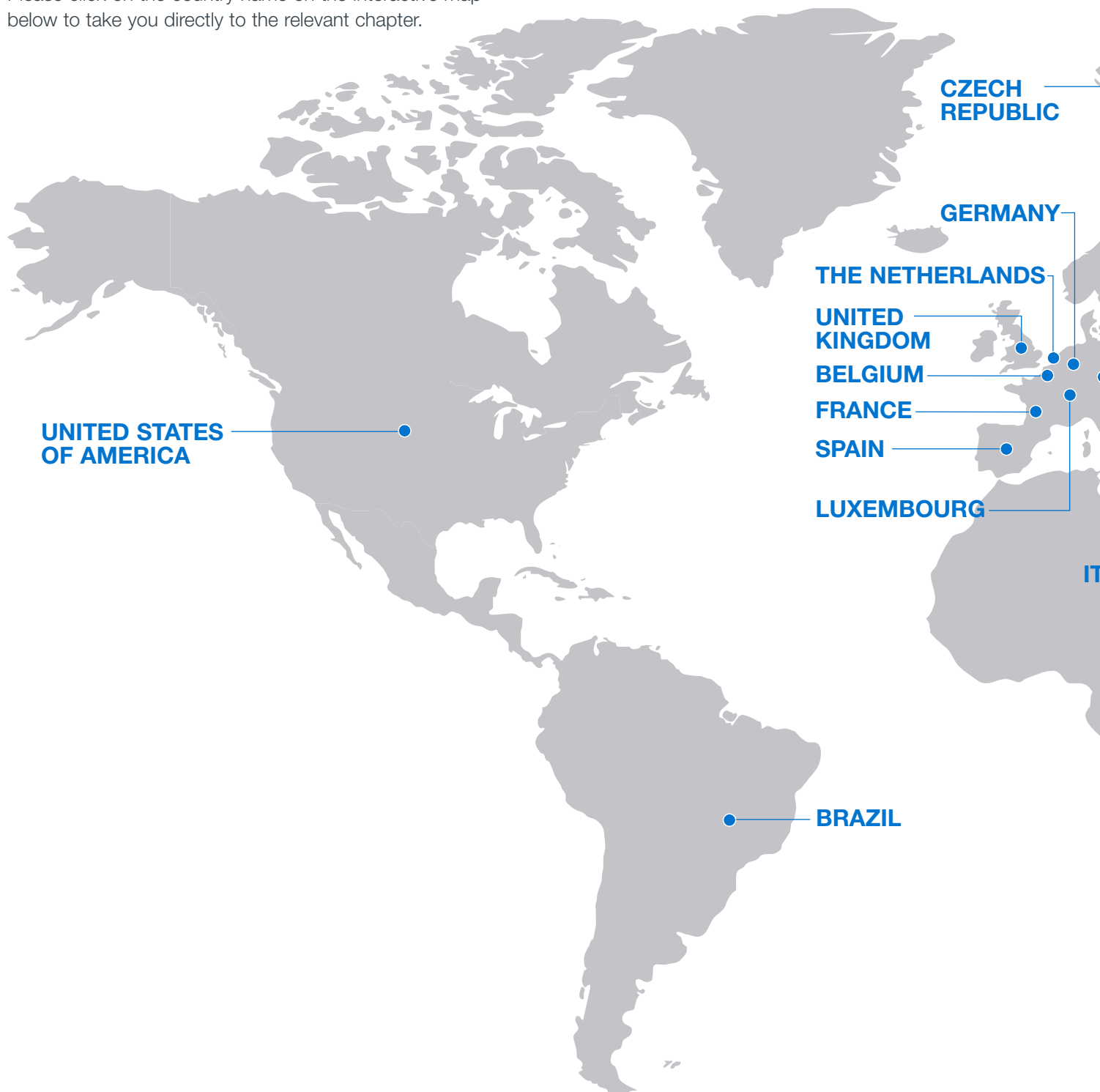
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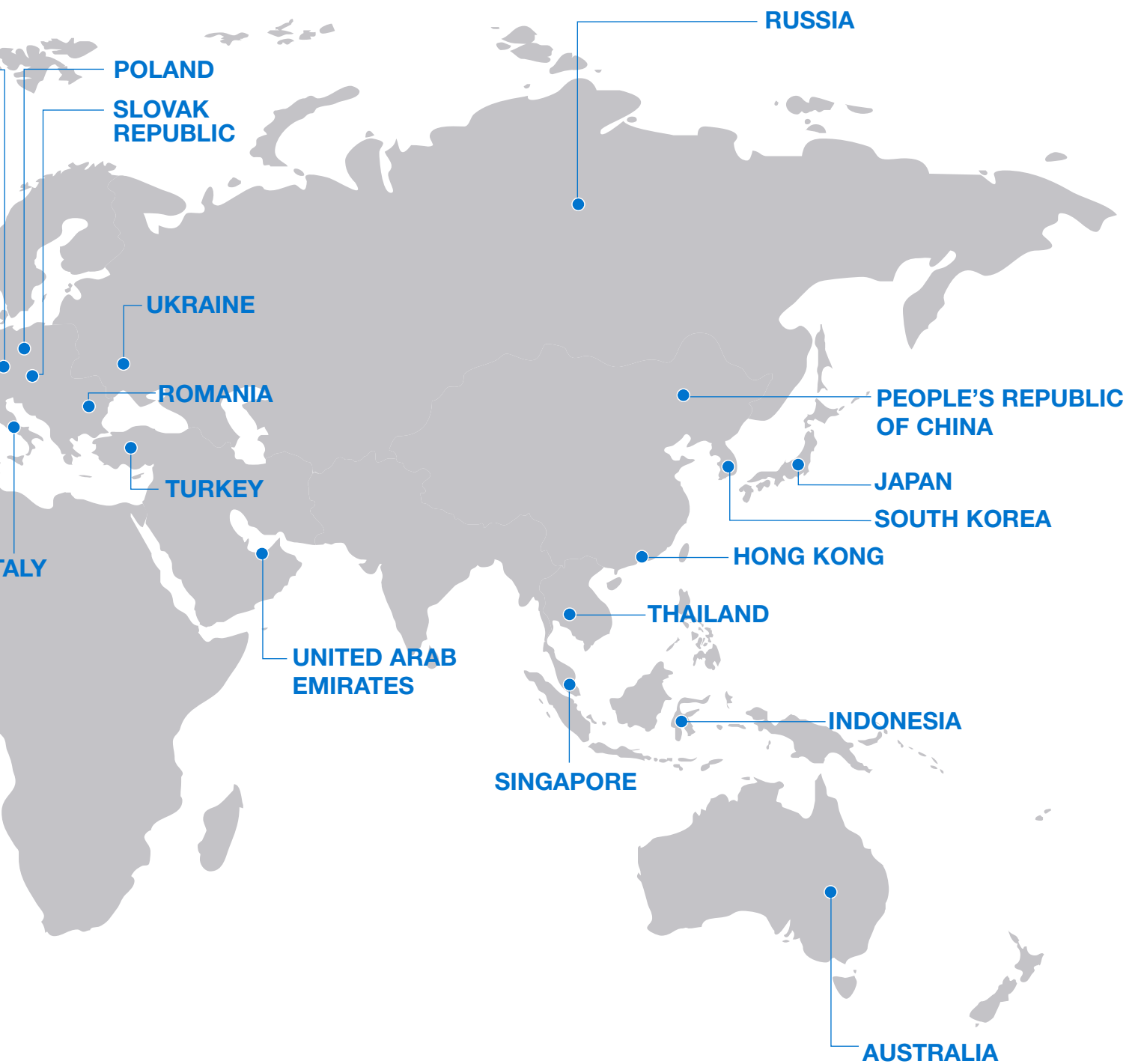
\*\*\* Contributed by Linda Widyati & Partners, our associated firm in Indonesia.

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# World Map

Please click on the country name on the interactive map below to take you directly to the relevant chapter.





# Foreword

Prosecutions for bribery and corruption continue to attract media headlines around the world and, in response, international companies continue to review what they have to do to address the risks to their business, and to their reputation. Fundamental to this is staying on top of relevant legislative developments and enforcement trends in the countries in which they operate. Some national authorities have even highlighted this information gathering as a regulatory requirement for directors and senior corporate officers. This review looks at recent developments in some of the jurisdictions around the world where we have offices, focusing particularly on changes to legislation, both recent and proposed, and on prosecutions and enforcement trends. We intend to produce updates at regular intervals.

Patricia Barratt and David Pasewaldt, Editors

Europe, the Middle East and Africa

# Belgium

## Changes to legislation

A draft Bill is pending before Parliament which is designed to amend the current Belgian legal principle of mutually exclusive liability of natural and legal persons, further to a recommendation by the OECD. The Belgian government argued that the principle is not fully exclusive, as both a natural person and a legal entity can be liable where the individual commits an offence “knowingly and willingly”, which would be the case in relation to a bribery offence, where wilful misconduct is already a necessary element. However, the abolition of the principle has been approved by the College of Prosecutors and the Bill has been submitted to the Council of State for an opinion. The timing of this proposed change remains unclear.

It is also expected that a Bill will be brought before Parliament in October to increase the sanctions for acts of foreign bribery.

## Prosecutions and enforcement actions

In early 2016, the Court of Appeal of Brussels issued a judgement confirming the convictions of 14 public officials, 35 contractors and 24 companies involved in a high profile corruption case relating to contracts tendered by the Belgian Buildings Agency. A number of other individuals involved in the criminal investigation had previously been discharged following expiry of the limitation period. The sanctions imposed in the proceedings in first instance had been relatively light in view of the lengthy investigation. The Court of Appeal increased the sanctions and pronounced (suspended) prison sentences of up to three years and a EUR 110,000 fine for one party involved. A limited amount of

EUR 100,000 was confiscated as instrument of the bribery. The total amount of bribes leading up to these convictions was estimated at EUR 380,135.85 and the value of the contracts awarded at EUR 16,633,306.

Apart from this case, there have been few enforcement cases in Belgium, and there is very little case law. According to statistics published by the Belgian Service for Criminal Policy, there were two convictions for private corruption in 2013, and 33 convictions for public bribery. No distinction is made between foreign bribery and domestic bribery. In addition, the records of the Belgian Financial Intelligence Processing Unit, which processes suspicious financial transactions, show that it reported 12 cases of embezzlement and corruption to the judicial authorities in 2014, for an amount of EUR 8.9 million in total.

## Other developments

In a follow-up report in February 2016, the OECD made a number of criticisms of Belgium's anti-bribery measures. On the one hand, the report welcomed Belgian efforts to remind the prosecution and enforcement authorities of their reporting obligations in cases of suspected foreign bribery, as well as attempts to raise awareness amongst its administration in relation to offences of bribery. However, it found that Belgium had not brought its legal framework into compliance with the OECD Convention, by not clarifying the attribution of the intentional element of the offence of foreign bribery. It also found that the time limitation periods (and rules for their suspension) do not provide sufficient time for an effective investigation and prosecution.

The OECD report also found that Belgium had not dedicated adequate human and financial resources to cases involving bribery, and that Belgian authorities were insufficiently proactive in cases where information on foreign bribery is revealed in the context of international cooperation. It felt that accounting offences were not being prosecuted vigorously enough, and criticised the fact that external auditors are not required to report such offences.

The report criticized the adequacy of sanctions for foreign bribery cases, in particular, non-pecuniary sanctions, and found that law enforcement authorities and prosecutors do not routinely consider confiscation measures with respect to the instrument and the proceeds of bribery. Lastly, the OECD deplored the absence of a sufficient (and sufficiently accessible) record in respect of criminal convictions for foreign bribery, or of settlements. The OECD Working Group requested Belgium to present a written report in October 2016 on implementation of its outstanding recommendations.

At the end of 2015, Transparency International published a study on ‘Transparency in Reporting on Anti-Corruption’ amongst Belgian listed companies. The main findings are that large multinationals are twice as transparent in terms of their anti-corruption policies as smaller companies. Even though the performance of large multinationals is much improved since 2012, they still underperform compared to the international average (50% compared with 70%). The study also found that Belgian companies on average do not communicate on their performance per country (7%).

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# Czech Republic

## Changes to legislation

A number of measures aimed at enhancing transparency or otherwise combating corruption have recently been proposed or passed. In June 2015, the Government approved a draft Online Sales Reporting Act, which would introduce an obligation on all sellers and service providers (with some exceptions) to report information about sales generating cash revenues to the local financial administration body. Despite strong resistance from opposition parties, the draft Act was approved by the Chamber of Deputies and is currently being discussed in the Senate.

In October 2015, the Government approved a draft of an amendment to the Public Procurement Act. This amendment aims to relax certain strict rules of the current legislation and to make it easier to blacklist contractors for misconduct. The amendment has been approved by the Chamber of Deputies and is currently being discussed in the Senate.

In September 2015, the Parliament approved the Contract Register Act which will therefore become effective in 2017. According to this Act, every contract concluded by a public institution worth more than EUR 2,000 must be published. This measure is perceived as a strong anti-corruption weapon by many NGOs. However, its real impact is questionable, because a breach of the publication duty will not invalidate the respective contract.

## Prosecutions and enforcement actions

In March 2016, OLAF started a formal investigation of a Czech company close to the Minister of Finance on the grounds of European subsidies fraud. The Minister of Finance has denied any connection to this company and all related accusations.

In February 2016, the director of the Energy Regulatory Office was sentenced to eight years in prison. She was charged with professional misconduct in relation to issuing licences to unauthorised solar plants. The verdict has not yet taken effect.

In March 2015, a former head of elite Prague hospital "Na Homolce" and several others were accused of corruption and bribery. The criminal proceedings are still pending before the court and all those charged have been released on bail.

Criminal proceedings are still pending before the court in respect of a former Defence Minister charged in June 2012 with the misuse of power. She was stripped of her parliamentary immunity later that year.

In June 2015 an MP, charged in May 2012 with taking bribes and stripped of his parliamentary immunity later that year, was sentenced to eight and half years in prison. The verdict has not yet taken effect.

## Enforcement trends

There has been a significant increase in high profile corruption investigations during the last few years and a number of high profile politicians, lobbyists and businessmen have been accused of corruption and bribery. Combating corruption is a priority of the current government and various new anti-corruption policies have been introduced at central and local levels. The sitting Minister of Finance labelled the combat against tax frauds his top priority and during the last two years the newly established Special Tax Fraud Unit has revealed tax frauds amounting to EUR 150 million.

Public officials are obliged to report the receipt of possessions, gifts, income and obligations to a publicly accessible Register of Conflicts of Interests. Currently, there are plans to introduce the same obligation for judges also. A significant number of public officials have been found to be in breach of this reporting duty, but a failure to report attracts only a relatively small fine.

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# France

## Changes to legislation

Sapin II, a draft Bill on transparency, anti-corruption and economic modernization, may soon introduce a new framework legislation to prevent, detect and punish corruption in France and abroad. The 'Loi relative à la lutte contre la corruption et pour la transparence de la vie économique', known as Sapin II, is to be debated in the French National Assembly in 2016, and could be adopted as early as this summer, according to the Ministry of Finance (as reported in the media).

Inspired by international standards, it provides, in particular, for (i) the creation of an agency (*Agence nationale de prévention et de détection de la corruption*) (the Agency) with the role of preventing and detecting corruption, (ii) the imposition of an obligation to prevent risks, as well as (iii) the creation of additional sanctions for failing to bring a company into compliance. The Agency will be granted broad investigative powers (in particular, to conduct on-site investigations, make document requests and conduct interviews), as well as the authority to impose sanctions.

The proposed draft Bill will also create a new obligation for companies to prevent corruption risks. This duty will apply to (i) companies with more than 500 employees and (ii) companies belonging to a group with at least 500 employees and a yearly turnover of more than EUR 100 million, as well as to their management. To fulfill this obligation, such companies will be required to

adopt effective anti-corruption procedures including:

- a code of conduct that defines prohibited acts and behaviours;
- an internal whistleblowing system that enables employees to report code of conduct violations;
- due diligence procedures to verify the integrity of partners (clients, suppliers, intermediaries);
- accounting control systems to avoid fraud, including acts of concealment or influence peddling;
- establishment of an inventory of risks; and
- implementation of disciplinary sanctions.

In the event of a violation, or if a company's anti-corruption procedures are deemed insufficient or ineffective, the Agency's enforcement committee will have the authority to issue warnings or orders to comply, or to impose administrative sanctions (up to EUR 1 million for companies and EUR 200,000 for individuals, together with the possible publication of the sanction).

A further sanction, similar to the *monitorship* procedure imposed by U.S. authorities, is aimed at ensuring future compliance: in the event of a conviction or judgment for corruption or influence peddling, a company may be forced to implement a compliance programme under the supervision of the Agency, at its own expense, within a maximum period of three years.

If implemented, Sapin II's radical reforms may raise France's anti-corruption legislation to the same level as other European countries.

## Prosecutions and enforcement actions

In February 2016, the Paris Court of Appeal found a major oil company guilty of corrupting foreign officials in the United Nations' oil-for-food programme for Iraq, overturning a 2013 ruling that had cleared the company of all charges. The programme allowed Saddam Hussein's regime to sell crude from 1996 to 2003 in exchange for humanitarian goods in short supply because of sanctions. The oil company was fined EUR 750,000 by the Paris Court of Appeal, in a case that drew significant global media attention.

## Enforcement trends

Following years of criticism by the Organization for Economic Cooperation and Development (OECD) and other organizations for its lacklustre performance in enforcing anti-corruption laws, the French authorities have recently been relatively active in attempting to ramp up the prosecution of these cases, leading to several investigations and court cases.

To do so, France strengthened its anti-corruption enforcement arsenal by adopting a number of new laws in 2013, resulting in the creation of the French *Parquet National Financier* – a financial prosecutor's office responsible for, among other things, prosecuting certain

corruption offences –, a new power for approved anti-corruption associations to initiate criminal proceedings for certain corrupt acts, and increased criminal penalties for bribery.

Nevertheless, despite these legislative initiatives, instances of corruption prosecutions remain limited at this stage. Indeed, in February 2016, the Council of Europe Group of States against Corruption (GRECO) welcomed a series of recent anti-corruption reforms in France, including the introduction of draft Bill Sapin II, but noted that important gaps remain. In particular, the report concluded that France has made no progress in improving its ability to prosecute corruption-related offences committed in a transnational context. Although France is a major exporting country, the report finds that its efforts to penalize international corruption have so far produced minimal results.

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# Germany

## Changes to legislation

Following the 2014 changes to the criminal offence of bribing delegates<sup>1</sup>, further measures strengthening criminal anti-corruption law have now entered into effect and there are further draft laws in the pipeline.

### German Law on Fighting Corruption now in force

On 26 November 2015, the German Law on Fighting Corruption (*Gesetz zur Bekämpfung der Korruption*)<sup>2</sup> entered into effect. The key elements of this new Law are the extension of the criminal offence of taking and giving bribes in commercial practice under section 299 German Criminal Code (*Strafgesetzbuch*) to acts beyond competition and the expansion of the criminal offences of bribing public officials under sections 331 *et seqq.* German Criminal Code and their extraterritorial applicability:

- Under the previous legislation, a person was criminally liable for the offence of taking and giving bribes in commercial practice (*Bestechlichkeit und Bestechung im geschäftlichen Verkehr*) under section 299 German Criminal Code if the offender (as “receiver”) allowed himself to be promised, demanded or accepted, or if he (as “donor”) offered, promised or granted a benefit in return for obtaining an unfair advantage (*unlautere Bevorzugung*) in competition (the so-called “competition model” [*Wettbewerbsmodell*]). Thus, section 299 German Criminal Code covered, for example, cases where an employee in the procurement department selected a service supplier which had not submitted the most

economically advantageous offer compared to competitors, but which had given the employee in the procurement department a personal benefit (such as presents or hospitality exceeding a “social-adequate” level) in return for his selecting that supplier. Since 26 November 2015, the criminal offence also covers benefits given – on the basis of an agreement of wrongdoing (*Unrechtsvereinbarung*) – to an employee or agent of a company, without the consent of the company, in return for a breach of a duty to that company (the “employer model” [*Geschäftsherrenmodell*]). According to the explanatory notes to the new Law, the relevant duty to the company can arise, in particular, as a result either of law or contract and (for example, from additional employment regulations in the form of internal company guidelines). Therefore, an employee of a company could now potentially be exposed to criminal charges of taking bribes if he, for instance, in breach of internal procurement guidelines, were to place an order without inviting an offer from a competitor for comparison, in return for a personal benefit, whether or not the offer from the competitor would have actually been more economically advantageous.

- In a further legislative change, the criminal offence of taking and giving bribes in commercial practice has been added to the list of predicate offences for money laundering (section 261 German Criminal Code), when committed on a commercial basis (*gewerbsmäßig*) or by a member of a gang (*bandenmäßig*).

- Under the new Law, in addition to “public officials” (*Amtsträger*), “European public officials” (*Europäische Amtsträger*) are explicitly included in the criminal offences of bribing public officials under sections 331 to 334 German Criminal Code. Furthermore, section 11 para 1 no 2a German Criminal Code now contains a legal definition of the term “European public officials” which includes, in addition to members of institutions and bodies of the European Union (and others), officials or other servants of the European Union and individuals mandated to execute tasks for the European Union. These amendments import previous provisions of the EU Anti-Corruption Act (*Europäisches Bestechungsgesetz*) regarding the equivalence of, in particular, officials and other servants of the European Union and public officials “under German law” into the German Criminal Code. However, these changes go beyond the EU Anti-Corruption Act as such officials and other servants of the European Union are now subject not only to the qualified criminal offences of granting and accepting bribes (sections 334 and 332 German Criminal Code), but also to the basic criminal offences of granting and accepting (illegal) benefits (sections 333 and 331 German Criminal Code). The basic criminal offences only require a “benefit” to be given to or accepted by a public official without approval by the competent authority. In this context, presents or hospitality exceeding a “social-adequate” level

<sup>1</sup> For further details, please visit the German section of our Anti-Bribery and Corruption Review July 2015 (pages 11 *et seqq.*), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

<sup>2</sup> For further details, please see our client briefing “German Law on Fighting Corruption – strengthening criminal anti-corruption law and criminal anti-money laundering law – has entered into effect” of January 2016, at [http://www.cliffordchance.com/briefings/2016/01/german\\_law\\_on\\_fightingcorruptionstrengthenin.html](http://www.cliffordchance.com/briefings/2016/01/german_law_on_fightingcorruptionstrengthenin.html).



may, under certain circumstances, be considered a “benefit” in this sense under German case law. However, the qualified offences of granting and accepting bribes require that the benefit be granted or accepted on the basis of an – expressed or implied – agreement of wrongdoing that the public official, in return, has violated or will violate his official duties.

- Finally, section 335a German Criminal Code, newly implemented by the Law on Fighting Corruption, contains an equivalence arrangement for “foreign and international public servants”. According to this new provision, certain public officials of foreign states and international organisations are treated as public officials under German law in the context of the criminal offences of bribing public officials if the offence concerns a future official act. The changes aim at importing former equivalence arrangements, especially of the Law on Combating International Bribery (*Internationales Bestechungsgesetz*), into the German Criminal Code. However, these changes go beyond the Law on Combating International Bribery as well, as they not only apply to the criminal offence of granting bribes (section 334 German Criminal Code), but also to the criminal offence of accepting bribes (section 332 German Criminal Code). Accepting bribes is the criminal offence of the public official as “receiver”, who demands, allows himself to be promised or accepts a benefit on the basis of an agreement of wrongdoing, whereas granting bribes is the crime of the “donor” in this arrangement. The Law on Combating International

Bribery previously imposed criminal liability solely on the “donor”. In addition, a connection with international business is – unlike under the Law on Combating International Bribery – no longer required.

### Law on Fighting Corruption in the Healthcare Sector

On 14 April 2016, the German Federal Parliament (*Bundestag*) adopted the Law on Fighting Corruption in the Healthcare Sector (*Gesetz zur Bekämpfung von Korruption im Gesundheitswesen*).

This Law sets out new criminal offences of taking and giving bribes in the healthcare sector, in sections 299a and 299b German Criminal Code. Under new section 299a (*Bestechlichkeit im Gesundheitswesen*), certain members of the medical profession would be criminally liable if they (as “receivers”), in connection with the exercise of their profession, were to demand, allow themselves to be promised or accept a benefit for themselves or a third person on the basis of an – expressed or implied – agreement of wrongdoing (*Unrechtsvereinbarung*) that they would, in return, grant an unfair advantage in competition when carrying out functions such as prescribing, supplying or procuring pharmaceutical or medical products. Proposed new section 299b German Criminal Code sets out a mirror offence for the “donor”. The penalty for both offences is imprisonment of up to three years or a pecuniary penalty, or imprisonment of between three months and five years (in very serious cases).

The background to these new measures lies in a decision of the German Federal Court of Justice (*Bundesgerichtshof*) dated 29 March 2012,<sup>3</sup> in which the court

had found that contract doctors in private practice (*niedergelassene Vertragsärzte*) were neither “public officials” nor “agents”. According to this case law, illegal benefits granted to contract doctors in private practice in order to influence their behaviour are currently not prohibited under section 299 German Criminal Code (taking and giving bribes in commercial practice), nor as granting (illegal) benefits or bribes (section 331 *et seqq.* German Criminal Code) under German criminal anti-corruption law. The new Law aims at addressing this lacuna.

### Prosecutions and enforcement actions

Several investigations and court cases have caught the attention of the media.

In November 2015, the Frankfurt regional court (*Landgericht*) sentenced four individuals to prison sentences of up to three years (without probation) for taking and giving bribes in commercial practice (section 299 German Criminal Code) in connection with the expansion of the Frankfurt airport in 2007. In addition, the court ordered the confiscation of approximately EUR 20 million as gross proceeds of these offences. The court found that the four individuals, including a real estate agent and a manager of the airport operating company, had participated in the payment of at least EUR 2.8 million in bribes in return for a preferential allocation of property to investors. Not all judgements are yet final since at least one individual has filed an appeal against his conviction with the German Federal Court of Justice (*Bundesgerichtshof*).

Also in November 2015, the Frankfurt prosecution authority announced an

3 File reference: GrS – St 57/202.

investigation into a payment of EUR 6.7 million by the German Football Association's (*Deutscher Fußball-Bund*) organisation committee for the football world cup 2006 to the World Football Association (FIFA) in 2005. According to research by a German news magazine, this payment was allegedly made from a slush fund to secure the award of the football world cup 2006 to Germany by bribing members of the FIFA executive committee. Notably, the Frankfurt prosecution authority did not initiate investigation proceedings regarding giving bribes in (international) commercial practice (section 299 German Criminal Code) and embezzlement (section 266 German Criminal Code) as it found that a prosecution regarding these offences would, in any event, be time-barred (the limitation period for both offences being five years). However, it initiated investigation proceedings regarding the allegation of tax evasion in a very serious case (with a limitation period of ten years) against current and former top-level managers of the German Football

Association, following which tax investigators searched the Frankfurt offices of the German Football Association on 3 November 2015. As in other jurisdictions, there is a provision in German tax law that prohibits tax deductibility for corrupt payments (section 4 para. 5 sentence 1 no. 10 sentence 1 German Income Tax Act [*Einkommensteuergesetz*]). The individuals under investigation, however, allegedly deducted the payment of EUR 6.7 million as business expenses by declaring it as "cost-sharing for a cultural programme" in the German Football Association's 2006 tax return.

### Enforcement trends

As a general trend, the focus of corruption investigation proceedings has expanded further from industrial companies in the last decade to other sectors, including the financial sector. There have been further investigation proceedings by German prosecution authorities into German and foreign banks and financial institutions conducting business in Germany, particularly

regarding alleged granting of (illegal) benefits to German public officials in the form of gifts and hospitality. German legislation, case law and enforcement practice are quite strict in this regard. This is particularly true when it comes to value thresholds for gifts and entertainment granted to public officials, which are low compared to international standards. Furthermore, German prosecution authorities continue to step up cooperation with tax authorities regarding allegations of potentially unjustified tax deductions with regard to allegedly corrupt payments in the tax returns of relevant companies.

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# Italy

## Changes to legislation

The Law of 27 May 2015, concerning provisions on criminal offences against the public administration, conspiracy in organized crimes, false statements in a company's financial statements or accounts, has introduced amendments relating to criminal offences against the public administration.

Prime Minister Renzi's Government has focused on the fight against bribery and has adjusted the applicable penalties with the intention of ensuring that a defendant convicted for the commission of a criminal offence against the public administration does not benefit from a suspended sentence, or a plea bargain, without further practical consequences.

The Italian Parliament has: (i) increased the applicable penalties; (ii) introduced discounts to the applicable penalties for defendants who have cooperated with the authorities; and (iii) provided for the availability of suspended sentences and plea bargains where the defendant disgorges an amount equal to the proceeds of the crime.

The penalties have been increased as follows:

- bribery: imprisonment from six to ten years (previously from four to eight years);
- bribery in the context of litigation: imprisonment from six to 12 years (previously from four to ten years);
- facilitation payments to a public official: imprisonment from one year to six years (previously from one year to five years);

- embezzlement by a public official: imprisonment from four to ten years and six months (previously from four to ten years);
- extortion by a public official (coercion): imprisonment from six to 12 years (previously from four to 12 years);
- extortion by a public official (by inducement): imprisonment from six to ten years and six months (previously from three to eight years).

The defendant may obtain a reduced sentence by cooperating with the authorities during the investigation and by helping the public prosecutor to seize the proceeds of the crime.

If a suspended sentence is permitted under Italian law, in case of conviction for a criminal offence against the public administration, a suspended sentence is only available where the defendant has disgorged an amount equal to the proceeds of the crime.

The new Law expands the categories of persons in the public administration who can commit the offence of extortion by a public official (coercion), so that this offence can now also be committed by all employees of the public administration (whereas previously it could only be committed by a more narrowly defined category of public officials).

The defendant cannot enter into a plea bargain unless an amount equal to the profits of the crime has been disgorged to the Italian authorities.

## Prosecutions and enforcement actions

Political corruption dominated headlines in Italy during both 2014 and 2015, especially with regard to three main criminal investigations: Mose (Venice), Expo (Milan) and Mafia Capitale (Rome). In these proceedings several managers and politicians were arrested for alleged corruption and conspiracy and, in Mafia Capitale also for membership in mafia organization group. The Prosecution Service has also seized a large number of bank accounts, business activities and real estate assets.

In October 2015 a Milan judge ordered Italian service firm Saipem to stand trial in respect of allegations of bribery in Algeria. The company and a number of former executives and intermediaries are also to stand trial. The prosecution alleges that intermediaries paid around USD 220 million to win contracts with the Algerian government-owned oil and gas company Sonatrach, worth about USD 9 billion. Saipem's parent company, Eni, has already been cleared of wrongdoing.

## Enforcement trends

The Italian Government continues to focus on both the prevention and prosecution of corruption. The National Anticorruption Authority (ANAC) has often been appointed by the Government to carry out a preliminary review and analysis of the main Italian public tenders (i.e. Milan's Expo trade fair and Jubilee 2016).

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# Luxembourg

## Changes to legislation

A decree of 28 December 2015 has amended the decree of 14 November 2014 on the code of conduct for members of the Luxembourg government. The amendments are minor. Apart from a few clarifications they essentially introduce a *de minimis* exemption for gifts received by government members. Whereas previously all gifts and hospitality, irrespective of their value, needed to be reported to the Prime Minister (and were published in a public register), henceforth gifts of a value less than EUR 100 received at public events no longer need to be reported.

Furthermore, on 2 February 2015, the Council of State ("*Conseil d'Etat*"),

an institution in the Luxembourg political system that advises the national legislature, adopted a specific code of conduct as part of its internal rules of procedure. This code of conduct reminds the members of the fact that corruption and influence peddling are criminal offences. Importantly, the code foresees a blanket prohibition on accepting any gift, or hospitality, of a value exceeding EUR 150, when representing the Council of State. Any offered gift or hospitality must also be reported.

## Prosecutions and enforcement actions

No significant prosecutions or enforcement actions have been reported.

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# Poland

## Changes to legislation

Polish criminal law (both substantive and procedural) is currently undergoing rapid and extensive changes. As one of the priorities of the government in office is a stricter criminal policy, some changes to the anti-corruption provisions can be expected in the near future.

Substantial changes to the Polish Code of Criminal Procedure are under consideration. It is intended to remodel criminal proceedings in the direction of a more inquisitorial trial system (which was in effect until July 2015 and then was temporarily replaced by a more adversarial one). The courts will again play an active role in trials and more actions will be taken *ex officio* – most importantly, judges will once again be active in evidence proceedings. The amendment also lifts the clear prohibition of the admission of evidence gathered illegally (the so-called “fruit of the poisonous tree”).

Moreover, a more centralised model of criminal policy will be imposed. In March 2014, the Minister of Justice took over the duties of the Prosecutor General (the latter office was abolished). Thus, the government gained more powers and possibilities in setting goals in criminal policy.

According to press releases, the Ministry of Justice is currently working on amendments to the Polish Criminal Code which are expected to lead to the extension of the limitation period for anti-corruption offences. However, no Bill in this respect has been drafted so far.

## Prosecutions and enforcement actions

In recent months a few major corruption-related prosecutions have dominated the headlines. In February 2016, a former high-ranking official of the Ministry of Internal Affairs was sentenced to four and a half years in prison (suspended) for accepting a bribe amounting to PLN 1.7 million (approx. EUR 400,000) in connection with bid rigging. This was the result of the trial against the main suspect in one of the biggest anti-corruption investigations in recent years, regarding irregularities in tender proceedings in connection with the purchase of IT equipment for the public administration authorities in the years 2007-2010. In total, almost 70 indictments were filed with courts. Most of the proceedings have not yet been finished.

As far as corruption in business-to-business relations is concerned, the manager of a chain of supermarkets, Kaufland, has been charged before a court in Wrocław with accepting bribes from representatives of leading beverages distributors (who are co-accused in the case) in exchange for access to the retail chain in shops belonging to Kaufland. According to the public prosecutor, the accused manager accepted bribes amounting to PLN 4 million (approx. EUR 950,000).

## Growing compliance culture

The perception of corruption both in business-to-business relations as well as in cooperation with the public authorities is in decline (which is reflected in opinion polls as well as international reports).

There is also a steadily growing compliance culture in Poland and awareness of corruptive behaviour in the private sector is much higher than even a couple of years ago.

The Warsaw Stock Exchange promotes compliance in its best practices for listed companies and good practices are implemented in companies that are not publicly traded.

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# Romania

## Changes to legislation

There is a current trend towards instigating changes in criminal law by submitting a plea of unconstitutionality to Romania's Constitutional Court. Where the Constitutional Court upholds such a plea, the legislature is required to amend the criminal law in accordance with the Constitutional Court's decision, and some procedures may be put on hold until the law is amended. Recent decisions of the Constitutional Court are mainly aimed at reinforcing observance of fair trials rights of the parties in line with European Court of Human Rights case law.

A number of recent pleas have ramifications for anti-bribery and corruption investigations:

### ■ *Enforcement of interception warrants by the Intelligence Services*

In decision No. 51 of 16 February 2015, the Constitutional Court upheld the plea of unconstitutionality in relation to Article 142 para. 1 of the Criminal Procedure Code which, through the terminology "*other specialized bodies of the state*", allowed the prosecutor to delegate the enforcement of the interception warrants and the actual recording activity to the Intelligence Services. The main grounds were that such terminology in criminal legislation was in breach of the principle that criminal law must be clear and foreseeable.

This decision generated intense debate at the level of relevant authorities (i.e. Ministry of Justice, National Anti-Corruption Department of the Prosecutor's Office, Presidency, politicians and media) as, according to publicly available information, most interception warrants were executed in practice by the Intelligence Services.

The decision will mean that:

- (i) criminal investigation activity that should be performed by prosecutors and/or the judiciary police could be significantly impaired due to insufficient technical equipment and
- (ii) evidence produced by the Intelligence Services and already used as evidence in pending criminal trials may be invalidated, leading to some criminal cases being discontinued for lack of evidence.

### ■ *The criminalisation of conflict of interest in the private sector*

The Criminal Code criminalised conflicts of interest in relation to private entities and individuals running companies and their relatives (Article 301 of the Criminal Code). Recently, the Constitutional Court considered that the criminalisation breaches the right of private entities to conduct economic trade and the right to hire their relatives in conducting their business and thus held the criminalisation to be unconstitutional (Constitutional Court decision no 603 of 6 October 2015).

### ■ *Discontinuance of a criminal investigation by prosecutors before trial (similar to Deferred Prosecution Agreements in the U.S. and the UK)*

The Criminal Procedure Code stipulates (Article 318) that the prosecutor, during the criminal investigation stage, may conclude that there is no public interest in prosecuting a case and can close the investigation if several conditions are met i.e. (i) the penalty for the crime is a fine or imprisonment for less than seven years, (ii) taking into consideration the nature of the alleged offence and the manner and means of its perpetration, as well as the consequences or potential

consequences, there is no public interest in prosecuting, and (iii) the criminal record of the perpetrator and their efforts to remedy or mitigate the consequences are such that it is appropriate for this procedure to be followed.

If such procedure is followed, the prosecutor may require the investigated person or entity to:

- (i) remedy the consequences of the deed, repair the damage inflicted or reach a settlement with the relevant civil party in order to repair the damage, (ii) apologize in a public manner to the victim, and/or (iii) perform unpaid community service for a period of between 30 and 60 days.

Use of this procedure is currently suspended following a recent decision of the Constitutional Court which provides that this procedure is unconstitutional unless validated by a court (i.e. by a judge rather than by a prosecutor) (Constitutional Court decision no 23 of 20 January 2016).

## Prosecutions and enforcement actions

A number of high stake cases were prosecuted and/or sent to trial in 2015, involving the former Romanian Prime Minister and other public officials:

- The Romanian National Anti-Corruption Department indicted the former Prime Minister, Victor Ponta, and Senator Dan Sova for complicity in offences of tax evasion, forgery and money laundering. There have also been high profile allegations of corruption in relation to Mr Ponta, and a number of requests to approve preventive arrest for Mr Sova (accused also of complicity in abuse of office) were repeatedly rejected by the Parliament. Trial is pending before the High Court of Cassation and Justice.

- The Romanian National Anti-Corruption Department also indicted the Mayor of Bucharest Municipality, Sorin Oprescu, for the offences of initiating and participating in a criminal organisation, abusive conduct in public position, receiving bribes and money laundering in relation to his position of Mayor. The case is currently pending trial in front of the Bucharest Tribunal. Mr Oprescu has been suspended from his position as Mayor until the criminal trial is finalised.
- The former chief prosecutor of the Directorate for Investigating Organised Crime and Terrorism (DIICOT), the second highest Prosecutor's Office in Romania, Alina Bica, was sent to trial and faced preventive detention of approximately four months for corruption offences while in his former position of representative of the Ministry of Justice within the National Authority for Restitution of Properties taken over by the communist regime. The prosecutors have alleged that some of the former presidents of the National Authority for Restitution of Properties together with the members of the Restitution Committee accepted bribes amounting to EUR 400 million and abused their public position in relation to inflated prices of several plots of land that were returned by the State to their alleged 'rightful owners' as compensatory measures paid by the State. The prosecutors allege that the business individuals who bought the

rights from the rightful owners paid bribes to the members of the Restitution Committee to increase the amount of compensation (i.e. approximately EUR 62 million in total) paid for their confiscated properties. The cases are currently pending trial in front of the High Court of Cassation and Justice.

- Apa Nova Bucuresti, the Romanian subsidiary of the French-owned Veolia Group, has been accused of bribery, tax evasion, money laundering and spying on its employees, in an investigation by the Romanian National Anti-Corruption Department. Prosecutors say the company paid out millions of Euros in bribes to Romanian officials in order to drive up the price of water for Romanian consumers. The investigation is still pending with the prosecutor's office.

### Enforcement trends

Fighting against corruption is still the trend in Romania and has intensified during 2015. The enforcement trend is on a positive scale, as over 1,250 defendants were indicted by the Romanian National Anti-Corruption Department in the course of 2015, including the Prime Minister, former Ministers, Members of Parliament, mayors, presidents of county councils, judges, prosecutors and a wide variety of senior officials. The interim asset freezing measures relating to these cases also increased, to reach a figure of EUR 452 million.

A particular trend has been the intensification of the fight against corruption at local level. Since 2013, the total numbers of local officials sent to trial for corruption amount to almost 100 mayors, over 20 county council presidents and dozens of other local officials.

As for the trial phase, the High Court of Cassation and Justice has maintained its track record in terms of bringing corruption cases to conclusion. In 2015, the Criminal Chamber settled, at first instance, eleven high-level corruption cases and the appeal panels of five judges settled, at final instance, eleven high-level corruption cases. Amongst the high profile defendants convicted were those who had served in the positions of Ministers, Members of Parliament, mayors, judges and prosecutors.

Concerning asset recovery procedures, a specialised agency – the Asset Recovery Agency – has been set up to manage seized and confiscated criminal assets (under Law no 318/2015). This is an important step as it seems that currently only around 10% of the value of seizure orders is actually collected, thus weakening the dissuasive effect of the sanction.

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# Russia

## Changes to legislation

### Anti-Corruption Law

On 17 October 2015 a number of changes to Federal Law No. 273-FZ On Preventing Corruption (the Anti-Corruption Law) were made, including changes to Article 10 on conflicts of interest.

Previously this article expressly stated that it applied to state and municipal officers only. The amended wording provides that Article 10 applies to all persons occupying positions that impose an obligation to prevent and settle conflicts of interest (Officers). Although the law does not state this explicitly, we believe that the most likely interpretation of this provision, taking into account other provisions of the Anti-Corruption law as well, is that the conflict of interest restrictions established under the Anti-Corruption Law do not apply to private sector individuals but only to state and municipal servants and certain types of employees of state corporations, state-owned entities and similar.

The concept of conflict of interest has also been extended and is now defined as a situation in which the Officer's personal interest (direct or indirect) affects or may affect the proper and impartial conduct of his official duties. Officers are obliged to take measures to avoid and report conflicts of interest and, if they do not, may be subject to dismissal.

The definition of personal interest was also broadened. Personal interest is now defined as the possibility of receiving not only money and other property, including property interests and property-related services, but also results of works and other benefit or preference (Benefit). The legislator defined the range of persons who, by obtaining the Benefit, may affect the Officer's personal interest.

They include the Officer's close relatives and relatives-in-law, and persons and organisations with which the Officer and/or his/her close relatives and relatives-in-law have a property, corporate or other close relationship.

### Anti-Money Laundering Law

On 10 January 2016 amendments to Federal Law No. 115-FZ dated 7 August 2001 On Preventing the Legalisation (Laundering) of the Proceeds of Crime and the Financing of Terrorism (the Anti-Money Laundering Law) came into force. These make the Anti-Money Laundering Law applicable to foreign unincorporated entities for the purposes of identifying their beneficial owners. These entities are defined as an organisational form established under the laws of a foreign state (territory) as an unincorporated entity. This may take the form of a fund, partnership, trust or other form of pooled investment and/or beneficial ownership that, under the person's *lex personalis*, is entitled to carry on commercial activity in the interests of its participants or other beneficiaries.

Foreign unincorporated entities are subject to control and identification procedures when conducting operations with monetary funds or other assets as required by the Anti-Money Laundering Law. For example, trusts and other foreign unincorporated entities of a similar structure or function are obliged to disclose the assets that they possess or administer and the surname/name and address of their settlors or trustees (administrators).

The monetary funds or assets of these entities, *inter alia*, may be subject to freezing or blocking in the event that it is established that they are involved in terrorism or terrorist financing.

### Draft Law on Corporate Criminal Liability

In March 2015 a draft law on the criminal liability of legal entities was submitted to the Russian State Duma. The draft law contemplated (for the first time) the imposition of criminal liability against companies and organisations (both Russian and international) for bribery-related and other offences. However, in mid-2015 the Russian Government gave a negative response to the Bill and it was not adopted.

### Draft Law on the Protection of Persons Reporting Corruption Offences

In February 2015 a draft law on the protection of persons reporting corruption offences was also announced by the Ministry of Labour and Social Protection of the Russian Federation. The draft law is in the process of amendment. The draft law is aimed at protecting those who report corruption and encouraging them to come forward by protecting their confidentiality, protecting them from unauthorised dismissal, providing them with monetary remuneration and/or protecting their relatives.

## Prosecutions and enforcement actions

The majority of corruption-related cases in Russia are against state and municipal officials. Recent, much-publicized cases include investigations against an ex-official of the Ministry of Defence of the Russian Federation for receiving bribes in the amount of RUB 45 million (approx. EUR 567,000 or USD 621,000), a former deputy minister for economic development of Krasnoyarsk Region for receiving a luxury car and RUB 14 million (approx. EUR 176,000 or USD 193,000) as a bribe and the head of Sakhalin Region for taking a bribe of USD 5.6 million.



Among the better-known bribery cases is the criminal investigation of the chairman of the board of directors of Rosbank (Societe Generale Group), Mr Golubkov, and the deputy president of Rosbank (Societe Generale Group), Mrs Polyanitsina. Mr Golubkov was suspected of extorting a bribe equal to USD 1.5 million from a borrower for prolonging a loan agreement and reducing the interest rate and monthly payments. At the end of 2015 criminal proceedings against him were terminated. Mrs Polyanitsina is suspected of acting as an intermediary in this extortion; the criminal investigation against her is still ongoing.

Recent notable cases in which there has been a conviction for bribe-giving include the criminal prosecution against the owner of LLC Trest Magnitostroy, Mr Laknitsky. He was fined RUB 30 million (approx. EUR 378,000 or USD 415,000) for giving the senator in the Chelyabinsk Region a RUB 10 million (approx. EUR 126,000 or USD 138,000) bribe to lobby for his business interests.

According to publicly available figures, in the first nine months of 2015, 8,800 individuals were convicted for corruption offences and approximately 11,000 officials were held administratively liable for non-compliance with anti-corruption standards. According to the statistics, during 2015 only RUB 588 million (approx. EUR 7.4 million or USD 8.1 million) was repaid by those involved in corruption offences, while about RUB 15 billion (approx. EUR 188.8 million or USD 207.2 million) remains to be collected.

In the first six months of 2015, 182 legal entities were held administratively liable under Article 19.28 of the Administrative Offences Code of the Russian Federation for providing, offering or promising unlawful remuneration. Penalties took the form of administrative fines and confiscation. Administrative fines payable by legal entities held liable under Article 19.28 total RUB 395 million (approx. EUR 4.9 million or USD 5.4 million).

### Anti-Corruption Council

On 26 January 2016 the Anti-Corruption Council and the Russian Federation President discussed further measures to improve state anti-corruption policy. It was announced that the National Anti-Corruption Plan for 2016-2017 would be presented to the President by the end of March 2016 and that this plan would pay special attention to the influence of ethical standards on officials' compliance with anti-corruption legislation.

During the Anti-Corruption Council's meeting, Chief of the Russian Federation President's Administration Mr Ivanov suggested that the Criminal Code of the Russian Federation be amended to establish separate criminal liability for giving and taking small bribes, i.e. those not exceeding RUB 10,000 (approx. EUR 126 or USD 138). If adopted, this would introduce a simplified procedure for investigating these crimes, which would fall under the competence of justices of the peace. These amendments are intended to make anti-corruption efforts more effective and statistics on corruption more accurate and transparent.

### OECD Report

In March 2016, the Russian Federation submitted a report providing information on the progress it had made in implementing the recommendations of the OECD's Phase 2 report, which evaluated the Russian Federation's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The report sets out details of further action in relation to some of the outstanding recommendations, and notes, with regard to others, that the Russian authorities are exploring methods of implementation.<sup>4</sup>

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<sup>4</sup> The full report can be found on the OECD website, and at <http://www.oecd.org/daf/anti-bribery/Russia-Phase-2-Written-Follow-up-Report.pdf>.

# Slovak Republic

## Changes to legislation

### Criminal Liability of Legal Entities

The OECD's report on the Slovak Republic's compliance with its obligations under the OECD Convention, published in November 2014, had identified a number of gaps, in particular, the lack of full criminal liability of legal entities. The Slovak Republic has now implemented this recommendation with the adoption by the National Council of the Slovak Republic of new legislation on the criminal liability of legal entities on 13 November 2015 (the Act). The Act, which will become effective as of 1 July 2016, introduces the new concept of the criminal liability of legal entities and enables the punishment of criminal conduct that could not previously be directly sanctioned at a criminal level. It is also intended to prevent situations where individuals are held criminally liable whilst the legal entity evades liability and continues its criminal conduct. The level of penalties contemplated under the Act can severely affect the continued operation and profitability of legal entities. The Act specifically enumerates the criminal offences which can be committed by legal entities, which include corruption. The Act also explicitly states that "effective remorse" (under which the criminal liability of a legal entity expires in certain circumstances) will not apply to corruption-related offences.

### Sports-related Corruption

On 26 November 2015, the Slovak National Council adopted a new act on sport which became effective on 1 January 2016 (the Sport Act). The Sport Act introduced complex new regulations for sports-related matters and amended a number of existing legislative acts,

including the Criminal Code, introducing a completely new criminal offence of sports corruption (the Amendment). These changes were adopted in response to a high level of corruption in the sports environment and the insufficient regulation of sports corruption under the general corruption criminal offences; they were also a reaction to recommendations on the manipulation of sports competitions by the Council of Europe and the fact that the majority of other European states have already adopted similar legislation.

The new criminal offence of sports corruption is set out in the Criminal Code as follows - "*Who directly or through an intermediary promises, offers or gives a bribe to another to act or refrain from acting in the course of competition [being an organised sport activity according to the rules determined by a sport organisation, aimed at achieving a sport score or a comparison of sport performances] or affect the result of the competition, shall be punished by imprisonment of one to five years. Equal punishment shall be imposed on any person who directly or through an intermediary, for himself or for another person receives, requests or promises a bribe to act or refrain from acting and thus influence the course or result of the competition.*" The Amendment also resolved the issue of the different punishments applied in cases of general corruption where a person who offers a bribe faces imprisonment of six months to three years, and a person who accepts a bribe faces imprisonment of between three to eight years. Another reason for the Amendment is that it extends criminal liability for "match fixing" from only those

select sports determined by case law, i.e. football, to all fields of sports and sport competitions. Furthermore, the Amendment makes aggravated penalties applicable in cases of sports corruption. Under the new criminal offence of sports corruption, the punishment faced by both categories of persons is the same. The maximum penalty available for the criminal offence of sports corruption is imprisonment of up to 12 years. The Specialized Criminal Court was appointed as the competent body to adjudicate the criminal offence of sports corruption.

## Prosecutions

Even though charges of sports corruption and corruption in general are not often brought in Slovak courts, in recent years two important cases occurred where the courts dealt with sports corruption and also imposed penalties, described in more detail below to illustrate the recent changes made under the Amendment.

The first case dealt with direct corruption in Slovak football in which the second highest officer in the Slovak Football Association, the general secretary, was arrested while accepting bribes from police undercover agents. These bribes related to the transfer of players in the Slovak National Football League, and the secretary general regularly asked for bribes between EUR 300 to EUR 500 for each transfer of a player. The court sentenced the secretary general to a sentence of three years and four months imprisonment (without probation) in 2010. In its decision, the court stated that the secretary general's greatest offence was the creation of an environment where bribes were offered on a regular basis

and that bribes had been requested even before the deployment of undercover police agents.

The second case dealt with a sophisticated group of players from the Slovak and the Czech football leagues as well as other individuals, who had been rigging and subsequently betting on football matches using Asian betting sites. In total, over 19 different football matches in Slovakia and the Czech Republic had been rigged, and the profit from one match was between EUR 2,000 up to EUR 60,000 per person. The case was initiated when the group tried to manipulate a junior player from the Czech Republic into rigging one of the matches. The junior

player immediately notified the police authorities and a formal investigation began in September 2013. From the beginning of the trial, all of the defendants denied any participation in the corrupt actions, but after a period, they all pleaded guilty. The Slovak Football Association imposed a disciplinary penalty of the prohibition of any activities in relation to Slovak football on all defendants. The court sentenced the group in 2014 to two to three years' imprisonment with probation and monetary penalties. The court also ordered the group to forfeit almost EUR 49,000 which they had obtained from illegal betting.

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# Spain

## Changes to legislation

On 1 July 2015, Organic Law 1/2015, amending the Penal Code, came into force, introducing a hugely significant change to the concept of corporate criminal liability in Spanish law. This was reported on in some detail in the July 2015 edition of this Update.<sup>5</sup>

## Prosecutions and enforcement actions

After years of complete inactivity, enforcement activity for corruption offences is currently very high in Spain. A significant number of public officials are involved in current corruption cases, and private sector company executives have also been accused of bribery of public officials.

Cases like Operation Púnica, involving public officials of the Madrid Regional Government and even important private and listed companies, the ERE case in Sevilla, involving officials of the Andalusia Regional Government, the Gurtel case, involving public officials of the Valencia Regional Government, and the Taula case, involving the ex-mayor of Valencia, Rita Barberá, and all her counsellors of the Popular Party Group at the Town Hall have attracted widespread media attention.

## OECD report

The OECD's follow-up to the Phase 3 Report & Recommendation on Spain in March 2015 has found that since the entry into force of the OECD Convention in Spain in 2000, no cases of foreign bribery have been prosecuted. The OECD Working Group continues to have concerns about the low level of foreign bribery enforcement in Spain and the lack of implementation of the enforcement-related recommendations. In addition, Spain has not taken steps to ensure that bribery-related accounting offences are effectively investigated and prosecuted. A majority of the recommendations that Spain has not implemented are related to technical deficiencies in Spain's Penal Code, relating to the scope of Spain's foreign bribery offences, the regime of liability of legal persons for foreign bribery, the adequacy of sanctions for natural persons, measures for confiscation of the proceeds of bribery, and investigative hurdles such as the statute of limitations.

Limited steps have been taken to improve international cooperation, but Spain could be more proactive in seeking mutual legal assistance or other forms of international cooperation. Regarding extradition, Spain

has not taken steps to assure extradition in foreign bribery cases or prosecution in the absence of extradition.

The report found that Spain had improved tax, anti-money laundering and auditing measures to combat foreign bribery, but indicated that further steps are required.

As part of the 2015 reforms, Spain has also tried to implement recommendations related to raising awareness and providing training on the liability of legal persons and measures for confiscation of the proceeds of bribery.

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<sup>5</sup> For further details, please visit the Spanish section of our Anti-Bribery and Corruption Review July 2015 (pages 20 *et seq.*), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).



# The Netherlands

## Changes to legislation

A Bill to improve (judicial) protection of whistleblowers was adopted in March 2016. The Bill aims to facilitate the reporting of wrongdoing (so as to expose wrongdoing, such as bribery and corruption, and safeguard integrity). A key element of the legislation is the establishment of a 'House for Whistleblowers' (*Huis voor Klokkenuiders*). The House, an autonomous administrative authority, will have a separate advice and investigation division. Employees, irrespective of the sector in which they work, will be able to approach the House for advice about reporting (suspected) instances of wrongdoing and subsequently file a request with the House to investigate the (alleged) wrongdoing. The Bill is expected to be enacted into law on 1 July 2016.

By 1 April 2016, banks with a seat in the Netherlands and Dutch branches of banks with seats in non-EU/EEA member states, must have ensured that most of their employees are bound by disciplinary rules. This obligation was introduced on 1 April 2015, through an amendment to the Dutch Financial Markets Supervision Act (*Wet op het financieel toezicht*). However, banks were given a one-year transitional period to comply. If bank employees violate the code of conduct applicable to them, anyone can file a report with the Foundation of Disciplinary Law for the Banking Industry (*Stichting Tuchtrect Banken*). Upon investigation of the report, the Foundation may decide to initiate disciplinary proceedings against the bank employee before a disciplinary committee. The committee can impose disciplinary measures, such as a fine up to EUR 25,000 or a temporary disqualification from a certain position in

banking industry (for a maximum period of 3 years).

As of 1 January 2016, the maximum fines that can be imposed for bribery offences have been increased as a result of an inflation adjustment:

- Active or passive bribery of a public official is punishable by a maximum term of imprisonment of six years and a maximum fine of EUR 82,000 for natural persons and EUR 820,000 for legal entities.
- Active and passive private commercial bribery is punishable by a maximum term of imprisonment of four years and a maximum fine of EUR 82,000 for natural persons and EUR 820,000 for legal entities.
- The maximum fine for legal entities may be increased up to a maximum of 10% of annual turnover if the maximum fine of EUR 820,000 is not considered an appropriate punishment.

The Dutch financial-economic fraud and anti-bribery rules were amended on 1 January 2015.<sup>6</sup> Since then no other changes were made to the rules.

## Prosecutions and enforcement actions

### Corruption in the Dutch housing sector

Over the last few years, there have been a number of allegations of corruption in the Dutch housing sector. In one highly publicized case, a former director of *Rochdale*, a Dutch housing association in the Amsterdam region, was convicted of passive commercial bribery (accepting different types of gifts), money laundering

and tax fraud by the Amsterdam Court of First Instance in December 2015.

Housing associations carry out the public task of providing affordable housing. Even so the Court agreed with the Public Prosecutor that the former director was not a public official and could only be convicted of private commercial bribery and not public bribery. According to the Court, the fact that housing associations perform a public task does not in itself mean that the former director would therefore be considered a public official, meaning a person appointed under the (direct) supervision and accountability of the government in a role with a seemingly obvious public character to carry out part of the tasks of the Dutch State or its organs. The Court considered that, at the time the offences took place, the government had no involvement with the appointment and dismissal of (supervisory) directors of housing associations and that housing associations became (financially) independent and responsible in the nineties when a greater distance was created between housing associations and the government and supervision was shifted from the Dutch state to the regulator for the housing sector (i.e. the Central Fund for Social Housing, *Centraal Fonds voor de Volkshuisvesting*).

The Court sentenced the former director to two and a half years of imprisonment. According to the Court, the former director had an exemplary role and his conduct should have been beyond reproach.

### Dutch and U.S. settlement

Recently an international settlement with Dutch and U.S. (criminal) authorities caught the attention of the Dutch and foreign

<sup>6</sup> For further details, please visit the Dutch section of our Anti-Bribery and Corruption Review July 2015 (pages 22 *et seq.*), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

media. This settlement is an example of an internationally coordinated approach by authorities in relation to corruption.

The Dutch Public Prosecutor (*Openbaar Ministerie*) announced that the Netherlands headquartered international telecom provider Vimpelcom Ltd and its Dutch subsidiary Silkway Holding B.V. (the Company) had accepted a settlement offered by the Public Prosecutor, the U.S. Department of Justice and the U.S. Securities and Exchange Commission. According to its press release, the Public Prosecutor accused the Company of bribing government officials in Uzbekistan and keeping inaccurate books and records. The allegations relate to the period starting from around the time the Company entered into the Uzbek telecom market and thereafter (2006-2012).

The Public Prosecutor indicated that Company is to pay a total settlement of USD 795 million (half is to be paid to the Public Prosecutor, the other half to the U.S. authorities). According to the Public Prosecutor, the Dutch part of the settlement consist of a fine of USD 100 million; the payment of the estimated value of goods eligible for confiscation (USD 130 million); and recovery of criminal proceeds (USD 167.5 million).

According to the Public Prosecutor, it had taken the following factors into account when determining the amount of the fine:

- the payments to government officials occurred over a long period of time (seven years);
- the payments were significant; and
- the Company cooperated with the investigation and shared its own internal findings. Also, the Company

has been taking steps to get its compliance in order and persons who had been (directly or indirectly) involved with the payments were no longer at the Company.

## Enforcement trends

### Whistleblowing for the financial sector

The Dutch Central Bank (*De Nederlandsche Bank*, or DNB) continues to prioritise anti-corruption efforts and, on 12 February 2016, opened a Whistleblowing Desk. The Desk provides professionals in the financial sector with a platform to report instances or suspicions of fraud, corruption, conflict of interest, or other serious breaches of laws and regulations or other breaches of integrity at financial institutions that are subject to DNB's supervision.

Professionals have to first internally report potential wrongdoing (e.g. through internal whistleblowing procedures). If they are unable to file a report directly (because no internal procedures are in place), they have well-founded concerns about disproportionate personal consequences, or they have filed an internal report but feel that the financial institution in question devoted insufficient attention to it, professionals can file a report with the Desk. DNB employees process the reports and can, where necessary, start investigations.

### Thematic examination: corruption in insurance sector

DNB has performed thematic examinations into the risk of corruption at banks and insurers in the past (the regulator often conducts thematic examinations to gain insight into risks in the sector). After such an examination in 2014, DNB published a guide to good practices to help banks and insurers fight corruption.

DNB announced on 24 February 2016 that it had completed its examination into risk controls aimed at preventing corruption in the insurance sector in the Netherlands. DNB's overall conclusion is that the sector fails to adequately identify and control corruption risks resulting from conflicts of interest and/or bribery. In its press release, DNB identified two main issues. From examinations conducted at large insurers, DNB concluded that in general they have an insufficient structural view of potential risks of conflicts of interest that may arise through the personal networks of their directors. Furthermore, DNB concluded that most insurers fail to sufficiently identify third party risk (i.e. the risk of becoming involved with corruption by third parties or the risk of reputational damage resulting from a relationship with third parties accused of corruption, for example "tied agents" or consultants). DNB stated that it expects insurers to be able to identify such risks and take necessary measures to control the risk but observed that due diligence in relation to third parties is not yet standard practice in the insurance sector.

### Professional football

It was announced on 31 March 2016 that DNB earlier this year launched an investigation into possible money laundering in professional football. According to DNB, it is investigating the extent to which banks and trust offices in particular are capable of recognizing and addressing forms of money laundering (e.g. match fixing, cash flows involving risks of corruption through royalty payments, transfer and broadcasting fees used for money laundering purposes, tax evasion). The results are expected to be published in June 2016.

## Dutch Authority for the Financial Markets

### Control of corruption risks by audit firms

Similarly, the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*, or AFM) has also been active in encouraging anti-corruption measures. In March 2015, the AFM sent letters to the audit firms under its supervision bringing to their attention the fact that they – when conducting audits or other tasks for their clients – may come across funds flows or transactions that could be instances of fraud or corruption. In its letter (a copy is available on the AFM's website <https://www.afm.nl/nl-nl/professionals/nieuws/2016/mrt/corruptierisico-accountantsorganisaties>, the AFM noted that audit firms are required to have sound and controlled business operations pursuant to the Audit Firms Supervision Act (*Wet toezicht accountantsorganisaties*, or Wta), which entails that they should recognize signs of fraudulent and corrupt practices in a timely fashion, and follow up such signs properly. Otherwise, audit firms may run the risk of getting involved with their client's corrupt practices, which may lead to reputational risks and in some instances to criminal prosecution.

According to the AFM, the business operations of audit firms should be organised in such manner that any involvement with violations of laws, including corruption, is tackled. The AFM stated that it is necessary for audit firms to adequately control risks of becoming involved with (foreign) corruption by their clients and/or risks of their clients being involved with (foreign) corruption. The AFM noted in its letter points of consideration for adequately controlling these risks:

- conducting adequate risk-analysis, whereby risks in relation to specific countries, sectors, the involvement of third parties and commercial practices are taken into consideration;
- having an open and ethical culture, which encourages employees to timely report (fraud/corruption) incidents;
- classifying clients in such manner that if there is an increased risk or there are signs of corruption, this is taken into account when conducting work for the client;
- providing (periodical) training about corruption so that corruption risks are better recognized and dealt with;
- recording properly any signs of corruption and any follow-up to ensure that control of corruption risks is a fixed element of the business operations;
- indicating in the audit assignment, if applicable, how the auditor during the audit dealt with the risks and signs of corruption; and
- reporting incidents in a timely manner to the AFM pursuant to the Wta.

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# Turkey\*

## Changes to legislation

In January 2016, Turkey ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which was signed in March 2007. This puts Turkey in a better position as regards compliance with internationally accepted policies on anti-money laundering and anti-corruption.

In March 2016, the Regulation on Measures Regarding Prevention of Laundering Proceeds of Crime and Financing of Terrorism and the Regulation on Program of Compliance with Obligations of Anti-Money Laundering and Combating the Financing of Terrorism were amended. Accordingly, the ambit of the financial and other professional institutions which are subject to certain obligations under anti-money laundering legislation (obliged parties) has been extended to include payment institutions and electronic money institutions. The amendments also set forth a thirty day time limit for the obliged parties to assign a compliance officer, starting from the licence of activity dates.

## Prosecutions and enforcement actions

In October 2014, a bribery investigation into alleged offences by certain officials of the Fire Fighting Department of the Istanbul Metropolitan Municipality was initiated. According to the allegations, the public officials working in the department were bribed by business owners in order to grant workplace permits for premises that do not meet the required conditions for obtaining workplace permits. The investigation is ongoing.

In June 2015, 41 people working in the Turkish Air Institution, including the former

president of the Institution, were detained due to corruption allegations. The prosecution alleges that the president of the Turkish Air Institution accepted bribes from a French firm in order to execute agreements for purchasing certain helicopters from their firm. According to the indictment, the detained persons laundered the illegitimate money through a shell company, owned by the president's son, by purchasing industrial oil. The case is still ongoing.

## Changes to policy

In November 2015, during the 2015 G20 Antalya Summit, Turkey introduced a separate anti-corruption working group in addition to the group established at the 2010 summit which took place in Canada. Important anti-corruption policy matters, both in the public and the private sectors, were discussed. The resulting anti-corruption action plans include:

- (i) transparency regarding the main shareholders of shell companies;
- (ii) fight against bribery;
- (iii) special attention to sectors within high risk groups; and
- (iv) transparency in the public sector.

## Enforcement trends

The nature of the investigations and prosecutions undertaken in recent years indicate that enforcement in Turkey has broadened to include bribery and money laundering rather than a traditional focus on collusive tendering. Additionally, the modernisation programme being conducted by the Financial Crimes Investigation Board (MASAK) in accordance with Financial Action Task Force (FATF) recommendations, also suggest promising enforcement developments.

In the most recent Corruption Perceptions Index published by Transparency International in December 2015, Turkey was ranked 66th among 167 countries, having fallen 13 places in this index since 2013. This result suggests that the prosecutions of high-ranking public officials in December 2013 have reverberated in the public and the international arena.

## OECD Report

In October 2014, the OECD published an OECD Report on Implementing the OECD Anti-Bribery Convention in Turkey, which highlighted Turkey's improvements to its legal framework in relation to the foreign bribery offence and its effective cooperation with other parties to the OECD Convention in relation to two foreign bribery investigations. However, the OECD Working Group issued several recommendations in relation to effective investigation, detection, prevention and sanctioning of foreign bribery. In particular, Turkey was recommended to:

- (i) increase efforts to detect, investigate and prosecute foreign bribery acts including bribery acts by legal persons;
- (ii) rectify deficiencies in its legal framework for corporate liability;
- (iii) increase the current level of sanctions for legal entities in relation to bribery offences;
- (iv) maintain the independence of prosecutors and provide an enhanced training to law enforcement authorities on the corporate liability provisions in foreign bribery cases; and
- (v) provide enhanced protection to whistleblowers in both the public and private sectors.

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\* Nothing in this client briefing should be interpreted or construed as legal advice in relation to the laws of Turkey. Turkish law advice is provided based on a co-operation agreement between Clifford Chance and Yegin Ciftci Attorney Partnership.

# Ukraine

## Changes to legislation

Overall in 2015-2016, Ukraine achieved significant progress in aligning its anti-corruption legislation with applicable international standards and recommendations, including those of the OECD/Istanbul Anti-corruption Action Plan (IAP) monitoring and the Group of States Against Corruption (GRECO). The Parliament has approved comprehensive anti-corruption legislation, including access to public information in format of open data and financing of political parties. All corruption offences and their elements are now criminalised, including the crime of illicit enrichment. However, this legislation has yet to be fully enforced.

Ukraine has also taken steps to establish significant new institutional anti-corruption machinery that consists of:

- National Anti-Corruption Bureau (NAB);
- National Agency for Preventing Corruption (NAPC);
- Specialized Anti-Corruption Prosecutor's Office (Prosecutor's Office); and
- National Agency for Identifying, Tracing and Management of Assets Derived from Corruption and Other Crimes (NAITMA).

The NAB is a specialized law enforcement body responsible for investigating corruption of high profile officials, including ministers, Members of Parliament, high-rank civil servants, judges, prosecutors of the Prosecutor General Office and regional prosecutor offices, directors and officers of state enterprises etc. The NAPC is a preventive body aimed at prevention of corrupt activities including monitoring civil servants' incomes and expenditures, creating a unified register for civil servants' declarations, monitoring conflicts of interest and ethical standards. The

Prosecutor's Office is aimed at overseeing how laws are observed during pre-trial investigations conducted by the NAB.

The NAITMA's mission will be to trace, return and manage criminal property as well as carry out forfeiture of assets arising from the crimes disposing such assets. Within the meaning of the law, criminal property is funds, property, property rights and other rights which are or may be arrested or seized under a court decision in a criminal proceeding. The NAITMA identifies, searches, evaluates such assets by request of an investigator, detective, prosecutor, investigative judge. The assets are transferred to control of the NAITMA by a resolution of the judge, investigative judge or upon consent of the owner.

## Prosecutions and enforcement actions

According to the Head of the Prosecutor's Office, NAB is reportedly in the process of investigating about 20 inquiries on corruption in the top echelons. Current corruption investigations mainly involve former and active executive officials, judges and officials of law enforcement agencies. The NAB investigations are focused on corruption in public enterprises and unlawful arrangements concluded by officials of such enterprises. The Chairman of the NAB had also emphasized that combating corruption in judicial sphere is one of the top priorities.

In March 2016 the detectives of the NAB in cooperation with the Prosecutor's Office issued a notice of suspicion on interference with the work of a public official (Mr Aivaras Abromavičius, former Minister of Economy and Trade) to the CEO of JSC "Naftogaz of Ukraine", Ukraine's leading fuel and energy company. Also the NAB is investigating

alleged interference by Mr Ihor Kononenko (the first deputy faction leader of Petro Poroshenko Bloc, one of Ukraine's political parties) and several other Members of Parliament with the work of Ministry of Economic Development and Trade. Charges against them are based on the public announcement of Mr Abromavičius that Petro Poroshenko Bloc has been lobbying their people for senior positions in a number of public companies. The pre-trial investigation of the statement made by Mr Abromavičius is in progress.

Also, the NAB has recently interrogated the Chairman of the National Bank of Ukraine (Mrs Valeriya Gontareva) in relation to an accusation of abuse of office.

In addition, three indictments had already been referred by the Prosecutor's Office to the court as of 1 March 2016, including one case initiated against several judges, as well as an indictment of the head of one of the state bodies, who was charged with embezzlement of funds in the amount of UAH 14 million (approx. EUR 480,000 or USD 546,000). Approximately five more cases will be referred to the court soon.

## Enforcement trends

As a general trend, Ukrainian officials tend to be the principal targets of corruption investigation proceedings rather than companies or private persons.

Although new legislation outlines the establishment and functions of the anti-corruption institutions, the actual establishment of these bodies is proceeding slowly and half-heartedly. Thus, it should be noted that, though it is becoming more and more difficult for corrupt officials to receive their illicit gains, there is still room for improvement.

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# United Arab Emirates

In our July 2015 briefing, we mentioned that the Gulf Cooperation Council (GCC) had approved a new anti-corruption law.<sup>7</sup> While there has not been any update on the progress of a GCC-wide anti-corruption law, the subject of corruption remains on the GCC's agenda and was discussed at a recent meeting in Riyadh in March 2016. The discussion focused on how to enhance cooperation between GCC member states, and share expertise between relevant anti-corruption agencies at the GCC level. There is also a proposal for the GCC to sign the UN Convention against Corruption as a regional organisation.

We also mentioned in our July 2015 briefing that a new taskforce has been created within Abu Dhabi's Accountability Authority to promote transparency as well as to investigate financial breaches and corruption. Its initial focus has been on promoting better public financial management, including improved accounting and reporting arrangements in the public sector. It is demanding more detailed levels of auditing and financial reporting in the public sector, driven in part by the recent fall in oil revenues. Its remit includes companies in which the government is a majority shareholder.

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<sup>7</sup> For further details, please visit the UAE section of our Anti-Bribery and Corruption Review July 2015 (page 26), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

# United Kingdom

## Changes to legislation

The government has announced that it does not intend to introduce a new crime of failing to prevent economic crime – similar to the offence in the Bribery Act 2010 of failing to prevent bribery by commercial organisations. During a parliamentary debate following the announcement the Parliamentary Under-Secretary of State for Justice, Mr Dominic Raab said “there is little concrete and specific evidence of the wider corporate economic wrongdoing that we should now target that is currently not unlawful and could reasonably be caught by a proposed new offence” (Hansard 3 November 2015, col 264 WH).

The Department for Business Innovation & Skills published a discussion paper in March 2016 setting out proposals to enhance the transparency of beneficial ownership for foreign companies that purchase land or property in England and Wales, or participate in public contracting in England. These proposals are stated to be designed “to help prevent the UK from being a safe haven for corrupt money from around the world”. The proposals, however, are still at an early stage.

## Prosecutions and enforcement actions

Sweett Group PLC pleaded guilty on 18 December 2015 to an offence under section 7 of the Bribery Act 2010 regarding conduct in the United Arab Emirates. Section 7 makes it an offence for a relevant commercial organisation to fail to prevent bribery by an associated person intending to obtain business or an advantage in the conduct of business for the organisation.

The investigation launched by the Serious Fraud Office (SFO) in July 2014 resulted in the SFO bringing the following charges:

*Between 1 December 2012 and 1 December 2015 Sweett Group PLC,*

*being a relevant commercial organisation, failed to prevent the bribing of Khaled Al Badie by an associated person, namely Cyril Sweett International Limited, their servants and agents. The bribing was intended to obtain or retain business, and/or an advantage in the conduct of business, for Sweett Group PLC, namely securing and retaining a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai, contrary to Section 7(1) of the Bribery Act 2010.*

His Honour Judge Beddoe described the offence as a system failure: “[t]he whole point of section 7 is to impose a duty on those running such companies throughout the world properly to supervise them. Rogue elements can only operate in this way – and operate for so long – because of a failure properly to supervise what they are doing and the way they are doing it”. Construction and professional services company Sweett Group PLC was sentenced on 19 February 2016 and ordered to pay GBP 2.25 million (GBP 1.4 million in fine and GBP 851,152.23 in confiscation), and almost GBP 100,000 in costs.

In another significant case, and one that has ongoing ramifications for historical conduct, the Court of Appeal decided that under UK anti-bribery legislation before the Bribery Act 2010 (in particular, the Prevention of Corruption Act 1906) it was an offence to corrupt an agent of a foreign principal or a foreign public body, even prior to 2002 (when legislation was introduced to clarify the jurisdictional effect of the previous anti-bribery legislation).

The judgment in *R v AIL, GH and RH* on 15 January 2016 overturned a previous Crown Court decision (in November 2015) which found that, before 14 February 2002,

when the Anti-Terrorism, Crime and Security Act 2001 came into force, it was not an offence under the Prevention of Corruption Act 1906 to corrupt an agent of a foreign principal, even where the elements of the alleged offence took place in England and Wales. The case concerns allegations that bribes were paid between June 2000 and November 2006 from an English bank account to officials or other agents of three foreign organisations in India, Poland and Tunisia, disguised as legitimate payments to “consultants” for apparently genuine services.

Interestingly the judgment vindicates the UK government’s position back in 2001 that bribery of foreign agents and principals was already covered by the 1906 Act; the judgment says that the 2001 amendments were enacted “*ex abundante cautela*” to address the concerns expressed by the OECD in the 1999 Review [which had criticised the reach of the UK’s anti-bribery legislation]”. The court also said that the point of law was of general significance “because of its implications for other [pending] bribery and corruption prosecutions”.

It was announced on 4 April 2016 that the Scottish Crown Office is to recover GBP 2.2 million under a civil settlement with a Scottish logistics company in respect of business obtained through unlawful conduct, in breach of sections 1 and 7 of the Bribery Act 2010. Braid Group (Holdings) Limited (Braid) had made a self-report to the Crown Office following an investigation into suspect payments by its subsidiary, Braid Logistics (UK) Limited, which specialises in freight forwarding and logistics. The investigation found that expenses, including personal travel, holidays, gifts, hotels, car hire and cash, had been made available to a U.S. customer employee, funded by inflating the invoices to the customer. During the

investigation further bribery offences were discovered in relation to a second customer. Criminal prosecutions of individuals may follow.

In a related decision the Scottish Court of Session Outer House held that the CEO of the Braid Logistics (UK) Limited, who was also a majority shareholder in the company, was a "Bad Leaver" under the company's articles, because he knew about and was involved in the bribery arrangements, and was therefore entitled to receive only par value for his shareholding – around GBP 18 million less than the actual value.

### **UK's First Deferred Prosecution Agreement**

Details of the UK's first Deferred Prosecution Agreement (DPA) were approved by Lord Justice Leveson, and published on 30 November 2015. In the SFO's first application for a DPA, Standard Bank Plc (Standard Bank), was the subject of an indictment alleging failure to prevent bribery contrary to section 7 of the Bribery Act 2010. This indictment was immediately suspended for a three year period. This was also the first use of section 7 of the Bribery Act 2010 by any prosecutor (a previous charge in a Scottish case had led to a civil settlement).

As a result of the DPA, Standard Bank will pay financial orders of USD 25.2 million and will be required to pay the Government of Tanzania a further USD 7 million in compensation. The bank has also agreed to pay the SFO's costs of GBP 330,000 in relation to the investigation and subsequent resolution of the DPA.

In addition to the financial penalty, Standard Bank has agreed to continue to cooperate fully with the SFO and to be subject to an independent review of its

existing anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws. It is required to implement recommendations of the independent reviewer. If the bank has complied with the terms of the DPA, the SFO will discontinue the proceedings once the three year period has expired.

Commenting on the DPA, Director of the SFO David Green CB QC said:

*"This landmark DPA will serve as a template for future agreements. The judgment from Lord Justice Leveson provides very helpful guidance to those advising corporates. It also endorses the SFO's contention that the DPA in this case was in the interests of justice and its terms fair, reasonable and proportionate. I applaud Standard Bank for their frankness with the SFO and their prompt and early engagement with us."*

The suspended charge related to a USD 6 million payment by a former sister company of Standard Bank, Stanbic Bank Tanzania, in March 2013 to a local partner in Tanzania, Enterprise Growth Market Advisors (EGMA). The SFO alleges that the payment was intended to induce members of the Government of Tanzania to show favour to Stanbic Bank Tanzania and Standard Bank's proposal for a USD 600 million private placement to be carried out on behalf of the Government of Tanzania. The placement generated transaction fees of USD 8.4 million, shared by Stanbic Bank Tanzania and Standard Bank.

The matter was reported to the Serious Organised Crime Agency (now replaced by the National Crime Agency) and to the SFO in April 2013, and the SFO required Standard Bank's solicitors to investigate

and report the findings to the SFO. Following the submission of this report in July 2014, the SFO conducted its own interviews, and, having determined that it was in the public interest to do so, started negotiating a DPA.

The DPA was part of a coordinated global settlement under which Standard Bank also agreed to pay USD 4.2 million to settle charges brought by the U.S. Securities and Exchange Commission; the SFO thanked the U.S. Department of Justice and the SEC for their assistance, as well as the UK Foreign and Commonwealth Office and the Financial Conduct Authority.

### **Enforcement trends**

UK prosecutors continue to focus on allegations of corruption, particularly by companies and financial institutions, and they have given a clear indication that DPAs will only be available where there is full cooperation. While the SFO entered into a DPA with Standard Bank (see above) on the basis of their proactive cooperation with the SFO, it went ahead with criminal charges against Sweett Group PLC (even though Sweett Group PLC pleaded guilty and the parent company had apparently not been aware of the corrupt payments), apparently because of a perceived failure to cooperate fully. The SFO said that investigations into individuals were continuing.

It was reported on 26 February 2016 that the police were discontinuing Operation Elveden, a five-year investigation by Scotland Yard into allegations of payments by journalists to police and other public officials in exchange for information. The investigation, launched in 2011, resulted in 34 convictions, including nine police officers and 25 other public officials, over the years, on charges mainly of

misconduct in a public office. The majority of journalists charged with conspiracy to commit misconduct in a public office were acquitted, having argued that they were acting in the public interest.

It has also been reported that requests to the UK for mutual legal assistance in fighting financial crime rose by 62% in 2015, including a significant rise in requests to the SFO.

### **The Serious Fraud Office (SFO)**

The Attorney General announced on 9 February 2016 that David Green's appointment as Director of the SFO would be extended for a further two years.

Shortly after this announcement, there were media reports that the National Crime Agency (which, since October 2013 has been the lead body for combating serious and organised crime) would be given the power to direct investigations carried out by the SFO and would have a representative on the SFO's board. However, no official announcement has been made.

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The Americas



# Brazil\*

## Changes to legislation

In a landmark decision that is also relevant for corruption cases, the Brazilian Supreme Court has clarified its understanding of the enforcement of criminal convictions, including when prison terms for convicted criminals shall commence.

The Brazilian Supreme Court's previous understanding was that a criminal conviction could only be enforced once all appeals have been exhausted. In practice, this meant that those who had been criminally convicted could turn to the notoriously complex Brazilian appeal system including courts of second instance and even the Brazilian Superior Court of Justice<sup>8</sup> before being required to serve their sentences. Often, by the time that the appeals were ruled on, the crimes were caught by the criminal statute of limitations.

The Brazilian Supreme Court has now changed its understanding of the enforcement of criminal convictions and has decided that once the appeals have been ruled on by courts of second instance, enforcement of the criminal conviction must commence. In practice this means that those who have been convicted and have not had an appeal ruling in their favour will no longer be permitted to remain free while appealing to the Brazilian Superior Court of Justice or even the Brazilian Supreme Court.

The Brazilian Supreme Court's change of understanding comes at a moment in which various high profile Brazilian contractors embroiled in Operation *Lava Jato* (see below) are being tried on criminal charges in connection with alleged corruption.

## Prosecutions and enforcement actions

### Recent Developments in Operation Lava Jato

Brazil's major corruption scandal, operation *Lava Jato*<sup>9</sup>, continues to develop on two fronts: (i) investigation of corruption allegations involving the state-controlled oil company, Petrobras and (ii) criminal proceedings in respect of the individuals involved in the scandal.

In respect of the ongoing investigations, in late March 2016, Brazilian Federal Prosecutors launched the 26th phase of the investigation, which alleged a "parallel accounting structure" operating within a major Brazilian contractor. This alleged "parallel accounting structure" was claimed by investigators to be responsible for making bribery payments to various politicians and directors of Petrobras.

Another notable phase of Operation *Lava Jato* was codenamed *Aletheia* (Ancient Greek for truth) and targeted former president Luis Inácio Lula da Silva. The former president was detained and questioned by the Federal Police in respect of a beachfront apartment and country house which Lula is accused of, although denies, owning.

In respect of the ongoing criminal proceedings, the Federal Courts in Curitiba, which are responsible for the *Lava Jato* criminal proceedings in first instance, recently convicted the former CEO of a major Brazilian contractor and others for corruption (*corrupção*), money laundering (*lavagem de dinheiro*) and conspiracy (*formação de organização criminosa*).

Further to the investigations and criminal proceedings in the courts of first instance,

the Brazilian Prosecutor General and the Brazilian Supreme Court are investigating various members of the Brazilian Congress, including the President of the House and the President of the Senate.

### Plea bargains in the spotlight

Whistleblower plea bargains were introduced into Brazilian legislation in the law against conspiracy which was enacted in 2013 (Federal Law No. 12,850/2013).

The *Lava Jato* investigations and its related criminal proceedings have since given whistleblower plea bargains widespread media attention. Further, after much debate in the media, the Brazilian Supreme Court has recently ruled that whistleblower plea bargains are a legitimate means of obtaining evidence.

Various players involved in Operation *Lava Jato*, including CEOs of major Brazilian contractors, former Petrobras directors and politicians, have entered into plea bargains with the Brazilian Prosecutors.

In order to enter into a plea bargain, the terms of the plea bargain must:

- identify the conspirators and indicate which crimes they committed;
- reveal the hierarchical structure and the division of responsibilities within the conspiracy;
- return, in whole or in part, the products of the crimes committed by the conspirators; or
- prevent future crimes from being committed by the conspirators.

The agreement must then be ratified by the relevant judge in order to be effective.

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\* Clifford Chance, like other international law firms, is not licensed to provide Brazilian legal advice and, therefore, nothing in this client briefing should be interpreted or construed as legal advice in relation to the laws of Brazil.

<sup>8</sup> The Brazilian Superior Court of Justice is hierarchically superior to the Federal and State courts of second instance and sits beneath the Brazilian Supreme Court.

<sup>9</sup> For further details, please visit the Brazilian section of our Anti-Bribery and Corruption Review July 2015 (page 30), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

# United States of America

## Enforcement Trends

U.S. government authorities continue to bring enforcement actions against companies for violations of the Foreign Corrupt Practices Act (FCPA) and the overall enforcement climate in the United States remains aggressive. This past year, the U.S. Securities and Exchange Commission (SEC) has continued to focus on corporate liability for FCPA violations, and has expanded its investigatory efforts, buoyed by an increase in whistleblower tips from the Dodd-Frank Whistleblower Program. In September 2015, the U.S. Department of Justice (DOJ) has emphasized its pursuit of individuals, in addition to corporate actors, including by issuing a new policy statement on cooperation credit, the "Yates Memorandum."<sup>10</sup> DOJ also announced a one-year FCPA enforcement pilot program offering reduced fines for business organizations that voluntarily self-disclose criminal conduct, fully cooperate with a criminal investigation, and timely and appropriately remediate their compliance failures.<sup>11</sup>

The U.S. authorities have shown their ongoing commitment to anti-corruption enforcement by expanding their enforcement staffing and cross-border cooperation. In remarks made at the American Conference Institute's 2015 International Conference on the Foreign Corrupt Practices Act (ACI Conference), Assistant Attorney General Leslie Caldwell

stated that DOJ planned to grow its FCPA Unit by at least fifty percent by adding ten new prosecutors<sup>12</sup>. DOJ has also hired a compliance expert to support the Fraud Section's FCPA enforcement program. The FBI has also bolstered its ranks, establishing three new squads of special agents focusing on FCPA enforcement and prosecutions.

Reflecting DOJ's approach to increased cross-border cooperation, Assistant Attorney General Caldwell stated at the ACI Conference that "we are determined to use every lawful means available to hold the perpetrators of corruption to account."<sup>13</sup> Indeed, DOJ cooperated with authorities in Latvia, Sweden, Switzerland, and the United Kingdom in connection with resolving at least three of its enforcement actions from this past year.<sup>14</sup> The SEC has similarly increased the extent to which it cooperates with non-U.S. entities in resolving corruption cases, for example cooperating with the African Development Bank in the Hitachi case, with the SEC leveraging their experience in these cases to expedite resolutions.

## Prosecutions and enforcement actions

While 2015 was comparatively quiet in terms of the total settlement amounts imposed by the SEC and DOJ, there have been a number of notable developments in U.S. anti-corruption enforcement.

## The SEC's enforcement actions

The SEC brought fifteen actions in 2015 against eleven entities and four individuals, recovering USD 215 million in the process. As in prior years, the SEC continues to charge companies with FCPA violations based not only on violations of the FCPA's bribery prohibitions, but also in cases where only accounting provision violations are charged (i.e., based on failures to establish appropriate internal controls). The SEC broke new ground in 2015 and early 2016, in terms of the types of entity charged, the type of conduct targeted, and the method by which the SEC resolved the action. These actions included:

### The SEC's first case that only dealt with payments to political parties<sup>15</sup>

Hitachi, Ltd. agreed to pay USD 19 million to settle alleged violations of the FCPA related to inaccurately recording improper payments to South Africa's ruling political party, the African National Congress (ANC). Hitachi sold a 25% stake in venture to a front company for the ANC. The sale allowed Hitachi to share in prospective power station contracts in the country, and the front company received USD 5 million in "dividends" based on the profits realized from these contracts. Hitachi also paid, and failed to disclose, an additional USD 1 million in "success fees" that were recorded as consulting fees without appropriate documentation. The African Development Bank and the South African Financial Services Board

<sup>10</sup> Yates Memorandum, Department of Justice, 9 September 2015, available at <http://www.justice.gov/dag/file/769036/download>.

<sup>11</sup> *Criminal Division Launches New FCPA Pilot Program*, 5 April 2016, available at <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program> (FCPA Pilot Program Announcement).

<sup>12</sup> *Department of Justice, Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 32nd International Conference on the Foreign Corrupt Practices Act*, Tuesday, 17 November 2015, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference>.  
<sup>13</sup> *Id.*

<sup>14</sup> These actions included: *United States v. James Rama*, and *In Re IAP Worldwide Services, IAP Worldwide Services Inc. Resolves Foreign Corrupt Practices Act Investigation*, 16 June 2015, available at <https://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation>. These examples of cross-border cooperation do not include cooperation garnered through DOJ's Office of International Affairs, which while cited in DOJ press releases, does not specify the foreign authorities the DOJ cooperated with. Companies should expect that the DOJ will attempt to cooperate with authorities in the appropriate jurisdiction, where appropriate.

<sup>15</sup> SEC Press Release 2015-212, *SEC Charges Hitachi With FCPA Violations*, 28 September 2015, <https://www.sec.gov/news/pressrelease/2015-212.html>.

assisted the SEC with this investigation, with the SEC stating that they hoped that this would be “the first in a series of collaborations [with the African Development Bank].”

### **The SEC’s first Deferred Prosecution Agreement (DPA) with an individual in an FCPA case<sup>16</sup>**

In February 2016, PTC Inc. and its two China subsidiaries agreed to pay a combined USD 28.2 million as part of a non-prosecution agreement with DOJ. Related to that agreement, the SEC reached a DPA with Mr Yu Kai Yuan, a former employee at one of those Chinese subsidiaries. The SEC had alleged that Yu Kai Yuan caused PTC to violate the FCPA’s internal accounting controls and books and records provisions. The SEC agreed to provide a three-year DPA to Mr Yu Kai Yuan as a result of his significant cooperation with the SEC during its investigation. In accepting the DPA, Mr Yu Kai Yuan acknowledged full responsibility for his conduct and agreed to cooperate with the SEC, including by providing requested documents and other materials, submitting to interviews and other inquiries, and testifying at trial, if requested.

### **DOJ’s enforcement stance and the Yates Memorandum**

DOJ prosecuted five companies in 2015 under the FCPA, gaining USD 870 million in penalties, while charging another eight individuals, reflecting DOJ’s increasing focus on pursuing individuals. On

10 September 2015, Deputy Attorney General Yates issued the “Yates Memorandum”, which formally stated DOJ’s focus on prosecuting individuals and predicated the availability of cooperation credit on the targeted company’s timeliness, diligence, and independence in carrying out its investigation<sup>17</sup>. To obtain cooperation credit, a company must now identify individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and must provide DOJ with all facts relating to that misconduct. The new policy makes no provision for compliance with local or foreign data protection or privacy laws.<sup>18</sup> Even if DOJ reaches a resolution with a company, DOJ retains the ability to prosecute individuals. Absent extraordinary circumstances, DOJ prosecutors will not agree to a corporate resolution that provides immunity for individuals. While the Yates Memorandum is a formal policy recognition of the focus on prosecuting individuals, it should be seen as a crystallization of existing DOJ policy, as articulated in two September 2014 statements by then Principal Deputy Attorney General Marshall Miller and former Attorney General Eric Holder.<sup>19</sup>

In remarks made during the 2015 ACI Conference, Patrick Stokes, Senior Deputy Chief, Fraud Section of DOJ, reflected upon the effect of the Yates Memorandum, stating that there has been a move by DOJ to focus on larger scale bribery schemes

that involve collusion and much more egregious criminal conduct – thus DOJ will not participate in every FCPA case given that discretion. The ultimate impact of the Yates Memorandum on DOJ’s FCPA enforcement priorities, if any, may become more apparent during the coming year.

### **FCPA Pilot Program**

On 5 April 2016, DOJ announced that it was conducting an enforcement pilot program applicable to all FCPA matters handled by the Fraud Section effective that day for a one-year period. DOJ stated that the “principal goal of this program is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.”<sup>20</sup> Where DOJ deems criminal resolution warranted, the pilot program offers businesses reduced fines for self-disclosure, cooperation, and remediation “of up to 50 percent below the low end of the applicable U.S. Sentencing Guidelines fine range, and generally [without] appointment of a monitor.”<sup>21</sup> DOJ may also decline to prosecute companies who meet these three requirements. According to DOJ, the pilot program “draws a clear distinction between credit that you can be eligible for voluntary self-disclosure as opposed to companies that may decide to wait to see if they get caught then cooperate.”<sup>22</sup>

16 SEC Press Release 2016-29, *SEC: Tech Company Bribed Chinese Officials*, 16 February, 2016, <https://www.sec.gov/news/pressrelease/2016-29.html>.

17 See Yates Memorandum, *supra* note 6.

18 However, statements by at least one DOJ official suggest that DOJ will not penalize a company that is genuinely unable to access the data in question due to local laws. See *Comments by Patrick Stokes at the American Conference Institute’s 32nd International Conference on the Foreign Corrupt Practices Act*, Tuesday, 17 November 2015.

19 See *Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program*, Wednesday, 17 September 2014, available at <https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>; *Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law*, Wednesday, 17 September 2014, available at <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.

20 The Fraud Section’s Foreign Corrupt Practices Act Plan and Guidance, 5 April 2016, available at <https://www.justice.gov/opa/file/838386/download> (FCPA Plan and Guidance).

21 FCPA Pilot Program Announcement.

22 Comments by Andrew Weissman at the FCPA Pilot Program Announcement, quoted by the FCPA Blog, available at <http://www.fcpablog.com/blog/2016/4/5/doj-launches-fcpa-self-reporting-pilot-program-with-new-guid.html>.

To qualify for additional fine reductions under the pilot program beyond credit available under the U.S. Sentencing Guidelines, DOJ requires that companies voluntarily self-disclose misconduct “prior to an imminent threat of disclosure or government investigation”, “within a reasonably prompt time of becoming aware of the offense”, and include all relevant facts, including the individuals involved.<sup>23</sup> DOJ clarified that full cooperation as required under the pilot program included, among other things, proactive cooperation; preservation, collection, and disclosure of relevant documents and information; provision of timely updates on the company's internal investigation; provision of facts relevant to potential criminal conduct by third parties; making officers and employees available for interviews by DOJ; disclosure of all relevant facts gathered through the company's internal investigation; disclosure of overseas documents; and provision of translations of foreign language documents.<sup>24</sup> While recognizing that remediation “can be difficult to ascertain and highly case specific,” DOJ stated that when assessing a company's remediation efforts under the pilot program it would evaluate the company's establishment of a culture of compliance; compliance resources; quality and experience of compliance personnel and their compensation and promotion within the company; compliance reporting structure; the independence of the compliance function; whether the company has conducted an effective risk assessment and implemented a tailored compliance

program on that basis; and compliance program auditing.<sup>25</sup> Additionally, DOJ stated that they would assess a company's remedial efforts with regard to discipline of employees responsible for the misconduct.<sup>26</sup> Highlighting the importance DOJ places on companies' voluntary self-disclosure, DOJ stated that a company will receive “markedly less” credit under the pilot program if it does not voluntarily self-disclose its FCPA misconduct – at most, such companies could receive a 25% reduction off the bottom of the U.S. Sentencing Guidelines fine range.<sup>27</sup>

### Other Developments

As mentioned, DOJ has been increasing its FCPA enforcement resources, most notably by appointing Hui Chen as a full time compliance expert. Ms Chen's role has been described as acting as a “bridge” between the compliance community and prosecutors, and she will be involved in both pre- and post-resolution actions. According to the DOJ announcement of Ms Chen's hiring, Ms Chen's duties as Compliance Counsel include providing expert guidance to the DOJ prosecutors when considering “the enumerated factors in the United States Attorneys' Manual concerning the prosecution of business entities”, which includes an evaluation of existing compliance programs at the time of the conduct giving rise to the criminal investigation. Additionally, Ms Chen's role extends to helping the prosecutors develop “appropriate benchmarks for evaluating corporate compliance and remediation measures”, as well as assisting in the post-resolution assessment of the companies'

implementation of agreed remedial measures and the effectiveness of those measures in detecting and preventing future wrongdoing. While it is unclear whether her appointment will lead to greater numbers of monitorships, DOJ has noted that as in the Alstom resolution, there will be deference given to monitorships that entities have with other authorities so that there are not overlapping monitorships.<sup>28</sup>

### The role of whistleblowers

Of increasing significance to both DOJ and the SEC is the Dodd-Frank Whistleblower Program. While these whistleblower reports are made directly to the SEC—with reports received both from within the U.S. and internationally – whistleblowers are encouraged to talk to DOJ as well. In 2015, there were 3,923 reports made to the SEC's whistleblower hotline – 186 of which were related to FCPA issues, which was an increase of 27 FCPA-related complaints from the previous year (there were 159 FCPA-related complaints made in 2014).<sup>29</sup> Moreover, out of the total number of whistleblower reports made in 2015, 421 reports were made by foreign whistleblowers, including from high risk jurisdictions.<sup>30</sup> The significance of the Dodd-Frank Whistleblower Program to the U.S. authorities' FCPA enforcement efforts should not be understated, as SEC Chief of the Foreign Corrupt Practices Act Unit Kara Brockmeyer called it a “game changer” and DOJ Senior Deputy Chief Stokes noted that the program's existence is “known around the world”.

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<sup>23</sup> FCPA Plan and Guidance at 4.

<sup>24</sup> FCPA Plan and Guidance at 5-6.

<sup>25</sup> FCPA Plan and Guidance at 7.

<sup>26</sup> FCPA Plan and Guidance at 8.

<sup>27</sup> *Id.*

<sup>28</sup> *Comments by Andrew Weissmann and Hui Chen at the American Conference Institute's 32nd International Conference on the Foreign Corrupt Practices Act*, Tuesday, 17 November 2015.

<sup>29</sup> U.S. Securities and Exchange Commission, 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program 21, 28 (2015).

<sup>30</sup> *Id.* at 30.

Asia Pacific



# Australia

## Changes to legislation

On 1 March 2016, Australia introduced new “books and records” provisions into its anti-bribery regime. The *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016* amends the *Criminal Code 1995* (Cth) and creates two new offences.

The “books and records” provisions are loosely based on the U.S. *Foreign Corrupt Practices Act 1997* (FCPA) provisions and require a company’s books and records to fairly and accurately reflect the company’s transactions.

The new provisions make it an offence to make, alter, destroy or conceal an accounting document, or fail to make or alter an accounting document a person is required by law to make or alter, with the intention that such conduct would facilitate, conceal or disguise the giving or receiving (by any person) of a benefit that is not legitimately due or a loss not legitimately incurred.

Penalties for individuals who breach these provisions include up to ten years imprisonment, a fine of up to AUD 1.8 million (approx. EUR 1.2 million or USD 1.35 million) or both. For a corporation, an offence can result in a fine not more than the greatest of AUD 18 million (approx. EUR 12 million or USD 13.5 million), an amount three times the value of the illegitimate benefit obtained by the company or ten percent of the company’s turnover for the 12 months before the offence was committed.

It is also now an offence to engage in reckless (rather than intentional) conduct regarding the facilitation, concealment or disguise of an illegitimate benefit or loss. Penalties for reckless conduct are half that of the above offence – for an individual up to five years imprisonment, a fine of AUD 900,000 (approx.

EUR 600,000 or USD 675,000) or both. For a corporation, an offence can result in a fine of not more than the greatest of AUD 9 million (approx. EUR 6 million or USD 6.75 million), one and a half times the value of the illegitimate benefit obtained by the company or five percent of the annual turnover of the company for the 12 months before the offence was committed. Neither offence requires the prosecution to prove that a specific benefit was given or received, a loss incurred or that the defendant intended that a particular person received a benefit or incurred a loss.

Both the Australian Senate Committee on Legal and Constitutional Affairs (Senate Committee) and the Australian Securities and Investments Commission (ASIC) supported the introduction of the new offences while other stakeholders have expressed concern over the lack of any nexus with actual foreign bribery conduct raising the possibility that the new offences could impose criminal liability in an unintended and unreasonable range of situations.

Other critics have suggested that the offences do not apply broadly enough and, unlike the FCPA provisions, do not impose an express obligation to maintain proper accounting records for the purpose of demonstrating anti-bribery compliance.

## Prosecutions and enforcement actions

In 2015, two directors of Lifese Pty Ltd, an Australian engineering and construction company, were charged with attempting to bribe Iraqi government officials to secure various multi-million dollar contracts. The directors have been released on bail and are awaiting trial. This is only the second foreign bribery prosecution to

be brought since the introduction of the foreign bribery legislation.

The first prosecution occurred in 2011 when two Australian companies, Securrency International Pty Ltd and Note Printing Australia Limited, two manufacturers of banknote and passport technology, were charged with conspiracy to bribe foreign public officials. There are suppression orders in place in relation to these proceedings. The prosecution of several individuals who were senior employees of these companies also continues.

The Australian Federal Police (AFP) said last year that there were 17 active investigations into foreign bribery. This is an increase from the seven investigations announced in 2012. The AFP has also been investigating Leighton Holdings Limited (now and as of 21 April 2015, called Cimic (Construction, Infrastructure, Mining and Concessions)) in relation to foreign bribery allegations since 2011. ASIC also commenced an investigation into Leighton Holdings in 2013 after being criticised for failing to do so. ASIC chairman Greg Medcraft had initially stated that in foreign bribery investigations criminal proceedings are the main game and that ASIC would not do anything to jeopardise the success of criminal actions taken by the AFP.

## OECD Report

The Phase 3 report by the Organisation for Economic Co-Operation and Development (OECD Report) was published in April 2015 and recognised the improvement Australia has demonstrated in relation to its increased focus on foreign bribery, however identified several areas for improvement.

The defence for facilitation payments was one area that the OECD Report

highlighted as requiring attention, given that a number of jurisdictions around the world (such as the UK) have no exemption for facilitation payments in their anti-bribery regimes. While government education programmes have discouraged the use of facilitation payments the distinction between facilitation payments and bribes still remains unclear to the Australian public.<sup>31</sup>

The OECD Report recommended continuing to raise awareness about the difference between a facilitation payment and a bribe and discouraging the use of small facilitation payments.<sup>32</sup> In light of the

current Australian Senate inquiry into foreign bribery (discussed below), it is possible that facilitation payments will be removed as a defence to foreign bribery in the future.

### Senate Inquiry

The Senate Committee is currently conducting an inquiry into foreign bribery with submissions to the inquiry having closed on 24 August 2015. Forty submissions have been received by the inquiry from various corporate entities, law firms, law societies, academics and individuals.

The inquiry is focusing on, amongst other things, the anti-bribery measures governing the activities of Australian corporations and individuals and the extent to which Australia is meeting its obligations under the OECD Convention.

The Senate Committee is due to release its report on 1 July 2016 with some speculation amongst stakeholders in Australia that the Senate Inquiry may result in various amendments to Australia's anti-bribery regime including the abolishment of the facilitation payment defence.

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<sup>31</sup> <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf>, page 5.

<sup>32</sup> <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf>, page 8.

# Hong Kong

## Changes to Legislation

The new Competition Ordinance, which came into force in December 2015, contains provisions to combat the practice of bid-rigging which has been a particular issue in building contracts. In July 2015, the Independent Commission Against Corruption (ICAC) brought charges against a former proprietor of an engineering company in connection with a HKD 45 million (approximately EUR 5.1 million or USD 5.8 million) bid-rigging scam. The accused admitted in court he had worked with others to secure a renovation contract at an inflated price. Under the new legislation, the Competition Commission can obtain search warrants and seize correspondence and other documents that may lead to the discovery of a cartel. Whistleblowers are also promised leniency if they co-operate with the Commission in its investigations.

## Prosecutions and enforcement actions

### Kwok and Hui lose bribery appeal

Former Sun Hung Kai Properties (SHKP) co-chairman Thomas Kwok and Rafael Hui, the former Chief Secretary, who had been jailed for five and seven and a half years respectively for bribery offences, lost their appeals in February 2016. Mr Justice Wally Yeung Chun-kuen wrote that it was a “sad day” for the city “if senior public officers, such as Hui, could accept large sums of money and agreed to be favourably disposed towards their ‘paymasters’ in their public offices with impunity because their money or other advantages were paid before they assumed or after they left public office”. Hui took HKD 8.5 million (approximately EUR 960,000 or USD 1.1 million) from Kwok shortly before he became Chief Secretary in 2005 and HKD 11.2 million (approximately EUR 1.3 million or USD 1.4 million) from two former

Sun Hung Kai executives after he left office.

One of the difficulties for the prosecution had been a lack of evidence to show specific acts that Hui had done to favour Kwok. The appeal judges dismissed the arguments: “Corrupted conduct of a public officer as senior as chief secretary would no doubt be committed secretly and insidiously. The corrupted conduct could simply take the form of an approving nod or a knowing wink ... His heart and soul were with SHKP and he would have felt obliged to favour SHKP when its interest conflicted with that of the people of Hong Kong.”

Kwok and Hui have applied to the Court of Final Appeal for leave to appeal to Hong Kong’s highest court (as at March 2016).

### Tsang pleads not guilty to misconduct in office

Former Chief Executive Donald Tsang will stand trial in January 2017 in relation to two counts of misconduct in public office. The trial is expected to last for 20 days and involve more than 25 witnesses. Misconduct in public office carries a maximum penalty of seven years’ imprisonment.

Tsang is the highest-ranking official ever to be charged for corruption in Hong Kong. He has been accused of failing to disclose his interests in a three-storey penthouse in Shenzhen between 2010 and 2012, when he was the city’s Chief Executive.

The first charge was that he failed to declare his rental of the apartment from a businessman to policymakers who were considering his applications for broadcast licences.

The second was that Tsang had proposed an architect for an award under

the city’s public honours system without declaring the architect was the interior designer of the flat.

Tsang has often been criticised for his behaviour while in office. He admitted using yachts and jets for private trips even though he later said he had paid commercial rates for their hire. He survived a no-confidence vote towards the end of his term in office in 2012, the first since the resumption of sovereignty in 1997.

Tsang was arrested on 5 October 2015 following a long investigation by the ICAC. Critics queried the length of time it had taken to arrest him.

Tsang’s arrest highlighted what a former judge has described as a “fundamental defect” in the city’s main anti-corruption legislation, the Prevention of Bribery Ordinance (POBO). POBO contains clear rules against gifts but they do not apply to the Chief Executive. Under section 3, soliciting and accepting an advantage without the permission of the Chief Executive is a crime, but the giver of the permission is not covered by the wording. The Chief Executive is also exempt from section 8, which states that anyone who offers an advantage to a “prescribed officer” while having dealings with the government is committing an offence. Despite repeated attempts to rectify the situation, the Government has still to commit to a timetable to address the issue.

## Big rise in corruption complaints

In January 2016, the ICAC reported a rise of nearly 20 per cent in corruption complaints, excluding those relating to district council and village elections. The rise follows significant falls in complaints in the three previous years. An ICAC

survey of public perceptions of corruption revealed that while corruption was expected to worsen in 2015, willingness to report suspected corruption was the lowest since the surveys began in 2011.

ICAC Commissioner Simon Peh told lawmakers in January 2016 that although the ICAC received 2000 complaints in 2015, only 200 people were prosecuted. He said that most cases foundered

because of insufficient evidence or inaccurate information. Peh also revealed a trend for people to lodge complaints out of malice. It is an offence under POBO to make false reports or to make an unauthorised disclosure that someone is being investigated. The offence is punishable with a year's imprisonment or a fine of HKD 20,000 (approximately EUR 2,260 or USD 2,580). Peh recommended a significant increase in

the penalty to five years' imprisonment and a fine of HKD 100,000 (approximately EUR 11,300 or USD 12,900), saying that the ICAC had a huge workload and could not afford to be distracted by unscrupulous people pursuing their own private agendas.

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# Indonesia\*

## Changes to legislation

The main government agency that enforces Indonesian Anti-Corruption Law is the Corruption Eradication Commission (*Komisi Pemberantasan Tindak Pidana Korupsi*, commonly known as the KPK), which was established under the 2002 Corruption Eradication Commission Law (the KPK Law). The KPK coordinates with other agencies in the eradication of bribery and corruption, conducts investigations, prosecutes bribery offences, undertakes action to prevent bribery, and monitors governance.

To carry out its enforcement duties, the KPK is granted certain powers to undertake specific measures, including, among others, using wire-tapping, instructing relevant institutions to impose travel bans and ordering banks or other financial institutions to block accounts potentially holding the proceeds of corrupt acts.

The KPK Law is currently being amended, with the Government having designated the Bill amending the KPK Law as a priority Bill for 2016. However, despite being on the priority list, the Indonesian President has postponed discussions on the amendment of the KPK Law due to sections of the public, the KPK and factions of the House of Representatives raising concerns in respect of certain proposed amendments, including limiting KPK's authority to conduct surveillance or wiretapping during the preliminary phase of investigations.

## Prosecutions and enforcement actions

The KPK has been highly proactive in combating corruption, and this is demonstrated by the large number of

high profile corruption cases against judges, lawyers, high-ranking government officials, and members of the House of Representatives which have been brought to court. From 2004 to early 2016, there have been approximately 330 corruption cases decided. Many of the investigations and court proceedings have caught the attention of the media and the public.

In early 2015, the former Chief Justice of the Indonesian Constitutional Court (which had previously been heralded as one of Indonesia's most credible institutions) was sentenced to life in prison for corruption after he was caught red-handed by the KPK receiving bribes to issue favourable verdicts in election disputes filed by local government heads. Related to this case, the former Banten Governor was found guilty of bribing the Former Chief Justice. She was sentenced to seven years in prison and fined IDR 200 million (approximately USD 15,000).

In mid 2015, the KPK caught an associate of a prominent litigation law firm, red-handed bribing three judges and a clerk from the Medan State Administrative Court on behalf of the law firm's clients, the Governor of North Sumatera and his wife. The brokered bribe was intended to secure a favourable decision in respect of the Governor's lawsuit against the North Sumatera Prosecutor's Office regarding the issuance of an investigation order for the misuse of social aid funds by the Governor's office. Following a KPK investigation, the managing partner of the prominent litigation law firm was sentenced to five years and six months in prison and ordered to pay fines in the amount of approximately USD 23,000

while his associate was sentenced to two years in prison and ordered to pay fines in the amount of approximately USD 11,250. The Chief Judge was sentenced to two years in prison and ordered to pay fines in the amount of approximately USD 15,000, while the Governor and his wife received prison sentences of three years and two years and 6 months respectively.

International co-operation and intelligence sharing between agencies, including the KPK, has also brought results. The UK Serious Fraud Office (SFO) had been working closely with the KPK and had shared evidence from a UK cooperating witness to help resolve the Innospec bribery case. Innospec Limited pleaded guilty in a UK court to conspiracy to bribe in relation to delaying the introduction of lead-free petrol in Indonesia (thereby protecting the sale of its fuel additives). This global case involved various countries: the UK, the US, Iraq and Indonesia. In Indonesia in late 2015, the former director of state-owned oil and gas giant Pertamina was found guilty of accepting bribes from an Indonesian company, which acted for Innospec. The court sentenced him to five years in prison. Earlier in 2015, the court also sentenced the former owner of Innospec's intermediary to three years in prison for paying the bribes.

## Developments

As highlighted earlier, the KPK is the main government agency that enforces the Anti-Corruption Law. The Indonesian Police and the Public Prosecutor's Office are the principal State agencies that prosecute any crime against Indonesian law, including the Anti-Corruption Law. There was high tension between the KPK and the Police in early 2015, which

\* Contributed by Linda Widyati & Partners, our associated firm in Indonesia.



started when the KPK decided to name the (then) only candidate for National Police Chief a bribery suspect. In a move which the public saw as retaliation, the Police charged two KPK commissioners with offences. This resulted in a standoff between the two agencies that is still ongoing, and which has threatened the effectiveness of the KPK. In late 2015, the House of Representatives appointed five new KPK commissioners, who were subsequently “sworn-in” by the President.

To date, prosecutions have been primarily focused on individuals, and not corporations, even though the Anti-Corruption Law and certain other specific

laws provide for the liability of corporations. In a recent move to prosecute corporations, the KPK and the Deputy Attorney General of Special Crimes have been invited by the Supreme Court to discuss the issuance of a Supreme Court Circular Letter containing guidelines on investigating and prosecuting corporations.

### Trends

Indonesia’s Transparency International Corruption Perceptions Index ranking for 2015 improved to 88 (from 107 in the previous year) out of 168 countries. Indonesia’s move up the rankings can be credited to greater national and

international co-operation and intelligence sharing, including with the KPK, as well as to improvements in the country’s bureaucracy and public services, including the E-Government and procurement transparency initiatives and the recent launch of online web and app platforms through which the public can directly file a report on any government services related issue, including facilitation payment requests.

These trends and developments offer hope and greater certainty in the fight against corruption in Indonesia.

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# Japan

There have been no significant developments further to those reported in the previous edition of this review (July 2015).<sup>33</sup>

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<sup>33</sup> For further details, please visit the Japanese section of our Anti-Bribery and Corruption Review July 2015 (page 39), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

# South Korea

There have been no significant developments further to those reported in the previous edition of this review (July 2015).<sup>34</sup>

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<sup>34</sup> For further details, please visit the South Korean section of our Anti-Bribery and Corruption Review July 2015 (page 40), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

# People's Republic of China

## Changes to legislation

### The Ninth Amendment to the Criminal Law

On 29 August 2015, the National People's Congress of China promulgated the 9th amendment to the Criminal Law. Included in the amendment are changes to the bribery-related provisions to expand the criminal fines applicable to individuals, to criminalise the act of giving bribes to "influential persons," and to restrict the availability of penalty exemption as leniency for bribe-givers.

Prior to the 9th amendment, criminal fines for giving bribes were primarily applicable to entity offenders, whilst those applicable to individual offenders were relatively limited. The 9th amendment expanded the application of criminal monetary fines to the following four types of individual offenders:

- any individual who commits the crime of giving bribes to anyone (non-government officials, government officials, "influential persons" or entities);
- any individual who commits the crime of brokering bribery;
- any person-in-charge of an entity that commits the crime of giving bribes; and
- any person who is directly responsible for bribery committed by an entity.

As the calculation of criminal fines is not specifically set forth under the Criminal Law, local courts have wide discretion. Therefore, local Chinese courts may impose unpredictable and potentially very high criminal fines on individual bribe payers, especially directors and senior managers of multinationals, as illustrated by a number of astronomically high criminal fines imposed in 2014. The change may further complicate any interaction with the authorities during an anti-bribery investigation since the new

provision may lend more leverage to the authorities in negotiation.

The 9th amendment added a new sub-provision to Article 390 of the Criminal Law (offence of individual bribing government officials). While "influential persons" who receive bribes have been subject to prosecution since 2009, the new sub-provision targets those who give bribes to a person who may exert influence on a current or former government official. Such "influential persons" include any close relative or any person who is closely associated with a current or former government official.

This amendment is an effort to further prevent government officials from receiving bribes through their "inner circle," whether during or after their service in the government. Corporate compliance due diligence should thus broaden payee background checks to "red flag" not only current and former government officials, but also any of their close associates to minimize risks of being caught for giving bribes to friends and families of government officials.

Prior to the 9th amendment, bribe payers might be eligible for leniency in the form of reduced or exempted penalties if they voluntarily confessed their crimes before being prosecuted. Now, whilst pre-prosecution confession may still lead to less serious penalties, it alone is insufficient to exempt the bribe payer completely from penalties. In addition to pre-prosecution confession, at least one of the following circumstances must exist in order to qualify the bribe payers for exemption from penalties: (i) the offence is relatively minor, (ii) the bribe payer has provided crucial information leading to successful investigation of others in a significantly important case, or (iii) the bribe payer otherwise makes significant contributions.

This provision is intended to resolve a long-existing problem in practice that bribe payers were prosecuted or penalized far less harshly than were the bribe recipients. This disparity was based on an assumption that a bribe payer is often a reluctant participant in the bribery transaction, but in reality, bribe givers and payers are often interdependent on each other.

### Draft Amendments to the Anti-Unfair Competition Law

On 25 February 2016, China released draft amendments to its Anti-Unfair Competition Law (the AUCL), which is supposed to be the first amendment to the AUCL since its promulgation in 1993. As regards commercial bribery, the draft amendments have made the following changes:

- The definition of bribery is expanded. While the current AUCL prohibits giving or accepting bribes, it does not clearly prohibit *promising* to offer or give bribes. The draft amendments explicitly provide that promising to offer or give bribes is also prohibited. In addition, the draft amendments expand the scope of recipients in commercial bribery. Under the current AUCL, bribery is defined as giving bribes to the counter party in a transaction. The draft amendments would extend the definition to cover giving bribes to third parties who have influence on a transaction.
- The draft amendments provide for employers' vicarious liability, adding a provision that an employer shall be liable for bribery undertaken by its employees for the purpose of seeking business opportunities or competitive advantages for the employer. As an exception to this principle, an employer is not liable for its employees' accepting or receiving

bribes which are against the employer's interest.

- The draft amendments contain an accounting provision. A person or entity will be held liable for providing an economic interest if there has been inaccurate recording of such interest in the books or accounting documents.
- The draft amendments potentially increase the penalty for commercial bribery. For violation of the commercial bribery provision, the current AUCL provides for an administrative fine of more than RMB 10,000 (approximately EUR 1,350 or USD 1,550) and less than RMB 200,000 (approximately EUR 27,000 or USD 31,000) or confiscation of illegal proceeds. Under the draft amendments, the fine should be of more than 10 percent and less than 30 percent of illegally obtained business revenue.

The draft amendments are currently open to public comments.

## Prosecutions and enforcement actions

The anti-corruption crackdown in China which started in 2012 has continued into

2015 and 2016. After the prosecution of GSK, the headline enforcement actions seem to have shifted to primarily target state-owned enterprises (SOEs). In March and July 2015, the central Commission for Discipline of the Communist Party of China (CCDI) conducted two rounds of anti-corruption inspections and for each round identified 26 central SOEs across key industries and sectors under investigation. In October 2015, following China's stock market meltdown, the CCDI announced plans to inspect all major government agencies and SOEs in the financial services sector. These include the People's Bank of China, China's stock exchanges, China's banking, security and insurance regulatory commissions and other state-owned banks and insurers, totalling 31 organizations.

The anti-corruption drive has also reached high-profile China-based companies. In June 2015, the two largest Chinese internet companies, Tencent Holdings Ltd and Alibaba Group Holding Ltd, were implicated in a bribery investigation by Chinese regulators. Shortly afterwards, the Public Security Bureau detained several former employees of Tencent (including one former Tencent employee who later

became an Alibaba executive). Tencent stated in a press release that it first uncovered improper practices by its online video department employees through an internal investigation in 2014 and reported the matter to local authorities. These individuals are said to have accepted kickbacks from online video providers in the amount of millions of RMB.

The anti-corruption crackdown has also taken on an international dimension, with China's strengthened co-operation with other countries to target corrupt officials who have fled the country. Following the launch of the "Fox Hunt" project in 2014 to track down and bring home fugitives suspected of financial crime, the Chinese authorities widened the scope of Fox Hunt by launching "Skynet". The "Skynet" is an effort to cut off corrupt officials' financial channels by targeting underground banks and offshore companies used for money laundering.

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# Singapore\*

## Changes to legislation

There have been no relevant legislative changes since the last review in July 2015.

## Prosecutions and enforcement actions

Case law since July 2015 sends a strong signal for a zero tolerance policy in relation to corruption and other instances of corporate and fiduciary misconduct:

- In the high-profile case of *Public Prosecutor v Lam Leng Huat and others* [2015] SGDC 326, following a three-year long trial, the Singapore courts found six leaders of a mega-church (City Harvest Church) guilty of engaging in a conspiracy to commit criminal breaches of trust by conducting sham investments and round-tripping transactions. They were found guilty notwithstanding absence of evidence of wrongful gain and their belief that they were acting in the best interests of the church and in obedience to their trusted pastor. They were sentenced to jail terms ranging from 21 months to eight years. The judge regarded this case as “a vivid illustration of wilful blindness”. Further, the Commissioner of Charities has resumed regulatory action for the removal of the defendants from their roles as executive members of the church. While this case did not concern charges under the Prevention of Corruption Act (Cap. 241), it is widely acknowledged in the international press as one of the biggest corruption scandals in Singapore.
- In *Song Meng Choon Andrew v Public Prosecutor* [2015] SGHC 180,

the Singapore High Court affirmed that indirect bribery of public officials (i.e. through middlemen) warrants custodial sentences, because of the erosion this causes to public confidence in government. In this case, the defendant was sentenced to 12 weeks’ imprisonment, despite not knowing the identity of the public official in question or the terms on which that public official was being persuaded (by the middleman) to act.

- In *Public Prosecutor v Hong Meng Choon* [2015] SGDC 246, the Singapore courts demonstrated the tough stance they adopt in sentencing persons guilty of corruption in the private sector. Despite the defendant being a first-time offender who had paid bribes of small sums (e.g. USD 50), he was sentenced to 14 months’ imprisonment due to the expansive nature of the bribes he gave (number of bribes, number of payees, duration).

### Pending prosecutions

There are a number of high-profile prosecutions that demonstrate the Singapore government’s firm and active approach against corruption in both the private and public sectors.

- Seven Singapore Technologies Marine Limited (ST Marine) senior executives have been charged with the falsification of entertainment expenses and the giving of bribes worth millions of USD relating to the grant of ship repair contracts.<sup>35</sup>
- Of significant public interest is the prosecution of Phey Yew Kok, a former Member of Parliament and

former president of the National Trades Union Congress, for criminal breach of trust and the investment of union funds without ministerial approval. Phey absconded in 1980 and surrendered himself at the Singapore Embassy in Bangkok in June 2015. He has been sentenced to 60 months’ imprisonment.

- In late 2015, four ex-Singapore Power employees were charged with corruption for accepting bribes of between USD 50 to USD 450 in the course of their employment.

## Cooperation with other governments

In December 2015, a Singaporean who was formerly a lead contract specialist of the United States Navy was charged with accepting bribes from the Chief Executive Officer of a ship support contractor, in exchange for providing him with non-public U.S. Navy information. These bribes appear to have been part of a major corruption scandal within the U.S. Navy. The Corrupt Practices Investigation Bureau (the CPIB) commented that it worked closely with U.S. authorities to conduct the joint investigation that resulted in the prosecution, and noted that Singapore has in place “a framework for international cooperation with overseas legal, law enforcement and regulatory authorities”, with whom the CPIB would “continue to work closely”.

## Global assessment

In the Rule of Law 2015 Index compiled by the World Justice Project, Singapore was ranked 9th overall worldwide, rising by one spot from 2014. Singapore was ranked 1st under “regulatory

\* Contributed by Cavenagh Law LLP, our Formal Law Alliance partner in Singapore

35 ST Marine is a subsidiary of ST Engineering, one of the largest companies listed on the Singapore Exchange, with a paid-up capital of about USD 9 million (as at 2 March 2015). Its majority shareholder is Temasek Holdings, an investment company of the Singapore government.

enforcement”, 3rd under “absence of corruption”, “criminal justice” and “civil justice”, and 2nd in Asia Pacific overall.

The Corruption Perceptions Index 2015 compiled by Transparency International gave Singapore a score of 85 (out of 100) for the perceived levels of public sector corruption, placing it 8th in the world rankings. While Singapore fell one spot from 2014, it improved its score of 84 from 2014.

**BACK TO MAP**

# Thailand

There have been no significant developments further to those reported in the previous edition of this review (July 2015).<sup>36</sup>

**BACK TO MAP**

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<sup>36</sup> For further details, please visit the Thai section of our Anti-Bribery and Corruption Review July 2015 (pages 44 *et seq.*), at [http://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

# Notes

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