Anti-Corruption Regulation 2020

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Anti-Corruption Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Australia, China, Denmark, Greece, Hong Kong, Portugal and Russia.

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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.

Lexology 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, James G Tillen of Miller & Chevalier Chartered, for his assistance with this volume.

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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 25 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 edition 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 edition confirms.

Second, this edition 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, this edition 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 (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 has come 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 (SEC) established a voluntary disclosure programme that allowed companies that admitted to having made illicit payments to 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 United States, 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 US 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 180 countries and territories by their perceived levels of corruption and publishes the results annually. In 2018, Denmark, New Zealand, Finland and Singapore topped the CPI as the countries perceived to be the world's least corrupt, while Somalia, Syria, South Sudan and Yemen 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 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 about findings of fraud or corruption to national authorities for prosecution have resulted in more than 60 criminal convictions.

In 2019, the World Bank announced that during the fiscal year, it debarred or otherwise sanctioned 48 firms and individuals for wrongdoing, 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 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, publishes 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 Voluntary Disclosure Programme (VDP) that allows firms and individuals that 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 late 2017, the World Bank's Office of Suspension and Debarment (OSD) published an addendum to its landmark 2015 report on World Bank enforcement activity. The addendum contains case processing and other performance metrics related to 489 sanctions imposed on firms and individuals involved in World Bank-financed projects from 2007 to 30 June 2017 (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 by the World Bank Group, the World Bank has cross-debarred hundreds of entities and individuals over the past five years, including 33 in the fiscal year 2019.

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;
- 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 Co-operation 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 (IACAC) in Caracas. The IACAC entered into force on 6 March 1997, and 34 member countries have now acceded to or 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 (the OECD Convention), which was subsequently ratified by the requisite number of parties and entered into force on 15 February 1999. Forty-four countries in all, including eight countries not currently members of the OECD, have now signed and ratified the OECD Convention; the most recent of these is Peru, which deposited its instrument of accession to the Convention in May 2018 and was accepted as a party to the Convention on 27 July 2018.

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, 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 (the 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.

As nearly all signatories to the OECD Convention had undergone these three phases of monitoring, in March 2016 the Working Group launched Phase 4, which 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 United States, 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, the invalidation 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, 43 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 186 countries are now party to it, though not all are signatories.

The UNCAC addresses six 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, extra-territorial 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 United States, 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 more than 1,000 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 one of Brazil's wealthiest businessmen, Marcelo Odebrecht, the former chief executive of Odebrecht SA, a major Brazilian construction conglomerate, 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. Prosecutors have added to the list of charges against Lula as Operation Car Wash developed. On 12 July 2017, the former president was convicted of passive corruption and money laundering and sentenced to 9-and-a-half years in prison for allegedly accepting more than US$1 million in kickbacks from a Brazilian engineering firm. On appeal, a federal appellate court not only unanimously upheld Lula's conviction, but voted to increase his prison sentence from 9-and-a-half years to 12 years and one month. Lula was arrested on 7 April 2018, shortly after Brazil's Supreme Federal Court (STF) rejected his habeas petition, and began serving his 12-year sentence. While in prison, Lula was convicted by Judge Gabriela Hardt, on 6 February 2019, for a second time on charges of corruption and money laundering and sentenced to 12 years and 11 months in prison; on 27 November 2019, an appellate court upheld the conviction and increased Lula's sentence to 17 years, one month and 10 days. On 7 November 2019, the STF issued a broad ruling that allows defendants to remain free while their appeals are pending. Due to this decision, Lula was released after spending 580 days in prison and will remain free until his appeals are exhausted.

Over the past three years, Brazilian authorities, alongside their international counterparts, have announced more than half a dozen coordinated global settlements, including a US$3.5 billion global settlement with Brazil-based conglomerate Odebrecht and its petrochemical unit, Braskem SA – the largest collective foreign bribery resolution in history. According to Brazil's Federal Public Prosecutor's Office, as of 9 September 2019, Operation Car Wash has led to 881 international cooperation requests from 61 different countries. Since it began, *Lava Jato* has also led to more than 200 appellate-level convictions of individuals.

France

Sapin II

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 programmes for high-risk employees. The Law also established the French anti-corruption agency (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.

In a new development within the French legal system, the Sapin II Law also created a new mechanism for resolving certain corporate criminal proceedings known as judicial agreements in the public interest (CJIPs), primarily those involving financial crimes, including cases of domestic and foreign corruption. 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 previous three years.

On 22 December 2017, approximately one year after Sapin II entered into force, the AFA published its first official anti-corruption guidance: 'Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism' (the Guidelines). Although not legally binding, the Guidelines, which are consistent with international anti-corruption compliance best practices, are intended to provide a framework around which organisations can develop their compliance policies and programmes. The stated scope of coverage of the Guidelines is broad. They apply to 'all private and public-sector entities, regardless of their size, legal structure, business area, revenue or number of employees' and 'are applicable everywhere on French territory'. Further, the Guidelines reach 'all companies, including subsidiaries of foreign groups, if such subsidiaries are established in the French Republic' and all such 'corporations and entities, regardless of where they do business, including other countries that do not have more rigorous standards for preventing and detecting corruption'.

On 27 June 2019, the French National Financial Prosecutor (PNF) and the AFA published their first joint guidelines (the Joint Guidelines) regarding the negotiation of CJIPs. The Joint Guidelines set forth certain factors that the PNF will consider before exercising its discretion to enter into a CJIP and in calculating any associated fine. Significantly, the Joint Guidelines encourage companies to self-report, conduct internal investigations and cooperate with prosecuting authorities. Specifically, the sufficiency of a company's cooperation with prosecution authorities will be a critical factor in the PNF's decision to negotiate a CJIP. The Joint Guidelines make clear that, as part of cooperation, French authorities expect companies to conduct internal investigations that preserve evidence and witness testimony and to report the results to the PNF along with all relevant documents and testimony. While the Joint Guidelines do not require companies to self-disclose potential misconduct to be considered for a CJIP, the PNF will favourably consider a company's self-disclosure within a reasonable period following the discovery of misconduct. The CJIP procedure is not available to individuals; however, the Joint Guidelines provide that internal investigations conducted by companies should assist with establishing individual responsibility for the misconduct. The Joint Guidelines also highlight French authorities' view that the CJIP procedure will facilitate the coordination of global enforcement actions among foreign regulators.

United States

As at 9 December 2019, the Department of Justice (DOJ) and the SEC had resolved 40 FCPA-related enforcement actions in 2019. 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, and through administrative orders. 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. In the past, 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 pace of enforcement in 2019 was slightly above the annual average of approximately 37 resolved FCPA enforcement actions over the past 10 years and an increase over the 32 actions in 2018. The increase in enforcement in 2019 was driven by a spike in the number of resolved actions against individuals, from 11 in 2018 to 17 in 2019, with a slight increase in the number of corporate enforcement actions from 21 in 2018 to 23 in 2019.

The DOJ and SEC recovered more than US$2.65 billion in monetary penalties (including fines, disgorgement of profits and payment of prejudgment interest) in corporate FCPA cases in 2019, for an average of nearly US$189.5 million per combined enforcement action, which is more than double the average over the past 10 years of US$67.3 million. These penalty amounts significantly eclipse those imposed by earlier FCPA settlements. For example, the average corporate FCPA penalty in cases before 2005 was only US$2 million and from 2005 to 2007 was only US$11.2 million.

Individuals have increasingly been targets of prosecution by US authorities and have been sentenced to prison terms, fined heavily or both. Since 2010, 147 individuals have been charged with 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 (or 'Yates Memo') 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 Memo. 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.

On 29 November 2018, Rosenstein, in an effort to address elements of the Yates Memo that had proven to be problematic in practice, announced some important limitations to the policy, most significantly a relaxation of the requirement that cooperating companies provide information on all individuals involved in some way in the underlying misconduct. As revised, the policy now only requires cooperating corporations to provide information relating to individuals who were 'substantially involved' in, or responsible for, corporate misconduct.

Consistent with its emphasis on individual prosecutions, in 2019, the DOJ matched its record of individual trials ending in an FCPA conviction with a total of four. On 8 November 2019, Lawrence Hoskins, a former senior executive of French-based Alstom, was convicted by a jury of six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy for his role in a scheme to pay bribes to officials in Indonesia to secure a US$118 million contract to build a power plant. Hoskins previously challenged the FCPA charges and, in 2018, the US Court of Appeals for the Second Circuit ruled that Hoskins — a UK citizen who was employed by a UK subsidiary of a French company, and who acted entirely outside the United States — could be found liable if he fell within the statue's jurisdictional scope. Consequently, the question whether Hoskins was an agent of Alstom's US subsidiary became a dispositive issue during trial. Since the FCPA does not define 'agent,' the trial court issued a pretrial ruling describing an agency relationship as '(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking'. Notably, the trial court held that control need only be exercised over the agent's actions taken on the principal's behalf and that '[o]ne may be an agent for some business purposes and not others.' The DOJ ultimately persuaded the jury that Hoskins acted as agent of Alstom's US subsidiary, arguing that even though Hoskins was an employee of a UK subsidiary of Alstom, the US subsidiary controlled his conduct with respect to the bribery scheme at issue.

Among other notable developments this past year, on 30 April 2019, the Criminal Division of the DOJ issued updated guidance on the 'Evaluation of Corporate Compliance Programs' (the Updated Evaluation Guidance) intended to 'assist prosecutors in making informed decisions as to whether, and to what extent, [a] corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (i) form of any resolution or prosecution; (ii) monetary penalty, if any; and (iii) compliance obligations contained in any corporate criminal resolution (eg, monitorship or reporting obligations)'. The Updated Evaluation Guidance does not establish a 'rigid formula' or a mandatory set of questions to be asked. Instead, the Updated Evaluation Guidance offers useful insights for companies regarding the DOJ's views on the design and operation of their compliance programmes.

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 all 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 a 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 edition for their timely summaries and for the valuable insights they provide.

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