Market Intelligence

ANTI-CORRUPTION 2020

Global interview panel led by Miller & Chevalier Chartered

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Anti-Corruption 2020

Global Trends

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In 2017, Mr Davis was appointed to serve as an Independent Compliance Monitor pursuant to an FCPA disposition following extensive vetting by the DOJ and SEC. This multi-year project recently concluded.

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International anti-corruption efforts continue to attract attention from companies, investors and governments of both exporting and host countries, and, in many places, populations in general. The problems of endemic corruption have been prominent factors in political upheavals experienced by countries such as Malaysia, Israel and Pakistan – all three of which are investigating current or former prime ministers for corruption – and in the shift of popular opinion away from entrenched governments or parties (for example, recently in Slovakia, in which an opposition party won an election on an anti-corruption platform in March 2020 against the ruling party, which had been in power for more than a decade). The United States, generally seen as an anti-corruption leader, has experienced political discord over perceived domestic corruption not seen since the era of the 1970s Watergate scandal. Even governments with less accountability to voters, such as those in China and Russia, evidence anxiety that corruption undermines their authority.

Concerns regarding the corrosive political and economic effects of public corruption have provided an impetus for several multinational conventions designed to combat corrupt payments and related issues. This started with the 1996 Inter-American Convention against Corruption and accelerated with the 1999 Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention and two Council of Europe conventions (criminal and civil) that came into force in 2002 and 2003. The scope of these international obligations expanded significantly with the entry into force of the UN Convention Against Corruption (UNCAC) in December 2005. The most important impact of these treaties and other efforts was to require signatories to prohibit domestic and transnational corruption, and many countries have implemented laws that in significant ways mirror the provisions of the law that first focused specific attention on these issues – the US Foreign Corrupt Practices Act (FCPA), enacted in 1977.

While the grand political dynamics may not concern compliance professionals on a day-to-day basis, the growth of anti-corruption regulation globally has resulted in the need to focus not just on the long and assertive reach of the FCPA, but also on an expanding array of other national laws, some of which create different compliance standards or (in the case of laws or judicial decisions related to issues such as data privacy, national security or the application of legal privileges) may undermine key aspects of a company's compliance programme if not handled appropriately. Companies also increasingly need to assess potential liability risks in many jurisdictions, as multi-country, coordinated international enforcement (in some cases, led by non-US countries) continues to become the norm in the anti-corruption sphere.

The ongoing covid-19 pandemic and related public lockdowns have affected governments' and companies' anti-corruption activities around the world. Government investigations have slowed down as authorities are unable to meet


John E Davis

witnesses, engage in certain mutual legal assistance activities or acquire or review needed information. In many countries, public funds or assets have been redirected towards pandemic-related activities. Even governments in countries with robust digital infrastructure have struggled. Companies have been similarly impacted, as compliance functions have faced sometimes severe budget crunches (often in the context of across-the-board cost cutting) and have had to devise methods of monitoring and training to make up for an inability to travel. Generally, companies with more sophisticated enterprise resource planning systems have more options to manage compliance and control activities remotely, but even those systems can be less effective than processes that include the ability to engage with business managers and frontline employees face-to-face.

Several multilateral organisations have issued guidance on the mitigating covid-19 pandemic's effects on corruption risks and related resource challenges. For example, the OECD issued a policy brief in late May 2020 that focuses on immediate issues such as:

- addressing increased corruption risks in pandemic-related emergency government procurement;

"Several multilateral organisations have issued guidance on mitigating the pandemic's effects on corruption risks and related resource challenges."

- ensuring accountability, transparency and fiscal controls over financial aid and economic stimulus and recovery packages;
- requiring companies to maintain appropriate risk management and internal control tools (especially ones allowing for remote access and control);
- highlighting the corruption risks from increased uses of business intermediaries in place of employees who cannot travel; and
- protecting whistle-blowers.

The policy paper also notes the importance of governments maintaining the integrity of their anti-corruption efforts, noting, for example, that 'investigations and prosecutions should not be influenced by considerations of national economic interest' and that governments should find ways to maintain 'adequate resources for investigative agencies' both during and after the pandemic.

The International Monetary Fund (IMF) has begun to offer covid-19-related recovery funding and debt relief to some client countries, and confirmed in late July 2020 that such assistance will be subject to the IMF's governance and anti-corruption requirements, including such steps as conducting and making public 'independent

ex-post audits of crisis-related spending' and taking steps to identify companies (and, importantly, their beneficial owners) that receive 'crisis-related procurement contracts' and the terms of such contracts. In response, the non-governmental organisation Transparency International (TI) has instituted its 'Tracking the Trillions' project to monitor the disbursement of these IMF funds and to call out countries using these funds that are not appropriately prioritising anti-corruption. TI is also emphasising the importance of protecting whistle-blowers, especially in these times of economic hardship, which makes disguising retaliation as the product of cost-cutting easier.

While there are many uncertainties related to the covid-19 crisis, one thing is certain – companies will face a very challenging corruption environment globally for the foreseeable future and will need to continue to adapt to events over the next year.

International enforcement trends

Enforcement of anti-corruption laws around the globe has continued on an upward, if uneven, trend, though it has been significantly impacted in 2020 by the global lock-downs and other measures countries are taking to combat the covid-19 pandemic. Reporting on enforcement by the signatories of the OECD Anti-Bribery Convention is considered by many to be the best yardstick to measure this progression, as the OECD Convention parties include most of the major capital-exporting countries (which can be seen as funding the 'supply' side of cross-border corruption) as well as other key economies, such as Russia and Brazil. The OECD also evaluates each signatory's implementation of convention obligations and issues detailed public reports that include critiques and recommendations for improvement.

The latest data on enforcement collected by the OECD Working Group on the Anti-Bribery Convention (released in December 2019 and covering to the end of 2018) show that 615 individuals and 203 entities have been sanctioned pursuant to criminal proceedings for foreign bribery by various convention signatories from the convention's 1999 entry into force to the end of 2018. The OECD report also states that 528 corruption-related investigations were ongoing in 28 countries as at the end of 2018. In 2018, 12 convention signatories were conducting 162 prosecutions (against 157 individuals and five entities) related to offences defined by the convention or relevant applicable country laws.

TI has released its own assessments of the effectiveness of the OECD Anti-Bribery Convention. The latest TI report on 'Exporting Corruption' (released in September 2018) provides a less sanguine outlook: TI asserts that 11 'major exporting' countries 'accounting for about a third of world exports' 'actively' or 'moderately' enforce their anti-corruption laws. The TI report states that seven countries (Germany, Israel,

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Italy, Norway, Switzerland, the United States and the United Kingdom) 'actively' enforce their anti-corruption laws, while four other countries (Australia, Brazil, Portugal and Sweden) manage 'moderate' enforcement. There is an argument that France and the Netherlands should at least qualify for a 'moderate' rating based on recent cases (France, for example, was a major driver of the blockbuster January 2020 global settlement with Airbus) and that Brazil should be moved to the 'active' category. TI cites 11 other countries with 'limited' enforcement, though the report states that the 'moderate' and 'limited' levels of enforcement 'are considered insufficient deterrence'. Most tellingly, TI noted that, as at the end of 2017, there was little or no enforcement by 22 countries, representing almost 40 per cent of the world's exports. That group includes China, Hong Kong, India, Russia and Singapore. TI noted 'disappointingly' that 'there has been little change in the overall enforcement level [based on share of world exports] since' 2015 and that the 'number of countries in the top two levels has increased by only one, and these nations account for roughly the same share of world exports as in 2015'. Of interest to compliance professionals, the TI report also noted that 'for most countries' the organisation's experts 'reported inadequate public statistical information and insufficient access to

case law' – making the tracking and understanding of enforcement trends and risk areas difficult.

The OECD Anti-Bribery Working Group is also focusing on enforcement as part of its 'Phase 4' monitoring of implementation of the OECD Anti-Bribery Convention by signatory countries. The OECD launched Phase 4 in 2016 and currently anticipates the review to last until 2024. The Working Group's Phase 4 guide states that the review is focusing on:

> *the progress made by Parties on weaknesses identified in previous evaluations; enforcement efforts and results; any issues raised by changes in the domestic legislation or institutional framework of the Parties . . . . [and] good practices which have proved effective in combating foreign bribery and enhancing enforcement.*

Each treaty member will be the subject of a written report during this phase of the convention's monitoring. Phase 4 reports have already been issued for such countries as the United Kingdom, Australia, Chile, Germany, Japan, Korea, Mexico, Norway and Switzerland. The United States and the Netherlands are scheduled for reports in October 2020, though the covid-19 situation may delay those processes.

In December 2018, the OECD launched a review of the 2009 OECD Anti-Bribery Recommendation, which is scheduled for completion in 2020. Public consultations occurred from March to May 2019. Per the OECD, the recommendation contains, among other things, 'provisions for combating small facilitation payments, protecting whistleblowers, [and] improving communication between public officials and law enforcement authorities'. The recommendation also includes provisions on the interpretation of certain key convention obligations, such as having in place appropriate systems that create legal liability or equivalent penalities for companies that engage in bribery.

Several other multinational bodies have focused on anti-corruption enforcement and related national strategies for reducing public corruption. The IMF, as part of its 1997 Governance Policy, has long assessed and attempted to address governance issues that can threaten to divert or undermine the financial assistance provided by the institution to specific countries. In April 2018, the IMF's executive board adopted a 'new framework' for 'enhanced fund engagement' on governance and corruption issues. Of the four 'elements' of this new framework, two are noteworthy in regard to enforcement trends. The first element 'is designed to enable the fund to assess the nature and severity of governance vulnerabilities – including . . . the severity of corruption'. The focus of such analysis will be larger-scale corruption issues – ones that arise in relation to to the IMF's 'surveillance' of economies 'when [such issues]

"The new IMF framework paper notes different types of corruption indicators and some initial concepts related to how the IMF should weigh them."

are sufficiently severe to significantly influence present or prospective balance of payments and domestic stability', or that 'affect the use of fund resources'. The framework paper notes, in particular, different types of corruption indicators and some initial concepts related to how the IMF should weigh them.

The framework notes specifically that 'an effective strategy requires action to curb the facilitation of corrupt practices by private actors, particularly in the transnational context'. Thus, the fourth element will focus 'on measures [in countries under review] designed to prevent the private actors from offering bribes or providing services that facilitate concealment of corruption proceeds'. To that end:

> *irrespective of whether a member is experiencing severe corruption itself, the Fund urges all members to volunteer to have their own legal and institutional frameworks assessed in the context of bilateral surveillance for purposes of determining whether: (a) they criminalize and prosecute the bribery of foreign public officials; and (b) they have effective . . . system[s] . . . designed to prevent foreign officials from concealing the proceeds of corruption.*

The framework notes that, if such an assessment occurs, the country would be benchmarked against applicable international standards to which the country has agreed, such as those in the OECD Anti-Bribery Convention or the UNCAC. Significantly, the framework states that the IMF 'should continue to avoid interference in individual enforcement cases'.

In June 2020, the IMF released a staff analysis of implementation to date of the new framework. The report found, among other things, that :

- 'a new centralised process to systematically analyse governance and corruption vulnerabilities for all fund members – a core aspect of the framework – has been put in place';
- 'the framework has supported deeper discussions on governance and anti-corruption issues' related to surveillance reports;
- the framework has supported efforts to link 'specific conditionality related to governance and anti-corruption reforms, with governance improvements now being a core objective of many programmes' supported by the IMF; and
- technical assistance efforts related to governance have focused in part on anti-corruption aspects.

The report also noted areas for continued work, including 'ensuring sustained engagement by the fund, building further ownership and efforts by country

authorities, supporting country teams in these complex discussions and filling data gaps'. The next formal evaluation of the framework is scheduled for mid-2021.

The IMF's attention to countries' anti-corruption enforcement frameworks dovetailed with efforts surrounding the 2019 G20 meetings focused on further implementing the G20's 'High Level Principles on Organizing Against Corruption'. These principles date from July 2017 and include, in part, the need for 'administrative measures' that deter corruption and encourage transparency across government agencies and on international cooperation relating to technical assistance and enforcement. The July 2019 Final Declaration by the G20 leaders noted support for an action plan to carry out these principles until 2021 and laid out several key steps.

First, the G20 countries approved the 'High-Level Principles for the Effective Protection of Whistleblowers'. These principles state that 'G20 countries should establish and implement clear laws and policies for the protection of whistleblowers' and that organisations, including corporate entities, should be encouraged 'to establish and implement protections and provide guidance on the elements of these protections'. The principles state that such protections should be broad and widely available and:

> *should ensure confidentiality of the whistleblower's identifying information and the content of the protected disclosure, as well as the identity of persons concerned by the report, subject to national rules, for example, on investigations by competent authorities or judicial proceedings.*

Given that several G20 countries do not always allow for anonymous reporting, it will be interesting to see whether these principles affect relevant laws or practices. Finally, the principles state that countries 'should ensure that whistleblowers who make a protected disclosure are protected from any form of retaliatory or discriminatory action' – but, as several civil society organisations such as TI have pointed out, countries are obliged only to 'consider providing for effective, proportionate and dissuasive sanctions for those who retaliate against whistleblowers or breach confidentiality requirements'.

The G20 also adopted a 'Compendium of Good Practices for Promoting Integrity and Transparency in Infrastructure Development', which focuses largely on corruption issues and responses. Many aspects of the 'good practices' discussed are more relevant to governments that are managing infrastructure projects than to companies, but the compendium does include information on corruption risk levels at different project stages, as well as suggestions on tenders, bids, awards and project monitoring and auditing that can provide insights for company compliance personnel working in the public procurement space.

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Finally, the OECD and UN issued a progress report on implementing the G20's 2030 Agenda for Sustainable Development, which includes an anti-corruption component. The report called progress on the anti-corruption goals 'uneven over the past five years'. The report cited the above-referenced OECD Working Group enforcement numbers favourably but noted that three G20 members 'have yet to conclude a single foreign bribery enforcement action'.

The G20's anti-corruption working group met in February 2020, and ministerial level discussions on anti-corruption issues are planned during the year. Civil society groups (through the Civil Society 20 process) have urged the working group to focus on a number of issues, including fighting corruption related to healthcare systems and emergency government procurement related to the ongoing covid-19 response, focusing on integrity issues related to the increased use of public–private partnerships and focusing on increasing the availability and role of information and communications technology to assess corruption risks and share solutions in a world that must conduct more work remotely.

The entity that monitors implementation of the Council of Europe conventions, GRECO, is in its fifth round of evaluations of member states' compliance with their

treaty obligations. A focus for this round, which began in March 2017, is 'preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies'. Meanwhile, GRECO continues to issue reports related to member countries' compliance with recommendations from earlier rounds of reviews, each of which has a different focus (for example, measures related to the integrity of legislators and judges). In May 2020, GRECO, in conjunction with the OECD and the French Anti-Corruption Agency (AFA), issued a report on 'Global Mapping of Anti-Corruption Authorities' – which contains information on relevant national enforcement authorities as well as the results of surveys of those authorities' status and powers. Among its conclusions, the report noted that many authorities' powers are focused on investigation of 'natural persons' (as opposed to corporate entities) and that 'less than half of respondent [authorities] have sanction mechanisms and those typically are of administrative nature'.

Turning to notable developments in individual countries, the January 2020 resolution of a bribery investigation of Airbus that involved French, UK and US authorities set a new record for internationally coordinated anti-corruption investigations, resulting in almost US$4 billion in fines and disgorgement shared among the various enforcement agencies. The long-running investigation was notable in part due to issues raised by France's 'blocking statute' – which prevents French persons from communicating information that would constitute 'evidence in foreign judicial or administrative proceedings' – and the French Criminal Procedure Code, which allows French authorities to exclude information that would be 'detrimental to the essential interests of France' when responding to mutual legal assistance requests. The French government (as well as the German and Spanish governments) owned stakes in Airbus throughout the relevant time period, adding to the challenging dynamics. To resolve these issues, the French and UK authorities executed an agreement in early 2017 that aided the agencies in overcoming these legal and practical hurdles through unprecedented joint operations. Also noteworthy is the fact that US and UK authorities agreed to French supervision of an independent compliance monitor for Airbus (though the United States required a separate arrangement related to remediation of Airbus' violations of US export controls).

The 1Malaysia Development Berhad (1MDB) corruption scandal has received significant press coverage in the media, and aspects of the various cases spawned by the scandal merit mention here. Most recently, on 28 July 2020, Najib Razak, the former Prime Minister of Malaysia who lost power in a 2018 election, in large part due to the scandal, was sentenced to 12 years in prison and ordered to pay a fine of close to US$50 million related to charges of abuse of power, money laundering and 'criminal breach of trust' by a Malaysian court. Days earlier, on 24 July 2020, the Malaysian government and Goldman Sachs announced an 'agreement in principle' to 'resolve all

"The January 2020 resolution of a bribery investigation of Airbus set a new record for internationally coordinated anti-corruption investigations."

the criminal and regulatory proceedings in Malaysia' against the firm relating to 1MDB issues. The announcement states that the agreement:

> *would involve the payment to the Government of Malaysia of $2.5 billion and a guarantee that the Government of Malaysia receives at least $1.4 billion in proceeds from assets related to 1MDB seized by governmental authorities around the world.*

Goldman Sachs is the subject of an ongoing FCPA-related investigation by US authorities and media reports have suggested that a resolution of that case may well involve penalties in the billions. Two ex-Goldman Sachs bankers have also faced US criminal charges in connection with their roles in the transactions under investigation. Finally, in November 2019, the US authorities concluded a civil settlement with Low Taek Jho (aka Jho Low), the accused mastermind of the 1MDB scheme, and members of his family in which the defendants forfeited more than US$700 million in assets. The US Department of Justice (DOJ) announced in April 2020 that it has

returned or assisted Malaysian authorities with the recovery of more than US$600 million misappropriated from 1MDB coffers.

The massive investigations of many political and business leaders in Brazil known as Operation Car Wash have continued, though at a slower pace than the past few years. Recent consequences of what is likely the largest corruption probe in history include a November 2019 FCPA resolution involving Samsung Heavy Industries that resulted in US$75 million in penalties split between Brazilian and US authorities, and the June 2019 disposition of a case against TechnipFMC (which involved US$296 million in global penalties related to the same conduct for which another company, Keppel Offshore, paid US$422 million in global penalties in December 2017). The investigation, now in its seventh year, was a major contributing factor to the election of Jair Bolsonero as President of Brazil, leading to fundamental policy shifts in that country – including more recent allegations of political interference in the investigation itself. Fallout from Operation Car Wash triggered a major constitutional crisis in Peru in the autumn of 2019.

The saga of Lee Jae-yong, the vice-chairman of Korean company Samsung Electronics originally sentenced in August 2017 to five years in prison on various

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charges that included bribery and embezzlement, continues. The prosecution of Mr Lee was one of several related to a larger corruption scandal that resulted in the earlier impeachment of South Korea's President, Park Geun-hye, who was convicted and sentenced to 24 years in prison in April 2018. However, in February 2018, an appeals court dismissed many of the corruption charges against Mr Lee and reduced the terms of his sentence. The prosecution appealed to South Korea's Supreme Court, which in late August 2019 reversed the appellate court ruling and ordered new trials for Mr Lee and Ms Park, with the possibility of longer sentences for both. Mr Lee's retrial occurred in late 2019, while Ms Park's trial took place in early 2020; they are both currently awaiting court judgments. The ultimate outcome of this case will likely deeply affect public perceptions of corruption in South Korea, where the large chaebol have long been considered untouchable due to their central economic role.

In Canada, the long-running corruption investigation of SNC-Lavalin, Canada's largest engineering and construction firm, came to a close in December 2019. In a settlement, the company agreed to plead guilty to fraud for bribing Libyan officials and to pay C$280 million in fines. The company also agreed to retain an independent monitor and to provide updates to the government on various compliance issues for three years. Though SNC-Lavalin and its affiliates are debarred from World Bank and other multilateral development bank contracts until 2023 based on separate proceedings, the settlement agreement's terms allowed the company to maintain its eligibility for government contracts in Canada – a result generally seen as critical to the company's financial health. The corruption investigation created significant political trouble for Canadian Prime Minister Justin Trudeau, who was the subject of allegations that he and his aides had inappropriately interfered with the investigation on behalf of the company. An August 2019 report by the Canadian parliament's ethics commission found that Trudeau improperly pressured the Attorney General on the matter.

Finally, an enforcement trend worth noting across many countries is the increasing, and increasingly formalised, use by various authorities of negotiated agreements with companies to reach dispositions in anti-corruption investigations. These tools, which go by different names, are similar to US-style deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), which are favoured in FCPA enforcement. Among the countries that have authorised or used these types of agreements are the UK (DPAs), France (CJIPs), Canada (remediation agreements), Israel (conditional agreements), the Netherlands (out-of-court settlements), Argentina (effective collaboration agreements) and Brazil (leniency accords). These agreements allow for flexibility in terms and the imposition of ongoing obligations, such as compliance programme implementation or reporting on activities, and thus

are increasingly favoured by the authorities. They also mirror many aspects of US DPAs and NPAs in terms of eligibility requirements. For example, the French government's formal guidelines for CJIPs, issued in June 2019, encourage companies to self-report, conduct internal investigations and cooperate with prosecuting authorities – concepts that are relatively novel in the French criminal law system. The increase in the use of such tools is also likely influenced by ongoing developments in international cooperation among various agencies in anti-corruption investigations. The OECD released a useful study of this trend among treaty signatories of using 'settlements and non-trial agreements' to resolve corruption cases in March 2019.

Trends in international cooperation and legal assistance

International cooperation through mutual legal assistance provisions of bilateral and multilateral treaties (including, most prominently, the OECD Anti-Bribery Convention, the Organization of American States Convention and the UNCAC) continues to accelerate. As an initial benchmark, the OECD's comprehensive 2014 Foreign Bribery Report found that '13 per cent of foreign bribery cases are brought to the attention of law enforcement authorities through the use of formal and informal mutual legal assistance between countries for related criminal investigations accounts'. A more recent OECD report from December 2017, entitled 'The Detection of Foreign Bribery', stated that 7 per cent 'of bribery schemes resulting in sanctions have been detected through mutual legal assistance (MLA) requests'. The drop in percentage may be the result of the overall increase in the number of bribery sanctions in the intervening years (which could show a numerical increase in MLA-based cases as a percentage drop in the resulting larger universe), as well as possible differences in counting methodologies. It is also noteworthy that these statistics only cover cases 'detected' through MLA; the figures do not appear to document assistance in cases that have arisen through other methods, such as company self-reporting. The rise in publicly announced enforcement dispositions involving multiple country authorities over the past four years provides strong evidence that cooperation efforts have increased (at least among OECD members) and the 2017 OECD report notes the proliferation of formal and informal cooperation mechanisms and arrangements.

In April 2016, the OECD held a workshop on mutual legal assistance in international corruption investigations that highlighted both the challenges and the growth of best practices regarding cooperation with the participation of enforcement authorities from 20 countries, including China, and issued a summary report of the proceedings. The OECD also hosts twice-yearly confidential meetings of law enforcement personnel from signatory countries – meetings that, according to recent OECD reports, 'have proven to be instrumental in fostering contacts between law enforcement officials and facilitating international cooperation in foreign bribery cases'.

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In July 2017, the new International Anti-Corruption Coordination Centre (IACCC) was launched under the auspices of the UK National Crime Agency, with the goal of 'bring[ing] together specialist law enforcement agencies around the world to tackle allegations of grand corruption'. IACCC participants include the UK, US, Australia, New Zealand, Canada and Singapore, with Switzerland and Germany as observers and Interpol support. While most of these countries already engage in significant international cooperation generally, IACCC participants share intelligence and conduct other mutual assistance activities designed to 'bring corrupt elites to justice'. According to a public summary of its activities in 2018 (the latest data available), the IACCC 'provided vital intelligence support' for nine grand corruption investigations, 'identified and disseminated intelligence of 227 suspicious bank accounts found within 15 different jurisdictions' and offered intelligence and technical support to countries 'who have never received international law enforcement support before'. The IACCC coexists with an older, smaller group, the International Foreign Bribery Taskforce (IFBT), which has operated since 2013. The IFBT has taken the lead, for example, in the multi-jurisdictional investigation of the company Unaoil and its interactions with various companies in the oil and gas and other industries.

Most of the recent corporate corruption investigations that have resulted in significant penalties have featured international cooperation among authorities. For example, the Car Wash scandal in Brazil has resulted in extraordinary international cooperation – recent examples being significant settlements involving Petrobras in late 2018, TechnipFMC in mid-2019 and Samsung in late 2019. According to Brazil's Federal Public Prosecutor's Office, as at September 2019, the Car Wash investigations have led to 881 international cooperation requests from 61 countries and the convictions of more than 200 individuals.

As another measure of the growth of international cooperation, it is noteworthy that eight of the top 10 largest global resolutions related to the US FCPA (historically the most active anti-corruption enforcement regime) have involved the extraction of penalties by authorities from at least two countries. Six of those cases were completed within the past four years:

- Airbus (US$3.92 billion – France, UK, US);
- Odebrecht/Braskem (US$3.77 billion – Brazil, US, Switzerland, Panama);
- Petrobras (US$1.78 billion – US, Brazil);
- Telia (US$965 million – US, Netherlands, Sweden);

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- Rolls-Royce (US$816 million – UK, US, Brazil); and
- Vimpelcom (US$795 million – US, Netherlands).

Despite these trends, there are data that suggest that international cooperation still has a long way to go before becoming the norm across the world. The July 2019 OECD and UN report on the G20 2030 Sustainability Goals noted above found that, 'while all G20 countries can use the UNCAC as a legal basis for mutual legal assistance, extradition or law enforcement cooperation, few countries regularly do so in practice'. International cooperation can often be difficult and time-consuming. A survey by the OECD conducted in December 2015 indicated that '70 per cent of anti-corruption law enforcement officials report that mutual legal assistance challenges have had a negative impact on their ability to carry out anti-corruption work'. The September 2017 TI 'Exporting Corruption' report noted that, in addition to sometimes restrictive legal requirements, mutual legal assistance 'processes often suffer from limited resources, lack of coordination and long delays'. For companies under investigation, dealing with even the possibility of multiple investigations by different government authorities can create significant challenges related to coordination of sometimes competing government priorities, additional costs and the quantification of liability risks (the last especially in countries where investigators are inexperienced or not subject to effective due process requirements).

International guidance on anti-corruption compliance programmes

The US authorities in charge of enforcing the FCPA have set out the basic elements of what they consider to be an 'effective' anti-corruption compliance programme. Due to the active anti-corruption enforcement undertaken by the United States over at least the past 20 years, these elements have influenced the development of compliance standards by multinational bodies and other countries. The US authorities initially provided this guidance through a series of annexes to specific investigation dispositions, which the agencies over time revised to add details based on issues identified by them and compliance professionals. The culmination of that effort is contained in the US agencies' publication 'A Resource Guide to the US Foreign Corrupt Practices Act' – the second edition of which was issued in July 2020. The DOJ has also issued several versions of a guidance document (the most recent update was in June 2020) to help prosecutors evaluate the effectiveness of compliance programmes of companies under investigation. The guidance walks through a series of questions focusing on various programme elements and in some cases implies preferred responses, though the documents do not provide benchmarks.

Similarly, the UK Ministry of Justice in 2011 issued guidance regarding what it considers to be 'adequate procedures' for companies to put into place to prevent

"Recently, several countries in addition to the US and UK have enunciated standards for corporate compliance programmes under their national anti-corruption laws."

bribery; these are to be used to determine whether a company has a defence against a UK Bribery Act charge that it failed to prevent bribery by an associated person. More recently, in January 2020, the UK Serious Fraud Office (SFO) issued its own guidance on compliance programmes, which makes clear the SFO's expectation that companies under investigation must ensure that they can provide evidence of an effective, tailored and risk-based compliance programme if they want to maximise their positions with respect to the SFO's prosecutorial decisions or their eligibility for a DPA upon the completion of the investigation.

Recently, several countries in addition to the US and UK have enunciated standards for corporate compliance programmes under their national anti-corruption laws. France issued its anti-corruption guidelines under its Sapin II legislation in December 2017. Among other details, the guidelines describe eight characteristics of a 'coherent and indivisible [compliance] policy framework' that largely track international practice. The importance of these guidelines was reinforced by the June 2019 guidance on the eligibility of companies for French CJIPs. Argentina's new anti-corruption law, which took effect in March 2018, defines the elements of a corporate 'integrity programme' (which again generally track other standards). Having such a programme in place can,

along with other factors, exempt companies from legal liability for illegal payments under the law.

The May 2020 GRECO, OECD and AFA survey discussed above also touched on the prevalence of anti-corruption standards in various countries – both in the public sector and among private companies. The survey found that 'the adoption of codes of conduct is more widespread than risk mapping, and that both are rarely mandatory in the private sector'. The report noted further that:

> *[c]orporate responsibility to detect and prevent corruption is rarely established by law. Even though some companies do introduce anticorruption measures on a voluntary basis, the absence of legally binding commitments might make it difficult to ensure a systematic approach to compliance.*

Thus, while some countries have joined the United States in various efforts to push companies subject to their laws to build and fund compliance programmes that deter corrupt behaviour, companies in many other countries, including some capital exporters, are not subject to such incentives or requirements.

International bodies have long focused on issuing their own guidance regarding the structure and key provisions of corporate compliance programmes. The OECD has led the field in this area, with its first 'Guidelines for Multinational Enterprises' issued in 1976. The seventh edition of these guidelines states that companies should 'not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office'. The OECD has updated these guidelines several times, with the current 2011 version containing more expansive language.

The OECD's 2009 Anti-Corruption Recommendation, which is currently under review as noted above, contains two annexes. The second, which the OECD Council adopted on 18 February 2010, is 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'. This document lists key elements of an anti-corruption compliance programme and related accounting controls. Given the number of compliance programme guidance documents that have been issued by national enforcement authorities and international bodies since 2010, it is likely that the OECD Good Practice Guidance will be significantly updated as part of the overall review of the recommendation.

The UNCAC established in its article 12.2(b) that all of its signatories 'shall take measures' to 'prevent corruption in the private sector', including:

> *promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business.*

The UNCAC itself does not define those standards, but this obligation covers all of the convention's parties. The UNCAC article thus globalises the idea that companies operating internationally should establish compliance programmes and related systems. The UN Office on Drugs and Crime issued a detailed Anti-Corruption Ethics and Compliance Handbook for Business in November 2013; the handbook discusses, in part, risk assessment issues and programme elements, and was developed with input from the OECD and the World Bank.

The International Chamber of Commerce (ICC) issued its first set of 'Rules on Combating Corruption' in 1977. The ICC updated its rules in 2011 and the current version contains specific advice on what the ICC considers to be the essential elements of a compliance programme. The rules are also part of a comprehensive 2017 ICC Business Integrity Compendium that contains other guidance from the organisation on such relevant compliance topics as gifts and hospitality, use and monitoring of agents and intermediaries, and whistle-blowing.

On 15 October 2016, the International Organization for Standardization (ISO) issued a new standard for 'anti-bribery management systems', called ISO 37001. The goal of this exercise was to create an internationally recognised standard for such compliance systems that would allow for certification by third-party auditors. The standard acknowledges that it is built on previous guidance from the OECD, ICC, TI and 'various governments', though the standard differs in certain respects on requirements and coverage (for example, risks from mergers and acquisitions are not specifically covered). The standard also contains information regarding how companies can achieve the relevant ISO certification.

Companies and countries have generally been slow to adopt this standard. Several companies, including Eni, Alstom SA, Legg Mason (all of whom have been the subject of FCPA-related cases) and CPA Global, have announced that they have been certified under the standard after assurance audits by independent organisations. Several other prominent multinationals, including Microsoft and Walmart, initially said that they would adopt the standard for their operations, but updates on these efforts have been scarce. There has been criticism within the compliance community regarding both the content of the standards and the accreditation process for certifying bodies. Some enforcement officials have warned companies, moreover, that ISO certification of their compliance programmes should not be considered as a safeguard against prosecution. For example, in November 2016 a DOJ official stated

that while 'certification is a factor, the DOJ would have a lot of questions about what was done' and would evaluate 'how the programme was adopted at the time'. More recently, another DOJ official stated that the certification 'may be helpful, but the DOJ will look at your programme, not a proxy for your programme' and that the DOJ will want 'evidence that what you're doing is working'. It is perhaps notable that the DOJ's June 2020 guidance on measuring the effectiveness of compliance programmes does not on its face give any weight to such certifications.

Efforts to measure and deter 'demand' for bribes

While corporate enforcement actions and compliance programmes are designed to constrain the 'supply' of bribe payments to public officials by businesses and their associated personnel, there is also an increasing focus on attempting to gauge and deter the 'demand' side.

Because today's standards require that compliance programmes be designed to mitigate the actual risk faced by companies across the globe, there is a need for compliance professionals to follow efforts to measure the actual likelihood that corrupt payments will be solicited in specific countries of operation. TI remains the

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most cited resource for this information. Since 1995, TI's Corruption Perceptions Index (CPI) has ranked countries (180 in 2019, the latest survey) by perceived levels of corruption. Those countries ranked lower on the survey are perceived as more corrupt and thus are considered to harbour greater risks of official corruption. Though some private consultancies are now offering different or more complex data sets to provide alternative measures, TI's CPI rankings are still frequently used by companies (and sometimes by enforcement agencies) as measures of potential overall corruption risks in the countries ranked.

TI also offers country-specific reports on 'integrity risks for international businesses' and overviews of 'corruption and anti-corruption efforts'. The list of countries covered is relatively short, since TI has only recently begun to generate these reports through its 'anti-corruption helpdesk'. The integrity risk reports focus more directly on the 'demand' side of corruption and offer commentary on issues such as the 'extent and types of corruption' in a country, 'cross-sectoral integrity risks' and 'business climate'. The reports are sourced with citations to media and mostly public sector analysis.

The World Bank's Enterprise Surveys provide another source of perceived levels of corruption in various countries. This source covers 139 countries, though some of the data sets on individual countries are ageing – some are over five years old and a few are now a decade old. According to the World Bank, the data is based on survey responses by over 135,000 firms worldwide. Compliance professionals may find here information that is more directly related to day-to-day operational issues, as the surveys cover responses to 12 'indicators' of potential corruption, including the likelihood of having to make a payment or gift to obtain an operating licence, the value of a gift to an official expected to secure a government contract or percentage of firms expected to give gifts to officials to 'get things done'.

There are also regional efforts to measure corruption demand. One example is the Latin America Corruption Survey, the most recent version of which was published in July 2020. This survey, conducted by 15 law firms practising across the region, focused on the perceived effectiveness of local anti-corruption laws and compliance practices. In the survey, 54 per cent of respondents region-wide responded that corruption was a significant obstacle to doing business and 47 per cent stated that they believed that they had lost business to competitors that paid bribes – though respondents in certain countries with high perceived levels of corruption reported significantly higher numbers. Only 45 per cent of respondents stated that they believe offenders were likely to be prosecuted in their countries, a figure which was down from 66 per cent when the survey first asked this question in 2008. In addition to trends on the demand side, the survey also provides useful information for benchmarking compliance efforts. For example, the responses discuss specific

types of compliance programme activities that companies operating in the region have undertaken.

Deterrence on the demand side is generally handled by local laws that govern the conduct of officials and all of the major anti-corruption conventions require their state parties to enact and enforce those laws in good faith. Some entities, such as the OECD and GRECO, have taken steps to assess countries' legal frameworks related to the demand side and to offer technical assistance for improving such frameworks.

For example, a December 2018 report by the OECD Working Group analysed a sample of case studies to assess the consequences for officials who solicited bribes in investigations brought in various signatory states during the period 2008–2013. The report noted that:

> *although a considerable number of investigations and prosecutions targeting public officials took place, only 20% of the 55 cases [examined by the OECD's analysis] ended with sanctions on one or more public officials.*

The OECD report noted several other issues: that 11 investigations of officials were still pending years after the study's technical cut-off date; that mutual legal assistance appeared to have little effect on demand-side investigations; and that media played a major role 'as an intermediary in information flow between the supply-side and demand-side enforcement authorities'. While it contains valuable data, the report does not cover more recent years in which there have been significant investigations and convictions of officials who solicited bribes, especially in Latin America and other individual high-profile cases, some of which are discussed in this *Market Intelligence*.

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