Anti-Corruption Regulation 2018

Contributing editor
Homer E Moyer Jr

2018

GETTING THE DEAL THROUGH

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Miller & Chevalier

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Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

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Global overview

Homer E Moyer Jr
Miller & Chevalier Chartered

Corruption, including corruption of public officials, dates from early in human history and countries have long had laws to punish their corrupt officials and those who pay them bribes. But national laws prohibiting a country's own citizens and corporations from bribing public officials of other nations are a new phenomenon, less than a generation old. Over the course of the past 20 years, anti-corruption law has established itself as an important, transnational legal speciality, one that has produced multiple international conventions and scores of national laws, as well as an emerging jurisprudence that has become a prominent reality in international business and a well-publicised theme in the media.

This volume undertakes to capture the growing anti-corruption jurisprudence that is developing around the globe. It does so first by summarising national anti-corruption laws that have implemented and expanded the treaty obligations that more than 150 countries have assumed. These conventions oblige their signatories to enact laws that prohibit paying bribes to foreign officials. Dozens of countries have already done so, as this volume confirms. These laws address both the paying and receiving of illicit payments – the supply and demand sides of the official corruption equation – as well as mechanisms of international cooperation that have never before existed.

Second, this volume addresses national financial record-keeping requirements that are increasingly an aspect of foreign bribery laws because of their inclusion in anti-corruption conventions and treaties. These requirements are intended to prevent the use of accounting practices to generate funds for bribery or to disguise bribery on a company's books and records. Violations of record-keeping requirements can provide separate bases of liability for companies involved in foreign and domestic bribery.

Finally, because the bribery of a foreign government official also implicates the domestic laws of the corrupt official's country of the, this volume summarises the better-established national laws that prohibit domestic bribery of public officials. Generally not a creation of international obligations, these are the laws that apply to the demand side of the equation and may be brought to bear on payers of bribes who, although foreign nationals, may be subject to personal jurisdiction, apprehension and prosecution under domestic bribery statutes.

The growth of anti-corruption law can be traced through a number of milestone events that have led to the current state of the law, which has most recently been expanded by the entry into force in December 2005 of the sweeping United Nations Convention against Corruption (the UNCAC). Spurred on by a growing number of high-profile enforcement actions, investigative reporting and broad media coverage, ongoing scrutiny by non-governmental organisations (NGOs) and the appearance of an expanding cottage industry of anti-corruption compliance programmes in multinational corporations, anti-corruption law and practice is rapidly coming of age.

The US 'questionable payments' disclosures and the FCPA

The roots of today's legal structure prohibiting the bribery of foreign government officials can be traced to the discovery in the early 1970s of a widespread pattern of corrupt payments to foreign government officials by US companies. First dubbed merely 'questionable' payments by regulators and corporations alike, these practices came to light in the wake of revelations that a large number of major US corporations had used off-book accounts to make large payments to foreign officials to secure business. Investigating these disclosures, the US Securities and Exchange Commission (the SEC) established a voluntary disclosure programme that allowed companies that admitted to having made illicit payments escape prosecution, on the condition that they implement compliance programmes to prevent the payment of future bribes. Ultimately, more than 400 companies, many among the largest in the US, admitted to having made a total of more than US$300 million in illicit payments to foreign government officials and political parties. Citing the destabilising repercussions in foreign governments whose officials were implicated in bribery schemes – including Japan, Italy and the Netherlands – the US Congress, in 1977, enacted the Foreign Corrupt Practices Act (FCPA) that prohibits US companies and individuals from bribing non-US government officials to obtain or retain business, and provided for both criminal and civil penalties.

In the first 15 years of the FCPA's implementation, during which time the American law was unique in prohibiting bribery of foreign officials, enforcement was steady but modest, averaging one or two cases a year. Although there were recurring objections to the perceived impact that this unilateral law was having on the competitiveness of US companies, attempts to repeal or dilute the FCPA were unsuccessful. Thereafter, beginning in the early to mid-1990s, enforcement of the FCPA sharply escalated, and, at the same time, a number of international and multinational developments focused greater public attention on the subject of official corruption and generated new and significant anti-corruption initiatives.

Transparency International

A different type of milestone occurred in Germany in 1993 with the founding of Transparency International, an NGO created to combat global corruption. With national chapters and chapters-in-formation now in more than 100 countries, Transparency International promotes transparency in governmental activities and lobbies governments to enact anti-corruption reforms. Transparency International's annual Corruption Perceptions Index (CPI), which it first published in 1995, has been uniquely effective in publicising and heightening public awareness of those countries in which official corruption is perceived to be most rampant. Using assessment and opinion surveys, the CPI currently ranks 176 countries and territories by their perceived levels of corruption and publishes the results annually. In 2016, Denmark, New Zealand, Finland and Sweden, topped the CPI as the countries perceived to be the world's least corrupt, while Somalia, South Sudan, North Korea and Syria were seen as the most corrupt.

In 1999, Transparency International also developed and published the Bribe Payers Index (BPI), which is designed to evaluate the supply side of corruption by ranking the 28 leading exporting countries according to the propensity of their companies to not bribe foreign officials. In the most recent BPI, published in 2011, Dutch and Swiss firms were seen as the least likely to bribe, while Russian, Chinese and Mexican firms were seen as the worst offenders.

Through these and other initiatives, Transparency International has become recognised as a strong and effective voice dedicated to combating corruption worldwide.

The World Bank

Three years after the formation of Transparency International, the World Bank joined the battle to stem official corruption. In 1996, James D Wolfensohn, then president of the World Bank, announced at

the annual meetings of the World Bank and the International Monetary Fund (IMF) that the international community had to deal with 'the cancer of corruption'. Since then, the World Bank has launched more than 600 programmes designed to curb corruption globally and within its own projects. These programmes, which have proved controversial and have encountered opposition from various World Bank member states, include debarring consultants and contractors that engage in corruption in connection with World Bank-funded projects. Since 1999, the World Bank has debarred or otherwise sanctioned more than 900 firms and individuals for fraud and corruption, and referrals from the Integrity Vice Presidency (INT) about findings of fraud or corruption to national authorities for prosecution have resulted in more than 60 criminal convictions.

In 2017, the World Bank announced that during the fiscal year ending 30 June 2017, it debarred or otherwise sanctioned 59 firms and individuals for wrongdoing under its Voluntary Disclosure Programme (VDP), including several high-profile negotiated resolution agreements in which companies acknowledged misconduct related to a number of World Bank-financed projects and cooperated with authorities from numerous countries to quickly address corruption identified during ongoing World Bank investigations. The World Bank maintains a list of firms and individuals it has debarred for fraud and corruption on its website and, in an effort to increase the transparency and accountability of its sanctions process, it recently began publishing the full text of sanction decisions issued by its Sanctions Board. As part of the World Bank's effort to curb corruption, the Integrity Compliance Office also works to strengthen anti-corruption initiatives in companies of all sizes, including assisting debarred companies to develop suitable compliance programmes and fulfil other conditions of their sanctions.

In July 2004 and August 2006, the World Bank instituted a series of reforms that established a two-tier administrative sanctions process that involves a first level of review by a chief suspension and debarment officer, followed by a second level review by the World Bank Group's Sanctions Board in cases where the sanctions are contested. In August 2006, the World Bank also established the VDP that allows firms and individuals which have engaged in misconduct – such as fraud, corruption, collusion or coercion – to avoid public debarment by disclosing all past misconduct, adopting a compliance programme, retaining a compliance monitor and ceasing all corrupt practices. The World Bank's Department of Institutional Integrity administers the VDP, which was developed in a two-year pilot programme. In mid-2015, the World Bank's Office of Suspension and Debarment (OSD) published a report containing case processing and other performance metrics related to 368 sanctions imposed on firms and individuals involved in World Bank-financed projects from 2007 to 30 June 2015 (not including cross-debarments or sanctioned affiliates). Per the OSD report, most of these sanctions resulted in debarments.

In April 2010, the World Bank and four other multilateral development banks (MDBs) – the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group – each agreed to cross-debar any firm debarred by another MDB for engaging in corruption or fraud on an MDB-financed development project. Mutual enforcement is subject to several criteria, including that the initial debarment is made public and the debarment decision is made within 10 years of the misconduct. The agreement also provides for wider enforcement of cross-debarment procedures by welcoming other international financial institutions to join the agreement after its entry into force. According to recent annual updates issued INT, the World Bank has crossed-debarred hundreds of entities over the past six years, including 84 in the fiscal year 2017.

In October 2010, the World Bank announced the creation of the International Corruption Hunters Alliance (ICHA) to connect anti-corruption authorities from different countries and aid in the tracking and resolving of complex corruption and fraud investigations that are cross-border in nature. According to the World Bank, the ICHA, which organises biennial meetings, has succeeded in bringing together more than 350 enforcement and anti-corruption officials from more than 130 countries in an effort to inject momentum into global anti-corruption efforts.

Finally, the World Bank has significantly expanded its partnerships with national authorities and development organisations in recent years to increase the impact of World Bank investigations and increase the capacity of countries throughout the world to combat corruption. For example, since 2010, the World Bank has entered into more than 50 cooperation agreements with authorities such as the:

- UK Serious Fraud Office (SFO);
- European Anti-Fraud Office;
- International Criminal Court;
- United States Agency for International Development;
- Australian Agency for International Development;
- Nordic Development Fund;
- Ministry of Security and Justice of the Netherlands;
- Liberia Anti-Corruption Commission; and
- Ombudsman of the Philippines.

In the coming years, the World Bank's prestige and leverage promise to be significant forces in combating official corruption, although the World Bank continues to face resistance from countries in which corrupt practices are found to have occurred.

International anti-corruption conventions

Watershed developments in the creation of global anti-corruption law came with the adoption of a series of international anti-corruption conventions between 1996 and 2005. Although attention in the early 1990s was focused on the Organisation for Economic Cooperation and Development (OECD), the Organisation of American States (OAS) was the first to reach an agreement, followed by the OECD, the Council of Europe and the African Union. The most recent, and most ambitious, is the UNCAC, adopted in 2003. The events unfolded as follows.

IACAC

On 29 March 1996, OAS members initialled the Inter-American Convention against Corruption (the IACAC) in Caracas. The IACAC entered into force on 6 March 1997, and 33 of its 34 signatories have now ratified it. The IACAC requires each signatory country to enact laws criminalising the bribery of government officials. It also provides for extradition and asset seizure of offending parties. In addition to emphasising heightened government ethics, improved financial disclosures and transparent bookkeeping, the IACAC facilitates international cooperation in evidence gathering.

OECD Convention

In 1997, 28 OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention), which was subsequently ratified by the requisite number of parties and entered into force on 15 February 1999. Forty-three countries in all, including six countries not currently members of the OECD, have now signed and ratified the OECD Convention; most recently Lithuania, which ratified the country's accession to the Convention on 16 May 2017. After amending its anti-corruption legislation to meet the OECD's standards, Peru renewed its request to join the Convention in June 2016 and is poised to become its next signatory.

States that are parties to the OECD Convention are bound to provide mutual legal assistance to one another in the investigation and prosecution of offences within the scope of the Convention. Moreover, such offences are made extraditable. Penalties for transnational bribery are to be commensurate with those for domestic bribery, and in the case of states that do not recognise corporate criminal liability, such as Japan, the Convention requires such states to enact 'proportionate and dissuasive non-criminal sanctions'.

In terms of monitoring implementation and enforcement, the OECD has set the pace. The OECD Working Group on Bribery (Working Group) monitors member countries' enforcement efforts through a regular reporting and comment process. After each phase, the Working Group's examiners will issue a report and recommendations, which are forwarded to the government of each participating country and are posted on the OECD's website.

In phase 1 of the monitoring process, examiners assess whether a country's legislation adequately implements the OECD Convention. In phase 2, examiners evaluate whether a country is enforcing and applying this legislation. In phase 3, examiners evaluate the progress a country has made in addressing weaknesses identified during phase 2, the status of the country's ongoing enforcement efforts, and any issues raised by changes in domestic legislation or institutional framework.

Since nearly all signatories to the OECD Convention had undergone these three phases of monitoring, in March 2016 the Working Group launched phase 4, which is focuses on:

- key group-wide cross-cutting issues;
- the progress made on addressing any weaknesses identified in previous evaluations;
- enforcement efforts and results; and
- any issues raised by changes in the domestic legislation or institutional framework of each participating country.

According to the OECD, phase 4, which is expected to continue to 2024, seeks to take a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements.

On 26 November 2009, the OECD Council issued its first resolution on bribery since the adoption of the OECD Convention. Entitled the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the resolution urges member countries to continue to take meaningful steps to deter, prevent and combat the bribery of foreign public officials, not only on a national level, but also on a multinational level, with rigorous and systemic follow-up. Among other things, the resolution recommends that member countries 'encourage companies to prohibit or discourage the use of small facilitation payments', and to always require accurate accounting of any such payments in the companies' books and records. The resolution was supplemented by two annexes setting out 'Good Practice Guidance' – one for member countries and one for companies.

Council of Europe conventions

On 4 November 1998, following a series of measures taken since 1996, the member states of the Council of Europe and eight observer states, including the US, approved the text of a new multilateral convention – the Criminal Law Convention on Corruption. A year later, the parties adopted the Civil Law Convention on Corruption. Forty-eight countries have ratified the Criminal Convention, which entered into force on 1 July 2002, while 35 countries have ratified the Civil Convention, which entered into force on 1 November 2003 .

The Criminal Convention covers a broad range of offences, including domestic and foreign bribery, trading in influence, money laundering and accounting offences. Notably, it also addresses private bribery. The Criminal Convention sets forth cooperation measures and provisions regarding the recovery of assets. Similar to the OECD Convention, the Criminal Convention establishes a monitoring mechanism – the Group of States against Corruption – to conduct mutual evaluations.

The Civil Convention provides for compensation for damage that results from acts of public and private corruption. Other measures include civil law remedies for injured persons, invalidity of corrupt contracts and protection for whistle-blowers. Compliance with the Civil Convention is also subject to peer review.

African Union Convention

The African Union Convention on Preventing and Combating Corruption was adopted on 1 July 2003. To date, 38 of the 49 signatories have ratified it.

The Convention covers a wide range of offences including bribery (domestic and foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The Convention also guarantees access to information, the participation of civil society and the media in monitoring the agreement. Other articles seek to ban the use of funds acquired through illicit and corrupt practices to finance political parties and require state parties to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.

The UNCAC

The most far-reaching, and potentially most important, of all of the international conventions is the UNCAC. One hundred and forty countries have signed this convention, which was adopted by the United Nations General Assembly on 31 October 2003. The UNCAC entered into force on 14 December 2005 and 183 countries are now party to it, though not all are signatories.

The UNCAC addresses seven principal topics:

- mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards for private companies;
- mandatory and permissive criminalisation obligations, including obligations with respect to public and private sector bribery, and trading in influence and illicit enrichment;
- private rights of action for the victims of corrupt practices;
- anti-money laundering measures;
- cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and
- asset recovery.

Enforcement

Windows into the fast-changing landscape of enforcement of anti-corruption laws and conventions are provided by:

- public dispositions of anti-corruption enforcement actions;
- media reports of official and internal investigations;
- disclosures in corporate filings with securities regulatory agencies and stock exchanges;
- private litigation between companies and former employees;
- monitoring reports by international organisations;
- voluntary corporate disclosures;
- occasional confessions or exposés of implicated individuals;
- public statements by enforcement officials;
- statistics compiled by NGOs and international organisations; and
- findings of anti-corruption commissions, World Bank reports and academic studies.

Although public knowledge of official investigations and enforcement activity often lags, sometimes by years, the available indicators suggest ever-increasing enforcement activity. Without going beyond the public domain, a few recent examples indicate the breadth and diversity of anti-corruption enforcement, including international cooperation, extraterritorial and parallel enforcement, the use of liberalised bank secrecy laws and a growing array of penalties and sanctions.

Brazil

Operation Car Wash

In the spring of 2014, the Federal Police of Brazil launched a money laundering investigation into, among other things, allegations of corruption at Petróleo Brasileiro SA (Petrobras), Brazil's state-controlled oil company. In less than two years, the investigation had gone global, with enforcement authorities from countries around the world, including the US, joining Brazil in investigating alleged improper payments to Petrobras personnel, as well as to a range of other Brazilian officials, including several high-ranking politicians and officials from other Brazilian state-owned or controlled entities. *Operação Lava Jato* (Operation Car Wash) has led to criminal indictments against 282 individuals and has expanded to include many non-Brazilian companies. Since mid-2015, Brazilian authorities have succeeded in securing a large number of prominent convictions related to these indictments. For example, on 8 March 2016, a Brazilian court sentenced Marcelo Odebrecht, the former chief executive of Odebrecht SA, a major Brazilian construction conglomerate, and one of Brazil's wealthiest businessmen, to 19 years and four months' imprisonment for various offences, including money laundering, corruption and criminal association, for his role in the payment of bribes to Petrobras officials to win favourable contracts. Several other executives of the conglomerate, along with several Petrobras officials, have also been convicted and sentenced for their participation in the scheme.

On 14 September 2016, Brazilian prosecutors charged Luiz Inácio Lula da Silva, Brazil's president between 2003 and 2011, with several offences, including money laundering and passive corruption, for allegedly receiving personal benefits in exchange for facilitating lucrative contracts with Petrobras and for participating in a scheme that involved using bribes paid by Petrobras contractors for political gain. In the months following this initial indictment, prosecutors have added to the list of charges against Silva as Operation Car Wash developed. On 12 July 2017, the former president was convicted of passive corruption and money laundering and sentenced to 9.5 years in prison for allegedly accepting more than US$1 million in kickbacks from a Brazilian engineering firm. The conviction is currently under appeal.

On 21 December 2016, Brazilian authorities, alongside their US and Swiss counterparts, announced a coordinated global settlement with Odebrecht and its petrochemical unit, Braskem SA, in connection with the underlying misconduct outlined above. To resolve criminal and civil charges at the corporate level, the companies agreed to pay at least US$3.5 billion in fines and disgorgement of profits to government authorities in Brazil, Switzerland and the US, making it the largest collective foreign bribery resolution in history.

JBS SA

On 30 May 2017, JBS SA, a Brazilian holding company and owner of the world's largest meat-packing company, entered into a leniency accord with Brazilian prosecutors. As part of the deal, the company agreed to pay to a fine of approximately US$3.2 billion. The leniency accord covers numerous corrupt practices involving various public entities, including pension funds of state-owned companies, state-run banks and Brazil's Ministry of Agriculture. In a parallel agreement, company executives obtained immunity in exchange for paying a fine and cooperating with authorities.

Notably, one of the executives provided Brazilian authorities with a March 2017 recording in which Brazil's president Michel Temer allegedly assents to paying bribes to silence the imprisoned former president of the Chamber of Deputies, who allegedly could provide incriminating testimony against Temer. The executives' plea deal is currently under review based on alleged omissions in their testimony provided during the negotiation of the deal. In addition, in September 2017, Brazilian authorities arrested the executives for insider trading, arguing that they amassed a large amount of foreign currency prior to the public announcement of the company's leniency accord knowing the impact that the deal would have on the company's shares and the Brazilian real.

In June and September 2017, Temer was charged with passive corruption, and obstruction of justice and participation in a criminal organisation, respectively, based on testimony and recordings obtained from JBS SA executives. In both instances, the Chamber of Deputies voted on whether to approve the charges, falling short of the two-thirds majority required to transfer the case against Temer to Brazil's Federal Supreme Court.

Dilma Rousseff

Finally, on 5 September 2017, Brazilian prosecutors charged Dilma Rousseff, the president of Brazil between 2011 and 2016, for her alleged participation in a criminal organisation that allowed her political party to receive millions of dollars in bribes for more than a decade. The following day, she was charged with obstruction of justice for allegedly appointing her predecessor, president Silva, to her cabinet to shield him from numerous investigations related to Operation Car Wash.

According to Brazil's Federal Public Prosecutor's Office, as of 14 November 2017, Operation Car Wash has led to 340 international cooperation requests and the convictions of 113 individuals.

Netherlands and Sweden

VimpelCom Ltd

On 18 February 2016, VimpelCom Ltd, the Russian-owned, Amsterdam-based global telecommunications provider, entered into a joint settlement with the Dutch Public Prosecutors Service, the Dutch Public Prosecutor's Service, and the US Department of Justice (DOJ) and the SEC to resolve corruption allegations relating to the company's activities in Uzbekistan.

According to the Dutch Public Prosecutors Service, VimpelCom, operating through an Uzbek subsidiary, made more than US$114 million in improper payments to a foreign official in Uzbekistan in exchange for that official's understood influence over the telecommunications regulator in Uzbekistan. Under the terms of its settlement with Dutch authorities, the company agreed to pay a US$100 million criminal fine and disgorge US$167.5 million in profit. In its parallel settlement with US authorities, the company and its Uzbek subsidiary further agreed to a US$460.3 million criminal fine and a US$375 million disgorgement, approximately US$397.5 million of which was collectively offset in recognition of the company's payments to Dutch authorities.

Telia Company AB

On 21 September 2016, Telia Company AB, a Swedish-based global telecommunications provider, of which the Swedish government is the majority owner, entered into a similar joint settlement with the Swedish Prosecution Authority, the Dutch Public Prosecutors Service, the DOJ and the SEC, and to resolve related allegations of corruption in Uzbekistan.

According to the Dutch Public Prosecutors Service, the Swedish company, operating through its Uzbek subsidiary, made more than US$331 million in improper payments to the same foreign official in Uzbekistan in exchange for the official's aforementioned influence. Under the terms of its global settlement with Dutch, US and Swedish authorities, the company and its Uzbek subsidiary agreed to pay a total of US$965 million in criminal fines, forfeiture and disgorgement, including a US$274 million criminal fine to Dutch authorities.

France

On 8 November 2016, France adopted the Sapin II law, legislation that significantly strengthens the country's anti-corruption regime, which had been criticised by the OECD as being out of step with the country's treaty obligations. The new law eliminates certain prerequisites that greatly curtailed the jurisdictional reach of the French law, including provisions that permitted jurisdiction only when:

- a victim or wrongdoer was a French citizen;
- the conduct at issue was an offence in both France and the place where the conduct occurred; and
- the complaint was filed by either a victim or a relevant foreign authority (the 'dual criminality' requirement).

Of note, the Sapin II law requires companies and presidents, directors and managers of companies with more than 500 employees and annual gross revenues exceeding €100 million to implement an anti-corruption compliance programme containing a variety of components, including a code of conduct, accounting controls, and training programs for high-risk employees. The law also established the French anti-corruption agency the AFA which has expanded enforcement powers beyond those of the Central Service for the Prevention of Corruption, the former agency responsible for enforcement of the laws. Among other things, the AFA will be in charge of:

- assisting in preventing and detecting corruption;
- verifying that companies that are required to adopt compliance programmes have such programmes in place;
- reporting possible violations of the law to prosecutors; and
- overseeing corporate monitorships.

The French government spent much of 2017 setting up the AFA, including promulgating regulations relating to the agency's organisation and appointing a director for the agency in March. How broadly the AFA's current director, Charles Duchaine, will interpret his mandate under the Sapin II law remains to be seen.

In a new development within the French legal system, the Sapin II law also created a new mechanism for resolving certain corporate criminal proceedings; primarily those involving financial crimes, including cases of domestic and foreign corruption. These judicial public interest agreements (CJIPs) have frequently been compared to US-style deferred prosecution agreements (DPAs). Although cooperating companies will have to agree to the facts enumerated in a CJIP, they will not be required to admit guilt. Under a CJIP, companies can be fined an amount equal to the benefit secured through the illicit activity, up to 30 per cent of the company's average revenue for the past three years.

On 28 November 2017, France's National Financial Prosecutor, Éliane Houlette, entered into the country's first CJIP resolution pursuant to the Sapin II law with HSBC Private Bank – the Geneva-based private banking unit of a global financial institution. Under the settlement, the Swiss unit agreed to pay €300 million to resolve allegations that it had helped French clients to evade taxes and launder money.

United Kingdom

In April 2013, the UK enacted the Crime and Courts Act 2013, which permits the SFO and the Crown Prosecution Service (the CPS) to enter into DPAs with cooperating corporate defendants to settle prosecutions for fraud, bribery and economic crimes. While UK law already permitted DPAs in the prosecution of individuals, the adoption of corporate

DPAs mirrors a common approach by the US government for prosecuting corporate misconduct in the anti-corruption area.

According to a draft Deferred Prosecution Agreement Code of Practice (DPA Code) issued by the SFO and the CPS, these agencies intend to use DPAs as 'an alternative to prosecution' and see the agreements as 'a discretionary tool . . . to provide a way of responding to alleged criminal conduct'. DPAs will not be offered in every prosecution. Instead, the draft code of practice outlines when the SFO and the CPS will offer to negotiate a DPA and how such negotiations will proceed.

Rolls-Royce

On 17 January 2017, the SFO announced its largest-ever DPA with Rolls-Royce Holdings plc and Rolls-Royce Energy Systems Inc, the UK-based global engineering company, which agreed to pay UK authorities £497.25 million to settle charges that is its energy, civil aerospace and defence aerospace business units had violated the UK Bribery Act by making tens of millions of US dollars in unlawful payments to government officials in China, India, Indonesia, Malaysia, Nigeria, Russia and Thailand in exchange for those officials' assistance in providing confidential information and awarding contracts to the company and its affiliates. In parallel, enforcement authorities from the US and Brazil announced settlements imposing another US$195 million in fines against the company as part of a coordinated global resolution totalling more than US$800 million.

European Bank for Reconstruction and Development

Finally, on 20 June 2017, the UK's Central Criminal Court (better known as the 'Old Bailey') sentenced Andrey Ryjenko, a former official at the European Bank for Reconstruction and Development (EBRD), to six years' imprisonment on corruption and money laundering charges for accepting improper payments in connection with his work at the bank.

Ryjenko was involved in reviewing loan and equity financing applications for companies in Eastern Europe and the Middle East and, according to UK prosecutors, approved certain investments into clientele of Chestnut Consulting Group, a US-based consultancy, in exchange for millions of dollars in payments to the official's sister. Ryjenko's sister, Tatjana Sanderson, was also charged but was declared unfit to stand trial.

Dimitrij Harder, a principal of Chestnut Consulting Group, accepted a plea deal and was sentenced to 60 months' imprisonment and US$2 million in sanctions in parallel proceedings in the US.

United States

In 2017, the DOJ and the SEC resolved 34 FCPA-related enforcement actions. These cases involved both US and non-US individuals and corporations and imposed a range of civil and criminal penalties. Corporate defendants resolved these cases by entering into DPAs, non-prosecution agreements and plea agreements. In some instances, a condition of settlement has been that the company retain and pay for an 'independent compliance monitor', who is given broad authority. In other instances, the company has been required to 'self-report' at periodic intervals on the status of its remediation and compliance efforts. On several occasions, the US enforcement agencies have also imposed a hybrid of the two, requiring companies to retain and pay for an 'independent compliance monitor' during the first half of their probationary period and 'self-report' at periodic intervals during the second half.

The 34 FCPA-related dispositions in 2017 come just a year after FCPA enforcement levels approached all-time highs with 58 resolved enforcement actions in 2016. This decline in enforcement was driven by a drop in the number of resolved corporate enforcement actions from 40 in 2016 to 17 in 2017, while the number of actions against individuals largely kept pace, with 17 in 2017 compared with 18 in 2016. Over the past decade, the DOJ and the SEC have averaged more than 35 enforcement actions a year, compared with approximately four a year during the first 28 years following the statute's enactment. Accompanying this increase in overall enforcement, the sanctions pursued by the agencies have also increased in severity, particularly in recent years, with monetary penalties (including fines, disgorgement of profits and payment of pre-judgment interest) significantly eclipsing those imposed by earlier FCPA settlements. For example, from 2005 to 2007, the DOJ and the SEC imposed approximately US$268 million in FCPA-related corporate penalties, with the average combined penalty coming to approximately US$11.1 million. In the ensuing nine years, these figures have skyrocketed, with the agencies imposing nearly US$3.6 billion in FCPA-related corporate penalties from 2015 to 2017, bringing the average combined penalty over that time period to approximately US$72.2 million.

Individuals have increasingly been targets of prosecution by US authorities and have been sentenced to prison terms, fined heavily or both. Since 2011, more than 110 individuals have been charged with or convicted of criminal or civil violations of the FCPA, and this emphasis by US enforcement authorities on the prosecution of individuals shows no signs of letting up. On 9 September 2015, the then Deputy Attorney General Sally Yates issued a memorandum entitled Individual Accountability for Corporate Wrongdoing to federal prosecutors nationwide detailing new DOJ policies that require a corporation that wants to receive credit for cooperating with the government to provide 'all relevant facts' about employees at the company who were involved in the underlying corporate wrongdoing. The DOJ's 2016 FCPA enforcement pilot programme furthered this aim by explicitly conditioning the benefits provided for a company's voluntary self-disclosure on compliance with the Yates Memorandum. On 29 November 2017, Deputy Attorney General Rod Jay Rosenstein announced the DOJ's new FCPA Corporate Enforcement Policy, which extended and codified the pilot programme's various elements through incorporation into the United States Attorneys' Manual, including the requirement that a company seeking the full benefit of a voluntary self-disclosure must turn over all relevant facts related to the individuals involved.

Among other notable developments this past year, several companies entered into substantial 'global' settlements to resolve FCPA-related charges in multiple jurisdictions simultaneously, including the aforementioned settlements with Odebrecht, Rolls-Royce Holdings plc and Telia, along with the settlement with the Singapore-based shipyard and vessel company Keppel Offshore & Marine Ltd, continuing an uptick in coordination and international cooperation to levels heretofore not seen between the US and a variety of other countries.

This small sample of the diverse array of investigations and prosecutions under way or pending reflects a pronounced shift in anti-corruption law and a dramatic escalation of enforcement activity compared with only a decade ago.

As yet untested is the provision in article 35 of the UNCAC, which creates a private right of action for entities or persons who have suffered damage as a result of bribery of public officials or other acts of corruption covered by the UNCAC. The US provides no private right of action consistent with article 35, as it maintained a reservation against this requirement when ratifying the UNCAC. However, a private right of action can be available within the US through other means. For instance, US law allows those injured in certain circumstances to bring a cause of action and seek compensation under the Racketeer Influenced and Corrupt Organizations Act (Rico) or as part of a civil securities suit. Recent examples of such litigation include actions against Odebrecht, Wal-Mart Stores Inc, Alcoa Inc, Avon Products Inc and Bio-Rad Laboratories Inc, all of which were filed in recent years, based in part on alleged FCPA violations.

Anti-corruption compliance programmes

The rapid changes in legal structures and enforcement have, in turn, contributed to a new corporate phenomenon and legal discipline – the widespread institution of anti-corruption compliance programmes within multinational corporations. Programmes that would have been innovative and exceptional in the early 1990s are becoming de rigueur. 'Best practices' have become a standard by which many companies seek to measure their own efforts and those standards continue to rise. Spurred by government pronouncements, regulatory requirements, voluntary corporate codes and the advice of experts as to what mechanisms best achieve their intended purposes, anti-corruption compliance programmes have become common, and often sophisticated, in companies doing business around the world.

As a result, anti-corruption codes and guidelines, due diligence investigations of consultants, business partners or merger targets, contractual penalties, extensive training, internal investigations, compliance audits and discipline for transgressions, have become familiar elements of corporate compliance programmes. The OECD's Good Practice Guidance on Internal Controls, Ethics and Compliance, issued on 18 February 2010, is directed squarely at companies, business

organisations and professional associations, and identifies a number of recognised elements of effective compliance programmes:

- a strong commitment from senior management;
- a clearly articulated anti-bribery policy;
- accountability and oversight;
- specific measures applicable to subsidiaries that are directed at the areas of highest risk;
- internal controls;
- documented training;
- appropriate disciplinary procedures; and
- modes for providing guidance and reporting violations.

This guidance is noteworthy both because it is one of the first treaty-based articulations of effective anti-bribery compliance standards and because, on close reading, it emphasises some elements that have received less attention in traditional compliance programmes.

In September 2016, the International Organization for Standardization (ISO) published the final version of its new standard on anti-bribery management systems, ISO 37001, which was developed over the course of four years with the active participation of experts from 37 countries. The standard is designed to be used as a benchmark by independent, third-party auditors to certify compliance programmes. In terms of substance, the standard largely tracks the OECD's Good Practice Guidance and guidance previously published by UK and US enforcement authorities. Thus, the key substantive aspects of ISO 37001 will be largely familiar to experienced compliance professionals. What is as yet unclear, however, is the level of deference that enforcement authorities around the world will provide to the new standard. Although seeking to obtain ISO 37001 certification may help to demonstrate a company's commitment to compliance, such a certification is unlikely to shield a company facing an investigation by enforcement authorities. Furthermore, there are a host of questions surrounding the new standard, which lacks detail on certain areas of concern. For instance, how responsive will ISO 37001 be to the evolving compliance expectations of relevant enforcement authorities? At the very least, companies that have yet to establish mature compliance environments should find the ISO 37001 standard to be useful metric as should vendors aiming to work for multinational companies, which can use an ISO certification to help establish their anti-corruption credentials during corporate due diligence.

Against this backdrop, the expert summaries of countries' anti-corruption laws and enforcement policies that this volume comprises are becoming an essential resource. It is within this legal framework that the implementation of anti-corruption conventions and the investigations and enforcement actions against those suspected of violations will play out. Our thanks to those firms that have contributed to this volume for their timely summaries and for the valuable insights they provide.

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