

**C L I F F O R D**

**C H A N C E**



**ANTI-BRIBERY AND CORRUPTION REVIEW**  
**JUNE 2017**

## **CONTENTS**

<b>Global contacts</b>	<b>3</b>
<b>World Map</b>	<b>4</b>
<b>Foreword</b>	<b>6</b>
<b>Europe, the Middle East and Africa</b>	<b>7</b>
Belgium	8
Czech Republic	10
France	12
Germany	14
Italy	18
Luxembourg	19
Poland	20
Romania	21
Russia	24
Slovak Republic	27
Spain	29
The Netherlands	30
Turkey	32
Ukraine	33
United Arab Emirates	35
United Kingdom	37
<b>The Americas</b>	<b>40</b>
Brazil	41
United States of America	43
<b>Asia Pacific</b>	<b>47</b>
Australia	48
Hong Kong	50
Indonesia	52
Japan	54
South Korea	55
People's Republic of China	57
Singapore	59
Thailand	61

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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**

The spotlight on anti-bribery and corruption compliance programmes continues to intensify as a number of countries adopt measures designed to make it easier to prosecute companies. Most significantly, France's Sapin II law requires companies subject to the provisions to adopt effective anti-corruption procedures, and has created a new agency to monitor compliance with these new requirements. The Netherlands has introduced requirements for certain companies to describe their anti-corruption procedures in their directors' report (or to explain why they do not have any), while Thailand has published a Handbook setting out measures which should be adopted by companies to prevent bribery, in the context of Thai corporate liability. Australia meanwhile is consulting on a proposed corporate offence of failing to prevent foreign bribery, with a defence of having a proper system of internal controls and compliance in place – similar to the offence, and related 'appropriate procedures' defence, of failure to prevent bribery under section 7 of the UK Bribery Act.

The corporate liability theme is further developed in new initiatives on different forms of deferred prosecution agreements/plea bargains (in France, Australia and Japan), while transparency in respect of corporate ownership, or in respect of the assets of public officials, is the subject of new legislation in the UK, the Slovak Republic and Ukraine.

Elsewhere, in a clear recognition of the benefits for prosecutors of encouraging individuals to report suspicions of bribery, there are developments in relation to protections for whistleblowers in the Czech Republic, the UAE, Russia, Germany and Australia.

The bar on anti-corruption compliance continues to be raised, and it is important for international companies to continue to review what they have to do to address the risks to their business, and to their reputation, and for them to keep up-to-date with ABC developments in the jurisdictions in which they operate.

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**EUROPE, THE MIDDLE EAST  
AND AFRICA**

## BELGIUM

### Changes to legislation

#### Increased penalties for officials

In 2016, Belgium substantially increased the criminal fines for bribery of public officials of a foreign state or an intergovernmental organisation. Previously, foreign bribery was sanctioned with the same criminal penalty as bribery involving a Belgian public official. The minimum fine has now tripled and the maximum has quintupled. The prison sentences for foreign bribery remain unchanged. This change in legislation is a response to the OECD's criticism on this point in its report issued in February 2016.

#### Mandatory exclusion period for companies

In June 2016, Belgium, implementing three EU Directives, passed a law which provides that companies that have been definitively convicted of bribery offences (including bribery of a foreign public official) must be excluded from public procurement award procedures unless they can show that they took sufficient measures to demonstrate their reliability.

#### Draft law on the abolition of the principle of mutually exclusive liability

A draft Bill designed to amend the current Belgian legal principle of mutually exclusive liability of natural and legal persons, further to a recommendation by the OECD, remains pending before Parliament. Although the Bill was submitted to the Council of State for an opinion and was discussed in the relevant parliamentary commission in late 2015, no further steps appear to have been taken to pass the law. It is therefore unclear when the Bill may be approved and enter into force.

### Prosecutions and enforcement actions

In terms of enforcement actions and prosecutions, several high profile cases have made headlines in 2016.

In early 2016, the Brussels Court of Appeal issued a judgment 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 (*Régie des bâtiments*). The Court of Appeal pronounced (suspended) prison sentences of up to three years and fines of up to EUR 110,000. An amount of EUR 100,000 was confiscated as being the 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.

Furthermore, several Belgian nationals have become implicated in the so-called 'Kazakhgate' scandal involving the (suspiciously) expeditious passing of a Bill in Parliament to extend the possibilities for settlement in criminal cases. It is said that the law was adopted to allow a Belgian national of Kazakh origin to avoid prosecution. It is also alleged that the former French president, Mr. Sarkozy, pushed for the adoption of the new law and that a former president of the Belgian Senate, a lawyer who advised the Belgian national, traded in influence to push for the adoption of the new law. The matter is currently under investigation. At the beginning of this year, new information surfaced which has led to additional

investigative measures against a magistrate involved in the negotiation of the criminal settlement with the Belgian national. It is alleged that this magistrate obtained a gift of favour to a non-profit organisation that he is in charge of, in exchange for the conclusion of the criminal settlement agreement. In addition, the matter has led to the creation of a parliamentary investigation commission.

In another high-profile case, the former head of the Belgian judicial police in Brussels was briefly detained and held for interrogation on charges of bribery and corruption within the police force, following his indictment in 2015 for passive corruption and money laundering.

### Enforcement trends

#### Statistics

Generally speaking, there have been few enforcement cases in Belgium and there is very little case law. Recent years have seen even less activity due to relocations of staff and budget cuts in the judiciary.

According to statistics published by the Belgian Service for Criminal Policy, there were 14 convictions for private corruption and 56 convictions for public bribery in 2015. No distinction is made between foreign bribery and domestic bribery.

In addition, the records of the Belgian Financial Intelligence Processing Unit (*Cellule de Traitement des Informations Financières/Cel voor Financiële Informatieverwerking*, or CTIF-CFI), which processes suspicious financial transactions related to money laundering and terrorist financing, show that in 2014 it reported twelve cases of embezzlement



and corruption to the judicial authorities, representing a total amount of EUR 8.9 million, compared to eight cases in 2015, representing a total amount of EUR 23.3 million.

## Other developments

### GRECO report

On 11 January 2017, the Group of States against Corruption (GRECO) published a report evaluating Belgium's implementation of the recommendations in GRECO's Fourth Round Evaluation Report dated 28 August 2014 on the prevention of corruption in respect of Members of Parliament, judges and prosecutors.

GRECO concludes that Belgium has not satisfactorily implemented or dealt with any of the 15 recommendations contained in the 2014 Report. Four recommendations have been partly implemented and 11 have not been implemented.

Insofar as Members of Parliament are concerned, GRECO expresses its regret that no measures have been taken to

implement its recommendations, particularly with regard to improving the arrangements regarding the declaration of assets, monitoring compliance with the rules of integrity by the parliamentary chambers, and the training of Members of Parliament in matters of integrity.

With regard to judges and prosecutors, GRECO welcomes certain actions which have been taken, such as the adoption of standard profiles for managerial positions and the proposal of measures to remedy the lack of periodic general reports on the functioning of the courts and the prosecution service. The activity report of the francophone disciplinary body containing some statistics on disciplinary proceedings is also considered to be a positive element. Nevertheless, GRECO considers that "more substantive work is required on various aspects, including the rules and guarantees applicable to judges in the administrative courts, over and above the Council of State, the conditions under which use is made of substitute judges, evaluating the arrangements for

assigning cases between judges, standardisation of the rules of professional conduct and more detailed information on disciplinary proceedings concerning judges and prosecutors, including by means of a specific publication on case law in this area".

In light of the foregoing, GRECO considers that the measures taken by the Belgian authorities to implement its recommendations are very limited and concludes that the currently very low level of compliance with these recommendations is unsatisfactory. It has therefore called on the head of the Belgian delegation to submit a report on progress in implementing the outstanding recommendations (i.e. all the recommendations) as soon as possible and by 31 October 2017 at the latest.

GRECO also invited the Belgian authorities to authorise, at their earliest convenience, the publication of this report, which has been done.

**BACK TO MAP**

## **CZECH REPUBLIC**

### **Changes to legislation**

A number of measures aimed at enhancing transparency or otherwise combating corruption have recently been proposed or passed. In January 2017, Parliament approved an amendment to the Act on Conflicts of Interest, a change that has been widely discussed, particularly in light of the fact that a well-known business leader currently also holds the portfolio of Minister of Finance. The Act provides that a company which is more than 25% owned by a member of the government is not eligible to bid for public procurement contracts. In addition, members of the government and of Parliament will no longer be able to own, hold shares in, or control any legal entity engaged in radio or television broadcasting.

The disputed Act on Electronic Records of Sales was approved by Parliament in September 2015 and became effective on 1 December 2016 (to be phased in gradually). The Act places an obligation on all sellers and service providers (with some exceptions) to report information on all sales generating cash revenues to the local financial administration body. Such measures are aimed at minimising tax fraud.

In August 2016, the Act on Association in Political Parties and Political Movements was amended to make the funding of political parties more transparent. The amendment creates a new Authority for the Supervision of the Funding of Political Parties, and sets further limits on donations made to political parties by companies or private persons.

In September 2016, Parliament enacted the Act on the Central Registry of Accounts as a means of fighting corruption. Banks and other credit

institutions are obliged to collect basic information on the accounts owned by their customers; the Czech National Bank is responsible for administering the Central Registry of Accounts. The aim is to support certain state authorities in the detection and prosecution of offences, especially in relation to economic crimes.

In April 2016, Parliament enacted the new Public Procurement Act to reflect European Union legislation. The Act relaxes some of the strict rules contained in current legislation on the one hand, and makes it easier to blacklist contractors for misconduct on the other. The Act also focuses on the digitisation of public procurement. In addition, as from 1 July 2016, all state and public institutions, local government units, public enterprises and legal entities in which a state or local government authority has a majority stake are obliged to publish all newly concluded contracts with a value of over CZK 50,000 (approximately EUR 1,900), excluding VAT, in the Registry of Contracts. Contracts (and contract metadata) must be published in an open and machine-readable format. Otherwise, they will be considered ineffective. Many NGOs perceive this to be a strong anti-corruption measure.

In February 2017, the government approved a draft Act on Protection of Whistleblowers, which protects – within the framework of employment law – those who report unlawful conduct in the public interest. The absence of such protection has long been criticised by many NGOs.

### **Further initiatives**

One issue currently under discussion is corruption in healthcare. The Ministry of Health is trying to cooperate with health insurance and pharmaceutical

companies to create several cooperative anti-corruption schemes that promote transparency, especially in relation to transactions between healthcare professionals and pharmaceutical companies.

The implementation of the Act on the Civil Service also continues. To enhance the transparency of the civil service, the professional résumés of all senior civil servants will be published online. Moreover, civil servants will have their bonuses reduced to prevent corruption and misuse of public money. Additionally, the Bill on the Public Prosecutor's Office, which has already been approved by the government and is now going through Parliament, aims to increase the effectiveness of the public prosecution service by creating a Special Public Prosecutor who will not fall under the supervision of the Supreme Public Prosecutor, with the aim of making the office more independent.

### **Prosecutions and enforcement actions**

In April 2017, a well-known lobbyist was released from prison following a decision of the Supreme Court. The lobbyist had been sentenced to four years in prison for corruption, later changed to fraud, in relation to the purchase of military equipment. The media were taken aback by the Supreme Court's decision, which is yet to be published.

In June 2015, one Member of Parliament 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. In autumn 2016, a court ruled that the wiretappings that formed the main evidence in the case were illegal and

the case has been sent back to the investigation phase for the gathering of further evidence.

In September 2016, two former Mayors and several city councillors of Prague were accused and found guilty of having launched an illegal public procurement procedure for Opencard (the public transportation operation system in Prague), causing damage to the city of Prague of CZK 25 million (approximately EUR 970,000). All of the accused were given suspended sentences of two to three years. The verdict has not yet taken effect.

In March 2016, the European Anti-Fraud Office (*Office Européen de Lutte Anti-Fraude* – OLAF) initiated a formal investigation into a Czech company close to the Minister of Finance for suspected EU subsidy-fraud of CZK 50 million, (approximately EUR 1.9 million). The Minister of Finance has denied any links to the company and all related accusations. The police decision is expected in spring 2017.

In February 2016, the director of the Energy Regulatory Office was sentenced

to eight and a half years in prison. She was charged with professional misconduct in relation to licences issued to unauthorised solar plants. The verdict has not yet taken effect and will be reviewed by the Court of Appeal.

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

Criminal proceedings against a former Defence Minister charged in June 2012 with the misuse of power have been referred back to the State Prosecutor for further investigation. She was stripped of her parliamentary immunity later that year.

### 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 business leaders have been accused of corruption and bribery. To date, however,

few of these prosecutions have resulted in final sentences. Combating corruption is a stated priority of the current government and various anti-corruption policies have been newly established at central and local levels. The sitting Minister of Finance named combating tax fraud as his top priority and during the last three years the newly established Special Tax Fraud Unit has revealed tax fraud amounting to EUR 300 million.

Public officials are required to report the receipt of all possessions, gifts, income and obligations to a publicly accessible Register of Conflicts of Interest. There are also plans to place the same obligation on judges. A significant number of civil servants have been found to be in breach of this reporting duty, but a failure to report is only subject to a relatively small fine.

**BACK TO MAP**

## FRANCE

### Changes to legislation

#### Sapin II

A statute dealing with transparency, the fight against corruption and the modernization of economic life (Sapin II) was enacted in December 2016.

It completely overhauls anti-corruption compliance in France, and brings it in line with international standards.

Sapin II creates an obligation to prevent corruption risks for French companies with at least 500 employees, or belonging to a group of companies which has at least 500 employees, and a turnover or group turnover of more than EUR 100 million. To fulfil this obligation, these companies are required to adopt effective anti-corruption procedures, including:

- a code of conduct that provides to all employees a clear and accessible definition of the different types of behaviour which are prohibited as potentially constituting acts of corruption or influence peddling;
- 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);
- a risk map, i.e. a document which identifies, analyses and prioritises the company's risk exposure to external corrupt solicitations, notably regarding the business sector and geographic

area in which the company pursues its activities;

- accounting control procedures to ensure that the company's books and accounts are not used for fraud or concealment of corruption or influence peddling;
- training programmes to prevent corruption and influence peddling;
- disciplinary sanctions for violations of company rules on corruption.

Sapin II also created a new administrative Agency (the *Agence française anticorruption* or French anti-corruption agency) tasked with monitoring the compliance of French companies with these new obligations.

To this end, the Agency has certain investigative powers (in particular, to conduct on-site review, make document requests and conduct interviews). In the event of a violation, or if a company's anti-corruption procedures are deemed insufficient or ineffective, the Agency's enforcement committee has the power 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).

Sapin II also expands the extraterritorial application of French law with regards to corruption. It is no longer limited to corruption or influence peddling engaged in by French nationals outside France,

but applies to wrongful conduct outside France by "persons habitually residing in France" or "having all or part of their economic activity in France."

Furthermore, where the offence is committed abroad, Sapin II removes the traditional preconditions for prosecution in France, i.e. that the conduct at issue be prohibited under the law of the country in which it was committed and that the prosecution be instigated only at the behest of the Prosecutor. This is likely to increase the number of cases which French authorities may investigate and prosecute.

Sapin II introduces a new criminal sanction, which is similar to the monitorship procedure imposed by U.S. authorities and aims 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.

Finally, and most importantly, Sapin II introduces the *Convention judiciaire d'intérêt public* (judicial agreement of public interest or CJIP), a French equivalent of a DPA. More specifically, the Act gives the Prosecutor, which in many instances will be the *Parquet National Financier* (national financial prosecutor or PNF), the power to negotiate CJIPs with legal persons under investigation for corruption, influence peddling or laundering of tax evasion proceeds.

Under a CJIP, the suspect would undertake to (i) pay a fine in proportion with the profit derived from the wrongdoing, capped at 30% of the company's average annual turnover over the past three years, and (ii) implement a compliance programme for a maximum period of three years under the control of the Agency. The CJIP itself would be published on the Agency's website. Importantly, however, the legal person is not required to admit its guilt, and the CJIP does not amount to a conviction. If it successfully carries out all of its undertakings, it can no longer be prosecuted.

### Prosecutions and enforcement actions

There have been no noteworthy cases involving bribery or corruption since our last Anti-Bribery and Corruption Review in May 2016.<sup>1</sup>

### Enforcement trends

The creation of the CJIP is likely to modify the PNF's approach to investigation and prosecution of corruption-related offences, and to increase the efficiency of the French response to these crimes. However, for the most part, co-operating with

defendants and negotiating sanctions are alien to the culture of French prosecutors. This new tool will therefore require a period of adaptation, in which the PNF develops its understanding of how to use it and in what circumstances.

**BACK TO MAP**

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<sup>1</sup> For further details, please visit the French section of our Anti-Bribery and Corruption Review 2016 (pages 10 *et seq.*) at [https://www.cliffordchance.com/briefings/2016/05/anti-bribery\\_andcorruptionreview-may20160.html](https://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html).

## GERMANY

### Changes to legislation

Following the 2015 changes to criminal anti-corruption legislation by the German Law on Fighting Corruption,<sup>2</sup> the focus of anti-corruption legislation has now expanded to other sectors. In this regard, the German Law on Fighting Corruption in the Healthcare Sector as well as the German Law on Combating Betting Fraud and Manipulation in the Sport Sector have now entered into effect, and there are further draft laws in the pipeline.

### German Law on Fighting Corruption in the Healthcare Sector now in force

On 4 June 2016, the German Law on Fighting Corruption in the Healthcare Sector (*Gesetz zur Bekämpfung von Korruption im Gesundheitswesen*) entered into effect. The key elements of this new law are the new criminal offences of taking and giving bribes in the healthcare sector in sections 299a and 299b German Criminal Code (*Strafgesetzbuch*):

- Under section 299a of the German Criminal Code, certain members of the medical profession are criminally liable for the offence of taking bribes in the healthcare sector (*Bestechlichkeit im Gesundheitswesen*) if they (as “receivers”), in connection with the exercise of their profession, 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*) in return for granting an unfair advantage in competition in the context of (i) prescribing pharmaceuticals, remedies, medical aids or medical devices, (ii) obtaining pharmaceuticals,

medical aids or medical devices, which are intended for direct application on the patient by the medical professional or his assistant, or (iii) referral of patients or examination material.

- Section 299b of the German Criminal Code sets out a mirror offence for the “donors”. Thus, a person is criminally liable for the offence of giving bribes in the healthcare sector (*Bestechung im Gesundheitswesen*) if he offers, promises or grants a benefit to certain members of the medical profession in connection with the exercise of their profession, for them or a third person on the basis of an agreement of wrongdoing in return for obtaining an unfair advantage in competition in the context of the cases described above.
- Criminal offences under sections 299a and 299b of the German Criminal Code carry a potential penalty of up to three years’ imprisonment or a pecuniary penalty (*Geldstrafe*). In especially serious cases, stipulated in section 300 of the German Criminal Code, the maximum penalty is imprisonment for a term of five years. An especially serious case occurs if the offence relates to a significant benefit (*Vorteil großen Ausmaßes*) – neither German statutory provisions nor German case law provides a relevant threshold in this regard – or the offender acts on a commercial basis (*gewerbsmäßig*) or as a member of a gang (*bandenmäßig*).

The German Law on Fighting Corruption in the Healthcare Sector was implemented to close a gap in the criminal liability under German criminal anti-corruption law which had been highlighted by a decision of the German

Federal Court of Justice (*Bundesgerichtshof*) dated 29 March 2012. In this decision, the court 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 were not prohibited under German criminal anti-corruption law, specifically neither under sections 331 *et seqq.* of the German Criminal Code, which stipulate the criminal offences for the public sector, nor under section 299 of the German Criminal Code, which stipulates the criminal offence of taking and giving bribes in commercial practice.

However, the implementation of the German Law on Fighting Corruption in the Healthcare Sector has been criticised for excluding pharmacists. As explained above, section 299a of the German Criminal Code now provides for criminal liability of certain members of the medical profession for the offence of taking bribes in the healthcare sector where they demand, allow themselves to be promised or accept a benefit in return for granting, an unfair advantage in competition in the context of the act of “prescribing” (*verschreiben*) pharmaceuticals, remedies, medical aids or medical devices. In contrast, the first draft version of this new law provided similar criminal liability in the context of the act of “delivering” (*abgeben*) such medical goods and, thus, included the pharmacists’ profession. According to the explanatory notes to the first draft version of the new law, “delivery” was supposed to encompass any kind of handing over to a patient, including administering

<sup>2</sup> For further details, please visit the German section of our Anti-Bribery and Corruption Review 2016 (pages 12 *et seqq.*) at [https://www.cliffordchance.com/briefings/2016/05/anti-bribery\\_andcorruptionreview-may20160.html](https://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html).

(*verabreichen*) medication. The deletion of this term has meant that pharmacists now fall outside the scope of section 299a of the German Criminal Code, and has led to the criticism that gaps in criminal liability remain.

### German Law on Combating Betting Fraud and Manipulation in the Sports Sector

On 19 April 2017, the German Law on Combating Betting Fraud and Manipulation in the Sport Sector (*Einundfünfzigstes Gesetz zur Änderung des Strafgesetzbuches – Strafbarkeit von Sportwettbetrug und der Manipulation von berufssportlichen Wettbewerben*) came into effect. In particular, this law sets out new criminal offences in sections 265c and 265d of the German Criminal Code:

- Under the new section 265c paragraph 1 of the German Criminal Code, athletes or coaches are criminally liable if they (as “receivers”) 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 the athlete or coach will, in return, influence the course or the result of a competition to the advantage of the opponent and, thereby, an illegal benefit will be received from a public sport bet in relation to that competition. The new section 265c paragraph 2 of the German Criminal Code mirrors the offence for the “donor”. The criminal offence under 265c of the German Criminal Code (*Sportwettbetrug*) is limited to agreements in connection with sports competitions which relate to sporting bets.
- In contrast, section 265d of the German Criminal Code (*Manipulation von berufssportlichen Wettbewerben*) introduced similar criminal offences

that include corrupt agreements regarding professional sport competitions even if there is no special relation to sporting bets.

This new law has to be seen against the background of the so-called football betting scandal involving the former umpire Robert Hoyzer, which emerged in 2005, and which revealed manipulation of numerous football games in the German second football league, the German Football Association Cup Competition (*DFB-Pokal*) and the regional football league through “bribery” of umpires and football players. According to investigators, the individuals involved in the manipulation generated high profits by placing bets on the relevant matches. The explanatory notes to the new law state that the criminal law in respect of such acts was previously inadequate. In particular, fraud under section 263 of the German Criminal Code requires proof of a specific pecuniary loss, which is often difficult to assess in cases of the manipulation of sporting competitions. Furthermore, the criminal offence of taking and giving bribes in commercial practice under section 299 of the German Criminal Code does not apply either because it requires acts in connection with the receipt of goods and services (*bei dem Bezug von Waren oder Dienstleistungen*), which would not apply to sporting bets.

### Draft law to establish a nation-wide central competition register

On 22 February 2017, following calls from, amongst others, the German conference of the Ministers of Justice (*Justizministerkonferenz*) and the German conference of the Ministers of Economics (*Wirtschaftsministerkonferenz*), the German Ministry of Economics (*Bundeswirtschaftsministerium*) presented a draft law to establish a nation-wide central competition register (*Entwurf eines*

*Gesetzes zur Einführung eines Wettbewerbsregisters*) to fight corrupt and illegal business practices and to facilitate fair competition, which is currently being discussed by the German Federal Parliament. The draft law would require companies that had engaged in corrupt activities or other economic crime to be listed on the new nation-wide register. Public sector customers would be required to review this register before awarding a relevant contract in order to exclude “unfair” companies from the public procurement process. Under certain conditions, exclusion would be mandatory.

Currently, there are similar registers in nine of Germany’s 16 Federal States (*Bundesländer*), including Hesse, North-Rhine-Westphalia, Bavaria, Berlin and Hamburg. Such registers are the subject of some controversy, partly because companies may be listed for offences other than corruption, and also because companies may be listed even before a final conviction. A number of registers list companies as soon as investigation proceedings are commenced or even where investigation proceedings have ended without a conviction, which has been criticized by some as being contrary to the principle of the presumption of innocence.

In particular, the current draft law proposes:

- that companies may be listed following a final conviction;
- that companies may be listed following conviction for a variety of offences, including corruption in the public and private sector, money laundering, tax evasion and other economic crimes;
- a potential mandatory ban from all public procurement contracts for a maximum term of five years;

- that companies be able to apply for early de-listing through a “self-cleansing” (*Selbstreinigung*) procedure that would include, in particular, cooperation with the enforcement authorities in the investigation of the violation.

### **Calls for a law to protect whistleblowers**

In the context of a Parliamentary Investigation Committee (*Parlamentarischer Untersuchungsausschuss*) by the German Federal Parliament (*Bundestag*) into so-called cum/ex-trades, various politicians have called again for the implementation of a new law to promote transparency and protect whistleblowers from discrimination. They argue that whistleblowers are essential for the disclosure of offences in banks and companies and thus, have to be protected. According to supporters of this initiative, such protection requires changes to German labour law and civil service law in order to provide certain privileges to whistleblowers in the future. In particular, they are calling for employees to have the right to report violations of legal obligations in connection with the employer’s business activities to external authorities or, under certain conditions, to the public, and to be entitled to protection against detrimental treatment for having done so.

### **Prosecutions and enforcement actions**

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

In January 2016, several offices of a German armament enterprise were searched by prosecutors in connection

with allegations of giving bribes to foreign public officials in return for the conclusion of purchase agreements. The investigation proceedings initially encompassed fourteen individuals under investigation (this increased to nineteen individuals under investigation by September 2016), most of whom are employees of the relevant armament enterprise. Later in 2016, these investigation proceedings were expanded to the parent company of the armament enterprise, which was also searched in June 2016 and again in March 2017. In particular, the former General Counsel and Chief Compliance Officer of that parent company was put under investigation on the grounds that he was aware of, but did not intervene and stop, relevant payments.

In September 2016, the Erfurt prosecution authority charged six individuals with corruption in the public sector and other offences in connection with the purchase and equipment of buses. The proceedings relate to, amongst other matters, 66 cases of giving bribes (section 334 of the German Criminal Code) to representatives of two public transportation companies in the German Federal State of Thuringia. In the months before indictment, several flats and offices were searched and several individuals were arrested. According to prosecutors, investigation proceedings against further individuals are being conducted in parallel.

In October 2016, after almost two years of court proceedings,<sup>3</sup> the Cottbus regional court (*Landgericht*) sentenced the former division manager of the Berlin airport company to a prison sentence of three and a half years (without probation) for taking bribes in commercial practice

(section 299 of the German Criminal Code) in connection with the construction of the new Berlin city airport. In addition, the court ordered the defendant to pay EUR 150,000 equivalent to the amount of the relevant economic benefit he received. Two further defendants, the CEO and one other employee of a Dutch construction company, were sentenced to imprisonment of 23 months and 15 months, respectively, on probation, for (aiding and abetting) the giving of bribes in commercial practice (section 299 of the German Criminal Code). According to the prosecutors, the former division manager of the Berlin airport company received a cash payment of EUR 150,000 in return for approving the payment of invoices by the Dutch construction company amounting to EUR 65 million without further verification. The judgment is not yet final as the former division manager of the Berlin airport company has filed an appeal against his conviction with the court of higher instance.

Further prosecutions and enforcement actions relate to a multi-million corruption affair concerning public construction projects in the German Federal State of North Rhine-Westphalia. Ferdinand Tiggemann, former Chief Executive Officer of the North Rhine-Westphalian building and real estate managing authority, was given a prison sentence of seven years and six months (without probation) (more than the six year sentence sought by the prosecution) for taking bribes (section 332 German Criminal Code) and breach of trust (section 266 German Criminal Code). According to the prosecutors, Mr Tiggemann had disclosed information about upcoming construction projects to intermediate buyers over a period of

<sup>3</sup> In December 2014, the Neuruppin prosecution authority commenced an investigation into alleged corruption offences in connection with the construction of the new Berlin city airport. For further details, please visit the German section of our Anti-Bribery and Corruption Review July 2015 (page 13) at [https://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](https://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).



several years in return for payments amounting to at least EUR 178,000. Following such information, the intermediate buyers were able to buy the relevant properties in advance and then resell them to the German Federal State of North Rhine-Westphalia with surcharges of millions of Euros.

### Enforcement trends

As a general trend, the focus of corruption investigation proceedings continues to expand further from industrial companies in the last decade to other sectors, including the financial sector, in more recent years. In particular, following the major strengthening of German criminal anti-corruption legislation in 2014 and 2015 by, amongst others, the German Law on Fighting Corruption,<sup>4</sup> the focus of the legislator has shifted to specific sectors, namely the healthcare and sports sectors. In this regard, the Central Office for Combating Property Crimes and Corruption in the Healthcare Sector (*Zentralstelle zur Bekämpfung von Vermögensstraftaten und Korruption im Gesundheitswesen*) at the Frankfurt General Prosecution authority, initiated investigation

proceedings due to alleged violations of the provisions under the new German Law on Fighting Corruption in the Healthcare Sector regarding representatives of a hospital and a medical centre already. According to statements from the leading prosecutor of this Central Office, the medical care industry, including hospitals, has a considerable backlog regarding relevant necessary compliance standards, whereas pharmaceutical companies generally apply such standards already.

Furthermore, German prosecution authorities are increasingly tending to bring corruption charges not just against employees in sales or other business departments of companies, but also against members of legal and compliance departments for aiding and abetting, by failing to prevent corrupt acts committed by others.

There are other areas in which the German legislator appears to be less eager to enforce applicable criminal anti-corruption laws and relevant regulations. This is particularly true regarding the so-called “Waiting Period

Act” (*Karenzzeitgesetz*) which came into effect on 2 July 2015.<sup>5</sup> This new law enabled the German Federal Government to impose a waiting period of up to eighteen months on certain public officials after resigning from public office and before starting a new job in the private sector under certain circumstances, in order to reduce the risk of granting (illegal) benefits to (former) public officials by way of highly remunerated positions in the private sector. These amendments have to be seen against the background of the moves by various politicians to private companies after resigning from their public functions, which raised concerns with regard to corruption. The new law provides that an expert committee must make a recommendation to the German Federal Government in each case as to whether a waiting period should be imposed. The relevant committee was established in July 2016, one year after the “Waiting Period Act” had come into effect, leading to public criticism of delays in implementing the new legislation.

**BACK TO MAP**

<sup>4</sup> For further details, please visit the German section of our Anti-Bribery and Corruption Review 2016 (pages 12 et seq.) at [https://www.cliffordchance.com/briefings/2016/05/anti-bribery\\_andcorruptionreview-may20160.html](https://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html).

<sup>5</sup> For further details, please visit the German section of our Anti-Bribery and Corruption Review 2015 (page 12) at [https://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](https://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html).

## ITALY

### Changes to legislation

Italy has adopted new legislation extending the range of its commercial bribery offences. Law No. 38/2017 (which was published on 30 March 2017 in the Official Gazette and came into force on 14 April 2017) aims to ensure that Italian law is fully consistent with EU Framework Decision 2003/568/JHA on combating corruption in the private sector. In particular this law includes (i) a revised version of Article 2635 Civil Code (Private Corruption) and (ii) the introduction of a new offence under Article 2635bis Civil Code (Instigation to Private Corruption).

In particular, Article 2635 of the Civil Code has been amended as follows:

- it will apply not only to the top managers within companies, but also to persons who carry out activities with *de facto* executive functions;
- it is extended to intermediaries;
- it will apply not only to promising and paying, but also to requesting money or other undue benefit;
- an offence may be committed even if the company has not suffered damages (previously damages were an express requirement);

Article 2635bis Civil Code makes it an offence to attempt to corrupt a top manager or a person with executive functions if the promise, payment or request is not accepted.

These amendments have implications under Law No. 231/2001 on criminal corporate liability, in that both the revised offence under Article 2635, and the new offence under Article 2635bis will be predicate offences triggering vicarious corporate liability.

Corporate entities, if found guilty of these offences, are subject to a fine of between EUR 100,000 to EUR 930,000 for Private Corruption and a fine of between EUR 52,000 to 620,000 for Instigation to Private Corruption, along with bans, including, debarment from public sector procurement, which can be applied on a precautionary basis, for a time period ranging from three months to two years.

### Prosecutions and enforcement actions

Political corruption has dominated headlines in Italy in recent years, focused on ongoing criminal investigations in Venice (Mose), Milan (Expo) and Rome (Mafia Capitale and, more recently, Consip). In these proceedings several managers and politicians were arrested for alleged corruption and conspiracy and, in Mafia Capitale, also for membership in the Mafia. Additionally, the Prosecution Service has seized a large number of bank accounts, business activities and real estate assets.

In July 2016 a Milan court indicted Eni, Saipem and the former chief executive of Eni, in relation to allegations that Saipem, or an intermediary, paid bribes in Algeria

in 2010 to obtain oil and gas contracts. The trial was due to start on 5 December 2016. Eni and two ex-Eni senior executives had been acquitted by an Italian judge in October 2015 on the same charges, but a higher court overturned that judgment in February 2016 and sent the case back to prosecutors for further investigation. A number of other companies being investigated in connection with the allegations were apparently set up by Mossack Fonseca, according to papers published by the International Consortium of Investigative Journalists, as part of the Panama Papers. It was also reported that Eni and Shell had been charged in connection with a controversial acquisition of an offshore block in Nigeria in 2011. However, Eni announced in December 2016 that the investigation had been closed, indicating “the propriety of the transaction”.

### Enforcement trends

The Italian government continues to focus on the prevention of corruption. The National Anti-corruption 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).

**BACK TO MAP**

## **LUXEMBOURG**

There have been no changes to anti-corruption legislation, or any significant corruption prosecutions or enforcement actions since our last Anti-Bribery and Corruption Review in May 2016.<sup>6</sup>

**BACK TO MAP**

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<sup>6</sup> For further details, please visit the Luxembourg section of our Anti-Bribery and Corruption Review 2016 (page 16) at [https://www.cliffordchance.com/briefings/2016/05/anti-bribery\\_andcorruptionreview-may20160.html](https://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html).

## POLAND

### Changes to legislation

Recent months have seen a number of changes and proposals for new legislation in the area of criminal law, including regulations that may affect the enforcement of anti-corruption laws.

#### Corporate criminal liability

In May 2016, the Polish Ministry of Justice presented draft guidelines on proposed changes to the Act on the Liability of Collective Entities for Acts Prohibited under Penalty (the Liability Act). According to these guidelines, the criminal liability of an entity will no longer be secondary to the criminal liability of an individual acting on its behalf. In order to start criminal proceedings against a corporate entity it will be sufficient to establish that an individual acting on its behalf committed an offence which has brought or could bring benefit to the corporate entity. This would allow criminal proceedings against corporate entities to run in parallel with criminal proceedings against individuals. The guidelines also suggest an increase of fines (but without providing numbers), which would not be dependent on the corporate entity's revenue. There have been no further updates on possible changes to the Liability Act since the May 2016 guidelines.

#### Extended confiscation

On 27 April 2017, amendments to the Polish Criminal Code regarding extended confiscation came into force.

This legislation implements Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. The following three key changes are to be introduced:

- *Confiscation of an enterprise belonging to a perpetrator or to a third party that intentionally allowed the enterprise to be used to commit a crime.* Three prerequisites will need to be fulfilled for the confiscation of an enterprise: (i) the enterprise must have been used to commit a criminal offence or to hide the proceeds of crime; (ii) the perpetrator must have obtained proceeds of a significant value (i.e. more than PLN 200,000 – approximately EUR 50,000); and (iii) the enterprise must be owned by an individual. The confiscated enterprise will become the property of the State Treasury.
- *Extended confiscation.* This is a presumption that the assets that a perpetrator obtained during the last five years before a final verdict is issued, originated from or in connection with crime. This covers not only benefits derived by the perpetrator from the criminal offences, but generally all assets of the perpetrator.
- *Compulsory administration of an enterprise during criminal proceedings.* This security measure applies both to

individuals and legal entities. A decision to put an enterprise into compulsory administration may be issued by a public prosecutor and take effect, subject to court approval, during the criminal investigation. The owner of the enterprise has no influence on the choice of the administrator.

#### Falsifying invoices

The Polish Criminal Code has also been amended to increase the penalties for falsifying invoices. Falsifying invoices is now a criminal offence subject to a penalty of up to 25 years of imprisonment and a fine of up to PLN 6 million, in cases where the value of the falsified invoice or invoices exceeds PLN 10 million.

#### Prosecution and enforcement actions

No significant prosecutions or enforcement actions have been reported.

#### Enforcement trends

The Polish Minister of Justice together with the Polish Special Forces Coordinator announced that the plans for 2017 are to unify the anti-corruption regulations, but no details have been provided so far.

**BACK TO MAP**

## ROMANIA

### Changes to legislation

#### Constitutional Court decisions

Decisions of the Romanian Constitutional Court continue to have far-reaching implications for criminal law generally.

As described in our May 2016

Anti-Bribery and Corruption Review,<sup>7</sup> the

Constitutional Court has the power to

require the legislature to amend aspects of criminal law that it has found to be

unconstitutional. Recent decisions of the

Constitutional Court are mainly aimed at

reinforcing observance of fair trial rights in

line with European Court of Human

Rights case law, but a number of recent

decisions also have ramifications for anti-bribery and corruption investigations.

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

As reported in our May 2016 Review,

Decision 51 (Constitutional Court

Decision No. 51 of 16 February 2015)

established that the delegation of the

enforcement of interception warrants and

recording activity to the Intelligence

Services (the SRI) was unconstitutional.

As part of this clear finding that the SRI had

systematically overreached in criminal

proceedings, the Constitutional Court

expressly left open the right of those

already subject to a final judgment to obtain

the benefit of the Constitutional Court's

decision by way of bringing an extraordinary

appeal/revision application. The wider

implications of this decision are therefore

potentially very significant (see also below).

#### Unconstitutionality of the "abuse in office" criminal offence

Decision 405 (Constitutional Court

Decision No. 405 of 15 June 2016) has

had an important impact on the criminal offence of abuse in office. The court considered that the terminology "*duty faultily performed*" should be interpreted as meaning "performed by breaching a law" *stricto sensu* (i.e. a law directly issued by Parliament, a Government Emergency Ordinance or simple Government Ordinance) and not in breach of rules that do not meet the threshold of being considered a law, such as internal regulations, government decisions or administrative acts which set personal conduct requirements.

Furthermore, the Constitutional Court found that the lack of a threshold for damages to the rights or interest of an individual/entity meant that the legislation setting out the offence of abuse in office was unconstitutional.

The government tried to amend the criminal legislation following Decision 405 by issuing Emergency Ordinance 13 (No. 13/01.02.2017). However, this was immediately repealed following strong protests against the changes.

The current situation is further confused by indications that some courts are treating abuse in office as having been partially abolished and are acquitting persons charged with breaching regulations that do not constitute a "law" *stricto sensu*.

The Minister of Justice announced that a draft law to change the Criminal Code in accordance with Decision 405 is being prepared and will be submitted to Parliament shortly.

#### Expected pardon law

A collective pardon law for certain crimes sanctioned by a maximum five-year prison sentence was debated at the beginning of the year but approval has been postponed as a result of public protests. There are rumours that the pardon could extend to corruption offences.

#### Prosecutions and enforcement actions

A number of high-profile cases were prosecuted and/or sent to trial in the last few months (end of 2016/beginning of 2017), involving several Ministers and other public officials.

#### Microsoft II

In November 2016, the National Anti-Corruption Directorate (DNA) launched a criminal investigation against two former Microsoft directors and a representative of Fujitsu Siemens Computers GmbH. The three are accused of being accomplices to repeated abuses of office by a public official, in relation to the acquisition of IT licences by various Ministries in Romania.

The DNA alleges that the total amount of damages caused to the national budget because of the IT licensing contracts between 2004 and 2008 is approximately USD 67 million.

The criminal case is still at an investigative stage and there are procedural matters preventing the DNA from investigating the former Ministers involved in the approval of the IT contracts (i.e. lack of consent from the Presidency or the Parliament to the commencement of the criminal investigation against the former Ministers).

<sup>7</sup> For further details, please visit the Romanian section of our Anti-Bribery and Corruption Review 2016 (pages 18 *et seq.*) at [https://www.cliffordchance.com/briefings/2016/05/anti-bribery\\_andcorruptionreview-may20160.html](https://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html).

### **Bute Boxing Gala**

In March 2017 the Supreme Court sentenced former Regional Development Minister Elena Udrea to six years in prison for passive bribery and abuse of office, and acquitted her of the charge of attempted use of false or incomplete statements. The ruling of the Supreme Court is not final and may be appealed to the five-judge panel of the High Court of Cassation and Justice.

The Supreme Court ordered the former minister to pay RON 8.1 million (approximately EUR 1.7 million) to the National Tourism Authority, as well as EUR 900,000 to two witnesses. The court also ordered the seizure of approximately RON 1 million (approximately EUR 200,000) from the assets of the former Tourism and Development Minister.

The prosecutors alleged that a services contract signed on 24 June 2011, and awarded by way of negotiation, in the absence of a tender announcement, between the Regional Development and Tourism Ministry and another company for the provision of advertisement services at events associated with an international professional boxing gala organised by the Romanian Boxing Federation, was the result of bribery.

### **Romanian Social Democrat leader Liviu Dragnea**

Liviu Dragnea, a key figure in the current government, was indicted by DNA prosecutors on 15 July 2016 for instigating abuse of office and instigating forgery.

According to the prosecutors, from July 2006 to December 2012, in his capacity as President of Teleorman County Council and President of Social Democrat Party, Liviu Dragnea incited the Executive Director of Teleorman County's General Directorate for Social Security

and Child Protection (DGASPC) at the time to commit abuse of office.

According to the DNA, Mr Dragnea took action to arrange for two employees of DGASPC in Teleorman to keep their positions with the institution and receive a salary, although he knew that they actually worked for the Teleorman branch of the Social Democrat Party.

### **Enforcement trends**

According to the DNA's report of activity in 2016, identification of fraud and corruption in the field of public procurement was a priority in 2016. Investigations focused particularly on infrastructure-related acquisitions, IT services, health, restitution of state owned property and public services. More than a quarter of the defendants sent to trial in 2016 had committed criminal offences consisting of abuse of office. Damages calculated by the DNA to have been caused by acts of abuse of office in 2016 alone amount to over EUR 260 million.

The value of fines levied in 2016 amounts to EUR 667 million, and a third of the individuals sent to trial had held a managerial position. More than 1,270 defendants were sent to trial for high and medium level corruption offences. These included three Ministers, six Senators, 11 Deputies, 47 Mayors, 16 Magistrates and 21 CEOs of national companies.

The DNA's priorities for 2017 are to continue investigations in high-level corruption cases, as well as fraud and corruption investigations in the fields of public procurement, health and infrastructure. The DNA will also focus on the EU funds-related fraud, corruption in the judiciary, the recovery of damages and extended confiscation.

In addition, the General Prosecutor of Romania stated that fighting against corruption, addressing tax evasion, recovering prejudices/proceeds of crime and providing a framework for fundamental rights will continue to be priorities of the Public Ministry in 2017.

The General Prosecutor also said that the National Agency for the Management of Impounded Assets is now operational and will help the Public Ministry to seize and recover the proceeds of crime.

However, it is difficult to predict anti-corruption trends given the recent and current criticisms, both external and internal, and the disclosures about the methods used by the DNA to investigate and obtain evidence in criminal cases by working with the Romanian Intelligence Services (see below).

### **Other developments**

The DNA has been closely involved in prosecuting high-profile criminal cases. However, in the context of considerable contentious public debate about the role of the SRI in corruption cases, the National Union of Judges of Romania (UNJR) published a document on 16 January 2017 (previously sent to it by the Supreme Council of National Defence (CSAT) on 16 February 2016) concerning the SRI's competences within the criminal justice system. The CSAT went on to acknowledge that the relationship between prosecutors and the security services was such that it had indeed resulted in "the creation of mixed teams consisting of representatives of criminal prosecution authorities, with the view to counterbalancing the risks sprung from the conduct of certain criminal activities". This has also been acknowledged by former Romanian President, Traian Băsescu, Romania's General Prosecutor and by the head of the SRI. Calls for an

investigation into the detail of the membership or competence of such joint prosecutor/intelligence service teams have so far been refused.

There have been a number of press reports based on disclosures by Sebastian Ghita, about alleged SRI interference. Mr Ghita, a former member of the Lower Chamber, and a member of the Parliamentary Commission for the Supervision of the Secret Services, was reported to have confirmed that the intelligence services played a role in important corruption prosecutions of

high-ranking officials over the past five to ten years, including that of former Prime Minister Adrian Nastase.

The DNA was reported to be investigating members of the current government who enacted Ordinance 13 (which, as above, sought to amend aspects of Romanian criminal law, including redefining the *abuse in office* criminal offence). However, the Constitutional Court, in a dramatic ruling on a potential conflict between the executive power (the Romanian government) and the legislative power

(the Romanian Parliament), found that the DNA had no legal basis to act in examining whether the government was justified in issuing Ordinance 13, and that its investigation of members of the government in relation to the enactment of Ordinance 13 was therefore illegal.

**BACK TO MAP**

## RUSSIA

### Changes to legislation

#### Anti-Corruption Law – compensation for damages

On 10 August 2016 a draft law introducing amendments to Federal Law No. 273-FZ On Preventing Corruption (the Anti-Corruption Law) was submitted to the Russian State Duma. This draft law contemplates that compensation for damages will be payable not only by the person who committed the corruption offence, but also by his immediate family, relatives and close friends if there is sufficient evidence that money, valuables or other property were obtained by them as a result of the corruption offence or constitute the proceeds from the sale of such property. Claims for compensation in respect of such damages are not subject to any limitation period. This draft law is currently being considered by the Russian State Duma.

#### Protection for whistleblowers

On 7 February 2017, the Ministry of Labour and Social Protection of the Russian Federation announced a new draft law amending the Anti-Corruption Law. This draft law is intended to introduce measures to protect people who report corruption offences. The draft law would provide protection for people who report corruption offences or otherwise assist in preventing corruption, including the following measures:

- keeping the person's identity and the content of the report on the offence confidential;
- provision of free legal aid;
- protection from unauthorised dismissal and other infringements of the employment rights of the person reporting the offence (e.g. dismissal by

the employer is only possible with the approval of a special review panel or collective anti-corruption body at the employer).

The draft law is currently in the process of being amended.

#### Criminal Code

On 15 July 2016, amendments to the Criminal Code of the Russian Federation came into effect, aimed at increasing the penalties for corruption-related offences.

#### Amendments to the definitions of corruption-related offences

In the Criminal Code, the definitions of offences such as accepting a bribe (Article 290) and giving a bribe (Article 291) were amended in line with Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which obliges States parties to the Convention to criminalise the offering, promising or giving of any undue pecuniary or other advantage to a foreign public official, not only for that official, but also for a third party. The definition of commercial bribery (Article 204) under the Criminal Code was also brought into conformity with the above definitions of accepting and giving a bribe.

Finally, the definition of incitement to bribe (Article 304) under the Criminal Code was amended: the range of persons who can be deemed *incited* to accept a bribe was made consistent with the range of persons who can be deemed to *accept* bribes. These amendments mean that incitement to bribe may be committed not only in relation to public officials, but also in relation to foreign public officials and officials of international organisations.

#### Amendments to the provisions on penalties for corruption-related offences

First, the penalties for commercial bribery (Article 204) under the Criminal Code have been made dependent on the amount of the bribe, the categories being "significant" (exceeding RUB 25,000, approximately USD 435), "large" (exceeding RUB 150,000, approximately USD 2,610) or "very large" (exceeding RUB 1 million, approximately USD 17,425). These amendments mirror similar provisions related to giving and accepting a bribe (Articles 290 and 291 of the Criminal Code) and acting as an intermediary for a bribe (Article 291.1 of the Criminal Code).

Second, the Criminal Code provisions were amended by adding alternative types of penalties, reducing the applicable fines and lengthening the terms of imprisonment.

Generally speaking, the rationale for these amendments was that in most cases persons found guilty of the above corruption-related offences have been sentenced to extremely high fines, calculated as a multiple of the value of the bribe, as this was the only alternative to imprisonment. Ultimately such sentences were often unenforceable because offenders were unable to pay the full amount of the fines, and court bailiffs had to apply to the courts to change the sentences from fines to imprisonment. In view of this, legislators are seeking to give the courts greater discretion in determining the penalty for criminal offences.

#### New corruption-related offences

Three new corruption-related offences have been added to the Criminal Code:



acting as an intermediary for a commercial bribe (Article 204.1), small-scale commercial bribery (Article 204.2), and small-scale bribery (Article 291.2).

Small-scale commercial bribery and small-scale bribery are applicable when the amount of the bribe/commercial bribe does not exceed RUB 10,000 (approximately USD 175). The criminalisation of small-scale corruption-related offences was driven by the fact that in the period from 2012 to 2015, an overwhelming number of all criminal cases related to bribery and commercial bribery involved bribes/commercial bribes of less than RUB 10,000 (approximately USD 175).

The penalties for small-scale bribery are lower than those for bribery.

There is a simplified procedure for investigating small-scale corruption-related offences, and they fall within the competence of the magistrates' courts.

#### Anti-money laundering law

On 21 December 2016, new 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) entered into force, imposing new obligations on Russian legal entities to disclose information on their beneficial owners, which is an important anti-corruption measure. In particular:

- Legal entities are obliged to hold information on their beneficial owners (an individual who directly or indirectly holds a stake of 25% or more in a Russian company or otherwise controls its actions) and to take appropriate and reasonable steps to establish the identity of their beneficial owners.

Information on a beneficial owner must include his/her name, surname and patronymic (if applicable), citizenship, date of birth, passport (or other identity document) details, migration card details, data of the document confirming the right of a foreign national or stateless person to stay (reside) in the Russian Federation, address of the place of residence, and taxpayer identification number.

The above obligation applies to all legal entities with a few exceptions. State and municipal agencies, and legal entities established under their authority, state corporations, organisations in which the Russian Federation has a 50% or more stake and issuers of securities admitted to trading on a regulated financial market that are subject to disclosure obligations under the Russian securities law are not obliged to comply with this obligation.

- Legal entities are obliged to: regularly, in any case at least once per year, update and document information on their beneficial owners; and store information on their beneficial owners and on the steps that they have taken to establish the identity of their beneficial owners for a period of at least five years after the date that they obtained the information.
- Information about beneficial owners is to be disclosed in legal entities' regular reports as set out by Russian law.
- Legal entities are obliged to provide information on their beneficial owners or steps taken to establish the identity of their beneficial owners, confirmed by the relevant underlying documents, at the request of an authorised agency or the tax authorities.

The list of bodies authorised to request that legal entities disclose their beneficial owners and the procedure governing the disclosure of such information were to be adopted by the Russian government by 7 September 2016, but are still pending. Until they are adopted, the provisions of the Anti-MoOService issued a non-binding information letter indicating that it has the authority to request the above information from legal entities about their beneficial owners and the steps they have taken to establish the identity of their beneficial owners. The letter also explains that legal entities may prove that they have taken steps to obtain information about their beneficial owners by providing requests sent to shareholders or other controlling persons and the respective responses.

In light of the above obligations, legal entities are entitled to request that their shareholders/controllers provide information required to determine the beneficial owners of the requesting company. In turn, shareholders/controllers of Russian companies are obliged to provide such information.

On 21 December 2016, the Administrative Offences Code of the Russian Federation was amended by adding Article 14.25.1, envisaging the following sanctions for non-compliance with Article 6.1 of the Anti-Money Laundering Law, which establishes an obligation for legal entities to disclose information on their beneficial owners: (i) an administrative penalty on officials of up to RUB 40,000 (approximately USD 700), and on legal entities of up to RUB 500,000 (approximately USD 8,700).

## Prosecutions and enforcement actions

In recent months, there has been a significant increase in corruption-related investigations into the conduct of public officials, a number of which have caught the attention of the media.

On 14 November 2016, Economic Development Minister Alexei Ulyukaev was arrested on suspicion of accepting a bribe of USD 2 million. It is reported that the bribe was given to him for facilitating a positive opinion of the Ministry of Economic Development allowing PJSC Rosneft Oil Company to enter into an agreement on the acquisition of the government's 50% stake in PJSC Bashneft Oil Company. Mr Ulyukaev is the first public official at such a high level to have been arrested for a corruption-related offence since 1953.

On 8 September 2016 the deputy head of "T" Department (a unit focusing on offences in the fuel and energy sector) of the Interior Ministry's Anti-Corruption Directorate, Dmitry Zakharchenko, was arrested on suspicion of accepting a bribe of RUB 7 million (approximately USD 122,000) through an intermediary from an unknown person. He was ultimately charged with accepting a "very large" bribe, abusing powers and obstructing justice and pre-trial investigation. It was also reported that during a search of an apartment owned by a relative of Mr Zakharchenko, an unprecedented amount of cash equal to USD 120 million and EUR 2 billion, weighing approximately 1.2 tonnes was found.

On 24 June 2016, the governor of the Kirov region, Nikita Belykh, was arrested on a charge of accepting a EUR 400,000 bribe. He was caught in a Moscow restaurant accepting the bribe from a German businessman, Yuri Zudhaimer. Mr Belykh allegedly received the bribe to protect the interests of two companies based in the Kirov region and controlled by Mr Zudhaimer: JSC Novovyatsky Ski Factory and LLC Forestry Management Company.

On 4 April 2017, an investigation was launched against the head of the Udmurt Republic, Alexander Solovyov, based on allegations that he took bribes totalling more than RUB 140 million (approximately USD 2.4 million). Mr Solovyov allegedly received the money from companies involved in building bridges over the Kama River and the Bui River near the town of Kambarka in the Udmurt Republic. In return, it is alleged that Mr Solovyov was expected to ensure the prompt allocation of public funds from the federal and regional budgets to pay for the construction work, and also to procure the issuance of licences for geological surveying of the area, sand mining and sand gravel production. He also reportedly received a stake worth RUB 2.7 million (approximately USD 47,000) in a commercial company.

Recent notable examples of corruption-related cases against officials of commercial organisations include criminal proceedings initiated in March 2017 against the general director of OJSC GSK, Viktor Kudrin. He is

accused of embezzling RUB 56 million (approximately USD 976,000) given to OJSC GSK in connection with a public contract for construction of the largest detention centres in Europe, Kresty-2. In a separate case, the head of the local branch of Rosselkhozbank in North Ossetia, Georgy Kalaev, was charged in June 2016, with accepting a commercial bribe of RUB 5.5 million (approximately USD 96,000). Mr Kalaev is alleged to have been given the bribe by the head of an agricultural company for the illegal provision of a RUB 10 million (approximately USD 174,000) loan on the basis of fabricated financial statements.

## Enforcement trends

Given the above, it appears that the Russian law-enforcement authorities are currently more focused on investigating corruption offences committed by public officials rather than commercial bribery. This is also evidenced by the fact that the recent amendments to the law, which require more transparency in relation to the ownership of assets, are mainly aimed at banning or preventing the illegitimate practice of public officials concealing their ownership of assets by the assistance of foreign law instruments, such as trusts, etc.

**BACK TO MAP**

## SLOVAK REPUBLIC

### Changes to legislation

#### Register of public sector partners

In November 2016, as part of the government's efforts to increase transparency with regard to public expenditure, the National Council of the Slovak Republic adopted Act No. 315/2016 Coll., on the Register of Public Sector Partners, which became effective on 1 February 2017.

The new legislation means that the public sector (central government, local government and entities controlled by central or local government) may only transfer funds and property to persons who are registered in a public register and who have disclosed their ultimate beneficial owner(s). Recipients of funds or property from the public sector are referred to as public sector partners.

All individuals and legal entities that have entered or will enter into any agreement with the State or local government, or with any legal entity financed or controlled by the State or local government, are considered to be public sector partners. According to this legislation, a public sector partner is any natural or legal person that receives funds, assets or other property rights from public resources, including EU funds (with certain narrow exemptions). The new register will contain data on the beneficial owners of public sector partners, i.e. any natural persons who actually control another person that does business with the State, as well as any natural person for whom such entity carries out business or trade. The law provides an exhaustive list of all persons who are deemed to be beneficial owners.

Each public sector partner has to be registered in the register prior to entering

into any public sector agreement.

A person who entered into a relevant agreement prior to 1 February 2017 has until 31 July 2017 to fulfil the registration obligation. The public sector partner has to appoint an "authorised person" (who must be an attorney, notary, bank, auditor or tax advisor) to procure the registration on its behalf. The authorised person will have an important role in the registration process, being the only person able to initiate the registration procedure. The authorised person is also required to verify the information on ultimate beneficial ownership recorded in the register at least once a year.

Non-compliance with the obligations under the new Act can result in severe sanctions. A person (either the public sector partner or the ultimate beneficial owner) in breach of the obligation to register correct and complete information faces a potential fine of up to the equivalent of the economic benefit obtained in connection with the breach or up to EUR 1 million. If a public sector partner fails to satisfy its registration requirements, there is also the risk that its contractual party may be entitled to terminate the agreement. A member of the statutory body of the partner which fails to comply with the obligations under the Act also risks being disqualified from acting as a member of a statutory or supervisory body.

### Prosecutions and enforcement actions

In February 2015, Dr. Viliam Fischer, a high-profile cardiologist, was accused by the family of a deceased patient of accepting EUR 3,000 in cash. Fischer received a suspended sentence of two years and probation of four years. He was given a fine of EUR 15,000 and a

ban on practising as a doctor for three years. Dr. Fischer entered into a plea bargain with the prosecutor and as a result, he has avoided a prison sentence of between three and eight years.

In mid December 2014, the police detained the head of the Pediatric Clinic of the Children's Faculty Hospital in Bratislava. Mr. Vladimír Polák was caught in the act of bribery as he accepted EUR 500 and a bottle of alcohol from the father of a patient in exchange for consent to treatment in another member state of the European Union. He was given a suspended sentence of two years and he also received a fine of EUR 5,000 and a ban on practising as a doctor for two years. Mr. Polák also lost his licence to practise medicine.

In December 2016, the National Criminal Agency (NAKA) launched a criminal prosecution in the Bašternák case. Bašternák's firm, BL-202, allegedly received excessive VAT refunds after it bought and sold seven apartments in the residential complex Bonaparte (where Slovak Prime Minister has a flat) in 2012. Interior Minister, Robert Kaliňák, is facing suspicions that he has been helping businessman Ladislav Bašternák to avoid criminal prosecution.

Bašternák reportedly bought the apartments for EUR 12 million, which the criminal office at the Financial Administration considers to be an excessive price. The company then applied for a VAT refund of EUR 2 million, which the State paid, in spite of suspicion that the transaction was fictitious. The real value of the property is likely to have been around EUR 1.5 million, which would mean that Bašternák illegally obtained over EUR 1.7 million on the

deal. However, the charge made by the investigator of the financial police department at the National Criminal Agency against Bašternák was failing to pay tax and insurance, despite tax fraud being on the table since the start of the case. Later, police chief Tibor Gašpar explained that NAKA had no other option because legislation in 2012 did not recognise the crime of tax fraud.

Where a person is charged with the criminal offence of failing to pay tax, a criminal penalty may be avoided where the person “legally regrets” the act, and pays the unpaid tax. In 2011, the Constitutional Court confirmed that legislation provides for criminal offences – including tax fraud – to be legally regretted in order to avoid a jail sentence.

This case was among the issues that the U.S. Department of State highlighted in its 2016 annual report on the state of human rights in Slovakia. The report mentions the allegations that Mr Kaliňák used his influence to stop the investigation into Bašternák for tax fraud. The report observes that he publicly denied any connection with Bašternák at first, but that a leak of the Minister’s bank records by a bank officer indicated that he had received EUR 260,000 from a company in which he had purchased shares from Bašternák, the former co-owner of the shares. The report adds that there have been suggestions that this payment was “a kickback Kaliňák received for shielding Bašternák from criminal investigation”.

### **Enforcement trends**

The cases highlighted above indicate an increasing focus in the Slovak Republic on corruption in the healthcare sector. The focus on healthcare is also suggested by recent attempts by the Ministry of Health to cooperate with health insurance and pharmaceutical companies in order to create several cooperative anti-corruption schemes that promote transparency, especially in relation to payments made between health care professionals and pharmaceutical companies.

**BACK TO MAP**

## SPAIN

### Changes to legislation

The Spanish Criminal Code (SCC) was amended on 1 July 2015 by Organic Law 1/2015, which introduced significant changes in relation to corporate criminal liability<sup>8</sup>. There have been no further material legislative developments since those changes.

### Prosecutions and enforcement actions

In recent years, the *Pujol* case, involving the former president of Catalonia and his family, the *Noós* case, involving members of the Royal Family, the *Tarjetas Black* case, involving the directors of Bankia, one of the most important Spanish Saving Banks and the former president of the IMF, the *Bárceñas* case, involving the former treasurer of the Popular party Group, the *Púnica* case, involving public officials of the Madrid Regional Government and significant private and listed companies, and the *ERE* case in Sevilla, involving officials of the Andalusia Regional Government, have all attracted widespread media attention.

### Enforcement trends

Since the beginning of the economic crisis in 2008, there has been a notable increase in corruption cases brought before the courts involving both politicians and private sector company executives accused of bribery.

The introduction of corporate criminal liability in the SCC in 2010 has led to a parallel increase in the number of cases where Spanish courts are investigating legal entities, both companies from the private sector and political parties.

In addition, as a consequence of the 2015 OECD Report which criticised Spain for not focusing enough on prosecuting bribery in international commercial transactions (section 286 ter SCC), the first investigations related to this offence have been launched over the past few years. In particular, there are two important cases: (i) the *Apyce* case, in which a Spanish publisher was accused of bribing public officials from Equatorial Guinea in a contract for supplying books and course materials to this country; and (ii) the *Angola* case, involving directors of the semi-public company from the defence sector, Defex, regarding a contract for supplying military equipment to Angola, which has recently been extended to other similar contracts in Egypt, Brazil, Cameroon and Saudi Arabia. In February 2017 the first conviction regarding bribery in international commercial transactions was issued in the *Apyce* case.

### Other developments

#### Transparency International report

In January 2017, Transparency International presented the results of its Corruption Perceptions Index 2016, which classifies 176 countries according to their perceived level of corruption. Spain is ranked 41st, and even though it is not categorized as a country with systemic corruption, the report mentions Spain's recent political and business scandals.

In addition, Transparency International proposed a number of measures to reduce corruption in Spain, such as improving legal provisions in relation to the offence of illicit enrichment and developing a law to protect whistleblowers.

#### UNE 19601 Certifiable standard

Since the introduction of corporate criminal liability and the requirement to

have an effective compliance programme in place in order to avoid liability for a criminal offence, compliance focus on crime prevention has become increasingly important.

Therefore, over the past year, a group of compliance specialists has been working on Spanish Standard Project 19601 or *UNE 19601* which is expected to be published in the Spanish Official Gazette (*Boletín Oficial del Estado*) in May 2017. When it is published this will be the first time that Spain will have an official certifiable standard providing general guidelines for compliance systems in order to prevent criminal offences by companies.

This project is the Spanish response to the international standardization process of ISO 19600 on Compliance Management Systems (CMS), as well as the ISO 37001 standard on Anti-Bribery Management Systems. Like these international standards, the *UNE 19601* contains requirements and guidelines for implementing, evaluating, maintaining and improving an effective compliance management system as well as recommendations regarding the elements an organisation should rely on to ensure compliance with an adequate general compliance policy.

It should be noted that, while the adoption of a Criminal Compliance Management System certified as being in accordance with *UNE 19601* Standard does not guarantee the exclusion of corporate liability, it will significantly reduce the risk of the company being held criminally liable for criminal offences committed by its managers or employees, since it constitutes evidence of responsible management.

**BACK TO MAP**

<sup>8</sup> For further details, please see the Spanish section of our Anti-Bribery and Corruption Review 2015 (page 20 *et seq.*) at: [https://www.cliffordchance.com/briefings/2015/07/anti-bribery\\_andcorruptionreview-july2015.html](https://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html)

## THE NETHERLANDS

### Changes to legislation Information on bribery and corruption prevention to be included in directors' report

Listed companies and certain other legal entities will have to include information about their anti-bribery and corruption efforts in their directors' report, with regard to reporting periods commencing on or after 1 January 2017.

The new reporting obligation applies to legal entities that are listed, certain credit institutions and insurance companies and legal entities that are designated based on their size and function in society that meet the following conditions:

- the average number of employees exceeds 500 in a financial year; and
- the legal entity does not meet the conditions to fall within the scope of the 'medium-size companies' exemption.

The relevant legal entities must include the following elements in their directors' report regarding anti-bribery and corruption:

- a description of the business model of the legal entity;
- the anti-bribery and corruption policy, including the applicable procedures, and the effects of this policy on the fight against bribery and corruption;
- the main anti-bribery and corruption risks that relate to the business activities of the legal entity and how these risks are managed by the legal entity.

If the relevant legal entity does not have an anti-bribery and corruption policy in place, it must explain why there is no such policy in place.

### Anti-bribery and corruption is focus area of new Corporate Governance Code

To reflect the growing focus by corporate enterprises on anti-bribery and corruption measures, this has been included as a topic in the new Dutch Corporate Governance Code (DCGC) as part of the long-term value creation principle.

This principle requires management boards to develop a view on long-term value creation by the company and its affiliates and formulate a strategy in line with this view. One of the main topics management boards need to pay attention to when developing the strategy is the fight against corruption and bribery.

Compliance with the DCGC is based on the "comply or explain" principle, so if management boards do not take the fight against corruption and bribery into account when developing the strategy, they will need to explain why they did so in the annual report.

### Prosecutions and enforcement actions Settlements with car importers for improperly influencing police and military officials

Recently the Dutch Public Prosecutor's Office (*Openbaar Ministerie*) announced that a number of car importers had reached settlement agreements involving the payment of amounts ranging from EUR 2 million to EUR 12 million. The Public Prosecutor accused the car importers of bribing one or more public officials who were involved in fleet management or procurement of vehicles

for the Dutch police and military in the period from 2001 to 2012.

The settlements consisted of two elements: (i) a fine and (ii) the confiscation of the proceeds of the bribery. According to the Public Prosecutor, the following factors were taken into account when determining the amount of the penalties:

- the period during which gifts were provided to public officials;
- the number of employees and public officials involved;
- the amount spent on gifts;
- the fact that the car importers all cooperated with the investigation;
- the fact that the current management boards of the car importers distanced themselves from the alleged conduct;
- the measures taken to strengthen the compliance systems and ensure compliance with anti-corruption legislation within the companies.

### Other developments Auditors to assess corruption risks

During recent years there has been a strong focus on the role of auditors in the prevention of bribery and corruption in the Netherlands. At the beginning of 2016 the Netherlands Authority for the Financial Markets wrote to audit firms asking them to focus on corruption risks when performing financial audits. To provide guidance to auditors on how to address corruption risks during audits, the Netherlands Institute of Chartered Accountants (NBA) published Guide 1137 regarding corruption and the work of an auditor.

The Guide provides guidelines which auditors can use to assess risks and identify corruption during the (annual) financial audit and other audit-related activities. The Guide seeks to raise awareness with regard to corruption, especially in the context of high-risk countries, sectors and transactions. Furthermore, the Guide provides guidelines with regard to elements that auditors need to focus on when performing financial audits. Most of these

elements focus on gaining insight in relation to internal controls addressing corruption risks.

#### **Trust offices to monitor integrity risk**

The Dutch central bank (*De Nederlandsche Bank, DNB*) identified corruption, money laundering, and terrorist financing, circumventing sanctions, (tax) fraud and conflict of interests as the most prominent integrity risks for trust offices and, according to DNB, transaction

monitoring is an essential measure to control these integrity risks. To provide guidance to trust offices on how transaction monitoring needs to be organised and executed, DNB published Good Practices for transaction monitoring by trust offices on 30 March 2017.

**BACK TO MAP**

## **TURKEY**

### **Changes to legislation**

In April 2016, the Prime Minister of Turkey introduced Circular No. 2016/10 on Increasing Transparency and Strengthening the Combat against Corruption which also set out an action plan for the years 2016 to 2019. However, following a change in the Prime Minister's office in May 2016, the Commission on Increasing Transparency and Strengthening the Combat against Corruption was excluded from Circular No. 2016/13 on Delegating Commission Duties to Members of Parliament which was issued by the new Prime Minister. Therefore, it remains to be seen whether the action plan introduced by the Circular on corruption will be implemented.

### **Prosecutions and enforcement actions**

Investigations remain ongoing in relation to the bribery investigation launched in October 2014 into allegations that officials of the Fire Fighting Department of the Istanbul Metropolitan Municipality took bribes from business owners in order to grant workplace permits for premises that did not meet the required conditions for obtaining workplace permits. Investigations also continue

following the detention, in June 2015, of 41 employees of the Turkish Aviation Institution (*Türk Hava Kurumu*), including the former president of the Institution, on suspicion of accepting 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.

In March 2016, a corruption case known to the public as the Roche case was resolved after 12 years. This was initiated back in 2004 following a tip-off by an employee to the public prosecutor's office about an issue involving the difference in medicine prices between public and private hospitals. Although the case had been dismissed due to the statute of limitations, the High Court of Appeals decided that the alleged crimes attracted a potential penalty of over ten years imprisonment, resulting in the case being reopened in order to be adjudicated before high criminal courts instead of the criminal courts of first instance. In March 2016, ten people, including the former general manager of

the company and former managers of the Social Insurance Institute, were sentenced to five years imprisonment, which was subsequently decreased to four years and two months for good behaviour during the proceedings.

In February 2017, fourteen people working at Adana Metropolitan Municipality, including the Mayor himself, were sentenced to five years imprisonment for corruption and bribery.

### **Other developments**

Turkey continues to descend in the ranking of countries according to perceived levels of public corruption. In the most recent Corruption Perceptions Index published by Transparency International in January 2017, Turkey was ranked 75th among 176 countries (from 66<sup>th</sup> position last year), having fallen 22 places in this index since 2013. This result suggests that the prosecutions of high-ranking public officials in December 2013 and ongoing investigations and prosecutions since have reverberated in the public and the international arena.

**BACK TO MAP**



## UKRAINE

### Changes to legislation

Recent anti-corruption legislative changes in Ukraine have included the establishment of specialised anti-corruption courts, electronic wealth declarations for public officials (E-Declarations) and a range of other anti-corruption preventive measures.

#### E-Declarations

E-Declarations for public officials were introduced in April 2016, and implemented in practice in August 2016. The new E-Declarations measure requires all state officials, Members of Parliament and officials of local government bodies to submit annual online reports setting out details of their assets, income, expenditure and financial obligations to the National Agency for Preventing Corruption (the NAPC). In June 2016, the NAPC adopted the standard form of the E-Declarations, the procedure for completing the form and the procedure for maintaining the E-Declarations register.

In addition to criminal liability, hefty administrative fines of up to UAH 42,500 (approximately EUR 1,435) were introduced for submitting false information in the E-Declarations in March 2016.

All senior Ukrainian government and parliamentary officials had to complete and submit their E-Declarations by 30 October 2016. Around 50,000 E-Declarations were filed, revealing that a large number of Ukrainian top officials/politicians and their family members keep millions of dollars in cash and own valuables such as luxury watches, expensive cars and vintage wine collections. Ukraine's Prosecutor General announced that his office will investigate all politicians/officials who declared savings in excess of USD 100,000 and/or gifts of over USD 10,000.

In March 2017, the Ukraine Parliament extended the requirement to submit E-Declarations to members of anti-corruption NGOs, presidential candidates and parliamentary candidates, who were ordered to comply by 1 May 2017. These measures are controversial since they appear specifically to target anti-corruption NGOs which receive foreign funding. Parliament also abolished an obligation to submit E-Declarations for some categories of military servicemen participating in the Anti-Terrorist Operation in the East of Ukraine.

#### Other anti-corruption preventive measures

In October 2016, the Cabinet of Ministers adopted "Measures for the prevention of corruption in the Ministries and other central executive bodies" which sets out a roadmap for each Ministry and agency of the Ukrainian government to implement anti-corruption measures. As part of this roadmap, the NAPC published a model anti-corruption programme for legal entities in March 2017. All entities participating in Ukrainian public procurement tenders where the expected value of the contract is equal to or exceeds UAH 20 million (approximately EUR 675,676) are expected to follow this model anti-corruption programme.

#### Anti-corruption courts

A new law "On the Judicial System and Status of the Judges" (adopted in June 2016) provides a basis for the introduction of specialised anti-corruption courts, in particular, the Higher Anti-Corruption Court. The draft law "On Anti-Corruption Courts" has been introduced, but has not yet been adopted. The rationale for the introduction of anti-corruption courts is that the general courts are too overloaded with cases and

are vulnerable to threats or influence from high-ranking corrupt officials who may be charged with bribery or other corruption offences.

### Prosecutions and enforcement actions

During 2016 the National Anti-Corruption Bureau of Ukraine (the NABU) investigated a constantly increasing number of cases. The most recent and famous cases are described below.

#### New investigations based on the data provided in electronic declarations

The total number of current investigations based on the information set out in the E-Declarations is 34. Out of these, 25 criminal proceedings have been commenced so far. The subjects of these investigations are mainly judges, MPs and heads of local authorities.

#### Arrest of the Head of State Fiscal Service of Ukraine

In March 2017 NABU investigators arrested the Head of the State Fiscal Service of Ukraine (Mr. Roman Nasirov) on suspicion of abuse of office.

Later in March NABU investigators, in cooperation with the Prosecutor's Office, issued a notice of suspicion to and arrested Mr. Nasirov and his alleged accomplice, the Head of Department of debt recovery of the State Fiscal Service of Ukraine.

Charges against them are related to the case of Mr. Oleksandr Onishchenko, an MP. The latter is suspected of a criminal enterprise aimed at misappropriating funds in the course of natural gas production and sale under joint venture agreements with the state company Ukrgasvydobuvannya. Damages to the

State as a result of the suspected criminal enterprise have been estimated at EUR 102 million.

#### **Charges against the Head of Audit Chamber of Ukraine and other authorities**

In March 2017 the NABU brought charges against the Head of the Audit Chamber of Ukraine and the chief auditor of the Audit Chamber of Ukraine. The charges against the two are based on the alleged unlawful transfer of official housing into private property.

#### **Bribery cases**

In January 2017 NABU investigators arrested an assistant of a judge on suspicion of receiving a bribe in the amount of USD 23,000 and fraud. The investigation continues.

#### **Enforcement trends**

The NABU continues to focus on allegations of corruption, particularly by Ukrainian officials. However, there have been no investigations resulting in convictions. Moreover, based on a recent NABU report, most corruption

indictments remain unscheduled for hearing for over ten months, highlighting the urgent need for the introduction of the anti-corruption courts.

**[BACK TO MAP](#)**

## UNITED ARAB EMIRATES

### Changes to legislation

The Emirate of Dubai issued a law (Dubai Law No.4 of 2016), establishing a new “economic crimes super regulator”, the Dubai Economic Security Centre (DESC), which came into effect on 15 May 2016.

The UAE also introduced a number of changes to the Penal Code (Federal Law No.3 of 1987) by Federal Decree-Law No. 7 of 2016 dated 18 September 2016; these changes came into effect on 29 October 2016.

### Dubai’s new super regulator

The DESC’s main objectives are to maintain the Emirate’s position as a global financial and economic hub, to protect investors and to deal with issues such as fraud, bribery, money laundering and terrorist financing. The law establishing the DESC also contains the first UAE whistleblower protection scheme, which includes protection from discrimination in the workplace. The DESC has jurisdiction across the Emirate of Dubai, including the Dubai International Financial Centre (DIFC).

The DESC’s powers allow it to:

- make rules, including in relation to imposing administrative penalties. A breach of the DESC law is subject to a fine of between AED 10,000 and AED 500,000 (approximately USD 2,720 to USD 135,900);
  - suspend trading on exchanges and the application of trading rules;
  - request the freezing of assets;
  - request police assistance and the production of information;
  - monitor donations, commodities, securities and cash trades; and
- coordinate with international organisations in matters negatively impacting Dubai’s economy.

The DESC has yet to become operational at the time of writing this report, although its board and CEO have been appointed.

### Relevant amendments to the UAE Penal Code

The main amendments to the bribery offences are:

- the definition of a *public official* (Article 5), has been widened/clarified to include board chairmen and members, directors, managers and all employees working in companies owned by the Federal or Emirate governments (whether partly or wholly);
- an *Employee of an international organisation* is now expressly prohibited from soliciting or accepting bribes (Article 234). An *Employee of an international organisation* is now defined as “any person who occupies a position in an international organisation or is authorised to act on its behalf” (Article 6bis (1)), although an *international organisation* is still not defined;
- the minimum amount of the fine for breaches of any of the bribery provisions has been raised (Article 238) from AED 1,000 (approximately USD 271) to AED 5,000 (approximately USD 1,360);
- a degree of extra-territorial application was introduced (Article 239bis 1) by applying the bribery provisions to acts committed outside the UAE:
  - if either the perpetrator or the victim is a UAE national;
  - if committed by a UAE public servant or a private sector employee; or

– if committed against UAE public funds or assets; and

- the criminal and civil claims in relation to a crime of bribery cannot be time-barred, nor does a sentence issued in relation to such claims fall away over time (Article 239bis 2).

### Prosecutions and enforcement actions

The UAE authorities do not typically publish information on prosecutions or enforcement actions. However, the following cases of corruption made the headlines in the local media.

### Fallout from the 1MDB Malaysia corruption scandal

In April 2016, it was reported that the UAE Central Bank ordered major UAE banks to freeze the accounts of two former senior officials in Abu Dhabi’s state-owned International Petroleum Investment Co (IPIC), and to provide information about their deposits and transactions. The UAE Central Bank did not set out the reasons for issuing its order.

IPIC has close business links to Malaysia’s scandal-hit sovereign wealth fund 1MDB, which is at the centre of corruption and money laundering investigations in the U.S., Switzerland, Singapore and Luxembourg.

### UAE police officers

In March 2017, a Dubai police officer was sentenced to three years imprisonment for taking AED 30,000 (approximately USD 8,150) in bribes for cancelling fines which had been issued to persons who overstayed their UAE visas. The officer was also fined AED 975,700 (approximately USD 265,900) and ordered to repay AED 445,700

(approximately USD 121,500) to the Dubai immigration authority. The nine bribe-givers were convicted *in absentia* and sentenced to three years imprisonment, a fine of AED 500,000 (approximately USD 136,240) each and ordered to repay the amounts lost by the Dubai immigration authority.

In February 2017, a Dubai police officer was charged with bribery for soliciting money from a man suspected of breaching UAE residency law instead of taking the man into custody. The officer had demanded bribes ranging from AED 500 and AED 1,000 (approximately USD 136 to USD 272). A second officer was charged with aiding and abetting. The officers were arrested following a

sting operation by the Dubai police who suspected the two of regularly blackmailing persons who were in breach of immigration laws.

In June 2016, a Sharjah police officer was found guilty of taking a bribe of AED 3,000 (approximately USD 820) for releasing a prisoner he was ordered to escort. The prisoner was charged with two others with aiding and abetting.

#### **Abu Dhabi engineer corruption case**

In June 2016, the Abu Dhabi police arrested a soil expert on charges of taking a bribe of AED 15,000 (approximately USD 4,090) to finalise a soil clearance transaction at a government laboratory.

### **Enforcement trends**

While general enforcement outcomes are typically not made public or discussed, the published reports on law enforcement officers taking bribes suggests that this is an increasing focus for local authorities, where anti-corruption units seem to be particularly active.

It has also been reported that the current trend is towards proactive enforcement of the UAE Penal Code's anti-bribery provisions, as the UAE seeks to promote transparency in business, to maintain its position as a favoured international business hub.

**BACK TO MAP**

## UNITED KINGDOM

### Changes to legislation

The Criminal Finances Act, which received Royal Assent on 27 April 2017, introduces a number of anti-bribery related measures. Measures in the Act include the introduction of a new anti-corruption tool, the unexplained wealth order, an extension of the powers of the Serious Fraud Office and the introduction of the much anticipated offence of failing to prevent the facilitation of tax evasion. Although the Act has been passed, these measures have not yet been brought into force.

### Unexplained wealth orders

The Criminal Finances Act provides that an enforcement authority (including the Financial Conduct Authority and the Serious Fraud Office (SFO)) would be able to apply to the court for an unexplained wealth order (UWO). This would require the respondent to provide a statement setting out the nature and extent of their interest in the property and explaining how the respondent obtained the property. There must be reasonable grounds for suspecting that the known sources of the respondent's lawful income would be insufficient to obtain the property, and the respondent must either be a politically exposed person (PEP), or there must be reasonable grounds for suspecting that the respondent (or a person connected with the respondent) is, or has been, involved in serious crime, either in the UK or elsewhere. For these purposes, a PEP means a person entrusted with a prominent public function by an international organisation or a state, other than the UK or another EEA State, or a family member or close associate of a PEP. If the respondent fails to comply with the UWO, the property which is the subject of the UWO (which may be in the UK or outside) is presumed to be recoverable for the purposes of a

civil recovery action, and the court can issue an interim freezing order preventing the respondent from dealing with it. Where the property is located outside the UK, the enforcement authority can ask the Secretary of State to request assistance from the government of the relevant country. The Act also provides for a criminal offence of making false or misleading statements in response to a UWO. This measure "reflects the concern about those involved in corruption overseas laundering the proceeds of crime in the UK", according to the Explanatory Notes to the Act.

### Extension of the powers of enforcement authorities

The Act extends powers already available to the National Crime Agency (NCA), the SFO and the Crown Prosecution Service (CPS) to the Financial Conduct Authority (FCA) and Her Majesty's Revenue and Customs (HMRC) to allow proceedings to be taken in the High Court to recover criminal property, without the need for the owner of the property to be convicted of a criminal offence. The Act also gives staff at the SFO direct access to the investigative powers granted to officers of other national law enforcement agencies in the Proceeds of Crime Act 2002.

### Corporate failure to prevent tax evasion

Following a commitment in April 2016 by the then UK Prime Minister, David Cameron, to clamp down on tax evasion, in the wake of the "Panama Papers" furore, the Criminal Finances Act introduces a number of new offences. The first offence is committed where a relevant legal entity fails to prevent a person associated with it from facilitating the evasion of UK taxes, while the second offence is committed where an

entity with some nexus to the UK fails to prevent a person associated with it from facilitating the evasion of foreign taxes. It is a defence for the entity to have such prevention procedures in place as it was reasonable in all the circumstances for that entity to have in place.

The government confirmed (in a letter from the Minister of State for Security dated 9 November 2016) that it would not extend the "failure to prevent" model (pioneered by the UK Bribery Act) to other types of financial crime without appropriate public consultation.

### Prosecutions and enforcement actions

#### Rolls-Royce

The most significant bribery related enforcement action in recent months is the deferred prosecution agreement (DPA) reached between the SFO and Rolls-Royce, which was approved by the Crown Court on 17 January 2017. According to the court judgment the conduct (which took place in Nigeria, Indonesia, Russia, Thailand, India, China and Malaysia) involved:

- agreements to make corrupt payments to agents in connection with the sale of Trent aero engines for civil aircraft in Indonesia and Thailand between 1989 and 2006;
- concealment or obfuscation of the use of intermediaries involved in its defence business in India between 2005 and 2009 when the use of intermediaries was restricted;
- an agreement to make a corrupt payment in 2006/2007 to recover a list of intermediaries that had been taken by a tax inspector from Rolls-Royce in India;

- an agreement to make corrupt payments to agents in connection with the supply of gas compression equipment in Russia between January 2008 and December 2009;
- failing to prevent bribery by employees or intermediaries in conducting its energy business in Nigeria and Indonesia between the commencement of the Bribery Act 2010 and May 2013 and July 2013 respectively, with similar failures in relation to its civil business in Indonesia; and
- failing to prevent the provision by Rolls-Royce employees of inducements which constituted bribery in its civil business in China and Malaysia between the commencement of the Bribery Act 2010 and December 2013.

Under the terms of the DPA Rolls-Royce agreed to pay GBP 497,252,645 (approximately EUR 580 million) in disgorgement of profits plus a financial penalty (plus interest), as well as around GBP 13 million in reimbursement of the SFO's costs. The DPA is effective for five years (which can be reduced to four years) and no protection is offered against the prosecution of any present or former officer, employee or agent or against Rolls-Royce for any undisclosed conduct. Rolls-Royce must also complete a compliance programme following the recommendations of the reviews commissioned by Rolls-Royce from Lord Gold.

#### **SFO v XYZ Ltd**

The UK's second DPA (after the DPA with Standard Bank<sup>9</sup>) was approved on 8 July 2016 between the SFO and an unnamed UK company, known as XYZ Limited and described as a UK SME. XYZ was the subject of an indictment alleging conspiracy to corruption and conspiracy

to bribe, contrary to section 1 of the Criminal Law Act 1977, and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010, in connection with contracts to supply its products to customers in a number of foreign jurisdictions. XYZ was not named in the proceedings because of ongoing, related legal proceedings.

Under the terms of the DPA, which is to last for at least three years and up to five years, the company agreed to pay approximately GBP 6.5 million (approximately EUR 7.7 million) to co-operate with the SFO and to carry out an internal compliance review in light of the UK Bribery Act and other applicable anti-corruption law, and to provide a report annually (to be compiled by XYZ's Chief Compliance Officer) to the SFO addressing all third party intermediary transactions and the completion and effectiveness of its existing anti-bribery and corruption controls, policies and procedures. A portion of the penalty was to be paid by the UK company's U.S. registered parent company as repayment of a significant proportion of the dividends it had received from the UK subsidiary over the indictment period. The SFO agreed not to seek costs in light of XYZ's means and ability to pay.

According to SFO Director, David Green, the case "raised the issue about how the interests of justice are served in circumstances where the company accused of criminality has limited financial means with which to fulfil the terms of a DPA but demonstrates exemplary co-operation. The decision as to whether to force a company into insolvency must be balanced with the level and nature of co-operation and this case provides a clear example to corporates".

The parent company had implemented a global compliance programme in late 2011, which had directly led to concerns within the subsidiary about the way in which some contracts had been obtained. XYZ had immediately instructed lawyers to carry out an internal investigation. The law firm made an initial self-report on behalf of XYZ, and continued to investigate, making two further self-reports. The SFO, in a two-year investigation, concluded that, out of 74 contracts examined, 28 had been procured as a result of bribes. The judgment found that there was no question of the parent company knowingly making profit from its subsidiary's criminality, indeed there was no suggestion that the parent company should have known about the conduct, or that it had behaved otherwise than with complete propriety when it was discovered.

The judge (the Rt Hon Sir Brian Leveson) in the XYZ case reiterated that "...it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile".

#### **HBOS bankers**

Six people, including two former bankers at HBOS, were found guilty on 30 January 2017 of bribery and fraud, following one of the largest and most complex investigations the special fraud division of the CPS had ever prosecuted, according to a press report quoting the CPS special prosecutor. The case involved excessive levels of hospitality, foreign holidays, sex parties and cash in

<sup>9</sup> For further details, please visit the UK section of our Anti-Bribery and Corruption Review 2016 (pages 31 *et seq.*) at [https://www.cliffordchance.com/briefings/2016/05/anti-bribery\\_andcorruptionreview-may20160.html](https://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html).

envelopes, given to two officers at HBOS in the bank's distressed assets division, in return for requiring small business customers to use a particular firm of consultants as a condition of obtaining further credit from HBOS. The consultants, however, demanded huge fees and in some cases even took over some of the businesses they were purporting to help, in order to benefit themselves. The accused were found guilty variously of conspiracy to corrupt, fraudulent trading and conspiracy to conceal criminal property; one of the "consultants" was sentenced to 15 years in prison while the former head of the impaired assets division was jailed for 11 years and three months.

### H2O and Total Asset Finance

On 7 February 2017, following an investigation by the SFO, four individuals were found guilty of conspiracy to make corrupt payments and conspiracy to commit fraud against two business lenders, Barclays Bank and KBC Lease (UK) Limited (KBC), a subsidiary of a Belgian banking group, in order to obtain almost GBP 160 million (approximately EUR 190 million). The case involved a number of long-term broadband contracts that H2O Networks (which supplied fibre-optic internet cable connections, particularly to public institutions) had entered into with councils and universities. The contracts were sold on to a company called Total Asset Finance (TAF). Individuals at TAF conspired to obtain loans from Barclays and KBC on the basis of falsely inflated or entirely false contracts. An 'inside man' at KBC approved funding by KBC to TAF (where two of those convicted worked), in return for payments of almost GBP 900,000 (approximately EUR 1.05

million). The four individuals were sentenced to terms of imprisonment varying from seven to fifteen years.

### Enforcement trends

With three DPAs now in the bag, the SFO has itself been identifying some developing trends. In a speech on 7 March 2017, Ben Morgan, Joint Head of Bribery and Corruption at the SFO, highlighted the differences between the three DPAs the SFO has so far agreed, but stressed that a DPA was the appropriate resolution in each case, and said that "the disposal of corporate criminal risk through resolutions like those in Standard Bank, XYZ and Rolls-Royce will become increasingly common". Mr Morgan also spoke of the benchmark for co-operation with the SFO that was necessary to qualify for a DPA, describing it as "a high bar".

On self-reporting, he said there was a "steady flow of engagement from companies... and new cases coming on to the operational divisions all the time". Self-reporting would remain an important consideration in the availability of DPAs. While, in the case of Rolls-Royce, the SFO had first heard of the conduct from an anonymous blog in China, and not from Rolls-Royce, the information had been of a very limited nature and Rolls-Royce had ultimately reported on conduct that ranged far beyond that.

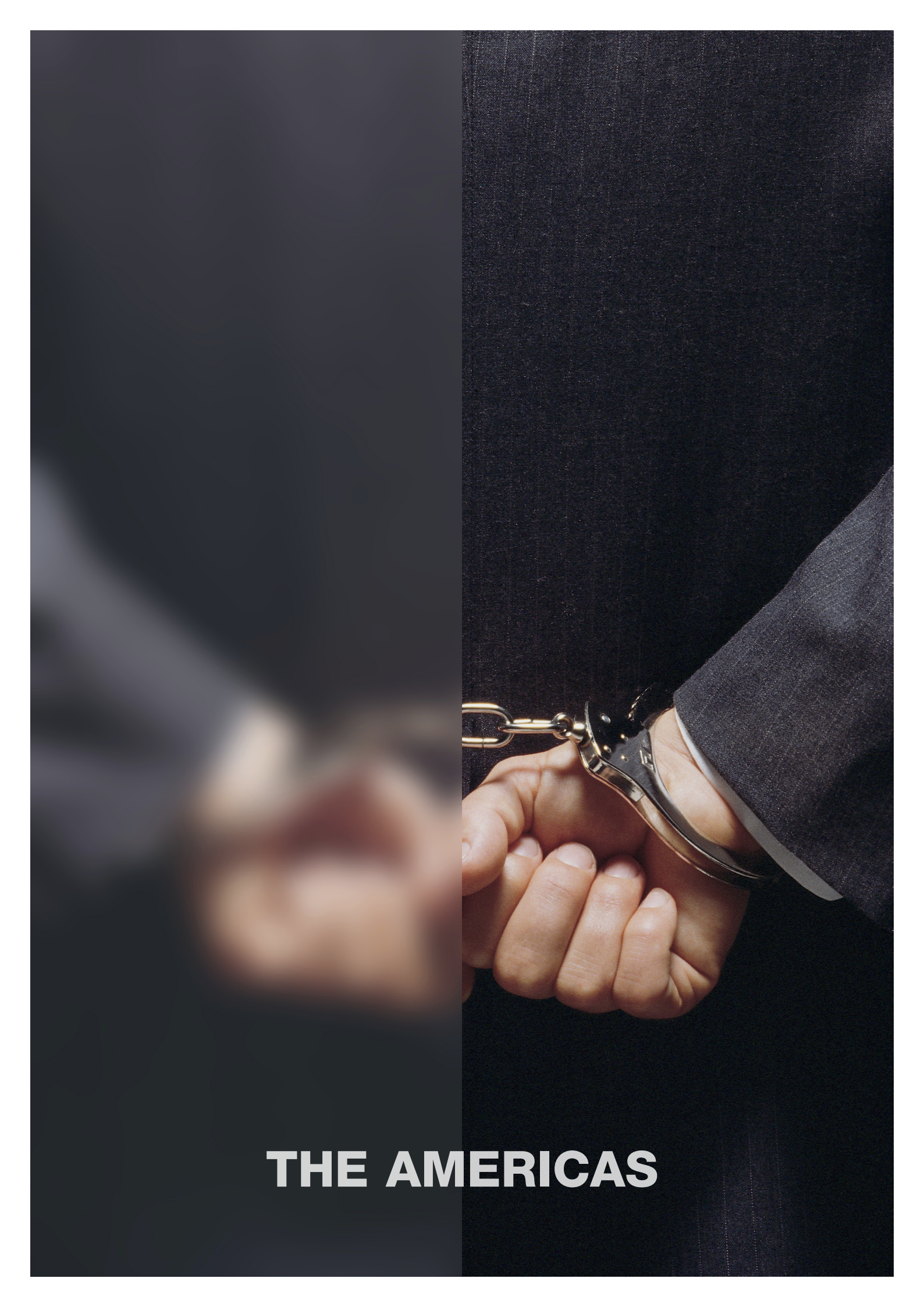
Mr Morgan also said that the SFO was "becoming more sophisticated in our understanding of how particular industries work, cultivating intelligence, joining the dots", and referred to the "irresistible, double-edged trend of closer and better international cooperation when it comes to enforcement [meaning] ...

better intelligence sharing, so we uncover criminality, and better evidence sharing so the perpetrators can be held to account whatever role they have had to play in the cycle of corruption – corporate payer, knowing executive, facilitating middle-man or corrupt decision maker".

In a speech in October 2016 on the SFO's current direction and enforcement priorities, Hannah von Dadelszen, Joint Head of Fraud, said the SFO currently had around 60 active investigations as well as Proceeds of Crime cases, civil recovery cases and strategic intelligence projects. The investigations included live cases in a wide range of sectors, including pharmaceuticals, financial services, defence, aerospace, transport, construction, retail, commodities, natural resources and professional services.

While there had been an increase in self-reporting, Ms Dadelszen said that cases that were not self-reported still formed the majority of the SFO's work. Ms Dadelszen, however, indicated that the SFO would be "less sympathetic to those businesses who sit back and wait for us to come knocking" and said that "the DPA process is not there for a company who leaves it to us to find them." This attitude was also reflected in Mr Morgan's speech, who stressed that "it is only right that those who do not cooperate receive the most punitive sanction available ... if they are convicted after trial".

**BACK TO MAP**



# THE AMERICAS



## BRAZIL

### Changes to legislation

Brazil's main anti-bribery legislation is Law No. 12,846/2013, referred to as the *Lei Anticorrupção* (the Brazilian Anti-Corruption Law), and various associated regulations and rules made since 2013. There have been no new laws or substantive changes to the Brazilian Anti-Corruption Law<sup>10</sup> since our last Anti-Bribery and Corruption Review in May 2016.

### Prosecutions and enforcement actions

There has been a significant number of investigations and prosecutions involving corruption in the past year; some of these stemmed from the well-known *Operação Lava Jato* (Car Wash Investigation), which started in March 2015 and reached its 37th stage as of April 2017, while others involved other instances of corruption in the country.<sup>11</sup>

These have included:

- *Operação Mar de Lama* – April 2016. A task force created by the Brazilian Federal Police, GAECO (Group of Special Action against Organized Crime), and the Public Prosecutor's Office to investigate a criminal organisation of public agents that allegedly embezzled USD 350 million from the city of Governador Valadares, State of Minas Gerais.
- *Operação Tabela Periódica* – June 2016. An operation conducted by the Brazilian Federal Police to investigate fraud in major infrastructure project bids. This operation derived from *Operação Lava Jato* and is a new stage of *Operação Recebedor*, which, in turn, is investigating cartels, bid-rigging, corruption, money-laundering and other crimes involving transportation infrastructure projects.
- *Operação Recomeço* – June 2016. An operation conducted by the Brazilian Federal Police and the Public Prosecutor's Office that is investigating the alleged embezzlement of approximately USD 35 million from Petrobras and Correios pension funds.
- *Operação Pripyat* – July 2016. An operation conducted by the Brazilian Federal Police and the Public Prosecutor's Office that derived from *Operação Lava Jato* and is investigating embezzlement, corruption, money-laundering and criminal collusion at Eletrobras and Eletronuclear, major Brazilian electricity companies.
- *Operação Abismo* – July 2016. An operation aimed at investigating criminal organisations, bid-rigging, cartels, corruption, money-laundering and bribery through contracts with Petrobras and a research centre. According to the investigations, there was a USD 10 million bribe to induce a competitor to withdraw from a tender exercise and payments to a political party and to Petrobras' officers.
- *Operação Irmandade* – August 2016. An operation conducted by the Brazilian Federal Police and the Public Prosecutor's Office that was commenced following discoveries made in *Operação Pripyat* and is investigating bribery and embezzlement of funds from Angra 3, third Brazilian nuclear powerplant, and from Eletronuclear.
- *Operação Greenfield* – September 2016. This operation is being conducted by the Brazilian Federal Police and is investigating the embezzlement of approximately USD 2.5 billion from pension funds, public banks and state owned companies. Also involved in the investigation are the Previc (*Superintendência Nacional de Previdência Complementar*) and CVM (*Comissão de Valores Mobiliários* – the Brazilian Securities and Exchange Commission). Authorities believe that partners of one of the biggest company conglomerates under investigation have entered into an agreement involving a payment of USD 60 million to a competitor businessman in order to conceal bribery and to persuade him not to disclose material information to the authorities.
- *Operação Calicute* – November 2016. The main target of this operation is the ex-governor of Rio de Janeiro Sergio Cabral. It is investigating corruption, money-laundering, and criminal associations involving infrastructure projects in Rio de Janeiro, such as the remodelling of the Maracana Stadium for the 2014 World Cup. Investigations showed that from August 2014 through July 2015, more than USD 100 million in gold, money and diamonds were the subject of transactions in Brazil and abroad.
- *Operação Eficiência* – January 2017. As a consequence of *Operação Calicute*, the Brazilian Federal Police started the *Operação Eficiência*, which is investigating the concealment of a

<sup>10</sup> We note that *Medida Provisória* 703 (Provisional Measure) from 2015, partially altered Law No. 12,846/2013 temporarily but was revoked on 29 May 2016.

<sup>11</sup> For example, an investigation conducted by Transparency International found that in São Paulo 3,452 properties worth at least USD 2.7 billion are linked to offshore secret companies, raising red flags about the use of real estate for money laundering in Brazil's largest city.

payment of USD 100 million and bribery. The ex-governor of Rio de Janeiro was targeted, as well as a Brazilian businessman accused of bribery in order to win contracts with the state of Rio de Janeiro.

- *Operação Leviatã* – February 2017. This operation, which derived from *Operação Lava Jato* and is being conducted by the Brazilian Federal Police, is investigating corruption, money laundering, criminal organisations and bribes to political parties worth 1% or more of the contract value of projects in the Belo Monte hydroelectric plant from the companies in the consortium responsible for construction of said plant.
- *Operação Carne Fraca* – March 2017. The Brazilian Federal Police are investigating major multinational companies accused of altering meat sold for domestic use and for exports.

The operation involves public agents accused of allowing the scheme, and more than thirty food companies accused of selling rotten meat, changing the valid expiry date and of using harmful products.

### **Enforcement trends**

Plea bargains were introduced into Brazilian legislation through Law No. 12,850/2013. Since then, approximately fifty plea bargains have been made and six have been approved and accepted by the Brazilian Supreme Court.

The most famous of these, and one which attracted the attention of the worldwide media in April 2017, was the plea bargain relating to the Odebrecht Group, which involved 78 officers and ex-officers of the engineering and construction global business.

Supreme Court Justice Edson Fachin used this plea bargain as grounds to

determine that 108 people must be investigated, including 24 Senators, 39 Federal Deputies, the President of the Congress and of the Senate, a Minister of the Federal Court of Auditors and eight Ministers of President Michel Temer. The most common crimes described in the bargains were corruption, money-laundering, fraudulent misrepresentation, collusion, and bid-rigging.

Brazilian President Temer was also mentioned in the plea bargains, but the Public Prosecutor's Office did not include him in the investigations because he is entitled to a temporary immunity due to his current position as President of Brazil, which means he cannot be investigated for crimes that are not a consequence of his mandated activities.

**BACK TO MAP**

## UNITED STATES OF AMERICA

### Changes to legislation

#### Repeal of oil and gas transparency requirements

On 14 February President Trump signed a joint resolution of Congress repealing the Cardin-Lugar regulations, which were due to come into effect in 2018. These regulations (made under the Cardin-Lugar amendment of 2010) would have required U.S.-listed oil, gas and mineral companies to file an annual report with the Securities and Exchange Commission containing details of payments to governments relating to extractive projects.

#### Proposed private right of action for FCPA violations

In March 2017, Congressman Ed Perlmutter introduced proposed legislation (*Foreign Business Bribery Prohibition Act* (H.R. 1549)) that would amend the Foreign Corrupt Practices Act (FCPA) to include a private right of action for individuals and companies to sue persons for violations of the FCPA's anti-bribery provisions.<sup>12</sup> While current legislation only allows for enforcement of the FCPA by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), Congressman Perlmutter stated that the new legislation was introduced in response to uncertainty over whether the FCPA will remain an enforcement priority for the Trump administration. Under the proposed Bill, a plaintiff would be required to prove an FCPA anti-bribery violation by the defendant that:

(i) prevented the plaintiff from obtaining

or retaining business, and (ii) assisted the defendant in obtaining or retaining such business. Congressman Perlmutter has introduced similar legislation on several occasions over the past nine years – none of which have been adopted – based on the rationale that FCPA violations could lead to U.S. companies losing business.

### Prosecutions and enforcement actions

2016 was a record-breaking year for FCPA enforcement with 27 enforcement actions and USD 2.48 billion in settlements collectively for the DOJ and the SEC. This compares to 11 enforcement actions and USD 133 million in settlements in 2015. Included among the 2016 resolutions were four of the largest FCPA resolutions in FCPA history. Notable cases are grouped below under headings indicating enforcement trends.

#### Individual liability, self-disclosure, and voluntary cooperation in the era of the Yates Memo and the FCPA Pilot Program

With the advent of the Yates Memo and the FCPA Pilot Program, several recent enforcement actions showed how these different norms might interact.

In July 2016, Richard Hirsch, a former Senior Vice President of construction management company Louis Berger International, Inc. (Louis Berger), was sentenced to two years probation and a USD 10,000 fine for his part in a foreign

bribery scheme.<sup>13</sup> The DOJ previously entered a deferred prosecution agreement (DPA), including a USD 17.1 million fine, with Louis Berger in July 2015.<sup>14</sup> Both actions stemmed from an alleged scheme to bribe Indonesian and Vietnamese government officials to secure contracts for the company between 2000 and 2010. Mr. Hirsch ran Louis Berger's Asia office at the time. District Court Judge Mary Cooper stated that the sentence took into account Mr. Hirsch's cooperation, which fraud section prosecutor John Borchert described as "an absolute game-changer."<sup>15</sup> Mr. Borchert contrasted Louis Berger's lack of cooperation with Mr. Hirsch's role as a key cooperator in the investigation from the outset. Mr. Hirsch's actions included explaining how particular transactions were bribes, how corrupt payments were made, and which foreign officials received them. In the wake of the Yates Memo and the FCPA Pilot Program, the case highlighted the DOJ's focus on individual liability while also providing an example of how cooperation by individual employees may impact enforcement actions against their employers.

In December 2016, General Cable Corporation (General Cable) entered into a non-prosecution agreement (NPA) and agreed to pay a USD 20.4 million penalty with the DOJ, and a USD 55.3 million disgorgement settlement with the SEC, in connection with improper payments made to government officials in Africa and Asia through subsidiaries and third

<sup>12</sup> *Perlmutter Introduces Legislation to Help Stop Corruption and Foreign Bribery under the Trump Administration*, 16 March 2017, please see <http://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=1652>; *Foreign Business Bribery Prohibition Act of 2017*, H.R. 1549, 115th Cong. (2017).

<sup>13</sup> *Louis Berger International Resolves Foreign Bribery Charges*, Department of Justice, 17 July 2016, please see <https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges>.

<sup>14</sup> *Deferred Prosecution Agreement*, United States v. Louis Berger Int'l, Inc. (D. N.J., 7 July 7, 2015), please see <https://www.justice.gov/opa/file/631346/download>.

<sup>15</sup> Hamilton-Martin, Roger, *Former Louis Berger exec avoids prison after "game-changing" FCPA cooperation*, Global Investigations Review, please see <http://globalinvestigationsreview.com/article/1038186/former-louis-berger-exec-avoids-prison-after-%E2%80%9Cgame-changing%E2%80%9D-fcpa-cooperation>.

parties.<sup>16</sup> While the payments involved a high level executive, and General Cable did not provide adequate “guidance or training . . . to ensure compliance with the FCPA,” the DOJ lauded the company’s voluntary self-disclosure and level of cooperation and remediation, and emphasized that the USD 20 million penalty was a 50 percent reduction off the bottom of the guidelines—as provided for under the Pilot Program. The settlement documents highlighted the significant cooperation and remediation steps taken by General Cable, which included “conducting a thorough internal investigation; making regular factual presentations and proactively providing updates to the Fraud Section; voluntarily making foreign-based employees available for interviews in the United States” and taking action against implicated employees, third-party agents, and distributors. The terms of the settlement highlighted the importance of internal controls and due diligence with regard to third-party agents as well as U.S. authorities’ continuing emphasis on the importance of voluntary self-disclosure and cooperation in assessing FCPA-related penalties.

### Focus on the financial industry

Whereas until recently, financial institutions have largely escaped FCPA scrutiny, this past year saw several notable enforcement actions against companies in the financial industry

following a sweep of the financial services industry. For example, in December 2016, U.S. enforcement authorities concluded the first FCPA case against a hedge fund.<sup>17</sup> In this case, the hedge fund entered into a USD 412 million combined settlement with the DOJ and the SEC for FCPA violations in several African countries. The settlement included a three-year DPA with the DOJ.

In November 2016, a major U.S. bank agreed to pay USD 264 million combined to the DOJ, the SEC, and the Federal Reserve to resolve FCPA allegations related to awarding jobs to relatives and friends of Chinese government officials in exchange for banking deals.<sup>18</sup> As part of the resolution, the bank signed a NPA with the DOJ and disgorged profits as ordered by the SEC. The case emphasized the need for companies to implement robust hiring policies and enforce internal controls, especially when dealing with the hiring of family members and friends of foreign government officials. These cases also indicate that additional FCPA enforcement actions within the financial services industry are likely in the near future.

### The new normal of cross-border cooperation and coordinated global settlements

As previously mentioned, US authorities are increasing their cooperation with other enforcement authorities across the globe, which can be seen in some

notable global settlements. For example in December 2016, a Brazilian conglomerate pleaded guilty and agreed to pay USD 3.5 billion in a global settlement with Brazil, the United States and Switzerland, stemming from a multi-continent scheme to pay millions in bribes to foreign officials to retain and obtain business.<sup>19</sup> (This global settlement amount was ultimately reduced to USD 2.6 billion following an independent “inability to pay” analysis conducted by DOJ to determine how much the company would be able to pay.) The following month, a UK engineering company agreed to pay USD 800 million in a global settlement with authorities from the United States, United Kingdom and Brazil.<sup>20</sup> The company admitted that it paid bribes through third parties to foreign officials in exchange for government contracts, with conduct occurring in Brazil, Thailand, Kazakhstan, Azerbaijan, Angola, and Iraq.

Both individually and combined, the size and scope of these settlements showed the ever increasing levels of cooperation between law enforcement authorities across the globe. The DOJ press releases have cited significant cooperation and assistance from enforcement authorities across the global including the United Kingdom, Brazil, Austria, Cyprus, Germany, the Netherlands, Saudi Arabia, Singapore, Switzerland, and Turkey, among others. As former Assistant Attorney General Leslie Caldwell

<sup>16</sup> *General Cable Corporation Agrees to Pay \$20 Million Penalty for Foreign Bribery Schemes in Asia and Africa*, Department of Justice, 29 December 2016, please see <https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and>.

<sup>17</sup> *Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine*, Department of Justice, 29 September, 2016, please see <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213>; See *SEC Press Release 2016-203, Och-Ziff Hedge Fund Settles FCPA Charge*, please see <https://www.sec.gov/news/pressrelease/2016-203.html>.

<sup>18</sup> *JPMorgan’s Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China*, Department of Justice, 17 November 2016, please see <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>.

<sup>19</sup> *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History*, Department of Justice, 21 December 2016, please see <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

<sup>20</sup> *Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, Department of Justice, 17 January 2017, please see <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

emphasized in a November 2016 speech, the DOJ has “strengthened [its] coordination with foreign counterparts – sharing leads, making available essential documents and witnesses, and more generally working together to reduce criminals’ abilities to hide behind international borders,” such that companies should expect significant cooperation between enforcement authorities across the globe.<sup>21</sup>

## Enforcement trends

U.S. enforcement actions against companies and individuals for violations of the FCPA show no sign of relenting, with increasing levels of cooperation between U.S. government authorities and foreign enforcement authorities. While inter-governmental cooperation is practically certain amongst members of the Organisation for Economic Co-operation and Development, the DOJ and SEC have also deepened links to non-OECD jurisdictions. For example, recent U.S. enforcement actions have involved cooperation with Brazil, Saudi Arabia, and Cyprus.

U.S. authorities have continued to emphasize the importance of voluntary disclosures in their public statements. For example throughout a recent 2016 conference focused on the FCPA, Daniel Kahn (Chief of DOJ’s FCPA Unit), Kara Brockmeyer (former Chief of the SEC’s FCPA Unit), Andrew Ceresney (the SEC’s former Head of Enforcement), and former Deputy Attorney General Sally Yates, all

made statements that stressed the improved enforcement outcomes that were available for companies who made voluntary disclosures and fully cooperated with U.S. authorities. For example Ms. Yates stated that the DOJ wanted to make it clear for companies that there was a material difference in resolutions between companies who voluntarily disclose their conduct versus those who do not.<sup>22</sup>

## Other developments

### FCPA Pilot Program extended

Launched in April 2016, the Pilot Program was aimed at motivating companies to voluntarily self-disclose FCPA-related misconduct and increase cooperation. The DOJ issued its first declination letters under the Pilot Program in June 2016, when declining to prosecute two companies in light of their prompt voluntary self-disclosure, efficacy of internal controls, and high levels of cooperation and remediation.<sup>23</sup> To date, the DOJ has issued five declination letters under the Pilot Program. The Pilot Program was initially slated to operate for a one year period, but will continue to run past April 2017 as the DOJ evaluates and modifies the program as it deems necessary.

### Corporate compliance

As mentioned in our 2016 Review, the DOJ’s appointment of Hui Chen as Compliance Counsel Expert was expected to help prosecutors develop “appropriate benchmarks for evaluating corporate

compliance and remediation measures.” In February 2017, the DOJ released an Evaluation of Corporate Compliance Programs guide (the Guidance) that lists sample topics and common questions that the DOJ has “frequently found relevant in evaluating a corporate compliance program.”<sup>24</sup> However, while the Guidance provides additional information on how the DOJ evaluates compliance programs, it does not provide a benchmark for compliance programs or note satisfactory answers to the listed questions in the event of a violation.

### The FCPA under the Trump Administration

As with every change in control over the White House, questions swirl about the enforcement priorities of the new administration. President Trump remains unpredictable, and as a result, his new administration has raised questions regarding the likely approach it may take on FCPA enforcement.

In the past, President Trump has publicly voiced his lack of support for the FCPA, suggesting in 2012 that FCPA enforcement has become “absolutely crazy,” that the FCPA is a “horrible law” that “should be changed,” and that it puts U.S. companies at a “huge disadvantage.”<sup>25</sup>

In 2011, Jay Clayton, President Trump’s nominee to head the SEC, helped pen a white paper that argued that U.S. companies should be subjected to fewer restrictions with respect to the FCPA.<sup>26</sup>

<sup>21</sup> Assistant Attorney General Leslie R. Caldwell Delivers Remarks Highlighting Foreign Corrupt Practices Act Enforcement at The George Washington University Law School, Department of Justice, 3 November 2016, please see <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-highlighting-foreign>.

<sup>22</sup> Deputy Attorney General Sally Q. Yates Delivers Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act, Department of Justice, 30 November 2016, please see <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international>

<sup>23</sup> Letter from Department of Justice to K&L Gates, 3 June 2016, please see <https://www.justice.gov/criminal-fraud/file/865406/download>; Letter from Department of Justice to Ropes & Gray, June 6, 2016, available at <https://www.justice.gov/criminal-fraud/file/865411/download>.

<sup>24</sup> Evaluation of Corporate Compliance Programs, Department of Justice, 8 February 2017, please see <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

<sup>25</sup> Trump: Dimon’s Woes & Zuckerberg’s Prenuptial (CNBC television broadcast 15 May 15 2012).

The paper concluded that “the continued unilateral and zealous enforcement of the FCPA by the United States may not be the most effective means to combat corruption globally – in fact, in some circumstances it may exacerbate the problem of overseas corruption.”

Some commentators have interpreted these statements as indicators that there may be a decrease in FCPA enforcement under the Trump administration. However, a significant shift in policy or even a repeal of the statute seems unlikely. Outgoing and current DOJ and SEC officials have stated that they expect FCPA enforcement to continue to be a priority.<sup>27</sup> As mentioned above, 2016 was a record year in FCPA enforcement, in terms of both number of enforcement actions (27 companies) and the overall amounts paid to resolve them

(USD 2.48 billion). Moreover, as part of his confirmation process, President Trump’s Attorney General Jeff Sessions stated that “if confirmed as attorney general, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case.”<sup>28</sup> Finally, during Mr. Clayton’s confirmation hearing, he stated that there is “zero room for bad actors in our capital markets” and that “companies subject to the FCPA looking to do business in countries known for corruption should think long and hard about the potential exposure to not ... just the Foreign Corrupt Practices Act but...thankfully now...similar oversight and enforcement from other OECD countries.”<sup>29</sup>

The most likely course is that the DOJ and the SEC will continue to pursue FCPA enforcement actions against companies and individuals, perhaps with some roll-back of the SEC’s “broken windows” approach of targeting even the smallest violations of securities laws. Even if U.S. authorities take a step back in FCPA enforcement, foreign jurisdictions are increasingly adopting and enhancing their own anti-corruption laws. As a result, the best positioned companies will be those that continue to implement and enforce their anti-corruption policies and procedures and, where necessary, to root out improper conduct from within their business.

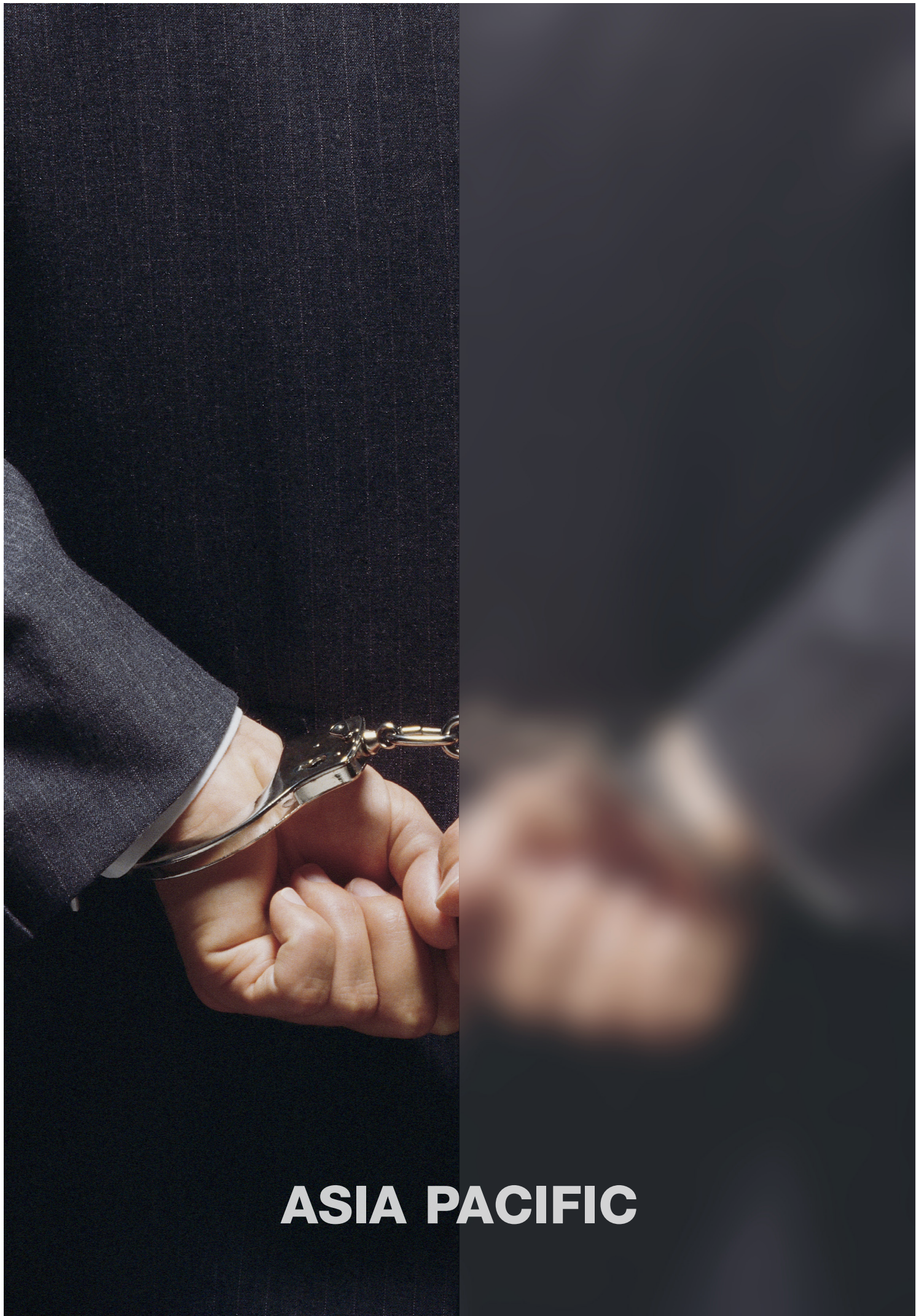
**BACK TO MAP**

<sup>26</sup> *The FCPA and its Impact on International Business Transactions— Should anything be done to minimize the consequences of the U.S.’s unique position on combating offshore corruption?*, N.Y. CITY BAR, December 2011, please see <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>.

<sup>27</sup> *Deputy Attorney General Sally Q. Yates Delivers Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act*, Department of Justice, 30 November 2016, please see <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international> (“In 51 days, a new team will be running the department, and it will be up to them to decide whether they want to continue the policies that we’ve implemented in recent years. But I’m optimistic. Holding individuals accountable for corporate wrongdoing isn’t ideological; it’s good law enforcement.”); *Remarks by DAAG Trevor McFadden at GIR Live DC*, 16 February 2017, please see <http://globalinvestigationsreview.com/article/1081452/remarks-by-daag-trevor-mcfadden-at-gir-live-dc> (“The fight against official corruption is a solemn duty of the Justice Department, each generation of Department leaders and line prosecutors takes up this mantle from their predecessors, regardless of party affiliation.”).

<sup>28</sup> *Nomination of Jeff Sessions to be Attorney General of the United States, Questions for the Record, Questions From Senator Whitehouse*, S. Comm. On the Judiciary, 115 Cong. (2017) please see <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Whitehouse%20QFRs.pdf>.

<sup>29</sup> *Nomination Hearing of Jay Clayton to be a Member of the Securities and Exchange Commission*, S. Comm. On Banking, Housing, and Urban Affairs, 115 Cong. (2017) please see <https://www.banking.senate.gov/public/index.cfm/2017/3/nomination-hearing>.



**ASIA PACIFIC**

## AUSTRALIA

### Changes to legislation

The Australian government released a public consultation paper on 4 April 2017 which proposes amendments to the foreign bribery offence (section 70.2 of the *Criminal Code Act 1995 (Cth)*), which would align Australia's foreign bribery regime more closely with the equivalent U.S. and UK regimes.

In its current form, it is an offence under Australian law for a person to provide (including causing, offering or promising to provide) a benefit to another where the benefit is not legitimately due and that person does so with the intention of influencing a foreign public official in the exercise of their duties in order to obtain or retain a business advantage.

The amendments under consideration by the Australian government include:

- extending the definition of "foreign public official" to include candidates for public office;
- replacing the concept of "not legitimately due" with one of three alternative concepts: "improperly influence", "dishonesty" or "improper";
- extending the offence to cover bribery to obtain a personal advantage, not just a business advantage;
- creating a separate foreign bribery offence based on recklessness (as opposed to the current offence which requires intent);
- creating a new corporate offence of failing to prevent foreign bribery, which would make a company automatically liable for bribery by employees, contractors and agents (in Australia

and overseas), unless the company can demonstrate a proper system of internal controls and compliance were in place;

- removing the requirement that a foreign official be influenced "in their official capacity" only; and
- clarifying that the business or advantage can be obtained for someone else and that the business or advantage does not need to be a specific business or advantage.

One notable absence from the proposals is any amendment to the facilitation payment defence which is one of the more controversial aspects of Australia's anti-bribery regime. The public consultation paper expressly refutes any need for an amendment to the facilitation payment defence, noting that the defence has not presented as an issue in the enforcement of the foreign bribery offence.

In addition to the proposed amendments to the foreign bribery offence, the Australian government is currently considering various other measures which are likely to strengthen Australia's anti-bribery and corruption regime including:

- *introducing deferred prosecution agreements (DPA)*: a public consultation paper was released on 31 March 2017 outlining a proposed model for a DPA scheme in relation to serious corporate crimes, including foreign bribery. The model under consideration draws on aspects of both the UK and U.S. DPA schemes; and
- *reforming whistleblower laws*: a Parliamentary Committee inquiry into

whistleblower protections in the corporate, public and not for profit sectors is in progress. The Committee's report is due by 30 June 2017 and is expected to lead to a legislative enhancement of protections available to whistleblowers.

### Prosecutions and enforcement actions

As we noted in our 2016 review, the Australian Federal Police (AFP) has been investigating Leighton Holdings Limited (now called Cimic (Construction, Infrastructure, Mining and Concessions) (Leighton) in relation to foreign bribery allegations since 2011. In January 2017, two former Leighton employees were charged with offences relating to the falsification of company documents. Interestingly, the charges were a result of the investigation by the Australian Securities & Investments Commission (ASIC), Australia's corporate regulator, rather than the AFP, and are offences under the Corporations Act 2001 (Cth) (Corporations Act) rather than the anti-bribery regime. The ASIC investigation has been underway since 2013 in parallel with the AFP investigation. The hearings have been set down for late November 2017.

In November 2016, the former chairman and a director of AWB Limited (AWB) was found to have breached his duties as a director under the Corporations Act for failing to make adequate enquiries into conduct by AWB that contravened United Nations sanctions against Iraq (known as the "oil for wheat" scandal). The director was fined AUD 50,000 and banned from managing a corporation for



five years. Similar to the actions against the former Leighton employees referred to above, the proceeding was brought by ASIC under the Corporations Act. Proceedings against another executive of AWB were dismissed and are currently the subject of an appeal by ASIC.

### **Enforcement trends**

As at April 2017, the AFP had 35 ongoing foreign bribery matters, including two active prosecutions

and a further four matters under consideration for prosecution.

### **Senate inquiry**

In our 2016 review, we noted that the ongoing Senate Committee inquiry into foreign bribery was expected to release its report on 1 July 2016. That report is now scheduled to be released on 30 June 2017. The Senate Committee inquiry is focused 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.

**[BACK TO MAP](#)**

## HONG KONG

### Changes to legislation

Although a number of defects in Hong Kong's main anti-bribery statute, the Prevention of Bribery Ordinance (POBO), have been identified in recent case law (see below) there have been no significant changes to legislation, or new legislative proposals, in relation to bribery and corruption since our last Anti-Bribery and Corruption Review in May 2016.

### Prosecutions and enforcement actions Kwok and Hui appeal to city's top court

Hong Kong's Court of Final Appeal (CFA) has heard the appeals of former Sun Hung Kai Properties (SHKP) co-chairman Thomas Kwok and the former Chief Secretary Rafael Hui against their convictions for corruption. Kwok and Hui, who were jailed in December 2014 for five and seven and a half years respectively for bribery offences, lost their initial appeals against conviction in February 2016.

The CFA had granted the pair leave to appeal to determine "whether in the case of a public officer, being or remaining favourably disposed to another person on account of pre-office payments, is sufficient to constitute the conduct element of the offence of misconduct in public office?".

Central to the issue is the validity of the so-called 'sweetener' doctrine, which says it is not necessary for prosecutors to prove a specific *quid pro quo* to establish misconduct in public office offences.

Prosecutors had successfully argued that Hui received HKD 8.5 million (approximately USD 1.1 million) from

Kwok to help ensure that the government maintained a "favourable disposition" towards SHKP. The Court of Appeal dismissed an appeal against the convictions in February 2016, in which the appellants argued that prosecutors had not been able to point to any specific act that Hui had done to favour SHKP.

If the appeals, which commenced on 9 May 2017, are successful, Kwok will be freed although Hui will remain in prison as he was also found guilty of four other charges that the CFA did not give him permission to challenge.

### Tsang convicted of misconduct in public office

Former Chief Executive Donald Tsang has been convicted of one count of misconduct in public office during his time in office between 2010 and 2012. Tsang was found guilty of deliberately concealing his private negotiations with a property tycoon to rent a luxury apartment in Shenzhen, while at the same time approving a digital radio broadcast licence application submitted by a company in which the tycoon, Bill Wong Cho-bau, was a major shareholder. Tsang is appealing against the conviction and sentence.

Tsang was sentenced in February to 20 months' imprisonment. On 24 April, a court granted his bail application. Tsang is the highest-ranking official ever to be convicted of a criminal offence and imprisoned in Hong Kong. Tsang had been serving his sentence in the island's Stanley Prison until he was transferred to hospital shortly before the bail hearing complaining of breathing problems. Tsang will remain on bail until his appeal is heard.

In passing the sentence, Mr Justice Andrew Chan said the seriousness of the misconduct in public office offence lay in the office which the defendant occupied.

The nine jurors cleared Tsang of a second count of misconduct in public office of failing to disclose his connection with the interior designer of the apartment when proposing him for an honour under the city's public honours system.

Tsang faces a 25-day retrial starting on 26 September over a separate bribery charge on which the jury failed to reach a verdict. Tsang is accused of accepting an advantage as Chief Executive over his alleged receipt of HKD 3.35 million (approximately USD 430,000) worth of renovations on the apartment as a reward for considering and making decisions in relation to the broadcast applications.

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.

Tsang 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 Independent Commission Against Corruption (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. POBO contains clear rules against gifts but they do not apply to the

Chief Executive. Under section 3 of the POBO, 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.

The situation is further complicated by the fact that the ICAC reports directly to the Chief Executive. Despite repeated attempts to rectify the situation, the government has still to commit to a timetable to address the issue.

### **Court of Final Appeal rejects “thought crime” defence in money laundering appeal**

In a judgment dealing with the conviction of the former Birmingham City Football Club chairman Carson Yeung, the CFA reaffirmed that, on a charge of dealing with proceeds of crime contrary to section 25(1) Organised and Serious Crimes Ordinance (OSCO), prosecutors have no need to prove that property handled by a defendant is the proceeds of crime, only that the defendant had reasonable grounds to believe it was.

Carson Yeung appealed against his conviction on five counts of dealing with property believed to be proceeds of an indictable offence for having laundered HKD 721 million Hong Kong. Yeung was sentenced to six years in jail.

Yeung argued in his defence that accepting the prosecution case meant a defendant could be convicted for “thought crime”. The CFA rejected the assertion, observing that if a defendant does not know, but has reasonable

grounds to believe, that funds are tainted, the defendant can claim immunity under section 25A OSCO by disclosing his suspicion to an authorised officer with legal powers to investigate the source of funds.

### **Court of Final Appeal quashes television star’s bribery conviction**

In March 2017, the CFA found the television presenter Stephen Chan and his assistant Tseng Pei-kun innocent of bribery charges brought by the Department of Justice under section 9 POBO.

The CFA unanimously reversed the Court of Appeal’s decision, with the majority ruling that Chan, the general manager of TVB, was not acting “in relation to his principal’s affairs or business” when he appeared for a special edition of the “Be My Guest” TVB show at Olympian City alongside the main New Year’s Eve countdown show in 2009 and was paid HKD 112,000 (approximately USD 14,300) for his appearance by Tseng.

Whilst TVB did not give express consent to Chan’s participation, they televised the show and so must have known about it. The CFA held that the appearance was not intended to injure the bond of trust and loyalty between the principal and agent. In the words of Ribeiro PJ, “it is not the legislative intent to stigmatize as criminal, conduct of an agent which is beneficial to and congruent with the interests of the principal (as in the present case).”

For an offence to be committed there would need to be conduct adverse to the principal’s interests, which was not the case. On the contrary, the appearance made the main New Year’s Eve show even more popular with viewers.

## **Enforcement trends**

The Chairman of the Advisory Committee on Corruption (ACOC) said in January 2017 that the corruption situation in Hong Kong remained stable and was well “under control”. Chow Chung-kong cited the ICAC’s 2016 annual survey, in which only 1.2% of respondents had come across corruption in the past 12 months.

The ICAC received 2,891 corruption complaints in 2016, a slight rise of 3% compared to 2,803 complaints received the previous year. 63% of these concerned the private sector, while government departments and public bodies accounted for 29% and 8% respectively.

Mr Chow noted that complaints related to building management still took up a large percentage of graft reports in the private sector. He cited the conviction and jailing in 2016 of an engineering company proprietor who offered HKD 45 million (USD 5.8 million) in bribes to secure renovation contracts as a sign of judicial determination to root out corruption and heightened public awareness towards malpractice in the sector.

In December 2016, Hong Kong was ranked fourth amongst 199 countries and territories with the least corruption risk in the 2016 TRACE Matrix survey published by TRACE International in collaboration with RAND Corporation. Countries and territories landing the top three spots were Sweden (first), New Zealand (second) and Estonia (third).

## **BACK TO MAP**

## 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 has extensive powers to undertake specific measures, including powers to use wire-tapping, to instruct relevant institutions to impose travel bans and to order banks or other financial institutions to block accounts potentially holding the proceeds of corruption.

The KPK Law was intended to be amended in 2016, with the government having designated the Bill as a priority Bill for 2016. However, the Indonesian President, Joko Widodo, has postponed discussions on the amendment of the KPK Law indefinitely in response to concerns raised by sections of the public, the KPK and factions of the House of Representatives in respect of some of the proposed amendments, including limiting the KPK's authority to conduct surveillance or wiretapping during the preliminary phase of investigations.

### Prosecutions and enforcement actions

The KPK, which is independent of the police and the Attorney-General's Office,

has taken an uncompromising approach to tackling corruption. To date, it has prosecuted and convicted government ministers, business tycoons, judiciary and senior political "fixers" in a number of high profile cases. Recently it has expanded its efforts to cross-border corruption, cooperating more closely with overseas law enforcement agencies, including the UK's Serious Fraud Office (SFO), and the Corrupt Practices Investigation Bureau (CPIB) of Singapore.

In early 2017, following "intensive" cooperation with the SFO and CPIB in respect of bribery and corruption allegations against Rolls-Royce Holdings Plc (Rolls-Royce) in a number of countries, including Indonesia, the KPK named a former chief executive officer of a state-owned airline as a suspect in a bribery case pertaining to the procurement of aircraft and engines from Rolls-Royce and Airbus. The KPK has accused the former chief executive officer of accepting monetary bribes of EUR 1.2 million and USD 180,000, and assets worth USD 2 million.

Recently, a Constitutional Court Judge was caught "red-handed" by the KPK in an anti-graft sting operation. The Constitutional Court Judge is alleged to have received USD 161,000 from a meat importer in connection with the court's judicial review of a revision to the animal husbandry law. This is the second high profile bribery scandal to have rocked the Constitutional Court in recent years with the former Constitutional Court Chief Justice being sentenced to life in prison for accepting bribes and money laundering in connection with an election dispute in 2015.

In March 2017, following an extensive investigation into the high-profile procurement of the electronic Identity Card (e-KTP) project, the KPK questioned around 200 witnesses, including several lawmakers, regarding the IDR 5.9 trillion (USD 443 million) project, which resulted in IDR 2.3 trillion in alleged state losses (USD 195 million). The KPK has named three suspects in the case so far, including two former Home Ministry officials and a businessman.

### Enforcement trends

President Joko Widodo continues to lead the fight against widespread corruption in Indonesia. He has introduced several important measures, including moving many government services online (with the aim of reducing opportunities for corrupt bureaucrats to demand bribes), improving information disclosure and transparency, promoting coordination with cross-border agencies on information sharing and anti-bribery enforcement and passing new regulations to make it easier to prosecute companies.

Historically, corporate entities in Indonesia have rarely faced criminal charges. The Indonesian Criminal Code, which is the key criminal statute in Indonesia, provides, in principle, that only individuals can commit criminal offences. Although a number of laws, including the Anti-Corruption Law, have introduced corporate criminal liability for specific offences, law enforcers have been traditionally reluctant to pursue corporate perpetrators and have instead brought charges against the individuals involved.

In late 2016, the Indonesian Supreme Court introduced a new regulation on

procedures for handling criminal offences committed by corporate entities (2016 SC Regulation). This is the first attempt by the Supreme Court to regulate the procedure and settlement of liabilities from corporate crimes arising under the various laws.

With the introduction of the 2016 SC Regulation, it is anticipated that law enforcers will increasingly prosecute corporate entities involved in corporate crimes.

### Other developments

Indonesia's Transparency International Corruption Perceptions Index ranking for 2016 dropped to 90 (from 88 in the previous year) out of 176 countries. Despite the slight fall in ranking, Indonesia is continuing with its efforts to combat bribery through greater national and international cooperation and intelligence sharing as well as improvements to bureaucracy and public services, including E-procurement programmes and information sharing.

These trends and developments offer greater certainty in what is a long road in Indonesia's fight against corruption.

**BACK TO MAP**

## **JAPAN**

### **Changes to legislation**

In June 2016, an amendment to the Code of Criminal Procedure in Japan was announced which establishes a system of plea-bargaining. It is expected that this new plea-bargaining system will become effective by June 2018. The plea-bargaining system will only apply to certain offences (Specified Offences), including bribery.

Under the plea-bargaining system, a prosecutor can enter into an agreement with a defendant (either an individual or a legal entity) whereby, in return for the defendant assisting prosecutors and police in investigating a Specified Offence committed by a third party (a separate individual or legal entity), the prosecutor can agree to drop or amend charges, or can agree the penalty to be proposed to the court (although what penalty is ultimately imposed remains at the court's discretion).

It is important to note that the plea-bargaining system is only available to defendants when they provide information or evidence in respect of a Specified Offence committed by a third party, not in respect of a Specified Offence that they themselves committed.

It will be interesting to see if this new plea-bargaining system encourages employees charged with bribery to provide evidence of any bribery-related conduct separately perpetrated by their employers, in order to enter into an agreement with the prosecutor to drop the individual charges laid against them.

### **Prosecutions and enforcement actions**

On 28 November 2016, the Nagoya High Court sentenced Hiroto Fujii, the Mayor of Minokamo, Gifu Prefecture, to 18 months in prison, suspended for three years, with an additional fine of JPY 300,000. The decision overturned an earlier finding of acquittal by the Nagoya District Court in March 2015.

The High Court found Fujii guilty of receiving improper payments amounting to JPY 300,000 from the president of a groundwater supply company, in connection with the installation of a water-cleaning system at a public school.

The same company's president (Mr. Masayoshi Nakabayashi) was found guilty by a differently constituted District Court in relation to a variety of bribery-related charges and sentenced to four years in prison.

In light of the decision, Fujii resigned as Mayor but has maintained his innocence, lodging an appeal with the Supreme Court of Japan. On 29 January 2017, in the mayoral election that took place following his resignation, Fujii was re-elected as Mayor, obtaining a 57.1% vote of confidence, although a decision of the Supreme Court is still pending.

On 22 November 2016, the Tokyo District Prosecutor's Office laid fraud charges against a former senior employee of a Japanese multinational banking and financial services company (who had been dismissed on disciplinary grounds in July of the same year). The defendant was accused of embezzling JPY 770

million, resulting in an internal review of the company's processes to prevent such conduct from occurring in the future. A trial date is yet to be set.

### **Other developments**

#### **The OECD urges the Japanese government to step up its efforts to fight international bribery**

On 29 June 2016, the OECD Working Group on Bribery in International Transactions sent a high-level mission to Japan to urge the Japanese government to step up its efforts to fight international bribery. On 30 June 2016, the Working Group issued a statement that "Japan must make fighting international bribery a priority"<sup>30</sup>.

Despite the repeated exhortations, it appears that Japan's fight against bribery of foreign public officials is progressing slowly. Since Japan's Unfair Competition Prevention Law was amended to make it an offence to bribe foreign public officials to obtain advantages in international business in 1999, only four cases of foreign bribery have been prosecuted in Japan.

The Working Group highlighted the fact that Japan had not yet passed legislation allowing illegal proceeds derived from bribery to be confiscated. In addition, the Working Group recommended that Japan establish an Action Plan to organise police and prosecution resources in order to proactively detect, investigate and prosecute cases of foreign bribery by Japanese companies.

In response, Japan confirmed its commitment to the global fight against corruption.

**BACK TO MAP**

<sup>30</sup> <http://www.oecd.org/corruption/japan-must-make-fighting-international-bribery-a-priority.htm>

## SOUTH KOREA

### Changes to legislation

The Improper Solicitation and Graft Act of Korea (the Graft Act), also known as the Kim Young-ran Act after its author, took effect on 28 September 2016, ushering in major changes to South Korea's anti-corruption regime.

Prior to the Graft Act, in respect of public officials, South Korea's Criminal Act prohibited, among other things: (i) the bribing of public officials in connection with their duties; and (ii) public officials from accepting, soliciting, or promising to accept bribes. The Act on Combating Bribery of Foreign Public Officials in International Business Transactions (FBPA), the analogue to the U.S. Foreign Corrupt Practices Act and UK Bribery Act, prohibited bribing officials of foreign governments and public international organisations.

A series of public scandals beginning in 2011 and culminating with the Sewol ferry disaster in 2014 led to calls for stricter anti-corruption rules and enforcement actions. The Graft Act, which was first proposed in 2013, was enacted on 27 March 2015.

The law faced immediate constitutional challenges by the Korean Bar Association and Journalists Association of Korea which were struck down by South Korea's Constitutional Court in a ruling in July 2016, paving the way for the law's implementation. A minor amendment of the law's wording came into force on 30 November 2016.

### An expansive view of public officials

Article 2 of the Graft Act expands the definition of "public official" to include not only public sector employees such as government officials and covered

employees of state-owned entities, but also employees of certain public and private schools, for example, those established under the Elementary and Secondary Education Act, the Higher Education Act, the Early Childhood Education Act and the Private School Act as well as employees of media companies covered by Article 2(12) of the Act on Press Arbitration and Remedies Etc. for Damage Caused by Press Reports, regardless of whether there is any state ownership or control. Indeed, the law's inclusion of journalists was one of the issues underlying the court challenge mentioned above.

Article 8 of the Graft Act, which prohibits the receipt of bribes by public officials, also prohibits the receipt, request, or promise to receive bribes by the spouse of a public servant in connection with his or her official duties.

### The prohibition of unfair solicitation

Article 5 of the Graft Act prohibits any person from, directly or indirectly, soliciting or requesting a public official to subvert their duties by taking an action falling into one of 15 prohibited categories. Notably this prohibition applies irrespective of whether any money is involved or promised.

The 15 prohibited categories are broadly drafted and include, among other things, causing a public official to grant authorisations or licences; intervene in or influence appointments, promotions, school admissions or grading; disclosing confidential information; and influencing investigations or judgments.

Article 5 also contains a list of seven circumstances under which the prohibitions do not apply, such as

requests for public action made through normal procedures. The list also provides an exception for "any act not deemed in breach of social norms," a standard which has been criticized for its vagueness.

### Strict liability and low thresholds

One of the most unusual aspects of the Graft Act is its blanket prohibition against any public official receiving: (i) more than KRW 1 million (USD 875) on a single occasion; or (ii) more than KRW 3 million (USD 2,630) in a year irrespective of how or why the money is received; i.e. the money can be nominally entirely unconnected with a public official's duties. The sanction for breach is a jail term of up to three years or a fine of KRW 30 million (USD 26,000) for both the public official and the giver.

Public officials are entirely prohibited from accepting, requesting, or promising to accept cash or benefits in connection with their duties, even in quantities below the amounts described above.

Instead, the only protection is provided under the so-called '3-5-10 Regulation', the Act's Enforcement Decree, which sets low and effectively 'safe harbour' thresholds for the giving and receiving of cash and other benefits. The 3-5-10 prefix comes from the monetary limits defining the safe harbour which are: (i) KRW 30,000 (USD 27) for food and drink; (ii) KRW 50,000 (USD 45) for gifts; and (iii) KRW 100,000 (USD 90) for funerals and festive occasions such as weddings.

Notably, in the context of Korean business entertainment, gift giving, and business culture, these limits are extremely low.

### **Corporate liability**

Article 24 of the Graft Act provides for joint liability for corporations for their employees' violations, unless the corporation has shown "due attention and supervision" to prevent the violation in question. This is similar to the scheme for corporate liability under the FBPA.

### **Prosecutions and enforcement actions**

There have been no prosecutions under the Graft Act so far since its implementation in September 2016. However, several notable investigations and criminal cases under South Korea's pre-existing laws have made international headlines amidst images of widespread public demonstrations.

### **President Park Scandal**

On 10 March 2017, President Park Geun-hye was removed from office following the Constitutional Court's unanimous decision to uphold Park's impeachment by the National Assembly in December 2016. On 31 March 2017, Park was arrested on charges that

included, among other things, extorting tens of millions of dollars from South Korean corporations for the benefit of foundations operated by Park's friend and confidante Choi Soon-sil. Samsung Vice-Chairman Lee Jae-yong was arrested on 16 February 2017 on charges that he made donations to Choi's foundations in exchange for favourable treatment from Park's government.

### **Continued 'Clean Up' efforts against public prosecutors**

In December 2016, a senior prosecutor was sentenced to four years in prison for pressuring Korean Air to award approximately USD 12 million in contracts to his brother-in-law's cleaning company in exchange for closing an investigation. The prosecutor was indicted in July 2016 on separate charges (of which he was later acquitted) that he accepted millions of dollars in bribes from an online videogame company in the form of stock. The case was one of a number of high-profile bribery cases involving the abuse of public prosecutorial powers in recent years.

### **Enforcement trends**

The focus on public officials and senior executives of South Korea's powerful chaebols represents a major shift toward accountability for members of the country's elite who long seemed to enjoy a certain immunity from criminal prosecution. The trend is likely to accelerate following the arrests of former President Park and Lee which have led to a public outcry against corruption at the highest levels of South Korean society.

Although there is yet to be a major case brought under the Graft Act since its introduction in September, the combined effects of the new law and recent enforcement actions have already left their mark on Korea's lively business culture, as noted in recent media commentaries and observed by our local attorneys. Popular dining and nightlife spots have seen a drop off in business, while some restaurants are offering special menus with prices below the Graft Act's USD 27 limit for foods and drink.

**BACK TO MAP**



## PEOPLE'S REPUBLIC OF CHINA

### Changes to legislation

Following the legislature's amendment of the Criminal Law in 2015, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) have published further guidelines on handling corruption related cases. Separately, one year after the publication of the first draft amendment to the Anti-Unfair Competition Law (AUCL), the PRC legislature released an updated draft amendment to the AUCL which removes some of the notable changes contained in the first draft amendment.

### The Graft and Bribery Interpretation

On 18 April 2016, the SPC and the SPP jointly issued the *Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery* (Graft and Bribery Interpretation), with the aim of providing up-to-date guidelines for prosecuting and handling criminal cases involving corruption activities.

The Graft and Bribery Interpretation has sought to clarify, *inter alia*, monetary thresholds for prosecution and conviction, the definition of key elements of corruption offences, and the circumstances under which leniency may be granted.

In particular, the Graft and Bribery Interpretation expands the definition of "money and property" as forms of bribes provided under the PRC Criminal Law. The definition now includes benefits that can be measured or obtained by money, such as home renovation, debt relief, membership services, and travel. The value of the bribe is calculated as the money actually paid or the market price of the benefits.

The Graft and Bribery Interpretation also raises the minimum threshold for the prosecution of bribing state officials from RMB 5,000 to RMB 30,000 (approximately from USD 720 to USD 4,400), in the absence of specific circumstances (such as the involvement of three or more people or bribing the judiciary, in which case the minimum threshold is RMB 10,000 (approximately USD 1,500)).

The Graft and Bribery Interpretation further clarifies the meaning of certain aggravating factors in the sentencing for bribery, such as "relatively large amount", "huge amount", "causing heavy loss to State interest" and various "serious circumstances."

These changes signal the PRC government's intention to further tighten its tough stance on corruption in the context of a maturing economy.

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

One year after the publication of the first draft amendment to the AUCL in February 2016 (2016 Draft, as reported in our 2016 Review), the PRC legislature released an updated draft amendment to the AUCL for public comments in February 2017 (the 2017 Draft).

Compared with the 2016 Draft, the 2017 Draft appears to adopt a more conservative approach. For example:

- The 2017 Draft does not include the detailed definition of commercial bribery that was contained in the 2016 Draft, but adopts a more general definition which is closer to that set out in the current AUCL.
- Regarding employers' vicarious liability, under the 2016 Draft, an employer is liable for bribery by its employee for the purpose of seeking business opportunities or competitive advantages for the employer, unless the employee's accepting or receiving bribes is against the employer's interest. In contrast, the 2017 Draft broadens the exception to cover circumstances under which the employer "has evidence to prove it was an employee's personal conduct."
- In terms of fines, under the 2017 Draft, the range is fixed between RMB 100,000 and RMB 3 million (approximately USD 14,500 to 435,000), whilst under the 2016 Draft, the fine may be calculated based on 10% to 30% of the company's illegally obtained business revenue, which creates more uncertainty and could generate significant fines in serious cases.

### Enhanced regulations in the healthcare sector

Healthcare has always been a sector with high corruption risks. In the past year, the healthcare sector has seen new regulations to combat commercial bribery. For example:

- In December 2016, the PRC government promulgated the "two invoice policy" in the pharmaceutical sector, with the aim of making costs and margins of distributors more transparent and of minimizing the risks of improper payments through third party distributors.

- In January 2017, the PRC government published opinions on pharmaceutical sector reform, including measures to strengthen the regulation of medical representatives by limiting their activities to academic education/promotion and technical consultancy and by prohibiting their sales activities.

### **Prosecutions and enforcement actions**

The most notable enforcement actions currently are those in the “industry sweep” by the Shanghai Administration for Industry and Commerce against tyre manufacturers, including Michelin, Bridgestone, and other multinational players. The actions relate to sales incentives/rebates provided by the manufacturers to their distributors in the form of gift cards, tour cards, gas cards and the like. Some of these sales incentives were actually provided to privately-owned distributors instead of their employees, but this has not

prevented the regulators from treating these incentives as commercial bribes on the grounds that they were not properly documented and/or they may otherwise have had an anti-competitive effect. These actions indicate that the regulators’ understanding of “commercial bribery” under the AUCL appears to be broader than the traditionally understood meaning, and suggests that the legality of rebates and discounts (even where consistent with market practice) needs to be carefully reviewed under PRC law.

### **Enforcement trends**

The anti-corruption crackdown in the PRC which started in 2012 has continued. According to a recent speech by Jianzhu Meng, the head of the Central Political and Legal Affairs Commission of the Communist Party of China, almost 100,000 corruption-related cases have been prosecuted in the five years since 2012 (representing a 32% increase over the previous five-year term), and over a

hundred of these involved very senior government officials at or above the provincial and ministerial level.

Enforcement actions have been common in the sectors of healthcare, consumer goods, real estate, manufacturing and financial services, but have now extended to new sectors such as TMT.

Another remarkable trend is the strengthening of cross-border cooperation. The SPP has highlighted in its most recent annual report that, since launching the “fox hunt” campaign (which targets overseas suspects of corruption offences) in late 2014, over 160 suspects have been extradited or convinced to return to China.

It is envisaged that these enforcement trends will continue for the next few years.

**BACK TO MAP**

## SINGAPORE

### Changes to legislation

There have been no relevant legislative changes since the last Review in May 2016.

### Prosecutions and enforcement actions

In one of the biggest corruption scandals in Singapore, the Singapore courts had initially found six leaders of a 'mega-church' (City Harvest Church) guilty of conspiracy to commit criminal breaches of trust by conducting sham investments and round-tripping transactions. They were found guilty notwithstanding the 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, and were sentenced to jail terms ranging from 21 months to 8 years. On appeal, the Singapore High Court revised the original charges brought against the key church leaders under section 409 of the Penal Code (for aggravated criminal breach of trust), and convicted them of a lesser charge under section 406 of the Penal Code (for criminal breach of trust *simpliciter*). As a result, their sentences were significantly reduced, with jail terms now ranging from 7 months to 3.5 years.<sup>31</sup> Dissatisfied with the High Court's ruling, the Attorney General's Chambers (AGC) has filed a criminal reference to the Court of Appeal, to clarify the law under which the High Court made its decision to reduce the jail terms of all six church leaders, on the basis that the High Court's decision engaged important questions of public interest<sup>32</sup>. The AGC's move came after Law and Home Affairs Minister K

Shanmugam stressed the Singapore government's need to uphold its "zero-tolerance approach" towards corruption<sup>33</sup>.

The former Eastern Regional Director for marine fuels of BP Singapore was charged with obtaining about USD 4 million in bribes from a businessman to advance the business interest of the latter's company with the oil and gas company<sup>34</sup>.

The case of *Public Prosecutor v Woo Poh Liang* [2016] SGDC 303 concerned the prosecution of Staff Sergeant Woo Poh Liang, who pocketed SGD 35,000 in bribes, the largest in Singapore's history with regards to police officers receiving monetary bribes. The judge affirmed Singapore's uncompromising position against law enforcement officers caught for corruption offences and was of the view that the defendant should face a custodial sentence of significant length. The defendant was sentenced to 31 months' imprisonment.

In *Public Prosecutor v Heng Tze Yong* [2016] SGDC 291, the Singapore Courts demonstrated the tough stance they adopt in sentencing persons guilty of corruption, even in the private sector. Although the defendant was a first-time offender who did not solicit the bribe of SGD 7,000, he was still given a custodial sentence of 5 weeks' imprisonment.

In *Public Prosecutor v Koh Puay Boon* [2016] SGDC 159, a director of a private company in Singapore was sentenced to 9 months' imprisonment and ordered to

pay a penalty of SGD 49,500 on charges of having corruptly received payments from a fellow director on five different occasions, which payments were intended to be given to a Louis Vuitton (LV) employee to induce that employee to further the company's relationship with LV. Although the payments, which totalled SGD 49,500, were never actually paid to the LV employee, the judge found that this was "not fatal" to the prosecution's case, since "paying an employee of your client in order to secure more business is obviously corrupt and so is the receiving of monies in order to do the same". Significantly, the judge stated that there was no presumption that cases of private sector corruption would only attract non-custodial sentences, and that the prevailing sentencing consideration should be that of general deterrence.

Another recent case shows that custodial sentences for bribery-related offences may be reduced where the defendant makes restitution of all bribes received, as well as compensation for any loss caused. In *Mathew Koottappillil Mathew v Public Prosecutor* [2017] SGHC 37, the appellant, an employee of Shimizu Corporation, had been convicted of receiving SGD 1,500 in bribes. The appellant's conduct had caused the company (Shimizu Corporation) a total loss of SGD 6,240 (inclusive of the SGD 1,500 bribe). The Singapore High Court later reduced the appellant's custodial sentence of 6 weeks to 4 weeks, on the basis that the appellant made full compensation to Shimizu Corporation, and also issued a formal apology to the project manager of the company.

31 See Selina Lum, Ng Huiwen, "City Harvest appeal verdict: Six church leaders get reduced jail terms, Kong Hee gets 3.5 years", The Straits Times (7 April 2017), please see: <http://www.straitstimes.com/singapore/courts-crime/city-harvest-appeal-verdict-six-church-leaders-get-reduced-jail-terms-kong>

32 See Angela Tan, "AGC file criminal reference with Court of Appeal over City Harvest Church verdict", The Business Times (10 April 2017), please see: <http://www.businesstimes.com.sg/government-economy/city-harvest-trial/agg-file-criminal-reference-with-court-of-appeal-over-city>

33 See Charissa Yong, "City Harvest appeal: Ruling may have implications on corruption cases, says Shanmugam", The Straits Times (9 April 2017), please see: <http://www.straitstimes.com/politics/ruling-may-have-serious-implications-shanmugam>

34 See Elena Chong, "Ex-BP executive charged with taking \$5.7m in bribes", The Straits Times (9 March 2017), please see: <http://www.straitstimes.com/singapore/courts-crime/ex-bp-executive-charged-with-taking-us4m-in-bribes-possibly-largest-amount-a>

In late 2016 and early 2017, a director and ten former and present employees of Singapore waterproofing company, TAC Contracts Pte Ltd, were charged with 368 counts of corruption for giving bribes ranging from SGD 490 to SGD 59,000 in the course of their employment. TAC Contracts Pte Ltd's director, Donald Ling Chun Teck, had been giving corrupt payments to his clients, including managing agents, contractors and property agents, when his company won jobs with them. The payments were disguised as referral fees, commissions or tokens of appreciation, and were given to his clients in cash either personally or by his sales staff. He was sentenced to 30 months' imprisonment<sup>35</sup>. The remaining employees have yet to be sentenced<sup>36</sup>.

## Enforcement trends

There is a developing expectation that senior officers should be taking a stand against corrupt practices. A senior executive involved in one of the largest corporate graft scandals in Singapore concerning shipbuilder ST Marine was sentenced to 20 weeks' jail and a fine of SGD 100,000. Mok Kim Whang was the company's senior vice-president from June 2000 to July 2004, and was found to have continued a pre-existing practice at ST Marine of paying bribes to its customers' employees and covering up the kickbacks with a false paper trail of "entertainment expenses". The sentencing judge remarked that the jail term for Mok "adequately recognises the need to send a strong signal to deter like-minded offenders that there are

painful consequences that will flow from weak-willed corporate executives". Significantly, the judge also noted that it will be "incumbent on senior officers to take a stand and if it is not possible to put an end to such illegal activities – then they should part company or ...report the activities to the authorities"<sup>37</sup>.

Overall, the number of corruption complaints and cases investigated by the Corrupt Practices Investigation Bureau (CPIB) reached a new low in 2016, according to statistics released by the CPIB on 12 April 2017.<sup>38</sup> In 2016, CPIB received 808 complaints, an 8% decrease compared to the number received in 2015. A total of 118 cases were subsequently pursuable, down from 132 cases in 2015. The majority of non-pursuable cases were because of insufficient, vague or unsubstantiated information. In 2016, there were 104 individuals prosecuted for corruption offences and 96 per cent of them were private sector employees. Custodial sentences were meted out to a majority of them in some instances.

Singapore also continues to increase its levels of cooperation with other governments. In September 2016, the Singapore's Attorney General's Chambers (AGC) approved the extradition of two former executives of a Singapore-based defence contractor at the centre of a bribery scandal involving the U.S. Navy.<sup>39</sup> The Corrupt Practices Investigation Bureau (the CPIB) has worked closely with U.S. authorities to conduct the joint

investigation that resulted in prosecution of those responsible.

## Other developments Singapore Standard for ABC procedures

A new Singapore Standard – the SS ISO 37001 – to help Singapore companies strengthen their anti-bribery compliance systems and processes was launched by the CPIB and the Standards, Productivity and Innovation Board (SPRING Singapore) on 12 April 2017. Companies that are venturing overseas can adopt the standard to benchmark the integrity of their governance processes against international standards and practices.

## Global assessment

In the Rule of Law 2016 Index compiled by the World Justice Project, Singapore was ranked ninth overall worldwide, maintaining its position from 2015. Singapore was ranked first under "regulatory enforcement", second under "absence of corruption", fourth under "criminal justice" and "civil justice", and second in the Asia-Pacific region overall.<sup>40</sup>

The Corruption Perceptions Index 2016 compiled by Transparency International gave Singapore a score of 84 (out of 100) for the perceived levels of public sector corruption, placing it seventh in the world rankings. While Singapore's score fell (slightly) from 85 in 2015, its ranking moved up a spot from 2015.

## BACK TO MAP

35 See Elena Chong, "Businessman jailed for giving bribes", The Straits Times (23 December 2016), please see: <http://www.straitstimes.com/singapore/businessman-jailed-for-giving-bribes>

36 See Shaffiq Idris Alkhatib, "10 current and former employees of firm accused of corruption", The Straits Times (1 March 2017), please see: <http://www.straitstimes.com/singapore/courts-crime/10-current-and-former-employees-of-firm-accused-of-corruption>

37 See Amir Hussain, "Former ST Marine senior vice-president in graft scandal gets 20 weeks' jail, \$100,000 fine", The Straits Times (26 September 2016), please see: <http://www.straitstimes.com/singapore/courts-crime/former-st-marine-senior-vice-president-in-graft-scandal-gets-20-weeks-jail>

38 See Wong Siew Ying, "Corruption cases in Singapore fell to record low in 2016, says CPIB at launch of new anti-bribery standard", The Straits Times (12 April 2017), please see: <http://www.straitstimes.com/business/companies-markets/corruption-cases-in-singapore-fell-to-record-low-in-2016-says-cpib-at>

39 See AsiaOne News, "Singapore court allows extradition in US Navy bribery case" (21 September 2016), please see: <http://news.asiaone.com/news/singapore/singapore-court-allows-extradition-us-navy-bribery-case>

40 <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index%2%AE-2016-report>

## THAILAND

### Changes to legislation Corporate Measures to Prevent Corruption

On 23 March 2017, the Office of the National Anti-Corruption Commission (NACC) published a handbook on corporate measures which should be adopted by companies in order to prevent bribery of public officials, foreign public officials and officials of international public organisations (the Handbook). The preparation of the Handbook was based on best practice guidance published by the United Nations Office on Drugs and Crime, the Organisation for Economic Co-operation and Development and Transparency International as well as on ISO 37001.

The Handbook is intended for companies who may be subject to the Organic Act on Counter Corruption B.E. 2542 (1999) (the Organic Act) (as amended in 2015). The 2015 amendments criminalised bribery of “foreign public officials” and “officials of an international public organisation”, increased penalties for bribery and corruption offences, and introduced corporate liability for offences committed by a company’s affiliates, employees, agents or any persons acting on its behalf, where the company did not have ‘appropriate measures’ to prevent the commission of the offence by such persons. Penalties include a fine of up to twice the damages or benefits received by the person committing the offence.

The measures recommended by the NACC in the Handbook include:

- senior management should clearly articulate zero-tolerance of corruption, including applying internal controls to prevent corruption;

- companies should monitor and assess corruption risks, including preparing appropriate measures to prevent and combat corruption;
- companies should adopt clear policies on facilitation payments, gifts and hospitality expenditures;
- companies should conduct due diligence on their joint venture partners, business partners, advisors and agents;
- companies should adopt adequate internal controls and good accounting standards;
- companies should adopt measures and controls to detect and report violations; and
- companies should carry out periodic reviews and evaluations of the anti-corruption programme.

#### New specialised Corruption Courts

The Thai government has recently adopted legislation intended to increase efficiency in the judicial system and, in particular, to address the increasing number of corruption cases. The Act on the Establishment of Criminal Court for Corruption and Misconduct Offence B.E. 2559 (2016) (the Corruption Court Act) (which became effective from 17 August 2016) establishes two types of specialised corruption courts (the Corruption Courts) with jurisdiction to hear corruption and misconduct cases involving ‘public officials’. Excluded from the ambit of the Corruption Courts are cases within the jurisdiction of the Supreme Court’s Criminal Division for Persons Holding Political Positions, set up in 1999 specifically to handle corruption and misconduct cases involving persons holding political positions in Thailand.

The Corruption Court Act provides for the establishment of:

- the Central Criminal Court for Corruption and Misconduct Cases (the Central Corruption Court), with jurisdiction over Bangkok, Samut Prakan, Samut Sakhon, Nakhon Pathom, Nonthaburi and Pathum Thani provinces; and
- the Regional Criminal Courts for Corruption and Misconduct Cases (the Regional Corruption Courts), with jurisdiction over the areas specified in the relevant Royal Decree.

The Central Corruption Court was formally opened on 1 October 2016, while the Royal Decree establishing the Regional Criminal Courts was published in the Royal Gazette on 18 February 2017. Nine Regional Corruption Courts will cover the remaining 71 provinces; seven of these were opened on 1 April 2017, while the remaining two are due to be opened on 1 October 2017. The Central Corruption Court has discretion to accept or reject any case arising outside the provinces specified in (i) above but filed with the Central Corruption Court.

The Corruption Courts now have explicit jurisdiction over criminal cases in which:

- public officials are charged with malfeasance in office or irregularities;
- public officials or individuals are charged with money laundering in relation to malfeasance in office or irregularities or violations of laws on submission of bids to government agencies, laws on public-private partnerships or other laws combating corruption;
- individuals are charged with giving or receiving bribes, coercing or using influence to force public officials to act

or not to act in accordance with the Criminal Code or other laws; and

- individuals are charged with deliberately refusing to declare assets, falsely declaring assets or covering up assets that should have been declared.

“Public officials” include state officials, foreign public officials and officials of international public organisations pursuant to the Organic Act, and officials pursuant to the Criminal Code (e.g. officials of the Thai government and Thai police officers).

#### **New laws on procedures for corruption and misconduct cases**

To ensure fair, transparent and efficient trials, Thailand enacted two new pieces of legislation which particularly govern corruption and misconduct cases filed with the Corruption Courts – the Act on Procedures for Corruption and Misconduct Cases B.E. 2559 (2016) (effective from 1 October 2016) and the Regulations of the President of the Supreme Court Concerning Procedures for Corruption and Misconduct Cases B.E. 2559 (2016) (effective from 2 October 2016).

The new laws introduced the following measures which will only apply in cases before the Corruption Courts:

- An inquisitorial system shall be used by the Corruption Courts. This means that the courts can be actively involved in investigating the facts of the case (as opposed to an adversarial system which is used in the normal criminal procedures).
- A case shall not be barred by prescription if the accused or the defendant absconds during the trial process or the enforcement process.

- Trial *in absentia* is allowed where (i) the defendant has absconded and the court has issued an arrest warrant but the defendant cannot be apprehended; or (ii) where the defendant is sick or otherwise absent, but is represented by an attorney and the court has granted permission.

#### **Prosecutions and enforcement actions**

We have seen an increasing number of corruption cases brought to the NACC and the Thai courts. There have been several cases where persons holding political positions and public officials were sentenced for corruption.

On 28 July 2016, the Criminal Court ruled that Benja Louicharoen, who was Deputy Finance Minister during Yingluck Shinawatra’s government, and three senior Revenue Department officials, were guilty of helping Panthongtae and Pinthongta Shinawatra, son and daughter of former Prime Minister Thaksin Shinawatra, evade nearly THB 16 billion in income taxes. However, they were released on bail and are currently appealing against the decision.

On 27 December 2016, the Court of Appeal sentenced Bhichit Rattakul, former Governor of Bangkok, to five years in prison in a corruption case, overriding the Court of First Instance’s decision to dismiss the case. The conviction was related to the purchase by the Bangkok Metropolitan Administration (BMA) of a plot of land for use as a parking area. It was claimed that Bhichit Rattakul together with seven other officials demanded and received a brokerage fee of THB 18 million for the purchase. Bhichit Rattakul was released on bail and is appealing against the decision to the Supreme Court.

#### **Enforcement trends**

Corruption has been and is still a significant problem in Thailand. Since the military coup in 2014, a lot of effort has gone into combating corruption and bribery, including reforming anti-corruption laws, establishing a new anti-corruption watchdog and specialised corruption courts, and improving and accelerating investigation and enforcement proceedings.

As a result, investigation and enforcement activities for corruption offences have become more widespread. A general trend has been for the focus of corruption investigation proceedings to expand further from high-ranking political officials to state officials, local government officials and officials of state enterprises.

Prime Minister General Prayut Chan-o-cha issued orders to suspend Sukhumbhand Paribatra from his duties as Governor of Bangkok in August 2016 and to finally remove him from office in October 2016 as a result of several ongoing investigations into alleged tender irregularities. These include the procurement of musical instruments for BMA’s schools, the THB 39.5 million “Bangkok Light of Happiness” New Year project and the THB 16.5 million renovation of the Bangkok Governor’s office. The investigations are still ongoing and he will be prosecuted if there is sufficient evidence to prove the offence.

On 29 March 2017, the Central Corruption Court ruled to confiscate the equivalent of THB 62.7 million in cash from the overseas bank account of Juthamas Siriwan, former governor of the Tourism Authority of Thailand. According to the news, this amount was transferred to her bank account by an American couple in exchange for them being awarded a THB 60 million contract to

organise the annual Bangkok International Film Festival between 2002 and 2007. Juthamas Siriwan and her daughter were also sentenced to jail for 66 years and 44 years, respectively, for the bribery. A petition for bail was rejected by the Court of Appeal due to the seriousness of the case and the high penalties. This case is now in the appeal process.

Investigations of cases involving former high-ranking political officials associated with former Prime Minister Thaksin Shinawatra are still being raised and attract media attention. The most recent case involves former foreign minister Surapong Tohvichakchaikul who was impeached on 30 March 2017 for malfeasance in re-issuing the national passports of ousted former Prime Minister Thaksin Shinawatra. Thaksin's passports were revoked during Abhisit Vejjajiva's government (2 years after the previous

military coup) and the revocation was later upheld by the Central Administrative Court. Surapong Tohvichakchaikul is banned from politics for five years as a result of his impeachment.

In the private sector, two major state enterprises (i.e. Thai Airways and PTT) are also under scrutiny after the United Kingdom's Serious Fraud Office revealed that Thailand was among seven countries in which Rolls-Royce was found to have conspired to bribe, or failed to prevent bribery. A special committee has been set up within the NACC to investigate bribery allegations involving Thai Airways and PTT. Investigations into both cases are still ongoing.

According to the National News Bureau of Thailand, Thai Airway's case involves the possible bribery of individuals, including former Minister of Transport

Suriya Juengroongruangkij, his deputy Wichet Kasemthongsri and the Thai Airways Board Director Kanok Aphiradee between the years 2004 and 2005, when Thai Airways purchased a Boeing B777-200ER and 6 Airbus A340-500s and 600s. Evidence has supported suspicions that these individuals and others, totalling 26 people, accepted bribes to prefer Rolls-Royce and its products in procurement bidding. Similarly, news from various sources claim that the U.S. Department of Justice found that employees of PTT and its subsidiary PTT Exploration and Production were involved in accepting bribes from Rolls-Royce of more than THB 385 million over ten years in return for awarding procurement deals.

**BACK TO MAP**

C L I F F O R D

C H A N C E

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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