

# The global anti-bribery landscape



Freshfields Bruckhaus Deringer

# The global anti-bribery and corruption sphere continues to evolve – whether through stronger legislation, new major investigations or enforcement.

We examine here the latest developments in the current anti-bribery landscape across all regions to help you stay up to date on the trends and areas of risk in this area. Through our Bribery Watch tool, which is available to Freshfields clients, we track these developments in over 150 countries.

Before the individual country summaries, we set out below five trends that cut across jurisdictions.

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# The global anti-bribery landscape

## Growing use of alternative means of resolution

As reported in our [global guide on corporate crime](#), there is a growing use of alternative means of resolution in corporate criminal investigations (including deferred prosecution agreements (DPAs), guilty pleas and other resolutions). This is likely to have an impact on bribery investigations and enforcement. As demonstrated by the UK example, the introduction of such mechanisms tends to be a precursor to increased enforcement action. This year, Canada and Australia are likely to follow Singapore and France in introducing DPAs, and Japan will introduce new leniency/plea bargaining arrangements in June.

Where countries have similar means of resolving criminal cases, they are also more likely to work together to co-ordinate in imposing fines, which we have seen, for example, with Brazil and the US, among others.

## 'Rest of the world' overtakes the US in foreign bribery investigations – although US activity remains high

This trend has been building for some years, but it has really come into focus in the past 18 months as many non-US authorities have shifted gears to ramp up their activity. TRACE International reported that [Europe had more foreign bribery investigations ongoing than the US as at 31 December 2017](#) – but, with 114 investigations, the US was by far still the most active single jurisdiction.

Latin America is a growing hotspot for domestic bribery enforcement as the ripple effect of Brazil's Operation Car Wash investigation continues to be felt around the region. Several countries in the region have taken steps against Brazilian construction group Odebrecht – including a recent fine of US\$61m levied on group companies by Mexico's Ministry of Public Administration. It remains to be seen whether this new focus on corruption – in places like Argentina, Colombia, Mexico and Peru – will lead to more enforcement action against more international groups of companies, as it did in Brazil.

## Prosecutors and law-makers continue to emphasise potential benefits of self-reporting and co-operation – but risks remain

As noted, several jurisdictions have recently introduced, or are considering introducing, new DPA/leniency/plea deal regimes. Each of these emphasise the potential benefits of self-reporting, co-operation and remediation – but prosecutors often still have wide discretion.

For example, 2018 has seen the first company convicted at trial for failing to prevent bribery in England. The company in question was unable to convince the jury it had adequate procedures to prevent bribery. Even though the company made a self-report, co-operated with the investigation and took remedial action, the Crown Prosecution Service nonetheless opted to prosecute rather than offer the company a DPA. While this is no indication of how the UK Serious Fraud Office (the SFO) would approach larger, more

complex cases of foreign bribery, it nonetheless demonstrates how much an offer of a DPA is within the discretion of prosecutors and the risks arising from a jury trial.

The US Department of Justice (DOJ) has gone further than most by introducing a presumption that it will decline to prosecute where a company voluntarily self-discloses misconduct, fully co-operates with the DOJ and takes timely and appropriate remedial action (including paying disgorgement). But the DOJ retains significant discretion, and if, in its view, aggravating factors are present, then this presumption can be rebutted. (See here for a detailed analysis of the [FCPA Corporate Enforcement Policy](#).)

Further, despite increased prosecutorial co-ordination, there is no guarantee a resolution in one jurisdiction will lead to a similar outcome elsewhere. Last year, for example, the DOJ declined to prosecute a US engineering company for paying bribes in India because the company had met the various requirements, including voluntarily self-reporting the misconduct to the DOJ. Upon news of the declination being made public, Indian authorities opened up an investigation into the company's Indian unit; the investigation is pending.

The DOJ, for its part, has announced a new policy that seeks to minimise 'piling on' multiple penalties for the same corporate misconduct by encouraging co-operation among department components and other enforcement agencies – including its counterparts overseas – in Foreign Corrupt Practices Act (FCPA) and other types of corporate criminal cases. See more on the new policy below.

Continued

# The global anti-bribery landscape

## DOJ announces new policy on co-ordination of corporate enforcement to avoid 'piling on'

US Deputy Attorney General (DAG) Rod Rosenstein announced a new DOJ policy on 9 May 2018 that seeks to minimise 'piling on' of duplicative penalties for the same corporate misconduct by encouraging co-operation among department components and other enforcement agencies within and outside of the US. The policy instructs DOJ components to co-ordinate with one another and with other domestic and foreign regulators when imposing penalties on a company. This could be a welcome relief for global companies, which have previously faced sometimes overlapping and duplicative penalties for the same underlying conduct.

The policy consists of four key features:

- first, the policy includes a reminder that the DOJ should not use its criminal enforcement authority against a company for 'purposes unrelated to the investigation and prosecution of a possible crime' (for example, to aid in resolving a civil matter);
- second, the policy directs the different components within the DOJ to co-ordinate with each other to 'avoid the unnecessary imposition of duplicative fines' and 'achieve an overall equitable result' based on a corporation's conduct. DAG Rosenstein noted that such co-ordination 'may include crediting and apportionment' of financial penalties, fines, and forfeitures;

- third, the policy encourages the DOJ, where possible, to co-ordinate with – and credit the amount of fines already paid to – other federal, state, local and foreign enforcement authorities seeking to resolve a case for the same misconduct; and
- fourth, the policy sets forth factors that the DOJ may use in evaluating whether co-ordination and apportionment between enforcement authorities serve the interests of justice in a particular case. The factors include the egregiousness of the wrongdoing, statutory mandates regarding penalties, the risk of delay in finalising a resolution and the adequacy and timeliness of a company's disclosures and co-operation with the DOJ.

Among other things, the policy reflects an increasing effort by the DOJ to co-ordinate more closely with foreign authorities. DAG Rosenstein noted that the DOJ will be dedicating additional resources to the DOJ's Office of International Affairs to assist with obtaining evidence from abroad. This is also intended to improve the DOJ's ability to support its foreign counterparts in similar requests.

Although the new policy is potentially good news for companies under investigation for bribery and corruption or other charges that span across different countries and involve multiple prosecutors and regulators, DAG Rosenstein cautioned that the DOJ's practical ability to co-ordinate with other agencies may be limited due to 'the timing of other agency actions, limits on information sharing across borders, and diplomatic relations between countries'. Nonetheless, an internal DOJ policy is the first step in addressing the

overlapping investigations and penalties that can result in unfair outcomes for corporate defendants in cases such as large FCPA investigations when multiple regulators are in the mix.

## Energy and natural resources key target of enforcement but a range of sectors are in prosecutors' cross-hairs

Prosecutors in a number of jurisdictions have a deepening familiarity with, and understanding of, the energy sector so it is no surprise it remains a key area of focus. Five of the 11 corporate FCPA resolutions in 2017 were in this sector and about half of the UK SFO's publicly listed bribery investigations are in the sector. This is, in large part, due to investigations spiralling out of the Unaoil and Operation Car Wash matters.

That said, recent FCPA and UK Bribery Act (UKBA) resolutions and investigations are spread across a range of sectors, including healthcare, telecoms, construction, aerospace and defence, and fast-moving consumer goods. TRACE International also reports that US foreign bribery investigations in the financial services industry just overtook investigations in the extractive industries (22 to 21) as at year-end 2017. A significant number of these relate to investigations into hiring practices.

# Landscape by country

AMERICAS

ASIA AND ASIA PACIFIC

EUROPE

MIDDLE EAST AND AFRICA



# Americas



# Argentina

## **New law focuses on corporate criminal liability for corruption offences, alternative resolutions and corporate compliance**

Emerging trends in Latin American anti-bribery and corruption efforts include corporate criminal liability for corruption offences, alternative resolutions and corporate compliance, and Argentina is at the helm of all three.

In late 2017, Argentina's congress passed a law providing for corporate criminal liability for certain corruption-related crimes, including national and transnational bribery. The law also provides for vicarious liability and penalties that include fines (up to five times the undue benefit obtained or that could have been obtained) and suspension of (business) activities or prohibition, for a period, from participating in public tenders/bids for public works or services. The law, which went into effect on 1 March 2018, does, however, permit exemption from liability for a company that (i) voluntarily self-discloses (spontaneously denounces) the commission of a covered offence, as a result of its own internal detection and investigation; (ii) can show that it had an adequate control and supervision system in place before the relevant misconduct; and (iii) returns the undue benefit obtained. The law also allows for matters to be resolved through leniency (collaboration) agreements, for companies that co-operate with Argentine authorities.

The law refers to corporate 'integrity programmes' consisting of a set of actions, mechanisms and internal procedures to promote integrity, supervision and control, aimed at preventing, detecting and correcting irregularities and unlawful acts covered by the law. The content of such integrity programmes provides clues as to what authorities will consider 'adequate' under exemption requirement (ii).

# Brazil

## Brazil continues fight against corruption with several large-scale investigations

Brazil, long a crusader in the fight against – as well as an eyewitness to – corruption, has had another busy year, with the continuation of investigations such as Operation Car Wash (the investigation into Brazil's Petróleo Brasileiro, known as Petrobras) and Operation Zelotes (the investigation into bribery of Brazilian tax authority administrative judges to obtain favourable tax decisions), as well as several new corruption-related 'Operations'. A few key developments and themes have emerged in Brazil, based upon recent activity.

## Leniency agreements

Leniency agreements in Brazil have developed a high profile, largely due to their use in resolving aspects of Operation Car Wash.

In August 2017, Brazil's Ministério Público Federal (Public Prosecutor's Office) issued leniency agreement guidelines for Brazilian federal prosecutors, formalising practices for the entering into of such agreements.

That same month saw a ruling stating that the Public Prosecutor's Office may rule upon administrative proceedings only if the Ministry of Transparency and Comptroller General of the Union (CGU) ratifies its decision. Although it is not final, and was only applied in the specific case of Odebrecht, this situation could be applied to other agreements that were entered into only with the Public Prosecutor's Office.

And, in July 2017, a construction company and the CGU entered into the first leniency agreement under the provisions of the Brazilian Clean Company Act. The company, as part of the agreement, agreed to pay BRL 574m (US\$175m) (including a fine, damages and disgorgement of illicit enrichment).<sup>1</sup>

In May 2018, the CGU and the Office of the Attorney General (AGU) published guidelines for calculating penalties to be paid under Clean Company Act leniency agreements.

Amongst other things, the guidelines set out aggravating and mitigating factors and indicate the percentage by which any penalty may increase/decrease where such factors are present. For example, the existence of a suitable company integrity programme may reduce the penalty by up to 4 per cent.

Each of these developments could impact companies subject to enforcement actions in Brazil, providing new clues into the processes for negotiating leniency agreements with Brazilian authorities.

## Continued international co-ordination

Beyond its own robust domestic anti-corruption efforts, Brazil has been co-ordinating with authorities abroad in some of the world's largest anti-corruption investigations. Such multijurisdictional muscle is likely here to stay – and to spill over into domestic anti-corruption efforts and resolution strategies.

## Legislated compliance

As of late 2017, companies entering into certain contracts with the public administration of the state of Rio de Janeiro must have integrity (compliance) programmes in place. Foreign companies with headquarters, subsidiaries or 'representation' in Brazil are subject to this law.

1. Agreement between UTC Engenharia SA and the CGU dated July 2017.

## Canada

### Facilitation payments are no longer permitted under Canadian law

Facilitation payments are now prohibited under Canadian law. On 31 October 2017, amendments to Canada's Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 came into force, repealing the facilitation payments exemption in the Act. This amendment was first passed by the legislature in 2013, but there was a delay in implementation to allow companies to adapt their policies and procedures.

### Canadian Court of Appeal confirms co-conspirators may be found guilty, even where there is no evidence a bribe was offered or made to an official

In 2017, the Court of Appeal upheld a 2013 decision (*R v Karigar*), extending the scope of the bribery offence by including agreements among co-conspirators to bribe a foreign public official, even without evidence that a bribe was made or offered to an official. An application for leave to appeal the decision to the Canadian Supreme Court was filed in September 2017.

### Parliament considering the introduction of DPA-style agreements

Deferred prosecution agreements (DPAs) may soon be available to Canadian prosecutors. In December 2017, the Canadian government completed a consultation on the potential creation of a DPA regime as an alternative means of disposing with certain charges. The government's summary report on its DPA consultation noted the majority of respondents were in favour of the introduction of a DPA regime in Canada.

The 2018 federal budget formally announced that the government would move forward with legislation introducing alternative forms of resolution similar to US and UK DPAs, through what is referred to in the draft legislation as a Remediation Agreement Regime. Under the proposed law, such agreements would only be available to corporate defendants (not individuals) and would be subject to court approval to ensure they are fair, reasonable and proportionate and in the public interest.

## Chile

### Chile's new president takes office with plans to overhaul the country's anti-corruption laws and regulations

In March 2018, Mr Sebastián Piñera Echenique took office as the new president of the Republic of Chile. Mr Piñera's government programme for the next four years includes the following proposals:

- greater oversight mechanisms for congress to inspect the performance of the government and the public administration;
- the creation of a new institution named the General Comptroller of the Congress to strengthen ethics control and budget management control;

- updating Chilean legislation on offences relating to the exercise of public functions, such as bribery and corruption; and
- expanding the requirements of transparency that must be met by all autonomous state bodies, including the Public Prosecutor's Office, the General Comptroller's Office, the Central Bank and the Electoral Service, among others.

## Colombia

### **Investigations into Odebrecht scandal continue, and Colombian prosecutors start to use recently introduced foreign bribery laws**

Investigations in Colombia continue into the awarding of large infrastructure projects to Brazilian construction group Odebrecht, well over a year after the company admitted – in a resolution with US, Swiss and Brazilian authorities – to paying bribes to secure government contracts in Colombia.

The fallout from this scandal has made corruption one of the key issues in this year's presidential elections. It has also led Colombian authorities to engage with their counterparts elsewhere in the region – including entering into a new memorandum of understanding with Peruvian authorities to combat cross-border bribery.

According to local news reports, Colombian prosecutors have started a number of investigations into Colombian companies for foreign bribery – the first such investigations to be reported since new foreign bribery laws were enacted in the country in 2016.

## Mexico

### **New anti-corruption system in force, but practical issues have arisen in its implementation**

Mexico introduced sweeping reforms to its anti-corruption laws in 2017 with a number of laws creating what is referred to as Mexico's Anti-Corruption System. Among other things, the reforms included the creation of new oversight, enforcement and investigation mechanisms at state and federal level, the introduction of a new leniency programme for those who self-report bribery and, for companies, new requirements regarding compliance programmes and new potential corporate liability for bribery.

While the reforms were introduced to much fanfare, implementation has proven difficult – particularly with respect to the appointment of new anti-corruption prosecutors and judges as envisaged by the new laws.

With Mexicans going to the polls in July 2018 to elect a new president, anti-corruption is high on the political agenda. It remains to be seen, however, if this will translate into a greater emphasis on enforcement and use of Mexico's new laws in this area.

However, while progress in implementing the new Anti-corruption System has been slow, Mexican authorities have recently brought enforcement action against Brazilian construction group Odebrecht following its admission in 2016 that it paid bribes in a number of countries, including Mexico. In April, Mexico's Ministry of Public Administration debarred two Odebrecht subsidiaries and their legal representatives from government contracts for over two years and levied fines of over US\$50m, in total, on the subsidiaries and individuals involved.

# Peru

## **New law targets companies for corruption offences**

Peru, already active in the fight against bribery and corruption, is poised to play an increasing role in anti-corruption efforts, thanks to legislative developments and enforcement activity from recent months.

A January 2017 Legislative Decree amended Peru's Law No 30424 on the administrative liability of legal entities for the commission of active transnational bribery, expanding its scope to other offences in addition to transnational bribery – thereby extending the criminal offences for which a legal entity can be found liable. Given this amendment, legal entities may now be found liable for money laundering, terrorism financing and domestic bribery, as well as transnational bribery. The law came into effect on 1 January 2018 and has established a new system for attributing liability, through which legal entities are autonomously (severally) liable and can be directly punished for committing a covered criminal offence.

Further, a legal entity can be held responsible when the offence is committed on its behalf and for its direct or indirect benefit by (i) its partners, directors, administrators or representatives in the exercise of the functions of their office; (ii) natural persons who, being under the authority or control of the persons previously mentioned under (i), commit the offence on the orders or authorisation of the latter; and (iii) natural persons mentioned under the preceding item, when supervision and control are not duly exercised on them by managers or representatives.

Pursuant to Law No 30424, legal entities that commit the crime of active transnational bribery shall be exempted from liability if, prior to the commission of the crime, the legal entity adopted and implemented a prevention system (compliance programme) appropriate to its nature, risks, needs and characteristics, consisting of supervision and monitoring measures suitable for preventing the crime or significantly reducing the risk of its being committed.

On the enforcement side, the fallout from the Odebrecht scandal continues: for example, following the December 2016 FCPA resolution between officials of the company and the US DOJ, Peru's Attorney General's Office announced the appointment of a special group of prosecutors in charge of the country's Odebrecht investigations. This special team of prosecutors has been extremely active, requesting preventive detentions and undertaking seizures and raids against persons (public officials and private individuals) suspected of being involved in Odebrecht-related acts of corruption.

# United States

## FCPA still being actively enforced

The DOJ and the SEC continue robust enforcement of the FCPA pursuing investigations against corporations and individuals.

US enforcement trends are in line with the themes we have observed globally, with the DOJ's continued co-ordinated, cross-border enforcement efforts and continued emphasis on seeking to hold individuals accountable for corporate wrongdoing. In the last year alone, the DOJ has announced several multijurisdictional anti-corruption actions resulting in billions of dollars of cumulative corporate penalties. The DOJ also implemented its FCPA Corporate Enforcement Policy, building upon the alternative FCPA resolution scheme first set forth in the prior 'Pilot Program'.

The SEC has continued to pursue actions for violations of the accounting provisions of the FCPA. While the majority of such cases are predicated on evidence of bribery, the SEC has also shown interest in other cases where it asserts that the corporation's failure to maintain accurate books and records and adequate internal controls created a heightened risk of bribery, even though the SEC has not alleged in those cases that the corporation actually made or offered to make corrupt payments to a foreign government official.

The Supreme Court of the United States decided an important issue with respect to the time period in which the SEC must commence an action to seek disgorgement. In the June 2017 *Kokesh v SEC* decision, the US Supreme Court held that any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued. The *Kokesh* decision is a blow to the SEC's long-standing view that disgorgement claims were not subject to a five-year statute of limitations, and the co-director of the SEC's Enforcement Division acknowledged that *Kokesh* 'will have particular significance for our FCPA matters'. Going forward, this decision may give greater predictability to SEC enforcement.

## Co-ordinated, cross-border enforcement efforts

Over the past eighteen months, the US authorities actively sought to enforce the FCPA with a number of major multijurisdictional FCPA resolutions, including ones with:

- a Swedish telecommunications company, which, in September 2017, agreed to pay over US\$965m as part of a global resolution (among US, Dutch and Swedish authorities) involving an improper payment scheme in Uzbekistan;<sup>2</sup>
- a Dutch oil and gas services company, which, in November 2017, agreed to resolve DOJ charges and pay a criminal penalty of US\$238m in connection with bribery schemes relating to officials in Angola, Brazil, Equatorial Guinea, Iraq and Kazakhstan<sup>3</sup> (the company settled with the Dutch Public Prosecutor's Office with respect to related conduct in 2014, and the DOJ 'credited [the company's] payment of penalties to the [Dutch Public Prosecutor's Office] and the payment of penalties likely to be paid to the Brazilian Ministério Público Federal');
- a Singaporean oil and gas services company and its wholly owned US subsidiary, which, in December 2017, agreed to pay a combined total penalty of over US\$422m to resolve charges with US, Brazilian and Singaporean authorities in connection with a scheme to bribe Brazilian officials;<sup>4</sup> and
- a French global financial institution and its wholly owned subsidiary agreed to pay a combined total of over US\$1bn to US and French authorities in June 2018, of which US\$585m relates to FCPA charges. The financial institution admitted paying an intermediary over US\$90m, a portion of which the intermediary then paid to Libyan officials to secure investments from the Libyan state for the financial institution. (The remainder of the penalty relates to charges of misconduct in US\$ and Japanese yen LIBOR submissions, which is unrelated to the FCPA case.<sup>5</sup>)

2. Telia Company AB global resolution dated 21 September 2017.

3. SBM Offshore NV deferred prosecution agreement entered into with the DOJ dated 27 November 2017.

4. Keppel Offshore & Marine Ltd global resolution dated 22 December 2017.

5. Société Générale SA global resolution dated 4 June 2018.

# United States

In calculating the fines, US authorities credited the amounts paid, or likely to be paid, to authorities abroad – a practice that, as of May 2018, is the crux of a new DOJ Policy on Co-ordination of Corporate Resolution Penalties ('Co-ordination Policy'). The Co-ordination Policy, which has been incorporated into the US Attorneys' Manual (and is discussed more thoroughly in our Introduction), is aimed at enhancing the DOJ's 'relationships with [its] law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties', per DAG Rosenstein. The Co-ordination Policy is likely to have significant implications for FCPA actions where there is a particular risk of parallel investigations by multiple anti-corruption authorities that can lead to large, co-occurring corporate penalties.

With an ever-growing list of public statements praising co-operation with, and assistance from, agencies and law enforcement worldwide, cross-border co-ordination and co-operation will continue to increase for the foreseeable future.

## Individual accountability

Individual accountability has remained a cornerstone of recent FCPA enforcement, from continued application of the DOJ's 2015 Memorandum on Individual Accountability for Corporate Wrongdoing (also known as the 'Yates Memorandum') to the SEC Enforcement Division's expectation that it 'will continue to have intense focus on the question of individual responsibility in every FCPA investigation'. Speaking more generally, one DOJ official predicted a 'record year' for individual prosecutions

(with charges filed or unsealed for over two dozen individuals), and the SEC's 'Division of Enforcement considers individual liability in every case it investigates; it is a core principle of our enforcement program'.

With a number of individual FCPA actions in the pipeline, the months ahead are primed to remain focused on the individuals alleged to have participated in foreign corrupt practices.

## Alternative resolutions

On 29 November 2017, the DOJ issued its FCPA Corporate Enforcement Policy (the 'Policy'). The Policy, codified in the US Attorneys' Manual, revises and perpetuates the FCPA 'Pilot Program' adopted in 2016, reflecting the DOJ's ongoing effort to provide greater clarity and predictability regarding the benefits that companies can expect to receive if they self-report evidence of misconduct, co-operate fully with DOJ investigations and undertake appropriate remediation.

Although the new Policy is largely consistent with the original Pilot Program, and also builds upon a longer record of DOJ enforcement, it contains several important statements. Most notably, the Policy establishes a presumption that the DOJ will decline to prosecute companies that voluntarily self-report potential FCPA violations, provide full co-operation and engage in timely and appropriate remediation. In order to qualify for a declination under the Policy, companies will also be required to give up any misconduct-derived benefit, via disgorgement, forfeiture or restitution.

This Policy (about which we have written in greater detail [here](#)), in conjunction with the DOJ's February 2017 guidance in Evaluation of Corporate Compliance Programs describing general features of an effective compliance programme, provides guidance to companies looking both to avoid FCPA-related prosecution and to resolve FCPA matters through alternative means.

In April 2018, the DOJ issued its first official declination under the Policy (this follows seven other declinations announced under the Pilot Program) to a data analytics company, noting the company's 'prompt voluntary self-disclosure'; identification of the relevant misconduct and 'thorough investigation'; 'full cooperation'; enhancement of its compliance programme and internal accounting controls; 'full remediation'; and payment of disgorgement to the SEC.<sup>6</sup> (By comparison, later that month, an aviation solutions company agreed to pay a US\$137.4m penalty, and to retain an independent corporate compliance monitor, as part of a deferred prosecution agreement with the DOJ where the company did not voluntarily self-disclose the relevant conduct in a timely manner,<sup>7</sup> although the company did receive credit for its co-operation and remediation.)

DOJ officials have indicated that the DOJ will look to the Policy as non-binding guidance in other criminal cases that do not involve alleged violations of the FCPA. For example, on 1 March 2018, the DOJ closed its investigation of a bank in a fraud matter with a declination letter in light of the bank's voluntary self-reporting, co-operation, remediation and payment of restitution, demonstrating the DOJ's apparent willingness to apply the approach set out in the Policy to other criminal laws and forms of misconduct.

6. Declination letter issued to The Dun & Bradstreet Corporation by the DOJ dated 23 April 2018.

7. Panasonic Avionics Corporation deferred prosecution agreement entered into with the DOJ dated 27 April 2018.

# Asia and Asia Pacific



# Australia

## **| New corporate offence of failure to prevent foreign bribery, higher penalties and introduction of DPAs being considered following uptick in enforcement**

Australia has recently shown an increased focus on anti-bribery and corruption enforcement, which we expect to be further strengthened this year with new foreign bribery offences.

A bill is currently making its way through parliament that would introduce a new corporate offence, in some respects similar to section 7 of the UKBA, of failing to prevent associates bribing foreign officials – unless the company can show it had adequate prevention procedures (Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017). The proposed penalties for such an offence are significant, with the maximum proposed penalty the greater of 100,000 penalty units (approx AUS\$21m), three times the benefit obtained from the bribe, or 10 per cent of the company's annual turnover if the benefit cannot be calculated.

The law, if passed, would also make a number of changes to Australia's existing foreign bribery laws, which could potentially lower the bar for prosecution by:

- removing the requirement that the foreign public official be influenced in the exercise of their official duties (only that the intention was to improperly influence the official); and
- extending the offence to cover any advantages, rather than limiting it to business advantages.

The bill also seeks to introduce the concept of deferred prosecution agreements (DPAs) into Australian law. Under the proposals, the Director of Public Prosecutions may agree a DPA with a company (but not individuals) in relation to certain economic crimes – with the final agreement subject to the approval of an 'approving officer' (usually a retired judge or another suitable candidate whom the Minister of Justice will appoint for a defined period).

As in other jurisdictions, the proposed DPA regime offers companies the prospect of reaching a negotiated resolution with prosecutors to avoid a prosecution and trial. Australian authorities will no doubt, in due course, seek to use the prospect of a DPA to encourage more companies to self-report and co-operate in bribery investigations.

## **| Australian prosecutors set out guidelines for dealing with companies that self-report foreign bribery**

On a related note, in December 2017, the Australian Federal Police and Commonwealth Department of Public Prosecutions released [best practice guidelines](#) setting out the principles they will apply when a company self-reports suspected bribery or related offences. The guidelines recognise that prosecuting a company that self-reports foreign bribery and co-operates with the investigation may not be in the public interest, even if there is a reasonable prospect of conviction.

# China

## **| New anti-corruption authority may lead to more enforcement as crackdown on graft continues**

China has created a new supra-agency, the National Supervision Commission (NSC), to institutionalise its anti-corruption measures.

In March 2018, China inserted a new chapter in its Constitution and passed a National Supervision Law to introduce the new agency. The NSC will consolidate anti-corruption powers that were previously divided among three agencies: (i) the Communist Party's Central Commission for Discipline Inspection, which had wide latitude to investigate Party members according to Party rules; (ii) the Supervision Ministry under the State Council, which supervised civil servants; and (iii) the procuratorates, which investigated and prosecuted bribery and corruption cases. The NSC is to function independently of other state agencies.

Broadly speaking, the NSC will monitor misconduct by everyone who performs 'official duties'. That would include not only staff of legislatures, governments, courts and procuratorates, but also managers of state-owned enterprises, public hospitals and public educational and cultural institutions. Note that not *all* employees of state-owned enterprises, teachers at public schools or doctors at public hospitals are considered 'government officials' in China. Only a small number of people working at these entities (likely managers) would be considered to be performing official duties under Chinese law and thus fall under the NSC's jurisdiction.

The NSC will have formidable powers. During investigations, the commission will have the power to question witnesses, interrogate and detain suspects, freeze assets and search premises. Most notably, the NSC can detain a suspect for up to six months. Such detention is allowed for both bribe-takers (likely officials) and bribe-givers (possibly someone in the private sector). The new law establishes a few safeguards against the abuse of the NSC's powers: for example, detention can only be used in specified circumstances (eg if the suspect is a flight risk), and all interrogations must be recorded. But some commentators are still concerned about possible abuse of the NSC's power, especially given the detainees' limited access to lawyers.

The creation of this new agency is not a surprise. China started the pilot reform of the supervisory system in a few provinces in December 2016, and then expanded it nationwide in November 2017. Now that NSC and its local counterparts are set up, China will amend relevant laws, including the Criminal Procedure Law, to reflect this major reform to the anti-corruption regime.

## **| Commercial bribery in focus: laws have become tougher and enforcement has increased**

On 1 January 2018, China's commercial bribery regime became tougher through amendments made to the Anti-Unfair Competition Law (AUCL).

The amendments now expressly prohibit bribery of third parties who can influence a transaction (for example, doctors who may be able to influence the use of certain products by their patients or hospitals).

The law now expressly provides that a company may be found liable for bribery carried out by its employees unless the company can establish that the employee was not acting to gain business opportunities or other competitive advantages for the company.

Administrative fines for commercial bribery have also increased, with the maximum now RMB 3m (approx US\$470,000). This is in addition to the confiscation of any illegal profit obtained. Where the offences are serious, the authority can revoke a company's business licence.

Following these amendments, the authorities will now have to publicly disclose any penalties levied, which not only increases reputational risk for the company involved, but may also affect the company's ability to bid for government-funded projects.

**Continued**

# China

The amendments have also strengthened the investigatory powers of the authorities. For example, when investigating commercial bribery, the authorities can now seek to freeze assets and obtain banking information. But the new powers are subject to procedural safeguards (eg approval must be sought from designated senior officials by way of a written report).

The AUCL allows victims of commercial bribery (likely to be competitors of the offenders) to commence civil actions and claim for damages. The amendments clarify how any compensation should be calculated. Usually, this will be by reference to the victim's actual losses. But if the actual losses cannot be calculated, the compensation amount will be based on the benefits obtained by the offender. And, if such benefits cannot be calculated, the compensation will be at the discretion of the authorities but, in such cases, it will not be higher than RMB 3m (approx US\$470,000).

These changes to commercial bribery laws in the AUCL follow an uptick in enforcement in this area by Chinese authorities in recent years. Since 2016, several international manufacturing companies have paid administrative fines and disgorgement for violating the AUCL by paying 'improper benefits' that damage fair competition or competitors' business opportunities.

With these changes to the AUCL, it is likely such enforcement will continue apace.

# Hong Kong

## **ICAC active in investigating corruption following high-profile prosecutions of officials and business people in recent years**

In recent years, the Independent Commission Against Corruption (the ICAC) has brought a handful of high-profile cases against senior government officials and well-known members of the business community.

According to the ICAC Commissioner, in 2017, the ICAC received 2,835 corruption complaints (excluding election-related complaints), with approximately two-thirds of the complaints concerning the private sector and approximately one-third relating to various government departments and public bodies. Further, in 2017, 189 individuals in 93 cases were prosecuted for non-election corruption offences, resulting in a conviction rate of around 80 per cent – although only a small number of these were high-profile cases.

In a speech in February 2018, the Commissioner noted the agency continues with a ‘three-pronged’ strategy of enforcement, prevention and education. In terms of inter-agency collaboration, the Commissioner also confirmed that in a recent investigation concerning a listed company, the ICAC conducted a joint operation with the Securities and Futures Commission. The ICAC is also active in co-ordinating with authorities in Mainland China, among others.

# India

## **Follow-on investigations increasingly common in India**

The Indian authorities have opened several investigations following enforcement action in the US or Europe that relate to alleged misconduct in India. The Central Vigilance Commission and the Central Bureau of Investigation have, for example, actively sought information from their counterparts abroad on investigations relating to large companies in the engineering, construction, aerospace and consumer goods sectors.

Of particular note is the case of a US engineering and construction company that, in June 2017, agreed a ‘declination with disgorgement’ with the US DOJ under the then FCPA Pilot Program. The US DOJ found the company’s Indian subsidiary<sup>8</sup> had paid ‘bribes’ to Indian officials, but the US DOJ closed its investigation without prosecuting because the company had self-disclosed the matter, co-operated with the investigation, took remedial measures and agreed to pay over US\$4m in disgorgement.

According to media reports, an investigation into the company in India followed this announcement – the results of which are still pending. While the outcome of this case remains to be seen, this does highlight the risks of follow-on investigations for companies that choose to self-report in their home jurisdiction. Prosecutorial co-operation across borders is increasing. But, as this case demonstrates, such co-operation does not always result in a single, co-ordinated resolution that allows a company to draw a line under the issue in all jurisdictions.

8. Declination letter issued to Linde North America Inc and Linde Gas North America LLC by the US DOJ dated 16 June 2017.

# Indonesia

## **| First company named as a suspect by Indonesian authorities in a corruption case**

In July 2017, Indonesia's Corruption Eradication Commission named a company as a suspect in a corruption case for the first time. The company is a publicly listed construction firm with links to a government official.

Corporate criminal liability has long existed in Indonesia, but corporate entities have not, until this case, been targeted in corruption investigations.

This follows a regulation issued by the Indonesian Supreme Court in 2016 (Regulation 13/20160) that clarified how companies could be found liable for certain crimes, including corruption, and sought to address certain procedural hurdles that had previously existed in bringing cases against companies.

# Japan

## **| A new plea bargaining system for Japan may impact bribery investigations**

A plea bargaining system will be introduced in June 2018 in relation to crimes such as certain antitrust violations, fraud, bribery and tax evasion.

Under the new system, a prosecutor can agree with a suspect or a defendant (collectively referred to here as the suspect) that the prosecutor will not charge the suspect, will revoke a charge against the suspect or will undertake another action and, in return, the suspect will provide testimony and/or evidence of certain types of crime committed by another individual or company. This provides an incentive to companies, as well as individuals, to provide information about tax, bribery or antitrust violations of others in return for lesser penalties.

This new plea bargaining system does not allow companies or individuals to negotiate lesser penalties through self-reporting only their own misconduct – the information given to the authorities must relate to another participant.

# Singapore

## **| With the introduction of DPAs, Singapore may see more anti-corruption enforcement against companies**

On 19 March 2018, the Singapore parliament passed the Criminal Justice Reform Act, which, among other things, enacts a framework for deferred prosecution agreements (DPAs) into the current Criminal Procedure Code. The new law largely copies provisions from the UK DPA regime, with a few key differences: (i) Singapore DPAs will apply to far fewer criminal offences; and (ii) the law does not require Singapore prosecutors to issue guidelines on when a DPA is appropriate. In keeping with historical practice, Singapore is unlikely to issue such guidelines on the exercise of prosecutorial discretion.

Nearly identical to the UK legislation, the Singapore law includes provisions on (i) persons who may enter into a DPA (corporates, but not individuals); (ii) court approval if the DPA is 'in the interests of justice' and the terms are 'fair, reasonable and proportionate'; (iii) breach; (iv) variation of terms; (v) expiry; (vi) publication of information (the DPA, a statement of facts and the court approval will all be made public); (vii) use in criminal proceedings; and (viii) the use of money received.

Crimes that will qualify for DPA consideration include Singapore's primary corruption, money laundering and receipt of stolen property offences, but not the primary fraud offence of cheating.

It is worth noting that, at this time, Singapore has not proposed any amendments to the standard for corporate criminal liability, which has closely followed the English common law 'identification principle'. Under this doctrine, at least one individual who is sufficiently senior to be considered the company's 'directing mind and will' must have had the relevant criminal intent for the criminal acts to be attributed to the company. That could present a huge hurdle for prosecutors wanting to use the new DPA regime where a company seeks to challenge corporate attribution. Companies should not readily agree to a DPA in Singapore without giving serious consideration to whether prosecutors could actually make their case without consent. On the other hand, this may signal that further amendments to the Penal Code are coming later this year, which may include new corporate criminal attribution rules.

The introduction of DPAs follows the December 2017 announcement that the Singapore Attorney General, as part of a resolution led by the US DOJ, had served a Singapore oil and gas services company with a conditional warning in lieu of prosecution for corruption offences. The company was ordered to pay over US\$105m to Singapore. This was part of a combined penalty of US\$422m agreed with authorities in the US, Brazil and Singapore to resolve charges the company had paid bribes to officials in Brazil.<sup>9</sup>

This case represents the first such joint corporate resolution by Singaporean authorities and may signal a new direction for anti-corruption enforcement in Singapore – particularly given the subsequent introduction of DPAs to resolve such matters.

9. Keppel Offshore & Marine Ltd global resolution dated 22 December 2017.

## South Korea

### **| Prosecutors continue to investigate corruption at the highest levels of politics**

South Korean prosecutors continue to probe the affairs of senior government officials, including five former presidents, arising from allegations of corruption and influence-peddling that have implicated a number of large companies. In a related investigation, the head of one of South Korea's most prominent global tech companies was convicted of paying bribes worth nearly US\$3m.

### **| Court interpretation of anti-corruption laws underlines how strict the anti-graft rules are**

The Anti-Corruption and Bribery Prohibition Act is now in its second year, and we are starting to see cases coming through the courts regarding its interpretation. For example, it was held that a gift of cookies – worth under KRW 50,000 (approx US\$40) – violated the anti-bribery law as they were given in direct connection with the public official's official duties. The individual and the company were each fined less than US\$20 each. Another court held that provision of certain benefits in connection with a movie seminar was permissible because, among other reasons, the company had offered the benefits uniformly to all participants, which cut across a range of industries.

## Vietnam

### **| Changes to the Criminal Code extend bribery offences to individuals in private sector and introduce corporate criminal liability for related offences**

On 1 January 2018, changes to Vietnam's Criminal Code took effect that prohibit individuals with 'positions and/or powers' in the private sector from offering or accepting bribes to induce a person to act for the benefit of the offeror. The bribery of public officials is also prohibited (as it had been even prior to the new Criminal Code).

Bribes include money, property and other benefits worth more than VND 2m (approx US\$90). Payments via intermediaries are also caught.

It has also now become an offence in Vietnam for an individual to bribe a foreign official (previously the law only dealt with the bribery of domestic officials).

Commercial entities may also now face criminal liability for certain economic crimes that are often related to bribery – such as tax evasion and money laundering.

# Europe



## Austria

### High-profile cases alleging corruption in real estate sector continue

In recent years, the Public Prosecutor's Office against White Collar Crime and Corruption (WKStA) has commenced a number of investigations into public officials for corruption. These include:

- investigations commenced in early 2017 against 32 employees of a public real estate company owned by the City of Vienna. The WKStA alleges the employees took bribes from multiple construction companies. In turn, the construction companies are accused of engaging in deceptive business practices by charging the public company fees for works that were never carried out or were overpriced; and
- investigations commenced in March 2018 against three officials of the Federal Office for the Protection of the Constitution and Counterterrorism (BVT), which represents the intelligence agency of the Austrian police. They are accused of misusing data and embezzlement.

Finally, following an eight-year investigation, several individuals, including senior ex-politicians, are now on trial in the high-profile 'BUWOG' case. The individuals are accused of embezzlement and making/receiving improper commission payments in relation to the privatisation of a state-owned real estate company.

## Belgium

### Belgium still to implement various GRECO recommendations

In April 2018, GRECO (the Council of Europe's Group of States Against Corruption initiative) published an interim compliance report noting Belgium had not satisfactorily implemented seven of the 15 recommendations set out in GRECO's 2014 evaluation of Belgium. Most of the remaining recommendations have only been partly implemented. The recommendations related largely to anti-corruption measures to ensure transparency and integrity within parliament and the judiciary.

### Belgian former vice-president of senate indicted over allegations of bribery to expedite criminal proceedings

A former Belgian minister and vice-president of the senate has been indicted for influence peddling in a multinational corruption probe concerning kickbacks allegedly paid in a trade deal between France and Kazakhstan. The former senate vice-president, who acted as a lawyer while in office, allegedly used his political influence to expedite a judicial settlement for his client, a Belgian-Uzbek businessman. While such settlement was enabled by, and one of the first following, an amendment to the law, the indictment does not target influence-peddling with respect to the legislative process surrounding the introduction of that law. Rather, it is restricted to alleged attempts by the senate vice-president to influence, among others, the ministers of justice and internal affairs to obtain and expedite a settlement for his client. According to the investigators, resolving the pending criminal prosecution in Belgium was a Kazakh condition to the trade agreement with France, and the Belgian politician was paid a large sum to render a solution.

# France

## First DPA-style agreements concluded indicate prosecutors' approach to such resolutions

In February 2018, French prosecutors entered into the first French-style deferred prosecution agreements (DPAs) related to bribery. The agreements settled corruption charges between the Public Prosecutor's Office and two French companies.<sup>10</sup> The agreements anticipate separate enforcement actions against individuals – indicating French prosecutors' willingness to pursue individuals as well as the companies involved. The agreements conclude investigations dating back to 2011 relating to contracts with a state-owned entity.

The companies agreed to pay a financial penalty made up of a fine and disgorgement, as well as pay compensation to the state-owned entity involved.

The level of the fines to be paid was adjusted based on several factors. Aggravating factors included the duration of the bribery scheme, which ran for several years. Mitigating factors included the companies' co-operation with the investigations, improvements to their compliance programmes and other remedial action, such as the firing of certain managers.

As part of the agreements, the French anti-corruption agency (Agence française anticorruption or AFA) will monitor the companies' compliance programmes (for 18 months/two years).

DPA-style agreements were introduced into French law in December 2016 through what is commonly known as the Sapin II Law. The first French-style DPA was entered into between the French Financial Prosecution Department and a Swiss subsidiary of an international bank in November 2017. The €300m agreement resolved charges of fraudulent direct selling of banking and financial products and aggravated laundering of tax fraud proceeds.

## First co-ordinated resolution between US and French authorities in a foreign bribery case

In June 2018, a French global financial institution agreed to pay a combined total penalty of US\$585m to settle charges arising from corrupt payments made by an intermediary to Libyan officials to secure investment business from the Libyan state. Under its agreement with the financial institution, the US DOJ agreed to credit the US\$292,776,444 that the financial institution will pay to the Parquet National Financier (PNF), which is equal to 50 per cent of the total criminal penalty otherwise payable to the US in relation to the FCPA charges. This is the first co-ordinated resolution between French and US authorities in a foreign bribery case.<sup>11</sup>

## French anti-corruption agency provides guidance on Sapin II compliance

Following a public consultation, on 22 December 2017 the AFA released formal guidance on anti-corruption compliance programmes as required by Sapin II ('Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism').

These guidelines, although non-binding, are closely monitored by the AFA and are inspired by international standards – so much of the content will be familiar to those used to dealing with similar guidance issued in relation to the FCPA or the UKBA.

Among other things, the guidelines set out the AFA's expectations of companies regarding third-party due diligence, risk-mapping and codes of conduct.

Of particular note is the scope of the guidelines. Even though the duty of compliance set out in Sapin II relates only to organisations that meet certain thresholds in terms of their size, the guidelines are aimed at a wide range of legal entities established in France – either public or private – including French subsidiaries of foreign groups. The guidelines also apply to all the aforementioned entities regardless of where they operate – including abroad – when they are not subject to more demanding anti-corruption provisions.

10. Agreements (*Conventions Judiciaire d'Intérêt Public*) entered into in February 2018 between the Public Prosecutor's Office of Nanterre and Kaeffer Wanner and Set Environnement, respectively.

11. Société Générale SA global resolution dated 4 June 2018.

## Germany

### German enforcement authorities actively investigating bribery

German prosecutors are investigating a number of bribery and corruption matters. One long-standing investigation into the sale of defence planes to Austria concluded in February 2018 with the company in question agreeing to pay a €250,000 fine and €81m disgorgement in Germany.

German prosecutors said they found no evidence Austrian officials were bribed, but they nonetheless alleged certain payments breached internal controls and represented a negligent breach of duty under Germany's Criminal Code. The company agreed to pay a penalty to resolve this matter without any admission of wrongdoing.

In another matter, a German technology company resolved an investigation in 2017 into alleged bribes in Greece and Peru by agreeing to pay a €48m forfeiture order.<sup>12</sup>

12. Agreement between the Bremen Prosecutor's Office and Thyssenkrupp's Atlas Elektronik GmbH.

## Ireland

### Parliament passes new corruption law broadening the definition of bribery and increasing potential for corporate criminal liability

The Criminal Justice (Corruption Offences) Bill 2017 has been passed by both houses of the Irish parliament.

Once in force, a company may be found liable for bribery carried out by its officers, employees, agents or subsidiaries – where such persons are acting to obtain or retain business or a business advantage for the company – unless the company took all reasonable steps and all due diligence to avoid the bribery. The new law will also increase the risk that company management could face personal criminal liability for bribery where the bribery is carried out with the officer's consent or connivance, or was attributable to any wilful neglect on the part of the officer.

The breadth of the offences will also be expanded. For example, the definition of 'corruptly' will be expanded to include acting with an improper purpose personally or by influencing another, whether by (i) making a false or misleading statement; (ii) withholding information; or (iii) by other means.

The law will introduce new offences such as giving a gift or advantage that the giver knows or ought to know will be used to facilitate bribery. Another new offence it will introduce is corruptly creating or using a false document – where someone knows or is reckless as to whether the document contains a statement that is false or misleading and is intended to induce a person to perform an act, in relation to his or her office, to his or her own prejudice or the prejudice of another.

The new law will have broad extraterritorial reach, so that a person may be tried in Ireland for certain corruption offences committed abroad where those actions would constitute an offence if committed in Ireland.

## Italy

### Major energy companies and individuals face trial in Italy for alleged corruption in Nigeria

Two oil and gas majors (from Italy and the Netherlands) are being prosecuted in Italy, along with several individuals, on bribery charges. The case relates to the companies' 2011 purchase of a Nigerian offshore exploration and production block.

Authorities allege that the money paid by the companies in 2011 was illegally paid on to various individuals and companies associated with ex-government officials. The defendants are contesting the charges.

Prior to 2011, the block had been the subject of various litigation and arbitration cases. The defendant companies assert that the onward payments were part of a separate agreement between the government of Nigeria and the other parties (including a company associated with an ex-minister for petroleum) to settle prior claims on the block.

The Italian courts may assert jurisdiction over foreign bribery cases, including those involving foreign companies, where some part of the alleged unlawful conduct occurred in Italy.

## The Netherlands

### Dutch prosecutors continue to work with their US counterparts resulting in multimillion-dollar fines

Over the past five years, Dutch prosecutors have resolved several foreign bribery investigations with multimillion-dollar, out-of-court settlements. Some, but not all, have been co-ordinated with the US.

In the most recent example, in 2017, a Swedish telecommunications provider and its Uzbek subsidiary agreed to pay US\$965m in a co-ordinated resolution with the Public Prosecution Service of the Netherlands (Openbaar Ministerie, the 'OM'), the US DOJ and the SEC to resolve foreign bribery charges related to business in Uzbekistan. Under the terms of its resolution with the SEC, the company agreed to pay US\$457m in disgorgement of profits and prejudgment interest, and the SEC agreed to credit any disgorged profits the company paid to the Swedish Prosecution Authority or the OM.<sup>13</sup>

Through this and other major cases, the OM has sought to send a clear message to the business community: international companies based in the Netherlands (including those based there for tax or financing reasons) must adhere to Dutch anti-bribery laws when trading abroad.

It is clear the OM is not a light touch. Changes to the Dutch Criminal Code in 2015 increased the maximum penalties for corruption to 10 per cent of turnover for legal persons guilty of foreign bribery or false accounting.

13. Telia Company AB global resolution dated 21 September 2017.

# Russia

## Proposed amendments to Code of Administrative Offences to encourage self-reporting and co-operation in bribery cases

The Russian parliament is considering amendments to the Russian Code of Administrative Offences. Under the Code, companies may be liable for domestic and foreign bribery (either public or private) carried out by those acting on the entity's behalf. Under the proposed amendments, companies may be able to avoid liability for domestic bribery if they can show they assisted in the investigation of the bribery (including making a report to the authorities) or if the bribe was extorted.

This leniency would not be applicable to bribery of foreign officials and officials of public international institutions connected with commercial transactions.<sup>14</sup>

Currently, an adequate compliance programme may be helpful in mitigating corporate liability for administrative offences under the Code, but there is no mechanism to self-report and co-operate with an investigation in return for leniency. These proposed amendments would open up that possibility, although it remains to be seen how, if passed, this would work in practice.

Under the proposed amendments, companies under investigation could also see their assets frozen up to the maximum amount of any potential fine. This would be a significant risk for companies to consider when weighing up the potential benefits of self-reporting.

We will continue to monitor these proposals.

## Criminal liability in the sphere of public procurement

In early May 2018, new provisions introducing criminal liability for misconduct in the sphere of public procurement came into force.

Under the new provisions, the following may give rise to criminal liability: (i) deliberate violation of public procurement legislation by a person acting on behalf of a public customer to satisfy any material or other personal interests (provided that the inflicted damage exceeds the statutory threshold of RUB 2.25m (approx US\$37,500)), (ii) bribery of such persons; and (iii) inciting bribery of such persons. The range of sanctions includes criminal fines, imprisonment and prohibitions from exercising certain activities and/or occupying certain positions.

In certain instances, a bribe-giver may avoid criminal liability for the bribery where such individual actively provides assistance in the investigation (including reporting to the authorities). The bribe-giver may also avoid liability if the bribe was extorted.

14. A **foreign official** is defined as an appointed or elected person who holds office in a legislative, executive or judicial body of a foreign state and any person exercising any public function for a foreign state, including for a public department or a public enterprise. An **official of a public international organisation** is defined as an international civil servant or any other person who is authorised by such international organisation to act on its behalf.

## Spain

### **Spain's anti-corruption enforcement continues to largely focus on domestic issues, despite last year's first foreign bribery convictions**

Spanish authorities are continuing to address allegations of domestic corruption, with little foreign bribery enforcement. According to TRACE International's *Global Enforcement Report*, Spanish authorities were not carrying out any foreign bribery investigations as at 31 December 2017.

This follows a trend of low levels of enforcement in Spain – at least in terms of foreign bribery. It was not until 2017 that Spanish prosecutors secured their first convictions for bribery of a foreign official when two executives of a publishing company pleaded guilty to bribing a minister from Equatorial Guinea to secure contracts for their company with the country's education ministry. The company itself was not part of the proceedings. The conduct took place before corporate criminal liability was introduced into the Spanish Criminal Code in 2010.

## Switzerland

### **Switzerland one of the most active prosecutors in Europe in ongoing foreign bribery investigations**

According to TRACE International, Switzerland was the third-most active enforcement agency in Europe in terms of ongoing foreign bribery investigations as at 31 December 2017. Only the UK and Germany had more ongoing investigations in Europe.

This is perhaps unsurprising given that some of the most high-profile international bribery cases of recent years have involved allegations that the Swiss financial system has been used to transfer illicit money related to the bribery in question. These include FIFA, Petrobras and 1MBD matters, to name a few. In light of this, Swiss prosecutors have been actively co-ordinating with counterparts in a number of jurisdictions, including the US.

# United Kingdom

## Following some debate, SFO future looks secure but changes at the helm are imminent

Debate about the future of the Serious Fraud Office (SFO) had been rumbling on for some years – and the agency’s future was the subject of a formal government review in 2017. However, the December 2017 National Anti-corruption Strategy made clear that the agency will remain in its current form, at least for the foreseeable future.

With a new permanent director taking the helm in September 2018, it remains to be seen if there will be any significant changes in the agency’s approach to bribery and corruption enforcement.

For now, the SFO is busy with a number of ongoing foreign bribery investigations – about half of which are in the energy sector. That said, the SFO does not have a specific sector focus – recently concluded and ongoing bribery investigations have cut across sectors (eg pharma, fast-moving consumer goods, banking, aerospace and shipping).

## SFO challenged on its approach to privilege and its power to compel production of overseas data

The SFO has been the subject of two recent judicial review applications – both arising in the context of foreign bribery investigations and both likely to have an impact on the SFO’s approach to such investigations.

In the first, [an individual brought a claim for judicial review of a decision by the SFO](#) not to pursue a company, XYZ Ltd, for breach of the duty of co-operation under a deferred

prosecution agreement on the basis that the company refused to provide external lawyers’ notes of initial interviews with then-current employees.

The High Court ultimately dismissed the claim for judicial review since the claimant had not exhausted all available remedies before the Crown Court. However, in the 40-page judgment, the court also made plain its view that the SFO had not complied with its duty, as a prosecuting authority, to take further steps to obtain the interview notes so that they may be disclosed in the criminal proceedings against the individual in accordance with the defendant’s Article 6 right to a fair trial.

In response to this case, the SFO will likely take a more robust position towards companies who claim privilege over first interview notes and is unlikely to agree to accommodate alternative arrangements, such as oral proffers.

In the second case, a decision on which is still pending, a US-based construction company (whose UK subsidiary is the subject of an ongoing bribery investigation) challenged [the SFO’s powers to compel an overseas entity to provide overseas data to the SFO](#).

Under section 2 of the Criminal Justice Act 1987, the SFO has the power to serve a notice on any person requiring them to produce documents relevant to the subject matter of an SFO investigation, although the territorial scope of these powers has been the subject of some debate.

With this latest judicial review of the SFO’s actions pending, we may be about to get some welcome clarity on the jurisdictional scope of these powers – at least as they relate to overseas entities.

## Adequate procedures finally tested at trial in a relatively small domestic bribery case

The adequate procedures defence in section 7 of the UKBA – the corporate offence of failing to prevent bribery – has finally been put to the test in a contested trial against a small UK office interiors company. The defendant company had, at the time, 30 employees and operated out of an office that was no bigger than the courtroom

The company<sup>15</sup> called evidence of its anti-bribery controls, including that it had a policy which required employees to act honestly and ethically, financial controls over invoice payments, and anti-bribery clauses in contracts with third parties. It also produced evidence that the relevant individual understood bribery should not be used. The jury’s verdict signals they did not accept that those measures amounted to adequate procedures in this case.

As a jury is not required to give reasons for its decision to convict, the precise rationale for this decision remains unclear. However, the company’s reliance on a generic ethics policy (rather than having in place specific anti-bribery policies) and its reliance on an overall understanding that people should not pay bribes (rather than evidence of specific training on this) could well have been factors that weighed against the company.

This was an unusual case for the prosecution (which was the Crown Prosecution Service and not the SFO) to choose as a ‘test’ case: the company had self-reported and, at the time of trial, it was dormant and had no assets. Given the company was dormant and could not pay any financial penalty, the only sentence available to the court was to impose an absolute discharge.

# Middle East and Africa



# Israel

## Following first indictment of an Israeli company for foreign bribery, Israel opens several new investigations

After many years of failing to take any significant action on foreign bribery, there has been a flurry of recent enforcement activity in Israel. In January 2018, an Israeli pharma company agreed with Israeli authorities to pay US\$22m after admitting it paid bribes to officials in Russia, Mexico and Ukraine. This followed a 2016 resolution with US authorities where the company and its Russia subsidiary agreed to pay US\$520m to resolve charges it violated the FCPA.<sup>16</sup>

One of Israel's largest construction companies is currently in the spotlight over allegations of bribery relating to infrastructure projects in Africa. Israeli police are investigating the allegations, and the company is the subject of a parallel audit by the Integrity Vice Presidency of the World Bank in relation to projects in Kenya.

## Senior political figures at the centre of major domestic bribery allegations

The prime minister is at the centre of a major corruption investigation that has rocked Israel. The prime minister's dealings are being scrutinised in at least three separate corruption probes, including one related to the telecoms sector – with Israeli police pursuing charges of bribery and related offences against him.

16. Conditional Agreement between the Office of Israel's Tax and Economic Prosecutor and Teva Pharmaceuticals Industries Ltd.

# South Africa

## **Several major multinationals in the spotlight in 'state capture scandal'**

A judicial commission has been established to investigate allegations of corruption within multiple state-owned entities and purported links between those entities and an Indian family, the Guptas, who are accused of using their close relationship with South Africa's former president to secure lucrative public contracts. The issue has been colloquially referred to as 'state capture'.

Several multinational companies have also faced allegations of wrongdoing, as business partners of, or as service providers to, either the Guptas or the state-owned entities alleged to have been 'captured' by the Guptas. Criminal charges have been filed against the local units of international auditors, management consultants and software companies.

Investigations are ongoing.

## **New law being considered to make clear the facilitation of payments is an offence and provide some comfort for those reporting suspicions of corruption**

The December 2017 draft Prevention and Combating of Corrupt Activities Amendment Bill is waiting to be introduced into parliament. This draft bill proposes to amend the definition of gratification to expressly include 'the facilitation of payments' as an offence in addition to giving and receiving gratifications (although these payments are already illegal based on an interpretation of the Prevention and Combating of Corrupt Activities Act (PRECCA) in any event).

Facilitation of payments includes any payment made to a public official, a foreign public official or any third party that acts as an incentive for the official to complete some action or process expeditiously, or to provide the party making the payment or another party an unfair or unlawful advantage.

Further, the Financial Intelligence Centre Act, 2001 creates an important obligation on persons to report suspicious and unusual transactions and imposes extensive 'know your client' requirements on 'accountable institutions' as defined in the Act.

The recently proposed amendments to PRECCA also provide a degree of comfort for individuals required to file reports by seeking to provide that a person who bona fide files a report as contemplated in the terms of subsection 34(1) may not be held liable to any civil, criminal or disciplinary proceedings in respect of the content of such report.

In the proposed amendments, bona fide 'self-disclosure' may result in no criminal or civil liability.

# Contacts

For further information please contact one of the below or your local Freshfields contact.

## Global contacts



**Marius Berenbrok**  
Global Investigations Co-head  
E [marius.berenbrok@freshfields.com](mailto:marius.berenbrok@freshfields.com)



**Geoff Nicholas**  
Global Investigations Co-head  
E [geoff.nicholas@freshfields.com](mailto:geoff.nicholas@freshfields.com)



**Adam Siegel**  
Global Investigations Co-head  
E [adam.siegel@freshfields.com](mailto:adam.siegel@freshfields.com)

## Knowledge contacts



**Michelle Bramley**  
Global Head of Knowledge  
E [michelle.bramley@freshfields.com](mailto:michelle.bramley@freshfields.com)



**Caroline Doherty de Novoa**  
Senior Knowledge Lawyer,  
Global Investigations  
E [caroline.dohertydenovoa@freshfields.com](mailto:caroline.dohertydenovoa@freshfields.com)

We would be happy to talk to you in more detail about recent developments and global trends in this area, or about any issues involving corporate criminal risk and investigations.

With thanks to Daniel Cendan, Counsel in the New York office, Emily Feirman, Knowledge Lawyer in the New York office, and the other various Freshfields lawyers who assisted in the preparation of this update

# Related content

## **Bribery Watch: a tool to help you keep track of new anti-bribery and corruption laws.**

To answer our clients' questions, we developed Bribery Watch, an online summary and comparison of anti-bribery and corruption laws and enforcement activity across 150 countries. For more information, please speak to your local Freshfields contact.

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