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# **Structured Settlements for Corruption Offences Towards Global Standards?**

**IBA Anti-Corruption Committee: Structured  
Criminal Settlements Subcommittee**

**Editors: Abiola Makinwa and Tina Søreide**

**December 2018**

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# I. Introduction

In 2016, the Structured Criminal Settlements Subcommittee (SCSS) of the IBA Anti-Corruption Committee commenced a two-year project entitled, ‘Towards Global Standards in Structured Settlements for Corruption Offences.’ The objective of this project was to map the evolving settlement practices for corruption cases of countries across the globe. The project hopes to add to the growing discussion on whether, and to what extent, there is a need for global standards.

Reports based on a distributed questionnaire have been submitted by country researchers from 66 countries from Africa, the Far East, the Middle East, North, Central and South America, and Western and Eastern Europe. While we have not been able to achieve full global coverage, these reports provide an up-to-date and comparative overview of salient issues relating to structured settlements for corruption offences.

We would like to thank most sincerely our global community of country researchers who contributed their valuable time to map the state-of-play of structured settlements in their jurisdictions. We are deeply grateful to our regional officers, Elisabeth Danon, Wendell Wong, David Gurfinkel, Adriana Dantas, Lindsay Sykes, Ceres Aral DesNos and Emmanuel Akomaye, as well as the officers of our key countries, Alison Levitt QC, Andrew Levine and Stéphane Bonifassi, for their indefatigable spirit over the last 24 months. Our sincere thanks also go to our project researchers Elif Kiesow Cortez and Matthew Getz for their contributions in shaping the questionnaire used in the project. We thank Jessica Berrada for her administrative support, and our research assistants, Lina Schmid, Kasper Vagle, Harry Ritte and Alina Carrozzini, who have done an incredible job of marshalling the mountain of documentation. Finally, our very special thanks to Robert Wlyd, Pascale Dubois, Bruno Cova, Leah Ambler and other members of the IBA Anti-Corruption Committee for this opportunity and much appreciated support.

Dr Abiola Makinwa (Chair)

Prof Tina Søreide (Vice Chair)

Ms Alison Levitt QC (Vice Chair)

## II. SCSS biographies

### Dr Abiola Makinwa (Chair)

Abiola Makinwa (née Falase) is a Senior Lecturer in Commercial Law with a special focus on Anti-Corruption Law and Policy at The Hague University of Applied Sciences in The Netherlands. She is a professional member of the International Compliance Association and Chair of the Structured Criminal Settlements subcommittee of the IBA Anti-Corruption Committee from (2016 – 2018). Dr Makinwa holds a PhD from Erasmus University Rotterdam. Her teaching and research focuses on the role of private actors and the importance of public/private dialogue in the fight against corruption. Her PhD thesis, *Private Remedies for Corruption: Towards an International Framework* (Eleven International Publishing, 2013) focuses on the role of private actors and strategies in the fight against corruption. In 2010, Dr Makinwa's essay, *Future Thinking through the Prism of International Corruption*, won The Hague Institute for the Internationalization of Law (HiiL) Future Thinking Essay award. In 2013, Dr Makinwa was awarded an EU OLAF Hercule II Grant to research European Perspectives on Negotiated Settlements for Corruption Offences. This resulted in a book, A Makinwa (Eds) *Negotiated Settlements for Corruption Offences: A European Perspective* (Eleven, 2015). In 2014, Dr Makinwa was appointed as the Dutch National Reporter together with Professor X Kramer to report on 'Civil Law Consequences of Corruption in International Commercial Contracts' for the 19th Congress of the International Academy of Comparative Law (Vienna, 2014). More recently, in April 2018, Dr Makinwa won a Comenius Senior Fellow Grant to develop an Anti-Corruption Integrity Digital Training Module from the Netherlands Initiative for Educational Research. From May 2018, she has also become a Senior Fellow of the Comenius Network of the Royal Dutch Academy of Arts and Sciences (KNAW).

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### Prof Tina Søreide (Vice Chair)

Tina Søreide is Professor of Law and Economics at the Norwegian School of Economics (NHH), at the Department of Accounting, Auditing and Law. At NHH she is part of the Norwegian Centre of Taxation (NoCeT), the Economics, Ethics and Law research group, and she teaches a master course on the law and economics of corruption. Prof Søreide has published broadly on corruption, governance, markets and development, recently with an emphasis on law enforcement. Her latest book is *Corruption and Criminal Justice: Bridging Legal and Economic Perspectives*, (Elgar, 2016), and in 2011 she co-edited with Susan Rose-Ackerman the *International Handbook on the Economics of Corruption Vol 2*. Among her recent journal articles is, *An Economic Analysis of Debarment*, published spring 2017 in the *International Review of Law and Economics*, co-authored by Emmanuelle Auriol. Prof Søreide has been engaged in policy work for the Norwegian Government and internationally, including for the Organisation for Economic Co-operation and Development (OECD), the EU, the World Bank, development agencies and governments, and is a member of the High Level Advisory Group on Anticorruption and Integrity (HLAG) to the Secretary General of the OECD. Her former employers include the University of Bergen (UiB), the Chr Michelsen Institute (CMI) and the World Bank.

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## **Ms Alison Levitt QC (Vice Chair, Country Officer – UK)**

Ms Levitt is a Partner and Head of the Business Crime group. She specialises in criminal, regulatory and related matters. Ms Levitt was called to the Bar by Inner Temple in 1988 and was appointed Queen's Counsel in 2008. After twenty years in private practice at leading London defence chambers, she was head-hunted to become the Principal Legal Advisor to the Director of Public Prosecutions. There she advised on some of the most significant cases of the time, as well as appearing as counsel in the Court of Appeal. She is an expert in private prosecutions and immunities from prosecution. Throughout her career as a barrister Ms Levitt has appeared in key cases in the Court of Appeal and has written many reports, including the Crown Prosecution Service's highly praised in-depth review of their previous conduct of allegations against the entertainer Jimmy Savile.

As an advocate, Ms Levitt has conducted lengthy and complex trials and appeals involving bank instrument fraud, proceedings against company directors and fraud on a massive scale connected with international metal trading. She is familiar with the transactional aspects of many different types of fraudulent and corrupt activity, and has been praised in the Court of Appeal for her knowledge of the law and capacity to master the most complex detail. Ms Levitt has a profound understanding of the UK governmental and political system, and international matters. She has been a Recorder of the Crown Court since 2006 and is a Master of the Bench of the Inner Temple. She is a former Chair of the Young Bar and has also been Secretary of the Criminal Bar Association of England and Wales. Ms Levitt is a Certified Fraud Examiner (CFE).

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## **Mr Andrew Levine (Country Officer – United States)**

Andrew Levine is a litigation partner at Debevoise & Plimpton LLP and focuses his practice on white collar and regulatory defence, internal investigations and a broad range of complex commercial litigation. He regularly defends companies and individuals in criminal, civil and regulatory enforcement matters and has conducted numerous investigations throughout the world. Mr Levine also advises clients on a broad array of anti-corruption matters, including conducting risk assessments, enhancing compliance programmes and mitigating risks presented by potential mergers, acquisitions and other transactions.

In 2014, Mr Levine was nominated to Global Investigations Review's inaugural '40 Under 40' list of the world's leading investigations lawyers, and he was recognised in 2013 as a 'Rising Star' by the New York Law Journal. Before joining Debevoise in 2006, Mr Levine served as Deputy Counsel to the Independent Inquiry Committee into the United Nations Oil-for-Food Programme, led by Paul A Volcker. Mr Levine also served as a law clerk to the Honorable Dennis Jacobs, US Court of Appeals for the Second Circuit, and to the Honorable Lewis A Kaplan, US District Court for the Southern District of New York. Mr Levine received his Juris Doctor (JD) Degree from Yale Law School, where he was a Senior Editor of the Yale Law Journal and Submissions Editor of the Yale Journal of International Law. He obtained his BA (Bachelor of Arts *Summa Cum Laude*) and Phi Beta Kappa from Yale College. Mr Levine publishes and speaks regularly on anti-corruption matters, and is a Co-Editor-in-Chief of Debevoise's monthly newsletter update on the Foreign Corrupt Practices Act (FCPA).

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## **Mr Stéphane Bonifassi (Country Officer – France)**

Admitted to the Paris Bar in 1991, *Who's Who Legal* has described Stéphane Bonifassi as a 'dean of the Parisian Bar' for his intrinsic ability to work in various courts (civil and criminal) in France, with corresponding proceedings abroad, and to successfully manage litigation involving complex financial crimes, including major corruption cases. He's also been called 'an exemplary practitioner who knows his trade inside-out.' With more than 26 years of criminal court experience, he has developed a unique sense of what investigative tactics can be used in concert with litigation tools to track, locate and recover misappropriated or hidden assets. He has assisted various countries that have been the victims of embezzlement or corruption. With his distinctive approach, Mr Bonifassi has emerged as a leader in this evolving practice area and serves as the Executive Director and exclusive French member of ICC FraudNet, the world's leading asset-recovery legal network.

Mr Bonifassi participated in litigation arising from the Bernard Madoff fraud, and he has been recognised as 'most highly regarded' by *Who's Who Legal: Asset Recovery 2015 and 2016* and was named a Thought Leader in 2017. He's also considered 'most highly regarded' by *Who's Who Legal: Business Crime Defence 2015, 2016 and 2017*. He was ranked by Chambers in 2017 in the Dispute Resolution – White Collar Crime category. He has served as president of the Criminal Law Commission of the International Association of Lawyers (UIA), as well as Co-Chair of the IBA Business Crime Committee.

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## **Ms Elisabeth Danon (Regional Officer – Europe, Country Officer – Canada)**

Elisabeth Danon is a Forensic Senior Adviser at KPMG Canada, where she helps companies prevent, detect and respond to the risk of fraud and corruption. In her previous capacity, she was a public procurement analyst at the World Bank for several years. Ms Danon also worked for the Anti-corruption Division of the OECD, where she assessed compliance of State Parties with the standards of the Anti-bribery Convention. Ms Danon received her law degree from Université Paris Ouest la Défense and her Masters (LLM) in International Business and Economic Law from Georgetown University Law Center. She is admitted to practice law in the state of New York and is a Certified Anti-money Laundering Specialist (CAMS). Ms Danon wrote several papers and articles on substantive, procedural and institutional issues connected to the fight against bribery. She is a regular contributor to the FCPA blog.

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## **Ms Lindsay Sykes (Regional Officer – Central America)**

Lindsay Sykes is a partner based in FERRERE's Bolivia offices. She leads FERRERE's Compliance & Investigations practice, covering Bolivia, Ecuador, Paraguay and Uruguay. In this capacity, she regularly conducts internal investigations into allegations of fraud, bribery and other corporate misconduct, anticorruption due diligence on potential business partners and acquisition targets, as well as trainings on anticorruption and ethics policies, and testing of existing compliance programmes and procedures. Her practice includes advising companies on local anticorruption and

related regulations as well as foreign regulations with extraterritorial application, particularly the US Foreign Corrupt Practices Act (FCPA).

Prior to joining FERRERE, Ms Sykes was a lawyer with Cleary Gottlieb Steen & Hamilton LLP and Clifford Chance US LLP, where her practice focused on enforcement and white collar defence. Ms Sykes has lead on-the-ground investigations into allegations of corporate misconduct throughout the world, including in Bolivia, Brazil, Chile, Ecuador, Equatorial Guinea, Hong Kong, Peru, Switzerland, the United Arab Emirates and Uruguay. Ms Sykes obtained her Juris Doctor degree, with honours, from The George Washington University Law School in Washington DC and her undergraduate degree, with high distinction, from the University of Virginia in Charlottesville. Prior to studying law, she was a Fulbright Scholar in Bolivia. Ms Sykes is a member of the Bars in New York and Washington DC, the American Bar Association (ABA) and the IBA. She is the Bolivia representative of the IBA's Anticorruption Committee and a Regional Officer of its Structured Criminal Settlements Sub-committee.

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David Gurfinkel graduated from the University of Buenos Aires in 1995. He began his professional practice at Commercial Courts and then associated with Allende & Brea Law Firm in 1996, where he became partner in 2003. Mr Gurfinkel is head of Allende & Brea's Litigation and Compliance and Investigations areas of practice. He has specialised in commercial litigation and arbitration, corporate compliance and ethics, anti-corruption and internal fraud investigations, insolvency and bankruptcy.

Mr Gurfinkel is a member of the IBA and currently serves as Regional Officer within the Anti-Corruption Committee. He is also a member of the Argentine Association of Ethic and Compliance. He has published articles on anti-corruption, ethic and compliance in specialised journals in Argentina and other countries. Mr Gurfinkel is also a member of the International Insolvency Institute, a non-profit organisation comprised of leading insolvency professionals, judges, academics and insolvency regulators from around the world. He has lectured in conferences at foreign universities and gave post-graduate courses at Argentine universities, both in the insolvency and the commercial litigation and arbitration field. He has been cited as a leading practitioner in Dispute Resolution, Litigation and Arbitration by, among others, Chambers & Partners Global, Chambers Latin America, *Who's Who Legal, Latin Lawyer 250* and Latin American Corporate Counsel Association (LACCA).

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Adriana Dantas is the lawyer who heads BMA's Corporate Ethics/Compliance and International Trade practice areas. She is known for her significant international experience, her strong academic background and her skill in representing clients in matters involving multiple jurisdictions. In the Corporate Ethics/Compliance area, Ms Dantas has been involved in conducting internal investigations and defending companies before Brazilian and US authorities. She has acted in proceedings resulting from industry sweeps conducted by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) and, more recently, by local authorities. She assists

national and international clients in matters such as administrative defences, negotiating leniency agreements, conducting internal investigations, crisis management and designing and implementing compliance programmes. In International Trade matters, Ms Dantas concentrates her practice on trade defence actions in Brazil and other countries and on representing companies and associations in international disputes, particularly disputes before the World Trade Organization's Dispute Settlement Body.

Ms Dantas is an active member of the International Anti-Corruption and International Trade Committees of the ABA and of the IBA. She is a member of the Committee on partnerships of the Brazilian Bar Association, Sao Paulo Section, the Society of International Economic Law (SIEL), the International Trade Committee of the ABA, and the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade (IBRAC). Ms Dantas is registered with the District of Columbia Bar as a foreign counsel.

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Wendell Wong is a highly respected civil and criminal lawyer. His civil-commercial practice includes contracts and commercial disputes, shareholder and director disputes, medical negligence, product liability and arbitration work. His criminal practice focuses on commercial and business crime, fraud, securities, corruption, corporate governance related offences and investigation work. Mr Wong also regularly engages in regulatory and compliance advisory work, as well as anti-fraud and anti-bribery investigations work for multinational companies. Chambers Global ranks Wendell as a leading practitioner in dispute resolution and commends his regional work related to the US Foreign Corrupt Practices Act. Chambers Global describes him as renowned for his developed understanding of the Indonesian legal system. Asia Pacific Legal 500 also ranks Wendell high in the area of dispute resolution. *Who's Who Legal* recognises Wendell as one of the top Business Crime Defence and Investigations lawyers in Singapore.

Mr Wong is an experienced arbitration lead counsel who has acted in numerous international arbitrations under the rules of the Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC) and United Nations Commission on International Trade Law (UNCITRAL). He is a strong advocate of pro bono work and was one of the pioneer trainers for International Bridges to Justice, a Ministry of Foreign Affairs' Criminal Justice Training for countries of the Association of Southeast Asian Nations (ASEAN) in Laos and Singapore in 2011 and Myanmar in 2013. He is also a mentor with the Criminal Legal Aid Fellowship of the Law Society of Singapore.

Mr Wong joined Drew & Napier in 2000, having spent three years as Deputy Public Prosecutor/ State Counsel with the Attorney General's Chambers. He is the current Co-Chair of the Criminal Practice Committee of the Law Society of Singapore and a member of the Steering Committee of the Singapore Academy of Law's Criminal Legal Aid Scheme. Mr Wong has also been appointed to law reform committees with the Ministry of Law and Ministry of Home Affairs, Singapore.

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## **Mr Emmanuel Akomaye (Regional Officer – Africa)**

Mr Emmanuel Akomaye was the Pioneer Secretary of the Economic & Financial Crimes Commission (EFCC) from 2003 – 2013 and the Nigerian National Focal Person for the Review of the United Nations Convention Against Corruption (UNCAC) until 2013. He was Special Assistant to the Attorney General of the Federation & Minister of Justice from 1999 – 2003 and a member of the Nigerian Presidential Task Team on the Financial Action Task Force on Money Laundering until 2013. He was a member of the Commonwealth Committee on Asset Recovery between 2004 – 2005. He participated in the World Bank/United Nations Office on Drugs and Crime (UNODC) Stolen Asset Recovery Initiative (StAR) project that undertook a special study on settlements as a tool to resolve complex corruption cases under the UNCAC. Mr Akomaye was also a member of the Committee chaired by the Attorney General of the Federation that negotiated settlements with various multinational corporations from 2010 – 2012. He was also the pioneer Chair of the Economic Community of West African States (ECOWAS) Network of Anti-Corruption Agencies in West Africa from 2009 – 2011.

Mr Akomaye, who is now in private legal practice and rendering anti-corruption compliance services (amongst others), holds a Master in Anti-Corruption Studies from the prestigious International Anti-Corruption Academy, Vienna. He has spoken in major International Conferences on Corruption, Asset recovery and Money Laundering. He is a 2008 recipient of the Nigerian National Honour of Member of the Federal Republic (MFR).

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Elif Erdemoglu is a lecturer in Corporate Law and in Data Protection and Privacy Compliance at The Hague University of Applied Sciences. Dr Erdemoglu is a Certified Information Privacy Professional (CIPP/E). Before joining The Hague University of Applied Sciences (THUAS), Dr Erdemoglu was a research fellow in Law and Economics at Harvard Law School. She holds her doctorate degree from the DFG Graduate School in Law and Economics, University of Hamburg, Germany. Her doctoral research was funded by the German Research Association (Deutsche Forschungsgemeinschaft – DFG). During her doctoral studies, Dr Erdemoglu was a visiting fellow at Harvard Business School in the Business Economics department and a visiting scholar at Berkeley School of Law. She completed a triple Master's degree programme in economic analysis of law with joint degrees from Manchester University Law School, Hamburg University Law School and Bologna University Department of Economics. Dr Erdemoglu's research is focused on utilising economic analysis of regulation to solve cooperation problems between public and private actors (ie, states and corporations).

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## **Mr Matthew Getz (Research Member)**

Matthew Getz's practice focuses on government and internal investigations, white collar defence, anti-corruption due diligence and regulatory compliance. Mr Getz has represented large multinational companies and financial institutions in some of the world's largest anti-corruption internal investigations. He has represented individuals and corporations under investigation by the UK Serious Fraud Office, US Department of Justice and other regulators and prosecutors, and has successfully represented individuals challenging Interpol Red Notices and extradition.

Mr Getz advises clients on all aspects of their anticorruption requirements, including investigations, representations before prosecutors and regulators, transactional support, assessments of compliance with the FCPA and Bribery Act, and creating and implementing appropriate compliance programmes and procedures. He regularly advises multinational clients on EU and UK sanctions and money-laundering regulations, EU data protection regimes, cybersecurity and compliance with human rights' investigative and reporting requirements. He is regularly asked to write and speak about these topics in publications and before audiences around the world. Prior to law school, Mr Getz was a financial journalist writing for leading publications in South Africa and the UK.

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Ceren Aral DesNos is a life sciences lawyer with over nine years of experience in advising medtech and pharma multinationals on a wide range of topics including contracts, transactions, pricing and reimbursement, distribution channels, competition law and IP protection. She is an expert on regulatory compliance and anti-corruption practices emphasising on interactions with healthcare professionals, relations with third-party providers, tender procedures, advertising/promotion activities and product liability. Representing trade associations at both national and EU level, she has been involved in policy discussions with MedTech Europe and EFPIA over the past years.

She is a regional representative of the IBA's Anti-Corruption Committee and a member of International Society of Healthcare Ethics and Compliance Professionals (ETHICS). Admitted as attorney at law to Istanbul and Paris Bars, Ms Aral DesNos has taken part in international dispute resolution processes and negotiation of cross-border contracts between France and Turkey, representing clients from both jurisdictions. She has represented the Turkish business TUSIAD before the EU business federation Business Europe as member of their legal affairs committee.

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# III. Mapping the state of play of structured settlements for corruption offences

**Abiola Makinwa**

## Introduction

In the 40 years since the historic passage of the Foreign Corrupt Practices Act, there has been a revolution in the world of anti-corruption enforcement. Foreign bribery is now a criminal offence in most countries. Corporations are prohibited from engaging in the grand scale corruption that corrodes social, economic and political development. However, the challenge that still strongly persists is how to achieve effective enforcement of international and domestic foreign bribery rules.

Conflicts of interest on the part of government officials often result in a lack of political will that inhibits effective enforcement in foreign bribery cases. Furthermore, the formidable information asymmetry, encountered by even the most advanced criminal justice systems seeking to meet a criminal burden of proof in corruption cases involving complex multi-jurisdictional, multi-layered transactions requires new tools. It is perhaps not surprising that while the OECD in its 2014 report, *An Analysis of the Crime of Bribery of Foreign Public Officials*, notes that there has been a ‘drastic increase’ in the enforcement of anti-foreign bribery laws since 1999, this increase has taken place primarily outside the traditional criminal trial process. Of the 427 cases considered in the OECD report, in the majority of cases, sanctions were imposed by way of settlement procedures.<sup>1</sup>

In light of these developments, the IBA Anti-Corruption Committee set up the Structured Criminal Settlement Subcommittee (SCSS) to explore this growing enforcement trend. The activities of the SCSS are to explore the latest trends in national and global settlements of corruption cases; to review research and experience to identify key challenges in relation to the possibility of a global coordinated settlement framework; drawing on this research and experience, to propose a framework for the development of a coordinated criminal settlement policy for serious financial crime; and, to prepare reports or publications for members of the Committee and IBA members to be presented at forthcoming IBA conferences with a view to formulating a model framework for the settlement of serious financial criminal cases.

In this spirit, the SCSS embarked on its inaugural two-year project entitled, ‘Towards Global Standards in Structured Criminal Settlements for Corruption Offences’ (the ‘IBA SCSS study’). With the help of lawyers from 66 countries, the SCSS Committee has mapped the state-of-play of structured settlement regimes in Africa, the Far East, the Middle East, North and South America, and Western and Eastern Europe. The reports collated in this volume were based on a distributed questionnaire. These reports provide an up-to-date and comparative overview of salient issues relating to structured settlements for corruption offences from diverse national viewpoints.

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<sup>1</sup> OECD, *An Analysis of the Crime of Bribery of Foreign Public Officials* (2014), at p 34.

The contributing correspondents have detailed their foreign bribery enforcement architecture; the availability of corporate liability; the criminal law principles that create the discretionary space (or not) for cooperation between corporations and prosecutors; the extent (if any) of prosecutorial discretion; the manner in which such prosecutorial discretion is exercised; and the effect of cooperation between corporations and prosecutors on final outcomes. The reports give insight into the level of judicial oversight over the settlements processes, as well as, how transparent these processes are vis-à-vis the information available to the general public. Finally, the effect of double jeopardy with regard to foreign settlements as well as the correspondent's perception of the level of predictability of the structured settlement process in their jurisdictions are described.

An initial consideration was how to define the scope of the project in a manner broad enough to capture the various domestic practices of 'cooperation' or 'negotiations' or 'collaborations' between alleged wrongdoers and investigating authorities. Recourse was made to a working definition agreed to at a High Level Seminar on *Negotiated Settlements for Corruption Offences: A European Perspective* sponsored by the European Anti-Fraud Office (OLAF) EU Commission that took place in The Hague from 22–23 May, 2014. From this perspective, a negotiated settlement was defined as:

‘An agreed resolution between law enforcement authorities and alleged wrongdoers regarding alleged violations of anti-corruption laws resulting in sanctions or other legal measures.’<sup>2</sup>

In this view, a negotiated settlement can be viewed as *any* resolution that is an alternative to a full trial or that mitigates penalty in respect of a foreign bribery allegation. This could be a non-prosecution agreement (NPA), a deferred prosecution agreement (DPA) or a declination. It could be a plea or charge agreement, an arrangement for dismissal or a conditional discharge. Also included are pre-trial diversion processes, abbreviated procedures and penalty notices.

Another preliminary observation relates to nomenclature. For the purposes of this project, the term 'structured settlements' was adopted at inception. However, the reports showed that while, in some cases, settlements are detailed procedures with extensive reporting, records and judicial overview, in other instances, cooperation with prosecuting authorities is quite informal. In this view, some correspondents could not reconcile informal processes of cooperation with authorities with the phrase 'structured settlements'. With the benefit of their responses, it would seem that the expression 'negotiated settlements' may better capture the various nuances of cooperation between alleged wrongdoers in manner not adequately conveyed by the expression 'structured settlements'.

An analysis of the 66 submitted reports leads to the following findings:

### *1. The global spread of structured settlements*

In the IBA SCSS study, of the 66 countries considered, 57 have some form of 'cooperation process' for the settlement of foreign bribery offences between public and private actors. Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Canada, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, England and Wales, Egypt, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Ireland, Israel, Italy,

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<sup>2</sup> See A Makinwa, *Negotiated Settlements for Corruption Offences, Wither Europe*, in A Makinwa, eds, *Negotiated Settlements for Corruption Offences, A European Perspective* (Eleven International Publishing, 2015) p 12.

Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Mexico, Montenegro, Netherlands, Nigeria, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, United States, all have some mechanism to encourage cooperation with investigatory authorities in cases of foreign bribery. Brazil, Columbia and Mexico do not have corporate criminal liability but nonetheless report settlements occurring in the administrative sphere.

According to the reports received, only nine countries had no settlements process for foreign bribery offences. These are Bulgaria, El Salvador, Indonesia, Nicaragua, Paraguay, South Korea, Turkey, the United Arab Emirates and Uruguay.

## 2. Categories of structured criminal settlements

Structured settlements for corruption offences operate on a 'reward' for good behaviour premise. Logically, the ultimate reward would be the complete avoidance of criminal prosecution by way of an out-of-court settlement. A settlement that constitutes a *true* alternative to criminal prosecution, can be referred to as a *de jure* settlement process. In such a *de jure* system of cooperation, the settlement process is not contingent upon an admission of guilt.

The quantifiable 'reward' of cooperation in a *de jure* settlement is the avoidance of a criminal trial and/or reduced penalties. This would include outcomes such as pre-trial diversions, leniency arrangements, penal orders, non-prosecution agreements, deferred prosecution agreements, presumptions in favour of the alleged wrongdoer or declinations. Cooperation mitigates penalty and can allow for a pre-trial termination of the criminal process. Voluntary disclosure of wrong doing; self-reporting; cooperating with enforcement authorities in investigations; assisting in the investigation and prosecution of other legal entities or individuals; acceptance of imposed obligations or conditions; are some of the behaviours of the alleged wrongdoer that are taken into consideration by the prosecuting authority in the *de jure* settlement process.

Cooperation processes that are contingent on an admission of guilt centre upon some form of plea or charge bargain. In as much as there is some form of *reward* for cooperation, this can also be referred to as a form of settlement. However, although these resolutions also encourage cooperation with the prosecuting agency, they are not a true alternative to the criminal trial. As such it can be referred to as a resolution or settlement of a *de facto* nature since it does not constitute a true *de jure* alternative to the criminal trial.

Our emphasis in this report is to distinguish those countries that have a true alternative to the criminal trial in the form of a *de jure* system of settlement. Most countries will have some form of plea bargain process incorporated in their criminal justice system. Where a *de jure* alternative to the criminal trial process exists, the country is classified as a country with a *de jure* model (even if it also has plea-based *de facto* settlement processes). Only where there is no *de jure* process is the country categorised, for the purposes of this report, as one with a *de facto* model of settlements.

On this basis we can adopt the following typology of settlements for foreign bribery offences:

1. any cooperation process that is not contingent upon an admission of guilt and constitutes a true alternative to the criminal trial process can be classified as a *de jure* settlement model; and

2. any cooperation process that is contingent upon an admission of guilt can be classified as a *de facto*, plea-based settlement model.

### 3. *The de jure settlement model*

The IBA SCSS study provides varied examples of countries in this category. Of the 66 countries considered, 30 countries reported *de jure* frameworks that provide a true alternative to the criminal trial.

Examples of countries with such *de jure* settlement processes are:

1. Austria (pre-trial diversion, section 198 *et seq* StPO), leniency provisions (section 209a StPO), discontinuance of criminal proceedings if there are several criminal proceedings (section 192 StPO), the opportunity to draw up a written penal order ('*Strafverfügung*'; section 491 StPO);
2. Azerbaijan (immunity granted to the corruption reporter);
3. Argentina, (section 21, Anti-Corruption Law 27.401, 1 March 2018 '*Acuerdo de Colaboración Eficaz*');
4. Chile (section 238 CCPC Conditional Adjournment);
5. Belgium (amicable settlement);
6. Croatia (Article 206(d) CPC deferment and dismissal of criminal prosecution);
7. England and Wales (Crime and Courts Act 2013, deferred prosecution agreement);
8. France (Law no 2016-1691, 9 December 2016, regarding Transparency, the Fight Against Corruption and the Modernisation of Economic Life, '*convention judiciaire d'intérêt public*');
9. Germany (informal bespoke pre-arranged settlement);
10. Israel (settlement procedure under the Israeli Securities Law), Kazakhstan (agreement upon cooperation);
11. Malaysia (defence mitigation argued to prosecutor);
12. Mexico, Montenegro (Article 272 Criminal Procedure Code, postponement of criminal prosecution);
13. Netherlands (Article 74 of the DPC '*transactie*');
14. Norway (section 255 to 261 of the Criminal Procedure Act, penalty writ);
15. Poland (Article 335 and 387 of the CPC, conviction without trial/voluntary submission to penalty);
16. Serbia (Article 283 Criminal Procedure Code, deferment of criminal proceedings);
17. Singapore (19 March 2018, Criminal Justice Reform Act, deferred prosecution agreements);
18. Slovakia (section 219 of the Criminal Procedure Code, conditional stay of criminal prosecution of a cooperating accused (reported as very uncommon));

19. Slovenia (suspension of prosecution);
20. Spain (31 March 2015 Organic Law, exemption from criminal liability based on existence of organisation and management model for the prevention of crime);
21. Switzerland (Article 352 ff CrimPC, summary penalty order);
22. United States (deferred prosecution agreement or a non-prosecution agreement, US Attorneys' Manual Section 9-27.200).

In some countries with no corporate criminal liability, the *de jure* settlement process was reported as applying only to natural persons. Examples are:

23. Costa Rica, (Article 25 of the the Code of Civil Procedure (*Codigo Procesal Civil* – CPC), Conditional Suspension of Proceedings);
24. Greece (Leniency agreement under Article 263B of the Greek Criminal Code);
25. Kazakhstan (agreement upon cooperation under Article 612 of the CPC);
26. Taiwan (Code of Criminal Procedure, deferred prosecution);
27. Egypt (Article 107 (*bis*) of the Penal Code).

Also within this *de jure* category are those countries that have a settlements process based on administrative liability:

28. Brazil (administrative liability regime under the Clean Company Act 2014 (Law No 12,846));
29. Colombia (administrative liability regime under Law No 1778 of 2016);
30. Mexico (Leniency under the 2017, General Law of Administrative Responsibilities (GLAR));
31. Peru (Prevention models under Law No 30424 of 1 January 2018).

### 3.1 EXPLICIT AND NON-EXPLICIT *DE JURE* FRAMEWORKS

*De jure* frameworks of cooperation may be explicit about the interaction between the alleged wrongdoer and the prosecuting authority. In this sense, the exercise of prosecutorial discretion is 'fettered' by clear rules and guidelines that stipulate how prosecutorial discretion shall be exercised. The classic example of such an explicit *de jure* framework is in the US where the US Attorneys' Manual, section 9-27.200; the Principles of Federal Prosecution of Business Organizations; the Resource Guide to the Foreign Corrupt Practices Act; the 2015 Individual Accountability Policy (Yates Memo); the 2016 Department of Justice Fraud Sections' Foreign Corrupt Practices Act Enforcement Plan and Guidance Pilot; and the more recent FCPA Corporate Enforcement Policy, constitute an explicit *de jure* settlement framework that provides a clear indication of the factors that will be taken into account by prosecutors in the exercise of their discretion. Another good example is in the UK where the Crown Prosecution Service Code for Crown Prosecutors, as well as, the Deferred Prosecution Agreements Code of Practice, set out those factors which are likely to be relevant to the prosecutor when deciding whether or not enter into a Deferred Prosecution Agreement.

The explicit *de jure* settlement frameworks provide a measure of transparency and consistency by explaining the full range of potential mitigation behaviours available to companies. The more explicit the guidance, the more likely that it can be used as a guide by corporations seeking to adapt their behaviours in such a way as to mitigate or avoid culpability. Explicit *de jure* frameworks encourage self-policing and self-reporting by corporations. They can change the way a corporation interacts in its supply chain and in how it does business, especially where factors to be taken into consideration include whether or not a corporation has an effective programme to prevent and deter acts of bribery; whether or not the corporation promptly reported wrongdoing; and the extent to which the corporation cooperated fully with the investigating authority.

The IBA SCSS study also provides examples of non-explicit *de jure* models of settlements. In Norway, for example, settlements in the form of so-called penalty writs, can be issued in response to the voluntary disclosure and cooperation of the alleged wrongdoer. However, the factors by which ØKOKRIM (The National Authority for Investigation and Prosecution of Economic and Environmental Crime) exercises its discretion to find that a case should be decided by the imposition of a fine or confiscation, or both by way of an optional penalty writ instead of preferring an indictment, are not clearly defined. Nor is such a settlement filed in court.

Another non-explicit *de jure* framework is that reported by the correspondent for Germany who notes that the character of settlements in Germany is of an ‘informal bespoke’ nature. In a similar vein, is the report from Malaysia that shows that a person under investigation may attempt to convince the prosecutor not to initiate criminal proceedings against him/her, or if criminal proceedings have already been initiated, can submit letters of representation to the public prosecutor to negotiate the possible withdrawal, amendment or reduction of charges. There is, however, no clear articulation of the factors that will influence the prosecutor in coming to a decision.

The opaqueness of non-explicit *de jure* systems provide an insufficient framework or guidance around which corporations can take preventive measures. This may not only reduce the incentive for corporations to adjust their behaviour but, in addition, the lack of transparency may expose the exercise of prosecutorial discretion to abuse.

#### 4. *The de facto settlement model*

*De facto* model of cooperation occurs where the framework for cooperation is based on an admission of wrongdoing that is rewarded by a plea or charge bargain. Cooperation with the investigative authority in order to obtain the lessening of charges or to receive a reduction of sentence in exchange for a plea of guilty, or *nolo contendere* plea in advance of trial, can be considered a common feature of most criminal justice systems. From a judicial efficiency perspective, plea bargaining models contribute to the speedy adjudication of criminal cases and the alleviation of the workload of courts.

However, the focus in *de facto* settlements is less on the behaviour of the corporations and more on aiding speedy adjudication. The IBA SCSS study shows that factors that influence prosecutorial discretion in *de facto* settlement models relate primarily to the speediness of the trial itself. For example, a plea agreement entered into with the alleged wrongdoer who admits guilt; who provides full information of all facts, events and circumstances that can serve as evidence for discovery; or provides evidence for the investigation; or evidence for the trial; who helps to prevent the commission of a

serious crime; or repairs damages caused by the wrongful act. Where *de jure* settlement models seem to seek to primarily influence the behaviour of the alleged wrongdoers *ex ante*, *de facto* settlement models primarily focus on the trial process and punishment of the alleged wrongdoer *ex post*.

Of the 66 countries covered in the IBA SCSS study, 24 are categorised as having *de facto* plea-based mechanisms of settlements. These countries include Albania, Belarus, Bolivia, Bosnia and Herzegovina, The Czech Republic, Canada, Denmark, Ecuador, Estonia, Finland, Guatemala, Honduras, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Portugal, Romania, Russia, Sweden and Ukraine.

In the *de facto* group, mention should be made of informal *de facto settlement* systems. In this instance, there is no possibility for plea bargaining because it is not permitted within the particular country's justice system. There is also no *de jure* framework for structured settlements. Yet, despite this, as reported for example in the case of Denmark, 'in practice some bargaining may occur' to achieve a reduced sentence. Such opacity may be problematic for the reasons identified above, that is, it provides little guidance for corporations to adjust their behaviour and can expose the exercise of prosecutorial discretion to potential abuse.

## 5. De jure models – rule of law considerations

*De jure* structured settlements replace the criminal trial. The extent to which such *de jure* settlement processes are consistent with the rule of law in terms of court oversight, transparency, information available to the general public and the predictability of the process is open to question. This is an important consideration because the *de jure* settlement, for the serious criminal offence of foreign bribery, is a compromise that involves the exercise of discretion. Unless such discretion is exercised according to predictable standards, its exercise is arbitrary. The arbitrary exercise of regulatory power is antithetical to the rule of law. The IBA SCSS study highlights differences in the level of judicial oversight, transparency and perceived predictability of the settlement process in countries with *de jure* settlement systems.

### 5.1 OVERSIGHT BY THE COURT

To what extent is there judicial oversight of the settlements process? Is the court involved in the initiation of the settlement process? In the conduct of the settlement negotiations? Is there some form of judicial supervision after the settlement has been reached?

Since the *de jure* settlement process is a true alternative to the criminal trial, it is not surprising that the IBA SCSS study uniformly showed that the court plays no role in the initiation of, or in the conduct of the negotiations. In all of the reporting countries, the court has no role in the initial stages where the prosecutor exercises the discretion to enter into negotiations with the alleged wrongdoer, nor is it necessary to obtain the court's consent to the process. Furthermore, in all reports of countries with *de jure* systems, the court is not involved in the negotiations preceding the settlement.

As to the question of judicial scrutiny of the settlement, there are varied responses. In some countries, before the settlement becomes final and binding the settlement must be filed in court and there is some measure of judicial review. These countries include Chile, Colombia, Costa Rica,

England, France, Japan, Kazakhstan, Nigeria, Poland, Slovenia, Spain, the US and Wales. In other countries there is no role for the court either before or after the structured settlement. There is no requirement to file the settlement reached in court, nor does the court have a supervisory or approval role. Examples are countries such as Belgium, Croatia, Israel, Montenegro, The Netherlands, Norway, Serbia and Switzerland.

These differences in the role of the court provide an interesting point of comparison. Rule of law considerations may suggest that the legitimacy of settlements for acts that are criminal in nature, require a measure of judicial overview in the public interest and in the interest of the structured settlements process itself.

## 5.2 TRANSPARENCY

The premise of the rule of law is that power should not be arbitrarily exercised but should be subject to well defined laws that ensure accountability of government and private actors. It posits that laws should be just and evenly applied; that human rights should be protected; that laws should be enacted and administered in an open, transparent, fair and efficient manner; and that dispute resolution should also be administered in a timely, accessible, ethical and independent manner.<sup>3</sup> In the IBA SCSS study correspondents were asked questions about public access to information about the settlements reached; about the extent of the information provided and the accessibility to this information by the general public.

In *de facto* settlement systems, since negotiation is centred on the basis of a plea of guilt, any subsequent bargain will usually be a matter of public record. The plea deal is filed in court; criminal hearing procedures are generally open to the public; and information about any eventual settlements is available to the general public. To what degree do the *de jure* models of settlements provide this level of access?

There was wide variety in the responses. Some countries reported that the information available to the public is ‘extensive’ or ‘somewhat extensive’. For example, in England and Wales, details about the deferred prosecution agreement are made known to the public. However, where necessary, details may be withheld if there is a possibility that this may prejudice ongoing criminal proceedings. Similarly in France, the settlement and the order approving it will be made available on the Anti-bribery Agency website (this is a new system so only time will tell if this is indeed the case in practice). In the Netherlands, a press release with a description of the criminal offences, a detailed description of the proposed settlement, a description of the underlying considerations with regard to the settlement (including a motivation of why the case should not be brought before a criminal judge), as well as an explanation of the amount of the fine, is released to the public. In the US, the DOJ makes publicly available, on its website, detailed information regarding convictions, plea agreements, DPAs and NPAs. Other countries where correspondents observed that information available to the general public is ‘somewhat extensive’ include Chile, Colombia, Costa Rica, Israel, Japan, Kazakhstan, Portugal, Taiwan, Switzerland and the US.

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<sup>3</sup> World Justice Project What is the Rule of Law? The Four Universal Principles. <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

On the other hand, some countries reported limited access to information. In many of these countries there is generally no information provided to the public unless this is requested by way of a request for access to information. Country reports of Austria, Azerbaijan, Belgium, Croatia, Guatemala, Mexico, Montenegro, Norway, Poland, Serbia, Slovakia, Slovenia, Spain and Uruguay indicated that information to the public is rather limited and in some cases non-existent.

### 5.3 RULE OF LAW – PREDICTABILITY

A key aspect of fairness is the tangibility of reward and predictability. To encourage cooperation there have to be *real gains* for all parties involved. To what degree do countries with a *de jure* system of structured criminal settlements meet the threshold of predictability of enforcement and tangibility of reward? Practicing lawyers gave their perceptions of the predictability of the settlements for corruption offences process. Several countries indicated that the process is reasonably predictable (Colombia, Croatia, England and Wales, Greece, Guatemala, Kazakhstan, Mexico, Montenegro, Netherlands, Serbia, Slovakia, Slovenia, Spain, Switzerland, Taiwan, and the US). In one country, Costa Rica, the perception of the correspondent was that the process was highly predictable. However, other countries reported the perception that there is no predictability to the process. These countries include Austria, Chile, Norway, Poland and Uruguay. In other instances, the *de jure* system of settlement has just been introduced and country reporters indicated that it is too early to provide a perception.

## Conclusion – looking forward

The individual country reports presented in this report provide insight into structured settlements for corruption offences regimes at the national level. As the reports show, settlements come in many guises. We can, however, distinguish those countries that have adopted *de jure* models of settlements, that are true alternatives to the criminal trial, from countries that have *de facto* processes of cooperation that are centred on an admission of wrongdoing. *De jure* systems encourage compliance in a prevention model *ex ante*, while *de facto* models focus primarily on the efficiency and speed of the criminal trial process in a punitive model *ex post*.

In reading through the reports, one can note the following:

1. about half of the countries covered in this study have adopted *de jure* models of settlements that provide a true alternative to the criminal trial;
2. several of these *de jure* settlement processes have been adopted in just the last five years. Argentina 2018; Brazil 2014; Colombia 2016; France 2016; Japan 2018; Mexico 2017; Peru 2018; Singapore 2018; Spain 2015; the UK in 2013. This indicates a growing momentum in the trend towards creating frameworks for settlement of foreign bribery cases that are of a *de jure* nature and;

3. in terms of encouraging ‘good behaviour’ there is great variety in the extent to which the models of *de jure* settlements provide an explicit indication of the factors that will influence the exercise of prosecutorial discretion. In some countries, this is sufficiently explicit to form a robust basis for corporations to introduce preventative measures, as well as soft and hard controls to reduce the risks of non-compliance. However, there are also examples of non-explicit systems. Such opaqueness not only provides little guidance for corporations on how to adjust their behaviour; it may discourage self-reporting and also expose the exercise of prosecutorial discretion to potential abuse.

The reports show that there is little homogeneity even within the broad groups of *de jure* and *de facto* settlements for corruption offences.

From the perspective of the challenge of how to achieve effective enforcement of anti-corruption laws, *de jure* settlement processes are no doubt an important tool. A network of *de jure* systems, operating across countries, provides several nodes of regulatory impulse (ie, any country with a jurisdictional link to the transaction) that encourage corporations to detect, prevent and remediate acts of corruption occurring internally within the corporation, within their supply chain, or otherwise within their sphere of influence. The delocalised and long reach of the factors that are taken into consideration in *de jure* settlements can be contrasted with the dependence on national criminal justice systems in *de facto* punishment-focused settlement processes. In this view, *de jure* settlement processes can provide an important alternative avenue of governance where national criminal justice systems are compromised by forces of corruption and the political will to enforce anti-corruption rules is lacking.

As the responses of the 66 countries covered by this IBA SCSS study show, public/private cooperation in anti-corruption enforcement is a growing phenomenon. The active participation of corporations in the policing, reporting and sanctioning of corrupt acts is opening up new vistas in the fight against corruption and impunity. Is this a trend towards new enforcement principles? In the next section the officers of the SCSS give their recommendations on the question of global standards for settlements in corruption cases.

# IV. Structured settlements for corruption offences: towards common standards?

## 1. Dr Abiola Makinwa (Chair, Structured Criminal Settlements Committee)

The question of global standards for structured settlements in corruption cases is best answered in the context of the transacting environment in which foreign bribery occurs. It is an environment that has no central nexus of governance. It is delocalised and fragmented. It is characterised by competing cultures and diverse criminal justice systems. It is an environment in which many states do not yet possess the capacity to detect, investigate and effectively prosecute complex, multi-jurisdictional, multi-layered corrupt transactions. Indeed, the state, through its officials, is often a principal actor in the grand-scale foreign bribery it seeks to prohibit. Furthermore, it is an environment where corruption significantly reduces political will by states to prosecute and, along with this, the incentive for corporations to comply with anti-corruption laws. For these reasons, one can argue that traditional criminal law enforcement is a poor fit with the environment in which grand scale corruption occurs and that there is urgent need for an alternative process.

This IBA SCSS study supports the view that the enforcement environment for such corruption offences is changing. There is a perceptible shift from state-centred, single-actor, punishment focused approaches, to approaches that favour public/private cooperation and prevention. In this regulatory landscape, cooperation between corporations and investigatory authorities, by way of settlement regimes, is a growing phenomenon. By engaging the corporation in the process of prevention, detection and sanctioning of corruption, settlements whether of a *de jure* nature (as a true alternative to a criminal prosecution) or a *de facto* nature (cooperation with the investigating authority to influence a plea or charge agreement), can provide much needed recourse against institutionalised corruption and impunity.

Settlements encourage self-policing and self-reporting by rewarding corporations that have an effective programme to prevent and deter violations of law; that promptly report wrongdoing; that fully cooperate with the investigating authority and take steps to implement hard and soft controls to prevent future occurrences. The ‘reward’ for such cooperation can take the form of plea agreements, non-prosecution agreements, conditional suspension of proceedings, deferred prosecutions or declinations. The key principle of settlements is ‘reward for good behaviour’, as well as prioritising ‘prevention’ above ‘cure’. The *de jure* model of settlements provides the greatest reward by offering the possibility to avoid criminal prosecution entirely. In this regard, explicit *de jure* settlement processes provide a greater measure of predictability, by explaining the full range of potential mitigation behaviours open to corporations in a transparent manner and therefore encouraging behavioral change. Settlements can influence the behaviour of corporations. Integrating the controls that can help a corporation to detect, police and self-report incidents of corruption has become necessary good practice. This is an important vehicle in shaping an environment conducive to compliance with anti-corruption rules.

However, as settlements spread (whether of a *de jure* or *de facto* nature), it is important to preserve and improve the effectiveness of this process. Predictability of enforcement is a key attribute of the

rule of law. The IBA SCSS study shows little consistency in the character of settlement process across jurisdictions. There are differences in the application of prosecutorial discretion; in the application of criminal justice principles; in the extent (or not) of judicial review; and in the role of the court. There are differences in the transparency of the process; the information available to the public; and even in the legal status of the settlement in other jurisdictions. Such a fragmented regulatory landscape is arguably not in the best interest of any of the stakeholders impacted by settlements.

**Towards global standards:** Given the multi-jurisdictional nature of international contracts tainted by foreign bribery and the diversity of negotiated settlements practices in different legal systems, there is urgent need for common ground. In an integrated global market, the move toward convergence, already seen in the spread of *de jure* systems (as established in this IBA report) is more likely to increase than not.

Moving towards global standards in explicit *de jure* settlement regimes will arguably encourage self-policing, self-reporting, as well as, the institution of anti-bribery controls by corporations operating across markets in a coherent fashion. An integrated market needs a measure of harmonisation, not only to ensure ‘a level playing field’ but also to ensure an efficient criminal justice process that does not impose onerous costs on business to the detriment of consumers.

The inherently cross-border and complex nature of corrupt transactions makes the need for a governing framework of cooperation imperative. Whether this framework is based on mutual recognition or on the development of model rules, remains the work of the next decade. As settlements spread, so too does the likelihood of multiple settlements processes in different countries arising out of the same transaction(s). It is to be expected that as settlements assume a more multi-jurisdictional character and become even more prevalent, this fact will, in and of itself, serve as a catalyst for an increasing measure of comparability of standards in settlement regimes.

Furthermore, if, as argued above, settlements are in the public interest as a vehicle to circumvent impunity, then they should also be seen to be instruments of justice. Settlements can rightly attract ethical condemnation. The public function of the criminal trial to assuage the public’s demand for ‘revenge’, the demand for individual accountability and for punishment that expresses ‘moral condemnation’ is not so easy to discern in a negotiated settlements process. Therefore, higher level criteria that promote the legitimacy of settlements are essential. Ensuring individual accountability, due process, non-derogation from fundamental freedoms, transparency and access to information about the settlements reached, is crucial to satisfy the public expectation of open, fair and transparent enforcement of anti-bribery rules. There should also be a concerted effort to address the position of ‘victims of corruption’ within this emerging framework. The greater the degree to which negotiated settlements fulfil such criteria, the more likely they are to be regarded as legitimate mechanisms of ensuring predictability of enforcement of anti-corruption laws in the eyes of the general public. Such higher level criteria must by definition stand above domestic processes.

Looking forward, it is clear that in a global market, cooperation between private actors and public regulatory authorities will ultimately require formal regimes of cooperation between the different national regulatory authorities themselves. This may serve as the springboard for global principles in settlement regimes that usher in an environment where prevention rather than punishment takes centre-stage in the fight for the effective enforcement of anti-corruption rules.

## 2. Professor Tina Søreide (Vice Chair, Structured Criminal Settlements Committee)

As structured settlements have taken root as a major mode of non-trial law enforcement in corporate bribery cases, we need to know how it works, in which contexts and whether it serves the purposes associated with law enforcement actions more generally – including the purpose of placing blame correctly for criminal acts, preventing future misconduct and promoting moral evolution in society. It is useful to have IBA officials involved in mapping regulations and actual practices, especially as a number of countries informally make use of settlements (their regulation is silent or unclear about such enforcement actions).

Settlements offer flexibility for law enforcers and this is particularly welcome in cases when corporations are suspected of crime where it is difficult or cumbersome to provide sufficiently hard evidence. This is often the case when the offender operates in international markets, typically with complex corporate structures and transactions via tax havens. The opportunity to offer settlements enables enforcement agencies to use sanction principles that deter corruption more efficiently than traditional enforcement methods. They motivate corporate offenders to self-report and cooperate and let them have a say in the enforcement process. Generally, offenders receive a lower penalty the more convincingly they have operated with crime-preventive measures, encouraged whistleblowers to speak out, self-reported incidents when they happen and chosen to cooperate with the investigation. The opportunity to offer settlements enables enforcement processes to reach a conclusion much faster – to the benefit of both the corporate offender and the enforcement agency. More importantly, they lead to enforcement actions in situations when the counterfactual might have been no enforcement action at all.

For several reasons, however, the practice is also controversial. One concern is how the opportunity to offer a settlement tends to leave an enforcement authority with several enforcement functions. A prosecuting office first handles the *investigation* of a case, secondly serves as a *regulator* who evaluates an alleged offender's self-reporting, cooperation and compliance system, and thirdly, it is the 'judge' who offers a penalty that ends the case. Compared to the checks and balances associated with criminal court proceedings as well as non-criminal regulation, the prosecutor serves with 'too many hats'. What is the proper solution? Judicial review of settlements is introduced as a control mechanism in some countries, yet, there is a risk that it offers little more than the pretence of legitimacy; if the judge simply signs off on whatever he or she receives in such cases it has no real impact. On the other hand, when judges *do* evaluate the facts of the case behind a settlement, they easily compromise the mentioned efficiency gains associated with settlements.

In the presented survey material, we find that countries with stronger rule of law allow their prosecutors to operate with *more* discretion, including in negotiating settlements. Similarly, countries that are ranked high on *Transparency International's Corruption Perceptions Index* provide their prosecutorial agencies with more discretionary authority. While this finding tells us that it is possible for countries to combine efficient law enforcement with broad discretion for prosecutors, all societies need institutional structures that secure fair and proper treatment of cases, and this definitely includes enforcement cases that ends with a settlement.

In particular, such enforcement modes require principles regarding the trade-off between publicity and confidentiality. While law enforcement legitimacy is associated with a certain extent of transparency, the opportunity for confidentiality around certain matters could be decisive for corporations' choice of bringing their case to the enforcement agency, especially when the evidence may lead to enforcement actions elsewhere or comprehensive collateral damage. Should the door be closed or open? In practice, this is difficult to regulate because it falls under the prosecutors' good judgment to manage such situations. Nevertheless, governments easily lose public confidence in their enforcement systems if they fail in introducing clear principles for the process leading up to a settlement, or protecting civil rights, or if they fail in being transparent about the outcomes of criminal law cases, about the sanctions principles in use and the eventual enforcement decision. A law enforcement system is accountable to the society of which it is part, which means it must inform citizens how laws are enforced. The more discretion placed with the prosecutor for the sake of efficient enforcement, the more important are the principles of transparency and legitimacy.

A further concern with settlements is how they might be seen as an easy way out for corporate offenders. As several sanctions in the US have demonstrated, a settlement is not necessarily a soft solution for a corporate offender. However, it does involve an element of bargain and, as this happens in the shadow of a court case, the outcome will normally be 'softer' than the expected outcome of a court case (yet some offenders may accept a settlement in cases when they could be acquitted in court). In reality, the settlement outcome depends on the bargaining powers of the parties, which (for both the offender and the enforcement agency) is a function of several factors – including the expected cost of a court process, the quality of the evidence, the possibility that new evidence becomes available before the court and the perception of the court's competence and its integrity. For outsiders as well as the parties involved it is, therefore, difficult to predict the outcome of a settlement-based enforcement process, which is likely to deviate quite a lot from the expected outcome of a court procedure. For these reasons as well, it is necessary to operate with clear principles for settlements and transparency around the results.

For the sake of avoiding a perception of arbitrary and 'soft' outcomes, the principles need to include clear sanctioning principles. In order to deter crime, the benchmark penalty – that applies to those who do little to self-regulate and do not cooperate in the investigation – must make crime unprofitable – for example, by combining a large fine with other sanctions that affect the offender. For those who self-report and cooperate in the investigation, there must be predictable rewards in terms of lower sanctions. We have to keep in mind, however, that for some forms of corruption, it will be impossible for governments to offer a scheme that deters the crime or induces firms to self-report because the bribery is too rewarding or too difficult to prove. For governments, therefore, settlements should be considered as one out of a set of enforcement tools and, clearly, not as a tool to rely on completely or as an excuse for allowing budget cuts in the judicial system.

Enforcement agencies need resources for independent investigation of the facts of a case. They also need budgets for comprehensive international collaboration. With an overall aim of preventing corruption internationally, enforcement agencies have to contribute in law enforcement processes outside their jurisdiction, especially for the sake of preventing immunity for bribe-recipients. Corruption is an international and two-sided problem and collaboration between law enforcers is essential for holding responsible both the briber and the bribe-recipient. Such collaboration also

contributes to protect corporate offenders against the risk of double jeopardy, a risk that might otherwise prevent offenders from self-reporting their offences.

As Dr Makinwa points out, we need to establish regulatory principles for the use of settlements in corporate bribery cases, which promote predictability and harmonisation across jurisdictions. Several forces are in motion for such aims. There has never been more collaboration among enforcement agencies for the sake of mutual legal assistance in these matters, exchange of experiences and debate about better solutions. The OECD Working Group on Bribery (WGB) plays an essential role in this respect and so do authorities that share their experiences in a large number of cases, especially the US, although there are also other countries with a rapidly increasing number of enforcement actions. The OECD WGB is particularly concerned about the regulation of settlements. In parallel with its processes on this theme, a group of experts (the Recommendation 6 Working Group on Settlements) have developed a set of draft recommendations on settlements to be submitted to the OECD WGB in the autumn of 2018. However, the private sector too is a driver for improved systems because it wants to see more predictability in these enforcement processes. The civil society also plays an important role as a constant reminder about the importance of tough action against crime, legitimate process and transparency about the results.

IBA members hold unique competence and experience to contribute in the process towards workable and legitimate solutions. With this survey, we have far better oversight of practices, which may feed into our useful debates. We also hope it will encourage more empirical and legal studies of settlements in bribery cases.

### **3. Ms Elisabeth Danon (Regional Officer, Europe)**

The possibility for a prosecutor to resort to a settlement facilitates enforcement of anti-foreign bribery laws. In 2014, the OECD reported that 69 per cent of successfully concluded cases since the entry into force of the Anti-Bribery Convention were resolved with a settlement. A settlement typically entails that a wrongdoer and the authority taking legal action against them work together towards a common goal – the resolution of a case – even though they have diverging interests. Beyond this basic paradigm, foreign bribery investigations are resource-intensive and require legal assistance from foreign jurisdictions. In the context of a settlement, the accused person often cooperates and contributes to the evidence finding exercise.

A settlement instrument can also be designed in a way that facilitates detection of the crime. Foreign bribery is particularly challenging to detect, as it is pernicious by nature and ‘contrary to many other offences, there is rarely an easily identifiable, direct victim who would be willing to come forward’ (OECD 2017). By rewarding voluntary disclosure through discounted monetary fines or the declination to debar wrongdoers from public tendering, settlement regimes can facilitate detection and, therefore, legal action against foreign bribery.

Settlements can be used to resolve transnational corruption cases in 35 out of the 39 European countries covered by the SCSS project. It is important to note that, while the option for prosecutors to resort to a settlement facilitates enforcement of foreign bribery laws, it is not in itself indicative of an actual commitment to do so. Commitment to enforce is, in fact, rather uneven among European countries. Europe is home to some of the biggest enforcers of foreign bribery laws, including

Germany and the UK, but several countries in the region have yet to successfully conclude one foreign bribery case, which means that their settlement system hasn't yet been tested for this offence. This variation tilts the balance in favour of companies that fall under the purview of countries with little or no enforcement.

SCSS data shows that the disparity of settlement models also contributes to tilting the playing field. Out of the 35 European countries where settlements can be used to resolve foreign bribery cases, ten have a *de jure* settlement system. In the 25 others, a *de facto* settlement can be reached between law enforcement authorities and the alleged offender.

Important aspects of settlements, including the extent of judicial review, vary significantly among European countries. In the UK, for instance, the court must agree on the principle that the Serious Fraud Office and the accused person enter a settlement. Once the settlement has been reached, it can only come into force if the terms are approved by a court. By contrast, certain settlements do not receive any form of judicial review. In Norway, ØKOKRIM can issue a 'penalty notice' to an accused legal person without court approval and the agreement becomes valid upon acceptance by the accused person.

With the exception of the UK, one common feature of settlement regimes in Europe is the limited visibility on the elements that weigh in on the settlement terms, including the sanction. In practice, prosecutors would often take into account voluntary disclosure, cooperation with law enforcement authorities and remedial actions in determining the sanction to be imposed, but uncertainty remains as to how these elements are measured and the extent to which they weigh on the sanction. As regards transparency of concluded settlements, here again, the UK is on one end of the spectrum. At the other end are Slovakia and Slovenia, where information on settlements is neither published nor accessible. Halfway in between are countries like the Netherlands and Norway, where settlements are subject to a press release by the prosecutor's office. In the Netherlands, however, this only applies to major cases.

The disparity of settlement systems is a source of uncertainty for businesses, which often fall under the purview of various jurisdictions. As settlements regimes are more favourable to wrongdoers in some countries than others, the fragmentation tilts the playing field and might drive countries to resort to forum shopping.

### ***Conclusion/recommendation***

As they are time and budget efficient, settlements offer a valid alternative to trial for the resolution of economic crimes. In European countries, they are increasingly used to resolve allegations of foreign bribery. In designing or reforming settlement systems, countries should ensure that settlements are fair, transparent and adequately balanced. In particular, it is essential that settlements are not perceived as being too lenient on wrongdoers, allowing them to buy their way out of trial. Several measures can be taken to convey the notion that settlements adequately deliver justice. Among others, these include:

1. making access to a settlement conditional to voluntary disclosure;
2. publishing and advertising the settlements; and
3. ensuring that sanctions are dissuasive and that they are comparable.

Settlements should also be designed to be drivers of enforcement and compliance. Governments should ensure that individuals and businesses are incentivised to come forward and collaborate with law enforcement authorities. Credits should be given to wrongdoers that have taken the appropriate measures to prevent wrongdoings. Finally, settlements should make space for appropriate victims' compensation.

#### **4. Ms Ceren Aral DesNos (Regional Officer, Middle East)**

Despite all having a public authority for investigation and prosecution of corruption in international business transactions, none of these countries have specific legislation on anti-corruption and pre-trial cooperation between the alleged wrongdoers and the prosecution. Corruption is governed by their penal codes and the relevant provisions of the Code on Criminal Procedure.

Within this framework, we do not see the existence of a true alternative to trial through cooperation, in any of these countries, except for limited circumstances. The three countries in the region present different models – on a scale from no cooperation as in the United Arab Emirates (UAE); to very limited cooperation as in Egypt; and limited cooperation as in Israel. The limited cooperation in Israel manifests itself as a mixture of *de jure* and *de facto* systems where a limited structured framework for criminal settlements exists alongside plea agreements integrated in the criminal procedural rules.

The rule of law and the role of the courts weigh heavily in the region. The UAE system relies completely on the role of the court providing for no cooperation through criminal settlements or plea agreements. Egypt does not allow plea agreements and Israel does only with an absolute judicial review. In Egypt, where criminal settlements are allowed, it is limited only to minor offences where serious offences are left to the review of the courts.

Accordingly, once a bribery and corruption allegation is already in place, the systems seem to provide sufficient predictability and transparency. When it comes to bringing offences into the daylight or to further discover their depth, their efficiency can be said to be restricted due to lack of sufficient room for cooperation.

The application of the criminal settlements is existent, however limited, in the region. In both Egypt and Israel, criminal settlements result in no charges or dropping of charges, with no judicial review over the settlement. Israel ensures publication and transparency of the settlements. The main variation on the criminal settlements comes from what offences can be subjected to the settlement. In Egypt, criminal settlement is possible only for minor offences that do not necessarily include bribery and corruption. That being said, over US\$2.5m agreed to be paid by Mubarak, as a result of the settlement made with the prosecution in Egypt in relation to the offence of accepting unlawful gifts, demonstrates that even such limited application could potentially have an important impact. In Israel, in order for the bribery and corruption to be subjected to a criminal settlement, it must be committed within the context of traded securities. Otherwise, they can only be subjected to plea agreements.

When reviewed globally, it can be said that the global trend of enhanced cooperation for corruption offences is reflected in the Middle East region too – but with limited application. The good practices of structured settlements can serve as examples to challenge the ‘all or nothing’ approach still existent in the region depending entirely on the role of the court. In this respect, a balancing exercise by introduction of at least a limited opportunity of cooperation could be beneficial for the UAE system. The Israeli model of a plea agreement with full judicial review could be a starting point for Egypt to integrate plea bargain into the criminal procedure. The number of Israeli criminal settlements, with worth of millions of dollars and concluded on bribery and corruption offences as a result of the trade securities investigations, can be considered to show the benefit in applying criminal settlements to bribery and corruption offences in general.

## **5. Mr Wendell Wong (Regional officer, Asia)**

On the heels of a series of large-scale corruption scandals involving high-ranking government officials and/or multinational corporations, which sent shockwaves through the region, Asia presents a unique backdrop for the study of structured settlements for corruption offences.

### *Existing models of structured criminal settlements in Asia*

At present, out of the six countries in Asia participating in the IBA SCSS study (namely, Indonesia, Japan, Malaysia, Singapore, South Korea and Taiwan), only Taiwan has implemented a *de jure* or explicit model of cooperation.

### *Emerging models: Japan and Singapore*

Nevertheless, the majority of the country researchers from Asia opine that there is greater room for cooperation between the prosecution and alleged wrongdoer(s) in negotiating structured settlements for corruption offences.

Driven by increasing awareness in this aspect and following in the footsteps of a growing number of jurisdictions worldwide, there is also renewed activity in the region with legal reform in the pipelines for at least two other countries – Japan and Singapore.

In 2016, Japan introduced prosecutorial bargaining to its Code of Criminal Procedure for implementation by June 2018. This applies to specific classes of offences including bribery. Prosecuting authorities may exercise their discretion to, amongst others, drop or reduce charges in cases where the alleged wrongdoer cooperates in the investigation of another person’s crime.

In January 2018, a new legal framework incorporating DPAs for corporate entities has been proposed in Singapore. The Public Prosecutor can agree to dismiss charges against a corporate entity for certain offences if it agrees to undertake strict obligations or comply with specific requirements. The overarching aim of this mechanism is to promote corporate reform. All DPAs require the approval of the High Court and their terms must be published.

## *Moving towards global standards?*

In Asia, where models of structured settlements for criminal offences are still in their infant stages for various countries and yet to be explored in others, talks of converging towards global, or even regional, standards for structured settlements for corruption offences may be premature at present.

Indeed, a more realistic goal may be to ensure there is no dilution (whether actual or perceived) of the sanctity of the rule of law in legal systems which provide for these structured settlements. This is because the discussion on structured settlements exposes an underlying tension between greater investigative or prosecutorial efficiency and incentivising compliance on one hand, and concerns over a weakening of the effect of deterrence achieved through prosecution on the other. After all, Asian societal values place a premium on accountability in the name of public interest when criminal misconduct occurs and harm is caused to society.

As structured settlements gain traction in Asia, moving towards greater transparency and relying on judicial oversight as a safeguard over structured settlements may well be a means of striking an acceptable balance between the competing considerations. This is evidenced in the models adopted (or to be adopted) by Japan, Singapore and Taiwan, which appear to place a premium on judicial supervision. This may entail the court approving the private negotiations and scrutinising the proposed terms of settlement. For example, in Singapore, all DPAs require the approval of the High Court, which must consider whether the terms of the DPAs are fair, reasonable and proportionate.

Nonetheless, to fully study the utility of various models for structured settlements in operation and test these models against the Asian legal and cultural backdrop, a longer runway is still required.

## **6. Ms Alison Levitt QC (Vice Chair, Structured Criminal Settlement Subcommittee and Country Officer, UK)**

The UK has adopted a *de jure* model. The structured criminal settlement process (referred to as DPAs, in England and Wales) is set out in the Crime and Courts Act 2013. However, since England and Wales is a common law jurisdiction, the practical application of DPAs will be established through precedent and case law.

DPAs are defined by legislation in the following way:

### **‘Paragraph 1 – Characteristics of a deferred prosecution agreement**

- (1) A deferred prosecution agreement (a ‘DPA’) is an agreement between a designated prosecutor and a person (‘P’ whom the prosecutor is considering prosecuting for an offence specified in Part 2 (the ‘alleged offence’).
- (2) Under a DPA –
  - (a) P agrees to comply with the requirements imposed on P by the agreement;
  - (b) the prosecutor agrees that, upon approval of the DPA by the court, paragraph 2 is to apply in relation to the prosecution of P for the alleged offence.

## Paragraph 2 – Effect of DPA on court proceedings

(1) Proceedings in respect of the alleged offence are to be instituted by the prosecutor in the Crown Court by preferring a bill of indictment charging P with the alleged offence (see section 2(2)(ba) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (bill of indictment preferred with consent of Crown Court judge following DPA approval)).

(2) As soon as proceedings are instituted under sub-paragraph (1) they are automatically suspended.

(3) The suspension may only be lifted on an application to the Crown Court by the prosecutor; and no such application may be made at any time when the DPA is in force.

(4) At a time when proceedings are suspended under sub-paragraph (2), no other person may prosecute P for the alleged offence.'

Where the authorities are considering prosecuting for an offence they must adhere to the statutory guidance set out in the Code for Crown Prosecutors. This code prescribes a two stage 'full code test' which must be satisfied before a prosecutor can take the decision to prosecute. These stages are the 'evidential stage' and the 'public interest stage'. Prosecutors may only prosecute those cases which pass both stages of the full code test. Additionally, the *Deferred Prosecution Agreements Code of Practice* was published jointly by the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS), the Director of the SFO and the Director of Public Prosecutions currently being the only designated prosecutors able to enter into DPAs. This statutory code of practice sets out a number of factors which should be considered as part of the decision making process on whether it is in the public interest to criminally prosecute a company or enter into a DPA. These factors include any history of similar conduct, the level of cooperation and whether the company self-reported.

In terms of procedure and form of DPAs, the legislation sets out what procedural requirements must be complied with and the type of 'persons' who may enter a DPA with a prosecutor (only body corporates, partnerships or unincorporated associations may enter into a DPA). In addition, formal *Rules of Court* (Part 11 of the Criminal Procedure Rules) have been made which supplement the legislation.

There is no prescribed form for a DPA; however, the legislation which brought DPAs into law requires that the DPA contains:

'(1) A statement of facts relating to the alleged offence, which may include admissions made by the accused.

(2) An expiry date, which is the date on which the DPA ceases to have effect if it has not already been terminated.

(3) The requirements that a DPA may impose on the accused include, but are not limited to, the following requirements:

(a) to pay to the prosecutor a financial penalty;

(b) to compensate victims of the alleged offence;

- (c) to donate money to a charity or other third party;
- (d) to disgorge any profits made by the accused from the alleged offence;
- (e) to implement a compliance programme or make changes to an existing compliance programme relating to the accused's policies or to the training of the accused's employees or both;
- (f) to cooperate in any investigation related to the alleged offence;
- (g) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.'

The DPA may impose time limits within which the accused must comply with the requirements imposed on the accused.

There is, therefore, an extensive legislative framework with guidance and rules of court underpinning the DPA system in England and Wales.

### *Rule of law observed in terms of transparency, role of the court and tangibility of reward*

The legislative framework for DPAs contains a number of requirements and obligations to ensure the process is transparent and to provide for a significant level of oversight by the court.

There is no role for the court before the prosecutor and the company begin negotiations. It is solely within the purview of the investigator/prosecutor to decide whether to commence negotiations.

After the commencement of negotiations between a prosecutor and a person in respect of a DPA, but before the terms of the DPA are agreed, there will be a preliminary court hearing. At this hearing the prosecutor must apply to the Crown Court for a declaration that entering into a DPA with the accused is likely to be in the interests of justice, and the proposed terms of the DPA are fair, reasonable and proportionate. Any such hearing must be held in private and any reasons given must also be given in private.

When the terms of a DPA have been agreed there will be a final hearing at which the prosecutor must apply to the Crown Court for a declaration that the DPA is in the interests of justice and the terms of the DPA are fair, reasonable and proportionate. The court must give its reasons for reaching this decision and the DPA only comes into force when it is approved by the Crown Court making the declaration. The hearing at which this application is made may be held in private but if the court decides to approve the DPA and make the above declaration, then it must do so and give its reasons in open court. Additionally, once the DPA has been approved by the court, the prosecutor is required by statute to publish the following information:

1. the DPA;
2. the declaration of the court made at the preliminary hearing and the reasons for its decision to make the declaration;
3. in a case where the court initially declined to make a declaration at the preliminary hearing, the court's reason for that decision; and

4. the court's declaration at the final hearing and the reasons for its decision to make the declaration.

As set out above, the DPA must contain certain specified information including a statement of facts relating to the alleged offence, which may include admissions made by the accused. Therefore, there is a significant amount of information which the legislation requires to be made public.

The legislation provides that publication of details of the DPA may be postponed by order of the court if the publication would prejudice proceedings. For example, the name of the company which was the subject of the UK's second DPA was not disclosed at the time of announcing the DPA because of the possibility of prejudicing ongoing court proceedings, the company was referred to as 'XYZ Ltd'; similarly, the terms of the fourth DPA with Tesco plc were not immediately made public because of the possibility of prejudicing ongoing criminal proceedings against individuals. There is no power to withhold publication of the information indefinitely.

In terms of predictability of outcome, an invitation to negotiate a DPA is solely a matter for the prosecutor (even in cases where the corporate entity has made a self-report) and is not necessarily guaranteed. A number of factors will be considered and, although self-reporting is encouraged, the SFO's DPA with Rolls Royce in January 2017 indicates that self-reporting is not necessarily a condition precedent. The DPA must also be approved by the court at a final hearing in order to be effective. If the court does not accept that (a) granting a DPA is in the interests of justice, and (b) that the terms of the DPA are fair, reasonable and proportionate, then it could, in theory, refuse to make the relevant declaration.

In terms of tangibility of reward for entering into a DPA, the most significant impact for a corporate will be that it significantly reduces the level of any monetary fine imposed. The reduction is likely to be in the region of a one-third smaller fine than after a trial. A reduced sentence for an early guilty plea is an established part of UK criminal law and this is not confined to DPAs. It may also avoid the risk of the company being successfully prosecuted, which can have wide ranging consequences, for example, in the sphere of public procurement.

### *Moving towards global standards?*

There are a number of significant variations in the criminal justice systems of different countries, the result of which is that it is probably not possible to create a global standard for structured settlements. For example, in England and Wales or the US, the criminal justice system is based on a common law adversarial court system; other jurisdictions have a civil codified law and operate an inquisitorial system. Additionally, there are those structured criminal settlements (SCS) systems which require a clear plea of guilty and there are others where this is not necessary. It is probably not possible to harmonise such fundamental differences within a single, all-encapsulating rule or standard.

What would be of significant assistance is a treaty catering for mutual recognition of structured criminal settlements across jurisdictions. As more and more corporate corruption/fraud investigations take on an international element, it will become ever more important to have a mechanism whereby the international nature of any settlement can be recognised. At present the SCS procedure operates in a vacuum, with joint agreements being left to the various jurisdictions

to negotiate and seek to agree between each other on an ad hoc basis. For example, the global SCS entered into by Rolls Royce in January 2017 involved a resolution with the Brazilian, UK and US authorities. These multi-agency settlements often attempt to carve up liability between the various jurisdictions but it can result in a significant overlap in the criminality which is subject to the settlement. A transnational recognition mechanism would help reduce the risk of double jeopardy in these types of agreements and ensure there is transparency and finality in any sentence/agreement.

## 7. Mr Stéphane Bonifassi (Country Officer, France)

The French structured criminal settlement, the Judicial Convention of Public Interest (JCPI – *Convention judiciaire d'intérêts public*) has been introduced by Law No 2016-1691 of 9 December 2016. It is a very recent mechanism for which, despite four recent applications, some factors remain unclear. Guidelines have been issued to prosecutors in January, in which additional elements have been given on the amount of the fines and the factors taken into account when calculating the fine. In addition, although the settlements need to be approved by a judge, Law No 2016-1691 doesn't say on what grounds.

The French JCPI inscribes itself in the *de jure* model. In a conference in March 2017, Eric Russo, Vice-Prosecutor of the National Financial Prosecutor's office, explained that the office will be more likely to negotiate a JCPI if the legal person conducted an internal investigation and if they were willing to cooperate and to disclose information about the wrongdoing. This could lead to reducing the penalty imposed. On that point, the guidelines issued in January 2018 confirm Eric Russo's statement and the applications of JCPs that have occurred all demonstrate that cooperation was a factor taken into account positively or negatively. HSBC, for example, saw its penalty rise due to their lack of cooperation whereas the two French companies that concluded a JCPI in March both saw their penalty reduced for their cooperation. Further practice will allow lawyers to understand what level of cooperation and what level of integrity/compliance commitment is required from the legal person.

The court's prior consent is not necessary for any settlement negotiation and the court is not involved before the settlements have been reached. It is only once the prosecutor and the legal person reach a settlement that the convention is filed to the district judge, who then sets a public hearing in which the alleged wrongdoer, the victims and their counsel are heard. At the end of this hearing, the district judge gives his approval or not. While doing so, he checks that the JCPI was adequate given the circumstances. He verifies its regularity and the proportionality of the amount of the fine and other penalties regarding the benefits of the misconduct. The guidelines provided to judges are not precise, which gives judges a wide discretion.

The procedure in France is quite transparent once the settlement has been reached, since the order approving the settlement and the settlement itself are available on the French Anti-Bribery Agency website. The publicity of the settlement is comprised of a statement of facts. However, in the French system, it is difficult to know in advance that a public hearing will be held, including public hearings where a judge gives his or her approval/denial of the settlement.

The objective of global standards for structured settlements would help reduce the disparity in enforcement policies and would hopefully allow facts to be efficiently prosecuted in one jurisdiction.

## 8. Mr Andrew Levine (Country Officer, US)

Structured settlements are essential to the functioning of the US criminal justice system. In the US, the number of settlements far exceeds the number of matters resolved through trial. Structured criminal settlements enable defendants to obtain greater certainty in managing their ultimate exposure. The government meanwhile seeks justice, while avoiding the inevitable logjam that would result if all defendants held prosecutors to their burden of proof, absent a huge increase in prosecutorial resources.

Indeed, US criminal authorities have sought to make structured settlements more appealing to corporations, offering benefits for those that voluntarily self-report, cooperate in the government's investigation, and fully remediate. Structured settlements also have fuelled the number of corporate criminal investigations that involve enforcement authorities from multiple countries. This proliferation of multilateral investigations in turn has yielded greater scrutiny of how authorities around the world structure settlements and how such settlements impact one another, an evolving area that warrants close attention.

For resolving corporate criminal charges in the US, the DOJ offers several forms of structured settlements, including:

- in a plea agreement, which is filed with a court, the defendant admits guilt, is convicted of the crimes charged and is sentenced by the court;
- in a deferred prosecution agreement DOJ files a charging instrument with the court but requests postponement of the prosecution for a specific period in order for the defendant to demonstrate good conduct. Typically, the defendant pays a penalty, waives the statute of limitations, admits relevant facts (but not guilt) and agrees to cooperate with the government. If the defendant has met its obligations at the end of the deferral period, DOJ asks the court to dismiss the charges; and
- in a non-prosecution agreement, DOJ retains the right to file charges but refrains from doing so on the condition that the settling company complies with the NPA's terms. The company may agree to terms similar to those imposed under a DPA, though an NPA is not filed with a court.

In negotiating structured settlements, US prosecutors retain significant discretion, both in determining what conduct to charge and the resulting monetary and non-monetary penalties. These forms of structured settlement involve differing levels of transparency and varying roles for the court. Plea agreements and DPAs, which must be filed in court, are publicly available in court records. In order for a plea agreement or DPA to become final, the court must approve it. Given the discretion afforded to prosecutors, such review may not be particularly vigorous, depending on the circumstances and the inclinations of the particular court.

That said, the associated filings for plea agreements and DPAs are often extensive, specifying the prosecution's key factual allegations and identifying the charges filed or resolved, though not necessarily in a comprehensive manner. DOJ makes publicly available certain information regarding plea agreements, DPAs and (in many but not all cases) NPAs. DOJ also recently has made available information about several resolutions of matters under the US Foreign Corrupt Practices

Act in which DOJ exercised its discretion to decline to bring charges, albeit while requiring the disgorgement of profits, arguably a new form of structured resolution.

From a US perspective, structured settlements are here to stay and an increase in the number of jurisdictions offering structured settlements seems inevitable and worthwhile. Such growth globally in the use of structured settlements presents various challenges and opportunities, including in four key respects:

1. Potential incentives differ markedly in terms of whether companies should self-report a potential violation. Some jurisdictions – including the US – seek to encourage and reward a company’s self-reporting. In other jurisdictions, self-reporting actually may result in a worse outcome for the company. Additionally, self-reporting in one country may trigger sharing of evidence with authorities in another country, possibly unbeknownst or contrary to the wishes of the cooperating company. Authorities have differing expectations regarding what constitutes cooperation sufficient to mitigate penalties. This variance may affect the ability of a cooperating company to assert the attorney-client privilege and inadvertently may waive privileges applicable in other jurisdictions.
2. The magnification of penalties is a serious concern. As more countries participate in a particular structured settlement, there is a risk that the total settlement amount is being enlarged rather than merely allocated among resolving jurisdictions, notwithstanding the crediting of penalties paid in one jurisdiction against those due in another.
3. The potential for structured settlements involving multiple countries gives rise to an inevitable tension between declination and coordination. Especially where having a relatively limited jurisdictional nexus, authorities in each country should consider whether to defer to the country with the greatest enforcement interest rather than participate in a given coordinated resolution. Relatedly, considerations of international double jeopardy lead to the question of whether a company (or individual) ever should be criminally prosecuted and punished in more than one country for the same conduct.

Uniformity in how authorities treat structured settlements seems neither essential nor feasible. But some compatibility of approaches is vital. Potentially critical factors include:

- the willingness of prosecutors and defendants to negotiate in good faith under circumstances where both believe that a structured outcome is likely superior to the alternative;
- consistency in the processes and incentives leading to settlement;
- equity and transparency in outcomes;
- appropriate prosecutorial supervision; and
- the availability of court oversight.

These elements reinforce the US experience with structured settlements, even if not uniformly embraced and achieved. Similar principles seem worth exploring further as other jurisdictions expand their use of structured settlements, including to focus on the compatibility and coordination of related settlements across jurisdictions and to address the risk that companies face competing, sometimes uncoordinated enforcement actions and overlapping penalties for the same underlying conduct.

# V. The SCSS questionnaire

IBA Anti-Corruption Committee: Structured Criminal Settlements Subcommittee  
Towards Global Standards in Structured Criminal Settlements for Corruption Offences Project

## Country Questionnaire

*Prepared by A Makinwa, T Søreide, E Erdemoglu, E Danon and M Getz*

Name of Country:

Name and affiliation of Country Researcher:

Contact Details of Country Researcher:

The focus of the SCSS is the resolution, by domestic authorities, of allegations of corruption in international business transactions. Country Researchers are kindly invited to answer, as far as possible, the questions set out below.

### *Surveys instructions:*

1. We kindly request that you tick ALL the boxes included in this form with an X. It is particularly important that all the boxes in RED are marked. In order to collect qualitative data, we also strongly encourage you to provide a brief explanation for each of your responses in the appropriate text box located underneath the checkbox question.
2. Please provide full legal references to support your answers to questions answered. Please also provide the English translation of such references where applicable.

### *Please note the following:*

1. Any reference to anti-corruption rules should be understood as referring to the rules governing corruption of a public authority in the context of international business transactions.
2. The term ‘public authority’ encompasses anyone vested with government authority (procurement agents, public officials, custom officers, etc), as well as officers of state-owned enterprises. The term ‘rules’ encompasses everything that is binding, whether treaties of direct applicability, statutes, regulations, case law, etc.
3. For the purposes of this study, a very broad definition of a structured settlement (negotiated settlement) is adopted. A structured settlement is ‘... any agreed resolution between law enforcement authorities and alleged wrongdoers regarding alleged violations of anti-corruption laws resulting in imposed or deferred sanctions or other legal measures.’

1. Background: Normative Framework
<p><b>1.1 Are there Anti-Bribery Rules in force in your country?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p>
<p><b>1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?</b></p>
<p><b>1.3 Do your foreign bribery laws have extraterritorial effect?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>1.4 Are facilitation payments allowed in your jurisdiction?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>1.5 Does your country provide for corporate criminal liability?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p><b>Other</b> (for instance, if the authority also assumes other roles as well or several institutions have overlapping mandates). Please provide further information:</p> <p>Please explain/provide further information:</p>
2. Exercise of prosecutorial discretion
<p><b>2.1 Do prosecutors have unfettered discretion in regards to the following:</b></p>
<p><b>2.1.1 Deciding whom to charge with a crime?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>2.1.2 Deciding what charges to file?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>2.1.3 Deciding whether to drop charges?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>2.1.4 Deciding whether or not to plea bargain?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>2.2 Which rules determine the exercise of prosecutorial discretion in your country? (You can choose more than one option)</b></p> <p><input type="checkbox"/> Principle of legality and mandatory prosecution</p> <p><input type="checkbox"/> Principle of opportunity</p> <p><input type="checkbox"/> Defence mitigation argued to a judge</p> <p><input type="checkbox"/> Defence mitigation argued to the Prosecutor</p> <p><input type="checkbox"/> <b>Other.</b> Please specify:</p> <p>Please explain/provide further information:</p>

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes  No

Please explain/provide further information:

**2.3.1 How clearly are the factors of this threshold defined?**

- Very clearly defined
- Somewhat clearly defined
- Defined, but not clearly
- Vaguely defined
- Not defined at all

Please explain/provide further information:

**2.4 Do these standards differ for individual and corporate defendants?**

Yes  No

Please explain/provide further information:

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

Yes  No

Please explain/provide further information:

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes  No – IF NO, PLEASE REFER DIRECTLY TO QUESTION 4

Please explain/provide further information:

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes  No

Please explain/provide further information:

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer? (You can choose more than one option)**

- Voluntary disclosure of wrong doing/self-reporting
- Cooperation with enforcement authorities through the investigation
- Existing prevention and detection measures:
- Risk assessment
- Training
- Detection mechanisms such as internal, anonymous
- Commitments to institute new prevention and detection measures
- Assistance in investigating and prosecuting individuals
- Other.** Please specify:

Please explain/provide further information:

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes  No

Please explain/provide further information:

**3.2.4 What form(s) can a structured settlement take?**

<b>3.2.5</b>	<b>What are the usual terms of such an agreement?</b>
<b>3.2.6</b>	<p><b>Are there limits on what the prosecution can offer?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<b>3.2.7</b>	<p><b>Do settlements ever get reversed for non-compliance in your jurisdiction?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<b>3.3 Role of the court in regards to structured settlements</b>	
Please explain the role of the courts with respect to any structured agreement reached:	
<b>3.3.1 Prior to the settlement:</b>	
<b>3.3.1.1</b>	<p><b>Is it necessary to obtain the court's consent before engaging in a settlement negotiation?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<b>3.3.1.2</b>	<p><b>Does the court have any other involvement before settlement has been reached?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<b>3.3.2 Once the settlement has been reached:</b>	
<b>3.3.2.1</b>	<p><b>Is the structured settlement filed in court?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<b>3.3.2.2</b>	<p><b>Does the court have some level of scrutiny or approval power over the terms of the settlement?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>If yes, is this outlined in regulations, guidelines or another piece of binding material?</p>
<b>3.3.3 During the implementation of the settlement:</b>	
<b>3.3.3.1</b>	<p><b>Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?</b></p> <p><input type="checkbox"/> A judge</p> <p><input type="checkbox"/> Another authority. Please specify :</p> <p>Please explain/provide further information:</p>
<b>3.3.3.2</b>	<p><b>Can this authority impose penalties for non-compliance?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>

### 3.4 Outcome of the structured settlement

Are there any rules that provide guidance about the outcome of such negotiations with respect to the following?  
Please select all options that apply and provide further information in the field next to each box you tick.

	Statutory Provisions	Guidelines	Past cases
Financial penalties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Disgorgement of profits	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Compensation to third parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Obligations to cooperate with other agencies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Monitors (and paying for them)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Corporate compliance programmes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Personal liability	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please explain/provide further information:

### 3.5 De facto or de jure

In view of your answers to 3.1 – 3.4 above, would you describe the criminal settlements process for corruption offences in your country as a *de jure* process (ie, subject to clearly defined legal rules governing the proposal and implementation of structured settlements) or *de facto* (ie, no clear legal framework for settlements)?

*de jure* process

*de facto* process

Please explain/provide further information:

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes  No

Please explain/provide further information:

#### 4.1.2 How detailed is the information provided about the settlement to the public? (Extensive = very detailed, transparent public statement) Please mark only one option.

- Extensive  
 Somewhat extensive  
 Limited  
 Very limited  
 Non-existent  
 Extensive

Please explain/provide further information:

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

- Extensive  
 Somewhat extensive  
 Limited  
 Very limited  
 Non-existent  
 Extensive

Please explain/provide further information:

<p><b>4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>4.2.1 If yes, is this data publicly available?</b></p> <p><input type="checkbox"/> Yes. Please provide the website:</p> <p><input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?</b></p>
<p><b>5. Competing domestic claims and the principle of <i>ne bis in idem</i>/double jeopardy</b></p>
<p><b>5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>Please explain/provide further information:</p>
<p><b>5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?</b></p> <p><b>(a) Foreign conviction</b></p> <p><input type="checkbox"/> Binding effect</p> <p><input type="checkbox"/> No effect</p> <p><b>(b) Foreign settlement</b></p> <p><input type="checkbox"/> Binding effect</p> <p><input type="checkbox"/> No effect</p> <p>Please explain/provide further information:</p>
<p><b>6. The following questions call for your opinion:</b></p>
<p><b>6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) No predictability; (b) Reasonable predictability; (c) High predictability.</b></p> <p><input type="checkbox"/> High predictability</p> <p><input type="checkbox"/> Reasonable predictability</p> <p><input type="checkbox"/> No predictability</p> <p><input type="checkbox"/> Please explain/provide further information:</p>
<p><b>6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the <i>existing framework</i> of rules in your country? Please motivate your answer.</b></p>
<p><b>6.3 In your opinion, <i>should</i> such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.</b></p>
<p><b>6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?</b></p>
<p><b>6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?</b></p>
<p><b>6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?</b></p>

# VI. Country reports

The Country reports are reproduced below. Please note that only sections that were filled in by the reporters have been included. Explanatory editorial notes have been added in some instances.

## Europe

### 1. ALBANIA

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*Eglon Metalia – Legal Consultant*

#### 1. Background: normative framework

##### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes. The rules are:

- the Criminal Code of the Republic of Albania;
- the United Nations Convention against Corruption;
- the Council of Europe Civil and Criminal Law Conventions on Corruption;
- Law No 9367, dated 7 April 2005, ‘On the Prevention of Conflicts of Interest in the Exercise of Public Functions’, as amended.

##### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

The Criminal Code of the Republic of Albania, the United Nations Convention against Corruption and the Council of Europe Civil and Criminal Law Conventions on Corruption.

##### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes. The Criminal Code of the Republic of Albania provides that the provisions of such law are applicable also to foreign individuals who bribe private or public bodies, damaging the interests of the state or other individuals.

##### 1.4 Are facilitation payments allowed in your jurisdiction?

No. There are no provisions in the Albanian legislation in that regard.

##### 1.5 Does your country provide for corporate criminal liability?

Yes. Law No 9754, dated 14 June 2007, ‘On Corporate Criminal Liability’ (hereunder ‘Law on corporate criminal liability’). Such law is also applicable to foreign companies that have been registered in Albania.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No. Other.

**If not, which authorities investigate and prosecute corruption, and how do they allocate responsibility?**

Police authorities and the Prosecutor General's Office are in charge of criminal investigations and law enforcement, while the High State Audit and internal auditing units within various state institutions inspect, assess, and report alleged cases of corruption. Joint Investigation Units that include both prosecutors and police officers deal with tracking corruption offences. Some of the prosecutors and police officers in these units specialise in the field of economic crimes and corruption.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes. Pursuant to the Criminal Procedures Code, the prosecutor conducts criminal prosecution, investigations, examines preliminary investigations, files charges in court and takes measures for the execution of decisions in compliance with the rules provided for under the law.

**2.1.2 Deciding what charges to file?**

Yes. See above.

**2.1.3 Deciding whether to drop charges?**

Yes. The prosecutor has the right not to initiate or dismiss criminal proceedings in cases provided for under the Criminal Procedures Code.

**2.1.4 Deciding whether or not to plea bargain?**

Yes. The prosecutor can enter into an agreement with a defendant charged with a serious crime committed in cooperation if the latter cooperates with the prosecutor or the court and gives full information and without reserves or condition on all the facts, events and circumstances, that serve as a fundamental evidence for the discovery, the investigation, the trial and the prevention of the serious crimes and the repair of the damages caused by them.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

Principle of legality and mandatory prosecution

Defence mitigation argued to a judge

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.5 *De facto or de jure***

*Editor's note: The cooperation with investigating authorities occurs within a plea bargain process (see section 2.1.4). This would constitute a de facto, plea-based settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No. There is no public register on such settlements except when the public bodies issue notices on different investigations that they are conducting.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement)

Non-existent.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate)**

Very limited. The company may ask the relevant authorities, (the prosecutors, the court or other investigation bodies) not to disclose the case details but must provide for a reason for example: trade secret.

### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes. The prosecutor's office.

#### **4.2.1 If yes, is this data publicly available?**

No. We could not identify specific cases but the General Prosecution Office publishes from time to time notices in regard to its proceedings. Please find more information here: [www.pp.gov.al/web/Press\\_News\\_38\\_2.php#.WP8NYm-GOM8](http://www.pp.gov.al/web/Press_News_38_2.php#.WP8NYm-GOM8).

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. The Criminal Procedures Code provides for the procedures that must be followed in such cases.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Discouraged because the law does not specifically provide for the cooperation with the prosecuting authority and no clear rules are into force.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

I think that bribery is a crime that must be punished and therefore I don't think that the cooperation with the prosecuting authority must be encouraged. On the contrary, the prosecuting authority must be strict and investigate such cases in order to discourage other wrongdoers to perform bribery in the future.

**6.4 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

I think that the law in Albania does not encourage such collaboration and, therefore, no other steps need to be taken except the strict implementation of the law.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

I do not know any relevant case.

## 2. AUSTRIA

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*Martin Eckel, Partner, Taylor Wessing*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes. The main legal provisions regarding bribery and corruption may be found in the Austrian Criminal Code (*Österreichisches Strafgesetzbuch*, hereunder ACC). Chapter 22 comprises ‘criminal offences relating to public officials, corruption and other related criminal offences.’ The main provisions can be found in sections 302 *et seq* ACC. There is a clear distinction between offences committed in the public sector and offences committed in the private sector. Furthermore, the ACC distinguishes between passive and active bribery.

The offences of passive bribery are laid down in sections 304, 305 and 306 ACC. Section 304 ACC criminalises a public official who demands, accepts, or accepts the promise for a benefit in return for the unlawful execution or omission of official duties. Section 305 ACC penalises a public official who demands a benefit, accepts or accepts the promise of an undue advantage in return for the lawful execution or omission of official duties. Section 306 criminalises a public official who demands a benefit, accepts or accepts the promise of an undue advantage intending that his official role will be influenced (acceptance of benefits for the purpose of interference).

The offences of active bribery are laid down in sections 307, 307a and 307b ACC. Section 307 penalises any person who offers, promises or provides a benefit to a public official in return for the unlawful execution or omission of official duties. Section 307a criminalises any person who offers, promises, or provides an undue advantage to a public official or arbitrator in return for the lawful execution or omission of official duties. Section 307b penalises any person who offers, promises or provides an undue advantage to a public official or arbitrator intending to influence his official role.

Furthermore, section 308 punishes the offence of ‘unlawful intervention’, which criminalises any person, who demands, accepts, or accepts the promise of a benefit in return for exercising undue influence on the decision-making of a public official.

#### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

European Union: Convention on the protection of the European Communities’ financial interests (ABl 1995 C 316, 48); First Protocol to the Convention on the protection of the European Communities’ financial interests (ABl 1996 C 313, 2); Second Protocol to the Convention on the protection of the European Communities’ financial interests (ABl 1997 C 221, 11); Convention against corruption involving officials (ABl 1997 C 195, 1); Council Framework Decision on combating corruption in the private sector (RB 2003/568/JI, ABl 2003 L 192, 54).

Council of Europe: Criminal Law Convention on Corruption (ETS 173); Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); Evaluation reports by the Council of Europe's Group States against Corruption (GRECO).

International: The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; United Nations Convention against Corruption (UNTS 18 (A/RES/58/4)).

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes. The anti-bribery provisions have extraterritorial effect. They will also apply if an Austrian citizen bribes a foreign public official, or if a foreigner bribes an Austrian public official, even if the bribe occurs in a country where such a bribe would not be punishable.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

The ACC regards facilitation payments in the same manner as any other advantage. Any amount of money or promised benefit, no matter how small, are considered criminal if offered to an official to influence his performance of official duties and would violate the ACC.

There are, however, a few exceptions: section 305 (4) of the ACC specifies that an advantage is not liable to prosecution if it is permitted by law or has been given during an event if there is a legitimate reason to attend this event. Receiving an advantage for charitable purposes is not punishable either, or if the advantage has a low value and is in accordance with local customs.

### **1.5 Does your country provide for corporate criminal liability?**

Yes. In 2006 the Austrian legislator introduced the Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz*). Thus, legal entities are liable if an employee or a decision-maker violates the ACC in order to achieve a business advantage for the entity.

The corporate liability regarding bribery and corruption includes active as well as passive criminal offences, which means offering and receiving a bribe triggers the liability of the entity concerned. This means, an entity is liable for any criminal offence of its decision-maker or employee if the criminal offence was performed for the benefit of the organisation or in breach of the organisation's duties. In order to exclude such a liability, the entity has to provide necessary and reasonable care to prevent criminal offences, in particular by implementing technical, organisational and personal precautions.

Section 2 (1) of the Austrian Act on Corporate Criminal Liability states that a decision-maker is a person with the power to act on behalf of the organisation under its bylaws, or an individual representing the organisation.

Companies violating anti-corruption laws can be fined with up to €1.8m. The amount of the fine is based on the severity of the crime, the entity's profitability, taking into account its overall financial capacity, the extent to which the organisation benefited and the company's precautionary measures taken to reduce criminal offences by its decision-makers or employees.

## **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. Centralised Public Prosecution for the enforcement of business crime and corruption (*WKStA Zentrale Wirtschafts und Korruptionsstaatsanwaltschaft*).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No. Due to the principle of legality prosecutors may only and, at the same time are obliged to, bring in charges when four requirements are fulfilled: the facts have to be sufficiently clear; the conviction has to be probable; there may not be a reason to discontinue the investigation; and a withdrawal from prosecution within the scope of pretrial diversion may not be possible (section 210 StPO = Austrian code of criminal procedure). The facts are sufficiently clear if all relevant sources of information have been reasonably explained. The conviction is probable if the available evidence is sufficient to justify a conviction.

#### **2.1.2 Deciding what charges to file?**

No. The prosecutor is only allowed to file charges for criminal offences for which the following requirements are fulfilled. Prosecutors are obliged to investigate against a person because of the initial suspicion of criminal offence (section 2 StPO). Investigation means measures to gather and use information or evidence to investigate the suspicion of a criminal offence. The aim of investigations has to be to clarify the factual circumstances and the suspicion of crime in such a way that the Public Prosecutor can take a decision with respect to bringing a charge.

#### **2.1.3 Deciding whether to drop charges?**

No. The prosecutors do not have unfettered discretion in regards to deciding whether to drop charges, but only when certain criteria are fulfilled. The Public Prosecutor's Office can discontinue an investigation procedure on grounds of ineligibility. This is possible if the damage of the crime with respect to guilt, the consequences of the crime and the conduct of the accused after the crime can be regarded as negligible and if further criminal proceedings are not required on grounds of special and general prevention (section 191 StPO).

In addition, criminal proceedings can be discontinued if there are several criminal proceedings against the same person, provided that this has prospectively no significant influence on the punishment and the legal consequences of a conviction, or if the accused person is also prosecuted abroad (section 192 StPO). In such a case, however, crime victims can file a petition for continuance of proceedings.

If an accused person voluntarily discloses his/her knowledge of facts that have not yet been the subject of an investigation procedure initiated against him before, the

Public Prosecutor's Office can also discontinue an investigation procedure. However, this testimony has to contain a complete description of the accused's own crime. Additionally, the discontinuance has to be justified by the evidential value of the information received (leniency programme, section 209a StPO).

In addition, the Public Prosecutor can refrain from prosecuting an entity if prosecution is not necessary, in view of the seriousness of the crime, the seriousness of the violation of duty, the consequences of the crime, the conduct of the entity after the crime, as well as legal disadvantages of the owner (section 18 VbVG = Act on corporate criminal liability).

#### **2.1.4 Deciding whether or not to plea bargain?**

No. Plea bargaining is prohibited in Austria.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

Principle of legality and mandatory prosecution.

Pursuant to the Austrian Criminal Procedure code, criminal procedures are characterised by a strict principle of legality. Accordingly, law enforcement authorities are obliged to investigate and prosecute offences *ex officio* whenever they become aware of a suspicion of such an offence.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences.**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities. Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No. However, there are rules that are similar to plea bargain agreements: pre-trial diversion (section 198 *et seq* StPO); leniency provisions (section 209a StPO); discontinuance of criminal proceedings if there are several criminal proceedings (section 192 StPO); the opportunity to draw up a written penal order ('*Strafverfügung*'; section 491 StPO) without executing an oral trial; and the discretion to prosecute a company.

(i) Pretrial diversion: If due to the investigation procedure the facts seem sufficiently clear, the Public Prosecutor can withdraw from the prosecution under certain circumstances within the scope of pre-trial diversion. This is applicable if the offence does not fall under

the competence of lay judges or a jury, the defendant did not incur a heavy burden of guilt and punishment is not required in order to prevent the defendant from committing further criminal offences. Measures of special prevention are linked with diversion. These range from the payment of a fine to rendering community service and the determination of a probationary period. In investigation proceedings the Public Prosecutor's Office will submit a precise diversion proposal to the defendant. Depending on whether or not the defendant wants to risk court proceedings, the defendant will accept or deny such proposal. During court proceedings it is still possible to reach a settlement with the defendant with respect to diversion. If the defendant fails to comply with the measures imposed on him, criminal proceedings may be continued later.

(ii) Leniency provisions: Within the scope of leniency provisions ('*Kronzeugenregelung*') it is possible to grant exemption from punishment to persons involved in a crime if they voluntarily disclose their knowledge of facts which have not yet been subject of an investigation procedure initiated against them. In return for exemption from punishment the Public Prosecutor's Office can oblige the accused person within the scope of leniency (eg, to pay a certain amount of money or to render community service). This information has to make a decisive contribution to resolve the crime comprehensively, going beyond the participation of the accused. The leniency programme has the advantage for the accused that they will not have a criminal record and will not have to serve a prison sentence. The Public Prosecutor's Office may refrain from taking any legal steps against an entity if sanctions are not considered necessary in light of the seriousness of the crime, the seriousness of the violation of duty by the entity, the seriousness of the violation of due diligence by the decision-makers, the consequences of the crime and the conduct of the entity after the crime. A disproportion between the seriousness of the crime and the time and effort spent on investigations has to be taken into account. The entity does not have a legal claim to this, but it may suggest such a procedure.

(iii) Opportunity to draw up a written penal order ('*Strafverfügung*'; section 491 StPO) without executing an oral hearing. This procedure requires an application of the prosecutor, the defendant's waiver of the right to request an oral hearing and a contradictory interrogation. There is no agreed-upon sentence, and the judge is free to decide, but it must not exceed a conditional one-year prison sentence. The defendant (as well as the prosecutor and the victim) may appeal against the penal order via protest ('*Einspruch*'). This forces the court to order the execution of an oral hearing. If no such protest is filed, the order becomes effective and has the same effects as a verdict.

### 3.5 *De facto or de jure*

*Editor's note: The pre-trial diversion, leniency provisions and penalty notice are not contingent upon an admission of guilt. (See section 3.1 above). This would constitute a de jure settlement process following the classification used in this report.*

#### 4. Transparency

##### 4.1 Public access to information on settlements

###### 4.1.1 Is information about settlement available to the public?

No.

###### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

###### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

##### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. We assume that the Ministry of Justice collects such data.

###### 4.2.1 If yes, is this data publicly available?

No.

#### 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

##### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

No.

##### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

#### 6. The following questions call for your opinion

##### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation?

High predictability.

### 3. AZERBAIJAN

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*Elnur Musayev, Senior Prosecutor, Anti-Corruption and Anti-Money Laundering Directorate*

#### 1. Background: normative framework

##### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

##### 1.2 Do your foreign bribery laws have extraterritorial effect?

Yes. Criminal Liability in Azerbaijan is defined according to the Penal Code 2000. Section 12 defines the territorial application of the Criminal Law (provisions of the Penal Code) Section 12.1-1 exempts the principle of double criminality in respect of the corruption offences (ie, even if the corruption crime committed abroad and is not criminalised abroad, it can be prosecuted in Azerbaijan). Moreover, according to section 12.2-1, foreigners and stateless people (*apatrizi*) could be prosecuted for corruption offences perpetrated outside the country if this offence involves Azerbaijani citizens and implicates corruption of officials international public organisations.

##### 1.3 Are facilitation payments allowed in your jurisdiction?

No. Facilitation payments fall into the definition of the passive bribery foreseen by section 311 of the Penal Code 2000. The concept of (passive) bribery requesting and solicitation, as well as acceptance of offer or promise of material and other advantage, privilege and preferment by public official, directly or indirectly, for the official himself/herself or another person, in order for that official to act or refrain from acting in the exercise of his/her official duties or patronage or indifference.

##### 1.4 Does your country provide for corporate criminal liability?

Yes.

##### 1.5 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?

Yes. Anti-Corruption Directorate under the Prosecutor General.

#### 2. Exercise of prosecutorial discretion

##### 2.1 Do prosecutors have unfettered discretion in regards to the following:

###### 2.1.1 Deciding whom to charge with a crime?

No. The prosecution is mandatory in Azerbaijan.

###### 2.1.2 Deciding what charges to file?

No. According to the provisions of the Criminal Procedure Code (CPC), a body of law regulating the process of the administration of justice at all stages, all the

circumstances, irregularities and violations of law shall be reflected in the files, investigated and acted upon.

### **2.1.3 Deciding whether to drop charges?**

No. The grounds for dropping the charge are clearly and unambiguously reflected in section 39 of the CPC. Such instances as the lack of elements of crime or event, insanity, existence of the effective court decision on the matter, expiration of the state of limitation, etc, are reflected in this section.

### **2.1.4 Deciding whether or not to plea bargain?**

No. Plea bargain is not foreseen in the Criminal Justice of Azerbaijan. However, there is an immunity granted to the corruption reporter, subject to the conditions that he informs the law enforcement before it come to knowledge of the fact or he acted under duress.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. The prosecutor is obliged to act once the information is obtained and there are sufficient grounds to do so (ie, presence of the elements of the offence in the findings).

### **2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined. The factors appear clear in the context of the legal tradition existing in the country.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No. Structured settlement is not foreseen in the criminal justice legislation. However, in practice, investigators and prosecutors could undertake measures to secure recovery of damages as a result of commission of a crime. If the best interest of the people, as well as recovery of damage requires so, the prosecution may take measures which in effect may resemble structured statement.

### 3.5 *De facto or de jure*

*Editor's Note: Immunity granted to the corruption reporter is not contingent upon an admission of guilt. (See section 2.1.4 above). This would constitute a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes. In practice, some measures may reflect the features of settlement. The prosecution regularly provides information on the recovery of damages.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.  
Limited.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. There are two specialised anti-corruption agencies in the country. The Commission on Combating Corruption, a prevention and strategic management body, as well as the Anti-Corruption Department, under the Prosecutor General, collect and publish information specified on quarterly basis.

#### 4.2.1 If yes, is this data publicly available?

Yes. [www.antikorrupsiya.gov.az](http://www.antikorrupsiya.gov.az). This site also has an English version.

### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

As mentioned above, structured settlements are not provided by the legislation. Natural or legal person shall be prosecuted for the commission of the corruption offences. However, the prosecution may act in the way resembling a structured settlement in the interest of human rights, especially recovery of damages. Usually, the prosecution act in consideration of the circumstances of the case, the consequences of the measures taken in respect of the legal persons. A typical example could be that prosecution foregoes legal action against a big construction company in a criminal case which implicates substantial number of aggrieved parties.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes. Preference is given to the local claim.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

Foreign court decisions may be given effect subject to the existence of a treaty and under the principle of reciprocity. The existence of the effective court decision on the matter is listed as a circumstance excluding criminal proceedings, under section 39 of the Criminal Procedure Code. A decision of the prosecution or investigation body is also listed under the circumstances excluding criminal proceedings. However, the court decision's prejudicial effect is supported by the international practice and is reflected in treaties. The prejudicial effect of the prosecutorial decision has not been reflected in the international practice and is not reflected in the international treaties. This matter has not passed a court test in Azerbaijan.

## 6. The following questions call for your opinion

### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation?

Although such legal arrangement does not exist in my country, *[Editors note: does not formally exist, Section 2.1.4 above refers to immunity granted to the corruption reporter]* I see it as quite a viable and effective tool. With the appropriate mechanisms of monitoring (ie, indicators and criteria of implementation progress), it could produce results, quite predictably. Therefore, this process shall involve specialist evaluators. It is applicable to both situations, whether this arrangement is applied for the recovery of damages or rehabilitation of the corporate wrongdoer.

### 6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?

In my country, such cooperation is impossible by law *[Editors note: does not formally exist, Section 2.1.4 above refers to immunity granted to the corruption reporter]*. But, as I mentioned above, the prosecuting authorities are negotiating. Similar practice exists in the tax regulation system, where the authorities can negotiate tax deductions and defer them. I believe this arrangement will take place in the criminal procedure in the foreseeable time, as the efforts to introduce plea bargaining for physical (natural) persons also take the ground.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

It should be encouraged, by all means, as rigid application of criminal sanctions may produce reverse results. The negotiation offers an opportunity to reach a constructive solution, which is in the best interest of recovering the damage inflicted as a consequence of an offence or rehabilitating the corporation. Moreover, the negotiation process offers an additional leverage of pressure on a corporation, as well as an opportunity to obtain feedback from the prosecuting authority.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

It certainly requires adoption of the legislative foundation first, and guidelines, preferably issued by the Prosecutor General.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

It should not be discouraged.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

It offers many advantages, first of all rehabilitation and sponge its record.

## 4. BELARUS

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*Alexey Anischenko, Partner, Sorainen Law Firm*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes. Criminal Code of the Republic of Belarus (hereunder, the Criminal Code), the Code of Belarus on Administrative Violations, the Law on Public Service and the Law on Combating Corruption.

#### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

The Council of Europe Criminal Law Convention on Corruption (ETS 173) and Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), The United Nations Convention Against Transnational Organized Crime, the United Nations Convention Against Corruption; the Civil Law Convention on Corruption.

#### 1.3 Do your foreign bribery laws have extraterritorial effect?

No. Bribery laws of Belarus do not have extraterritorial effect on foreign nationals in cases involving bribes paid in foreign countries.

#### 1.4 Are facilitation payments allowed in your jurisdiction?

No.

#### 1.5 Does your country provide for corporate criminal liability?

No. Belarus laws do not provide for criminal liability of legal entities.

#### 1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?

No. If not, which authorities investigate and prosecute corruption, and how do they allocate responsibility? The Investigative Committee of the Republic of Belarus, General Prosecutor's Office of the Republic of Belarus, The State Security Committee of the Republic of Belarus (KGB), the State Border Committee, the Tax and Duties Ministry of the Republic of Belarus, the National Bank of the Republic of Belarus and other organisations within their competence and in accordance with the law.

### 2. Exercise of prosecutorial discretion

#### 2.1 Do prosecutors have unfettered discretion in regards to the following:

##### 2.1.1 Deciding whom to charge with a crime?

No. The powers of the prosecutor are stipulated in the Criminal Code and therefore restricted.

### **2.1.2 Deciding what charges to file?**

Yes.

### **2.1.3 Deciding whether to drop charges?**

No. The grounds for terminating proceedings in a criminal case are provided for by the Code of Criminal Procedure.

### **2.1.4 Deciding whether or not to plea bargain?**

No. The prosecutor (or his deputy), following the examination of the application filed by the accused person, decides whether to satisfy or dismiss a motion. This decision must comply with the provisions of the criminal law.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Defence mitigation argued to a judge.

Defence mitigation argued to the prosecutor.

The court, when deciding a sentence, must resolve the issue taking into account the circumstances that might mitigate liability. Mitigating circumstances may lessen the penalties that the defendant receives for committing the crime.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. The term of preliminary investigation is limited according to the provisions of the Code of Criminal Procedure.

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

The provisions of the Code of Criminal Procedure provide for the extension and suspension of preliminary investigation.

## **2.4 Do these standards differ for individual and corporate defendants?**

No. Legal entities are not subjected to criminal liability.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

## **3.2 Form, features and terms of structured settlements**

### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

#### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*‘Досудебное соглашение о сотрудничестве’ (plea deal)*

### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

#### **Existing prevention and detection measures:**

Training.

Assistance in investigating and prosecuting individuals.

### **3.2.3 What form(s) can a structured settlement take?**

A plea deal.

### **3.2.4 What are the usual terms of such an agreement?**

Such terms are not stipulated by legislation.

### **3.2.5 Are there limits on what the prosecution can offer?**

Yes. The terms of a plea deal must comply with the provisions of the Criminal Code. For example, a plea deal cannot be made in a case of criminal insanity.

### **3.2.6 Are the terms of an agreement absolute, or can they be deferred?**

No. The terms of an agreement can be deferred in each particular case.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court’s consent before engaging in a settlement negotiation?**

No.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. The court examines whether the accused person assisted in preliminary investigation, exposed guilty persons and certain other issues stipulated in the Code of Criminal Procedure.

**3.3.2 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority. Prosecutor at the stage of examination of an application and judge in the court.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes. In case of non-compliance authorities can decide to dismiss the motion.

**3.4 Outcome of the structured settlement**

**Are there any rules that provide guidance about the outcome of such negotiations with respect to the following?** Please select all options that apply and provide further information in the field next to each box you tick.

Personal liability: If the provisions of a plea deal are fulfilled, the amount of penalty may not exceed the amount stipulated in the Criminal Code.

**3.5 De facto or de jure**

*Editor's note: The settlement process 'plea deal' is contingent upon an admission of guilt. (See section 3.1, 3.2.1 and 3.2.3 above). This constitutes a de facto, plea-based settlement process following the classification used in this report. However, legal entities are not subjected to criminal liability.*

**4. Transparency**

**4.1 Public access to information on settlements**

**4.1.1 Is information about settlement available to the public?**

Yes.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive. The criminal hearing procedures are open to the public except for the particular cases stipulated in the Code of criminal procedure.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent. Legal entities cannot be held criminally liable.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. These rules are contained in international agreements.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

It is encouraged, however cooperation between the prosecuting authority and alleged wrongdoers in a form of a plea deal is a new mechanism introduced in 2015 and, therefore, the existing framework requires further elaboration.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Please motivate your answer. In our opinion, it should be encouraged to facilitate and speed up the process of criminal investigation.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Better communication on the possibility to make a plea deal and its mitigating consequences.

**6.5 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Companies are obliged to render assistance to state authorities that are engaged in the fight against corruption. A plea deal, however, can be made only with natural persons.

*Hans Van Bavel, Litigation and Arbitration Partner, Stibbe (Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Corruption offences are laid down in Articles 246 to 252 (re: bribery involving state officials) and in Articles 504 *bis* and 504 *ter* (re: bribery involving private persons) of the Belgian Criminal Code (BCC). These Articles prohibit the solicitation or acceptance of an offer, a promise or an advantage, of whatever nature, so that the person on the receiving end of the solicitation or offer would adopt a certain behaviour in relation to his profession (passive bribery). They also prohibit the proposing of any offer, promise or advantage of whatever nature (active bribery).

Article 16 *bis* of the Act of 4 July 1989 prohibits companies and other legal entities from giving gifts to political parties, candidates and representatives. Only natural persons are allowed to give gifts to political parties and candidates. Any legal entity that gives a gift to a political party, to one of its components regardless of the legal form of that component to a list, to a candidate or a political representative in violation of this Act, or any person who accepts such a gift on behalf of the political party or at the expense of the party, is punishable by fine. Furthermore, this Article prohibits companies from rendering services to political parties, etc, free of charges or below the ‘actual price’ and from granting credits to them that do not have to be repaid.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the United Nations Convention Against Corruption.

The Council of Europe Criminal Law Convention on Corruption (ETS 173) of 1999 on Corruption contains provisions on active and passive corruption in the public and private sectors. Belgium ratified this convention in 2004.

The Council of Europe Civil Law Convention On Corruption (ETS 174) considers the civil aspects of corruption. Belgium ratified it in 2007.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes. According to Article 10 quater of the Preliminary Title of the Criminal Procedural Code any person bribing a person abroad who holds a public office in Belgium or a public office elsewhere but is a Belgian national or serves an international public organisation whose headquarters is in Belgium can be held liable in Belgium for committing that offence abroad (universality principle). Secondly, Belgian nationals or persons having permanent

residence in Belgium can be prosecuted for bribery offences that are committed abroad and that involve a person holding a public office in another state or within an international organisation. However, prosecution for these offences is subject to dual incrimination.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. Bribery is defined in a very broad manner in Belgium. The law does not provide for any exception, not even the facilitation of payments.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes. Under Article 5 of the BCC, corporate entities can be held liable for crimes. Generally, any legal persons can be held criminally liable, regardless of the nature or form under which they are incorporated. Certain types of associations and companies that do not have legal personality under Belgian company law are regarded as complete legal persons under Belgian criminal law. In principle, legal entities governed by public law can also be held fully accountable for criminal offences. However, some public bodies are excluded from criminal responsibility, such as the Belgian Federal State, the Regions, the Communities, the Provinces, the Capital Region of Brussels, the Municipalities and the Municipal Welfare Authorities.

Article 5 of the BCC does not limit the scope of natural persons who could cause the company they work for to be liable. It is, therefore, of no importance who (be it an employee, director or what position they hold within the company) has actually committed the offence. However, not every act committed by a natural person who works at a company will lead to the finding of criminal liability on that company under Belgian criminal law. Such criminal liability will only be found if the facts in question can be materially and morally imputed to the company.

- **Material imputation:** The company is criminally liable for the offences that relate intrinsically to: (1) to the realisation of its purposes; or (2) to the fulfilling of its interests; or (3) depending on the specific circumstances of the case, have been committed on behalf of the company.
- **Moral imputation:** Since bribery is an offence requiring intent, the criminal intent is required at the level of the legal entity. This intent must be present ‘within the leadership bodies’ of the legal entity, which should be interpreted more broadly than the mere scope of only the legal or statutory bodies (organs) of the legal entity. In this respect, ‘wilful blindness’ can be sufficient.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other. The Public Prosecutor’s Office is the main body responsible for investigating crimes and prosecuting those responsible or allegedly responsible for them. Concerning corruption, the Public Prosecutor’s Office is assisted by specialist police services (ie, the Central Office for the Repression of Corruption, the Central Service for the Fight Against Organised Economic and Financial Crime and the Financial Crime Units at the Belgian Federal Police Department). If intrusive methods of investigation are needed, the investigating judge will, in principle, take over the investigation.

## 2. Exercise of prosecutorial discretion

### 2.1 Do prosecutors have unfettered discretion in regards to the following:

#### 2.1.1 Deciding whom to charge with a crime?

Yes. The Public Prosecutor's Office enjoys in principle an unfettered discretion with regard to criminal prosecution. However, the victim of crimes has some possibilities of recourse under Belgian law to sue the perpetrator and bring proceedings before court. Under certain circumstances the victim can bring criminal proceedings by having the perpetrator directly summoned or by lodging a complaint with the investigating judge and – at the same time – applying to the court as an injured civil party.

#### 2.1.2 Deciding what charges to file?

Yes. See 2.1.1.

#### 2.1.3 Deciding whether to drop charges?

Yes. See 2.1.1.

#### 2.1.4 Deciding whether or not to plea bargain?

Yes. Belgium only knows a guilty plea procedure (Article 216 of the Belgian Criminal Procedural Code), based on the French system of plea bargaining (*'comparution sur reconnaissance préalable de culpabilité'*). This relatively new procedure allows the Public Prosecutor to bargain with the perpetrator the penalty to be imposed in exchange for the perpetrator's admission of guilt. The Public Prosecutor has full discretion with regard to the guilty plea procedure. However, guilty plea is only possible if the Public Prosecutor is of the opinion that the facts at hand do not have to entail a prison sentence of more than five years.

### 2.2 Which rules determine the exercise of prosecutorial discretion in your country?

(You can choose more than one option)

Principle of opportunity.

### 2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?

No.

## 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

'Amicable settlement': this is an alternative out-of-court settlement procedure that is available if the Public Prosecutor is of the opinion that the facts at hand do not have to entail a prison

sentence of more than two years and as long as it does not concern a crime that constitutes a serious violation of one's identity. The accused negotiates with the Public Prosecutor about the payment of a lump sum of money in exchange for an extinction of criminal liability. Contrary to the guilty plea procedure, the 'amicable settlement' does not include an admission of guilt, however.

But, a recent decision of the Constitutional Court (2 June 2016, Case No 83/2016) held that certain provisions of the legislation relating to structured settlements violate the Belgian Constitution, and the right to a fair trial, in that the approval of those settlements by the courts must be limited to only assessing formal compliance with legal requirements, which – according to the Constitutional Court – was not sufficient. As a result of this decision, any out of court settlement of a criminal case is currently no longer possible if an investigating judge or trial judge has been seized.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No. See 3.1.

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Other. The law enforcement authorities (the Public Prosecutor) will determine the sum of money that must be paid by the alleged bribe payer, based on the gravity of the offence. It is at the discretion of the Public Prosecutor.

#### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No. Since a settlement is only possible if no investigating judge or trial judge has been seized, the settlement with the Public Prosecutor is not submitted to any waiver of privilege or equivalent protection.

#### **3.2.4 What form(s) can a structured settlement take?**

The 'amicable settlement' is recorded by the Public Prosecutor in an official statement ('*procès verbal*').

#### **3.2.5 What are the usual terms of such an agreement?**

The agreement has to give a detailed overview of the facts and offences for which it is concluded. Furthermore, it has to establish that the victim has been compensated for the loss caused to him/her and the person who allegedly committed the offence has to accept paying the sum of money (which amounts to a fine) in order for the criminal proceedings to be terminated within a specific deadline.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes. The lump sum may not exceed the maximum fine stipulated by the Belgian Criminal Code for the offence in question. It should always be proportionate to the offence at hand.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No. Currently, after the decision of the Constitutional Court, the legal framework regarding court approval has been held to violate the Constitution and the right to a fair trial in that no complete control by a judge is possible.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

No. Currently, after the decision of the Constitutional Court, the legal framework regarding court approval has been held to violate the Constitution and the right to a fair trial in that no complete control by a judge is possible.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No. Currently, after the decision of the Constitutional Court, the legal framework regarding court approval has been held to violate the Constitution in that no complete control by a judge is possible.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: The Public Prosecutor.

The Public Prosecutor will check if the agreed lump sum (fine) has been paid.

### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

### **3.5 De facto or de jure**

*Editor's note: The settlement process (amicable settlement) is not contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). This would constitute a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. The settlement is not disclosed publicly in any way and information regarding it can only be accessed by judicial authorities. However, the existence of a settlement is mentioned on the criminal record of the accused.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Very limited

### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes. The Central Office for the Repression of Corruption (OCRC) collects and processes information in relation to corruption offences. However, based on these data, no distinction can be made between public and private (foreign) bribery.

#### **4.2.1 If yes, is this data publicly available?**

No. The information centralised by the OCRC is not publicly available. Individual access is possible but only after obtaining permission through a time-consuming procedure for each file separately.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No. Which country will deal with the case depends entirely on mutual arrangements. There are no rules under Belgian law determining which country has priority in treating the case.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

From the case law of the Court of Justice of the European Union (CJEU), both a conviction and settlement in an EU-member state have a binding effect throughout the European Union (ECJ, 11 February 2003, Gözütok and Brügge).

Other rules apply to convictions and settlements from outside the European Union. In principle, they do not have a binding effect.

**6. The following questions call for your opinion**

**6.1 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

In my opinion, such cooperation is not encouraged by the existing legal framework. However, liaising with the authorities can be considered as an element of good faith on the wrongdoer's part or at least as a mitigating circumstance should he be sanctioned.

**6.2 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Cooperating with the authorities can be considered as an element of good faith on the wrongdoer's part or at least as a mitigating circumstance, should he/she be sanctioned. Consequently, the advantage could be financial.

*Jelena Bajin, Attorney at law, Law office of Tomislav Šunjka*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Anti-Bribery rules are contained in various laws: the Criminal Code (Official Gazette of Bosnia and Herzegovina, Nos: 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15), Law on Prevention of Money Laundering and Financing of Terrorism (Official Gazette of B&H, No 47/14), Law on civil service in the institutions of Bosnia and Herzegovina (Official Gazette of the B&H, Nos: 29/03, 23/04, 39/04, 67/05, 8/06) and codes of conduct for civil servants and rules on incompatibility of office, Law on conflict of interest in the governmental institutions of BiH ( Official Gazette of B&H, Nos: 13/02, 16/02, 14/03, 12/04, 87/13), Law on political party financing ( Official Gazette of B&H, No: 95/12), Law on protection of whistle blowers (Official Gazette of of B&H, No: 49/06).

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The United Nations Convention Against Corruption; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and OECD Anti-Bribery Convention.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

In cases where the crime was committed outside the territory of Bosnia and Herzegovina, the prosecutor may undertake criminal prosecution if it is a criminal offence under the law of Bosnia and Herzegovina. In these cases, the prosecutor shall undertake the criminal prosecution only if the offence committed is defined as a criminal offence under the law of the state in whose territory the crime was committed. If under the law of that country the prosecution is undertaken at the request of the victim, the prosecution will not be undertaken if no such request has been submitted (Article 210 of the Criminal procedure Code (Official Gazette of B&H, Nos: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13)).

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Criminal liability of legal entities is regulated with the Criminal Code (Official Gazette of B&H, Nos: 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15), with Article 11 and Article 13 paragraph 3 and Chapter XIV of said Code.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Special Department for Organised Crime, Economic Crime and Corruption (Special Department II) was established with the forming of the Prosecutor's Office of Bosnia and Herzegovina (Prosecutor's Office of BiH) in 2003, when the Department consisted of only International Prosecutors, who were given authority pursuant to then adopted amendments to the Law on the Prosecutor's Office BiH. Prosecution of perpetrators of criminal offences related to organised crime, economic crime and corruption is within the jurisdiction of the Special Department II in accordance with the laws of Bosnia and Herzegovina, as well as prosecution of terrorism and unlawful joining of BiH citizens to foreign paramilitary or para-police formations, in accordance with the amendments to the Criminal Code of BiH of June 2014. As of that date the joining of BiH citizens to foreign formations and their participation in foreign battlefields is defined as a criminal offence. The jurisdiction of the Special Department includes criminal offences of corruption related to employees in the institutions of Bosnia and Herzegovina; economic and financial crime, including the criminal offences of tax evasion, smuggling, customs fraud and money laundering, as well as criminal offences of organised crime, which include but are not limited to, criminal offences of international drug trafficking, trafficking in persons and similar criminal offences stipulated by the Criminal Code of Bosnia and Herzegovina.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

In accordance with the Article 35 of the Criminal procedure Code, Rights and Duties of the Prosecutor are:

(1) The basic right and the basic duty of the prosecutor shall be the detection and prosecution of perpetrators of criminal offences falling within the jurisdiction of the Court;

(2) The prosecutor shall have the following rights and duties:

(a) as soon as he becomes aware that there are grounds for suspicion that a criminal offence has been committed, to take necessary steps to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorised officials pertaining to the identification of suspect(s) and the gathering of information and evidence;

- (b) to perform an investigation in accordance with this Code;
- (c) to grant immunity in accordance with the law;
- (d) to request information from governmental bodies, companies and physical and legal persons in Bosnia and Herzegovina;
- (e) to issue summonses and orders and to propose the issuance of summonses and orders as provided under this Code;
- (f) to order authorised officials to execute an order issued by the Court as provided by this Code;
- (g) to propose the issuance of a warrant for pronouncement of the sentence pursuant to Article 334 of this Code;
- (h) to issue and defend indictment before the Court;
- (i) to file legal remedies;
- (j) to perform other tasks as provided by law.

(3) In accordance with Paragraphs 1 and 2 of this Article, all bodies participating in the investigative procedure are obligated to inform the prosecutor on each undertaken action and to act in accordance with every prosecutor's request.

**2.1.2 Deciding what charges to file?**

Yes. As previous.

**2.1.3 Deciding whether to drop charges?**

Yes. As previous.

**2.1.4 Deciding whether or not to plea bargain?**

No. In accordance with Article 231 of the Criminal Procedure Code, the Court decides on the plea bargain.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Principle of opportunity is provided only in criminal proceedings against minors.

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

In accordance with Article 35 of the Criminal Code, the prosecutor has the right and duty, as soon as he becomes aware that there are grounds for suspicion that a criminal offence has been committed, to take necessary steps to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorised officials pertaining to the identification of suspect(s) and the gathering of information and evidence. If during the course of an investigation, the prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offence, the prosecutor shall prepare and refer the indictment to the preliminary hearing judge in accordance with Article 226 of the Criminal Procedure Code.

**2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

**2.4 Do these standards differ for individual and corporate defendants?**

No.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

**3.5 *De Facto or De Jure***

*Editor's note: Plea bargain contingent upon an admission of guilt. (See section 2.1.4 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

**4. Transparency**

**4.1 Public access to information on settlements**

**4.1.1 Is information about settlement available to the public?**

No.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No. Action plan for conducting strategy of combating corruption for 2015 to 2019 provides that one objective is establishing a unique record system (electronic register) for criminal offences related to corruption.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

## 7. BULGARIA

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*Dessislava Fessenko and Kamen Chanov, Of Counsel, Kinstellar (Sofia, Law Firm),  
Junior Associate, Kinstellar (Sofia, Law Firm)*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

Articles 301, 302, 302a, 304, 304a, 304b, 304c, 305, 305a, 306, 307 and 307a of the Criminal Code; Act on Measures against Money Laundering; Countering Corruption and Forfeiture of Illegally Acquired Assets Act (2018); Administrative Violations and Sanctions Act.

#### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

United Nations:

- Convention against Corruption (2004);
- Convention against Transnational Organised Crime (2000) and corresponding Protocols;
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

Council of Europe:

- Criminal Law Convention on Corruption (1999) and its corresponding Additional Protocol (2003);
- Civil Law Convention on Corruption (1999);
- Resolution (97) 24 on the Twenty Guiding Principles for the fight against corruption;
- Recommendation No R (2000) 10 on codes of conduct for public officials;
- Recommendation No R (2003) 4 on common rules against corruption in the funding of political parties and electoral campaigns.

All legal instruments of the European Union in the field of Justice and Home Affairs as part of the EU's *acquis communautaire*, in particular (but not limited to):

- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;
- Commission Decision of 6 June 2011 Establishing an EU Anti-corruption reporting mechanism for periodic assessment.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes. Article 3(1) of the Criminal Code stipulates that it applies to crimes committed on the territory of the Republic of Bulgaria. Pursuant to Article 4(1), the Criminal Code has an extraterritorial effect with respect to Bulgarian citizens who have committed crimes abroad.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. The exact wording of the prohibition contained in Article 301 of the Criminal Code encompasses a gift given to a person to perform or to abstain from performing an activity.

### **1.5 Does your country provide for corporate criminal liability?**

No. No corporate criminal liability is foreseen in the Criminal Code. However, pecuniary sanctions may be imposed on legal entities subject to Article 83 of the Act on Administrative Violations and Sanctions for certain criminal offences committed by the legal entity's management members, authorised representatives and employees.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

The prosecutor has the general discretion to initiate pre-trial proceedings and to maintain the indictment for publicly actionable offences (Article 46 of the Criminal Procedure Code (CPC)). In certain exceptional circumstances, the proceedings may be initiated by another investigative body (ie, investigators, investigating police officers and customs inspectors at the Ministry of Interior and the Customs Agency respectively), although they act under the supervision of a prosecutor. In the event of corrupt acts committed by senior public officials or endangerment of the economic and financial security of the State, the State Agency for National Security has the power to perform operative search and operative-technical activities pertinent to surveillance and monitoring of persons, facilities and activities pursuant to the State Agency for National Security Act. The evidence gathered is then delivered to the relevant competent authority of the judiciary (Article 25 of the State Agency for National Security Act).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Article 14(1) of the CPC stipulates that the prosecutor shall make decisions by inner conviction, which must be based on objective, comprehensive and complete investigation of all circumstances relevant to the case, taking the law as guidance. This provision supports the idea of unfettered discretion to the extent allowed by the specific facts and provided the person charged with an offence does not have immunity (Article 25 of the CPC). Furthermore, the prosecutor has the power to raise

charges for indictable offences (Article 46 of the CPC). However, it may also either initiate proceedings ex officio or join proceedings initiated after a complaint by the victim to a crime, if the victim is unable to defend his/her own interests due to helpless condition or dependency on the perpetrator (Articles 48 and 49 of the CPC).

### **2.1.2 Deciding what charges to file?**

Yes.

It is within the powers of the prosecutor to terminate or suspend the proceedings, to submit a proposal for exemption from criminal liability or to raise charges (Article 242 of the CPC). Pursuant to Article 246(1) of the CPC, the prosecutor draws up and indictment once he/she has ascertained that the necessary evidence has been collected, that there are no reasons to terminate or suspend the criminal proceedings, and that no considerable violation of the procedural rules has been allowed.

### **2.1.3 Deciding whether to drop charges?**

No.

The prosecutor may decide to terminate the proceedings based on a limited number of grounds, in particular if it was insufficiently proven that the accused party was the perpetrator of the offence (Article 243(1), item 2 of the CPC) or in the case of one of the legal reasons precluding the initiation of criminal proceedings (such as, but not limited to, death of the perpetrator, the act committed does not constitute a criminal offence, the perpetrator is not criminally responsible due to amnesty, etc; Article 243(1), item 1 of the CPC). This is done through a decree against which the victim or other relevant parties may bring an appeal before the court, which may, in turn, revoke it and remit the case back to the prosecutor with mandatory guidance on the application of the law. In addition, a prosecutor from a higher-standing prosecution office may revoke a decree for termination of criminal proceedings, which has not been appealed by the relevant parties, if neither of the requisites contained in Article 243(1) of the CPC have been fulfilled.

### **2.1.4 Deciding whether or not to plea bargain?**

No.

It is within the discretion of the prosecutor to decide whether to propose an agreement to dispose of the case with the limitations of the legal grounds below (Articles 242(1), 357(1), item 4, 363(1) item 4 of the CPC). The defendant's counsel may also propose that an agreement be drawn up (Article 381(1) of the CPC). However, the option to enter into an agreement is not always available as it is subject to several notable exceptions. For instance, the agreement would not be allowed in the case of a serious offence with intent, such as, but not limited to, crimes against the Republic, murder, debauchery, bribery, crimes related to the use of nuclear energy for peaceful purposes, etc.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Defence mitigation argued to the prosecutor.

Article 3 of the Judiciary System Act (JSA) stipulates that the judges, the prosecutors and the investigators shall base their acts on the law and the evidence gathered in the course of the specific case. In addition, the court and the relevant competent authority in the pre-trial phase of the proceedings must take into account all mitigating circumstances in the specific case (Article 107(3) of the CPC).

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. The CPC contains a set of criteria that need to be fulfilled before a prosecutor reaches the decision to prosecute.

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

## **2.4 Do these standards differ for individual and corporate defendants?**

Yes. No corporate criminal liability in Bulgaria as of yet.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No. Structured settlements are prohibited where the crime is bribery (Article 381(2) of the CPC).

*Editor's Note: based on the information in this report there is no structured settlements for corruption offences process for bribery envisaged within this criminal justice system (See section 2.1.4).*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

Yes. Only when the relevant authority has published a decision.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. Only to the extent the decision is published.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent. No corporate criminal liability currently exists under Bulgarian legislation.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

While there is no official register of foreign bribery allegations, the Prosecutor's Office publishes in May each year a report on the application of the law and on the activity of the prosecutor for the preceding year, which contains high-level statistics on bribery cases as well. The latest report is published on 14 May 2018 and covers the entire 2017.

**4.2.1 If yes, is this data publicly available?**

Yes. To a limited extent only, when the prosecution office publishes it. [www.prb.bg/media/filer\\_public/99/95/9995681f-b103-4140-956f-18bf3c8e94fb/GD%20-%202017%20-%20PRB.pdf](http://www.prb.bg/media/filer_public/99/95/9995681f-b103-4140-956f-18bf3c8e94fb/GD%20-%202017%20-%20PRB.pdf).

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

No publicly available information in this respect.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

The *ne bis in idem* principle may be claimed to apply. However, in situations as the one described in the question, the principle may be applied with view of defending the public interest, and the enforcement priorities of the Bulgarian state and local enforcement agencies may still pursue the case even if it falls also within the competence of another jurisdiction.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

**6. The following questions call for your opinion**

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

To a limited extent, given that no settlement could be concluded with respect to alleged acts of bribery and no availability of other leniency options.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

No, as far as the decision to prosecute is concerned, as such situations could potentially turn into 'horse-trading' and distort the ultimate objective of rendering justice.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

No specific further steps identified given that settlement is not an available outcome with respect to bribery.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is an advantage for companies to cooperate only when – as a result of the wrongdoing – they have sustained damages, which they would like to recover through civil claims. Then, it is in the company's interest to assist/facilitate evidence gathering, so that the prosecutor proceeds to charging the wrongdoer and the case proceeds to review by the court.

## 8. CROATIA

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*Korać Goran, Attorney-at-law, Law office of Tomislav Šunjka*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

- Criminal code (Official Gazette Nos: 125/11, 144/12, 56/15 and 61/15-correction);
- Law on Bureau for combating corruption and organised crime (Official Gazette Nos: 76/09, 116/10, 145/10, 57/11, 136/12 and 148/13);
- Law on procedure about confiscation proceeds of crime and misdemeanor (Official Gazette no: 145/10);
- Law on avoiding of conflict of interest while performing public duties (Official Gazette Nos: 26/11, 12/12, 124/12, 48/13 and 57/15);
- Law on Civil Servants (Official Gazette Nos: 92/05, 142/06, 107/07, 27/08, 34/11 – Law on Register of employees in public sector, Nos: 49/11, 150/11, 34/12, 49/12, 37/13, 38/13 and 01/15);
- Law on financing of political parties and electoral campaigns (Official Gazette Nos: 24/11, 61/11, 27/13, 02/14 and 96/16);
- Law on prevention of money laundering and financing of terrorism (Official Gazette Nos: 87/08, 25/12);
- Law on Public Procurement (Official Gazette No: 120/16).

#### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

- United Nations Convention against Corruption (UNCAC) (2005);
- The Council of Europe Criminal Law Convention on Corruption (ETS 173);
- The Council of Europe Civil Law Convention On Corruption (ETS 174);
- Recommendations from the Report of Group of countries against corruption of Council of Europe (GRECO).

#### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

Articles 13–17 of the Criminal code (Official Gazette Nos: 125/11, 144/12, 56/15 and 61/15-correction) provide regulations on extraterritorial effect of bribery rules whereby bribery rules may be applied and criminal prosecution may be initiated both against domestic and foreign citizens for criminal offences performed abroad which includes a

number of corruption criminal offences (eg, soliciting/accepting bribe, bribery, corruption in bankruptcy proceeding, corruption in public procurement, corruption in business operations, etc). Criminal prosecution may be initiated only if the foreign country in question recognises this kind of criminal offence as well.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

The Law on responsibility of legal entities for criminal offences (Official Gazette Nos: 51/03, 110/07, 45/11, 143/12) prescribes that a legal entity shall be sentenced for the criminal offence committed by a natural person, if by this criminal offence some obligations of the legal entity are being violated or the legal person has gained or should have gained some illegal gain for itself or some other person. A legal entity may be sentenced for any of criminal offence prescribed by the Criminal Code, including criminal offences relating to corruption and bribery (eg, soliciting/accepting bribe, bribery, corruption in public procurement, corruption in bankruptcy proceeding, corruption in business operations, etc)

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. It is the Bureau for Combating Corruption and Organised Crime (the 'Bureau'), (in Croatian: *Ured za suzbijanje korupcije i organiziranog kriminaliteta* or USKOK).

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

The Law on Public Prosecutors (Official Gazette Nos.: 76/09, 153/09, 116/10, 145/10, 57/11, 130/11, 72/13, 148/13, 33/15 and 82/15) and Law on Bureau for combating corruption and organised crime (Official Gazette Nos:76/09, 116/10, 145/10, 57/11, 136/12 and 148/13) are prescribing that the Prosecutor's Office is independent in its work, that it has to act in accordance with principal of legality and opportunity and that it must obey the mandatory instructions of a higher ranked prosecutor office.

Article 38 of the Criminal Procedure Code (Official Gazette Nos: 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13 and 152/14) stipulates that the main duty of the Public Prosecutor is to prosecute offenders for criminal offences which are being initiated ex officio, whereby the Public Prosecutor is obliged to initiate criminal proceeding if reasonable suspicion exists that certain person has committed criminal offence which is being initiated ex officio and if there is no legal interference for prosecution of this person (eg, diplomatic immunity, health reasons, etc).

The Public Prosecutor, as well as a public prosecutor employed and acting on behalf of USKOK, has the following authorisations and duties:

- to undertake all necessary actions in order to discover crime and to find perpetrators;
- to decide on rejection of criminal charges, postponement (defer) of criminal prosecution, dismissal of criminal prosecution, raising of an indictment, as well as about dropping of the charges after indictment has been raised;
- to decide on initiation and carrying out of investigation;
- to collect the evidence and perform supervision on collected evidences;
- to raise and represent the indictment in front of the court;
- to propose and present the evidences in front of the court;
- to undertake actions in respect to plea bargain and make plea agreement with the defendant;
- to submit legal remedies against court judgments and resolutions which have not become legally valid and extraordinary legal remedies against the legally valid judgments and resolutions; and
- to undertake actions in order to determine and find property gained by criminal offences, propose measures for seizure and as well to seize the proceeds of crime.

#### **2.1.2 Deciding what charges to file?**

Yes. Please see answer to 2.1.1.

#### **2.1.3 Deciding whether to drop charges?**

Yes. Please see answer to 2.1.1.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes. Please see answer to 2.1.1.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

The Criminal Procedure Code prescribes that the main principle is the principle of legality and mandatory prosecution, under which the prosecution authority has to initiate prosecution if reasonable suspicion exists that a certain person has committed criminal offence. In accordance with Article 206(d) of the Criminal Procedure Code, in some cases

and under the specific conditions, the Public Prosecutor is entitled to apply the principle of opportunity and to dismiss criminal prosecution of the suspect.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

If reasonable suspicion exists that a certain person has committed criminal offence which is being initiated ex officio, the prosecution authority has to initiate criminal prosecution. On the other hand, the prosecution authority is entitled to make decision on rejection of criminal charges, postpone (defer) of criminal prosecution, raise the indictment, dismiss the criminal prosecution, as well as dropping the charges or make a plea agreement with the suspect.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

The Criminal Procedure Code does not define term 'reasonable suspicion' so there is no precisely specified/prescribed legal threshold.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3 Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences.**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

According to the Criminal Procedure Code of Republic of Croatia, a structured settlement agreement may be considered for deferring and afterwards dismissing criminal prosecution. This agreement may be concluded prior to filing indictment. After filing the indictment, the accused person can enter plea bargain with the prosecuting authority (public prosecutor or prosecutor acting on behalf of the Bureau).

Article 206(d) of the Criminal Procedure Code prescribes that the prosecuting authority may decide to postpone (defer) and afterwards dismiss criminal prosecution for criminal offences punishable by a monetary fine or by imprisonment for a term up to five years, and this if the suspect accepts to fulfil one or several of obligations provided by Criminal Procedure Code. This can be done only after the prosecution authority obtains consent of the injured party. Obligations which may be imposed by the law to the suspect are the following:

- removal of damage and/or compensation of injured party;
- payment of the certain amount in charity;

- payment of the due legal support and/or regular payment of the legal support amount;
- performance of community service;
- subjecting of the suspect to the treatment or rehab from drugs, alcohol and other addictions in accordance with special regulations prescribed by law; and etc.

Provided that structured settlement, as described above, may be concluded only for criminal offences punishable by a fine or imprisonment for a term up to five years, the alleged bribe payer may resolve foreign bribery allegation through it only for criminal offence from Article 251 paragraph 1 (soliciting and accepting bribe in bankruptcy proceeding), Article 252 paragraph 2 and Article 253 (accepting bribe/bribery in business operations), Article 294 paragraph 2 (active bribery), Article 296 paragraph 2 (bribery in order to trade with influence) of the CPC.

If the suspect fulfils the obligation/s within the prescribed deadline, the prosecution authority will dismiss the criminal charges by a ruling and notify the injured party thereof.

## **3.2 Form, features and terms of structured settlements**

### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Structured settlement on postponement and dismissal of prosecution, as described above, does not prescribe the obligation of the suspect person to make a plea.

#### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Odbačaj kaznene prijave prema načelu svrhovitosti – odustanak od kaznenog.*

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

### **3.2.4 What form(s) can a structured settlement take?**

Written form.

### **3.2.5 What are the usual terms of such an agreement?**

In order to postpone (defer) and afterwards dismiss criminal prosecution, a public prosecutor will determine obligations which a suspect must fulfil and a period of time during which a suspect must fulfil the obligations undertaken.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The prosecuting authority may offer postponement and afterwards, after the obligations are met, dismissal of prosecution. This is possible only if the suspect fulfils the obligations which may be as follows:

- removal of damage and/or compensation of third party;
- payment of the certain amount in charity;
- payment of the due legal support and regular payment of the legal support amount;
- performance of community service;
- subjecting of the suspect to the treatment or rehab from drugs, alcohol and other addictions in accordance with special regulations.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

If the suspect fails to fulfil undertaken obligation/s, the prosecution authority will proceed with criminal prosecution in order to decide on the criminal charges and proceed to the indictment of the suspect.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached:**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

No.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: An officer of the authority in charge of the execution of the obligation/s imposed by settlement agreement.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

### **3.4 Outcome of the structured settlement**

Financial penalties. The Prosecution authority may impose to a suspect an obligation to pay a certain amount of money in charity and this is to humanitarian organisation or public institution.

Disgorgement of profits. The Prosecution authority can impose to a suspect an obligation to repair the damages caused by commission of the criminal offence.

Compensation to third parties. The Prosecution authority can impose to a suspect an obligation to compensate third parties (injured person/s).

Obligations to cooperate with other agencies. The Prosecution authority may impose to a suspect an obligation to carry out some community service or humanitarian work.

### **3.5 *De facto or de jure***

A potential Decision of the Prosecution authority to postpone (defer) and afterwards dismiss criminal prosecution of the suspect is based on the principle of opportunity.

The Prosecution authority may decide to postpone and afterwards dismiss criminal prosecution (enter a structured settlement) at its own choosing, while it may be considered only for criminal offences for which a monetary fine or imprisonment for a period of time up to five years may be imposed and only in cases where injured party gives an approval for application of this institute.

Additionally, there are no strict conditions which are to be met for a structured settlement to be entered.

*Editor's note: The settlement process (deferment and dismissal of criminal prosecution) is not contingent upon an admission of guilt. (See section 3.1 above). This constitutes a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

In accordance with provisions of the Law on Bureau for combating corruption and organised crime (Official Gazette Nos: 76/09, 116/10, 145/10, 57/11, 136/12 and 148/13), Law on Public Prosecutor's Office (Official Gazette Nos: 76/09, 153/09, 116/10, 145/10, 57/11, 130/11, 72/13, 148/13, 33/15, 82/15) and the Law on right to access to information (Official Gazette no: NN 25/13, 85/15), the Bureau for combating corruption and organised crime and the Public Prosecutor Office have to act on a request for access to information of public importance. Under the aforementioned laws, the Bureau for combating corruption and organised crime and the Public Prosecutor Office have to inform the public about important facts and give public statements, as well as provide access to information, whereby

a public prosecutor and the Bureau for combating corruption and organised crime can deny access to the documentation which are marked as secret.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

No, but by adopting the 'Strategy for Prevention of Corruption for 2015–2020', the National assembly of the Republic of Croatia has dealt and processed relevant documentation and information. The Strategy predicts increase of integrity, transparency and responsibility of all public authorities; improvement of internal mechanisms of public authorities; full implementation of existing framework in prevention and combating corruption; improvement of role and cooperation with civil sector; improvement and incitement of media in prevention and combating corruption.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

IMPORTANT NOTICE: Investigation and criminal prosecution for criminal offences relating to corruption and bribery is primarily being conducted by a prosecutor acting on behalf of and employed at Bureau for combating corruption and organised crime and *not* by the Public Prosecutor's Office. Also, in relation to claims of other countries, the prosecution may be left to some other country only under the mutual agreement with country in question.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

It is general principal that no person shall be tried again and sentenced for a criminal offence for which he or she has already stood trial and a final and valid judicial verdict exists.

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

According to the legislation, structured settlement can be concluded in relation to the following corruption offences: Article 251 paragraph 1 (soliciting/accepting bribe and bribery in bankruptcy proceeding), Article 252 paragraph 2 and Article 253 (soliciting/accepting bribe and bribery in business operations), Article 294 paragraph 2 (bribery), Article 296 paragraph 2 (bribery in order to trade with influence) of the Criminal Code. So, cooperation between alleged wrongdoers and prosecuting authority is possible only in respect to mentioned criminal offences, whereby it is likely and reasonable for expecting that prosecution authority shall offer settlement agreement.

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Existing framework does not encourage enough cooperation between prosecuting authority and alleged wrongdoers. Positive effect of this institute is that cases are closed quicker and this is an effective and efficient way for the public authority to combat corruption and bribery, but application of these settlement agreements is extremely restricted (only for criminal offences mentioned in 7.3.) Also, cooperation between prosecuting authority and alleged wrongdoers (suspects) is more favourable for the suspect as well, considering consequence of fulfilling undertaken obligation/s is postponement (defer) and afterwards dismissal of criminal charges, while there is no conviction.

### **6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Yes, I believe that cooperation should be encouraged but considering official state policy of zero tolerance to corruption, any improvement in respect to settlement agreement concerning corruption offences is unlikely.

### **6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

It is necessary to make changes of legislation and to expand the list of criminal offences in respect to corruption and bribery for which a settlement agreement can be concluded, as well as to more precisely determine conditions for concluding and applying agreement (for example, this instrument should be applied to criminal offences for which is predicted imprisonment up to eight years and not for five years of imprisonment as it is currently) and prescribe wider scope of obligations which potentially may be imposed to alleged wrongdoers

(performing of certain actions: applying of certain regulations and rules, submitting of reports, mandatory checking, etc).

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is no clear advantage. Under the current legislation, in case a company establishes existence of corruption and/or bribery within a company, there is no clear picture about eventual advantage that it would gain if it unilaterally reports existence of corruption to prosecutors authorities. It can be expected that prosecution authority and court would recognise reporting of corruption and/or bribery as mitigating circumstance, but the company would not be released from criminal responsibility for reporting of corruption and/or bribery. It may only have influence at sentencing.

*Jitka Logesová and Kristýna Del Maschio, Partner and Junior Associate, Kinstellar (Prague)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Act No 40/2009 Coll, the Criminal Code (the ‘Criminal Code’); Act No 418/2011 Coll, on Corporate Criminal Liability; and Act No 141/1961, on Criminal Proceedings (the ‘Criminal Procedure Code’).

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The United Nations Convention Against Corruption (UNCAC), OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, The Criminal Law Convention on Corruption of the Council of Europe, The Civil Law Convention on Corruption of the Council of Europe, legal instruments of the European Union (eg, Convention against corruption involving officials of the European Communities or officials of Member States of the European Union, Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, etc).

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Czech bribery laws would apply if (1) the offender is a Czech citizen or a company with registered seat in the Czech Republic or (2) at least a part of the bribery offence was committed in the Czech Republic.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Under the Criminal Act, a bribe means an unauthorised advantage in the form of direct asset enrichment or other benefits that the bribed person is to receive or with their consent give to another person and to which they are otherwise not entitled. Importantly, Criminal Act does not set any quantitative threshold for a bribe; therefore, even an advantage of a low value could be considered a criminal offence.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

With effect from 1 January 2012, corporate criminal liability is governed by Act No. 418/2011 Coll., on Corporate Criminal Liability (*lex specialis* to the Criminal Code and the Criminal Procedure Code).

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other. There is no special unit/or authority dealing with corruption in international business transaction operating in the Czech Republic. Corruption cases and serious economic crime cases are investigated by the National Headquarters against Organised Crime and prosecuted by state prosecutors.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No. The state prosecutor is obliged to submit the indictment if there is no out-of-court measure possible (eg, settlement or conditional suspension of criminal proceedings) and the results of the investigation sufficiently justify bringing the accused person to the court.

**2.1.2 Deciding what charges to file?**

Yes.

While the indictment can only concern the conduct that raised the accusations (ie, facts of the case), the state prosecutor has discretion as to the qualification of the conduct. The change of qualification can concern either the gravity or type of the criminal offence. In addition, the court is not bound by such qualification of the state prosecutor and might change the qualification.

**2.1.3 Deciding whether to drop charges?**

No.

In general, it is not in his discretion. In the pre-trial proceedings, the state prosecutor is obliged to drop charges in certain cases (eg, statutes of limitation period expired, the act did not happen, etc) and only in certain exceptional cases, he can drop charges at his discretion (eg, the punishment, which may come as a result of the criminal prosecution, is completely irrelevant next to the punishment which was already imposed on the accused for another act or that will affect them as expected).

**2.1.4 Deciding whether or not to plea bargain?**

Yes. It is in his sole discretion to negotiate a plea bargain with the accused but such plea bargain must be approved by the court.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

The principle of opportunity applies only in certain exceptional cases when the state prosecutor may at his discretion discontinue the prosecution – please refer to question 2.1.3.

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

In general, a principle ultima ratio has to be followed (ie, the criminal liability of an offender and the criminal consequences associated with it may only be applied in socially harmful cases where application of liability under another legal regulation is insufficient). However, there are no specific thresholds as to the decision whether to prosecute or not.

**2.4 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

The principle of opportunity applies only in certain exceptional cases when the state prosecutor may at his discretion discontinue the prosecution – please refer to question 2.1.3.

**2.5 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

In general, a principle ultima ratio has to be followed (ie, the criminal liability of an offender and the criminal consequences associated with it may only be applied in socially harmful cases where application of liability under another legal regulation is insufficient). However, there are no specific thresholds as to the decision whether to prosecute or not.

**2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

**2.6 Do these standards differ for individual and corporate defendants?**

No.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences.**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes. Czech law recognises a concept of the plea bargain agreement.

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes. If the plea bargain agreement is not concluded in the end, an admission of guilt will not be taken into account in further proceedings.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Dohoda o vině a trestu.*

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Other. Criminal Procedure Code does not stipulate specific factors which should be taken into account by the state prosecutor when deciding on entering into the plea bargaining agreement.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No. The accused cannot be forced to waive the legal privilege. The legal privilege forms a part of the constitutional right for defence.

**3.2.4 What form(s) can a structured settlement take?**

Section 175a(6) of the Criminal Procedure Code sets forth particular requirements of the plea bargain agreement. Under this provision, the plea bargain agreement must contain the following:

- the names of the parties to the agreement;
- the date and place of the drawing up thereof;
- a description of the act for which the accused is prosecuted, stating the place, time and manner of committing the act, and, if appropriate, any other circumstances under which the act took place so that it cannot be confused with any other act;
- legal qualification of the criminal offence considered to have occurred by such act, stating the applicable provision of the Criminal Code and all statutory features including those that justify a certain penalty rate;
- declaration of the accused on admission of guilt;
- the kind, length and manner of execution of punishment, including the length of the probation period as agreed in accordance with the Criminal Code;
- the extent and manner of compensation for damage or non-material damage, or the surrender of unjust enrichment, if agreed;
- a protective measure, if the imposition thereof may be taken into consideration and if it was agreed; and
- the signatures of the parties to the agreement.

**3.2.5 What are the usual terms of such an agreement?**

Please refer to question 3.2.4.

### **3.2.6 Are there limits on what the prosecution can offer?**

No.

The Criminal Procedure Code does not stipulate any particular requirements to be fulfilled while negotiating the settlement. However, if the plea bargain agreement would be disproportionate to the committed act (eg, in terms of the kind and level of the proposed punishment or compensation for damage), the court would not approve such agreement.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No. The settlements do not impose obligations on the accused but rather sentences.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. It is at the sole discretion of the state prosecutor to start negotiating a plea bargain agreement.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes. The court must approve the agreement.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The court will not approve the plea bargain agreement if it is incorrect or disproportionate in terms of its correspondence with the facts of the case and the committed act or in terms of the kind and level of the proposed punishment or protective measure, or is incorrect in terms of the extent and manner of compensation for damage, or if the court ascertains that the rights of the accused were seriously violated when concluding the agreement on guilt and punishment. In such case the court decides on returning the case back to pre-trial proceedings.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

Another authority: Probational and Mediation Service Agency and the Prison Service.

Probational and Mediation Service Agency is the body responsible for supervising enforcement of criminal sentences except for the custodial sentence where the Prison Service is responsible. Decisions pertaining to the enforcement of criminal sentences and other protective measures are performed by the court.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

There are no special obligations of the accused arising from the agreement. The agreement is approved by the court in the form of a judgment imposing a sentence on the accused rather than obligations.

### **3.4 Outcome of the structured settlement**

Only criminal sanctions and damages can be imposed as part of the settlement (ie, no obligations such as monitors or corporate compliance programmes can be imposed). There are no specific rules or guidelines on the sanctions to be imposed as part of the settlement – the same rules as for the court deciding on such sanction in a main trial apply.

### **3.5 *De facto or de jure***

*Editor's note: The settlement process is contingent upon an admission of guilt. (See section 3.1 above). This constitutes a de facto, plea-based, settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

The information about settlement is not publicly available in general. However, each individual is entitled to request authorities to be provided with information pertaining to their activities according to Act No 106/1999, Coll, on Freedom of Information (including courts' final decisions).

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent. Please refer to question 4.1.1.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No. Czech law enforcement authorities collect data on corruption related criminal cases in general. There is no separate data collection and processing in the case of foreign bribery.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

If there is a clash between domestic jurisdictions (eg, criminal and administrative jurisdiction), the principle of *ne bis in idem* applies. If an administrative authority finds out during administrative proceedings that a crime might have been committed, it must refer the matter to criminal authorities. On the other hand, if the criminal authorities find out that the prosecuted conduct is not a crime but rather an administrative offence, they must suspend the prosecution and refer the case to the respective administrative authorities.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

If a company is convicted for a corruption criminal offence (or acquitted) in one of the member states of the EU, the company cannot be prosecuted for the same crime in the Czech Republic. In the event of a conviction in non-EU states, the prosecuting authorities may, at their sole discretion, discontinue the prosecution if they deem the sentence imposed in the foreign country to be sufficient.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

Such cooperation between the alleged wrongdoer and the state prosecutor is possible through an institute of suspension of criminal proceedings. In line with the Criminal Procedure Code, criminal proceedings may be discontinued conditionally if certain obligations are fulfilled (eg, the accused confessed, compensated damage, etc). However, this only applies to minor offences (ie, offences where the upper punishment limit of a custodial sentence amounts to a maximum of five years), which is rarely the case of corruption offences.

The decision on the conditional suspension of criminal proceedings is at the discretion of the state prosecutor (in pre-trial proceedings) or the judge (during main trial).

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Such cooperation in case of minor offences is encouraged by the existing framework given the fact that if the criminal proceedings are not conditionally suspended in the end, the court must disregard confession of the accused.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

We are of the view that such cooperation should be encouraged because it is in most cases almost impossible to uncover bribery and find sufficient evidence without cooperation from the alleged wrongdoer.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

As mentioned above, corruption cases are often very difficult to investigate and bring to prosecution due to lack of evidence. In our view, the law making authorities should focus more on implementing and enhancing legal instruments (such as deferred prosecution agreements) that will encourage offenders to report an offence and provide the authorities with evidence.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

Not applicable.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Cooperation with the law enforcement authorities might serve as a mitigating factor in the criminal proceedings. In case of conviction of a company, it might help to lower the sanction being imposed on the company. On the other hand, the company cannot be certain how their cooperation will be assessed and reflected in the sentence.

*Christian Bredtoft Guldmann, Lawyer and Partner, Lundgrens Law Firm*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Danish Criminal Code section 122 (active public official bribery), Danish Criminal Code section 144 (passive public official bribery) and Danish Criminal Code section 299(2) (active and passive private sector bribery).

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

United Nations Convention against Corruption, the Council of Europe Criminal Law Convention on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No.

Danish foreign bribery laws only have extraterritorial effect for Danish citizens, individuals domiciled in Denmark and Danish businesses and only to the extent that the alleged offence was contrary to local law in the country in which the offence was committed.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are not exempted from Danish bribery laws. That being said, to my knowledge, no Danish public prosecutor has ever filed charges against any Danish individual or company for alleged facilitation payments.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

The Danish Criminal Code section 306 sets forth that corporate criminal liability is applicable with respect to all offences in the Danish Criminal Code including bribery offences.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

The Danish State Prosecutor for Serious Economic and International Crime is responsible for prosecuting offences related to corruption in international business transactions, cf BEK No 1177 of 6 December 2012, section 2. However, please note that the unit is responsible for all matters pertaining to serious economic and international crime, not only bribery.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

Prosecutors are required to charge with a crime unless one of the conditions in Administration of Justice Act sections 721 and 722 is met.

#### **2.1.2 Deciding what charges to file?**

No.

Prosecutors are required to charge with a crime unless one of the conditions in Administration of Justice Act sections 721 and 722 is met.

#### **2.1.3 Deciding whether to drop charges?**

No.

Prosecutors may only drop charges if one of the conditions in Administration of Justice Act sections 721 and 722 is met.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

The Danish Supreme Court stated in case 297/2008 that plea bargain is generally not allowed under Danish law. That being said, a defendant may from practical perspective achieve a reduced sentence if cooperating with the prosecutor.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No. See above.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

As an example, pursuant to the Administration of Justice Act section 722(1)(5) the prosecutor may drop charges if the costs of prosecuting is not justified by the potential sentence.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

### 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

#### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

*Editor's note: There is no de jure settlement process envisaged within the Denmark criminal justice system. See section 3.1. Nor is plea bargaining a feature of the criminal justice system (see section 2.1.4 above). Yes, in practice some bargaining may occur to achieve a reduced sentence. (See section 2.1.4 above and 4.1.1. below). This would constitute an informal de facto, plea-based, settlement process following the classification used in this report.*

### 4. Transparency

#### 4.1 Public access to information on settlements

##### 4.1.1 Is information about settlement available to the public?

No.

Even though there is no formal settlement process, a company charged with a bribery offence may choose to accept an administrative fine. If doing so, it may from a practical perspective be possible to influence the amount by indicating to the prosecutor what fine amount the company would choose to accept. There would not be a formal settlement agreement in this situation.

##### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

##### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

#### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. The Danish State Prosecutor for Serious Economic and International Crime keeps track of bribery allegations.

##### 4.2.1 If yes, is this data publicly available?

No. Not directly, but the prosecutor does from time to time provide digested information on its website.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

The Danish Criminal Code section 10a sets forth that if another jurisdiction has ruled on the same matter Denmark cannot prosecute for that same matter.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

With respect to foreign settlements, they will only be binding if confirmed by a court.

## 6. The following questions call for your opinion

### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability

Reasonable predictability.

### 6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?

In my view, a Danish company charged with bribery allegations may very well choose to cooperate but that would typically be for public relation reasons rather than due to legal benefits.

### 6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?

Encouraged, in a limited way – it should not give companies a way out as this would reduce incentive not to use bribery.

### 6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?

Clear statements on reduction of fines in case of cooperation.

### 6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?

In Denmark, the advantage would by most companies be deemed reputational.

*Alison Levitt, Partner, Mishcon de Reya LLP (Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The Bribery Act 2010.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The law of England and Wales already adopts a wide approach in terms of jurisdiction. The Criminal Justice Act 1993 provides that for certain specified offences, such as fraud or theft, a person may be guilty of that offence if any of the events which are 'relevant events' in relation to the offence occurred in England and Wales. However, there are further legislative provisions which extend the extra-territorial effect of certain offences such as bribery.

The Bribery Act does have extra-territorial effect. However, this differs depending upon the offence.

#### **Section 1, 2 or 6 of the Bribery Act 2010**

Where no act or omission, which forms part of an offence under section 1, 2 or 6, takes place in the UK, if the acts or omissions done or made outside of the UK would form part of such an offence if done or made in the UK, and the accused has a 'close connection' with the UK, in such circumstances the acts or omissions form part of the offence under section 1, 2 or 6 and proceedings may be taken at any place in the UK. The Bribery Act sets out an exhaustive list of situations when there is a 'close connection' with the UK. These are when the accused is:

- a British citizen;
- a British overseas territories citizen;
- a British National (Overseas);
- a British Overseas citizen;
- a person who under the British Nationality Act 1981 was a British subject;
- a British protected person within the meaning of that Act;
- an individual ordinarily resident in the UK;

- a body incorporated under the law of any part of the UK; or
- a Scottish partnership.

### **Section 7 of the Bribery Act 2010**

In addition to the offences under section 1, 2 or 6, a relevant commercial organisation may also be prosecuted for an offence under section 7 of the Bribery Act 2010. An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere. The offence can only be committed by a 'relevant commercial organisation' which is defined as:

- a body which is incorporated under the law of any part of the UK and which carries on a business (whether there or elsewhere);
- any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the UK;
- a partnership which is formed under the law of any part of the UK and which carries on a business (whether there or elsewhere); or
- any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the UK.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

These are prohibited under the Bribery Act 2010. Additionally, the payment of facilitation payments abroad by persons with a 'close connection' to the UK is likely to be an offence under the Bribery Act 2010.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

In England and Wales, the general rule for corporate criminal liability is determined by 'the Identification Doctrine'. In contradistinction to some other jurisdictions, in England and Wales a company is not automatically liable for the criminal acts of its employees or managers. In England and Wales a company is fixed with criminal liability through the acts or omissions of its 'directing mind'. This means that a company can only be found guilty of a criminal offence if the offence is committed by someone who is acting as the company. There are no fixed rules as to exactly who will be acting as the company and each case will be dependent upon its facts. In order for a relevant commercial entity to be prosecuted for an offence contained within sections 1, 2 or 6 of the Bribery Act 2010 the relevant acts must therefore have been carried out by the 'directing mind' of the company.

There are, however, a number of exceptions to the 'Identification Doctrine' created by statute; one of which is s7 of the Bribery Act 2010. This is a corporate criminal offence of failure by a commercial organisation to prevent bribery. The offence under section 7 does not rely upon the Identification Doctrine, instead it creates a separate strict liability offence

where a relevant commercial organisation is guilty of an offence if a person associated with it bribes another person intending: (a) to obtain or retain business for the commercial organisation; or (b) to obtain or retain an advantage in the conduct of business for the commercial organisation. It will be a defence for the relevant commercial entity to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

The Serious Fraud Office both investigates and prosecutes and is the lead agency for overseas corruption. Other investigators and prosecutors of bribery and corruption are the International Corruption Unit of the National Crime Agency and the Crown Prosecution Service.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

All charging decisions, including those made by the Serious Fraud Office, are made in accordance with the Crown Prosecution Service Code for Crown Prosecutors. The Code for Crown Prosecutors contains a two stage test, the 'Full Code Test'. The first stage is the Evidential Stage which requires the prosecutor be satisfied that there is a realistic prospect of conviction. This means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing the case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. It should be noted that this is a different test to that which must be applied by the criminal courts (ie, sure of guilt). If the case does not pass the Evidential Stage then no charges should be brought. If the case does pass the Evidential Stage then the prosecutor must consider the Public Interest Stage. This requires the exercise of prosecutorial discretion, but it is not unfettered.

If the case satisfies the evidential stage then a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. When deciding the public interest, prosecutors should consider each of the questions set out in the Code for Crown Prosecutors so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the Director of Public Prosecutions, should enable prosecutors to form an overall assessment of the public interest.

In relation to exercising this discretion it is important to note that:

‘[...] the discretions conferred on the Director [of the Serious Fraud Office] are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice.’ [2008] UKHL 60 R. (on the application of *Corner House Research v Director of the SFO*. Similar principles apply to the Director of Public Prosecutions.

It is possible to challenge through the courts an unreasonable or unlawful decision made by the prosecuting authority. This includes the opportunity to challenge a decision not to prosecute.

#### **2.1.2 Deciding what charges to file?**

No. The Code for Crown Prosecutors contains specific guidance for deciding what charges to file.

#### **2.1.3 Deciding whether to drop charges?**

No. The prosecutor has the power to discontinue proceedings but any such decision needs to be made in accordance with the published guidance.

#### **2.1.4 Deciding whether or not to plea bargain?**

No. Plea bargaining in the form in which it takes place in, for example the United States, is not permitted under the law of England and Wales. Decisions to accept a plea need to be taken in accordance with the Code for Crown Prosecutors and other guidance such as the Attorney General’s guidance on the acceptance of pleas.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Other. Prosecutorial decisions involve the exercise of judgment in accordance with published guidance (ie, the Code for Crown Prosecutors referred to above).

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

As set out above, the Code for Crown Prosecutors prescribes a two-stage test for a prosecutor to make the decision to prosecute. These are the Evidential Stage and the Public Interest Stage. Prosecutors may only prosecute those cases which pass both stages of the Full Code Test.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

These are set out in the Code for Crown Prosecutors. However, it should be noted that the Code sets out high level principles which should be applied. Sitting beneath the Code is published legal guidance which the prosecutor must also take into account and which sets a standard by which the prosecutor can be judged by the courts. Being a common law jurisdiction the courts have ruled on cases involving the exercise of prosecutorial discretion. This case law also assists in defining the factors which make up the threshold that determines when a prosecutor should make a decision to prosecute.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

These are referred to as Deferred Prosecution Agreements (DPAs) and are discussed in more detail below. These agreements are not available to individuals. Under the legislation which creates the statutory basis for DPAs only a body corporate, a partnership or unincorporated association may enter into a DPA.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

The legislation which creates these agreements contains no requirement in either the statute or published guidance for a formal admission of guilt. Some facts may need to be admitted and, on a practical level, DPA negotiations are likely to involve some level of acknowledgement of wrongdoing.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

Deferred Prosecution Agreement or DPAs. These were created by a piece of legislation called the Crime and Courts Act 2013.

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer? (You can choose more than one option)**

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures;

assistance in investigating and prosecuting individuals; and

Other.

Please see the DPAs Code of Practice. Section 2, entitled ‘Factors that the prosecutor may take into account when deciding whether to enter into a DPA’, sets out those factors which are likely to be relevant to the prosecutor when deciding whether or not enter into a DPA. The list contained in the Code of Practice is not intended to be exhaustive.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No. Although any such waiver will go towards demonstrating cooperation.

**3.2.4 What form(s) can a structured settlement take?**

There is no prescribed form for a DPA however the legislation which brought DPAs into law requires the following information to be contained within a DPA:

A DPA must contain a statement of facts relating to the alleged offence, which may include admissions made by the accused.

A DPA must specify an expiry date, which is the date on which the DPA ceases to have effect if it has not already been terminated under paragraph 9 (breach).

The requirements that a DPA may impose on the accused include, but are not limited to, the following requirements:

- to pay to the prosecutor a financial penalty;
- to compensate victims of the alleged offence;
- to donate money to a charity or other third party;
- to disgorge any profits made by the accused from the alleged offence;
- to implement a compliance programme or make changes to an existing compliance programme relating to the accused’s policies or to the training of the accused’s employees or both;
- to cooperate in any investigation related to the alleged offence;
- to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

The DPA may impose time limits within which the accused must comply with the requirements imposed on the accused.

The amount of any financial penalty agreed between the prosecutor and the accused must be broadly comparable to the fine that a court would have imposed on the accused on conviction for the alleged offence following a guilty plea.

A DPA may include a term setting out the consequences of a failure by the accused to comply with any of its terms.

#### 3.2.5 What are the usual terms of such an agreement?

This is extremely recent legislation. To date there have only been four DPAs. It is therefore too early to identify trends in the terms of these DPAs.

#### 3.2.6 Are there limits on what the prosecution can offer?

Yes.

As set out above, the level of any fine must be broadly comparable to the fine that a court would have imposed on conviction for the alleged offence following a guilty plea. Additionally, according to the DPA Code of Practice prosecutors should not agree to a term which would prevent the corporate body from being prosecuted for conduct not included in the indictment.

#### 3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?

Yes.

The legislation which creates DPAs contains provisions which govern cases of non-compliance by the accused. In such circumstances the prosecutor is able to apply to the court for an order terminating the DPA. This has not yet happened in England and Wales.

### 3.3 Role of the court in regards to structured settlements

**Please explain the role of the courts with respect to any structured agreement reached:**

#### 3.3.1 Prior to the settlement:

##### 3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?

No. There is no role for the court before the prosecutor and the company begin negotiation. In England and Wales there is a separation of the investigator/prosecutor and the court.

##### 3.3.1.2 Does the court have any other involvement before settlement has been reached?

Yes.

After the commencement of negotiations between a prosecutor and the accused in respect of a DPA but before the terms of the DPA are agreed, the prosecutor must apply to the Crown Court for a declaration that:

- entering into a DPA with the accused is likely to be in the interests of justice, and
- the proposed terms of the DPA are fair, reasonable and proportionate.

Any such hearing is held in private and any reasons given are in private.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. The requirement for Court scrutiny is set out in legislation (the Crime and Courts Act 2013), schedule 17, paragraph 8:

‘(1) When a prosecutor and the accused have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that:

- (a) the DPA is in the interests of justice, and
- (b) the terms of the DPA are fair, reasonable and proportionate.

(2) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).

(3) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).

(4) A hearing at which an application under this paragraph is determined may be held in private.

(5) But if the court decides to approve the DPA and make a declaration under sub-paragraph (1) it must do so, and give its reasons, in open court.

(6) Upon approval of the DPA by the court, the prosecutor must publish:

- (a) the DPA,
- (b) the declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,
- (c) in a case where the court initially declined to make a declaration under paragraph 7, the court’s reason for that decision, and

(d) the court’s declaration under this paragraph and the reasons for its decision to make the declaration, unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings).’

### 3.3.3 During the implementation of the settlement:

#### 3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?

Another authority: Prosecutor. The prosecutor (either the CPS or SFO) oversee DPAs after their approval by court.

#### 3.3.3.2 Can this authority impose penalties for non-compliance?

No.

If the prosecutor believes that a corporate body subject to a DPA has failed to comply with a term, and that the breach cannot be rectified or is appropriately serious, it may make an application to the Crown Court.

The court must decide whether, on the balance of probabilities, the corporate body has failed to comply with the terms of the DPA. If the court finds that the corporate body is in breach, it may:

- invite both parties to rectify the failure to comply; or
- terminate the DPA.

### 3.4 Outcome of the structured settlement

Are there any rules that provide guidance about the outcome of such negotiations with respect to the following?

	Statutory Provisions	Guidelines	Past cases
Financial penalties	Yes. Crime and Courts Act 2013.	Yes. Joint SFO/CPS guidance on DPAs and the 2014 Sentencing Guidelines for fraud, bribery and money laundering offences.	Yes. As enclosed.
Disgorgement of profits	No.	Yes.	Yes.
Compensation to third parties	No.	Yes.	Yes.
Obligations to cooperate with other agencies	No.	Yes.	No.
Monitors (and paying for them)	No.	Yes.	Yes.
Corporate compliance programmes	No.	Yes.	No.

The DPA Code of Practice sets out guidance on the requirements which may be included in a Deferred Prosecution.

As set out above, the legislation prescribes that the amount of any financial penalty agreed between the prosecutor and the accused must be broadly comparable to the fine that a court would have imposed on the accused on conviction for the alleged offence following a guilty plea.

Since England and Wales is a common law jurisdiction, guidance and case law will be relevant to most issues.

In terms of personal liability, the DPA is negotiated by the corporate entity and, as a result, it is unlikely to have any direct impact on personal liability although there may be separate criminal proceedings brought against individuals and the corporate entity may be expected to cooperate with any investigation and prosecution.

### **3.5 *De facto or de jure***

The criminal settlement process is set out in legislation, however, since England and Wales is a common law jurisdiction, the practical application of DPAs will be established through precedent and case law.

*Editor's note: The settlement process 'deferred prosecution agreement' is not contingent upon an admission of guilt. (See section 3.1 and 3.2 above). This would constitute a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

Yes. The details of DPAs are not made public until they have been approved.

As highlighted above, the details may be withheld by order of the court or if the publication would prejudice proceedings. For example, the name of the company which was the subject of the UK's second DPA has not yet been disclosed because of the possibility of prejudicing ongoing court proceedings; similarly, the terms of the fourth DPA with Tesco plc have not been made public because of the possibility of prejudicing ongoing criminal proceedings.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive – although it should be noted that publication may be delayed if it would prejudice ongoing legal proceedings (as seen in the example of XYZ Ltd and the recent DPA with Tesco plc).

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Limited. The DPA process is ultimately controlled by the prosecutor but there is no statutory limit on the issues which can be negotiated and there is nothing which expressly prohibits negotiations taking place on the terms of any public announcement.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes. The relevant investigation/prosecutorial authority will hold information about bribery prosecutions but are not believed to collect and process separate information about foreign bribery.

**4.2.1 If yes, is this data publicly available?**

No.

Some case specific information is provided on the Serious Fraud Office web page: [www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements](http://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements).

More specific information may be available to the public via a Freedom of Information request subject to whether separation of domestic and foreign bribery is easily accessible.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. Due to the wide reach of the Bribery Act there can be overlap between different jurisdictions.

Guidance has been issued by the Attorney General for handling criminal cases affecting both England, Wales or Northern Ireland and the US. England and Wales is also a signatory to the United Nations Convention Against Corruption. For example Article 47 of the United Nations Convention provides as follows:

‘States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.’

In the absence of these Conventions, applying the law on double jeopardy, which applies equally to offences which take place outside of England and Wales, is likely to prevent criminal proceedings on the same facts and for the same offence.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

The principles of *autrefois acquit* and *autrefois convict* in the case of a foreign conviction would preclude any further prosecution of the company for the same offence on the same factual basis although this would not preclude a prosecution on a different factual basis, or for a different offence.

In the context of a foreign structured settlement, as referred to above, DPAs are a relatively new aspect of the law of England and Wales and this issue has not been specifically determined by the courts. While the courts of England and Wales have taken a narrow view on how to interpret the principles of *autrefois convict* and *autrefois acquit*, it is likely that a Foreign Structured Settlement would be treated as having binding effect in England and Wales and any further criminal prosecution in England and Wales would be an abuse of the courts process and/or violate these principles. Until this matter is determined by a court it is not possible to definitively respond to this question.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

There is no guarantee that the Serious Fraud Office or the Crown Prosecution Service will grant a DPA even in cases where the corporate entity has made a self-report. A number of factors will be considered, including the level of genuine cooperation forthcoming and each case will be determined on its own facts. It is, however, likely that a company which makes a self-report and/or provides the authorities with a high level of cooperation will be able to agree a DPA. An illustration of this potential uncertainty can be seen in the prosecution of Skansen Interiors for an offence under section 7 of the Bribery Act 2010. Despite self-reporting to the authorities, the Crown Prosecution Service decided against entering into a DPA. There may be features of that case which make it fact specific as the company had been dormant for a number of years and had no assets to pay a fine.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Such cooperation is encouraged. The Deferred Prosecution Agreement Code of Practice makes substantial reference to cooperation and the published judgments emphasise how important cooperation was in the company successfully agreeing a Deferred Prosecution Agreement with the Serious Fraud Office.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Such cooperation should be encouraged to facilitate the reporting of bribery and corruption which would otherwise have not been identified.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

It is difficult to assess the effect of this new legislation but the extremely small number of DPAs may support anecdotal evidence that companies will only cooperate when they have no alternative.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

This is a topic of some debate. Because DPAs are still relatively novel it is difficult to say whether financial penalties are any less than they would be had the prosecution been able to prove each element of the offence, particularly as the Crime and Courts Act 2013 requires the level of any fine to be broadly comparable to the fine that a court would have imposed on the accused on conviction for the alleged offence following a guilty plea. In terms of reputation, once again it is difficult to say what the long-term effects are likely to be. However, due to the novelty of DPAs, the recent examples have attracted significant media attention. It should be noted that a conviction for certain offences under the Bribery Act 2010 acts as a mandatory ground for exclusion from public procurement contracts. Entering into a DPA would avoid the mandatory exclusion and therefore, for certain corporate entities, may be a significant factor.

*Carri Ginter and Gerli Helene Gritsenko, Partner and Legal Assistant at Sorainen Law Firm*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Anti-corruption Act; Penal Code; Income Tax Act; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; United Nations Convention Against Corruption; Criminal Law Convention on Corruption; Civil Law Convention on Corruption; Additional Protocol to the Criminal Law Convention on Corruption; Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

#### **1.2 Do your foreign bribery laws have extraterritorial effect?**

Yes.

According to Article 42 in United Nations Convention Against Corruption (adopted in New York on 31 October 2003), which Estonia adopted on 20 January 2010, and Penal Code section 7, sec 2, page 2, Estonian courts have jurisdiction if the corruptive act is committed in Estonian territory or on the board of an Estonian vessel or aircraft. On condition that another State's sovereignty is not violated, Estonia has a right to establish its jurisdiction on another territory, if the corruptive act is committed by a person connected to Estonia, including Estonian citizens, incorporated companies and residents or if the act is committed against Estonia.

#### **1.3 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are treated as bribe under the Penal Code section 298, sec 1, and are punishable by a pecuniary punishment or up to three years' imprisonment. Requesting, consenting to promising of property or other advantage by a person to himself/herself or third persons or accepting thereof in exchange for his or her actual or alleged influence peddling over an official with the intention of getting unequal or unjustified advantages from the point of view of public interest for the person giving the advantage or third persons, as well as promising of giving an advantage for the same purpose, is punishable by a pecuniary punishment or up to three years' imprisonment.

#### **1.4 Does your country provide for corporate criminal liability?**

Yes.

According to the Penal Code section 14 sec 1, in the cases provided by law, a legal person shall be held responsible for an act which is committed in the interests of the legal person by its body, a member thereof or by a senior official or competent representative.

#### **1.5 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

Regarding investigation: Central Criminal Police, if it is an issue of officials working in local municipalities and public offices, and private companies/non-profit organisations; Security Police Board, if it is an issue of high-ranking national officials (the President, Member of the Parliament, Minister, Auditor General, Legal Chancellor, judge, prosecutor, or higher official of governmental authority, Chancellery of the Parliament, Office of the President of the Republic, Office of the Chancellor of Justice, State Audit Office or court) according to *Politsei- ja Piirivalveameti ja Kaitsepolitseiameti vaheline uurimisalluvus*, section 1 and section 2, sec 2. Regarding prosecution: according to the Code of Criminal Procedure section 30, sec 1, a prosecutor's office shall direct pre-trial proceedings and ensure the legality and efficiency thereof and represent public prosecution in court.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

The person/persons whom to charge with a crime will be in the criminal file, but a prosecutor can choose whoever. According to the Code of Criminal Procedure Section 222, sec 1, if an official of an investigative body is convinced that the evidentiary materials necessary in a criminal matter have been collected, he or she shall immediately send the criminal file to a prosecutor's office together with the physical evidence, recordings and a sealed envelope containing the personal data of anonymous witnesses. According to section 222, sec 2, if there are several suspects in one and the same criminal matter, a joint summary of the pre-trial proceedings shall be prepared setting out the personal data of each suspect separately. Section 154, sec 3, states that the final part of a statement of charges shall set out: the name of the accused. So, material will be in the criminal file, but the prosecutor makes the final decision and makes the charges (but has not unfettered discretion).

### **2.1.2 Deciding what charges to file?**

No.

The facts relating to the criminal offence will be in the criminal file, so the charges come from that information, but a prosecutor can choose what charges to file.

According to the Code of the Criminal Procedure section 154, sec 3, the final part of a statement of charges shall set out: the content of the charges. The prosecutor still has to follow the law, so his/her discretion is not unfettered.

### **2.1.3 Deciding whether to drop charges?**

No.

According to the Code of the Criminal procedure section 223, sec 1, a prosecutor's office which receives a criminal file shall declare the pre-trial proceedings completed, require the investigative body to perform additional acts or terminate the criminal proceeding (termination can only be on the basis which are stated in the Code of the Criminal Procedure). The prosecutor still has to follow the law, so his/her discretion is not unfettered.

### **2.1.4 Deciding whether or not to plea bargain?**

No.

According to the Code of Criminal Procedure section 205, sec 1, the Office of the Prosecutor General may, by its order, terminate criminal proceedings with regard to a person suspected or accused with his or her consent if the suspect or accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence which is important from the point of view of public interest in the proceedings and if, without the assistance, detection of the criminal offence and taking of evidence would have been precluded or especially complicated. The prosecutor still has to follow the law, so his/her discretion is not unfettered.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

According to the Code of Criminal Procedure section 6, investigative bodies and Prosecutors' Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

According to the Code of Criminal Procedure section 226, sec 1, if a prosecutor's office has submitted a criminal file for examination and is thereafter convinced that the necessary evidence in the criminal matter has been taken, the prosecutor's office shall prepare the statement of charges. That is the only regulation regarding threshold.

### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

Explained also in the previous question. The prosecutor has to be convinced that the necessary evidence in the criminal matter has been taken, but it is not defined when the prosecutor has to be convinced. It will all be the prosecutor's decision whether to file charges or not.

### **2.4 Do these standards differ for individual and corporate defendants?**

No. The procedure is the same and the same rules apply as explained in the previous question.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes. There are no special regulations for bribery cases, but the Code of Criminal Procedure section 239 sec 2 states when the settlement proceedings shall not be applied and bribery cases are not listed.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes. Code of Criminal Procedure section 245 sec 1, page 8, states that a settlement shall set out the legal assessment of the criminal offence and the nature and extent of the damage caused by the criminal offence.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Kokkulepe.*

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Other.

There are no specific rules which factors to take into consideration. It is always the prosecutor's choice during negotiations for a settlement and later, in court, the judge will say whether those factors were taken into consideration correctly according to the Code of Criminal Procedure sections 245 and 248.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

According to the Code of Criminal Procedure section 141, sec 1, pages 1 and 2, a suspect or accused shall be excluded from office at the request of a prosecutor's office and on the basis of an order of a preliminary investigation judge or on the basis of a court ruling if he or she may continue to commit criminal offences in case he or she remains in the office or his or her remaining in the office may prejudice the criminal proceeding.

### **3.2.4 What form(s) can a structured settlement take?**

There is only one form for settlements, but the content can vary. According to the Code of Criminal Procedure section 245, sec 1, page 9, a settlement shall set out: the type and the category or term of the punishment.

### **3.2.5 What are the usual terms of such an agreement?**

There have been none regarding bribery cases, but according to the Code of Criminal Procedure section 245, sec 1, a settlement shall set out:

- the time and place of conclusion of the settlement;
- the official title and name of the prosecutor;
- the name, residence or seat and address, personal identification code or, in the absence thereof, date of birth, citizenship, education, native language and the place of work or educational institution of the accused;
- the name of the counsel;
- the criminal record of the accused; the preventive measures applied with regard to the accused and the duration thereof;
- a notation that the rights of the suspect or accused in settlement proceedings and the consequences of settlement proceedings have been explained to him or her;
- the facts relating to the criminal offence;
- the legal assessment of the criminal offence and the nature and extent of the damage caused by the criminal offence;
- the type and the category or term of the punishment;
- property subject to confiscation;
- the basis and object civil action or proof of claim in public law filed against the accused; and
- the expenses relating to the criminal proceeding compensated for by the accused, if possible as an absolute amount.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The limits come from the Code of Criminal Procedure section 245, sec 1, which is mentioned above. Also, section 244, sec 4, states that no settlement shall be concluded on a more severe punishment than 18 years' imprisonment.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

When the person will not do what the court judgment says (it says the same whatever the settlement was), a prosecutor can go to the bailiff according to the Code of Criminal Procedure section 417, sec 2 (if a convicted offender has failed to pay the amount of the pecuniary punishment imposed on him or her to the prescribed account in full within one month after the entry into force of the court judgment or by the specified due date or if the terms for the payment of instalments of an amount of pecuniary punishment are not complied with and the term for payment of the amount of pecuniary punishment or a fine to the extent of assets has not been extended or apportioned) a copy of the court judgment shall be sent to a bailiff within ten days as of the receipt thereof.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

Code of Criminal Procedure section 239, sec 1: A court may adjudicate a criminal matter by way of settlement proceedings at the request of the accused or the prosecutor's office. If a suspect or accused wishes that settlement proceedings be applied, he or she shall submit a written request pursuant to the prosecutor's office and if a prosecutor's office considers application of settlement proceedings possible, the office shall perform the following acts: explain the option of applying settlement proceedings, the rights of the suspect or accused and the counsel in settlement proceedings and the consequences of application of settlement proceedings to the suspect or accused and the counsel (Code of Criminal Procedure section 240 page 1 and section 242, sec 1).

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes. According to the Code of Criminal Procedure section 245, sec 5, a prosecutor's office shall send copies of a settlement to the accused and his or her counsel and the criminal file to the court.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

Once the settlement has been filed to the court by a prosecutor's office, a judge who receives a criminal file shall verify the jurisdiction over the criminal matter and make a ruling on: the prosecution of the accused; the return of the criminal file to the prosecutor's office if there are no grounds for application of settlement proceedings; the return of the criminal file to the prosecutor's office granting the possibility to conclude a new settlement if the court does not consent to the legal assessment of the criminal offence or the type or the category or term of the punishment; the return of the criminal file to the prosecutor's office and continuation of the proceedings if the court does not consent to the adjudication of the criminal matter by way of settlement proceedings (Code of the Criminal Procedure section 245, sec 1, pages 1, 2, 3, 4).

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: A prosecutor.

When the person won't do what the court judgment says (it says the same whatever the settlement was), a prosecutor can go to the bailiff according to the Code of Criminal Procedure section 417, sec 2 (if a convicted offender has failed to pay the amount of the pecuniary punishment imposed on him or her to the prescribed account in full within one month after the entry into force of the court judgment or by the specified due date or if the terms for the payment of instalments of an amount of pecuniary punishment are not complied with and the term for payment of the amount of pecuniary punishment or a fine to the extent of assets has not been extended or apportioned), a copy of the court judgment shall be sent to a bailiff within ten days as of the receipt thereof.

### 3.3.3.2 Can this authority impose penalties for non-compliance?

No. According to the Code of Enforcement Procedure section 204, sec 1, enforcement proceedings for the collection of amounts imposed as pecuniary punishment and fines to the extent of assets imposed in criminal matters shall be conducted pursuant to a court judgment which has entered into force and has been sent to a bailiff for enforcement. So, the bailiff only does what the court judgment says, he/she cannot impose any other penalties.

## 3.4 Outcome of the structured settlement

**Are there any rules that provide guidance about the outcome of such negotiations with respect to the following?** Please select all options that apply and provide further information in the field next to each box you tick.

Financial penalties (Statutory Provision)

There are no special rules regarding bribery cases, but according to the Code of Criminal Procedure section 245, sec 1, a settlement shall set out details – see 3.2.5 above.

## 3.5 *De facto or de jure*

*Editor's note: The settlement process is contingent upon an admission of guilt (see section 3.2 above). This constitutes a de facto, plea-based, settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

According to the Code of the Criminal Procedure section 249, pages 1 and 2, the main part of a court judgment shall set out: the charges on which the court convicts the accused and the content of the settlement. In general, all final court judgments are available to the public in Estonia.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

According to the Code of the Criminal Procedure section 249 pages 1 and 2, the main part of a court judgment shall set out: the charges on which the court convicts the accused and the content of the settlement.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

According to the Code of the Criminal Procedure section 11, sec 1, every person has the opportunity to observe and record court sessions. Section 12, sec 1 pages 1, 2, 3 and 4, a court may declare that a session or a part thereof be held in camera: in order to protect a state or business secret or classified information of foreign states; in order to protect morals or the private and family life of a person; in the interests of a minor or a victim; in the interests of justice, including in the cases where public access to the court session may endanger the security of the court, a party to the court proceeding or a witness. So there is only a limited way when everything can be classified.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes. Estonian law does not differentiate bribery of foreign public officials and domestic public officials.

**4.2.1 If yes, is this data publicly available?**

Yes. [www.riigikohus.ee/?id=142](http://www.riigikohus.ee/?id=142) and [www.riigiteataja.ee/en](http://www.riigiteataja.ee/en).

All the information is available like any other court judgments in Estonia because, as mentioned in previous question, Estonian law does not differentiate bribery of foreign public officials and domestic public officials.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

There are none regarding bribery cases.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 4, page 3, states that when more than one party has jurisdiction over an alleged offence described in this Convention, the parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

According to Article 41 of the United Nations Convention Against Corruption, each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention. Estonia has not stated that in any laws.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

It is usually very hard to have enough evidence against the alleged wrongdoers, so it might be easier to just drop the case than continue prosecuting.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Discouraged. There are very strict rules when cooperation can be implied.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

It should be discouraged, otherwise there is a chance that the wrongdoers will not be charged with a crime or there will be a settlement which is too convenient to the alleged wrongdoer.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

It should be regulated that in bribery cases settlement is not an option, so that only the judge will have to decide the punishment.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

They have more inside information when working with the authorities, so it might be financial advantage in my opinion.

*Ville Kivistö and Tom Vapaavuorim, Counsel, Bird & Bird Attorneys Ltd and Partner, Bird & Bird Attorneys Ltd*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes. The Criminal Code of Finland, chapter 16 and chapter 40.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

The Criminal Code of Finland. The Criminal Code of Finland applies when it is a question of Finnish citizen. There are no other laws in Finland regarding bribery.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Finnish law applies to an offence committed outside of Finland by a Finnish citizen. If Finnish law applies to the offence, Finnish law applies also to the determination of corporate criminal liability.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

There is no term 'facilitation payment' in Finland's Criminal Code. Yet there is bribery violation. According to bribery violation, it is punishable if the actions are conducive to weakening confidence in the impartiality of the actions of authorities.

The constituent elements describing the conduct and the circumstances under which the act was carried out have to be evaluated from the point of view of an outsider. The phrasing 'is conducive to weakening' means that the act does not have to necessarily weaken the confidence in the impartiality of the actions of authorities in the case at hand. It is sufficient that the conduct is such that it would normally weaken this confidence.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

A corporation in the operations of which an offence has been committed shall on the request of the Public Prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code for the offence. Corporate criminal liability applies for bribery.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No. Police investigate and the Public Prosecutor prosecutes.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes. The prosecutors will decide independently whom to charge.

#### **2.1.2 Deciding what charges to file?**

Yes. The prosecutor is the only authority who has competence to decide for charges. The prosecutor must bring a charge for a suspected offence if the prerequisites under the Criminal Code of Finland are fulfilled.

#### **2.1.3 Deciding whether to drop charges?**

Yes.

The prosecutor is the only authority who has competence to decide charges. The prosecutor must decide to waive prosecution if the prerequisites for the bringing of charges are not met or, even though there are probable grounds to support the guilt of the suspect and the other prerequisites exist, the prosecutor may nevertheless waive prosecution on the basis of relevant sections in the Criminal Code.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The prosecutor is the only authority who has competence to decide for charges. The prosecutor may, on his or her own motion or on the initiative of the injured party, undertake measures for the submission and hearing of a proposal for judgment in the proceedings (settlement proposal) if the maximum sentence provided in law for the suspected offence is imprisonment for six years, but not for certain offences referred to in the Criminal Code.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Prosecutors will decide independently whom to charge. There are specific rules and laws concerning the prosecutors.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

According to Criminal Proceedings Act the duty of the prosecutor is to bring a charge for an offence and to prosecute the case.

The prosecutor shall bring a charge for a suspected offence if he or she deems that: (1) it is punishable according to law; (2) the right for its prosecution is not time-barred; and (3) probable grounds exist to support the guilt of the suspect.

### **2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

See previous. The prosecutor shall bring a charge for a suspected offence if he or she deems that: (1) it is punishable according to law; (2) the right for its prosecution is not time-barred; and (3) probable grounds exist to support the guilt of the suspect.

### **2.4 Do these standards differ for individual and corporate defendants?**

No. The prosecutor will act according to Criminal Proceedings Act in all cases.

In addition, a corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences.**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes. Proceedings on the basis of a settlement (plea of guilty) may be used in various offences and bribery is one of them.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

The prosecutor may, on his/her own motion or on the initiative of the injured party, undertake measures for the submission and hearing of a proposal for judgment in the proceedings (settlement proposal) when the suspect of the offence in question or the defendant in the criminal case admits having committed the suspected offence.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Syyteneuvottelu.*

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer? (You can choose more than one option)**

Cooperation with enforcement authorities through the investigation.

### **Existing prevention and detection measures:**

risk assessment;

commitments to institute new prevention and detection measures;

assistance in investigating and prosecuting individuals;

the grounds reducing the punishment: attempts of the offender to prevent or remove the effects of the offence or his/her attempt to further clear up the offence;

in determining the punishment on the basis of plea bargain, at the most two-thirds of the maximum length of imprisonment or of the maximum amount of the fine may be imposed; and

the court may waive imposition of a corporate fine also when the punishment is deemed unreasonable, taking into consideration: (1) the consequences of the offence to the corporation, (2) the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the omission or offence.

#### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

#### **3.2.4 What form(s) can a structured settlement take?**

The investigator of charge may propose a settlement and the prosecutor is also active in this process.

After the pre-trial investigation the prosecutor may propose the settlement proceeding to the defendant.

#### **3.2.5 What are the usual terms of such an agreement?**

The defendant will admit the offence. The complainant shall give approval before the settlement negotiations will start.

#### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

In determining the punishment on the basis of plea bargain, at the most two-thirds of the maximum length of imprisonment or of the maximum amount of the fine may be imposed and at the least the minimum amount that is provided for the type of punishment.

#### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No. The court will give the verdicts on the basis of the settlement proposal. There are customary ways to appeal the verdict.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. The prosecutor will decide whether to negotiate or not. The prosecutor will draft the settlement proposal.

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

Yes. The court will decide on proceedings on the basis of the settlement proposal.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

Outlined in the Criminal Procedure Act: unless the court decides otherwise, proceedings on the basis of a plea of guilty consist of the following stages, in the order indicated:

- the prosecutor shall clarify the content of the proposal for judgment and the other circumstances connected with it, and present to the necessary extent the criminal investigation material dealing with the case;
- the court shall inquire of the defendant, whether or not he or she continues to admit the offence and consents to the consideration of the case in the procedure provided in this chapter and whether or not he or she understands also in other respects the content and significance of the proposal for judgment, and seek to ensure that the proposal corresponds to the intent of the defendant;
- reserve the defendant an opportunity to otherwise comment on the proposal for judgment and the criminal investigation material;
- reserve the injured party an opportunity to comment on the proposal for judgment other claims are heard;
- the parties are provided with an opportunity to present their closing statement.

The court shall ensure that the case is dealt with appropriately and that irrelevant matters are not mixed into the case. The court shall use questions to eliminate ambiguities and deficiencies in the statements of the parties.

Criminal Procedure Act: The court shall issue a judgment according with the proposal for judgment if:

- (1) the defendant has made the admission and given the consent to the settlement proceedings;
- (2) no reasonable doubt remains regarding the voluntary and valid nature of the admission, taking into consideration also the criminal investigation material concerning the case;
- (3) the court convicts in accordance with the proposal for judgment; or
- (4) there is otherwise no bar to acceptance of the proposal.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

The settlement system usually concerns individuals. However, it may be possible to use settlement also if a company is a defendant. However, we are not aware of any cases concerning settlement for companies.

There exists only a limited amount of case law related to bribery in business. We are not aware of any cases in Finland where settlement proposal has been applied.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No. The court will give verdict in the basis of the settlement proposal and other material. The court will analyse the case and decide if the procedure will constitute a charged offence or not.

## **3.4 Outcome of the structured settlement**

### **Statutory Provisions:**

Financial penalties – yes.

Disgorgement of profits – yes.

Personal liability – yes.

In Finland, bribery in business and bribery in public sector are stipulated only in the Criminal Code. The criminal liability of legal persons is applicable both in the case of bribery in business and bribery in public sector. No guidelines concerning gifts, entertainment and hospitality or bribery in general have been given.

### 3.5 *De facto or de jure*

There are clear legal rules concerning individuals. Yet, we are not aware of any bribery cases in which settlements have been applied.

*Editor's note: The settlement process is contingent upon an admission of guilt (see sections 3.1 and 3.2 above). This constitutes a de facto, plea-based, settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes. The settlements are handled in the court. The court will give the verdicts which are public.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive. Settlement is equal to court's verdict.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

The prosecutor will decide independently the content of the public statement. The company can of course give its own public statement.

However, there are no cases concerning companies and structured settlements in bribery cases.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. Police will gather the documents and form a record of the entire material. This record will be public after the court proceeding has begun. A part of the documents might be confidential if they contain trade secrets, etc.

#### 4.2.1 If yes, is this data publicly available?

No. Anyone can ask the record from the court or from the police, if the case is already public. The person who is asking the record should know the journal of the case. Otherwise it is complicated to get the record.

### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

In Finland, we are not aware of any cases regarding structured settlement with bribery cases.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. Legal praxis and general legal principles will give the guidance.

### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

The status of the conviction and the settlement may be different depending if there is an agreement.

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

It is hard to say, because we do not have bribery cases that have been settled, as far as we know. In general, the settlement procedure is well regulated. In this perspective the outcome shall be considered reasonable predictability.

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

The cooperation is not encouraged particularly. Usually the prosecutor will ask the defendant's opinion of settlement rather late. If the defendant is denying the offence, no settlement will be negotiated.

### **6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The benefit for the defendant of cooperation should be better than it is at the moment. The defendant can have one-third discount of the punishment. In many cases, it is not good enough.

### **6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There are no clear advantages towards companies of cooperating. The advantage is mainly reputational. In some occasions the cooperation can reduce company's punishment.

*Stéphane Bonifassi, Bonifassi Avocats, Member of the IBA Anti-Corruption Committee*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

The French provisions of the Penal code prohibit corruption and trafficking in influence towards a public administration and against the administration of justice in both passive and active forms.

Corruption of a public administration is prohibited as follows:

In its passive form (Article 435-1 of the French Penal code):

‘It is punishable by ten years’ imprisonment and a fine of e1,000,000 or a fine of twice the amount of the proceeds for a person holding public authority, charged with a public service mission or invested with a public elected office in a foreign state or within a public international organisation to unlawfully solicit or accept, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another to carry out or to have carried out, for abstaining or for having abstained from carrying out an act of his or her function, mission or mandate, or facilitated by his or her function, mission or mandate.’

In its active form (Article 435-3 of the Penal code):

‘It is punishable by ten years’ imprisonment and a e1,000,000 fine or a fine of twice the amount of the proceeds for a person to unlawfully solicit, at any time, directly or indirectly, from a person holding public authority, charged with a public service mission or invested with a public elected office in a foreign state or within a public international organisation, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to carry out, or to have carried out, to abstain or have abstained from carrying out an act of his or her office, mission or mandate, or facilitated by his or her office, mission or mandate.

The same penalties apply to anyone yielding to a person described above who unlawfully solicits at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to carry out, or to have carried out, to abstain or have abstained from carrying out an act specified in the previous paragraph.’

Corruption against the administration of justice is prohibited as follows :

In its passive form (Article 435-7 of the Penal code):

‘A penalty of ten years’ imprisonment and e1,000,000 or a fine of twice the amount of the proceeds applies to:

- any person holding judicial office in a foreign State or within or from an international court;
- an official at the office of a foreign court or international court;
- any expert appointed by such court or such court or by the parties;
- any person charged with a mission of conciliation or mediation by such a jurisdiction or by such court; or
- an arbitrator exercising his mission under the rule of law of a foreign arbitration to unlawfully solicit or accept, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to carry out or have carried out, to abstain or to have abstained from carrying out an act required by his or her position or facilitated by his or her position.’

In its active form (Article 435-9 of the French Penal code):

‘It is punishable by ten years’ imprisonment and a fine of €1,000,000 or a fine of twice the amount of the proceeds to unlawfully solicit, at any time, directly or indirectly, from:

- any person holding judicial office in a foreign state or within or from an international court;
- an official at the office of a foreign court or international court;
- any expert appointed by such court or such court or by the parties;
- any person charged with a mission of conciliation or mediation by such a court; or
- any arbitrator exercising his position under the rule of law of a foreign arbitration for himself, herself or another, offers, promises, donations, gifts or benefits of any kind for himself, herself or another to carry out or abstain from carrying out, or because he or she has abstained from an act of his or her function or facilitated by his or her function.

The same penalty applies to anyone yielding to requests made to a person mentioned in 1 to 5 unlawfully seeking, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another to carry out or have carried out, to abstain or to have abstained from an act of his or her function or facilitated by his or her function.’

Legal provisions prohibiting trafficking in influence follow the same pattern (towards public administration and against the administration of justice and in both passive and active forms).

Trafficking in influence toward public administration is prohibited as follows:

In its passive form (Article 435-2 of the French Penal code):

‘It is punishable by five years’ imprisonment and a fine of €500,000 or a fine of twice the amount of the proceeds for a person to solicit or accept, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to abuse or have abused his or her real or supposed influence with a view to obtaining distinctions, employment, contracts, or any other favourable decision from a person holding public authority, charged with a public service mission or invested with a public elected office in a public international organisation.’

In its active form (Article 435-4 of the French Penal code):

‘It is punishable by five years’ imprisonment and a fine of €500,000 or a fine of twice the amount of the proceeds for a person to unlawfully solicit, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to abuse or to have abused his real or supposed influence with a view to obtaining distinctions, employment, contracts or any other favourable decision from a person holding public authority, charged with a public service mission or invested with a public elected office or holding public elected office within a public international organisation.

The same penalties apply to anyone yielding to requests described above or to unlawfully soliciting at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to abuse or have abused his real or supposed influence with a view to obtaining distinctions, employment, contracts or other favourable decisions from a person described above.’ (Article 435-4).

Trafficking in influence against the administration of justice is also prohibited as follows:

In its passive form (Article 435-8 of the French Penal code):

‘It is punishable by five years’ imprisonment and a fine of €500,000 or a fine of twice the amount of the proceeds for a person to solicit or accept, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another, to abuse or have abused of his real or supposed influence with a view to obtaining any decision or opinion in favour of a person referred to in Article 435-7, when exercising his or her function within or from an international court or when called upon by such a court.’

In its active form (Article 435-9 of the French Penal code):

‘It is punishable by ten years’ imprisonment and a fine of €1,000,000 or a fine of twice the amount of the proceeds to unlawfully solicit, at any time, directly or indirectly, from:

- any person holding judicial office in a foreign state or within or from an international court;
- an official at the office of a foreign court or international court;
- any expert appointed by such court or such court or by the parties;
- any person charged with a mission of conciliation or mediation by such a court; or

- any arbitrator exercising his position under the rule of law of a foreign arbitration for himself, herself or another, offers, promises, donations, gifts or benefits of any kind for himself, herself or another to carry out or abstain from carrying out, or because he or she has abstained from an act of his or her function or facilitated by his or her function.

The same penalty applies to anyone yielding to requests made to a person mentioned in 1 to 5 unlawfully seeking, at any time, directly or indirectly, offers, promises, donations, gifts or benefits of any kind for himself, herself or another to carry out or have carried out, to abstain or to have abstained from an act of his or her function or facilitated by his or her function.'

### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

France is signatory to the following European and international anti-corruption conventions:

European Union:

- the Convention on the Fight against Corruption Involving Officials of the European Union or Officials of Member States of the European Union, Brussels, 26 May 1997 (Convention on European Officials).

Council of Europe:

- the Criminal Law Convention on Corruption, signed by France on 9 January 1999 (accompanied by an agreement establishing the Group of States against Corruption (GRECO)) and ratified on 25 April 2008; and
- the Civil Law Convention on Corruption signed by France on 26 November 1999 and ratified on 25 April 2008. No reservations were taken by France.

International:

- the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Paris, 17 December 1997, ratified by France on 31 July 2000 (OECD Anti-Bribery Convention); and
- the United Nations Convention against Corruption, New York, 31 October 2003, ratified by France on 11 July 2005.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Articles 113-2, and 113-5 to 113-8 of the French Penal Code provide that:

- (i) French criminal law is applicable to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory (Article 113-2);

- (ii) French criminal law is applicable to any person who, within the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad if the felony or misdemeanour is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court (Article 113-5);
- (iii) French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present Article applies even if the offender has acquired French nationality after the commission of the offence of which he or she is accused (Article 113-6);
- (iv) French criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place (Article 113-7);
- (v) in the cases set out in (iii) and (iv), the prosecution of offences may only be instigated at the behest of the Public Prosecutor. It must be preceded by a complaint made by the victim, his or her successor, or by an official accusation made by the authority of the country where the offence was committed (Article 113-8); and
- (vi) French criminal law is applicable to any felony committed by means of an electronic communication network when it damages a natural person living/a legal person registered inside the territory of the French Republic (Article 113-2-1).

It should be noted that corruption offences are misdemeanours under French law. Moreover, as stated by Article 689-8 of the French Code of Criminal Procedure, a person accused of bribing a European public official or a European public official accused of being bribed outside the territory of France and who happens to be in France may be prosecuted and tried by French courts.

According to its terms 'For the application of the Protocol to the Convention on the Protection of the Communities' Financial Interests' made in Dublin on 27 September 1996 and of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union made in Brussels on 26 May 1997, the following may be prosecuted and judged under the conditions provided for in Article 689-1:

- any community civil servant working for one of the European Communities' institutions or for an organisation created in accordance with the treaties instituting the European Communities and having its seat in France, who is guilty of the misdemeanour provided for in Article 435-1 of the Criminal Code or of an offence which damages the financial interests of the European Communities, in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995;

- any French person or any other member of the French civil service guilty of any of the misdemeanours provided for in Articles 435-1 and 435-2 of the Criminal Code or of an offence which damages the financial interests of the European Communities in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995;
- any person guilty of the misdemeanour provided for in Article 435-2 of the Criminal Code or of an offence which damages the financial interests of the European Communities in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995, where these offences are committed against a French national.

In addition, Article 21 of the Law No 2016-1691 issued on 9 December 2016 removes prerequisites that were mandatory to prosecute corruptive acts committed outside the territory of the French Republic. The criminal proceedings no longer depend on whether the conduct is punishable under the legislation of the country in which it was committed as demanded by the Article 113-6 of the Penal code, nor must it be preceded by a complaint made by the victim or his successor, or by an official accusation made by the authority of the country where the offence was committed as stated by the Article 113-8 of the Penal code.

Not only does Article 21 of the Law No 2016-1691 remove several prerequisites to pursue corruption but it also widens jurisdiction over the persons who allegedly committed the offence. Where the previous provisions were applicable to French nationals who committed an offence outside the French territory, the new provision makes it possible to pursue not only French citizens, but also persons who have their habitual residence over the territory of the French Republic or any person exercising its economic activity, fully or partly, over the territory of the French Republic.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. Facilitating payments are not allowed in our jurisdiction and fall under the bribery prohibition.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

With respect to Article 121-2 of the French penal code:

‘Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in Articles 121-4 and 121-7. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of Article 121-3.’

## **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. In practice, the investigation and prosecution of corruption in international business transactions is carried out by the National Financial Prosecutor's Office.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Article 40-1 of the French code of criminal procedure states that:

‘where he considers that facts brought to his attention in accordance with the provisions of Article 40 constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, the district prosecutor with territorial jurisdiction decides if it is appropriate:

1. to initiate a prosecution;
2. or to implement alternative proceedings to a prosecution, in accordance with the provisions of Articles 41-1 or 41-2;
3. or to close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this.’

However, the exercise of prosecutorial discretion may be passed on to an investigating judge in three cases:

- Either the case is a criminal one (this is not applicable to corruption offences which are not crimes but misdemeanours), then ‘a preliminary judicial investigation is compulsory’ (Article 79 of the code of criminal procedure).
- Either the case is a misdemeanour (corruption offences are misdemeanours), then the preliminary judicial investigation is optional. Therefore, if/when the prosecutor submits the case to a preliminary judicial investigation, he/she loses his/her unfettered discretion to the investigating judge.
- Victims may also override the prosecutor discretion by lodging a complaint. Provisions under Article 85 of the code of criminal procedure state that ‘any person claiming to have suffered harm from a felony or misdemeanour may petition to become a civil party by filing a complaint with the competent investigating judge’. However this petition needs to meet certain criteria in order to be valid. This is a way to balance the discretion of prosecutors in their handling of cases.

### **2.1.2 Deciding what charges to file?**

Yes. See answer under 2.1.1.

### **2.1.3 Deciding whether to drop charges?**

Yes. See answer under 2.1.1.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes. Article 495-7 of the French code of criminal procedure states that the district prosecutor may enter into a plea bargain.

According to Article 495-7 relative to the procedure of Appearance After Prior Admission of Guilt (AAPAG):

‘for misdemeanours... the district prosecutor may, of his own motion or at the request of the party concerned or his advocate, use the procedure of appearance on prior admission of guilt under the provisions of the present section, in relation to any person summoned to this end or brought before him under the provisions of Article 393, where this person admits the matters of which he is accused.’

Therefore, corruption offenders would be eligible for a plea bargain, in theory.

In practice, there is no case of plea bargain for corruption offences. It is not yet the practice of prosecutors to use these provisions for such offences. In addition, to enter into a plea, the accused has to admit he/she/it committed an offence. Therefore such a plea cannot be appealing for legal persons as such an admission would automatically disbar them from public tenders (see below). This the reason why DPAs were recently introduced in France (see below).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of opportunity.

Article 40-1 of the French code of criminal procedure refers to the district prosecutor to decide what is ‘appropriate’ to initiate a prosecution, implement alternative proceedings to a prosecution, or to close the case without taking any further action.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined. Under the relevant provision, the prosecutor must relate on what is ‘appropriate’.

## **2.4 Do these standards differ for individual and corporate defendants?**

No. The standards for individual and corporate defendants do not differ. However, it is important to note that DPAs (see below) may only apply to corporate defendants (individuals are excluded from DPAs).

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

According to the French code of criminal procedure, different forms of settlements might be considered between the prosecution and the alleged wrongdoers. One of these settlements will induce a guilty plea (Article 495-7 of the French code of criminal procedure, see above), whereas the other will spare the alleged wrongdoers of criminal charges (Article 41-1-2 of the French code of criminal procedure).

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

As stated under the section 3.1, two different procedures open possibilities to enter structured settlements but only one of them is contingent upon an admission of guilt.

The AAPAG procedure under the provision 495-7 of the French code of criminal procedure only applies to guilty pleas. (See paragraph 2.1.4)

However, Law No 2016-1691 of 9 December 2016 regarding ‘Transparency, the Fight Against Corruption and the Modernisation of Economic Life’ inserted a new form of settlement within the Code of criminal procedure: the Judicial Convention of Public Interest (JCPI). This procedure authorises the prosecutor to initiate negotiations with legal persons accused of corruption, as long as no criminal proceedings have been formally initiated or in the frame of an investigation led by an investigating judge. They are the equivalent of DPAs.

The negotiation will turn around the payment of a fine, which might be up to 30 per cent of the average annual turnover of the company over the last three years, and around a possible compliance monitoring of an administrative anti-corruption Agency.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

The Appearance After Prior Admission of Guilt (AAPAG) is contingent upon admission of guilt. It is called ‘*comparution sur reconnaissance préalable de culpabilité*’.

The Judicial Convention of Public Interest is called '*Convention judiciaire d'intérêt public*' (CJIP) and spares the alleged wrongdoer of an admission of guilt.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Other.

The procedure of '*convention judiciaire d'intérêt public*' has been introduced by Law No 2016-1691 of 9 December 2016 (known as '*Loi Sapin 2*'). A decree has been released on 7 April 2017 and the Ministry of Justice and the bureau of special criminal legislation issued a *circulaire* (the equivalent of a memo) on 31 January 2018, which helps define what elements should be taken into account by the prosecutor when concluding a DPA. Furthermore, at a conference relative to the Law No 2016-1691 and its application, Eric Russo, Vice-Prosecutor of the National Financial Prosecutor's Office, explained that they will be more likely to negotiate a JCPI if the legal person conducted an internal investigation and if they are ready to disclose information about who did what.

The Circulaire issued in January confirms the Eric Russo's intervention. Indeed, the prosecutor can increase the fine by taking into account the:

- seriousness of the facts;
- length of wrongdoing; and
- criminal record.

The Circulaire also explains that the prosecutor also has the power to reduce the fine and to applying a diminishing factor to the amount of the fine. In order to do so, he will take into account:

- whether the company made an auto-denunciation;
- if such auto-denunciation was made quickly with regard to the facts;
- whether the company cooperated with the judicial authority;
- whether the facts were revealed by the company or by an individual; and
- all circumstances related to the company, including all measures taken in order to reduce the risk of any other wrongdoing or measures taken to repair the prejudice caused to third parties.

Therefore, in determining the punishment imposed on the alleged bribe payers the company's past, current and future behaviour will be taken into account.

In addition, the benefits that the company made out of the wrongdoing will also be taken into account and the amount of the time will need to be at least twice the

amount of the profits that the company.

Finally, the punishment imposed will also take into account the victim if there is one.

However, it is important to note that the JCPI applies to legal persons only. Individuals remain accountable for their acts and may be prosecuted and indicted in the traditional way or enter into a plea (AAPAG).

Concerning the AAPAG: this procedure is contingent upon an admission of guilt. However, there are no clear guidelines regarding the factors taken into account to determine when it is appropriate to enter into an AAPAG nor concerning the appropriate penalties. As we will see later, the prosecutor has an extensive discretion regarding the sentence. The law only provides for a maximum threshold. This differs from the JCPI procedure as there is no admission of guilt required in this case.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

In-house lawyers have no privilege and cannot benefit from it.

Outside counsels cannot be forced to give information but their client, the company, can always decide to disclose any information.

### **3.2.4 What form(s) can a structured settlement take?**

**Concerning the JCPI:** this procedure is brand new but four JCPIs have been reached between companies and the prosecutor. Two of these JCPIs concerned internal bribery issues, one concerned a tax matter and the most recent one, concluded in June, concerned international bribery and was the object of a joint DPA/JCPI. However, the decree of 27 April 2017 relative to the JCPI outlines that the prosecutor who suggests a convention sends it by registered mail to the representative of the corporation. It is implied that it is a ‘take it or leave it’ approach but practice already demonstrates that companies negotiate with the prosecutor in order to minimise the fine. In addition, there are informal discussions between the prosecutor and the company to reach an agreement that is most likely to be a success.

The proposed convention will indicate:

- the company’s name;
- a precise statement of facts and its potential legal/criminal qualification; and
- the nature and the quantum of the proposed obligations, including the term of the payment and its methods.

**Concerning the AAPAG:** in accordance with Article 495-9 section 1 of the French code of criminal procedure:

‘where, in the presence of his advocate, the person accepts the proposed penalty or penalties, he/she is immediately brought before the president

of the district court or the judge appointed by him, who is seized with the approval request by the district prosecutor.’

### 3.2.5 What are the usual terms of such an agreement?

**Concerning the JCPI:** the convention settles several points:

- first, the convention will determine the amount of the fine which might be up to 30 per cent of the average annual turnover of the company over the last three years;
- second, the convention will determine the duration of the monitoring programme led by the French anti-bribery agency (FABA), which may be up to three years;
- third, the corporation will have to bear the cost of the monitoring programme (such as experts, financial or legal analysts. a maximum amount of costs will be previously set by the convention; and
- fourth, when a victim is identified, the convention also sets the amount awarded to the victim.

**Concerning the AAPAG:** the AAPAG does not waive the criminal liability. The guilty plea procedure only reduces the sentence according to Article 495-8 of the French criminal procedure code.

‘Where the penalty suggested is a prison sentence, its duration may not exceed either a year or half the prison sentence incurred. The prosecutor may suggest that it be suspended in part or in whole. He/she may also suggest that this sentence be subject to the measures of adaptation listed in Article 712-6. If the district prosecutor proposes an immediate prison sentence, he/she makes it clear to the person whether he means the penalty to be immediately enforced or whether the person will be summoned to appear before the penalty enforcement judge for the conditions of implementation of the sentence to be determined, notably in relation to semi-detention, external placement, or placement under electronic surveillance. Where the penalty of a fine is proposed, its amount may not exceed the maximum fine applicable to the offence. It may be accompanied by a suspension.’

### 3.2.6 Are there limits on what the prosecution can offer?

Yes.

**Concerning the JCPI:** the JCPI does not waive criminal charges against individuals who committed the corruptive acts. There is no limit about what the prosecution can offer apart from a maximum amount, but one has to keep in mind that the convention will have to be validated by a judge (see below).

**Concerning the AAPAG:** as seen earlier, the Article 495-8 of the Code of criminal procedure provides a maximum imprisonment threshold. However, the provision does not provide for any minimum sentencing.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

**Concerning the JCPI:** Article 41-1-2 of the Code of criminal procedure states that if the judge does not approve of the convention, or if the legal person uses its right of withdrawal, or if the legal person is in breach of the settlement, the district prosecutor will initiate criminal proceedings.

Since this tool is new, there is no precedent of reversed settlement.

**Concerning the AAPAG:** the settlement taken upon guilty plea procedure has the effect of a conviction judgment.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. The court's prior consent is not necessary for any settlement negotiation (JCPI or AAPAG).

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. The court is not involved before the settlement has been reached.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

Concerning the JCPI: once the prosecutor and the legal person reached a settlement, the JCPI is filed to the district judge in accordance with the Article 41-1-2 of the Code of criminal procedure.

Concerning the AAPAG: the Article 495-11 of the French code of criminal procedure states that:

‘An order by which the president of the district court or the judge appointed by him approves the penalty or penalties proposed states as its reasons firstly that the person concerned, in the presence of his advocate, has admitted the offences charged, and secondly that these penalties are justified in relation to the circumstances of the offence and the character of its perpetrator’.

### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

**Concerning the JCPI:** first of all, the district judge sets a public hearing in which the alleged wrongdoer, the victims, and their counsel are heard. At the end of this hearing, the district judge gives his approval or not of the JCPI. While doing so, he ensures the procedure of Judicial Convention of Public interest is the proper procedure to enforce. He verifies its regularity and the conformity of the amount of the fine and other penalties regarding the benefits of the misconduct (Article 41-1-2 II. of the Code of criminal procedure). As said earlier, the guidelines provided to judges are not precise. It gives judges a wide discretion.

**Concerning the AAPAG:** following the terms of the Article 495-11 of the Code of Criminal Procedure, the judge approves the penalty or penalties proposed, checks firstly that the person concerned, in the presence of his advocate, has admitted the offences and has agreed to the penalties, and secondly that these penalties are justified in relation to the circumstances of the offence and the character of its perpetrator. There again, this gives wide discretion to judges.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority. The first paragraph of the Article 708 of the Code of criminal procedure states that ‘the execution of any sentence or sentences imposed takes place upon an application made by the Public Prosecutor after the decision has become final.’

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes.

**Concerning the JCPI:** as stated before, the prosecutor is in charge of the execution of any sentence. If the legal person does not prove it fully executed the settlement within the allocated time, the prosecutor will reinitiate criminal proceedings.

**Concerning the AAPAG:** as seen earlier, the Public Prosecutor may request the assistance of law enforcement (eg, police, tax authorities) in order to execute the sentence.

### 3.4 Outcome of the structured settlement

#### Statutory Provisions

Financial penalties: provisions under Article 22 of the law of 9 December 2016 allow the prosecutor to sentence the offender with a fine up to 30 per cent of the average annual turnover of the company over the last three years.

Disgorgement of profits: Eric Russo, Vice-Prosecutor of the National Financial Prosecutor's office, explained during a conference that the amount of the fine will necessarily be a multiple of the profits linked to the offence depending on the level of cooperation.

Compensation to third parties: when victims are identified, the convention will provide for their compensation.

Obligations to cooperate with other agencies: since 9 December 2016, the French Anti-Bribery Agency is in charge of monitoring legal persons agreeing to a JCPI if it provides for such a monitoring. The legal persons may be under the control of FABAs for up to three years.

Monitors (and paying for them): the FABAs who will be the monitors will appoint experts that will work under its supervision at the costs of the company.

Corporate compliance programmes: some companies are now under the obligation of setting a compliance programme (Article 18 of the December 2016). The threshold for such an obligation is based upon annual turnover and number of employees.

Personal liability: the JCPI only applies to legal persons. It doesn't prevent the prosecutor from prosecuting individuals who committed the offence.

### 3.5 *De facto or de jure*

French law is based upon written legal materials and not on precedents. Therefore, the judicial process is *de jure*. Still, when it comes to settlements, the guidelines are very limited and practice/precedents will play a crucial role.

*Editor's note: The 'convention judiciaire d'intérêt public' (JCPI) procedure is not contingent upon an admission of guilt. (See section 3.1 and 3.2 above). This constitutes a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

**Concerning the JCPI:** according to Article 41-1-2 of the code of criminal procedure, the settlement issued by the JCPI is available to the public during the public hearing when the judge gives his or her approval/denial of the settlement.

In addition, the prosecutor will give a press release. The whole process is included in the final publication including the factors that have increased the fine or on the contrary that have reduced it.

The JCPI is not mentioned on the criminal record of the company.

Finally, the settlement and the order approving it are available on the French Anti-Bribery Agency website, which seriously extends the publicity of the settlement (which is comprised of a statement of facts).

**Concerning the AAPAG:** the hearing approving an AAPAG is public but apart from this, no specific publicity measures are provided for. It may therefore be hardly public if the prosecutor decides not to give it publicity.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

There is no explicit provision authorising to negotiate the contents of the public statements on the case. Practise will tell. Still, the 27 April 2017 decree seems to say that the prosecutor's office will draft the settlement and that the company can either accept it or leave it (although in practice it's already been demonstrated that there is some room for negotiation). It must be noted that the settlement is comprised of a statement of facts and that it is a public document.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No. As explained above, the settlement (including a statement of facts) will be published on the FABA's website. The prosecutor's office will keep the data collected in its archive with limited access.

**4.2.1 If yes, is this data publicly available?**

Yes. The FABA has been created by the law of 9 December 2016. [www.economie.gouv.fr/afa](http://www.economie.gouv.fr/afa). Page with publications: [www.economie.gouv.fr/afa/publications](http://www.economie.gouv.fr/afa/publications).

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

At this stage, there is no structured settlements agreed upon. Some are in the loop.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

Article 14 section 7 of the International Covenant on Civil and Political Rights of 1966 states that ‘no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.’

French jurisdictions have a mixed behaviour regarding the application of the ‘*non bis in idem*’ principle mentioned above in the international arena.

Article 692 of the French Code of criminal procedure states that ‘no prosecution may be initiated against a person who proves that he has been finally tried abroad for the same matters and, in the case of conviction, that the sentence has been served or extinguished by limitation.’ Therefore, the *res judicata* principle applies for offences entirely committed abroad.

Article 113-2 of the penal code states that ‘French Criminal law is applicable to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.’

If the offence is committed within the French territory or is deemed to have been committed within the French territory, the French courts will bring forward their exclusive jurisdiction, regardless of a previous foreign decision. This exclusive jurisdiction is a breach to the principle of *non bis in idem*. Nevertheless, recent decisions taken by French courts tend to acknowledge foreign settlements as binding if they are conducted impartially, independently, with diligence, if the settlement did not tend to avoid criminal charges, if the sentences have been properly executed, and if the acts do not violate fundamental interests of the nation. The case law is not settled. Finally, it should be said that the *non bis in idem* principle applies within the EU although it could be debated as to whether it would apply to settlements agreed upon abroad. The Cour de Cassation rendered a decision in May in which it decided that a DPA signed in the US did not prevent prosecution in France and, therefore, that the *non bis in idem* principle did not apply to international DPAs.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country’s legal system?

(a) Foreign conviction: Binding effect. No effect.

(b) Foreign settlement: Binding effect. No effect.

See above answer 6.1.

## **6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

The provisions of the structured settlement (JCPI) is hardly in practice yet compared to other countries. Yet, from the four JCPI's that have been concluded and from the guidelines issues in January 2018, we could say that cooperation between the alleged wrongdoers and the prosecuting authorities will incline the prosecutor to reduce the penalty. Yet at this stage we don't know whether, for example, an auto-denunciation will automatically lead to a JCPI. The prosecutor still has entire discretion to decide whether to engage the procedure or not.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Such cooperation is clearly encouraged by the new provisions of Law No 2016-1691 and by the guidelines issued in January 2018. The National Financial Prosecutors are eager to use this procedure hoping the coordination between the companies and the prosecution will give them better chances to enforce anti-bribery provisions. Still, the lack of guidelines and the leniency of courts when dealing with international corruption cases may be an impediment to the development of such settlements.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Corruption offences are often complex, transnational and well hidden. The cooperation of companies is necessary to an effective enforcement.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The Financial Prosecutor's Office need to provide companies with clear guidelines as to the framework of such negotiations. It is far from being the case. They should also ask for sentences that would depart from the extremely lenient ones given by courts up to now.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There are two main advantages for companies to cooperate with authorities and obtain a settlement: (1) the companies will avoid an automatic debarment from public tenders; and (2) it offers them a way to settle with other enforcement authorities abroad through a global settlement.

*Kai Hart-Hoenig, Attorney-at-Law, Dr Kai Hart-Hoenig Rechtsanwälte*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

German Criminal Code Section 299 (private sector domestic and abroad), Section 299a (healthcare industry), Subsection 331 pp (public sector domestic and EU and other foreign states).

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

UN Convention against Corruption; OECD Anti-Bribery Convention; Council of Europe Criminal Law Convention on Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes. Acts abroad, as well as effects abroad of acts conducted in Germany, are encompassed.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

There is no exception (apart from payments at a jurisdiction, where no judicial remedies are available against extorting officials – such as customs officers not allowing imports of perishable goods – and where not paying would expose the requested payer to a disproportionate and unreasonable hardship/detriment (this exception is not sufficiently court-tested and considered, and the likelihood of getting it recognised is close to nil)).

#### **1.5 Does your country provide for corporate criminal liability?**

No.

I could also have ticked the yes-box. It is fairly about labelling and not about substance. With regards to a label, under criminal law corporations can only be subjected to forfeiture. However, heavy administrative fines can be imposed as well and have the same effect as criminal ones with the sole difference that they are governed by the Regulatory Offences Act. Disgorgement beyond forfeiture can be ordered also under administrative law. The same applies to winding up/dissolving corporates.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No. The ordinary prosecutors' offices are responsible.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regard to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

Prosecutors are obliged (and thus must not exercise discretion) to initiate criminal investigative proceedings once they become aware of facts which might suggest, on the basis of criminological experience, that there is a possibility that a criminal offence has been committed. Not initiating proceedings would amount to obstruction of justice (a criminal offence, in Germany).

If charging means indicting, then there is a leeway. If the prosecutor considers an offence a rather minor one or one of low gravity he/she can compound the case in exchange of a payment (not even an administrative fine), should the suspect and the competent court agree.

#### **2.1.2 Deciding what charges to file?**

Yes.

In principle, all charges have to be filed. However, statutory law provides for charges being left out if they do not carry a sanction relevant vis-à-vis what the sanction is going to be as to the indicted offences.

#### **2.1.3 Deciding whether to drop charges?**

No. See 2.1.2. and 2.1.1.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Such a concept does not exist under German Law. However, something similar to a plea bargaining may occur during a trial proceeding (after the indictment) if all parties agree.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

Principle of legality and mandatory prosecution.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

Not in terms of time. The gravity of the offence is relevant for an indictment; a degree of suspicion/strength of evidence is required where a conviction is more likely than an acquittal.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

Although Germany formally has no corporate criminal liability (besides criminal forfeiture), corporations are subject to liability and sanctioning under the Regulatory Offences Act. Apart from forfeiture, measures taken against corporations ensue from its managers' wrongdoing as a predicate offence or from enrichment.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

I would say yes, however, I believe that defining structured settlement as wide as in this enquiry might lead to a false conclusion. Germany does not have provisions akin those in the US regarding DPAs or NPAs. Components of such settlements are usually only considered to be mitigating factors. A certain type of pre-arranged settlement is purely 'informal'. And this is underpinned by the fact that according to a judgment of the Supreme Federal Court a promise/assurance by a prosecutor is not binding (ie, the same prosecutor can change his/her mind even if the legal or factual situation has not changed at all). There is never a settlement in writing besides the only statutorily stipulated settlement within a court trial.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

Because of the informal character of such settlement, this depends upon what the prosecutor or court considers necessary as a prerequisite of a settlement.

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer? (You can choose more than one option)**

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures;  
assistance in investigating and prosecuting individuals; and  
to be considered in the context of what is elaborated above at 3.1.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

A prosecutor is not formally entitled to demand a waiver of privilege, however, he/she is in practice strongly inclined to do so regarding corporates.

**3.2.4 What form(s) can a structured settlement take?**

Since such settlements are informal anything could be included if not unequivocally prohibited by language of the law or other legal grounds. They do not envisage abandoning proceedings – or compounding proceedings in return for a mere payment – but levying an administrative fine on corporations. Additionally, they may require improvements of the compliance management system in return for a reduction of the fine. Possible are also payments of a compensation character (towards the alleged victim) in lieu of forfeiture or fine.

**3.2.5 What are the usual terms of such an agreement?**

There are no usual terms as agreements are informal bespoke settlements. However, often, refraining from prosecuting individuals – or only compounding the case in return for a payment (again: not a fine, also not an administrative one) – and only imposing an administrative fine on the company may be seen a term often chosen.

**3.2.6 Are there limits on what the prosecution can offer?**

Yes.

As the prosecutor's' conduct is governed by the so-called principle of legality – as opposed the principle of opportunity – statutory law confines their leeway. However, in practice creativity matters.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

Deferred settlements require certain measures to be taken by the defendant prior to a settlement, thus it can never occur that a settlement is reversed. In such a circumstance, the settlement will simply not be made.

### **3.3 Role of the court in regard to structured settlements**

Please explain the role of the courts with respect to any structured agreement reached.

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

If the settlement requires the court's approval after it has been negotiated, then it is advisable to include the court in advance. However, because of the largely informal character of such settlements this inclusion is also an informal one, often not documented in the files despite the obligation to document the course of the proceedings in its entirety.

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

Yes.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

No and yes.

The requirement to file a structured settlement before or in a court depends on the nature of the settlement itself (eg, a so-called penal order, which means a kind of indictment applying for a fine or a term of imprisonment not exceeding one year but must be suspended on probation, without an objection by the accused, is settled merely in writing by the court but without a public trial hearing).

The only way to obtain a settlement without a court's involvement in whatever way, is travelling the route of administrative fines, provided the predicate offence is not of criminal nature.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. This is unequivocally governed by the Criminal Procedure Code.

#### **3.3.3 During the implementation of the settlement:**

##### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Dependent on the nature of the underlying offence either an administrative authority or a prosecutor's office.

### **3.3.3.2 Can this authority impose penalties for non-compliance?**

See above.

### **3.4 Outcome of the structured settlement**

It is about an informal programme where factors which would be considered mitigating ones in case of formal proceedings are taken into consideration to pre-arrange the structure and outcome of formal proceedings.

### **3.5 *De facto or de jure***

*Editor's Note: Based on the information in this report there is an informal settlements process with 'bespoke agreements' (see section 3.1, 3.2.4 and 3.2.5 above), this would nonetheless constitute a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No and yes.

The public has no access to the files and needs to be informed only according to state press law and the German Information Freedom Act. It will only be necessarily in the public domain if dealt with in a regularly public trial hearing – if covered by the media.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. See above – maybe nil, maybe extensive if in a public trial hearing.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate)**

Limited.

The company does not have a right to exert influence; however, by working with the authorities it can influence them to take its wishes into consideration.

### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

If it is about a central register, yes, there is one in place as to investigations by prosecutors, but not especially dealing with bribery matters. As to bribery, there are currently some so-called corruption registers in place, which are run by the states and not done in a uniform way. These registers are going to be superseded by a federal register scheduled to be established by the Federal Cartel Office and operational by 2020.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

It is not possible for me to provide an example due to the informal character of such agreements.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Germany is only bound by the Schengen convention and has to take into account criminal or administrative fines by foreign courts/authorities. But German courts are not obliged to take forfeiture measures of non-EU-authorities into account, they are subject to discretion governed by the criterion of hardship.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

Again: See 5.1.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability. Obvious because of the above depicted very informal nature of cooperation.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Because of the absence of predictability and binding effect of assurances this does fairly discourage cooperation.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

In principle such means provide possibilities to compel companies or individuals to accept settlement because they do not want to risk unpredictable contentious proceedings. However, sometime a good option to escape public trials and more severe sanctions.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

I guess the ‘bus has left the station’. Especially, if there is a US connection (ie, the DoJ, SEC or another US authority is involved), there is almost no possibility to escape the pressure to cooperate/constraints as to further business and survival. Thus, the regime to be designed should not undermine the corporates’ right to reject cooperation – that is, not considered an aggravating factor – and the ramifications should not be of such a nature that small and medium sized companies cannot survive cooperation because, inter alia, requirements as to the completeness of internal investigations to obtain a credit which need resources/ expenditures not bearable. Furthermore, effective compliance measures in the past should be seen a mitigating factor and either ignored or even considered aggravating because of not having prevented the wrongdoing or secured its detection prior to a public investigation.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Not clear in principle. But there are some cases where a cooperation is advisable, some cases where it is not.

*Ilias Anagnostopoulos, Managing Partner, Anagnostopoulos Law Firm*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

- Article 235, which punishes passive bribery;
- Article 236, which punishes active bribery;
- Article 237, which punishes passive bribery and active bribery involving members of the judiciary;
- Article 237A, which punishes trading in influence;
- Article 237B, which punishes bribery in the private sector;
- Article 159, which punishes passive bribery of political officers;
- Article 159A, which punishes active bribery of political officers.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Greece is a member of:

- the UN Convention against Corruption (Law No 3666/2008);
- the Council of Europe Criminal Law Convention on Corruption and Additional Protocol (Law No 3560/2007);
- the EU Convention on the Protection of the European Communities' Financial Interests (Law No 2803/2000);
- the EU Convention against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Official Journal C195 of 25 June 1997) (Law No 2802/2000);
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Law No 2656/1998).

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Greek criminal law is based on the principle of territoriality whereby Greek criminal statutes are enforced to all offences perpetrated on Greek territory, even if they were committed by foreigners (Article 5 Greek Criminal Code(GCC)). However Greek criminal courts assert extra-territorial jurisdiction in the following instances (as stipulated in the GCC):

- in case of offences, which are characterised by Greek criminal laws as felonies or misdemeanours and that were committed in a foreign state by a Greek national, subject to the following conditions: the offence is punishable under the law of the state where it was committed or if committed in a 'politically unconstituted' country. (Article 6, para 1 GCC). According to Article 6 para 2 GCC, prosecution may be brought against a foreigner, who was a Greek national at the time the offence was perpetrated. In both aforementioned cases, if the offence committed is a misdemeanour, the victim or the government of the state where the act was perpetrated must request the offender's prosecution; and
- in case of felonies and misdemeanours committed abroad by a foreign national provided that they were aimed against a Greek national and are punishable in accordance with the law of the state where they were committed. As is the case with Article 6 GCC, prosecution for such misdemeanours requires a request by the victim or the government of the relevant state.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. According to Greek Law facilitation payments constitute bribes for lawful acts, which are prohibited by the anti-bribery provisions.

#### **1.5 Does your country provide for corporate criminal liability?**

No.

The concept of criminal liability of legal entities (eg, companies) does not exist in Greek Criminal Law. However, criminal sanctions may be imposed on a legal entity's managers (eg, for tax evasion, involuntary manslaughter due to a work accident), while companies are subject to administrative sanctions.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

Prosecutors are required to press charges against all persons allegedly involved in criminal activities, when sufficient indications of such involvement exist.

#### **2.1.2 Deciding what charges to file?**

Yes.

The legal characterisation of the charges is given by the prosecutor following a legal assessment of the factual basis of each case.

### **2.1.3 Deciding whether to drop charges?**

Yes.

After the conclusion of the preliminary investigation, the prosecutor can drop the case, if no evidence justifying prosecution has been revealed or prosecution is prohibited by law (the statute of limitation has run, lack of a duly submitted criminal complaint by the alleged victim where this is required, or death of the alleged perpetrator, among others).

When a person is prosecuted, only the judicial council can drop the charges during the pre-trial stage of the proceedings.

### **2.1.4 Deciding whether or not to plea bargain?**

No. Plea bargaining is not provided for by Greek law.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Prosecutors are required by law to prosecute a person if there is sufficient evidence indicating that he has committed a crime.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. Existence of ‘sufficient evidence’ indicating that a crime was committed.

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The existence of sufficient indications that a crime has been committed relies on prosecutor’s assessment on the evidence of the case file.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

In certain cases, Greece has entered into a settlement in the context of ad hoc agreements with the companies under investigation. It should be highlighted that such settlements do not cover the criminal liability of individuals, such as directors or employees of the company.

### 3.5 *De facto* or *De jure*

*Editor's Note: based on the information in this report (see section 6.1 below) Article 263B [of the Greek Criminal Code]:*

*'provides for leniency measures in favour of wrongdoers who wish to cooperate with the prosecuting authorities. In particular, the said Article stipulates that those who are involved in acts of corruption shall benefit from a favourable treatment or even remain unpunished if they provide the authorities with essential information concerning acts of bribery.'*

*This would constitute a de jure settlement process following the classification used in this report. Note that legal entities cannot incur criminal liability within the Greek legal system.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

There are no general rules on accessibility of such agreements. Limited access may be provided depending on the nature of the agreement.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. See above.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Very limited.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

#### 4.2.1 If yes, is this data publicly available?

No.

### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

Siemens has entered into a settlement with Greece in relation to civil claims arising from bribes allegedly given to Greek officials by Siemens employees. This settlement will reach approximately e270 million. In this context, Siemens waived claims of e80 million that concerned implemented projects and the delivery of equipment to the Greek State. Siemens is also required to dispense up to the amount of e90 million for transparency initiatives and anti-corruption programmes, as well as for academic and research programmes that aim at

enhancing Greece's competitiveness. Finally, Siemens will spend over €100 million, in order to enhance its activities in Greece.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

The rules of double jeopardy or *ne bis in idem* are not directly applicable to entities as they are not the subject of a criminal prosecution. These rules may be indirectly applied (through examination of individual criminal liability) but this is a disputed matter.

In case of a foreign conviction of an individual, the *ne bis in idem* principle may apply prohibiting prosecution by the Greek State of the same individual for the same transaction.

Foreign settlements, which are made between a corporation and the judicial or prosecutorial authorities, do not cover the criminal liability of individuals and therefore cannot be considered as 'final decisions'.

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

Article 263B provides for leniency measures in favour of wrongdoers who wish to cooperate with the prosecuting authorities. In particular, the said Article stipulates that those who are involved in acts of corruption shall benefit from a favourable treatment or even remain unpunished if they provide the authorities with essential information concerning acts of bribery. However, the predictability regarding the outcome of such cooperation is not high, because it relies on whether the prosecuting or judicial authorities consider that they contributed significantly to the revelation and prosecution of said acts.

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

See above.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

It should be encouraged provided that it follows specific rules and that the procedures are transparent and subject if necessary to judicial control.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

A legislative framework which provides adequate safeguards for the alleged wrongdoers as well as irrevocable benefits regarding their treatment by the judicial authorities during the proceedings. Also, judicial review of the 'cooperation' procedure between the alleged wrongdoer and the prosecutor.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

This should be assessed on a case by case approach. However, if there is evidence of serious wrongdoing, the company may be left with no choice but to refer all gathered information to the authorities. It should be noted that corporations are given motives for self-reporting through provisions for leniency and or immunity programmes. Listed companies are under an obligation to disclose relevant information to the public following the existing regulations.

*Ákos Nagy, Attorney-at-Law, Andr  k   Kinstellar (Budapest, Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The Hungarian regulations on bribery are set out in:

- Act No 100 of 2012 of the Criminal Code;
- Act No 104 of 2001 on the Criminal Liability of Legal Entities;
- Act No 19 of 1998 on Criminal Proceedings (please note that there is currently a new bill on criminal proceedings which is expected to be adopted in 2017).

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Hungary is a signatory to the following European and international anti-corruption conventions:

Council of Europe (and EU):

- the Civil Law Convention on Corruption, Strasbourg, 4 November 1999, in force in Hungary since 1 January 2004;
- the Criminal Law Convention on Corruption, Strasbourg, 27 January 1999, in force in Hungary since 1 July 2002;
- the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, 27 November 1995;
- the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, 26 May 1997; in force in Hungary since 8 October 2005;
- the Additional Protocol to the Criminal Law Convention on Corruption, 15 May 2003, in force in Hungary since 25 November 2014.

International:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997, in force in Hungary since 25 May 2000 (the Convention on Combating Bribery);
- the United Nations Convention against Corruption, 31 September 2003, ratified by Hungary on 14 December 2005;

- the United Nations Convention against Transnational Organized Crime, 15 November 2000, ratified by Hungary on 22 December 2006;

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Under Section 2-3 of the Criminal Code, with regard to acts committed abroad, Hungary has jurisdiction if:

- (a) the offence was committed abroad by a Hungarian citizen;
- (b) the offence was committed by a non-Hungarian citizen and the offence is punishable by both the foreign and Hungarian criminal codes; and
- (c) the offence (which is punishable under Hungarian law) was committed by a non-Hungarian citizen, abroad, against a Hungarian national or against a legal person or unincorporated business association established under Hungarian law.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

Yes.

Hungary takes a rather wide approach when it comes to establishing what is deemed a 'bribe'. Any unlawful advantage – whether monetary or moral in nature – can be considered as a bribe if such advantage is given by way of the bribed person violating his/her obligations; therefore, any facilitation can be considered as bribery under Section 290 of the Criminal Code.

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Yes, under Section 2 of the Corporate Criminal Liability Act, corporate criminal liability can be established if the crime was committed for the benefit of the company by its managing director, executive officer, company secretary, supervisory board member or other representative or it was committed by its member or employee in the scope of activities of the company and the managing director, company secretary, or supervisory board member could have prevented such act by exercising his/her supervisory or inspection powers.

However, please note that establishment of corporate criminal liability by criminal court is rather rare in Hungary and that until today the Hungarian court practice only acknowledged private individuals as bribe payers, not companies.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

Yes, in severe cases it is usual that the Central Investigation Prosecution Office investigates. However usually the ordinary prosecution offices will pursue the investigation (in less severe cases).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

In Hungarian criminal proceedings, the prosecutors have, in theory, wide discretion rights in determining the scope of charges to be brought before a criminal court under Sections 216–226 of the Criminal Proceedings Act. However, every such decision requires adequate reasoning which is provided to the parties involved in the criminal proceedings.

#### **2.1.2 Deciding what charges to file?**

Yes. Please refer to point 2.1.1 above.

#### **2.1.3 Deciding whether to drop charges?**

Yes. Please refer to point 2.1.1 above.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes. Please refer to point 2.1.1 above.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Defence mitigation argued to a judge.

The prosecution, within the context of legality, is generally mandatory in Hungary although the prosecutors have, in theory, wide discretion when it comes to determining the scope of charges to be brought before a criminal court under Sections 216–226 of the Criminal Proceedings Act. In Hungary, defence mitigation is argued to the judge under Sections 1–11 of the Criminal Proceedings Act although the prosecution has the right to withdraw any proof submitted to the court.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

As mentioned previously, Hungarian law takes a rather wide approach when it comes to establishing what is deemed a ‘bribe’. Any unlawful advantage whether monetary or moral in nature can be considered as a bribe if such advantage is given by way of the bribed person violating his/her obligations under Section 290 of the Criminal Code.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all. Please refer to above point 2.3.

### **2.3.2 Do these standards differ for individual and corporate defendants?**

No.

No, please refer to above point 2.3. Please note that the Hungarian court practice only acknowledged private individuals so far as bribe payers and not companies.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

There is no specific crime settlements process for corruption offences in Hungary. However, if the bribe payer becomes a defendant in a criminal proceeding, it can either:

- (i) waive from its right to a court hearing by admitting the crime before the charges filed by the prosecution to the criminal court in order to achieve less severe punishment under Section 553 of the Criminal Proceedings Act; or
- (ii) try to enter into a plea bargain which may result in the termination of the criminal proceedings if the conditions (overriding investigation or national security interest) are met under Section 192 of the Criminal Proceedings Act.

Please note that the Hungarian court practice only acknowledged private individuals as bribe payers so far and not companies and that application of either of these proceedings are discretionary decisions of the prosecution and/or the court.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes. Please refer to point 3.1 above.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*‘Lemondás a tárgyalásról’* – waiver of right to a trial.

*‘Nyomozás megszüntetése az együttműködő gyanúsítottal szemben’* – termination of crime investigation against a cooperating suspect (plea bargain).

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

Enforcement authorities also take into account general mitigating factors (eg, committing a crime for the first time, pregnancy, if the offender is a minor, etc) and aggravating factors (duplicity, committing a crime by a group of people, etc).

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

Should any person with privilege or equivalent protection (eg, MPs, Constitutional Court judges, etc) become suspect, the General Prosecutor may file a request to the respective authorities to demand the revocation of such privilege or equivalent protection.

### **3.2.4 What form(s) can a structured settlement take?**

In case of a waiver of right to trial, there is a certain type of written agreement, only for the purposes of such type of proceedings and it does not have any further legal effect under Section 538 of the Criminal Proceedings Act.

### **3.2.5 What are the usual terms of such an agreement?**

The agreement must contain the description of the confessed crime, its qualification based on the Criminal Code, the statements of the defendant regarding the type, severity and content of the agreed penalty under Section 538 (8) of the Criminal Proceedings Act.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The prosecutor may only request lowering the severity of the penalty from the court in the form of an agreement, but may not offer anything directly.

The court usually applies less severe penalties under Section 533 of the Criminal Proceedings Act and Section 82 (2)-(3) of the Criminal Code. This practically results in two to five years of reduction in custodial sentences.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

The agreements are binding the parties only in the context of the procedure as set out in point 3.2.4 above. If the court finds the agreement reasonable and issues a decision in accordance with the agreement, the provisions of the decision become enforceable. The agreement shall not be reversed for non-compliance as the defendant has to comply with the provisions of the decision.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

Engagement in a settlement is at the discretion of the prosecutor under Section 538 of the Criminal Proceedings Act.

##### **3.2.1.2 Does the court have any other involvement before settlement has been reached?**

No.

The agreement is reached only by the alleged wrongdoer and the prosecutor. The prosecutor has to file the agreement to the court under Section 538 of the Criminal Proceedings Act.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

The agreement must be filed in court by the prosecutor for approval and issuing a decision, as provided in Section 538 of the Criminal Proceedings Act. In case of a plea bargain, the prosecution has sole discretion under Section 192 of the Criminal Proceedings Act.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

If yes, is this outlined in regulations, guidelines or another piece of binding material?

According to Section 541 of the Criminal Procedure Act, if the court approves the facts indicated, the qualification of the crime and the proposed type, content and severity of the penalty then it holds a public hearing. No other rules are set for the court's approval other than the provisions of Code.

#### **3.3.3 During the implementation of the settlement:**

##### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority – Prosecutor's Office.

The prosecutor discusses the description of the crime, the qualification of it by the Criminal Code and the proposed penalty with its type, severity and content with the accused. The prosecutor must also inform the alleged wrongdoer on the consequences of the procedure following the waiver of right to a trial and that the court is not obliged to approve the agreement. The informing of the accused and its statements must be recorded in minutes.

### **3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes.

As mentioned above, the agreement itself is not binding, the defendant must only comply with the decision. The prosecutor may not conclude an agreement with the accused if it does not cooperate.

## **3.4 Outcome of the structured settlement**

Please note that the requested information is not publicly available. Waiver from the right to trial, in our experience, is rare in the Hungarian criminal practice.

## **3.5 De facto or de jure**

*Editor's note: The settlement process is contingent upon an admission of guilt. (See section 3.1 and 3.2 above). This constitutes a de facto, plea-based settlement process following the classification used in this report. Note that only natural persons are acknowledged as bribe-payers under Hungarian law (See section 3.1).*

# **4. Transparency**

## **4.1 Public access to information on settlements**

### **4.1.1 Is information about settlement available to the public?**

No. Please note that the requested information is not publicly available.

### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Not applicable – please note that the Hungarian court practice only acknowledged private individuals as bribe payers so far and not companies.

## **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

The Hungarian Police and Prosecution collect data on corruption related criminal cases in general. There is no separate data collection in the case of foreign bribery.

**4.2.1 If yes, is this data publicly available?**

No.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Not applicable.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

As mentioned above in point 1.2, the Hungarian Criminal Code specifically lists cases where Hungary has jurisdiction in criminal cases. The main rule is that the courts in Hungary have jurisdiction in cases where a crime was committed within the territory of Hungary.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

According to Hungarian law, when a foreign verdict in a criminal case is being recognised in Hungary, the rules of the Hungarian Criminal Code shall apply. Hungary currently does not recognise settlements as an alternative to conviction in cases of corruption; therefore a foreign settlement agreement would not be recognised either. Section 40 (1) of Act 38 of 1996 states that a final verdict issued by another court is equivalent to one issued by a Hungarian court if there was a proceeding against the perpetrator and the punishment or other measure imposed does not conflict with the Hungarian legal system.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

There is an opportunity under Hungarian law for the authorities to decide whether to prosecute or not to prosecute on the basis of cooperation with alleged wrongdoers under Section 192 of the Criminal Proceedings if the person is willing to enter into a 'plea bargain'. However, please note that such proceedings have no formal requirements and that the

prosecution has sole discretion in this respect. In the latter stages of the proceedings, if the case is of high value and the alleged wrongdoer opts to cooperate with the authorities, this will affect only the severity of the punishment but not the conviction itself.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Cooperation between the prosecuting authorities and the alleged perpetrator is actively encouraged as prescribed in the provision in the Criminal Code which states that if the alleged wrongdoer confesses to the authorities before the crime is uncovered, he shall not be punishable. In addition, there is a possibility of a lighter punishment if the alleged wrongdoer cooperates with the authorities.

Please note, however, save as set out in above point 6.1, that cooperation does not have any effects on the decision of the authorities to prosecute, although they can enter into a plea bargain as well, which can result in the termination of the criminal investigation (this can only apply prior to pressing charges).

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

We are of the view that cooperation between the authorities should be actively encouraged; however, such cooperation should not rule out the possibility of criminal sanctions as criminal sanctions are perhaps the best deterrent to corruption-related crimes.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

See above point.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

See above point.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is a clear financial advantage considering that the applicable Hungarian laws give the authorities the right of discretion with regard to the sum of the fine imposed, and such fine is likely to be lower if the convicted wrongdoer cooperated with them.

*Kenan Furlong, Partner, A & L Goodbody*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Criminal Justice (Corruption Offences) Act 2018

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

- EU Convention on the Protection of the European Communities Financial Interests (and Protocols), entered into force on 17 October 2002;
- OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, entered into force on 21 November 2003;
- Council of Europe Criminal Law Convention on Corruption, entered into force on 1 February 2004;
- Convention of the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, entered into force on 28 September 2005;
- Additional Protocol to the Council of Europe Criminal Law Convention on Corruption, entered into force on 1 November 2005;
- UN Convention against Transnational Organised Crime, entered into force on 17 July 2010;
- UN Convention against Corruption, entered into force on 9 December 2011;
- Ireland signed the Council of Europe Civil Law Convention on Corruption on 4 November 1999 but has not yet ratified it.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Where a person commits an act outside of Ireland which constitutes an offence under the law of the local jurisdiction and, if done in Ireland, would constitute an offence under the 2018 Act, that person is guilty of an offence as if the offence had been committed in Ireland. Such an offence imposes a liability, on conviction, to the penalty to which he or she would have been liable if he or she had done the act in the State. The categories of persons subject to extraterritorial jurisdiction include: (a) an Irish official acting in his or her capacity as an Irish official; (b) an Irish citizen; (c) an individual who has had his or her principal residence in the State for the period of 12 months immediately preceding the alleged commission of

the offence concerned; (d) a company or other body corporate established under the law of the State.

Furthermore, a person may also be tried in Ireland for an offence under the 2018 Act if any of the acts alleged to constitute the offence were committed within Ireland notwithstanding that other acts constituting the offence may have occurred outside Ireland.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

The 2018 Act does not distinguish between facilitation payments and other types of corrupt payments. As such, a facilitation payment will be illegal if it fulfils the elements of the relevant corruption and bribery offences.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Section 18 of the Criminal Justice (Corruption Offences) Act 2018 provides that a company shall be guilty of an offence where any director, manager, secretary (or somebody purporting to act in the capacity), employee, agent or subsidiary commits a corruption offence under the Act with the intention of obtaining or retaining business or an advantage for the company.

The only defence will be for the company to show that it took all reasonable steps and exercised all due diligence to prevent the commission of the offence.

Furthermore, the Act also states that:

‘Where an offence under this Act is committed by a body corporate and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of a person who was a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person shall, as well as the body corporate, be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

Where the affairs of a body corporate are managed by its members, subsection (3) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.’

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other.

The following bodies can investigate alleged offences under Irish bribery law, relating to both foreign and domestic public officials:

- The Garda National Economic Crime Bureau (GNECB) (this is an office of the Irish police force);
- the Revenue Commissioners;
- the Criminal Assets Bureau;
- the Office of Director of Corporate Enforcement.

The prosecution of offences is carried out by the Director of Public Prosecutions (DPP).

## 2. Exercise of prosecutorial discretion

### 2.1 Do prosecutors have unfettered discretion in regards to the following:

#### 2.1.1 Deciding whom to charge with a crime?

Yes.

While the final decision in relation to whom will be charged with a crime remains with the DPP, it must have regard to the Guidelines for Prosecutors (4th edition October 2016).

#### 2.1.2 Deciding what charges to file?

Yes.

The Guidelines for Prosecutors state that, while the final decision to charge rests with the DPP, it must have regarded to the following considerations:

- The Public Interest: as in other common law systems, a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest. A prosecution should be initiated or continued, subject to the available evidence disclosing a prima facie case, if it is in the public interest, and not otherwise.
- The strength of the evidence: a prosecution should not be instituted unless there is a prima facie case against the suspect. By this is meant that there is admissible, relevant, credible and reliable evidence which is sufficient to establish that a criminal offence known to the law has been committed by the suspect.
- Is there a public interest reason not to prosecute: once the DPP is satisfied that there is sufficient evidence to justify the institution or continuance of a prosecution, the next consideration is whether, in light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.
- Delay: the DPP should, in any case where there has been a long delay since the offence was committed, consider in light of the case law of the courts whether that delay is such that the case should not proceed.

- Special Factors which may apply where the extradition of a suspect to face trial are required: the extradition of persons required to answer any charge of an offence or to serve a sentence imposed will always involve expense to the State. In the case of serious offences, it will generally be appropriate to incur that expense where there are reasonable prospects of conviction, in order to maintain confidence in the administration of the law and to deter offenders fleeing from justice.

### **2.1.3 Deciding whether to drop charges?**

Yes.

The Guidelines for Prosecutors states that, while the final decision to charge rests with the DPP the victim can request that the DPP drops the charges within a certain time limit. According to the Guidelines for Prosecutors, the DPP must have considered this request but it can deny such a request if it is inconsistent with the public interest.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Occasionally, the defence counsel will approach the DPP seeking to discuss the charges to be proceeded with. Such an approach usually takes the form of the accused offering to plead guilty to fewer than all the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account by the sentencing judge without proceeding to conviction. Agreements as to charge or charges and plea must be consistent with the requirements of justice. A plea to some charges or to a lesser charge or charges should not be entertained by the prosecution unless (a) the charges or charges are appropriate having regard to the nature of the criminal conduct and (b) there is evidence to support the charges.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Other. The DPP must have regard to the Guidelines for Prosecutors, as outlined above.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Whether the evidence is sufficiently strong to justify bringing a prosecution. If the answer to that question is 'no' then a prosecution will not be pursued. If the answer is 'yes' then, before deciding to prosecute, the prosecutor will ask whether the public interest favours a prosecution or if there is any public interest reason not to prosecute.

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The threshold is based on general guidelines. They are set out and there is a general sense as to their meaning. However, they lack the precision of definite rules.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

The Interpretation Act 2005 provides that, in all Irish legislation, references to ‘persons’ include references to companies and corporate entities. However, to date, there are no recorded prosecutions of companies or their officers under Irish anti-corruption legislation.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

There are no specific provisions providing for such kinds of settlement.

### **3.5 *De facto or de jure***

*Editor’s note: Plea bargain process contingent upon an admission of guilt. (See section 2.1.4 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

#### **4.1.2 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate).**

Non-existent.

### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

The Central Statistics Office (CSO) took over responsibility for the publication of crime statistics from An Garda Síochána in 2005 in accordance with the Garda Síochána Act 2005. It has compiled and published crime statistics since the third quarter of 2006. The CSO compiles data in relation to the prosecution and resolution of offences in general. There is no specific data regarding foreign bribery allegations in Ireland as there have been no cases against Irish nationals or companies for bribing foreign public officials to date.

#### **4.2.1 If yes, is this data publicly available?**

No. There is no specific data regarding foreign bribes.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

There are no cases dealing with structured settlements in this jurisdiction.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

**6. The following questions call for your opinion**

**6.1 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

There is no existing framework of rules in Ireland regarding this matter.

**6.2 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

We are of the view that such cooperation should be encouraged as it can be beneficial to all parties in the appropriate circumstances. Cooperation of this nature can save on costs and resources in the investigation and prosecution of corporate offences otherwise borne by the public exchequer. Cooperation of this nature, for example, deferred prosecution agreements (DPAs), can also avoid the risk of the 'corporate death penalty' (ie, where the prosecution of a corporate entity leads to a catastrophic fallout resulting in the demise of that entity and consequent loss of jobs). Furthermore, in jurisdictions where they have been adopted, DPAs allow the imposition of a range of sanctions not open to the criminal law such as disgorgement of profits, compensation for victims, and cooperation in any prosecution of individuals and implementation of a compliance programme.

**6.3 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

If Ireland were to introduce DPAs into the legislative framework governing the investigation of corporate bribery and corruption offences, the following steps should be considered:

- there would need to be clarity, transparency and judicial oversight in respect of any such cooperation between the relevant regulator or prosecutorial authority and the target of an investigation; and
- there would also need to be a detailed Code of Conduct on the use of any agreements between the relevant regulator or prosecutorial authority and the target of an investigation and detailed sentencing guidelines for relevant offences.

It is our view that the use of DPAs should be confined to indictable offences that fall within the traditionally recognised band of white collar offences, including bribery and corruption to investigations targeting corporate entities. We are also of the view that any introduction of DPAs into the Irish framework should be phased (ie, limited to the DPP and a limited number of other regulators in the first instance and rolled out to further regulators on a periodic basis).

Finally, we would also recommend that any steps necessary to ensure that legal professional privilege is protected in the negotiation of DPAs should also be taken.

**6.4 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

We are of the opinion that such cooperation should be encouraged.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

We are of the view that cooperation as outlined above can have both financial and reputational advantages for a company in that a negotiated DPA can significantly reduce the time, legal costs and operational resources incurred by a long-running investigation. From a reputational perspective, a DPA can be significantly preferable to a criminal conviction.

*Paola Mariani, Associate Professor, Bocconi University; Lawyer, Pesce & Associates*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Corruption is a criminal offence in Italy. The provisions of the Penal Code concerning corruption were substantially amended in 2012 according to the Statute No 190/12, 'Provisions for preventing and fighting corruption and illegality in public administration'. The Statute No 69/15 provided a minor reform of the criminal provisions concerning bribery.

The different criminal behaviours falling within the scope of the sociological concept of bribery of a public official or a person in charge of a public service can be sanctioned according to the following crimes:

- (i) Misappropriation of public funds – '*Peculato*' (Article 314 of the Italian Penal Code);
- (ii) Misappropriation of public funds taking advantage by third party's mistake – '*Peculato mediante profitto dell'errore altrui*' (Article 316 of the Italian Penal Code);
- (iii) Bribery relating to lawful acts – '*Corruzione per un atto d'ufficio*' (improper bribery – Article 318 of the Italian Penal Code);
- (iv) Bribery relating to unlawful acts – '*Corruzione per un atto contrario ai doveri d'ufficio*' (proper bribery – Article 319 of the Italian Penal Code);
- (v) Judicial bribery – '*Corruzione in atti giudiziari*' (Article 319 *ter* of the Italian Penal Code);
- (v) Misconduct – '*Abuso d'ufficio*' (Article 323, paragraph one of the Italian Penal Code);
- (vi) Extortion – '*Concussione*' (Article 317 of the Italian Penal Code);
- (vii) Undue inducement to give or promise advantages – '*Induzione indebita a dare o promettere utilità*' – '*Concussione per induzione*' (new Article 319 *quater* of the Italian Penal Code), namely the so-called extortion through inducement;
- (viii) Incitement to bribery – '*Istigazione alla corruzione*' (Article 322 of the Italian Penal Code).

### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Italy has ratified the Council of Europe's Criminal and Civil Law Conventions on Corruption in 2013. Italy is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions since 2000. Italy has ratified the United Nations Convention against Corruption (Merida Convention) in 2009.

### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

According to Article 9 of the Italian Penal Code, corruption crimes committed abroad by a national can be sued in Italy and punished with imprisonment of up to three years as minimum sanction. Since 2000, when Italy ratified the OECD anti-bribery Convention, corruption in international business is an autonomous crime. Article 322 *bis* of the Italian Penal Code extends the domestic bribery offences to the bribe of foreign public officials. Moreover, according to Article 4 of Legislative Decree No 231/2001, legal persons can be held responsible for corruption offences committed abroad provided that:

1. their main place of establishment is on Italian soil;
2. Italy can exercise its criminal jurisdiction on the offence committed abroad by the individuals according to Article 9 Italian Penal Code;
3. the State in which territory the offence was committed is not already prosecuting/ adjudicating the said offence.

### 1.4 Are facilitation payments allowed in your jurisdiction?

No.

Assuming that facilitation payments is the intended definition given by the US FCPA stating that its anti-bribery prohibition 'shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action', we can say that a similar provision does not exist in the Italian jurisdiction. When the actions or omissions committed abroad fall within the scope of application of the corruption offences punished with imprisonment of up to three years as minimum sanction they can be sued also in Italy. The point is the margin of appreciation left to the courts in comparing an action and omission performed abroad by foreign officials to the same performed by a domestic public official.

### 1.5 Does your country provide for corporate criminal liability?

Yes.

Legislative Decree No 231/2001 (adopted to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) provides for a direct liability of legal entities, companies and associations for certain crimes committed by their representatives. The company's liability is triggered if such crimes have been committed by persons holding representative, administrative or (de facto) managerial positions in the company, or by persons working under their control, provided that these persons have committed the crimes at least 'also' in the interest of or for the benefit of the company, and the company cannot demonstrate to have taken adequate measures to prevent the commission of such crimes.

## **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

In Italy there is no enforcement authority committed to fighting foreign corruption. This task is generally shared by the Police forces and Public Prosecutors in charge with the investigation and prosecution of foreign bribery.

Italy has three different Police bodies: the 'Guardia di Finanza', the military division 'Carabinieri' and the 'Polizia di Stato' (State Police). Guardia di Finanza is a police service specialised in financial crime and tax crime. Carabinieri and the State Police are national police forces in charge for the maintenance of public security and fight against crime. They have jurisdiction to investigate all types of crimes including economic ones.

None of these forces have special departments committed to investigate in foreign bribery (the Guardia di Finanza and the Carabinieri have special units dealing with bribery).

In Italy, prosecutors are members of the judiciary and are not under the control of the Executive power. The most important Public Prosecutor Offices (Milan, Rome and Naples) are organised in sections where some are specialised in domestic bribery. The same sections have been in charge of the few foreign bribery cases. The National Anticorruption Authority for evaluation and transparency of public administrations is a Governmental Agency created in 2009. The main goal of the Agency is to introduce integrity and transparency in domestic public administrations and to report suspected case of corruption to the prosecutors.

The Agency has no power in investigation and prosecution for both domestic and foreign corruption.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No. The principle of mandatory prosecution prevents any sort of rule on prosecutorial discretion.

#### **2.1.2 Deciding what charges to file?**

No. The principle of mandatory prosecution prevents any sort of rule on prosecutorial discretion.

#### **2.1.3 Deciding whether to drop charges?**

No. The principle of mandatory prosecution prevents any sort of rule on prosecutorial discretion.

#### **2.1.4 Deciding whether or not to plea bargain?**

No. The principle of mandatory prosecution prevents any sort of rule on prosecutorial discretion.

In the Italian system there is a form of plea bargaining named '*patteggiamento*'. When the perspective punishment would be less than five-year imprisonment, the defendant may plea bargain with the prosecutor. The defendant is rewarded with: (1) reduction of one-third of the maximum penalty allowed by statute; (2) possible conditional deferral of the sentence; and (3) expungement of the conviction if the defendant does not commit the same kind of offences within five years after having agreed to a plea of guilty. The defendant must accept to plead guilty to the charges. It is not a non-conviction mechanism in general but in case of individual corruption crimes determining corporate responsibility it is the only settlement mechanism in Italy.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

In Italy, the general principle of mandatory prosecution is a Constitutional rule. Article 112 of the Italian Constitution reads as follow: 'The Public Prosecutor has the duty to institute criminal proceedings'. All corruption offences, including international bribery, are prosecuted *ex officio* by public prosecutors. This principle also applies to legal persons. It means that in Italy there is no room for prosecutorial discretion. If the Public Prosecutor receives information on a case of foreign corruption he/she has the duty to conduct the investigation together with police forces.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No. The principle of mandatory prosecution prevents any sort of rule on prosecutorial discretion.

## **2.4 Do these standards differ for individual and corporate defendants?**

No. The standard of prosecution and investigation is the same for individuals and companies even if the form of legal responsibility differs.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

### **3.5 *De facto* or *de jure***

*Editor's note: The settlement process (*patteggiamento*) is contingent upon an admission of guilt. (See section 2.1.4 above). This constitutes a *de facto*, plea-based settlement process following the classification used in this report.*

#### **4. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

##### **4.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No. General principles on *ne bis in idem* and double jeopardy in criminal law applies also to corruption crimes.

##### **4.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

As for Article 4 LD 231/2001, if the corporation is under investigation and prosecution in the foreign State where the bribery transaction took place, the corporation cannot be prosecuted in Italy as well. In case the corporation can prove that the negotiation settlement is a legitimate way to settle the corruption offences in the foreign State, it should be able to claim the application of Article 4 LD 231/2001.

*Arman Kazhdarov, Junior Associate, Kinstellar (Kazakhstan, Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Criminal Procedure Code (CPC) 2014 of the Republic of Kazakhstan (RK) and Code on Administrative Violations of the Republic of Kazakhstan (AC).

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

UN Convention against Corruption (ratification date: 4 May 2008).

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

According to Article 8, CPC, RK citizens who committed a crime outside RK are criminally liable in accordance with the CPC if the offence is punishable in the state in which it was committed and if the offender was not held criminally liable in that state.

Foreign citizens and stateless persons who do not permanently reside in RK and who committed a crime outside RK are criminally liable in accordance with CPC if the crime was directed against the interests of RK and in cases provided for in an international agreement binding upon RK, if they were not held criminally liable in another state.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments that are not provided by law are not allowed. However, payments to the State are allowed to expedite certain state services such as issuance of passports and state IDs.

#### **1.5 Does your country provide for corporate criminal liability?**

No.

Article 15 of the CPC stipulates that only individuals may be held criminally liable.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other: the National Anti-Corruption Bureau is competent with investigating corruption in international business transactions. However, this authority is also responsible for investigating corruption in other areas.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

A prosecutor is entitled to charge an individual with a crime only based on the results of pre-trial investigation (Article 302, CPC). Therefore, a prosecutor may only charge a person in relation to whom the pre-trial investigation was conducted.

#### **2.1.2 Deciding what charges to file?**

Yes.

Article 302, CPC provides that a prosecutor decides whether to approve a criminal indictment (presented by an investigative authority) or to issue a new indictment on the basis of the case materials. Moreover, a prosecutor may personally investigate a case and, therefore, decide how to qualify actions/failure to act of a suspect and what charges to include into the indictment (Article 58, CPC).

#### **2.1.3 Deciding whether to drop charges?**

Yes. Article 302, CPC provides that prosecutor may dismiss criminal charges.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes. Article 302, 615, 616, CPC entitles prosecutors to decide whether to plea bargain.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. After a prosecutor receives the indictment and materials of case.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

Articles 366 and 367, CPC clearly stipulate that both a bribe giver and receiver can be held criminally liable under the mentioned articles, unless the alleged bribe is a gift that: (1) is given for the first time; (2) is not negotiated in advance; and (3) does not exceed two monthly calculation indices.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

Since the CPC does not provide for criminal liability of legal entities, these standards are only applicable to individual defendants.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes. Chapter 63, CPC provides the procedure for entering into a plea bargain.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

Article 612, CPC provides that a procedural agreement (structured settlement) can be concluded either in the form of (1) agreement on admission of guilt; or (2) agreement on cooperation. Therefore, only procedural agreement in the form of agreement on admission of guilt requires admission of guilt.

**If yes, what is such a structured settlement called in your language?**

*Процессуалдық келісім/Процессуальное соглашение* (procedural agreement).

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

Other.

Enforcement authorities also take into consideration factors stipulated in Q.2.3.1. and general mitigating factors (eg, committing a crime for the first time, pregnancy, minority of the offender, etc) and aggravating factors (duplicity, committing a crime with a group of people, etc).

##### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

According to Chapter 57, CPC, pre-trial investigations regarding persons who have protections and immunities can be initiated with the approval of the General Prosecutor of RK. Pre-trial investigation regarding persons mentioned above can be initiated without the approval of the General Prosecutor only in cases when: (1) a person is arrested at the crime scene; or (2) a person committed or was at the stage of preparation to commit a grievous or an extremely grievous crime.

### **3.2.4 What form(s) can a structured settlement take?**

Article 612, CPC: (1) agreement on admission of guilt; and (2) agreement on cooperation.

### **3.2.5 What are the usual terms of such an agreement?**

Article 616, CPC enlists general terms of agreements on admission of guilt such as the parties, date, alleged crime, mitigating and aggravating factors, punishment, actions arrested/suspect/accused shall take after conclusion of the structured settlement, etc. CPC does not provide for terms of the agreement on cooperation.

### **3.2.6 Are there limits on what the prosecution can offer?**

No.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

According to CPC, a court cannot reverse the agreement, but it can return the case to a prosecutor, refuse to consider the case or terminate proceedings. According to Article 626, CPC, a court can return a case to a prosecutor if: (1) there are no reasons for concluding a procedural agreement; (2) if the court does not agree with the qualification of crime, amount of civil claim, type, term or amount of punishment stipulated in a procedural agreement. The court also may refuse to consider the case and return the case to the prosecutor if it suspects that the accused is not guilty. The court may terminate the proceedings if there are general circumstances that exclude criminal proceedings. The procedural agreement can also be amended or cancelled by the prosecutor if new circumstances that were not stipulated in the procedural agreement are revealed (section 3, Article 617, CPC).

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. According to Chapter 63, CPC, the court's consent is not necessary.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. According to Chapter 63, CPC, the court's involvement is not necessary.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes. According to Article 622, CPC, structured settlements in the form of agreements on admission of guilt are filed in court.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. See question 3.2.7.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: Prosecutor's Office.

According to Article 620, a prosecutor determines whether a party properly observed and understood the terms of the agreement on cooperation.

However, there are no similar provisions regarding agreements on admission of guilt. Please also note that corporations are not subject to criminal liability and this answer relates only to individuals.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

### **3.4 Outcome of the structured settlement**

**Are there any rules that provide guidance about the outcome of such negotiations with respect to the following? Please select all options that apply and provide further information in the field next to each box you tick.**

There are no such rules.

### **3.5 *De facto or de jure***

*Editor's note: The settlement process (agreement on cooperation) is not contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). This would constitute a de jure settlement process following the classification used in this report. Note that legal entities cannot incur criminal liability within the Kazakhstan legal system.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

Yes. All legislation regarding procedural agreements is available to the public.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

Corporations cannot be held criminally liable.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

National Anti-Corruption Bureau, Prosecutor's Office, Courts.

**4.2.1 If yes, is this data publicly available?**

Yes. Website: [www.sud.gov.kz](http://www.sud.gov.kz).

Only court decisions and resolutions are available. There are also private data bases such as [www.online.zakon.kz](http://www.online.zakon.kz) and [www.bestprofi.kz](http://www.bestprofi.kz).

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy principle**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Article 20, CPC states that no one can be convicted for the same crime more than once. Article 8, CPC stipulates that citizens of RK who have committed a crime outside the territory of RK shall be held criminally liable, in accordance with the CPC, if the offence is punishable in the state where it was committed and if the offender was not held criminally liable in the state where the crime was committed.

The same applies to foreign citizens and stateless persons who are in RK and who cannot be extradited to a foreign country pursuant to an international agreement. Foreign citizens and stateless persons who do not permanently reside in RK and who committed a crime outside the territory of the RK shall be criminally liable in accordance with the CPC in case the crime was directed against the interests of RK and in cases provided for in an international agreement binding upon RK, if they are not held criminally liable in another state.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

As was mentioned above, RK legislation does not provide for criminal liability of legal entities. In regards to individuals, Article 601, CPC provides that foreign convictions may be recognised and enforced in RK:

- (i) in case of admission of RK citizen convicted in a foreign state to imprisonment;
- (ii) in case of admission of RK citizen who in the state of insanity committed a socially dangerous action in a foreign country and in respect of whom a foreign court decision on compulsory medical treatment was issued;
- (iii) in case a person delivered to RK was convicted by a foreign court and did not serve the sentence;
- (iv) in case RK refused to extradite a person convicted by a foreign court;
- (v) when deciding whether to confiscate property located in RK or its monetary equivalent;
- (vi) in other cases provided for in international agreements binding upon RK.

**6. The following questions call for your opinion.**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

It is rather encouraged since it is a relatively new concept for RK legislation and is considered by many as one more way to assist overwhelmed authorities and courts.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Taking into consideration RK realities, structured settlements should be discouraged since corruption is an acute problem in Kazakhstan and authorities have to ensure that punishment for corruption offences is inevitable and harsh so it discourages potential bribe givers and bribe receivers. Structured settlements, in turn, leave the door open to further corruption offences.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

The country authorities should ban procedural agreements for a period of time.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

As it was mentioned above, CPC does not provide for criminal liability of corporations.

*Agris Repšs (Partner), Viktorija Jarkina (Counsel), Toms Vilnis (Associate), Toms Kārlis Broks and Madara Meļņika (Legal Assistants), Sorainen Law Firm*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The core laws are:

- the Law On Prevention of Conflict of Interest in Activities of Public Officials (hereinafter LOPCIAPO);
- Criminal Law (hereinafter ‘CrL’);
- Criminal Procedure Law (hereinafter ‘CrPL’);
- the Law on Corruption Prevention and Combating Bureau, which regulates the Anti-bribery institution – the Corruption Prevention and Combating Bureau (hereinafter ‘the Bureau’); and
- separate material and procedural norms regarding anti-bribery can be found in;
  - the Latvian Administrative Violations Code;
  - Investigatory Operations Law.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

With regard to corruption in international business, Latvia has signed and is a member of:

- the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Criminal Law Convention on Corruption;
- the Additional Protocol to the Criminal Law Convention on Corruption; and
- the United Nations Convention Against Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

With regard to bribery (offering, accepting, misappropriating or giving a bribe) the term ‘public officials’ is to be interpreted broadly. It encompasses representatives of the State authority as well as ‘officials or agents of international organisations, international parliamentary assemblies and international courts, or any other person holding a legislative, administrative or judicial office of a foreign state or of any its administrative units (whether

appointed or elected) and any person exercising a public function for a foreign state, including functions for any of its administrative units or a public agency, or a public enterprise' (CrL Article 316(3)).

In other words, under Latvian law a person can be held criminally liable for bribing foreign public officials and foreign public officials can be held criminally liable for accepting the bribe. Section 4 of the CrL sets out preconditions for applicability of the CrL outside the territory of Latvia. Latvian citizens are held criminally liable under Latvian law for an offence committed in the territory of another state irrespective of whether the offence has been recognised as criminal and punishable in the territory where it was committed (CrL Article 4(1)). The same principle applies to situations where a natural person commits an offence (eg, offers a bribe) outside of territory of Latvia in the interests or to the benefit of a legal person registered in the Republic of Latvia (CrL Article 4(1)). These provisions are applied in conjunction with the *ne bis in idem* principle as provided by Article 4 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are not expressly regulated under Latvian law. It must also be noted that Latvian law distinguishes bribes from gifts. However, the distinction is blurry and must be read in the light of the surrounding circumstances (eg, intent and amount). While a bribe is given to induce an official to act lawfully or unlawfully, gifts (including money) are usually given to show gratitude or as means of speeding up the legal process in question.

However, LOPCIAPO prescribes certain restrictions on state officials to accept gifts while they are fulfilling their duties as public officials. A public official is also prohibited from accepting additional payments for providing services under public office regardless of the service being for free or not (LOPCIAPO Article 16).

Article 2 of LOPCIAPO reveals that the purpose of the law inter alia is to ensure that the public official's actions are carried out in the interests of the public and the influence of a personal or financial interest of any public official is prevented. This leads to a conclusion that facilitation payments are not directly prohibited per se – a person can offer a gratuitous or facilitating gift to an official without fearing that that will be seen as an offering of a bribe under CrL (an offence is not considered criminal, applying the law by analogy). However, the law either prohibits completely or at least restricts acceptance of such gifts or payments.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes

As a general rule, only natural persons can be held criminally liable in Latvia. However, for the criminal offences specified in the CrL a court or a public prosecutor may apply coercive measures to a legal person governed by private law, including a company owned by the State or the municipal government, as well as a partnership, if a natural person has committed an offence in the interests of the said legal person, for the benefit of the legal person or

as a result of insufficient supervision or control, acting individually or as a member of the collegial authority of the relevant legal person:

- on the basis of the right to represent the legal person or act on its behalf;
- on the basis of the right to take a decision on behalf of the legal person;
- when implementing control within the legal person.

Coercive measures for a legal person include:

- liquidation;
- restriction of rights;
- confiscation of property; and
- monetary levy (CrL Article 70(1)).

## **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

Upon receiving information regarding a possible crime, an investigative institution establishes whether the investigation falls under its authority. For example, if the Financial Police determines that the investigation of a committed crime is outside its authority (eg, bribery), it hands over the case to the Bureau, thereby avoiding overlapping between investigative institutions.

The only authority dedicated to investigating corruption is the Bureau. When combating corruption, the Bureau performs the following functions:

- it applies sanctions to public officials for administrative violations in the field of corruption prevention in cases provided by law; and
- it carries out investigative and operational actions to discover criminal offences provided in the CrL in the service of State authorities, if they are related to corruption (the Law on Corruption Prevention and Combating Bureau, Article 8).

However, there is no special unit that would investigate corruption exclusively in international business transactions. Prosecutorial power is vested in public prosecutors who are responsible for criminal prosecution and maintenance of State prosecution (CrPL Article 36(1)).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

The Public Prosecutor takes over leadership of criminal proceedings and decides on the initiation of criminal prosecution of a person against whom the criminal proceedings have already been initiated by the investigative institutions (CrPL Article 38(1)). Thus, the Public Prosecutor does not decide whom to charge with a crime. Rather, the prosecutor decides whether there is sufficient evidence obtained from the investigation that would enable him/her to initiate further criminal proceedings (eg, whether to charge the person to whom the proceedings have already been initiated against with a crime) (CrPL Article 402).

The principle of mandatory nature of criminal proceedings (CrPL Article 6) provides that the proceedings can only be initiated in a case where the reason and grounds for initiating criminal proceedings are known. They can be commenced after an investigative institution has received a submission in a form of either report, information or a submission (CrPL Article 369). If such information has been submitted to the Prosecutor's Office or court, they send this information to the investigative institutions (CrPL Article 371). However, if such information has been submitted to the prosecutor or if the prosecutor has witnessed the crime, he/she may start an investigation him/herself if the law prescribes so (CrPL Articles 38(1) and 371(3)) and may therefore decide who should be prosecuted. Generally the initial decision to investigate the offender is taken by the investigator and only if sufficient evidence is gathered against that offender, the prosecutor can charge that offender with a crime, but he/she cannot take an arbitrary decision to charge a specific individual if no prior investigation has been performed.

### **2.1.2 Deciding what charges to file?**

No.

Pre-trial criminal proceedings are aimed to ascertain whether a criminal offence has been committed (CrPL Article 384(2)). Therefore, actions of a person under investigation can be qualified only in accordance with the corresponding provision in the CrL (CrPL Article 398(2)). If the prosecutor is supervising the investigation, and if the gathered evidence is sufficient, the prosecutor must demand that the investigator qualifies the criminal offence according to the respective provision of the CrL (CrPL Articles 37(2)1) and 398(2)). The investigator indicates the qualification of the criminal offence in his/her decision to complete the investigation (CrPL Article 401(2)2)).

If the prosecutor is of the opinion that the evidence gathered from investigation is sufficient to indicate that the person is guilty, the prosecutor takes a decision to charge that person (CrPL Article 402) and in that decision repeats investigator's legal classification of the crime committed (CrPL Article 405(1)3)).

However, if the prosecutor is of the opinion that there is no sufficient basis for holding a person criminally liable, the prosecutor may return the case for further investigation (CPL 403(3)1)) or terminate criminal proceedings and release the person from criminal liability (CrPL Article 379, or Article 415, if the release is conditional).

Therefore, the prosecutor has limited discretion as regards the decision on what charges to file. In most cases the prosecutor merely decides whether or not to proceed with the decision already taken by the investigator. Only in cases where new evidence has been brought up or a need to modify the prosecution has arisen, the prosecutor can decide what the charge will be, considering the said evidence (CrPL Article 408).

### **2.1.3 Deciding whether to drop charges?**

Yes.

Generally, the CrPL prescribes the prosecutor's discretion regarding termination of pre-trial proceedings and release of a person from criminal liability (eg, if the crime committed does not warrant the application of a criminal punishment or if the offence has been committed by a minor (CrPL Article 379)).

Likewise, if the prosecutor, taking into account the nature of and harm caused by a committed criminal offence, personal characteristic data and other conditions of the case, is of the opinion that the accused will thereafter not commit criminal offences, the prosecutor may terminate criminal proceedings and conditionally release the accused from criminal liability (CrPL Article 415(1)).

The prosecutor has the duty to terminate pre-trial proceedings if criminal proceedings are excluded (CrPL Article 377) or in cases when there is no sufficient evidence to prove someone's guilt and further evidence is not expected to be obtained (CrPL Article 392(2)). Pre-trial proceedings may also be terminated if a person upon whom harm has been inflicted, has not requested to initiate such proceedings and such request is required by the law (eg, when a person has received threats of murder).

If reasonable doubt exists (eg, an alibi of the accused has been confirmed during trial investigation) regarding the guilt of the accused while the prosecutor's case is ongoing, the prosecutor has the right or duty to withdraw from the case with the consent of a higher-ranking public prosecutor (CrPL Article 43(1)1)). Withdrawal from prosecution can be either full or partial.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The public prosecutor may enter into a plea bargain (agreement) regarding admission of guilt and punishment, on the basis of:

- prosecutor's own initiative; or
- initiative of the accused; or
- initiative of the defence counsel.

Therefore, the prosecutor has the discretion to decide whether to enter into the agreement proposed by the accused or his/her defence counsel. The agreement can be entered into if the accused agrees with the amount and qualification of his/her

incriminating offence, assessment of the harm caused by such offence, and the effect of the agreement on the proceedings (CrPL Article 433(1)). The defendant and the prosecutor may enter into an agreement either during pre-trial (CrPL Article 433) or trial (CrPL Article 544) proceedings. The agreement must afterwards be approved by the court (CrPL Articles 438(1) and 546).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Defence mitigation argued to the prosecutor.

It is essential for a prosecutor to react to a violation of law and to ensure that a decision is taken on matters related to the said violation in accordance with the procedures prescribed by law (Office of the Prosecutor Law Article 1(2)). However, a prosecutor has the discretion to terminate criminal proceedings if, upon consideration of the surrounding circumstances, the offence is of such nature that do not require furtherance of the criminal proceedings.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The decision to prosecute is made when the evidence gathered in the investigation indicates the guilt of the person being investigated and the public prosecutor is convinced that the evidence confirms such guilt (CPL Article 402)).

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

Although the law states that the guilt of the accused person must be confirmed by evidence, the prosecutor has the discretion to evaluate the sufficiency of such evidence.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

Since the CrL does not separately prescribe corporate criminal liability, there is no distinction between individual and corporate defendants with regards to prosecutorial matters.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Latvian law does not specifically recognise the notion of structured settlements in criminal law. The closest parallel to a settlement is a plea bargain/agreement. For the purposes of this section, 'structured settlements' will hereinafter be referred to as 'agreements'.

Generally, every allegation under the CrL can be resolved through agreements (CrPL Article 433(1)). However, the prosecutor must consider entering into an agreement if possible (CrPL Article 443(1)). If the relevant CrL provision does not prescribe a fine as a punishment for the crime committed, no agreement to pay such fine can be made. For example, the CrL does not prescribe a fine as a punishment if the bribe given is of large scale or if it is given by a State official (CrL Article 323(2)).

The prosecutor may also terminate the criminal proceedings by drawing up a penal order. The circumstances under which a penal order may be drawn up are prescribed under Article 420 of the CrPL. They include the prosecutor's discretion to evaluate harm of the committed offence and to recognise that the person should not be imprisoned. Instead of imprisoning the accused person, the prosecutor may prescribe either compulsory work or a fine as the main punishment (CrPL Article 421(2)).

However, this does not mean that the prosecutor is empowered to arbitrarily replace imprisonment with a fine. The CrPL prescribes that the penal order may be drawn up only if the imprisonment sanction prescribed by the violated CrL provision does not exceed five years (CrPL Article 420(1)). Therefore, if a bribe given is of a large scale (for such offence the maximum punishment is imprisonment for eight years), the prosecutor cannot draw up a penal order and issue a fine instead of imprisonment. Furthermore, the prosecutor may order a fine or compulsory work only if the violated CrL provision provides alternative sanctions. If the only punishment is imprisonment, the prosecutor cannot draw up a penal order. Conversely, a court may exercise discretion prescribed by Article 41.2 of the CrL and replace imprisonment with a fine in cases where the CrL prescribes imprisonment as the only punishment. The amount of the fine is determined by evaluating financial status of the wrongdoer.

Generally, a fine must be paid within 30 days (CrL Article 41(1)). However, a court or the prosecutor (where appropriate) may structure the payment of a fine into terms or suspend the payment for a period which is not longer than one year from the day when the judgment or penal order has come into legal force (CrL Article 41(5)). If the fine exceeds 300 minimum monthly salaries, the term may be set to no longer than three years (CrL Article 41(5)).

## **3.2 Form, features and terms of structured settlements**

### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

#### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Vienošanās.*

### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

voluntary disclosure of wrong doing/self-reporting;

cooperation with enforcement authorities through the investigation;

assistance in investigating and prosecuting individuals; and

other.

Mitigating factors for bribery may be the following:

- the perpetrator has admitted the guilt, freely confessed and regretted the committed criminal offence;
- the perpetrator has actively furthered disclosure and investigation of the criminal offence;
- the perpetrator has voluntarily compensated the harm caused by the criminal offence to the victim or has eliminated the harm; and
- the perpetrator has facilitated disclosure of another person's crime (CrL Article 47(1)1-4).

The court or the prosecutor may impose a lighter punishment on the basis of the above stated mitigating factors. However, this is not an exhaustive list as circumstances which are not provided for in the CrL and which are related to the criminal offence committed, may also be considered as circumstances that mitigate the liability (CrL Art 47(2)). Therefore, theoretically commitments to institute new prevention measures might also be seen as mitigating as long as they are not too vaguely connected to the possible justification of the crime.

The Supreme Court has recognised that if the guilt has been admitted for the purposes of the agreement process, it will not constitute a mitigating circumstance when the punishment is determined, since the accused will already receive a lighter penalty because of the said admission.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

In order to hold a person, who has immunity from criminal proceedings, criminally liable, the prosecutor submits a proposal to the competent authority for the receipt of consent (CrPL Article 120(6)).

Except for the immunity from criminal proceedings, there are no other privileges or protections mentioned in the CrPL that could be waived.

### **3.2.4 What form(s) can a structured settlement take?**

The agreement takes form of a protocol (CrPL Article 437(1)). The compliance with the form is seen as an obligatory requirement for legality of the agreement.

### **3.2.5 What are the usual terms of such an agreement?**

In addition to general information (eg, name of the accused, prosecutor, etc), the agreement must include a consensus between the prosecutor and the accused with regard to the following:

- qualification of the criminal offence;
- amount of harm caused by the criminal offence, and an agreement regarding the compensation of such harm;
- aggravating and mitigating circumstances of the liability of the accused;
- information regarding the accused person;
- punishment that a public prosecutor will request for the court to impose (CrPL Article 371(1)5)-9).

Likewise, an agreement protocol regarding a coercive measure against a legal person indicates the coercive measure, the imposition of which will be requested from the court by the Public Prosecutor (CrPL Article 441.(1)).

If the accused has committed several criminal offences, the prosecutor indicates the punishment that the prosecutor will request to be imposed regarding each of the criminal offences and the final punishment. Such provision is also complied with in cases where a punishment is determined for an accused based on several judgments (CrPL Article 437(2)).

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The limits on what the prosecution can offer are contingent on the offence committed. Therefore, the limit with regards to the type of punishment to be imposed is already set out by the CrL (CrL Article 46(1)) (eg, for giving a bribe, the applicable punishment is imprisonment for maximum of five years or temporary deprivation of liberty, or community service or a fine (CrL Article 323(1)). The choice and extent of the punishment mentioned, however, depends on the circumstances surrounding the offence and is at the discretion of the prosecutor (CrL Article 46(2)). The punishment must conform with the purposes of punishment set out in CrL Article 35.

However, before the approval of the agreement, a judge evaluates the punishment provided for in the agreement only if the selected type of punishment is not commensurate with the nature of the criminal offence committed and the harm caused (CrPL Article 539(1)). If the punishment is disproportionate or even not in accordance with the limits set in the CrL (CrL Articles 35 and 46), it breaches Art 1 of

the CrPL by not providing a fair regulation of criminal legal relations and the judge has the right to send the agreement back to the prosecution to eliminate the violation (CrPL Article 539(1)). If the agreement entered into during trial proceedings does not comply with provisions of the CrL, the court will not approve it and the case will be examined in accordance with the general procedure (CrPL 546(3)).

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

In 2016, the Supreme Court examined 16 cassation complaints. In four cases, the judgment remained unaltered while in nine cases (plus one untypical case regarding expulsion from Latvia) the judgment got fully annulled and, in two cases, annulled in part. The main reason for annulling the judgment was the fact that the court had added additional punishments that were not mentioned in the agreement, and the court had annulled the agreement in part regarding the punishment and had decided on this question during the court session.

As exemplified by the Supreme Court's decision in 2006, the decision of the court of first instance to send the case to a public prosecutor for elimination of violations was to remain unaltered because the punishment offered by the prosecutor was too soft. The defendant in this case was charged with giving a bribe of €10,000 to terminate criminal proceedings against him. The prosecutor had agreed to impose a punishment of three years in prison conditionally, which the court deemed to be too disproportionate punishment considering the damage caused.<sup>4</sup>

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached:**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The negotiations regarding the agreement are initiated by the prosecutor at his or her discretion on the basis of the prosecutor's own initiative or the initiative of the accused or the defence counsel (CrPL Article 433(1)). For this, no approval by the court is required.

However, should the prosecutor and the defendant wish to enter into an agreement during trial proceedings (up to commencement of a court investigation), they must get the court's approval beforehand (CrPL Article 544(1)).

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<sup>4</sup> Decision of the Supreme Court on 9 May 2006 No. SKK-01-288/2006. Available in Latvian at: <http://at.gov.lv/files/uploads/files/archive/department2/2006/a/kd090506.doc>.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

Before submission to the court for approval, the court does not participate in the agreement procedure between the prosecutor and the accused.

**3.3.2 Once the settlement has been reached:**

**3.3.1.3 Is the structured settlement filed in court?**

Yes.

After entering into the agreement, the Public Prosecutor sends the criminal case materials together with the minutes of the agreement to the court, and asks the court to approve the agreement entered into. Article 438 of the CrPL sets out the necessary terms to be included in a proposal to the court.

The agreement becomes officially valid only after it has been approved by the court. In 2015, the Supreme Court ruled that if the court has not indicated the approval of the agreement and whether the accused are to be recognised as guilty, such rulings lack the essential requirements to be enforceable even if the court has approved the punishment and its extent.<sup>5</sup>

**3.3.1.4 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The judge examines whether the agreement is in accordance with the procedures laid down in the CrL and whether the CrL has not been violated (CrPL Article 539).

The judge evaluates the type of punishment provided for in the agreement only if it has been detected that the selected type of punishment is not commensurate with the nature of the criminal offence committed and the harm caused.

If the court determines a violation during pre-trial proceedings, the judge takes a decision and sends the case to the Public Prosecutor for elimination of the violation. Additionally, during court investigation the court ascertains whether the accused understands the criminal offence for which he or she is being prosecuted, whether he or she considers him or herself guilty, whether he or she signed the agreement consciously and voluntarily, and whether he or she understands the consequences thereof and agrees to comply with the agreement (CrPL Article 541(2)).

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<sup>5</sup> Decision of the Supreme Court on 8 September 2015 No. SKK-415/2015. Available in Latvian at: <http://at.gov.lv/files/uploads/files/archive/departament2/2015/SKK-415-2015.doc>.

In 2010, the Supreme Court ruled that the law does not require courts to repeatedly motivate the decision to confirm the agreement, since the motivation for the punishment and other terms have already been included in the agreement by the prosecutor. Only when the agreement is evidently unjust, courts have the right to send it back to the prosecutor for elimination of the violation.

### **3.3.2 During the implementation of the settlement:**

#### **3.3.2.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: prison administration, court bailiffs, state probation service, etc.

The agreement always results in sentencing the defendant. Certain established authorities control the execution of the sentence, regardless on what procedure the punishment has been based on. In 2006, the Supreme Court ruled that the prosecutor is not authorised to agree on the execution of the sentence but rather on the sentence itself.

Imprisonment is carried out by the deprivation of liberty institutions of the Latvian Prison Administration of the Ministry of Justice, the confiscation of property is carried out by the court bailiffs and the community service is implemented by the State Probation Service (Sentence Execution Code of Latvia (SECL), Article 5(1)). Criminal punishments which have been adjudged as additional punishments are executed by bailiffs and institutions subordinate to a ministry in accordance with their scope of authority (SECL 5(2)). Hence, participation of authorities guarantees that the terms of agreement are observed properly.

#### **3.3.2.2 Can this authority impose penalties for non-compliance?**

No.

Penalties for non-compliance take a form of substitution of the sentence. For example, if a fine has not been paid in full, it can be substituted with imprisonment correlating the unpaid amount with the length of the deprivation of liberty (CrL 41(6)).

The same principle applies to other punishments. If the convicted person ignores the warning given and without justification repeatedly violates the conditions and procedures for serving the community sentence, such action is considered as an evasion of serving the sentence and the community service execution institution lodges a submission to the district (town) court regarding substitution of this sentence with temporary imprisonment up to one year in accordance with the CrL (SECL Article 138 and CrL Article 137).

Identically, the convicted person, to whom the head of the deprivation of liberty institution has granted permission to temporarily leave the territory of the deprivation of liberty institution, is held liable for failure to return to the deprivation of liberty institution at the time specified in the permit in accordance with the procedures laid down in the CrL regarding evasion in serving the sentence. In such cases, the penalty would also be imposed by the court (SECL Article 49(3), CrL Article 137).

### 3.4 Outcome of the structured settlement

	Statutory Provisions	Past cases
<b>Financial penalties</b>	Financial penalties are a type of punishment imposable on natural persons (CrL Art 36) and on legal persons in form of a coercive measure as well (CrL 70.)	
<b>Disgorgement of profits</b>	With regard to legal persons, coercive measures that may be included in an agreement are, for example, confiscation of property and monetary levy (CrL Art 70(2)). Disgorgement of profits, while not specifically prescribed by law, may also be implicitly included in these measures.  Confiscation of property and a fine may be adjudged against a convicted person as an additional punishment (CrL Art 36(2)).	Case law shows that an agreement on the acquisition or confiscation of illegally obtained assets can also be included in the agreement as additional punishment.
<b>Compensation to third parties</b>	The victim has the right to apply for compensation (CrPL Art 351); the agreement on compensation for any harm inflicted must be included in the agreement (CPL 437.1.6).	
<b>Obligations to cooperate with other agencies</b>	Applies to cases when the prosecutor terminates criminal proceedings, conditionally releasing from criminal liability (eg, with obligation to participate in probation programmes). Does not apply to agreement procedures.	
<b>Personal liability</b>	Since admittance of one's guilt is an essential part of the agreement procedure, personal liability will always be present.	

The outcome of the agreement will always be the punishment or the coercive measure provided by the CrL.

### 3.5 *De facto or de jure*

The detailed rules regarding the proposal, structure, implementation and other questions connected to the agreements are set both in law and case law. The non-observance of those rules leads to invalidity of the agreement.

*Editor's note: The settlement process is contingent upon an admission of guilt. (See sections 3.1 and 3.2 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

During criminal proceedings, the criminal case materials are secret and only the officials performing the criminal proceedings, as well as the persons to whom the referred officials present the relevant materials in accordance with the procedures provided in the CrL, are permitted to inspect such materials (CrPL Article 375(1)).

When criminal proceedings are finished and the final judgment comes into effect, employees of courts, Prosecutor's Office, investigating institutions, and persons whose rights were infringed in the respective criminal proceedings, as well as persons who performed scientific activities, are permitted to inspect the materials of the criminal case (CrPL Article 375(2)).

This means that the information about the agreement is not officially available to the public during criminal proceedings.

However, the Law on Judicial Power states that a court adjudication given during open court is generally accessible information (Article 28.2(1)). Only with regard to adjudications given during closed sessions is the access to the information restricted – in such adjudications only the introductory and operative parts are available to the public (Article 28.2(2)). Court judgments taken during open court are published on an internet homepage after entering into effect, unless it has been laid down otherwise in law (Article 28.2(5)). Since the court approves the agreement in a form of adjudication, the agreement itself is publicly available. Provisions of the Personal Data Protection Law still apply.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

A court outlines the essence and validity of an agreement in the reasoning of a judgment (CrPL Article 543(2)). This includes a short summary of essential circumstances surrounding the committed crime. In the operative part of the judgment the court indicates decisions on various matters, such as the fact that the court approves the entered-into agreement (CrPL Article 543(3)2)) and compensation for harm, including the amount of compensation disbursed by the State (CrPL Article 543(3)7)). As mentioned in point 4.1.1, all this information is publicly available unless otherwise stated by law.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

Latvian law does not allow a company to negotiate contents of the public statements on the case. The extent of the contents of the case is prescribed by law. Article 282 of the Law On Judicial Power states that court judgments taken during open court are published on an internet homepage after they come into effect. Detailed instructions on the judgment components upon its publishing on the internet are laid down in the Cabinet regulations. It must be noted that the rules regarding anonymisation of decisions apply to natural persons only and, therefore, the full title of the company and relevant circumstances will be included in the published decision.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

The Bureau collects and processes data to a limited extent – as long as it can be used to facilitate performance of its functions.

Functions of the Bureau include:

- developing a corruption prevention and combating strategy;
- reviewing complaints and submissions in accordance with their scope of authority, as well as carrying out inspections proposed by the President of Latvia, the Saeima (Latvian parliament), the Cabinet and the Prosecutor General;
- compiling and analysing the experience of other countries in the field of corruption prevention and combating;
- analysing regulatory enactments and draft regulatory enactments, as well as proposing amendments and submitting recommendations for new regulatory enactments (Law On Corruption Prevention and Combating Bureau Article 7(1)).

This list is not exhaustive).

An example of such efforts are the Guidelines on corruption prevention and combating for years 2015 – 2020 which are available at the Bureau’s homepage.<sup>6</sup>

**4.2.1 If yes, is this data publicly available?**

No.

Statistics of the initiated allegations are included in the annual reports of the Bureau. Some of the cases in these reports are described in more detail. Foreign bribery is not analysed separately.

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<sup>6</sup> Version in Latvian available at: [https://www.knab.gov.lv/upload/free/koncepcijas/knab\\_pamatNostadnes\\_2015\\_2020.pdf](https://www.knab.gov.lv/upload/free/koncepcijas/knab_pamatNostadnes_2015_2020.pdf).

An unofficial overview of the corruption cases is published in the website Corruption °C by the Centre for Public Policy PROVIDUS, which was established in 2002 and has since developed into the leading think-tank in Latvia. Since 2005 Corruption °C follows and analyses key trends in corruption and anti-corruption policy in Latvia by identifying the most important developments and providing in-depth analysis. However, neither bribery in general, nor consequently foreign bribery, is analysed separately either in the statistical, or analytical part.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

In 2015, 715 cases were sent to the court through the process of agreement. This number is 277 more cases (46.5 per cent) than in 2014. Thus, a slow, but steady increase can be observed starting from 2010 (209 cases) with 233 cases in 2012, 379 in 2013 and 379 cases in 2014. However, information of how many of those cases have been connected to bribery is not available.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

The applied rules are prescribed by the international treaties of which Latvia is a member, namely the Convention on Combating Bribery on Foreign Public Officials in International Business Transaction and United Nations Convention Against Corruption.

If the competing jurisdictions are those states that have signed the Convention on Combating Bribery on Foreign Public Officials in International Business Transaction, the Convention lays down that the parties involved shall, at the request of one of them, consult each another to determine the most appropriate jurisdiction for prosecution (Article 4(3)).

The United Nations Convention Against Corruption states that if a State Party, exercising its jurisdiction, has been notified or has otherwise learned that any other State Parties are conducting an investigation, prosecution or judicial proceeding in respect to the same conduct, the competent authorities of those State Parties shall, as appropriate, consult one another to coordinate their efforts.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

Both the foreign conviction and foreign settlement have binding status. The CrPL stresses the *ne bis in idem* principle by stating that no person may be tried or punished again for the offence for which he has already been acquitted or punished in Latvia or in a foreign country

(CrPL Article 25).

Therefore, both the foreign convictions and settlements are taken into consideration before commencement of the criminal procedure.

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

High predictability.

Latvian law does not directly prescribe means of cooperation regarding the decision to prosecute. The prosecutor may refuse to prosecute only if necessary circumstances set out in law are present.

These are:

- criminal offence has not caused harm that would warrant the application of a criminal punishment;
- the person who has committed a criminal violation or a less serious crime has made a settlement with the victim;
- a criminal offence has been committed by a minor and special mitigative circumstances of the committing of the criminal offence have been determined;
- it is not possible to complete the criminal proceedings within reasonable term;
- the person committed the criminal offence while he or she was subject to human trafficking and was forced to commit the offence (CrPL Article 379);
- circumstances that exclude criminal proceedings have been established (CrPL Article 377); and
- pre-trial proceedings have failed to prove the guilt of the alleged wrongdoer (CrPL Article 392(2)).

Hence, should the alleged wrongdoer offer assistance, cooperate or admit his/her guilt, while none of the circumstances mentioned above apply, the prosecutor will prosecute him/her regardless. However, the outcome of proceedings depends on whether the wrongdoer has already been charged with a crime. Cooperation and admittance of guilt are essential prerequisites that may enable the prosecutor to draw up a penal order or enter into an agreement (plea bargain). They are also seen as mitigative circumstances which may result in determination of a softer punishment than the punishment provided by law by default (CrL Article 49).

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

The cooperation is encouraged even before the criminal proceedings have been

commenced. A mitigating circumstance prescribed by the CrL is the fact that the perpetrator of the criminal offence has admitted his or her guilt, has freely confessed and has regretted the criminal offence committed (CrL Article 47(1)1)). Article 47 of the CrL provides other circumstances that are seen as mitigating, thus encouraging the offender to cooperate. Rights to cooperate are prescribed by Article 21 of the CrPL. It prescribes forms in which cooperation may take place as well as the timeframe in which the cooperation is possible.

If the accused has confessed his guilt after the criminal proceedings have been commenced, the process can be finished considerably faster in comparison with the general court proceedings and a lighter penalty is imposed as a result. Especially encouraging is the provision which allows for conclusion of the agreement even during the trial proceedings. Cooperation and confession of guilt may also be a factor should the prosecutor exercise his/her discretion to draft the penal order. Cooperation may also enable the prosecutor to release a person from criminal liability if such person has given substantial assistance in the uncovering of a serious or especially serious crime, which is more serious or dangerous than the crime committed by the person himself or herself (CrL Article 58(3) and 60).

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Such cooperation should be absolutely encouraged as it ensures procedural effectivity in cases where the accused recognises the fact of committing a criminal offence and agrees to the qualification of it. A good example of the effects of cooperation on the procedural effectivity is a penal order. Issuance of the penal order ends criminal proceedings and prevents the case from being heard in court, thus reducing the workload of the courts. However, the penal order may be issued only if the accused has admitted his or her guilt (cooperation).

Additionally, by not furthering investigation but concluding an agreement instead, both time and resources are spared. The very fact that the voluntary disclosure of wrongdoing and the cooperation ensures a lighter penalty than it would have been in the case the person had denied his fault, highlights a fair regulation of criminal legal relations.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The accused persons should be more informed about the benefits of admitting their guilt and cooperating.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Cooperation is practically bargaining for the best outcome for both parties. Therefore, the obvious advantage for the company would be a lighter penalty (financial advantage). Other advantages are of a legal nature, which are more general and apply to all persons (eg, faster procedure, etc).

*Darius Raulušaitis, Attorney-at-Law, Sorainen Law Firm*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Lithuania's anti-corruption legislation is well developed. Lithuanian provisions criminalising corruption are comprehensive, covering active and passive bribery and trading in influence, extending to officials operating abroad. The Law of the Republic of Lithuania on the Prevention of Corruption establishes criminal acts regarding corruption, the Law of the Republic of Lithuania on the Special Investigation Service sets the purpose of the Special Investigation Service (SIS) which is in charge of prosecuting and preventing corruption. The Criminal Code of the Republic of Lithuania (the Criminal Code) criminalises corruption in the public and private sectors and lists six most dangerous corruption-related crimes. The Criminal Code provides for criminal liability for bribery (Article 225), trading in influence (Article 226), graft (Article 227), abuse of office (Article 228), unlawful registration of rights to an item (Article 228(1)) and failure to perform official duties (Article 229).

In addition, Lithuania is a party to the main international conventions, which set forth the state's commitment to criminalise corruption-related offences under the national law. Lithuania has ratified the United Nations Convention against Corruption (UNCAC), Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, the Council of Europe Civil Law Convention on Corruption, the Criminal Law Convention on Corruption, and the United Nations Convention against Transnational Organized Crime. In April 2015, the Council of the OECD invited Lithuania to open formal OECD accession talks. Once Lithuania becomes a member of OECD, it will be able to ratify the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It should be pointed out that Lithuanian legal regulation of bribery of foreign officials in the context of international business transactions already meets the requirements of OECD Convention guidelines and OECD recommendations.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Lithuania is a party to the main international conventions and treaties and has implemented most of the relevant provisions criminalising corruption at international level. However, Lithuania is not a member of OECD yet, but is in the process of becoming one. Article 230 of the Lithuanian Criminal Code (Interpretation of concepts) provides as follows:

The civil servants indicated in connection with corruption-related crimes – bribery, abuse of office, unlawful registration of rights to an item, and failure to perform official duties – shall be state politicians, state officials, judges, civil servants under the Law on Civil Service, and other persons who perform the functions of a government representative or hold

administrative powers while working or holding office in state or municipal institutions or agencies on other statutory grounds, as well as official candidates for such positions.

A person holding appropriate powers at a foreign state or European Union institution or agency, an international public organisation or an international or European Union judicial institution, at a legal entity or another organisation controlled by a foreign state, as well as official candidates for such positions shall be deemed equivalent to a civil servant.

In addition, a person who works or on other statutory grounds holds office at a public or private legal entity or another organisation or is engaged in professional activities and holds appropriate administrative powers or has the right to act on behalf of this legal entity or another organisation, or provides public services, as well as an arbitrator or juror shall also be deemed to be equivalent to a civil servant.

A bribe shall be any unlawful or undue reward in the form of any pecuniary or other personal benefit for oneself or another person (tangible or intangible, with or without an economic value on the market) in exchange for a desired lawful or unlawful act or omission of a civil servant or a person equivalent thereto in exercising his/her powers.

Any person may be held liable for trading in influence or grafting.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Under the Criminal Code, corruption-related crimes are classified as so-called criminal acts subject to universal jurisdiction. The Criminal Code allows jurisdiction for a crime committed abroad only if the crime is addressed in a relevant treaty (this would be the case for bribery, trading in influence and graft).

Under Article 7 of the Criminal Code, persons shall be liable under the Criminal Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under the laws of the place of commission of the crime where they commit crimes subject to liability under treaties, which are related to, among other things: (1) laundering of criminal assets; (2) bribery; (3) trading in influence; (4) graft.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Lithuanian law prohibits any facilitation payment. A payment, gift or service of any value given to a civil servant or a person equivalent to a civil servant (see paragraph 1.2. for an explanation) for a desired action or omission may result in criminal liability.

Under Article 225 of the Criminal Code, the giving, acceptance, an agreement to accept and an offer to give a bribe amounting to more than one MSL (minimum salary level) (e38) is considered to be a crime: bribery, trading in influence or graft, respectively. The same actions where a bribe is valued at less than one MSL (e38) are treated as a misdemeanour. A misdemeanour is an act (action or omission) prohibited under the Criminal Code, which

is punishable by a non-custodial sentence, with the exception of arrest (Article 12 of the Criminal Code).

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Criminal liability of a legal entity is governed by Article 20 of the Criminal Code (Criminal Liability of a Legal Entity), which provides as follows:

- A legal entity shall be held liable solely for the criminal acts the commission whereof is subject to liability of a legal entity as provided for in the Special Part of the Criminal Code.
- A legal entity shall be held liable for the criminal acts committed by a natural person solely where a criminal act was committed for the benefit or in the interests of the legal entity by a natural person acting independently or on behalf of the legal entity, provided that the person, while occupying an executive position in the legal entity, was entitled: (1) to represent the legal entity, or (2) to take decisions on behalf of the legal entity, or (3) to control the activities of the legal entity.
- A legal entity may also be held liable for criminal acts where they have been committed by an employee or an authorised representative of the legal entity as a result of instructions, permission, insufficient supervision or control by the person indicated in paragraph 2 of this Article.
- A legal entity may be held liable for criminal acts committed by another legal entity which it controls or which represents it under the conditions set out in paragraphs 2 and 3 of this Article where a criminal act has been committed for the benefit of the above-mentioned legal entity or with the permission of a person holding an executive position in the legal entity, or due to insufficient supervision or control.
- Criminal liability of a legal entity shall not release from criminal liability a natural person who has committed, organised, instigated or assisted in the commission of a criminal act. Criminal liability (in addition, if a natural person is released from criminal liability or is not held liable for other reasons) of a natural person who has committed, organised, instigated or assisted in the commission of a criminal act for the benefit or in the interests of a legal entity shall not release the legal entity from criminal liability.
- The State, a municipality, a state and municipal institution and agency as well as an international public organisation shall not be held liable under the Criminal Code.
- A legal entity may be held liable under Articles 225, 226, 227 and 228 (bribery, trading in influence, graft and abuse of office) of the Criminal Code.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The Special Investigation Service (SIS) (*Speciali j tyrim tarnyba*), which is in charge of prosecuting and preventing corruption.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Prosecutors have the absolute discretion to launch a pre-trial investigation and filing charges once they have identified any signs of criminal acts and suspect someone of committing a crime. In addition, they have the discretion to decide: (1) whether to terminate the pre-trial investigation; or (2) to complete the pre-trial investigation, draw up an indictment and transfer it (including all information regarding the case) to the court. During criminal trials, prosecutors have the discretion to propose appropriate punishments for the accused.

#### **2.1.2 Deciding what charges to file?**

Yes.

#### **2.1.3 Deciding whether to drop charges?**

Yes.

Two main rules that apply and sum up all the answers to the questions in paragraph 2.1:

- prosecutors have the absolute discretion to decide whom to charge with a crime, what charges to file and whether to drop charges; and
- prosecutors make decisions independently. Therefore, prosecutors' decisions in accordance with the law can be revised only by a higher-ranking prosecutor or by a court.

For further explanation, see also paragraph 2.2.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Lithuanian laws do not provide for or govern a direct possibility to end criminal prosecution with a plea bargain. The Criminal Code only provides for an opportunity for the accused to reach compromise with the State in the cases of trading in influence (Article 226) or grafting (Article 227) under the following circumstances: a person shall be released from criminal liability for trading in influence or grafting where he was requested or provoked to give a bribe and, upon offering, promising or giving the bribe and before the delivery of a notice of suspicion filed against him, the person notifies a law enforcement institution thereof or offers, promises or gives the bribe with the law enforcement institution being aware thereof (Article 226(6) and Article 227(5) of the Criminal Code).

Therefore, basically, the Criminal Code refers to being ‘requested or provoked to give a bribe’ (Article 227(5) of the Criminal Code). However, solicitation and extortion alone do not absolutely exempt an offender from criminal liability. They should rather go together with effective regret (see below) and bribery should be reported as soon as possible before the suspect is recognised.

It should be pointed out that a pre-trial investigation is terminated by the decision of a pre-trial judge approving the prosecutor’s decision to terminate the pre-trial investigation. The court subsequently assesses all the circumstances when deciding whether an offender should be released from criminal liability.

In addition, Article 226(6) and Article 227(5) of the Criminal Code do not apply to a person who has offered, promised or given a bribe to a person indicated in Article 230(2) of the Criminal Code (see paragraph 1.2).

Effective regret allows an individual who has offered, promised or paid a bribe to avoid punishment by reporting this fact to the law enforcement authorities before the bribe is discovered. The purpose of such defence is to assist law enforcement officers in prosecuting government officials who abuse their office by giving bribe gives an incentive to report the bribes they pay. However, this purpose is less relevant in the case of foreign bribery because there is no guarantee that a foreign official who has been given a bribe will be prosecuted if the bribe giver comes forward. Such an official is often in a different country than that of the bribe giver and the country that would be in a position to assert jurisdiction over the bribe giver may not be able or willing to prosecute the bribe recipient (see *Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia* of OECD Anti-Corruption Network for Eastern Europe and Central Asia, page 21).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Prosecutorial discretion in Lithuania is governed by the Criminal Code, the Code of Criminal Procedure of the Republic of Lithuania (the Code of Criminal Procedure) and the Law of the Republic of Lithuania on the Prosecutor’s Office. The general provisions of the Criminal Code and the Code of Criminal Procedure apply to corruption cases.

If facts showing corruption exist, the prosecutor is required to prosecute the case. Lithuanian legal regulation allows for prosecutorial discretion only under very limited circumstances; in nearly all cases, the prosecutor would be required to bring a corruption case. Moreover, the prosecutor leads the pre-trial investigation and tries the case.

At the pre-trial phase, the prosecutor may choose to work with other agencies, including the Special Investigation Service (SIS), which is a law enforcement agency with specialisation in investigating corruption-related crimes (including foreign bribery).

Article 2 of the Code of Criminal Procedure establishes a duty for prosecutors to take all possible actions in order to carry out a pre-trial investigation within the shortest possible time

and to reveal a criminal offence. The Code of Criminal Procedure sets forth the following time limits for pre-trial investigations (Article 176):

A pre-trial investigation should be carried out within the shortest possible time, but no more than:

- three months in case of a misdemeanour;
- six months in case of minor, less serious and negligent crimes;
- nine months in case of serious and grave crimes.

Foreign bribery (both active and passive) would fall into the categories of less serious or serious crimes, thus subject to a pre-trial investigation period of six to nine months. Normally, this would hardly seem to be enough time to conclude a complex foreign bribery investigation. Nonetheless, the Code of Criminal Procedure goes on to provide that the prosecutor leading the pre-trial investigation may obtain approval to extend this time period 'because of the complication or high scope of the case or other important circumstances by the resolution' (Article 176). Lithuania's Special Investigation Service has explained that circumstances such as the need for mutual legal assistance or a set of complex facts would be considered sufficient grounds to extend this time period; according to this agency, this ameliorates any potential problems with the short time frame (see *Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia* of the OECD Anti-Corruption Network for Eastern Europe and Central Asia, page 33).

Under Article 166 of the Code of Criminal Procedure, prosecutors are obliged to launch a pre-trial investigation once they have received a complaint, a statement or a report about a criminal act. It is important to point out that the Code of Criminal Procedure also sets out the conditions under which prosecutors refuse to initiate a pre-trial investigation: (1) the data about a criminal act are obviously incorrect; and (2) there are clear circumstances stated in Article 3(1) of the Code of Criminal Procedure which oblige prosecutors to terminate a pre-trial investigation (for example, an act which has been committed has no elements of a crime or a misdemeanour).

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. See paragraph 2.3.1.

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The threshold under Articles 225–227 (bribery, trading in influence and graft) of the Criminal Code is defined in terms of the money value of a bribe. Under the Criminal Code, the giving, acceptance and agreement to accept and an offer to give a bribe valued at less than one MSL (€38) are treated as a misdemeanour. It stipulates that, regardless of the value of a bribe, prosecutors are obliged to prosecute every act which has any elements of corruption-related criminal acts.

The threshold under Articles 228 (abuse of office) and Article 229 (failure to perform official duties) of the Criminal Code is associated with major damage caused to the State, to the European Union, an international public organisation, a legal or natural person.

It should be pointed out that the actual value of a bribe and the majority of damages are separately determined for each case during a criminal trial.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

A person (including a legal entity) may be released from criminal liability for grafting or trading in influence where the person was requested or provoked to give a bribe and, upon offering, promising or giving the bribe and before the delivery of a notice of suspicion filed against him, the person notifies a law enforcement institution thereof or offers, promises or gives the bribe with the law enforcement institution being aware thereof (Article 226(6) and Article 227(5) of the Criminal Code).

Article 226(6) and Article 227(5) of the Criminal Code do not apply to a person who has offered, promised or given a bribe to a person indicated in Article 230(2) of the Criminal Code (see paragraph 1.2.).

#### **3.5 *De facto or de jure***

*Editor's note: The settlement process (effective regret) is contingent upon an admission of guilt. (See section 2.1.4 and 3.1 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

### **4. Transparency**

#### **4.1 Public access to information on settlements**

##### **4.1.1 Is information about settlement available to the public?**

No.

Under Article 177 of the Code of Criminal Procedure, all pre-trial investigation data are not to be disclosed. In addition, data regarding a pre-trial investigation may be disclosed during a criminal trial only with the prosecutor's consent.

Depersonalised court rulings are available to everyone interested via the following e-court systems and websites, provided that a case has been examined in a public criminal trial:

- [www.infolex.lt](http://www.infolex.lt);
- [www.eteismai.lt](http://www.eteismai.lt);
- [www.teisesgidas.lt](http://www.teisesgidas.lt).

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement)

Limited.

As mentioned above, depersonalised court rulings are published on e-court systems, provided that a criminal case has been examined in a public trial.

In addition, the Code of Criminal Procedure provides for partial or full anonymity of witness testimony and offers additional guarantees to secret witnesses who report corruption (Articles 198–200 of the Code of Criminal Procedure). The Code of Criminal Procedure allows witnesses to request anonymity in investigations. If this is granted, only the prosecutor, the pre-trial investigation officer and the judge have the right to know the witness's identity (Articles 199–202 of the Code of Criminal Procedure). It means that an anonymous witness in all criminal case documents is identified by a number (Article 201 (1) of the Code of Criminal Procedure).

However, there is no specific legislation on whistle-blower protection in the public or private service in Lithuania. However, it should be pointed out that there is a draft law on the protection of whistleblowers, which has been submitted to and will be discussed by the Lithuanian Parliament. The aim of this law is to ensure the protection of whistle-blowers and to encourage information on corruption-related crimes to be revealed more actively.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

The Special Investigation Service (SIS) is a law enforcement agency with specialisation in investigating corruption-related crimes (including foreign bribery). SIS collects all significant data regarding corruption-related crimes and provides summarised statistics at the end of the year (for further information, see paragraph 4.2.1).

#### **4.2.1 If yes, is this data publicly available?**

Yes. [www.stt.lt](http://www.stt.lt).

It should be pointed out that data regarding the investigation, prosecution and resolution of foreign bribery allegations is provided by SIS in the form of summarised statistics. It means that all the significant data do not give access to any specific cases or details regarding investigation. SIS provides activity reports containing statistics on completed pre-trial investigations that were submitted to court, court rulings in examined criminal cases in trials, etc.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Taking into consideration corruption-related criminal acts and criminal cases which have been examined in a public trial, it should be noted that only in very rare cases the court gives an opportunity for someone to be released from criminal liability under Articles 226(6) and 227(5).

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

A single criminal act committed both in the territory of the State of Lithuania and abroad shall be considered to have been committed in the territory of the Republic of Lithuania if it was initiated or completed or discontinued in this territory (Article 4(3) of the Criminal Code). In addition, under Article 3(8) of the Code of Criminal Procedure, a person cannot be punished twice for the same criminal act (*ne bis in idem* principle). It leads to the rule that someone who has committed a crime is punished for it only once.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

A person (including citizens of the Republic of Lithuania and other permanent residents of Lithuania who have committed crimes abroad) who has committed corruption-related crimes (bribery, trading in influence, graft) shall not be held liable under the Criminal Code where the person: (1) has served a sentence imposed by a foreign court; (2) has been released from serving the entire or part of the sentence imposed by a foreign court; (3) has been acquitted or released from criminal liability or punishment by a foreign court's judgment, or no penalty has been imposed by reason of the statute of limitation or on other legal grounds provided for in that state (Article 8(2) of the Criminal Code).

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

Although the general provisions under which alleged wrongdoers and prosecuting authorities cooperate in providing a person with an opportunity to be exempted from criminal liability are governed by Lithuania's laws, the final decision depends on the prosecutor and the court's discretion. The court will always assess all the circumstances when deciding whether an offender should be released from criminal liability.

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Taking into consideration that release from criminal liability under Article 226(6) and Article 227(5) is applied in very rare cases, it should be concluded that cooperation between the prosecuting authority and alleged wrongdoers is not encouraged enough to be practised widely.

### **6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Cooperation between the authorities and alleged wrongdoers should be encouraged, as it is not very effective in the current situation. As already mentioned, effective regret allows an individual who has offered, promised or paid a bribe to avoid punishment by reporting this fact to the law enforcement authorities before the bribe is discovered. However, the aim to assist law enforcement officials in prosecuting government officials who abuse their office by giving bribe gives an incentive to report the bribes they pay is less relevant in the case of foreign bribery because there is no guarantee that the foreign official who has been given a bribe will be prosecuted if the bribe giver comes forward. Such an official is often in a different country than that of the bribe giver, and the country that would be in a position to assert jurisdiction over the bribe giver may not be able or willing to prosecute the bribe recipient (see *Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia* of the OECD Anti-Corruption Network for Eastern Europe and Central Asia, page 24).

### **6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

There are several steps that have already been taken by Lithuania to encourage such collaboration: (1) the Criminal Code allows witnesses to request anonymity in investigations; (2) lump sums are available for providing valuable information to SIS on corruption-related offences. Moreover, there is a draft law on the protection of whistleblowers, which has been submitted to and will be discussed by the Lithuanian Parliament (for further explanation, see paragraph 4.1.2).

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

The financial advantage (a lump sum) can be gained by providing valuable information about corruption-related crimes to SIS. The said opportunity is confirmed by an order of the SIS director on remuneration to persons who have provided valuable information to SIS on corruption-related offences. The actual value of information provided by someone is separately evaluated in each case. A lump sum can be granted to a person under the following circumstances: (1) information which has been provided is associated with corruption-related offences; (2) a person provides information about a corruption-related offence voluntarily and before his recognition as a suspect or before the delivery of a summons for questioning; (3) provided information is valuable for revealing corruption-related crimes; (4) a person has not received remuneration before for revealing a corruption-related criminal act.

A lump sum may be up to 75 MSL (€2,850) where a minor crime has been revealed; up to 385 MSL where a less serious crime has been revealed; up to 750 MSL where a serious crime has been revealed. Anyone who knows or has a reasonable suspicion that a corruption-related crime has been or is to be committed is also encouraged to contact SIS, regardless of the informant's citizenship, age, social status or any other factor.

SIS receives reports in a variety of ways: by telephone through a 24-hour hotline; by mail at SIS's headquarters or at any field office via the SIS website; in person via appointment or during visiting hours. Although Lithuanian officials have explained that informants 'occasionally' prefer to remain anonymous, SIS staff prefer to identify the informant, so they can follow up on the report. If requested, they will ensure the confidentiality of all details and information provided to them (see *Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia* of the OECD Anti-Corruption Network for Eastern Europe and Central Asia, page 51).

*Guy Loesch, Partner, Linklaters LLP (Luxembourg)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Articles 246 to 250 of the Criminal Code sanction corruption, traffic of influence and the corruption of judges. Article 247 of the Criminal Code criminalises active bribery and trading in influence and provides that:

‘Any person unlawfully proposing or giving directly or indirectly an offer, a promise, a donation, a gift or an advantage of any kind to persons holding public authority, or public officials, or persons entrusted with a mission of public service, or agents entrusted with an elective public mandate, with the objective of getting this person to: (1) carry out or abstain from carrying out an act relating to his or her office, duty or mandate, or facilitated by his or her office, duty or mandate or (2) abuses his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision, shall be punishable by imprisonment of five to ten years and a fine of e500 to e187,500.’

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Luxembourg has signed and ratified the following international conventions and treaties:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 21 November 1997 (approved by law dated 15 January 2001);
- the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, dated 15 November 2000 (approved by a law dated 18 December 2007); and
- the United Nations Convention against Corruption dated 31 October 2003 (approved by law dated 1 August 2007).

Luxembourg also signed and ratified the following regional conventions and treaties:

- Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 26 July 1995;
- Second Protocol drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union of the Convention on the protection of the European Communities’ financial interests of 19 June 1997;
- Council of Europe Criminal Law Convention on Corruption of 27 January 1999; and

- Additional Protocol of the Council of Europe Criminal Law Convention on Corruption of 15 May 2003.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Pursuant to Article 252 of the Criminal Code, the provisions punishing corruption also apply to foreign public authorities (public officials of other States, European Union officials, officials or agents of other public international organisations).

### **1.4 Are facilitation payments allowed in your jurisdiction**

No.

The Articles of the Criminal Code relating to bribery and transposing the OECD Convention of 1997 do not include the term ‘undue’ contained in Article 1 of the Convention. As a result, ‘facilitation payments’ are considered an offence under Luxembourg law.

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Under Luxembourg law, a corporate entity may be held liable if a crime or an offence has been committed by its corporate bodies on behalf of the company (Law of 3 March 2010 Introducing Criminal Liability of Legal Entities into the Criminal Code and the Code of Criminal Investigation). Corporate criminal liability may extend to individuals if they are perpetrators or accomplices.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The State Prosecutor for Economic and Financial crimes (*Parquet économique et financier*).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Pursuant to the principle of discretionary prosecution, the prosecutor’s office has sole discretion to decide which action to undertake when an offence is reported.

#### **2.1.2 Deciding what charges to file?**

Yes.

Pursuant to the principle of discretionary prosecution, the prosecutor shall take the necessary steps to investigate and prosecute criminal offences. The decision to decide which charges to file will depend on the outcome of the prosecutor’s investigation.

### **2.1.3 Deciding whether to drop charges?**

Yes.

The prosecutor has the sole discretion – at the exclusion of all other members of the judiciary and even the prosecutor’s immediate superiors – to decide whether or not to drop charges. However, the prosecutor has to justify his decision to take no further action. Further, he can revoke his decision, particularly if he is informed of new elements in the case.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Pursuant to the Law of 24 February 2015 on the Judgment upon Consent (*jugement sur accord*), the prosecutor has the initiative to plea bargain (together with the accused, see 3.3.1). Additionally, the prosecutor has the right to reverse his decision to plea bargain without having to justify his decision.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of opportunity.

Pursuant to Article 23 section 1 of the Code of Criminal Procedure, the Prosecutor receives complaints and information and considers the appropriate follow-up.

Moreover, pursuant to Article 23 section 2 of the Code of Criminal Procedure, any authority, public office holder or civil servant who is informed of a crime or an offence, is required to inform the Department of Public Prosecution thereof without delay and to transmit to the Department any information, reports or documents relating thereto.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The implementation of the principle of prosecutorial discretion necessarily entails an assessment of the trouble to the public order.

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

The notion of disturbance of public order is clearly defined but the prosecutor has a margin of manoeuvre to decide whether or not to prosecute.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

The principle of prosecutorial discretion applies both to individual and corporate defendants.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Foreign bribery allegations can be settled by way of a ‘judgment upon consent’ procedure (Law of 24 February 2015), which is similar to a structured settlement procedure. However, a ‘judgment upon consent’ only applies if the criminal sentence incurred is less than or equal to five years’ imprisonment. The incurred imprisonment sentence for corruption in Luxembourg ranges between five years and ten years. In other words, the settlement procedure is only possible if the incurred imprisonment sentence for the allegation of corruption is limited to five years.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

The ‘judgment upon consent’ settlement is conditional on the admission of guilt by the defendant.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Jugement sur accord.*

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

The ‘judgment upon consent’ procedure only requires the accused to recognise his wrongdoing.

##### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

The accused does not lose any of his privileges during the judgment upon consent procedure.

##### **3.2.4 What form(s) can a structured settlement take?**

The structured settlement is formalised by an agreement entered into between the prosecutor and the alleged bribe payer.

### **3.2.5 What are the usual terms of such an agreement?**

The agreement should contain:

- the qualification of the offences under the Criminal Code recognised by the alleged bribe payer;
- the extenuating circumstances taken into account (if applicable);
- all major and minor penalties which have to be pronounced by the judge;
- the decision that has to be taken by the judge regarding restitutions and costs of proceedings; and
- the decision that has to be taken by the judge with regards the claims for damages and the decision ordering payment of the amounts to be paid by the alleged bribe payer.

Moreover, the act should list the name, surname, birthdate and residence of the alleged bribe payer. It has to be signed by the prosecutor, the alleged bribe payer and his lawyer.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The sentence proposed by the prosecutor cannot exceed five years' imprisonment.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

To the best of our knowledge, such settlements have never been reversed for non-compliance since the entry into force of the law of 2015.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The proposal to enter into a settlement agreement is done either at the initiative of the prosecutor or at the request of the accused (Article 564 of Code of Criminal Procedure).

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

An agreement has to be filed in court as soon as the settlement has been concluded between the prosecutor and the accused.

Indeed, the Criminal Chamber of the District Court (*Chambre correctionnelle du Tribunal d'Arrondissement*) is seized by the prosecutor and has to rule on the validity of the agreement (checking all of the usual terms of the agreement as set out above).

If the agreement seems to be irregular but could be regularised, the judge can ask the parties to review it (or can simply modify it with the parties' consent). If not, the judge can nullify the act. In any event, the judge cannot modify the content of the agreement without the parties' consent, especially with regard to the settlement of the sentences.

A civil party cannot oppose the settlement agreement or ask for the deferment of the 'judgment upon consent'. However, the civil party can file a civil suit if its claims have not been settled.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

If yes, is this outlined in regulations, guidelines or another piece of binding material?

This is outlined in the law (Law of 24 February 2015 modifying the Code of Criminal Procedure in order to introduce the judgment upon consent).

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: The Chief State Prosecutor (*Procureur Général d'Etat*) is in charge of monitoring the implementation of the *jugement sur accord*.

The Luxembourg Registry (*Administration de l'enregistrement et des domaines*) is responsible for the collection of fines. If the judge has also ruled on the civil claim, it is for the civil party to pursue the execution of the civil claim (Article 197 of the Code of Criminal Procedure).

### 3.3.3.2 Can this authority impose penalties for non-compliance?

Yes.

If the accused does not comply with the settlement, an incarceration can be ordered. Notably, if the accused does not pay his fines, he can be incarcerated as set out by the ‘*Contrainte par corps*’ (enforcement by committal) procedure (Articles 29 *et seq* of the Criminal Code).

## 3.4 Outcome of the structured settlement

### Statutory Provisions:

Financial penalties: 1 Article 575 para 1 and 2 of the Code of Criminal Procedure.

Disgorgement of profits: 1 Articles 565 and 578 of the Code of Criminal Procedure.

Compensation to third parties: 1 Articles 565 and 578 of the Code of Criminal Procedure.

Personal liability: 1 Article 575 of the Code of Criminal Procedure.

There are no guidelines available, but the prosecutor would not enter into a bargaining of the sentence.

## 3.5 *De facto or de jure*

*Editor’s note. The settlement process (judgment upon consent) is contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). This would constitute a de facto, plea-based, settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

The hearing whereby the judge rules on the settlement agreement is a public hearing. However, there is not yet a public record on existing case law.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited.

The terms of the settlement entered into between the prosecutor and the accused remain secret until the hearing whereby the judge has to rule on the agreement.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

A company cannot negotiate the contents of the public statements. Indeed, when the settlement is approved by the company, the judge will be seized and will rule on the agreement during a public hearing. It is for the prosecutor to decide whether or not a public statement will be made. So far, there has never been a public statement.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

A Corruption Prevention Committee (*Comité de Prévention de la Corruption*) has been put in place. The Corruption Prevention Committee is composed of members of the ministries and notably aims at gathering information about the fight against corruption (*Règlement grand-ducal du 15 février 2008 déterminant la composition et le fonctionnement du Comité de Prévention de la Corruption*).

**4.2.1 If yes, is this data publicly available?**

No.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

The judgment upon consent procedure is relatively new but has already been used multiple times. According to our information – to be made public soon – 14 judgments approving structured settlements have been issued in 2016, mainly in relation to tax fraud cases. For example, in June 2016, a neurosurgeon recognised his wrong doing (not declaring €250,000 to the tax administration) and was sentenced by a judgment upon consent.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Article 4 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides that when more than one country has jurisdiction over an alleged offence involving bribery of foreign public officials, the countries involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

Article 21 of the European Convention on Mutual Assistance in Criminal Matters provides for the option of providing information with a view to prosecution if the judicial authorities of one party deem it appropriate for the judicial authorities of another Member State to engage proceedings. Moreover, consultations and eventual referral of a case to another State with whom Luxembourg does not have a treaty relationship may be envisaged under the condition of reciprocity.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

If a judgment is recognised by Luxembourg courts, the *ne bis in idem* principle applies. If an accused has been sentenced or acquitted by a foreign court for bribery allegations, the national judge in Luxembourg will not be able to prosecute and to sentence the same person for the same acts.

Articles 54 to 58 of the Schengen Agreement provide that:

‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’

Similarly, Article 50 of the Charter of Fundamental Rights of the European Union provides that: ‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

There is no legal basis regarding the status of a foreign settlement. It could be envisaged that if the foreign settlement has the force of *res judicata*, the principle *ne bis in idem* would apply.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

Even if the prosecutor has sole discretion to propose a sentence to be validated by a judge, making a possible outcome harder to predict, the prosecutor cannot propose a sentence exceeding a five years' imprisonment penalty.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Such cooperation is encouraged. Indeed, the Law of 2015 on the *jugement sur accord* aims at easing the workload of judges by proposing to the accused an accelerated procedure and a lesser sentence. It further avoids lengthy and cumbersome investigations both for the prosecutor and accused.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Such cooperation should indeed be encouraged for the reasons set out under point 6.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Difficult to say. The prosecutor would hardly publicly encourage to follow that route. But social welfare institutions and lawyers could certainly provide guidance and advice to seek a structured settlement.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Though companies should certainly cooperate with the authorities, such companies would not necessarily have a financial advantage, at least not from the prosecution's view. A structured settlement, however, would avoid to have to suffer a lengthy criminal investigation and possibly a largely publicised court hearing, hence also saving lawyer's fees and reputational damage.

*Ivan Štrbac, Attorney-at-Law, Tomislav Šunjka Law Office*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

- Criminal Code (Official Gazette no 37/96; 226/2015);
- Law on preventing corruption (Official Gazette of the Republic of Macedonia no 28/2002; 46/2004; 126/2006; 10/2008; 161/2008 and 145/2010);
- Decisions of the Constitutional Court of the Republic of Macedonia, published in the Official Gazette of the Republic of Macedonia:
  - U no 190/2002 of 30 April 2003, no 33/2003;
  - U no 44/2005 of 21 September 2005, no 89/2005 and
  - U no 160/2006 of 10 January 2007, no 7/2007);
- Law on Financial Police (Official Gazette of the Republic of Macedonia, nos 12/2014, 43/2014 и 33/2015);
- Law on Money Laundering Prevention and other Criminal Proceeds and Financing Terrorism (Official Gazette Nos 4/2008, 57/2010, 35/2011 and 44/2012);
- Law on preventing conflict of interests (Official Gazette of the Republic of Macedonia, Nos 70/2007, 114/2009 and 6/2012);
- Law on financing political parties (Official Gazette of the Republic of Macedonia, Nos 76/2004; 86/2008, 161/2008, 96/2009, 148/2011);
- Decision of the Constitutional Court of the Republic of Macedonia, U no 36/2006 dated 08 March 2006 published in the Official Gazette of the Republic of Macedonia;
- Law on free access to public information (Official Gazette of the Republic of Macedonia, Nos 13/2006; 86/2008 and 6/2010);
- Law on Public Procurement (Official Gazette of the Republic of Macedonia, Nos 136/2007, 130/2008, 97/2010, 53/2011, 185/2011, 15/2013, 148/2013, 160/2013, 28/2014, 43/2014 and 130/2014);
- Law on Courts (Official Gazette of the Republic of Macedonia, Nos 58/2006, 62/2006, 35/2008 and 150/2010);
- Decisions of the Constitutional Court of the Republic of Macedonia, no 256/2007 dated 16 April 2008, published in the Official Gazette of the Republic of Macedonia;

- no 61/2008, no 74/2008 dated 10 September 2008;
- no 118/2008 and no 124/2008 dated 14 January 2009; and
- no 16/2009 and no 12/2011 of 29 February 2012, published in the Official Gazette of the Republic of Macedonia no 39/2012);
- Law on the Public Prosecution Office;
- State Audit Law (Official Gazette of Republic of Macedonia No158/10 and 135/11);
- Law on Civil Servants (Official Gazette, Nos 27/2014, 142/2016);
- Code of Ethics for Civil Servants (Official Gazette, No. 133/2011);
- Criminal Procedure Law (Official gazette No 150/2010).

**1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Council of Europe’s Criminal Law Convention on Corruption;

United Nations Convention against Corruption (UNCAC).

**1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

According to Articles 357–359 of the Criminal Code (Official Gazette no 37/96, 226/2015) in connection with Article 117 of the Criminal Code, there is a prescribed limited extraterritorial effect of the Criminal Code in regard to the criminal acts of bribery of public officials and bribery by public officials.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

There is a special section of the Criminal Code which deals with corporate criminal liability.

In cases prescribed by law, a legal entity is liable for a criminal act committed by the responsible person of such legal entity, on behalf, on the account or for the benefit of the legal entity.

The legal entity is also liable for a criminal act which is committed by its employees or representatives that resulted in significant benefit in assets or resulted in damages for someone else, if:

- the execution of a conclusion, order or any other decision or approval by administrative body, management body or supervisory body, means perpetration of a criminal act; or

- the crime was committed due to omission of obligatory supervision by the administrative body, management body or supervisory body; or
- the administrative body, management body or supervisory body failed to prevent the criminal act or concealed it or failed to report the crime before the initiation of criminal proceeding against the perpetrator.

Under the terms specified in paragraphs (1) and (2) of this article, all legal entities are liable, with the exception of the State.

The Self-Government units are liable only for acts committed outside their public competences.

Under the conditions specified in paragraphs (1) and (2) of this article, a foreign legal entity is criminally liable, if the act has been committed within the territory of the Republic of Macedonia, regardless whether there is a representative office or subsidiary of the legal entity that operates within the territory of the country.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No. If not, which authorities investigate and prosecute corruption, and how do they allocate responsibility?

- The prosecutor's offices that distribute responsibility in general by two criteria: (1) territorial and (2) prescribed sanctions;
- The Specialised Prosecutor's Office for Fighting Organised Crime and Corruption (it is competent to prosecute the perpetrators of criminal acts of organised crime and corruption for the whole territory of Macedonia and can request employees from law enforcement institutions to act under its coordination);
- Financial Police, Ministry of Finance (to detect and investigate offences involving financial crime, to initiate and conduct misdemeanour procedures, and introduce offence procedures to the competent bodies);
- Sector for Organised Crime and Corruption, Ministry of Interior.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Article 30 of the Law on the Public Prosecution Office prescribes the following:

‘In the realisation of his function of prosecution of perpetrators of criminal offences and misdemeanours, the Public Prosecutor shall:

- have the authorisations that also belong to the Ministry of the Interior and other state institutions for detection of criminal offences and their perpetrators and collection of evidence for the purpose of criminal prosecution of the perpetrators of criminal offences;
- in the pre-investigative procedure, have an authority to issue orders for the application of special investigative measures;
- manage the pre-investigative procedure and dispose of the authorised officials from the Ministry of Interior, the Financial Police and the Customs Administration, pursuant to the law;
- have the right to undertake any actions necessary for the detection of the criminal offence and detection and prosecution of its perpetrator, for which, the law authorises the Ministry of Interior, the Financial Police and the Customs Administration;
- decide whether to initiate or continue with criminal prosecution of the perpetrators of criminal offences;
- move and represent indictments before the courts;
- enunciate regular and extraordinary legal remedies against judicial decisions;
- file requests for initiation of misdemeanour proceedings and undertake other actions prescribed by law.’

Public prosecutors shall also perform other actions prescribed by the law, to ensure efficient functioning of the criminal justice system and prevention of crime. If no actions are taken by the other state institutions referred to in paragraph (1), line 1 of this Article, the public prosecutor on his own, may undertake all the actions that are usually undertaken by authorised personnel from the Ministry of Interior or other state institutions.

### **2.1.2 Deciding what charges to file?**

Yes. Please see 2.1.

### **2.1.3 Deciding whether to drop charges?**

Yes. Please see 2.1.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

Principle of legality and mandatory prosecution.

Principle of opportunity.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

### **2.3.1 How clearly are the factors of this threshold defined?**

There is no specified/prescribed legal threshold.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Under the provisions of the Criminal Procedure Code, the parties can only bargain over the type of criminal sanction and not over the composition of the indictment. The defendant is also released from the obligation to provide any facts that will harm him/her or his/hers close relatives and has a privilege of non-self-incrimination. Additionally, he has a right to state all of the relevant facts that may benefit his/hers position.

### **3.5 *De facto or de jure***

*Editor's note: Plea bargain process contingent upon an admission of guilt. (See section 3.1 above and 4.1 below). This would constitute a de facto, plea-based, settlement model following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

Since settlements as such do not exist in the existing legal framework (but only plea bargains with the possibility to negotiate the sentence), this chapter shall be passed considering that it deals with public access to the settlements.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

No person shall be tried and sentenced for a criminal offence for which he/she has already stood trial and a final and valid judicial verdict exists.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Considering that the cooperation in this regard does not exist, this and following questions are unanswered.

*Tamara Janković, Attorney-at-Law, Tomislav Šunjka Law Office*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Anti-bribery Rules are present in various laws:

- the Law on Prevention of Corruption (published in the Official Gazette of Montenegro (MNE) no 53/2014);
- Criminal Code (published in the Official Gazette of MNE nos 70/2003, 13/2004, 47/2006 and Official Gazette of MNE nos 40/2008, 25/2010, 32/2011, 64/2011 – other law, 40/2013, 56/2013, 14/2015 42/2015 and 58/2015 – other law);
- the Law on Prevention of Money Laundering and Financing of Terrorism (published in the Official Gazette of MNE no 33/2014);
- the law on Public Procurement (published in the Official Gazette of MNE no 42/2011, 57/2014 and 28/2015);
- the Law on Civil Servants and State Employees (published in the Official Gazette of MNE no 39/2011, 50/2011, 66/2012, 34/2014, 53/2014 – other law and 16/2016);
- Law on Seizure and confiscation of material benefit derived from criminal activity (published in the Official Gazette of MNE no 58/2015); and
- Law on Judicial Council and judges (published in the Official Gazette of MNE).

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

- The Council of Europe Criminal Law Convention on Corruption (ETS 173);
- Additional Protocol to the Criminal Law Convention on Corruption (ETS 191);
- The United Nations Convention against Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The Criminal Code prescribes that the criminal legislation of Montenegro shall apply to a citizen of Montenegro and to an offender who became a citizen of Montenegro (after the commission of the offence) who commits a criminal offence abroad, if he is found on the territory of Montenegro or if he is extradited to Montenegro (Article 136 of the Criminal Code).

Additionally, criminal legislation of Montenegro shall also be applicable to a person who is not citizen of Montenegro and who commits criminal offence from Articles 422 (Trading in Influence), 422a (Incitement to Trading in Influence), 423 (Passive Bribery) and 424 (Active Bribery) in the commission of which a national of Montenegro is involved in any way, if he is caught in the territory of Montenegro or gets extradited to Montenegro.

It is not necessary for prosecution to be initiated that the criminal offences referred to in Articles 422, 422a, 423 and 424 of the Criminal Code are also punishable under the law of the country where the offence was committed.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Article 16 of the Law on Prevention of Corruption provides that public officials shall not accept money, securities or precious metal in connection with the exercise of public function, regardless of their value, as well as that public officials shall not accept gifts in connection with the exercise of public function, except for protocol and appropriate gifts.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Corporate criminal liability is regulated by the Law on the liability of legal entities for criminal offences (published in the Official Gazette of MNE Nos 2/07, 13/07, 73/10, 30/12 and 39/16).

A legal entity may be liable for criminal offences prescribed under a special part of the Criminal Code of Montenegro and for other criminal offences prescribed under other laws if the conditions for liability of legal entities prescribed under this law are met (Article 3).

Grounds for liability of a legal entities are prescribed under provision of Article 5 as following: a legal entity shall be liable for a criminal offence of a responsible person who acted within his/her authorities on behalf of the legal entity with the intention to obtain any gain for the legal entity. Article 6 prescribes that the legal entity shall be held liable for a criminal offence even if the responsible person who committed such criminal offence has not been convicted of such criminal offence.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The competent authorities for investigation and prosecution of corruption differ depending on whether a criminal offence represents a higher or lower level of corruption.

The Special State Prosecutor's Office shall have jurisdiction for the prosecution of perpetrators of high-level corruption criminal offences (Official Gazette of Montenegro, No 10/2015) which includes, among other: trading in influence; inciting to engage in trading in influence; active bribery and passive bribery, provided that those criminal offences are committed by a state official (Article 3).

A public official, in terms of this law (the Law on Special Public Prosecutor's Office, Official Gazette of MNE, No 10/2015 ), shall be a person who is elected, nominated or appointed to a state authority, state administrative authority, local self-government authority, local administration authority (hereinafter referred to as: official authority), independent authority, regulatory authority, public institution, public enterprise or to any other business organisation or legal entity that exercises public powers or undertakes activities of public interest or is owned by the state, as well as a person whose election, nomination and appointment are subject to the consent of the official authority.

The Special Public Prosecutor's Office shall take all the actions falling within its jurisdiction before the Special Division of the High Court in Podgorica. The seat of the Special Public Prosecutor's Office shall be in Podgorica.

The same Law governs the relationship between the Special Public Prosecutor's Office and the Police Department as follows: police tasks related to the criminal offences referred to in Article 3 of this Law (which includes high-level corruption) shall be carried out by police officers employed in a special organisational unit of the administrative authority responsible for police work with the Special Public Prosecutor's Office (hereinafter referred to as: Police Division).

Additionally, to investigate criminal offences that fall within jurisdiction of the Special Public Prosecutor's Office, the chief special prosecutor may delegate certain tasks to the civil servants employed in administrative authorities responsible for tax affairs, customs affairs, affairs involving prevention of money laundering and terrorist financing and inspection affairs.

The aforementioned refer to high-level corruption which requires the criminal offence to be committed by a state official. However, should a criminal offence of active bribery, for example, be committed by a person who is not a state official towards a state official, the competent authorities for investigation and prosecution shall be the Basic Public Prosecutor's Office which shall take actions falling within its jurisdiction before the competent Basic Court. There is also no special Police Department which will take police tasks regarding corruption that are not high-level.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

The Law on Public Prosecution Office (Official Gazette of MNE, No 11/2015) prescribes that Public Prosecutors shall prosecute criminal offences that are prosecuted ex officio, independently, that they shall not act under anybody's influence and that nobody shall influence the Public Prosecutors in the exercise of their duties. The only exception may be mandatory operating instructions of higher ranked Public Prosecutors which they must obey.

Article 131 prescribes the following:

- mandatory operating instructions, according to this Law, shall include general instructions and instructions to be followed in individual cases (paragraph 2); and
- general instructions shall be issued by the Supreme Public Prosecutor and their adoption may be initiated by the Head of the Public Prosecutor's Office, when it is considered necessary. General instructions shall be issued in writing (paragraph 3).

Instructions to be followed in an individual case shall be issued by the:

- Supreme Public Prosecutor for Public Prosecutors at the Supreme Public Prosecutor's Office and for the Supreme Special Prosecutor, Heads of High and Basic Public Prosecutor's Offices;
- Supreme Special Prosecutor for Special Prosecutors from that Prosecutor's Office;
- Head of the High Public Prosecutor's Office for Public Prosecutors from that Prosecutor's Office and Heads of the Basic Public Prosecutors' Offices in their areas of work; and
- Heads of the Basic Public Prosecutor's Offices for the Public Prosecutors of those Prosecutor's Offices (paragraph 4).

Article 132 prescribes the following:

- instructions to be followed in an individual case shall be made in writing and with an explanation. Exceptionally, when circumstances do not permit it, instructions may be verbal, and yet, within a reasonable time, shall be given in writing.

### **2.1.2 Deciding what charges to file?**

Yes.

In addition to the explanation given under item 2.1.1, the Criminal Procedure Code (Official Gazette of MNE, Nos 57/2009, 49/2010, 47/2014, 2/2015, 35/2015 and 58/2015) prescribes that the Public Prosecutor shall initiate prosecution when there is a reasonable suspicion that a certain person has committed a criminal offence that is prosecuted *ex officio* (Article 19). The basic right and the main duty of the Public Prosecutor shall be the prosecution of the criminal offenders (Article 44).

For criminal offences prosecuted *ex officio*, the Public Prosecutor shall be competent to:

- issue binding orders or directly manage the activities of the administrative authority competent for police affairs in the preliminary investigation;
- render decisions on the postponement of criminal prosecution, when envisaged so by the present Code and reject criminal charges for reasons of fairness;
- order the investigation to be conducted, conduct the investigation and perform urgent evidentiary actions during the preliminary investigation;

- conclude plea agreements with accused persons, after having collected evidence in line with the present Code;
- present and represent indictments (ie, bills of indictment before competent courts);
- file appeals against judgments; and
- undertake other actions provided for by this Code (Article 44).

### **2.1.3 Deciding whether to drop charges?**

Yes.

The Criminal Procedure Code prescribes that Public Prosecutors may drop charges before the end of the main hearing before a first instance court and they may do so before a superior court in cases envisaged by this Code.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

In accordance with the Criminal Procedure Code, the Public Prosecutor may decide to plea bargain with the defendant for criminal offences for which the Public Prosecutor prosecutes ex officio, except for criminal offences of terrorism and war crimes. The Law provides the subject-matter of the plea agreement. But, even when the Public Prosecutor decides to conclude a plea agreement, he is obliged to submit it to the Court and the Court shall decide through a ruling whether a plea agreement should be rejected, dismissed or accepted. When a ruling on acceptance of the plea agreement becomes final, the Court shall, without delay, and no later than within three days, render a decision that the defendant is found guilty in accordance with the accepted agreement.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

As stated under item 2.1.2, the State Prosecutor shall initiate prosecution when there is reasonable suspicion that a certain person has committed a criminal offence that is prosecuted ex officio. Additionally, the Criminal Procedure Code prescribes that the Public Prosecutor brings an indictment within 15 days from conclusion of the investigation, and which shall be concluded when he finds that the case has been sufficiently clarified.

### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

The Criminal Procedure Code neither defines the term ‘reasonable suspicion’, nor when the case could be ‘sufficiently clarified’.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Article 272 of the Criminal Procedure Code prescribes that the Public Prosecutor may decide to postpone criminal prosecution for criminal offences punishable with a fine or imprisonment for a term of up to five years, when he/she establishes that it is not functional to conduct criminal proceedings, considering the nature of the criminal offence and the circumstances of its commission, the offender’s past and personal attributes, and if the suspect accepts to fulfil one or several of obligations provided by this Code.

The suspect shall fulfil the accepted obligation within six months at the the latest. If he fulfils his obligation within stated period, the State Prosecutor shall dismiss the criminal charges.

A structured settlement, as described above, may be concluded only for criminal offences punishable by a fine or imprisonment for a term up to five years. The alleged bribe payer may resolve the foreign bribery allegation using this process (see Article 424 paragraph 2 of the Criminal Code (Active Bribery)).

Article 424 of the Criminal Code (Active Bribery) prescribes the following:

- Paragraph 1: (a) Anyone who directly or indirectly gives, offers or promises a bribe to a public official for himself or for another person, to perform an official or other act he must not perform or not to perform an official or other act he must perform; or (b) anyone who intercedes in bribing a public official in the manner described above shall be punished by a prison term from one to eight years.
- Paragraph 2: (a) Anyone who directly or indirectly gives, offers or promises a bribe to a public official for himself or for another person, to perform an official or other act he must perform or not to perform an official or other act he must not perform, or (b) anyone who intercedes in bribing a public official in the manner described above shall be punished by a prison term from six months to five years.

Additionally, it must be noted that an alleged bribe payer may enter a structured settlement only during the investigation, prior to the indictment has been filed by the Public Prosecutor.

## **3.2 Form, features and terms of structured settlements**

### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

If, by way of an agreement on the admission of guilt, the accused person fully confesses to the criminal offence, and such agreement on the admission of guilt concluded between the Public Prosecutor and the accused is accepted by the court, as described under item 2.1.4, the court shall render a decision that the defendant is found guilty. In this case (by way of plea bargain), the accused person becomes convicted and cannot enter a structured settlement.

*Editor's note: settlements under the Article 272 of the Criminal Procedure Code procedure are concluded prior to indictment and do not require an admission of guilt. (See section 3.1 above).*

#### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Odlaganje krivičnog gonjenja.*

### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Other.

As stated under item 3.1, Article 272 of the Criminal Procedure Code prescribes that the Public Prosecutor may decide to postpone criminal prosecution for criminal offences punishable by a fine or imprisonment for a term up to five years, when he/she establishes that it is not functional to conduct criminal proceedings having in mind the nature of a criminal offence and the circumstances of its commission, the offender's past and personal attributes, and if the suspect accepts to fulfil one or several of obligations provided by this Code.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

### **3.2.4 What form(s) can a structured settlement take?**

Written form. The Public Prosecutor delivers a decision to a suspect, injured party, if any, or the beneficiary humanitarian organisation or public institution.

### **3.2.5 What are the usual terms of such an agreement?**

The decision shall contain obligations imposed by the Public Prosecutor, which a suspect has to fulfil and which are selected from obligations provided by the Criminal Code in accordance with discretionary authorisation of the Public Prosecutor, as well as the term in which the suspect has to fulfil those obligations.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The Public Prosecutor may impose one or more of the following obligations to a suspect:

- to eliminate a detrimental consequence or to compensate the damage caused by the criminal offence;
- to fulfil obligations as to the payables for material support or other liabilities determined by a final judgment;
- to pay a certain amount of money for the benefit of a humanitarian organisation, fund or public institution; and/or
- to carry out some community service or humanitarian work.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

Should a suspect fail to fulfil the obligation(s) imposed by the Public Prosecutor within the prescribed period by the abovementioned Decision, the Public Prosecutor shall not dismiss the criminal charges. Instead, the Public Prosecutor shall continue with the criminal procedure and decide whether to file an indictment against the suspect.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

As explained under item 2.1.2, the Public Prosecutor is entitled to render decisions on the postponement of criminal prosecution.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

No.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: an officer of the authority in charge of executing criminal sanctions.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

### **3.4 Outcome of the structured settlement**

#### **Statutory Provisions:**

Financial penalties: the Public Prosecutor may impose on a suspect an obligation to pay a certain amount of money for the benefit of a humanitarian organisation, fund or public institution.

Disgorgement of profits: the Public Prosecutor may impose on a suspect an obligation to eliminate a detrimental consequence caused by the criminal offence.

Compensation to third parties: the Public Prosecutor may impose on a suspect an obligation to compensate the damage caused by the criminal offence and to fulfil obligations as to the payables for material support or other liabilities determined by a final judgment.

Obligations to cooperate with other agencies: the Public Prosecutor may impose on a suspect an obligation to carry out some community service or humanitarian work.

### **3.5 *De facto or de jure***

Considering that the Public Prosecutor may decide to postpone criminal prosecution (enter a structured settlement), when he/she establishes that it is not functional to conduct criminal proceedings having in mind the nature of a criminal offence and the circumstances of its commission, the offender's past and personal attributes, there are no strict conditions which are to be met for a structured settlement to be entered. Instead, decision on whether a structured settlement shall be entered or not depends only on the Public Prosecutor.

*Editor's note: The Article 272 of the Criminal Procedure Code settlement process is not contingent upon an admission of guilt. (See section 3.1 above). This constitutes a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

In accordance with the Law on free access to information of public importance (Published in the Official Gazette of MNE No 44/2012), the Public Prosecutor must

act upon a request for access to information of public importance which refers to confirmed indictments, orders on conducting the investigation and decisions on the requests for exclusion. Additionally, the Public Prosecutor acts upon such requests in accordance with limitations prescribed by the same law which entitles him/her to limit the right for access to information of public importance if that is in interest of privacy protection prescribed by the Law on Protection of Personal Data, and the prevention of investigation and prosecution of perpetrators of criminal offences.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

No person shall be tried again and sentenced for a criminal offence for which he or she has already stood trial and a final and valid judicial verdict exists.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

According to legislation, structured settlements can be concluded in relation to the following corruption offences: Trading in Influence; Incitement to Trading in Influence; Passive Bribery, but only in the case where an official accepts a bribe after he performed or failed to perform his official duties; and Active bribery, but only in the event prescribed by Article 424 paragraph 2 of the Criminal Code.

Anyone who directly or indirectly gives, offers or promises a bribe to a public official for himself or for another person, to perform an official or other act he must perform or not to perform an official or other act he must not perform, or anyone who intercedes in bribing a public official in the manner described above shall be punished by a prison term from six months to five years.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

The existing framework encourages cooperation between the prosecuting authority and alleged wrongdoers, since the possibility to defer criminal prosecution enables the public prosecutor to finish a case quicker, without the need to bring an indictment and go on trial; it is more cost effective and efficient for the public authorities. On the other hand, it is favourable for the suspect since the consequence of fulfilling undertaken obligation(s) is a dismissal of the criminal complaint/allegation and there is no conviction.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Cooperation between the authorities and alleged wrongdoers as it is in current legislation in relation to corruption offences should be discouraged because the state, which declares zero tolerance to corruption, should have a system which effectively prosecutes and punishes wrongdoers for committed corruption offences.

**6.4 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

Amendments to the Criminal Procedure Code should be made in the way that a structured agreement which has dismissal of the criminal complaint/allegation (and not conviction) cannot be concluded in relation to corruption offences.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is no clear advantage to the companies in cooperating with the authorities.

*Jurjan Geertsma, Partner, JahaRaymakers*

### **1. Background: normative framework**

#### **1.1. Are there Anti-Bribery Rules in force in your country?**

Yes.

The Dutch Penal Code (DPC) criminalises multiple forms of bribery, such as active and passive bribery of (foreign) public officials and active and passive bribery of persons that are not public officials. Furthermore, the DPC criminalises (active and passive) bribery of (inter) national judges.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

The most relevant laws/guidances are:

- the Dutch Penal Code (*Wetboek van Strafrecht*) of 3 March 1881;
- the Convention on the protection of the European Communities' financial interests;
- the first Protocol to the Convention on the protection of the European Communities' financial interests;
- the OECD Anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions were reason for the Dutch legislator to amend the Dutch legal framework on corruption;
- the Council of Europe Criminal Law Convention on Corruption (ETS 173) and Additional Protocol to the Criminal Law Convention on Corruption (ETS 191);
- the Council of Europe Civil Law Convention on Corruption (ETS 174);
- the United Nations Convention against Corruption;
- the United Nations Convention against Transnational Organized Crime;
- the OECD Guidelines for Multinational Enterprises;

#### **1.3. Do your foreign bribery laws have extraterritorial effect?**

Yes.

The DPC establishes jurisdiction for the Dutch Public Prosecutor for certain types of bribery committed abroad. For instance, the Dutch Public Prosecutor has jurisdiction to prosecute, amongst others, the following persons: (1) the bribed Dutch official in a foreign country, (2) anyone who bribes a Dutch (non-)official in a foreign country, (3) a Dutch national who bribes a (non-)official abroad.

#### **1.4. Are facilitation payments allowed in your jurisdiction?**

No.

As a starting point, for criminal liability on the basis of Dutch (criminal) law, the aim of a certain payment to a public official is not relevant. Therefore, strictly taken, ‘facilitation payments’ can lead to criminal liability as well. However, according to the Public Prosecutor’s guideline on investigation and prosecution of foreign bribery (*Aanwijzing opsporing en vervolging buitenlandse corruptie*), the Public Prosecutor does not consider it appropriate to conduct a rigorous investigation and prosecution on tackling bribery of foreign public officials further than called for by the OECD Convention. This means that payments, which in terms of the OECD Convention are to be considered as ‘facilitation payments’, will in general not lead to prosecution.

#### **1.5. Does your country provide for corporate criminal liability?**

Yes.

According to Article 51 of the DPC, both individuals and legal entities are capable of committing criminal offences. It follows from Dutch case law that a legal entity can be held criminally liable for criminal offences of individuals (for instance employees) if these offences can be ‘reasonably attributed’ to the legal entity, which depends on the specific facts and circumstances of the case. According to the Dutch Supreme Court, an important point of reference in this context is whether the offence (of the individual) took place within the ‘sphere’ (context/interest) of the legal entity, which is determined by a few criteria.

Furthermore, according to Article 51 of the DPC, if criminal liability of the legal entity has been established, also individuals that ordered the commission of the criminal offence (‘*opdrachtgever*’) or actually directed the unlawful behaviour (*feitelijk leidinggever*) may be prosecuted and convicted for such criminal offences. Whether a person ordered the commission of or actually directed unlawful behaviour is determined by several criteria that are formulated in Dutch case law.

#### **1.6. Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

To guarantee the impartiality of the investigation as far as possible, the National Police Internal Investigations Department (*Rijksrecherche*) is charged with investigating cases of public bribery involving high-ranking officials, judges and politicians. In other cases of (public and commercial) bribery, the investigation can be conducted by the regular police forces as well.

The Public Prosecution Office in Rotterdam has appointed a special prosecutor in charge of coordinating bribery cases (*Landelijk corruptieofficier van justitie*). This prosecutor has particular expertise in investigating and prosecuting bribery cases and provides assistance to local public prosecutors who are authorised to investigate and prosecute bribery cases in their jurisdictions.

## 2. Exercise of prosecutorial discretion

### 2.1 Do prosecutors have unfettered discretion in regards to the following:

#### 2.1.1. Deciding whom to charge with a crime?

No.

According to the so-called discretionary principle (*opportunitetsbeginsel*) Dutch public prosecutors have discretion in deciding whom to charge with a crime and what charges to file. However, if a public prosecutor decides not to prosecute a certain person, interested parties (*belanghebbenden*) can file a complaint against such decision with the Court of Appeal (Article 12 DCC). The Court of Appeal assesses the complaint and – if it finds the complaint well-founded – may order the Public Prosecutor to start prosecution. However, this does (solely) mean that the Public Prosecutor should bring the case before a criminal judge and does not particularly mean that someone will be convicted for a criminal offence by the criminal judge.

Furthermore, if an offence is criminalised with solely a fine and the suspect offers to pay this fine and to meet all other conditions (set by law) and which the Public Prosecutor requires in this respect, a public prosecutor may not deny imposing such conditions (Article 74a of the Dutch Code of Criminal Proceedings (DCC)) and start prosecution instead.

#### 2.1.2. Deciding what charges to file?

Yes. See under 2.1.1.

#### 2.1.3. Deciding whether to drop charges?

Yes. In principle, yes. However, please see the explanation under 2.1.1.

#### 2.1.4. Deciding whether or not to plea bargain?

No.

Dutch law does not as such know the concept of ‘plea bargain’. However, according to Dutch law, the Public Prosecutor is authorised to settle a case under certain circumstances and under certain conditions, where settlement could for instance include paying a certain amount of money (*transactie*, *schikking* and *strafbeschikking*).

### 2.2. Which rules determine the exercise of prosecutorial discretion in your country? (You can choose more than one option)

Principle of opportunity.

Other. Please specify: also principle of legality (but no mandatory prosecution).

The starting point is that the Public Prosecutor may only prosecute offences which are criminalised by law (principle of legality, Article 1 DPC). If an offence is criminalised by law, the Public Prosecutor can decide to start prosecution (discretionary principle, Article 167 DCC). The Public Prosecutor may also refrain from prosecution on public-interest grounds.

Furthermore, the Public Prosecutor is entitled to deal with a case alternatively (such as offering a settlement). Mitigating circumstances may be taken into account by the Public Prosecutor in deciding whether or not to prosecute in a specific case. In addition, the Public Prosecutor's Office has drafted own guidelines (which are publicly available) which can be used by the Public Prosecutor in deciding how to deal with a criminal case.

**2.3. Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Yes, according to Article 74 of the DPC, the Public Prosecutor may reach a settlement (*transactie*) with a suspect for criminal offences that are criminalised with imprisonment of less than six years. In addition, according to Article 257a of the DCC, the Public Prosecutor may give a so-called '*strafbeschikking*' for offences that are criminalised with imprisonment of less than six years. It is important to note that a '*strafbeschikking*' differs from a '*transactie*', since accepting a *strafbeschikking* means that someone admits guilt to a criminal offence, while accepting a *transactie* only means that someone buys off (further) criminal prosecution. Cases that deal with criminal offences that are criminalised with six or more years imprisonment cannot be settled with a *transactie* or *strafbeschikking* and, therefore, should be brought before a criminal judge (unless the Public Prosecutor decides not to prosecute, in which case interested parties may file a complaint against such decision).

**2.3.1. How clearly are the factors of this threshold defined?**

Very clearly defined. Please see explanation under 2.3.

**2.4. Do these standards differ for individual and corporate defendants?**

No. Please see explanation under 1.5 and 2.3.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Some forms of (public and private) foreign bribery are criminalised with imprisonment of four to six years, which means that the Public Prosecutor is entitled to reach a settlement (please see the explanation under 2.3. in this respect).

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes and no, this depends on whether the suspect accepts a '*transactie*' or a '*strafbeschikking*' (please see the explanation under 2.3. in this respect).

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Strafbeschikking.*

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting. Yes

Cooperation with enforcement authorities through the investigation. Yes

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals.

Although Dutch law does not contain a statutory provision which explicitly states that the Public Prosecutor or criminal judge should take these factors into account, Dutch case law shows that most/all of the above-mentioned factors can be taken into account by the Public Prosecutor when reaching a settlement as well as by the criminal judge when deciding the level of penalties.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No. They can ask, but they cannot demand a waiver.

**3.2.4 What form(s) can a structured settlement take?**

A ‘*transactie*’ and a ‘*strafbeschikking*’, please see under 2.3. for a further explanation.

**3.2.5 What are the usual terms of such an agreement?**

‘*Transactie*’ and ‘*strafbeschikking*’.

**3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Article 74 of the DPC includes which conditions the Public Prosecutor can require when offering a *transactie*. In addition, Article 257a of the DCC includes provisions on what penalties/measures can be included in a *strafbeschikking*.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

The Public Prosecutor may decide to start prosecution if the conditions of a *transactie/ strafbeschikking* have not been met/have been breached (Article 255a and 354a DCC).

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1. Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The Public Prosecutor may decide to engage in a settlement without prior consent of the court or a judge. Dutch law does not contain a statutory provision which requires the Public Prosecutor's consent in this regard.

##### **3.3.1.2. Does the court have any other involvement before settlement has been reached?**

No. Not applicable.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

No.

A structured settlement is not filed in court. However, (almost) all verdicts and settlements are filed at the judicial information service (*Justitiële Informatiedienst*, part of the Ministry of Security and Justice). The *Justitiële Informatiedienst* provides all chain partners of historical and current information of (suspected) individuals and legal entities involved in criminal cases.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement**

No.

#### **3.3.3 During the implementation of the settlement:**

##### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: In principle, the Public Prosecutor who engaged in the settlement takes care of the execution of the settlement (as also included in the Public Prosecutor's guideline '*Aanwijzing OM-strafbeschikking*'). If the terms of the settlement have not been met/been breached, the Public Prosecutor may decide to start prosecution and bring the case for a criminal judge.

### 3.3.3.2 Can this authority impose penalties for non-compliance?

Yes.

Non-compliance with terms and conditions included in a *transactie* or *strafbeschikking* may be reason for a public prosecutor to start prosecution instead, in which case a criminal judge will assess the case and may decide to impose a penalty instead.

### 3.4 Outcome of the structured settlement

Are there any rules that provide guidance about the outcome of such negotiations with respect to the following? Please select all options that apply and provide further information in the field next to each box you tick.

	Statutory Provisions	Guidelines	Past cases
Financial penalties	Yes	Yes	Yes
Disgorgement of profits	Yes	Yes	Yes
Compensation to third parties	Yes	Yes	Yes
Obligations to cooperate with other agencies	No	No	Yes
Monitors (and paying for them)	No	No	Yes
Corporate compliance programmes	No	No	Yes
Personal liability	No	No	Yes

### 3.5 De facto or De jure

*Editor's note: The settlement process (transactie) is not contingent upon an admission of guilt. (See section 2.3 above). This would constitute a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

Whether or not a settlement is made public depends on the specific circumstances of a case. Settlements in large bribery cases such as *Ballast Nedam (2012)*, *SBM Offshore (2015)* and *Vimpelcom (2016)* were made public via a press release by the Dutch Public Prosecutors Office. Furthermore, the policy of the Dutch Public Prosecutors Office regarding high and special transaction (*Aanwijzing hoge transacties en bijzondere transacties*) states that in principle a press release will be published for settlements of e50,000 or more or special settlements between e2,500 and e50,000.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

Please see the explanation under 4.1.1. for cases in which a settlement is made public. The '*Aanwijzing hoge transacties en bijzondere transacties*' states that a press release, in any case, includes the following information: a description of the criminal offences which according to the Public Prosecutor can be proven, a detailed prescription of the proposed settlement with respect to all involved suspects (specifically in case of a suspected legal entity and responsible individuals), a description of the underlying considerations with regard to the settlement (including a motivation of why the case should not be brought before a criminal judge) and an explanation of the amount of the fine.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

As the '*Aanwijzing hoge transacties en bijzondere transacties*' states what information should (in any way) be included in a press release, it is difficult for a company to negotiate on the contents of such press release. However, apart from the information that should be included according to the '*Aanwijzing hoge transacties en bijzondere transacties*', a company may have some influence on the additional information that will be included. In this situation, a company that fully cooperated with the authorities may probably exert more influence than a company who did not/hardly cooperate at all.

#### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes. Please see the explanation under 3.3.2.

##### **4.2.1 If yes, is this data publicly available?**

No.

Dutch law (the '*Wet Justitiële en Strafvorderlijke gegevens*') prescribes that only certain persons/institutions (for instance magistrates) in limited situations have access to the judicial information system.

#### **4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Between December 2012 and May 2015, the Netherlands opened seven new foreign bribery investigations, bringing the total number to 16 since the entry into force of the Convention. Ten of these are ongoing investigations and four have been closed. The remaining two investigations are the cases of the Dutch companies, SBM Offshore and Ballast Nedam referenced above, that were finalised with sanctions imposed on the defendants through out-

of-court settlements. SBM Offshore agreed to a US \$40m fine and a US \$200m disgorgement for payments in Angola, Brazil and Equatorial Guinea. Ballast Nedam agreed to pay €17.5m and, in the context of the same case, KPMG Accountants NV agreed to pay a €3.5m fine and €3.5m in confiscation in relation to bribery relating accounting misconduct.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. The principle of *ne bis in idem* is incorporated in Article 68 of the DPC.

### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

Foreign conviction: Binding effect.

Foreign settlement: Binding effect.

In principal, both foreign convictions and foreign settlements have binding effect if the sentence has been fully served or conditions of the settlements have been fully met (Article 68 section 2 and 3 of the DPC).

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

The existing framework does not provide a lot of predictability. The contacts with the authorities however can give more feeling with the question on how to deal with the matter.

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Unfortunately that is rather uncertain. In my opinion, the existing framework does not stimulate this as such.

### **6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

From the company's and prosecutor's perspective this should be encouraged. This can be cost and reputation effective and can be sufficient to change behaviour.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Provisions of clarity and certainty.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

In general, there are both financial and reputational advantages although in particular there are no clear advantages.

*Erling Grimstad, Managing Director, Advokatfirmaet Erling Grimstad AS*

**1. Background: normative framework**

**1.1. Are there Anti-Bribery Rules in force in your country?**

Yes.

Section 387, 388 and 389 of the Penal Code of 2005 (in force 2015) prohibit bribery and trading in influence.

**1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

The current anti-corruption regulations in the Norwegian Penal Code is based on the OECD convention of 21 November 1997 and the Council of Europe – Criminal Law Convention on Corruption of 27 January 1999, including the Additional Protocol to the Criminal Law Convention on Corruption.

**1.3. Do your foreign bribery laws have extraterritorial effect?**

Yes.

Bribery and trading in influence applies for offences committed by a Norwegian citizen or a person with domicile in Norway, nationally and abroad. The extraterritorial effect also applies for criminal acts made on behalf of a company incorporated in Norway.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payment is a criminal offence according to the Penal code, section 387. There are no exception for grease payments in the Penal code.

**1.5. Does your country provide for corporate criminal liability?**

Yes.

Companies may be subject to penalty (Penal code Chapter 4, sections 27 and 28).

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The National Authority for Investigation and Prosecution of Economic and Environmental Crime (OKOKRIM).

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

### **2.1.1 Deciding whom to charge with a crime?**

Yes.

The fifth part (indictment chapter 19) in the Criminal Procedure, the Prosecution Guidelines and circular given by the Attorney General, provides rules and guidance for Public Prosecutors. In general, the prosecutors have unfettered discretion when deciding whom to charge with a crime.

### **2.1.2 Deciding what charges to file?**

Yes.

### **2.1.3 Deciding whether to drop charges?**

Yes.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes. There are no plea bargain options according to Norwegian legislation.

## **2.2. Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

In Norway, out of court settlements, called penalty writs, are regulated by Sections 255 to 261 of the Criminal Procedure Act. Section 255 reads as follows:

‘If the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority may issue a writ giving an option to this effect (an optional penalty writ) instead of preferring an indictment. Sanctions referred to in section 2, No. 4, may also be decided by issuing such a writ and may also be imposed together with sanctions specified in the first sentence.’

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No. Prosecutors cannot demand it, but the wrongdoer can choose to do so.

**3.2.4 What form(s) can a structured settlement take?**

The penalty writ can be issued by OKOKRIM or other prosecutors in charge of the prosecution. The wrongdoer can decide to either accept or decline the writ. Once accepted, a writ is valid without court approval. If the writ is declined or the wrongdoer fails to provide an answer, the prosecution can decide to issue an indictment and proceeds with a court procedure.

**3.2.5 What are the usual terms of such an agreement?**

The main term of a writ is the monetary sanction (fine and confiscation if there were proceeds from the crime).

**3.2.6 Are there limits on what the prosecution can offer?**

Yes.

A writ must be in accordance with the level of penalties given by the court. There is no practice for bargaining in writs issued by prosecutors.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No. Penalty writs are neither deferred nor conditional. A case concluded with a penalty writ is considered *res judicata*.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.3.1.1. Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

**3.3.1.2. Does the court have any other involvement before settlement has been reached?**

No.

### 3.3.2 Once the settlement has been reached:

#### 3.3.2.1 Is the structured settlement filed in court?

No.

#### 3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?

No.

### 3.4 Outcome of the structured settlement

	Statutory Provisions	Guidelines	Past cases
Financial penalties	Yes	No	Yes
Disgorgement of profits	Yes	No	Yes

### 3.5 *De facto or de jure*

*Editor's note: The settlement process (penalty writ) is not contingent upon an admission of guilt. (See section 3.1 above). This would constitute a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

OKOKRIM may choose to publish a press release on its website when a penalty notice is concluded. The press release may contain information on the terms, but the information given is often rather limited.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Limited.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

**4.2.1 If yes, is this data publicly available?**

Non applicable.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Penalty notices cannot be used with natural persons when the offence committed is punishable with a prison sentence. Foreign bribery is nearly systematically pursued under the offence of aggravated corruption, which is punishable with imprisonment. For this reason, settlements for committing foreign bribery only apply to legal persons for committing foreign bribery. To this day, legal action for committing foreign bribery was started and concluded against five legal persons. All five entities were proposed a penalty writ. Four of them accepted the writ and were sanctioned. The only company that did not take the writ was prosecuted and eventually acquitted.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. The rule of double jeopardy according to the European Convention on Human Rights applies.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

Foreign conviction: No effect.

Foreign settlement: No effect.

Be aware that any foreign conviction or foreign settlement could lead to investigation and possible prosecution of entities or individuals provided that double jeopardy doesn't apply in that case.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

*Karolina Stawicka, Attorney-at-Law, Bird & Bird (Warsaw)*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Yes, there are. Corruption is a criminal offence in Poland pursuant to the Penal Code (the Act of 6 June 1997 – the Penal Code (JL of 1997, No 88, item 553, as amended)) and the Act on the Central Anti-corruption Bureau (the Act of 9 June 2006 on the Central Anti-corruption Bureau (JL of 2012, item 621)). The former provides a catalogue of corruption offences, which includes those involving public officials (Article 228 (corruptibility) and Article 229 (bribery)), public organisations and public funds (Articles 230 and 230a (paid favouritism)), economic operators (Article 296a (managerial bribery)), and public procurement (Article 305 (frustrating or impeding a public tender procedure)). The Polish government is currently working on a new legislation (draft of 1 January 2018) on transparency in public life that is to impose on entrepreneurs new obligations with a view to fight corruption and to grant to the Central Anti-corruption Bureau and its Head new powers, including the power to impose on them high penalties of up to PLN 10m (approximately e2.5m) for a failure to have and follow anti-corruption by-laws.

### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Polish anti-bribery rules with regard to corruption offences closely reflect international anti-corruption regulations, and, in particular:

- Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union;
- Council of Europe Criminal Law Convention on Corruption (ETS 173) and Additional Protocol to the Criminal Law Convention on Corruption (ETS 191);
- The Council of Europe Civil Law Convention On Corruption (ETS 174);
- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192 of 30 July 2003);
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and
- United Nations Convention against Corruption.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Yes, they do, but to a limited extent. In principle, Polish anti-bribery laws only apply to acts committed in Poland, although they may have extraterritorial effect: (1) whenever the wrongdoer is a Polish national and the offence involved is punishable both under Polish law and the law of the country in which it was committed, and/or (2) where undue advantage was gained in Poland, even indirectly. (Articles 109, 111, and 112 of the Penal Code). This means that Polish anti-bribery laws also apply to international corruption offences.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

No, they are not. Although facilitation payments are not covered by Polish law *expressis verbis*, a very broad definition of corruption and the lack of any threshold imply that any and all payments relating to a specific matter which are not formal must be deemed a bribe (Article 229 of the Penal Code).

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Yes, it does, pursuant to the Act of 28 October 2002 on Liability of Collective Bodies for Acts Prohibited under a Penalty. The Act applies to both criminal and fiscal offences referred to in Article 16 thereof (including all corruption offences). Under the Act, corporate criminal liability may be established only after a court has first ruled that an individual acting in the name or on behalf of the corporation has committed such an offence. The court can do so via a final judgment convicting the individual, a judgment conditionally discontinuing criminal or fiscal offence proceedings against him or her, a decision to allow him or her to voluntarily assume liability, or a decision to discontinue proceedings against him or her owing to the circumstances which make penalising him or her impossible (Articles 3 and 16 of the Act).

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other: The investigation is the responsibility of the Police, the Central Anti-corruption Bureau (in Polish, *Centralne Biuro Antykorupcyjne* – CBA), and the State Prosecutor's Office (*Prokuratura Krajowa*), the latter also being responsible for the prosecution, including the bringing and sustaining of indictments. In addition, the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego* – ABW) is charged with investigating corruption whenever it involves public officials and may be likely to endanger State security. As for the Police, they also have a specialised unit, the Central Investigation Office (*Centralne Biuro Śledcze* – CBS), which is tasked with fighting organised crime, including corruption.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

No, they do not, because whenever the circumstances of the case indicate that an individual committed an offence, he or she must be charged therewith (Articles 10 and 313 of the Code of Penal Procedure). Article 313 (1) of the Code of Penal Procedure provides that if upon the launching of or during an investigation facts are established which lead to the justified suspicion that the individual concerned committed a specific act which is punishable, the Public Prosecutor must draw up a decision presenting the charge. The wording of this provision provides for no discretion of any kind in this respect. Thus the Public Prosecutor is duty-bound to act (bring the charge).

#### **2.1.2 Deciding what charges to file?**

No.

No, they do not. This is because the actual circumstances of the case dictate the specific charge to be brought (Article 313 of the Code of Penal Procedure). Where in the course of the investigation new facts come to light, a new charge must be brought or the existing charge must be amended accordingly. Thus, a new decision must be taken and the alleged wrongdoer must be questioned again, without delay (Article 314 of the Code of Penal Procedure).

#### **2.1.3 Deciding whether to drop charges?**

No.

No, they do not. A public prosecutor wishing to drop a charge and discontinue proceedings may only do so via a formal decision subject to it being justified and being taken if there are no sufficient grounds for indictment (Article 322 (1) and (3) of the Code of Penal Procedure). This is so because the principal aim of prosecutorial proceedings is bringing a charge and submitting an indictment (Article 10 of the Code of Penal Procedure). Principles of legality and mandatory prosecution must be strictly observed, at all stages of the proceedings, as any decision of a public prosecutor on discontinuation, whether taken without charging anyone or after the alleged wrongdoer has been charged, is subject to court scrutiny (Article 306 in conjunction with Article 465 (1) and (2) of the Code of Penal Procedure). Furthermore, the decision to discontinue proceedings may be overruled by the Prosecutor General if he determines that it was unjustified, save where the court has already upheld it (Article 328 of the Code of Penal Procedure).

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

No, they do not. The requirements under which the plea bargaining rule may be relied upon are as provided for by law: the alleged wrongdoer must first enter a guilty plea and there can be no doubt as to the circumstances of the case and his or her guilt (Article 335 of the Code of Penal Procedure).

#### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Defence mitigation argued to a judge.

Defence mitigation argued to the prosecutor.

In Poland, public prosecutors are duty-bound to strictly observe the principles of legality and mandatory prosecution (Article 10 of the Code of Penal Procedure). However, it is their will and determination which dictates whether or not a preliminary investigation will result in the gathering of sufficient evidence for indictment or the fulfilment of statutory requirements for a structured settlement (see 2.1.4 above). Polish law allows for the defender and/or alleged wrongdoer to present to a public prosecutor or before a court arguments or proposals justifying the lessening of a penalty, the latter including a proposal to settle with the aggrieved party or make good the damage caused (Article 60 of the Penal Code), or an undertaking to cooperate with law enforcement authorities (Article 61 of the Penal Code).

#### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

No, there is no such threshold. The prosecution is mandatory whatever the gravity of the offence involved (Article 10 of the Code of Penal Procedure).

##### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all. Not applicable.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No. Not applicable.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Yes, it is. Although there is no legal definition of a structured settlement, Polish law provides for procedures whereby a settlement can be reached between an alleged wrongdoer (including but not limited to the alleged bribe payer) and an authority administering justice by way of which he, she or it may receive a sentence that is more lenient than it would be otherwise and the case is closed. In Poland, structured settlements are governed by Articles 335 and 387 of the Code of Penal Procedure. The former applies to individuals only, and the latter applies to both individuals and collective bodies. Both Articles cover criminal offences of all types, including corruption, regardless of gravity, although they differ as to on whose initiative and when the settlement procedure may be commenced. Furthermore, the bribe payer may be excluded from criminal liability without a need to reach any settlement with the authority administering justice (Article 229 (6) of the Penal Code). This Article provides that the perpetrator of the offence referred to in paragraphs 1, 2, 3, 4 or 5 thereof (bribery) is not subject to a penalty if the financial or personal advantage or a promise of the same was received by a holder of public office but the perpetrator has notified an authority competent to prosecute offences of this and disclosed all the material circumstances involved, before this authority becomes aware of the offence that was committed. Article 296(a) (5) of the Penal Code provides likewise in cases of managerial bribery.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

Polish law provides for two main procedures leading to structured settlements: under Article 335 or Article 387 of the Code of Penal Procedure. Article 335 provides for two settlement options, where only one is contingent upon a guilty plea (Article 335 (1) of the Code of Penal Procedure). The two other procedures (under Article 335 (2) or Article 387 of the Code of Penal Procedure, respectively) do not require such a plea, at least in express terms. However, for a settlement to be possible, there cannot be any doubt as to the circumstances of the case and the guilt of the perpetrator. Furthermore, Article 335 (2) of the Code of Penal Procedure requires that any and all statements made by the perpetrator may not be contrary to the evidence gathered. This means that should all the evidence indicate, beyond any doubt, the guilt of the perpetrator, he or she has no choice but to in effect plead guilty, if he or she wishes to rely on the settlement option.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

Since Polish law does not provide for any legal definition of a settlement, structured or otherwise, there is no formal term for it. The Polish equivalent ‘*porozumienie*’ (settlement or arrangement) only appears in the domestic case-law and works authored by academics. According to common practice, such settlements are referred to as: (1) a conviction without trial (*skazanie bez rozprawy*) under Article 335 of the Code of Penal Procedure, and (2) voluntary submission to a penalty (*dobrowolne poddanie się karze*) under Article 387 of the Code of Penal Procedure).

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting;  
cooperation with enforcement authorities through the investigation;  
assistance in investigating and prosecuting individuals; and  
other.

Polish courts enjoy discretionary power in deciding the severity of the penalty or penal measures to be levied, within the limits provided for by the Penal Code. When deciding on such measures, courts may take into consideration whether the alleged wrongdoer acted alone or as a member of an organised group, the damage done, his or her attitude following the criminal offence (eg, voluntary disclosure, cooperation with law enforcement authorities), and whether or not any arrangement has been reached with the aggrieved party via mediation (Article 53 of the Penal Code). The latter requirement is to encourage alleged wrongdoers and, in particular, collective bodies, to be actively involved in making good the damage done. The cross-border dimension of the criminal offence in question has no direct effect on the severity of a penalty/penal measures to be levied.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

Yes, they do. Where an alleged wrongdoer enjoys immunity, whether as a diplomat, consular officer, judge, member of parliament, or similar, the Public Prosecutor involved is duty-bound to notify an appropriate authority of the fact that a preliminary investigation has been launched with regard to the individual concerned (Article 21 (2) of the Code of Penal Procedure) and, if necessary, to submit a motion for the immunity to be waived. The Public Prosecutor may not waive it on his or her own. The investigation has to be stayed until immunity is waved (Article 17 (1) (4) and (8) of the Code of Penal Procedure, in conjunction with Article 104 of the Penal Code).

**3.2.4 What form(s) can a structured settlement take?**

In Poland, structured settlements take the form of a sentencing judgment (Article 343 (6) in conjunction with Article 355 of the Code of Penal Procedure, and Article 387 (1) and (1a) of the Code of Penal Procedure).

**3.2.5 What are the usual terms of such an agreement?**

Both types of settlement (sentencing judgment), whether under Article 335 or Article 387 of the Code of Penal Procedure, include all or some of the following: (1) the penalty levied, together with the extent thereof (Article 32 of the Penal Code); (2) the penal measure(s) levied, together with the extent thereof (Article 39 of the Penal Code), forfeiture ordered (Articles 44 and 45 of the Penal Code) and compensation

measures levied (Articles 69 to 74 of the Penal Code); and (3) the decision as to the costs to be paid (Articles 616 to 641 of the Code of Penal Procedure).

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Yes, there are. Public prosecutors are duty-bound to observe provisions on the penalty provided for by law for a particular criminal offence, together with the limits thereof. However, when proposing the penalty and/or penal measure(s) to be levied, and the extent of the same, they may take into consideration several factors (see 3.2.2 above), and this may be reflected in the extraordinary lessening of the penalty (Article 60 of the Penal Code), or a deferred sentence (Articles 69 to 74 of the Penal Code). Insofar as criminal offences which carry a penalty of the deprivation of liberty for up to eight years are concerned, a public prosecutor may, relying on Article 37a of the Penal Code, propose a lesser penalty (ie, a fine or limitation of liberty, together with social work). Structured settlements (sentencing judgments), whether under Article 335 or Article 387 of the Code of Penal Procedure, may not include deferred prosecution agreements (Article 66 of the Penal Code), this being confirmed, inter alia, by the judgment of the Supreme Court of 22 October 2014 (case file no IV KK 92/44), nor can they include any agreements to dispense with a penalty whatsoever (Article 61 of the Penal Code). Since in Poland, the majority of corruption offences carry a penalty of the deprivation of liberty for a term of more than five years, and deferred prosecution agreements are only possible in relation to offences carrying a less severe penalty, such agreements may not be relied upon in the fight against corruption, unlike in some other jurisdictions.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

In Poland, structured settlements (whether under Article 335 or Article 387 of the Code of Penal Procedure) take the form of a sentencing judgment, delivered thereunder. Thus, when a convicted party covered by the settlement fails to abide by the judgment delivered, the court is duty-bound to review the case and depending on the severity of non-compliance, must or may reverse the judgment accordingly (Article 75 of the Penal Code).

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

No, it is not, whenever Article 335 of the Code of Penal Procedure is relied upon. In any such case, the negotiations are entered into, carried out and concluded between the Public Prosecutor and the alleged wrongdoer and, to some extent, the aggrieved party, as the settlement reached must reflect the aggrieved party's interests, since the settlement is subject to the aggrieved party's consent. The court is not involved at this stage at all. On the other hand, the settlement procedure under Article 387 of the Code of Penal Procedure is entirely before the court seized of the case (see 3.3.1.2 below).

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

No, it does not, whenever Article 335 of the Code of Penal Procedure is relied upon. On the other hand, the settlement procedure under Article 387 of the Code of Penal Procedure is entirely before the court seized of the case. In such a case, the settlement procedure is initiated via an application from the alleged wrongdoer or his or her legal counsel. It is common practice for settlement terms to be negotiated and agreed upon with the Public Prosecutor and the aggrieved party concerned prior to the submission of the application, with a view to assuring their formal consent being granted before the court (Article 387 (2) of the Code of Penal Procedure).

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

Yes, it is. Whenever Article 335 of the Code of Penal Procedure is relied on, the settlement is filed in court upon a motion from the Public Prosecutor (Article 335 (4) in conjunction with Article 343 of the Code of Penal Procedure). Whenever Article 387 of the Code of Penal Procedure is relied on, the settlement is filed by the court upon application from an alleged wrongdoer or his or her legal counsel, either in writing or at a hearing in the record. Such an application must be submitted, however, by no later than the moment the last alleged wrongdoer has been heard at the first hearing (Article 387 (1) of the Code of Penal Procedure).

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

Yes, it does. Whether under Article 335 or Article 387 of the Code of Penal Procedure, the court may or may not accept the terms of the settlement proposed. It may demand that a term be amended for the court to approve the settlement and include it in the sentencing judgment delivered thereby

(Article 335 (3) and (4) in conjunction with Article 343 (3) and (7) of the Code of Penal Procedure, and Article 387 (3) of the Code of Penal Procedure). Both settlement procedures require consensus as to their terms reached from the Public Prosecutor and the aggrieved party. Thus the court is duty-bound to verify whether the alleged wrongdoer and the aggrieved party reached an agreement as to the damage that needs to be made good and the compensation that needs to be paid (Article 335 (1) in conjunction with Article 343 (2) and (5) of the Code of Penal Procedure and Article 387 (2) of the Code of Penal Procedure).

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: courts.

This is so because in Poland structured settlements (whether under Article 335 or Article 387 of the Code of Penal Procedure) take the form of a sentencing judgment (Article 2 of the Penal Enforcement Code).

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes.

Yes, it can. Depending on the severity of non-compliance, the court may: (1) issue an order that the term concerned be met forthwith or by a certain date; (2) issue an order that the deferred penalty be enforced; or (3) issue a decision stating that the penalty or penal measure levied be substituted with another one (Articles 75 to 75a of the Penal Code). In some cases, non-compliance of a particularly serious nature may result in another punishable offence being committed (eg, non-compliance involving being engaged in an economic or professional activity covered by the injunction included in the original judgment (Article 244 of the Penal Code)).

## **3.4 Outcome of the structured settlement**

### **Statutory Provisions**

Financial penalties – yes.

Financial penalties levied for corruption offences committed by individuals range from PLN 100 (approximately e25) to PLN 1.08m (approximately e270k) (Article 33 (2) of the Penal Code).

Financial penalties that may be levied on collective bodies range from PLN 1k (approximately e250) to PLN 5m (approximately e1.25m), but may not exceed three per cent of the revenue generated by the entity concerned in the financial year during which the prohibited act was committed (Article 7 of the Act on Liability of Collective Bodies for Acts Prohibited under a Penalty).

Disgorgement of profits – yes.

Forfeiture may concern all benefits, including any and all assets and financial advantages, derived even indirectly from the offence committed. Furthermore, any and all assets that were instrumental in or facilitated committing the offence may also be forfeited. As of 27 April 2017, this may also include the undertaking owned by the perpetrator and, where the financial advantage gained is of considerable value, an undertaking owned by a third party may be forfeited as well if it was instrumental in or facilitated committing the offence and its owner was aware of this or agreed thereto (Articles 44, 44a, and 45 of the Penal Code).

Forfeiture may concern the following: (1) an asset derived even indirectly from the prohibited act, or used or intended to be used to commit it; (2) a financial advantage derived even indirectly from it; and/or (3) the amount equal to the value of any of the above, save when such have to be surrendered to the entitled entity (Article 8 of the Act on Liability of Collective Bodies for Acts Prohibited under a Penalty).

Compensation to third parties – yes.

Such compensation should reflect the damage or loss caused by the offence or act punishable under a penalty (Article 46 of the Penal Code and Articles 8 (2) and 11 (2) of the Act on Liability of Collective Bodies for Acts Prohibited under a Penalty). Wherever the damage or loss sustained cannot be assessed punitive damages may not exceed PLN 200k (approximately e50k).

Monitors (and paying for them) – yes.

When delivering a judgment which includes an injunction, the court may name another law enforcement authority tasked with monitoring whether or not the convicted party abides thereby (Articles 41a to 41b and Article 72 of the Penal Code).

Personal liability – yes.

Corruption offences carry the penalty of the deprivation of liberty for a term of six months to eight years. In more severe cases, deprivation of liberty can span one to ten years. Where a financial advantage is of a considerable value and has been conferred or promised to be conferred on a holder of public office, the penalty provided for is even stiffer and the individual found guilty may be deprived of liberty for a term of two to 12 years (Articles 228, 229, 230 and 296a of the Penal Code).

See 3.2.6 above. All the penalties and penal measures which may be included in a structured settlement (sentencing judgment) may only be levied subject to the statutory limits being observed.

### **3.5 *De facto or de jure***

As has been explained above, structured settlement procedure under Article 335 (1) of the Code of Penal Procedure is subject to *de jure* process. Whereas those under Article 335 (2) or Article 387 of the Code of Penal Procedure are subject to *de facto* process, as they do not require a formal guilty plea.

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

Yes, it is, but to a very limited extent. First, structured settlements in Poland take the form of a sentencing judgment which is available to the public present at the hearing concerned, unless it is announced behind closed doors (eg, in cases where material interests of the State must be kept secret; Articles 355, 360, and 364 of the Code of Criminal Procedure). Second, the operative part of the judgment only lists the offence(s) committed and the penalty and/or penal measure(s) levied. Third, copies of the judgment are only available to the parties concerned; there is no database which is available to the public. The court seized of the case may, however, decide to have the operative part of the judgment or information about it published, as an additional penal measure (Article 39 (8) of the Penal Code and Article 9 (1) (6) of the Act on Liability of Collective Bodies for Acts Prohibited under a Penalty). For example, the Court of Appeal of Katowice ruled in its judgment of 28 June 2007 that court judgments ought to be published, above all, in cases of particular interest to society, those leading to a public outcry, or those of public concern; this measure ought to be relied on whenever there is an offence with a high incidence in a particular milieu or jurisdiction.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. See 4.1.1 above.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

The company can only negotiate whether or not the operative part of the judgment is to be published. Its content cannot be negotiated at all. Where a judgment is published, it includes the following information: (1) name (first and last) of the individual convicted, (2) date and place of his or her birth, (3) his or her parents' first names, (4) date, type and venue of the offence committed, and (5) legal basis for the conviction, together with the penalty levied (Article 413 of the Code of Penal Procedure). The publication involves the dissemination by the court of an excerpt or copy of the judgment, together with information on it being final, via an appropriate channel of communication, which as a rule is the court's webpage – Public Information Bulletin (Article 197 of the Penal Enforcement Code). The court may also rely on other media, including the press, TV and the like (Articles 198 and 199 of the Penal Enforcement Code).

## 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

Yes, it is, but only insofar as the general statistics are concerned. Such data is gathered by the Central Anti-corruption Bureau, Ministry of Justice and State Prosecutor's Office.

### 4.2.1 If yes, is this data publicly available?

Yes. Please provide the website:

- <https://pk.gov.pl/sprawozdania-i-statystyki>
- <https://pk.gov.pl/sprawozdania-i-statystyki/sprawozdania-statystyczne-pg-plk-pg-plca-i-pg-1n-za-2016-r.html#.WQS8iNKGPCs>
- <https://pk.gov.pl/wp-content/uploads/2018/04/sprawozdanie-PK-P1CA.pdf>
- <https://cba.gov.pl/pl/informacja-o-wynikach>
- <https://isws.ms.gov.pl/pl/baza-statystyczna/>

Statistics on structured settlements in Poland (ie, judgments delivered pursuant to Articles 335 or 387 of the Code of Penal Procedure) may be found in an annual report on activities of the State Prosecutor. These provide no information on the number of structured settlements reached in relation to corruption.

## 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

In 2016, public prosecutors submitted to courts motions under Article 335 (1) of the Code of Penal Procedure relating to 99,955 individuals in total, in 92,145 cases in total, and under Article 335 (2) of the Code of Penal Procedure, 40,096 individuals in total, in 35,522 cases in total. In the same year, courts delivered judgments under Article 335 (1) of the Code of Penal Procedure relating to 98,850 individuals in total, and under Article 335 (2) of the Code of Penal Procedure, 27,142 individuals in total. Article 387 of the Code of Penal Procedure was relied upon in convicting 17,681 individuals. This shows that the practice of convicting without trial as a form of structured settlement is more widespread in Poland than voluntary submission to penalty under Article 387 of the Code of Penal Procedure.

These statistics, however, do not show how many of these cases concerned corruption offences (<https://pk.gov.pl/sprawozdania-i-statystyki/sprawozdania-statystyczne-pg-plk-pg-plca-i-pg-1n-za-2016-r.html#.WQS8iNKGPCs>). In 2015 (ie, before the subsequent amendments to the Code of Penal Procedure), the reliance on Article 335 of the Code of Penal Procedure was even more widespread, resulting in 145,752 cases being determined thereunder (ie, 55 per cent of all the criminal cases referred to courts in that year). As for 2017, there were 50,316 settlements reached under Article 335 (1) of the Code of Penal Procedure, 36,166 under Article 335 (2), and 15,628 under Article 387.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

The principle of *ne bis in idem* is one of the most fundamental principles of the legal system in Poland (Article 17 (1) (7) of the Code of Penal Procedure). In Poland, this principle is deemed to be procedural in nature, and, according to domestic law, it is as a rule only applicable to proceedings brought or carried out in Poland. Where a case has a cross-border dimension, the principle has only limited application. Pursuant to Article 114 of the Penal Code, a judgment from a foreign court is of itself not a hindrance to the penal proceedings relating to the same prohibited act being brought or continued in Poland. Nevertheless, this principle is observed in Poland in the context of offences with a cross-border dimension in cases where: (i) a foreign court judgment has been recognised in Poland with a view to the sentence being enforced therein, or such a judgment relates to an offence where the prosecution is to be continued abroad or the wrongdoer is to be extradited from Poland (Article 114 (3) (1) of the Penal Code); (ii) a foreign court judgment is covered by an international agreement or treaty binding on Poland (Article 114 (3) (3) of the Penal Code), and (iii) a judgment has been delivered by an international penal tribunal operating pursuant to an international law which is binding in Poland (Article 114 (3) (2) of the Penal Code).

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

Since in Poland the principle of *ne bis in idem* has a very limited scope of application with regard to offences with a cross-border dimension (save for sentencing judgments delivered by competent courts in other EU Member States (Article 114a of the Penal Code)), foreign settlements have no binding effect on Polish courts. However, this does not mean that foreign settlements or a foreign sentencing judgment are, by and large, of no interest to Polish courts. The circumstances surrounding and/or terms of a foreign settlement or foreign sentencing judgment may be taken by a Polish court into consideration for the purposes of evidentiary proceedings, assessment of damage, attitude of the alleged wrongdoer, or assessment of the extent to which the damage was made good under the terms of the settlement reached. The court is duty-bound to take all such circumstances into consideration while deliberating the severity of the penalty to be levied (Articles 53 and 60 of the Penal Code, in conjunction with Articles 335 (1) and (2), and 387 (1) of the Code of Penal Procedure).

## **6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

Practice shows that when the Public Prosecutor expresses an interest in discussing the possibility of cooperation between the alleged wrongdoer (collective body or otherwise) and prosecuting authorities, there is a reasonable probability that the outcome of the cooperation will reflect the terms proposed by the alleged wrongdoer. Polish law provides for no procedure to appeal against his or her lack of willingness to apply Article 335 of the Code of Penal Procedure. Under such circumstances, the alleged wrongdoer may still rely on the settlement procedure under Article 387 of the Code of Penal Procedure.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

It seems that such cooperation is currently discouraged. There seem to be at least two reasons for this. First, Polish laws on structured settlements have been amended in a material way three times in the last three years, thus leading to legal uncertainty. The second last amendment (20 February 2015) was fairly consensual in its nature, whereas the last one resulted in reversion to a more conservative approach (amendments of 11 March 2016). Second, since Polish law does not provide for a possibility of reaching a settlement relating to a criminal offence or an act punishable under a penalty which would be based on a deferred prosecution agreement, such cooperation does not seem very attractive.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Yes, it should, to the benefit of all the parties concerned. First, it would result in cases being closed more quickly, one of the main problems in Poland being the lengthiness of court proceedings. Secondly it would also be cost-effective.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

It seems that another amendment of the law would be indispensable. First, it would seem worthwhile to revert to a more consensual approach. Second, it would be appropriate to introduce a deferred prosecution mechanism as one of the elements of the structured settlement system. Third, a further lessening of the severity of penalties and penal measures would be welcome, especially with a view to encouraging cooperation with prosecuting authorities at the earliest possible stage of an investigation. Fourth, it would seem fitting, as well, to introduce a system similar to the one followed in the US, in which entering into cooperation at the earliest possible stage is encouraged by the existence of a scaling

mechanism (the severity of the penalty and/or penal measures are lessened in proportion to the stage in the proceedings at which the cooperation is entered into). Fifth, it would seem worthwhile to widen the scope of application of Article 335 of the Code of Penal Procedure so as to cover collective bodies.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Yes, there is. The possible advantages include the following: (1) faster conclusion of the case and, as an additional benefit, the conviction being expunged earlier; (2) less severe penalty and/or penal measures being levied, including a lower financial penalty having to be paid; (3) a better situation in a possible civil law suit where the aggrieved party, having agreed within the context of the structured settlement to a certain level of compensation, may be likely to demand a larger sum before a civil court; and (4) the reputation not being tarnished to the same extent as otherwise.

*Rodrigo de Freitas Leal, Lawyer, Rodrigo de Freitas Leal & Partners*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

- Law 20/2008 of 21 April, Portuguese Penal Code; and
- Law 36/1994 (updated in 2010) of the Portuguese Penal Code.

#### **1.2 Are facilitation payments allowed in your jurisdiction?**

No.

Under both the Penal Code and other applicable laws, no money or other means or ‘advantages’ (as defined in Portuguese) are allowed, unless they are given/applied as a tax, tariff or price (legally).

#### **1.3 Does your country provide for corporate criminal liability?**

Yes.

#### **1.4 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other: several entities are dedicated to such activities; firstly, the Counsel for Prevention of Corruption (Law 54 of 3 September 2008). Further, the Prosecutor’s Office is empowered to start criminal procedures, including investigation of bribery and corruption cases; this office also has a special Unit called the ‘Tax Analysis Unit’ for these matters, while the Judiciary Police has a special unit for financial crimes which conducts specialised investigations.

### **2. Exercise of prosecutorial discretion**

#### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

##### **2.1.1 Deciding whom to charge with a crime?**

No.

The principle of legality (contained in the Constitution and the Penal Code), provides that public officials may not exercise discretion in deciding whether or not to enter charges against a person. Such decision must be taken on the basis of evidence gathered pursuant to an official investigation.

##### **2.1.2 Deciding what charges to file?**

No. See answer to previous question.

### **2.1.3 Deciding whether to drop charges?**

No. See answer to previous question.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The closest act to a plea bargain available under Portuguese Law is called ‘Provisional Suspension of the Procedure’ (*Suspensão Provisória do Processo*), provided in Articles 281st Penal Procedural Code and 9th of the Law 36 (1994), which state that the judge and the prosecutor may enter into an agreement in filing a case for a number of years, if the defendant assumes the deed, repays the amounts he/she received in an illicit manner, and abides by special conduct imposed by the court.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Defence mitigation argued to a judge.

Other. Please specify: The above-mentioned ‘Suspension’ – see previous answer.

Articles 281st Penal Procedural Code and 9th of the Law 36 (1994).

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No. As previously specified, the principle of legality does not allow for this.

### **3.5 *De facto or de jure***

*Editor’s note: The settlement process (provisional suspension of the procedure) is contingent upon an admission of guilt. (See section 2.1.4 above). This constitutes a de facto, plea-based, settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

Yes.

Files may be accessed upon request by anyone showing a legitimate interest. Individuals, as well, may attend proceedings, unless declared private, in accordance with the Penal Procedure Code, Articles 86 to 90.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

When there is a public statement, the Court alone decides the contents. In cases where no public statement is provided, the explanation provided in the answer above applies.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Under Portuguese law, investigations are conducted by the Prosecutor's Office (Article 71, 1 and 2 from the Statutes of the Prosecutors Office); more specifically, the Judiciary Police is responsible for the investigation of this type of crimes (Statutes of the Judiciary Police and Law of the Organisation of Criminal Investigation).

**4.2.1 If yes, is this data publicly available?**

No.

Information may only be accessed through consultation of files, as explained above; it cannot be accessed online.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

This solution was not reached in any known case (I am referring to the Provisional Suspension of the Procedure, as explained in the questions above), because public mediatic cases are under great pressure and the judiciary does not want to settle for a solution not involving trial, regardless of the potential outcome of the trial (condemnation or absolution).

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

The introductory clauses (Articles 4 to 8) of the Penal Code regulate situations of conflict between jurisdictions.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

In principle, Portuguese courts respect foreign decisions, except for cases where (1) the foreign jurisdiction does not recognise Portuguese decisions and (2) the foreign decision has been reached with prejudice to the rights of the accused. Settlements in criminal proceedings are illegal and violate our principle of 'public order'. Hence, they are not accepted by Portuguese courts.

**6. The following questions call for your opinion**

**6.1 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

It is not encouraged thanks to the principle of legality and the suspicion surrounding this type of cases.

**6.2 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

In my opinion, as a principle, we should not negotiate with persons committing corruption offences. These persons should face the consequences of their actions rather than trying to negotiate a way out. It is important to remember that these perpetrators are often powerful actors, who can twist and bend tough structures. To cooperate with them amounts to facilitating the criminal activity. On the other hand, cooperation may be useful when guarantees of non-repetition are provided.

**6.3 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

In my opinion, cooperation would be facilitated by the adoption of a gravity spectrum for corruption-related offences. Such instrument would help during negotiation without prejudicing the principle of legality.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

In this case, I would recommend investing in investigations, adopting more efficient technologies and improving the exchange of information between entities that denounce and prosecute these crimes.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is not a clear advantage, as such is considered by the judge only at the end of the trial. It may indeed result in a less severe penalty; however, such outcome is not certain, especially in cases where a great damage has occurred as a result of the criminal activity and the cases have had an impact on the public.

*Bogdan Bibicu, Partner, Kinstellar (Bucharest Office)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The main enactments were (a) the Criminal Code, (b) the Code of Criminal Procedure, (c) Law no 78/2000 on the prevention, the discovery and the sanctioning of criminal offences of corruption and (d) the Government's Emergency Ordinance No 43/2002 on the National Anticorruption Directorate.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Romania implemented the following laws/legal instruments criminalising corruption:

- the United Nations Convention against corruption (adopted 31 October 2003, entered into force 14 December 2005);
- the Criminal Convention against corruption (adopted 27 January 1999);
- the Additional Protocol of the Criminal Law Convention on Corruption (adopted 15 May 2003);
- the Civil Convention against corruption (adopted 4 November 1999);
- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;
- Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering; and
- the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000).

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Romanian criminal law applies to offences committed on the territory of Romania, regardless of whether the perpetrator possesses Romanian citizenship. In addition, Romanian criminal law applies to offences committed outside of Romanian territory by a Romanian citizen or a Romanian legal entity if the sentencing stipulated by Romanian law is life imprisonment or a term of imprisonment longer than ten years.

In all other cases, Romanian criminal law applies to offences committed outside of Romanian territory by a Romanian citizen or a Romanian legal entity if the act is also criminalised by the criminal law of the country where it was committed or if it was committed in a location that is not subject to any State's jurisdiction.

At the same time, Romanian criminal law applies to offences committed outside of Romanian territory by a foreign citizen or a stateless person against (a) the Romanian State, (b) a Romanian citizen or (c) a Romanian legal entity.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No. Under Romanian law, facilitation payments are considered bribes.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

Under Romanian law, criminal offences may be perpetrated by both legal entities and individuals. The conditions for imposing criminal liability on legal entities are provided by the criminal legal framework, mainly the Criminal Code and the Criminal Procedure Code.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other: the National Anti-corruption Directorate has the power to conduct criminal investigations of the corruption/corruption related criminal offences.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

The prosecutor may initiate criminal proceedings when there is evidence leading to a reasonable presumption that a person/entity committed an offence and when there are no circumstances preventing the initiation thereof.

**2.1.2 Deciding what charges to file?**

Yes.

The prosecutor will decide the charges on the basis of the evidence produced during the criminal prosecution. However, the judge has the possibility to change the legal classification of conduct as established by the prosecutor.

**2.1.3 Deciding whether to drop charges?**

No.

The prosecutor may decide to drop the charges in two situations: (a) if the offences for which the law requires a penalty of a fine/imprisonment of no more than seven years, the prosecutor can drop charges when, having considered duly the content of the offence, the modus operandi and the instruments used, the goal of the offence and the concrete circumstances of its commission, the consequences that occurred or could have occurred, he/she finds that a public interest is not served in prosecuting; or (b) the legal requirements for initiating the criminal actions are not met.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The prosecutor has the right to decline the conclusion of a plea bargain when the legal requirements are not met. If the prosecution offers a plea bargain and an agreement is reached, the relevant court will need to approve such agreement.

#### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Other: separation of judicial functions, benefit of the doubt, finding the truth, *ne bis in idem*, fair trial and reasonable, duration of the trial, right to freedom and safety, right to defence, observance of human dignity and private life.

The general principles governing the criminal trial are provided by the Criminal Procedure Code in Articles 3–11, being mandatory for the participants in the criminal proceedings.

#### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

The prosecutor is required to investigate the criminal offence if the constitutive elements of the offence are met, regardless of whether and to what extent injury has been caused.

##### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all. Please see the response to question 2.3.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

Under Romanian law, if criminal law describes an act as unlawful and such act was committed with guilt and someone can be held liable for it, insofar as no justification can be provided, the prosecutor will investigate this criminal action, regardless of whether the perpetrator is a private individual or an entity.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

### 3.5 *De facto or de jure*

*Editor's note: Plea bargain process contingent upon an admission of guilt. (See section 2.1.4 above). This constitutes a de facto, plea-based, settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

Romanian legislation provides for the possibility to conclude a plea bargain with the prosecutor. The Information and Public Relations Office of the National Anticorruption Department at times issues brief press releases concerning some of the plea bargains concluded with the prosecutors. Moreover, the Prosecutor's Office attached to the High Court of Cassation and Justice may also issue such press releases. In addition, information regarding the conclusion of plea bargains is available online, specifically on Romanian courts' websites.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited.

The information made available to the public usually only includes general aspects of the case (ie, the name of the defendant, the criminal offence perpetrated, the damage caused, the sentence).

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

The prosecutor is vested with the power to decide which details of a given case should be released to the public, due to the fact that he/she does not operate during a public phase of the criminal trial. During the trial phase some additional information may be released to the public (eg, a summary of the hearings).

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

The National Anticorruption Directorate frequently issues reports (either annually or at given time intervals) regarding the activities conducted.

**4.2.1 If yes, is this data publicly available?**

Yes. [www.pna.ro](http://www.pna.ro).

The information is published in the reports mentioned above, section 4.2. These reports are usually published on the website of the National Anticorruption Directorate.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

As per the international treaties regarding international cooperation ratified by Romania, criminal sentences issued in other signatory countries are mutually recognised by the competent authorities and they become effective and mandatory in Romania. Further provisions and conditions in relation to ongoing criminal investigations are applicable.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

The Criminal Procedure Code provides that no person can be investigated or prosecuted for an offence when a final criminal judgment has already been issued against that same person for the same offence, even if the charges were different. Thus, a foreign conviction is binding.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

Under Romanian law, it is possible for alleged wrongdoers to cooperate with the prosecution. However, such cooperation does not impact on the outcome of the criminal investigation, as the prosecution, depending on the evidence uncovered, may decide to either indict the alleged wrongdoers or not. Cooperation between the alleged wrongdoers and the prosecution may be considered a mitigating circumstance and, consequently, may decrease the criminal sanction.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Cooperation between the Prosecution and alleged wrongdoers is encouraged by the existing criminal framework in order to facilitate criminal investigation. In fact, such cooperation can be advantageous for the alleged wrongdoers since it may be considered as a mitigating factor for sentencing purposes and hence it may decrease the criminal sanction imposed by the Court.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Cooperation should be encouraged, especially considering the legal principles governing the conduct of criminal proceedings in Romania, as it helps to conduct a more comprehensive criminal investigation. Further, it may aid in (a) speeding-up the criminal trial and (b) identifying other potential wrongdoers.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Romania has already taken steps with a view to facilitating cooperation, the most important of which was decreasing the amount of sanctions which can be imposed on wrongdoers who cooperate with the prosecution.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

The Criminal code provides that companies may receive a financial advantage if they cooperate with authorities, that is, a reduction of the penalties applied by court.

*Nikolai Akimov, Government Procurement Lawyer and Deputy Head of the Department for Public Procurement Programmes at Moscow Metropolitan Governance University*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

- The Constitution of the Russian Federation, the Criminal Code of the Russian Federation dated 13 June 1996 No 63-FZ;
- Federal Law dated 25 December 2008 No 273-FZ ‘On Fighting Corruption’;
- Federal Law dated 07 August 2001 No 115-FZ ‘On Fighting Legalisation (Money Laundering) of Incomes Gained via the Path of Crime and Terrorism Financing’;
- Federal Law of 5 April 2013 No 44-FZ ‘On the contract system in the procurement of goods, works and services for state and municipal needs’;
- Federal Law dated 03 December 2012 No 230-FZ ‘On Control over the Conformity of Officials’ and Certain Other Persons’ Expenses to their Income’; and
- Administrative Offence Code of the Russian Federation dated 30 December 2001 No 195-FZ.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations Convention Against Corruption;
- the Agreement on the Foundation of the Interstate Anti-Corruption Council dated 25 October 2013;
- the Agreement between the Governments of the Russian Federation and the Republic of Belarus on Cooperation Effectiveness Increase Concerning Fighting Against Corruption dated 25 December 2013; and
- the Model Law on Fighting Corruption (Saint-Petersburg, 25 November 2008) – non-regulatory.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Article 12 (1) of the Criminal Code of the Russian Federation dated 13 June 1996 No 63-FZ: Russian Federation citizens and stateless persons permanently residing in the Russian

Federation who committed a crime against the interests protected by the present Code outside the Russian Federation are subject to criminal liability in accordance with the present Code unless there is a foreign court's sentence on the crime.

Article 12 (3): Foreign citizens and stateless persons not permanently residing in the Russian Federation who committed a crime outside the Russian Federation are subject to criminal liability in accordance with the present Code if the crime is committed against the Russian Federation's interests, or a citizen of the Russian Federation, or a stateless person permanently residing in the Russian Federation, or in cases stipulated by an international agreement of the Russian Federation or other international document which confirms the obligations that are recognised by the Russian Federation concerning the relations regulated by the present Code if the foreign citizens or stateless persons not permanently residing in the Russian Federation were not convicted of committing a crime in a foreign country and are being held criminally liable in the Russian Federation.

Special subject: a foreign public official or a public official of a public international organisation may also be held (note 2 on the Article 290 of the Criminal Code), but not Russian public officials (see comment on the Article 285 of the Criminal Code).

Article 4 (2) of the Federal Law dated 25.12.2008 No. 273-FZ 'On Fighting Corruption': Foreign citizens, stateless persons not permanently residing in the Russian Federation, foreign legal entities that have civil legal capacity and are incorporated under foreign legislation, international organisations, as well as their branches and representative offices charged with (or suspected of) corruption crimes conducted outside the Russian Federation are subject to liability in accordance with the Russian Federation's legislation in cases stipulated by the Russian Federation's international agreements and federal laws.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

General Article: The Criminal Code: Article 291.2. Petty Bribery 1. Bribery taking, giving a bribe personally or through an intermediary in the amount not exceeding RUR 10k are subject to a penalty in the amount of up to RUR 200k or in the amount of the convicted person's salary or other income for the period of up to three months, or correctional labour for the period of up to one year, or custodial restraint for the period of up to two years, or imprisonment of up to a year.

#### **1.5 Does your country provide for corporate criminal liability?**

No.

Article 19 of Russian Criminal Code: Only natural persons of the age stipulated by the Code may be prosecuted.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

The federal government allocates the functions on fighting corruption among federal executive agencies (Article 5 (3) of 273-FZ); government agencies, regional and local authorities prevent corruption within the scope of their authority (Article 5 (4) of 273-FZ); the anti-corruption activities of internal affairs agencies, the Federal Security Service, customs authorities and other law enforcement agencies are coordinated by the Attorney General and other attorneys (Article 5 (6) of 273-FZ). The Accounts Chamber of the Russian Federation conduct anti-corruption activities within the scope of its authority.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

The reason for being charged with a crime is the presence of components of a crime in a person's actions (Article 8 of the Criminal Code). The presence of a crime's elements in one's activities is the reason for the conduct of investigative activities (Article 7 (2-1) of Federal Law from 12 August 1995 N144-FZ 'On Investigative Activities').

**2.1.2 Deciding what charges to file?**

No.

The reason for being charged with a crime is the presence of components of a crime in a person's actions (Article 8 of the Criminal Code).

**2.1.3 Deciding whether to drop charges?**

Yes.

The court, an investigator or a junior detective with the prosecutor's consent may drop misdemeanours and medium-gravity charges due to the offender's active repentance (Article 28 (1) of Criminal Procedure Code).

**2.1.4 Deciding whether or not to plea bargain?**

Yes.

Article 317.1 (1) of the Criminal Procedure Code: A move to engage in a settlement is submitted in writing by the offender or the suspect to the prosecutor. The investigator or prosecutor may either confirm the offender's plea bargain or dismiss it (Article 317.1–317.2 of the Criminal Procedure Code).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution – Article 3 of the Criminal Code.

Principle of Opportunities – Article 4 of the Criminal Code.

Defence mitigation argued to a judge – for example, Article 248 of the Criminal Procedure Code.

Defence mitigation argued to the prosecutor – for example, Article 225 (1–7) of the Criminal Procedure Code.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

The reason for being charged with a crime is the presence of components of a crime in a person's actions (Article 8 of the Criminal Code).

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

Corporate defendants are eligible for administrative prosecution only (Article 14 of 273-FZ and Article 19.28 of the Administrative Violations Code).

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Article 21 (5) of the Criminal Procedure Code: the prosecutor is entitled to enter into a structured settlement with the offender upon the initiation of a criminal case.

Article 317.1 (2) of the Criminal Procedure Code: the offender or suspect is entitled to move to engage in a settlement from the beginning of the criminal prosecution up to the end of the preliminary investigation.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

Article 317.7 (1) of the Criminal Procedure Code stipulates that the trial and conviction of an offender who has entered into a structured settlement are conducted in accordance with Article 316 of the Criminal Procedure Code, which states the

necessity of an admission of guilt. In accordance with the Article 314 of the Criminal Procedure Code, the special procedure shall not be applied unless the offender admits his guilt.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

*досудебное соглашение о сотрудничестве.*

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

Article 317.7 (4) The following shall be taken into account:

- the character and extent of the offender's collaboration with the inquest, the criminal prosecution of accomplices, the tracing of the assets acquired via the crime;
- the importance of the offender's collaboration for crime investigation, the criminal prosecution of accomplices, the tracing of the assets acquired via the crime;
- crimes and criminal cases detected or opened due to the offender's collaboration;
- the degree of threat to personal safety undergone by the offender, his close relatives, other relatives and connected persons due to the offender's collaboration; and
- the offender's personality, aggravating and mitigating circumstances.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

Article 11 (1) of the Criminal Procedure Code Protection: the court, prosecutor, investigator or junior detective must clarify to the suspect, offender, victim of a crime, civil claimant, civil defendant and other parties to the criminal process their rights, obligations and liabilities and ensure the enjoyment of these rights.

**3.2.4 What form(s) can a structured settlement take?**

Structured settlements are made in a written form.

**3.2.5 What are the usual terms of such an agreement?**

Article 317.3 (2) of the Criminal Procedure Code: a structured settlement agreement should specify:

- the date and place in which the document originated;

- an official of the prosecutor's office, who concludes an agreement on the part of the prosecution;
- the last name, first name and patronymic of the suspect or accused person who enters into an agreement on the part of the defence, and the date and place of his birth;
- a description of the crime, the time and place of the crime, as well as other circumstances to be proved in accordance with the Code;
- the clause, part and Article of the Criminal Code of the Russian Federation which establish liability for a crime;
- the actions that a suspect or an accused person is obliged to commit while fulfilling his obligations specified in the agreement; and
- the mitigating circumstances and provisions of criminal law that can be applied to a suspect or accused person subject to the fulfilment of his obligations specified in the agreement.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Criminal law in Russia does not allow the inclusion of an agreement not to charge more serious criminal charges. The investigator and the prosecutor are required to establish all circumstances of the criminal act and to bring appropriate charges against the accused. The structured settlement the offender enters into consists of the provisions of the criminal law that guarantee the mitigation of the sentence imposed by the court in accordance with the offender's collaboration during the investigation.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If the offender fails to perform his obligations under the agreement, the prosecutor is entitled to defer the terms of the agreement or to reverse it (Article 317.4 (5) of the Criminal Procedure Code).

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The move to engage in a settlement negotiation is submitted to the prosecutor (Article 317.1 (1) of the Criminal Procedure Code).

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

The offender is entitled to move to engage in a settlement negotiation only until the preliminary investigation is over (Article 317.1 (2) of the Criminal Procedure Code).

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

No.

The prosecutor files with the court a plea for the special court procedure (Article 317.5 (1,4) of the Criminal Procedure Code).

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: Prosecutor.

The prosecutor must confirm the offender's compliance with the terms of the settlement (Article 317.4 (4) of the Criminal Procedure Code).

**3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

If the settlement is reversed due to non-compliance the proceedings are conducted per the standard procedure (Article 317.4 (5) of the Criminal Procedure Code).

**3.4 Outcome of the structured settlement**

**Statutory Provisions:**

Financial penalties – yes.

Personal liability – yes.

In case of such an agreement the term of imprisonment or the amount of penalty cannot exceed 50 per cent of the maximum term or the amount of penalty stipulated by the Criminal Code. (Article 62 (2) of the Criminal Code).

### 3.5 *De facto or de jure*

In order to criminalise any corruption activities and to fulfil the Russian Federation's international obligations, the Criminal Code of the Russian Federation imposes liability for corruption (Resolution of the Plenum of the Supreme Court of the Russian Federation dated 9 July 2013 No 24). Entering into a structured settlement by offenders for corruption crimes is regulated by the general provisions stipulated in Chapter 40.1 of the Criminal Procedure Code of the Russian Federation.

*Editor's note: The Article 314 Criminal Procedure Code settlement process (special procedure) is contingent upon an admission of guilt. (See section 3.1 and 3.2 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

Article 12 of the Criminal Code. Operation of the criminal statute with regard to persons who have committed crimes outside the Russian Federation:

- Russian Federation citizens and stateless persons permanently residing in the Russian Federation who committed a crime against the interests protected by the present Code outside the Russian Federation are subject to criminal liability in accordance with the present Code unless there is a foreign court's sentence on the crime;
- armed forces personnel deployed outside the Russian Federation are liable for the crimes conducted on another state's territory under the present Code unless otherwise stipulated by the Russian Federation's international agreement; and
- foreign citizens and stateless persons not permanently residing in the Russian Federation who committed a crime outside the Russian Federation are subject to criminal liability in accordance with the present Code if the crime is committed against the Russian

Federation's interests, or a citizen of the Russian Federation, or a stateless person permanently residing in the Russian Federation, or in cases stipulated by an international agreement of the Russian Federation or other international document which confirms obligations that are recognised by the Russian Federation concerning the relations regulated by the present Code if foreign citizens or stateless persons not permanently residing in the Russian Federation were not convicted of committing a crime in a foreign country and are being held criminally liable in the Russian Federation.

#### **4.2.1 If yes, is this data publicly available?**

Yes. Please provide the website: <https://sudrf.ru>.

Partially available. In accordance with Article 14 (1-B,r) of the Federal Law dated 22 December 2008 No 262-FZ 'On ensuring access to the information on the courts activities in the Russian Federation', data on cases being heard by the courts and the text of court decrees shall be published on the internet.

#### **4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

The case of Ekaterina Smetanova is a fine illustration of how a structured settlement functions. She was one of the offenders in the *Oboronservice* case that concerned corruption activities in the Ministry of Defence of the Russian Federation. Smetanova was accused of fraud (Article 159 (4) of the Criminal Code, with a maximum term of basic punishment at ten years of imprisonment) and commercial bribery (Article 204 (3) of the Criminal Code, with a maximum term of basic punishment at seven years of imprisonment). Not much is known about the hearings themselves since they were closed to the public. What is known for sure, is that she entered into a structured agreement, was taken under state protection due to possible threats, confessed her guilt and bore witness against other offenders. Such actions were considered mitigating by the court during sentencing and no aggravating circumstances were found. As such, she was conditionally sentenced to four years' imprisonment and a penalty in the amount of RUR 6,499,655.00.

### **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

#### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Article 12 (1) of the Criminal Code of the Russian Federation dated 13 June 1996 No 63-FZ: Russian Federation citizens and stateless persons permanently residing in the Russian Federation who committed a crime against the interests protected by the present Code outside the Russian Federation are subject to criminal liability in accordance with the present Code unless there is a foreign court's sentence on the crime.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

Article 472 (1,2) of the Criminal Procedure Code, Court procedure on enforcement of a foreign court's sentence. If a Russian court during the examination of a foreign court's request for extradition of a Russian citizen sentenced to imprisonment by a foreign court determines that the action for which such Russian citizen is sentenced is not deemed a crime under Russian legislation, or a foreign court's sentence cannot be enforced due to the expiry of the periods of limitations or other grounds stipulated by the Russian Federation's legislature or the Russian Federation's international agreement, the court shall issue a decree of refusal of recognition of the foreign court's sentence. In all other cases, a court shall issue a decree of recognition and enforcement of a foreign court's sentence.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

If the offender fulfils the terms of a structured settlement and collaborates with the investigation his case will be heard under the special procedure and his sentence will be mitigated. However, there is a risk that the investigator or the prosecutor will find the data provided by the offender insufficient for the investigation. In such cases, a structured settlement may be cancelled (the prosecutor's discretion is very high).

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Cooperation between the prosecuting authority and alleged wrongdoers is discouraged. There are certain problems due to the absence of an effective mechanism that could protect an offender from self-incrimination. There are also problems with structured settlements' application since sometimes offenders bear witness not against their accomplices but against other crimes' perpetrators. Another problem relates to sentencing. In some cases, a punishment imposed to take account of the aggregate of crimes under the structured settlement equals the punishment imposed under the standard procedure. The absence of a legally guaranteed substantive punishment decrease where there has been active collaboration in the disclosure of crimes in which the offender did not participate also deprives offenders of the willingness to collaborate with investigations.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Cooperation between the prosecuting authority and alleged wrongdoers should be encouraged. Structured settlements should in the first place be used for the gravest offences, probation of which may be difficult.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Substantial and procedural provisions governing structured settlements should be changed. Entering into a structured settlement should be regulated more precisely.

*Tanja Dugonjić, Attorney-at-Law, Law Office of Tomislav Šunjka*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Anti-Bribery rules are contained in various laws:

- The Anti-Corruption Agency Act (Official Gazette of the Republic of Serbia, Nos 97/2008, 53/2010, 66/2011, 67/2013, 112/2013 and 8/2015);
- Criminal Code (Official Gazette of the Republic of Serbia, Nos 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016);
- Law on the Prevention of Money Laundering and the Financing of Terrorism (Official Gazette of the Republic of Serbia, Nos 20/2009, 72/2009, 91/2010 and 139/2014);
- Law on Public Procurement (Official Gazette of the Republic of Serbia, Nos 124/2012, 14/2015 and 68/2015);
- Law on the Protection of Whistleblowers (Official Gazette of the Republic of Serbia, Nos 128/2014);
- Law on Judges (Official Gazette of the Republic of Serbia, Nos 116/2008, 58/2009, 104/2009, 101/2010, 8/2012, 121/2012, 124/2012, 101/2013, 111/2014, 117/2014, 40/2015, 63/2015, 106/2015 and 63/2016);
- Law on Public Prosecution (Official Gazette of the Republic of Serbia, Nos 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012, 121/2012, 101/2013, 111/2014, 117/2014, 106/2015 and 63/2016); and
- Law on Civil Servants (Official Gazette of the Republic of Serbia, Nos 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009 and 99/2014).

### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

The Council of Europe Criminal Law Convention on Corruption (ETS 173) and Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), the United Nations Convention Against Corruption

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No.

The Criminal Code (Official Gazette of the Republic of Serbia, Nos 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016) provides

conditions under which Serbian criminal law can be applied to a Serbian national or a foreigner who commits an offence abroad.

The criminal legislation of Serbia shall apply to a citizen of Serbia, and to an offender who became a citizen of Serbia after the commission of the offence, who commits a criminal offence abroad, if he is found on the territory of Serbia or if he is extradited to Serbia (Article 8 of the Criminal Code).

The criminal legislation of Serbia shall also apply to a foreigner who commits a criminal offence against Serbia or a Serbian citizen outside the territory of Serbia, if he is found on the territory of Serbia or if he is extradited to Serbia. The criminal legislation of Serbia shall also apply to a foreigner who commits a criminal offence abroad against a foreign state or foreign citizen, when such offence is punishable by five years' imprisonment or a heavier penalty, pursuant to laws of the country of commission, if such a person is found on the territory of Serbia and is not extradited to the foreign state. Unless otherwise provided by the Criminal Code, the court may not impose in such cases a penalty heavier than set out by the law of the country where the criminal offence was committed (Article 9 of the Criminal Code).

In the cases referred to above, a criminal prosecution shall not be undertaken if:

- the offender has fully served the sentence to which he was convicted abroad; or
- the offender was acquitted abroad by final judgment, the statute of limitation has expired in respect of the punishment, or was pardoned;
- a relevant security measure was enforced abroad to an offender of unsound mind; or
- criminal prosecution under the foreign law requires a motion by the victim, and such motion was not filed.

In the cases referred to above, a criminal prosecution may be undertaken only if a criminal offence is also punishable under the law of the country where it was committed, unless permission has been granted by the Republic's Public Prosecutor, or it is provided by a ratified international agreement.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Corporate criminal liability is provided by the Law on the liability of legal entities for criminal offences (Official Gazette of the Republic of Serbia, no 97/2008).

Article 2:

‘A legal entity may be liable for criminal offences constituted under a special part of the Criminal Code and under other laws if the conditions governing the liability of legal entities provided for by this Law are satisfied.’

Article 6:

‘A legal person shall be held accountable for criminal offences which have been committed for the benefit of the legal person by a responsible person within the remit, that is, powers thereof.

The liability referred to in paragraph 1 of this Article shall also exist where the lack of supervision or control by the responsible person allowed the commission of crime for the benefit of that legal person by a natural person operating under the supervision and control of the responsible person.’

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Law on Organisation and Jurisdiction of Government Authorities in Suppression of Organised Crime, Corruption and Other Severe Criminal Offences (Official Gazette of the Republic of Serbia, Nos 42/2002, 27/2003, 39/2003, 67/2003, 29/2004, 58/2004, 45/2005, 61/2005, 72/2009, 72/2011, 101/2011, and 32/2013) governs the establishment, organisation, jurisdiction and powers of government bodies and special organisational units of government bodies for the detection, criminal prosecution and processing of criminal offences relating to abuses of official duty (Abuse of Office, Unlawful Mediation, Soliciting and Accepting Bribes, and Bribery), when a person receiving a bribe is an official or responsible person holding public office, on the grounds of the election, designation, or appointment by the National Assembly, the Government, the High Judicial Council, or the State Prosecutorial Council.

The Prosecutor’s Office for organised crime has jurisdiction to proceed in criminal offences of corruption.

A service for suppression of organised crime, part of the Ministry of the Interior, performs police duties in respect of criminal offences of corruption.

A new law, the Law on Organisation and Jurisdiction of Government Authorities in Suppression of Organised Crime, Terrorism and Corruption (Official Gazette of the Republic of Serbia, No 94/2016), will enter into force on 1 March 2018. Its aim is to strengthen the capacity of the Public Prosecutor’s Offices. For example, it provides for the establishing of special departments of the Public Prosecutor’s Offices for suppression of corruption apart from the Prosecutor’s Office for organised crime. Additionally, it introduces new investigation methods for the prevention of organised crime.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

In principle, the Law on Public Prosecutions (Official Gazette of the Republic of Serbia, Nos 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012, 121/2012, 101/2013, 111/2014, 117/2014, 106/2015 and 63/2016) provides that prosecutors are independent in their work, but have to obey the mandatory instructions of a higher ranked prosecutor. These are the relevant provisions of the aforementioned law:

- Article 5 paragraph 2: ‘All forms of influence by the executive and the legislative authorities on the work of the public prosecution and its activity in cases, attempted by using public office, the public information, media and any other means, which may threaten the independence of the work of a public prosecution, is prohibited.’
- Article 5 paragraph 3: ‘A public prosecutor and deputy public prosecutor have to refuse to undertake any action which represents influence on the independence of the work of the public prosecution.’
- Article 45 paragraph 1: ‘A public prosecutor and deputy public prosecutor are independent of the executive and the legislative powers in performance of their duties.’
- Article 45 paragraph 3: ‘No one outside the public prosecution is entitled to define the tasks of public prosecutors and deputy public prosecutors, or influence their decisions in cases.’
- Article 45 paragraph 4: ‘A public prosecutor and deputy public prosecutor shall be accountable for their decisions only to the competent public prosecutor.’
- Article 46 paragraph 2: ‘The office of a public prosecutor must be performed impartially.’
- Article 18 paragraph 1: ‘A higher ranked prosecutor may issue to an immediately lower ranked prosecutor mandatory instructions for proceeding in particular cases when there is doubt in respect of the efficiency and legality of his actions, and the Republic’s Public Prosecutor may issue such instruction to any public prosecutor.’
- Article 23 paragraph 1: ‘Deputy public prosecutors are required to perform all actions entrusted to them by public prosecutors.’
- Article 24 paragraph 1: ‘A public prosecutor may issue to his deputy mandatory instructions for work and action.’

### **2.1.2 Deciding what charges to file?**

Yes.

Please see explanation for question 2.1.1.

In addition, the Criminal Proceedings Code (Official Gazette of the Republic of Serbia, Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014) provides that in the case of criminal offences prosecutable ex officio, the Public Prosecutor is authorised among other actions to:

- manage pre-investigation proceedings;
- decide on not undertaking or deferring criminal prosecution;
- conduct investigations;
- conclude plea agreements and agreements on giving testimony;
- file and represent an indictment before a competent court;
- drop charges; and
- file appeals against court decisions which are not final and submit extraordinary legal remedies against final court decisions.

### **2.1.3 Deciding whether to drop charges?**

Yes.

The Criminal Proceedings Code adopts the principle of mutability. This means that the Public Prosecutor may drop the charges during a trial until its end, and even during a trial before the court of second instance, by giving a statement that he is dropping the charges, without the obligation to give any reasons.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The Criminal Proceedings Code provides that the Public Prosecutor may conclude a plea bargain with a defendant. It provides the manner and content of a plea bargain. However, when a prosecutor concludes a plea agreement, he has to submit it to the competent judge, who will render a decision on acceptance or dismissal of the plea agreement based on the grounds provided in the Criminal Proceedings Code.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The Public Prosecutor files an indictment when there is justified suspicion that a certain person has committed a criminal offence. (Article 331 paragraph 1 of the Criminal Proceedings Code).

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The Criminal Proceedings Code (Article 2) defines the term ‘justified suspicion’ as a set of facts which directly substantiate grounded suspicion and justify the filing of an indictment. In addition, the term ‘grounded suspicion’ is defined as a set of facts that directly show that a certain person is the perpetrator of a criminal offence.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

According to the Criminal Proceedings Code, a structured settlement can be concluded prior to filing an indictment against a suspect. After filing the indictment, the accused person can conclude a plea bargain with the Public Prosecutor.

Article 283 of the Criminal Proceedings Code provides that the Public Prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term of imprisonment of up to five years if the suspect accepts one or more of obligations provided in this Code. If the suspect fulfils the obligation within the prescribed time limit, the Public Prosecutor will dismiss the criminal complaint/allegation by a ruling and notify the injured party thereof.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Odlaganje krivičnog gonjenja.*

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

The Public Prosecutor has the right to decide, based on the principle of opportunity, whether to require the suspect to fulfil one or more obligations.

##### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

##### **3.2.4 What form(s) can a structured settlement take?**

It is in written form.

### **3.2.5 What are the usual terms of such an agreement?**

In order to defer criminal prosecution the Public Prosecutor will determine the obligations which a suspect must fulfil and a time limit during which the suspect must fulfil the obligations undertaken, with the proviso that the time limit may not exceed one year.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The Criminal Proceedings Code provides that the suspect can be obliged to undertake the following:

- to rectify the detrimental consequence caused by the commission of the criminal offence or indemnify the damage caused;
- to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution;
- to perform certain community service or humanitarian work;
- to fulfil obligations of support including as to family members which have fallen due;
- to submit to an alcohol or drug treatment programme;
- to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct; and/or
- to fulfil an obligation determined by a final court decision, or observe a restriction determined by a final court decision.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

If the suspect fails to fulfil the undertaken obligation/s, the Public Prosecutor will continue with the criminal prosecution in order to decide on the criminal complaint/allegation and whether to bring an indictment against the suspect.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

No.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: an officer of the authority in charge of the execution of criminal sanctions.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

## **3.4 Outcome of the structured settlement**

### **Statutory Provisions**

Financial penalties – yes. The Public Prosecutor can impose on the suspect the obligation to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution

Disgorgement of profits – yes. The Public Prosecutor can impose on the suspect the obligation to rectify the detrimental consequences caused by the commission of the criminal offence

Compensation to third parties – yes. The Public Prosecutor can impose on the suspect the obligation to indemnify damage.

Obligations to cooperate with other agencies – yes. The Public Prosecutor can impose on the suspect the obligation to perform certain humanitarian work or community service

## **3.5 *De facto or de jure***

The decision of the Public Prosecutor to defer criminal prosecution is based on the principle of opportunity.

*Editor's note: According to Article 283 of the Serbian Criminal Proceedings Code, criminal proceedings can be deferred if a suspect accepts one or more obligation provided in the code. This process is not contingent upon an admission of guilt. (See section 3.1 above). This would constitute a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

The Law on Organisation and Jurisdiction of Government Authorities in Suppression of Organised Crime, Corruption and Other Severe Criminal Offences (Official Gazette of the Republic of Serbia, Nos 42/2002, 27/2003, 39/2003, 67/2003, 29/2004, 58/2004, 45/2005, 61/2005, 72/2009, 72/2011, 101/2011, and 32/2013) provides that all persons engaged in performing tasks and duties within the purview of government authorities pertaining to the suppression of corruption offences, shall duly treat all information and data they have acquired in the course of performance of these duties as officially classified information. A newly enacted law on the organisation and jurisdiction of government authorities in the suppression of organised crime, terrorism and corruption, which shall become effective on 1 March 2018, provides that data from the pre-investigation phase and investigation related to corruption offences can be disclosed to the public upon approval of the competent public prosecutor.

In accordance with the provisions of the Rulebook on Administration in Public Prosecutors' Offices (Official Gazette of the Republic of Serbia, Nos 110/2009, 87/2010 and 5/2012), when the Public Prosecutor finds that public should be informed about actions taken by the Public Prosecutor's Office, he will inform the public about these actions, in a way that does not harm the interests of the proceedings or compromise the privacy of the parties to the proceedings.

However, the Public Prosecutor has a duty to act upon a request for access to information of public importance. The law on free access to information of public importance (Official Gazette of the Republic of Serbia, Nos 120/2004, 54/2007, 104/2009 and 36/2010) provides grounds on which one can request access to information of public importance. For example, a public authority shall grant the applicant his/her right to access information of public importance if such information relates to a person, event or occurrence of public interest, especially in case of a holder of public office or a political figure, insofar as the information bears relevance on the duties performed by that person; or if a person's behaviour, in particular concerning his/her private life, has provided sufficient justification for a request for such information.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

The Action Plan for the Implementation of the National Anti-Corruption Strategy in the Republic of Serbia for the Period 2013–2018 provides that one of objectives of the Republic of Serbia is establishing a unique record system (an electronic register) for criminal offences related to corruption, in accordance with the law governing protection of personal data. This objective should be accomplished by: amending by-laws in order to establish a unique methodology for data collection; recording and statistical reporting on criminal offences related to corruption; establishing a system for the monitoring of criminal cases related to corruption; enabling interconnection between databases on criminal investigations; and the electronic exchange of information and access to databases by prosecutors and the police, Customs Administration, Tax Administration, Anticorruption Agency and other relevant authorities.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No. In the Republic of Serbia, only the Public Prosecutor's Office is entitled to prosecute corruption offences.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

According to the legislation, a structured settlement can be concluded in relation to the following corruption offences: soliciting and accepting bribes (but only in cases when an official solicits and accepts a bribe after he performed or failed to perform his official duties); active bribery; and influence peddling.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

The existing framework encourages cooperation between the prosecuting authority and alleged wrongdoers, since the possibility to defer criminal prosecution enables the Public Prosecutor to finish a case more quickly, without the need to bring an indictment and go to trial; it is more cost effective and efficient for the public authorities. On the other hand, it is favourable for the suspects since the consequences of fulfilling the undertaken obligation(s) are the dismissal of the criminal complaint/allegation and no conviction.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Cooperation between the authorities and alleged wrongdoers in relation to corruption offence should be discouraged because the state, which declares zero tolerance for corruption, should have a system which effectively prosecutes and punishes wrongdoers for committed corruption offences. Providing the possibility to defer criminal prosecution and final dismissal of the allegation under very broad conditions within the discretion of the Public Prosecutor does not have much influence on the prevention of corruption. Consequently, inefficient prosecution of corruption offences could lead to an increase in the costs of doing business, corrode public trust and undermine the rule of law.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

Amendments to the Criminal Proceedings Code should be made in a way that structured agreements which have dismissal of the criminal complaint/allegation as a consequence (and not conviction) could not be concluded in relation to corruption offences.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is no clear advantage to companies in cooperating with the authorities.

*Roman Oleksik (Partner), Dasa Labasova (Associate), Kinstellar (Bratislava Office)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

- Act No 300/2005 Coll, the Criminal Code as amended (section 233, 234, 326, 328–336) (the ‘Criminal Code’);
- Act No 301/2005 Coll, the Criminal Procedure Code as amended (section 10 paragraphs 20 and 21, sections 14, 108, 112, 114, 115, 117, 118, 216, 220, 228) (the ‘Criminal Procedure Code’);
- Act No 291/2009 Coll, establishing the Specialised Criminal Court Act, as amended;
- Act No 91/2016 Coll, on the Criminal Liability of Legal Persons (the ‘CLLP Act’);
- Section 49 of the Act No 513/1991 Coll, Commercial Code as amended.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Council of Europe Criminal Law Convention on Corruption (ETS 173);
- the Council of Europe Civil Law Convention On Corruption (ETS 174); and
- the United Nations Convention against Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Generally, the Slovak courts do not have jurisdiction in relation to acts of bribery and/or corruption carried out outside of Slovakia. Only a limited extra-territorial application of Slovak criminal laws applies to determine the criminal liability for an act committed outside of the territory of the Slovak Republic by (1) a Slovak national or a foreign national with permanent residency status in the Slovak Republic or (2) a legal entity with a registered seat in Slovakia or an entity which has established a branch in the Slovak Republic.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are illegal in Slovakia and the sum paid does not need to be substantial for criminal liability to arise. The Slovak Criminal Code does not provide an exemption for small facilitation payments, although the seriousness of the whole act will be considered in cases where the payment is small.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

The relevant law has been adopted only recently, in 2016. The CLLP Act imposes criminal liability on legal persons for crimes expressly listed in the CLLP Act, including, inter alia, accepting a bribe; offering or giving a bribe; and indirect corruption insofar as the crime is committed by, on behalf of, or through the activities or to the benefit of a legal person.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

The National Anti-Corruption Unit of the National Criminal Agency is charged with the investigation of these types of crimes and the Specialised Prosecution Office is entrusted with their prosecution.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

Under section 234 of the Criminal Procedure Code as amended, the prosecutor is obliged to file an indictment against a person if the results of the investigation justify bringing the accused person to the court.

**2.1.2 Deciding what charges to file?**

Yes.

While an indictment can only be brought in respect of the conduct which led to the accusations, the prosecutor has discretion as to the categorisation of the conduct. A change of categorisation can concern either the gravity or the type of the criminal offence.

**2.1.3 Deciding whether to drop charges?**

Yes.

While the indictment can only be brought for the conduct which raised the accusations, the prosecutor has discretion as to the qualification of the conduct. The change of qualification can concern either the gravity or the type of the criminal offence.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

According to section 232 of the Criminal Procedure Code, the assessment as to whether the statutory conditions and suitability criteria for the conclusion of a plea bargain are met lies exclusively within the discretion of the prosecutor. Further, the prosecutor is entitled to withdraw the proposal of a plea bargain prior to the commencement of court proceedings set out to obtain the court's approval thereof. In that case, preliminary proceedings are resumed.

#### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

The Criminal Procedure Code contains in section 2(5) both principles, where prosecution is mandatory for all offences which come to the knowledge of the prosecutor, if not provided otherwise by domestic law or an international treaty in force. The principle of opportunity is reflected in sections 215, 216, 220 and 232 of the Criminal Procedure Code. These rules stipulate mandatory and facultative grounds for the application of the principle of opportunity. However, under section 216(6c) and section 220(2c), in respect of crimes of corruption of public foreign officials, both conditional suspension and reconciliation are inapplicable.

#### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The principle of *ultima ratio* and the subsidiarity of criminal repression under section 10(2) Criminal Code must be applied by the prosecution in criminal proceedings. The act shall not be considered as a minor offence, if according to the enumerated circumstances the act itself is not significantly socially harmful.

There are no exceptions or threshold values. In Slovak case law, a gift consisting of bottles of wine and alcohol was considered a bribe, as was a gift of €55.

##### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

As stated above, there are no thresholds in Slovak law. However, the act shall not be considered even as a minor offence, if according to the enumerated circumstances the act itself is not significantly socially harmful. These factors are defined in vague terms for all minor offences under section 10(2) Criminal Code and relate to the gravity of conduct, as determined by: means; results; surrounding circumstances; degree of fault; and the motive of the perpetrator.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

In Slovakia there is a so-called plea bargaining procedure.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

The only settlements available in Slovak legal framework for corruption offences are:

- plea bargaining procedure is a procedure which allows the offender to plead guilty in exchange for a less severe sentence. The procedure to conclude such an agreement is set out in section 232 and ff, and 331 and ff, of the Criminal Procedure Code; or
- conditional stay of criminal prosecution of a cooperating accused. Under section 219 of the Criminal Procedure Code, a stay of criminal prosecution can be made conditional upon:
  - cooperation of the alleged wrongdoer clarifying a case of:
    - corruption;
    - the criminal offence of setting up, masterminding and supporting a criminal group;
    - the criminal offence of setting up, masterminding and supporting a terrorist group;
    - a felony committed by an organised group, a criminal group, or a terrorist group; or
    - identifying or convicting the perpetrator of such a criminal offence; or
    - the interest of the society in clarifying the criminal offence is stronger than the public interest in the criminal prosecution of the alleged wrongdoers.

The alleged wrongdoer shall be given a probation period ranging from two to ten years during which the alleged wrongdoer shall cooperate in the above described manner, otherwise the prosecution will continue. However, the final consideration as

to whether the duty of cooperation has been fulfilled lies within the sole discretion of the prosecutor. In practice, use of this procedure is rather uncommon. In the answers below we will describe the plea bargain procedure.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Dohoda o vine a treste.*

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

Section 36 of the Criminal Code lists several so-called mitigating circumstances. A prosecutor (and subsequently the court) has to determine the type and the degree of the penalty, in particular on the basis of the mode of the commission of crime and its consequence, culpability, motive, aggravating circumstances, mitigating circumstances, the person of the offender, his personal situation and his rehabilitation potential.

The plea bargaining procedure allows for the exceptional reduction of a custodial penalty.

Under the Criminal Code, the mitigating circumstances are as follows:

- the offender has committed the criminal offence in a state of justified emotional distress;
- the offender has committed the criminal offence because of the lack of knowledge or experience;
- the offender has committed the criminal offence due to the consequences of an illness;
- the offender has committed the criminal offence at an age close to that of juveniles or as an elderly person, if this fact had an influence on his mental or volitional ability;
- the offender has committed the criminal offence under the pressure of dependency or subordination;
- the offender has committed the criminal offence under threat or duress;
- the offender has committed the criminal offence due to an emergency that he did not bring about himself;
- the offender has committed the criminal offence under the influence of a stressful personal or family situation, which he did not cause himself;

- the offender has committed the criminal offence in trying to avert an attack or other danger; or acting under circumstances which, subject to the fulfilment of other conditions, exclude criminal liability without, however, fully meeting the requirements of necessary self-defence, extreme necessity, exercising the rights or performing the duties or the consent of the injured party, authorised use of a weapon, permissible risk or acting as an agent;
- the offender had led a regular life before he committed the criminal offence;
- the offender contributed to the elimination of any adverse effects of the criminal offence or voluntarily offered compensation for damage inflicted;
- the offender confessed to having committed the criminal offence and showed signs of effective repentance;
- the offender reported his criminal offence to the competent authorities;
- the offender cooperated with the competent bodies in the investigation of his criminal activities; or
- the offender contributed to identifying or convicting an organised group, a criminal group or a terrorist group.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

Based on an approved plea bargaining agreement, the penalty of Loss of Honorary Titles and Distinctions may also be imposed on an offender. This is, however, only applicable for particularly serious crimes. Passive foreign bribery is a particularly serious crime per se, active foreign bribery is considered as particularly serious if the bribe exceeds the amount of €133k.

### **3.2.4 What form(s) can a structured settlement take?**

The plea bargain agreement form is set precisely by the Criminal Procedure Code.

A plea bargain agreement shall contain:

- the names of the parties to the agreement, the date, place and time of the agreement;
- the description of the act, the place, time or other circumstances under which it occurred to prevent mistaking it for another act, and the legal classification of the criminal offence constituted by the act, including the relevant provision of the Criminal Code;
- the type, degree and execution of punishment;
- the amount and manner of compensation for damage caused by the act; and
- protective measures, where relevant.

A plea bargain agreement shall be signed, in witness of consent, by the prosecutor, the accused, the defence counsel and any victim who has successfully claimed damages in compensation and taken part in the procedure.

**3.2.5 Are there limits on what the prosecution can offer?**

No.

Plea bargaining proceedings are a reason for an exceptional reduction of a custodial penalty, below the rate set in the Criminal Code (a custodial sentence that is one-third lower than the minimum statutory penalty can be imposed – section 39 paragraph 4 of the Criminal Code, Decree No 619/2005 Coll, as amended, section 6, paragraph 2). However, it is not possible to establish the extent to which a company can negotiate with the Public Prosecutor on the other types of penalties.

Furthermore, as a plea bargaining agreement is subject to the court's approval, it is possible that the court will not grant approval if the judge finds the agreed penalty to be disproportionate.

**3.2.6 Are the terms of an agreement absolute, or can they be deferred?**

No.

A plea bargain agreement cannot be deferred as such, only the execution of the custodial penalty imposed can be suspended (the execution of a pecuniary penalty can be suspended in the case of a juvenile offender).

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

It is not possible to appeal against the judgment by which the plea bargain agreement was approved, except if the right to defence was fundamentally violated.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

Under section 3 of the Decree No 619/2005 Coll, as amended, it is in the sole discretion of the prosecution to start the plea bargaining proceedings.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes. Section 331 of the Criminal Procedure Code

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

Once the plea bargain agreement is concluded between the prosecutor and the offender, the prosecutor hands it over to the court for approval. The court will scrutinise the agreement as to whether the act is a criminal offence, whether the accused has explicitly pleaded and whether the evidence says the same. The court may reject the agreement if it finds that procedural rules were materially breached or if it considers the agreement as obviously not reasonable (section 331 of the Criminal Procedure Code).

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

### **3.5 *De facto or de jure***

**In view of your answers to 3.1–3.4 above, would you describe the criminal settlements process for corruption offences in your country as a *de jure* process (ie, subject to clearly defined legal rules governing the proposal and implementation of structured settlements) or *de facto* (ie, no clear legal framework for settlements)?**

There are strict rules as to the plea bargaining procedure. However, the rules as to the applicable penalties (other than a custodial penalty) are not clearly defined.

*Editor's note: (1) The settlement process (conditional stay of criminal prosecution of a cooperating accused) is uncommon (see section 3.2.1 above and Section 6.1 below). However, it would constitute a de jure settlement process following the classification used in this report. (2) The plea bargain settlement process is contingent upon an admission of guilt. (See section 3.1 above). This constitutes a de facto, guilty plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

The prosecutor's decision on the conditional stay of a criminal prosecution of the cooperating accused is not publicly available. A plea bargain agreement is subject to the court's approval by a final judgment. This court judgment is publicly available.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

The court's judgment, by which the plea bargaining agreement was approved, provides the public with the following information: (1) the description of the act, place, time, or other circumstances under which it occurred to prevent mistaking it for another act, (2) the legal categorisation of the criminal offence constituted by the act, including the relevant provision of the Criminal Code, (3) the type, degree and execution of punishment, (4) the amount and manner of the compensation for damage caused by the act (if relevant), and (5) any protective measures (if relevant).

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

Statistics on all types of criminal offences (including foreign bribery) are processed by the Ministry of the Interior. These statistics provide general information on the types of criminal offences, the number of criminal offences discovered, information about the offenders (eg, minor, juvenile, nationality), and the number of solved cases. Further, all final court decisions should be publicly available (with data about individuals anonymised). However, in practice, this rule is not exactly adhered to.

#### 4.2.1 If yes, is this data publicly available?

Yes. Please provide the website:

- [www.minv.sk/?statistika-kriminality-v-slovenskej-republike-csv](http://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-csv).
- <https://obcan.justice.sk/infosud/-/infosud/zoznam/rozhodnutie>.

#### **4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

As an example, we can describe the following case: a plea bargain was agreed with a nationally recognised cardiologist who was charged in February 2015 by the Slovak National Criminal Agency with accepting a €3k bribe from a family seeking to move one of its members up on the surgery waiting list. By plea bargaining with prosecutors on 1 April, the surgeon avoided a prison sentence of between three and eight years. The surgeon received a suspended sentence of two years and probation of four years, a fine of €15k and a ban on practising as a doctor for three years. The court also approved the confiscation of a portion of the bribe to the tune of €800.

In 2016, a total of 4,639 plea bargain agreements were filed with the courts for approval. Out of these requests, 4,367 agreements were approved.

#### **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

##### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Dual competence in criminal prosecution is solved by the regime of extradition (sections 498– 514 of the Criminal Procedure Code).

Extradition can only occur upon the request of another state and in cases where the conduct is also punishable under laws of the Slovak republic with a minimum sanction of at least one year imprisonment.

##### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

A foreign conviction or settlement does not create an obstacle of *res judicata* under section 9(1) of the Criminal Procedure Code and does not prohibit prosecution for the same conduct for which the foreign conviction was rendered. However, in these cases, under section 215(2b) of the Criminal Procedure Code, the prosecutor may discontinue the prosecution if a foreign judicial body has issued a conviction and the conviction is deemed sufficient.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

Cooperation with the prosecutorial authorities regarding the decision on whether or not to prosecute in corruption matters is reflected in the possibility of a conditional stay of criminal prosecution of the cooperating accused. However, the final consideration of whether the duty of cooperation has been fulfilled and whether the prosecution will continue or not lies within the sole discretion of the prosecutor. In practice, use of this procedure is rather uncommon.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

In light of the above, cooperation is rather discouraged under the existing framework, bearing in mind that even if the alleged wrongdoer provides all relevant information which he possesses, after the probation period the prosecution may still prosecute the wrongdoer. Furthermore, there is no real guarantee for such subjects as to the real exclusion of their criminal liability.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Encouraged.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

In our opinion, cooperation should be encouraged by, for example, the provision of clear guarantees in return for the cooperation of the alleged wrongdoer. As mentioned above, the current state of law is silent as to the existence of such guarantees and the final consideration as to whether the duty of cooperation has been fulfilled lies within the sole discretion of the prosecutor.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

No.

*Jelena Bajin, Attorney-at-Law, Law Office of Tomislav Šunjka*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Anti-Bribery rules are contained in the Criminal Code (Official Gazette of the Republic of Slovenia, Nos 63/94, 70/94 – correction, 23/99, 40/2004 and 95/2004) and the Integrity and Prevention of Corruption Act (Official Gazette of the Republic of Slovenia No 45/10, 26/11 and 43/11).

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Slovenia has ratified a number of international conventions, such as the Council of Europe Civil Law Convention on Corruption (ETS 174), the Council of Europe Criminal Law Convention on Corruption (ETS 173), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

In accordance with the Criminal Code (Articles 12–125), the Criminal Code of the Republic of Slovenia shall apply to any person who commits a criminal offence in the territory of the Republic of Slovenia, to any person who commits a criminal offence on a domestic vessel regardless of its location at the time of the committing of the offence, to any person who commits a criminal offence either on a domestic civil aircraft in flight or on a domestic military aircraft irrespective of its location at the time of the committing of the criminal offence, to any person who, in a foreign country, commits either a criminal offence under Article 249 (counterfeiting) of the present Code referring to domestic currency or any of the criminal offences under Articles 348–362 (criminal offences against the security of the Republic of Slovenia and its constitutional order) of the present Code, to any citizen of the Republic of Slovenia who commits any criminal offence abroad and who has been apprehended in or extradited to the Republic of Slovenia, to any foreign citizen who has, in a foreign country, committed a criminal offence against the Republic of Slovenia or any of its citizens and who has been apprehended in the territory of the Republic of Slovenia or has been extradited to it, and to any foreign citizen who has, in a foreign country, committed a criminal offence against it or any of its citizens and has been apprehended in the Republic of Slovenia and is not extradited to a foreign country.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

Corporate criminal liability is regulated by the Liability of Legal Persons for Criminal Offences Act (Official Gazette of the Republic of Slovenia, Nos 59/99, 12/2000 – correction, 50/2004 and 98/2004 – Officially Consolidated Text No 1).

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

**If not, which authorities investigate and prosecute corruption, and how do they allocate responsibility?**

The Criminal Police/National Investigation Bureau and the Prosecutor's Office.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

In accordance with Article 45 of the Criminal Procedure Code, the basic right and basic duty of the Public Prosecutor shall be the prosecution of perpetrators of criminal offences. In respect of criminal offences prosecuted ex officio, the Public Prosecutor shall have jurisdiction to take the necessary steps concerning the detection of criminal offences, tracing of perpetrators and directing of preliminary criminal proceedings, to request that investigations be undertaken, to prefer and press an indictment or a charge sheet before the competent court, to file complaints against judgments that have not become final and to apply extraordinary legal remedies against finally binding judicial decisions.

**2.1.2 Deciding what charges to file?**

Yes. As previous.

**2.1.3 Deciding whether to drop charges?**

Yes. As previous.

**2.1.4 Deciding whether or not to plea bargain?**

No. A plea bargain can be concluded only before the competent court.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

With respect to criminal offences prosecuted ex officio, the Public Prosecutor shall have jurisdiction to take the necessary steps concerning the detection of criminal offences, tracing of perpetrators and directing of preliminary criminal proceedings, to request that investigations be undertaken, to prefer and press an indictment or a charge sheet before the competent court, to file complaints against judgments that have not become final, and to apply extraordinary legal remedies against finally binding judicial decisions.

**2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

**2.4 Do these standards differ for individual and corporate defendants?**

No.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?

Yes.

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Postopek poravnovanja.*

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

voluntary disclosure of wrong doing/self-reporting;

cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

**3.2.4 What form(s) can a structured settlement take?**

It must be in writing and concluded before the competent court.

**3.2.5 What are the usual terms of such an agreement?**

The Public Prosecutor may, with the consent of the injured party, suspend prosecution of a criminal offence punishable by a fine or not more than three years' imprisonment if the suspect is willing to behave as instructed by the Public Prosecutor and to perform certain actions to allay or remove the harmful consequences of the criminal offence. These actions may include: (1) elimination or compensation of damage; (2) payment of a contribution to a public institution or a charity or fund for compensation for damage to victims of criminal offences; (3) execution of some generally useful work; and/or (4) fulfilment of a maintenance liability.

**3.2.6 Are there limits on what the prosecution can offer?**

No.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If the terms of settlement are not followed by the offender, within six months, or in special circumstances, a year, in accordance with the law, the criminal procedure is continued, as the settlement was not concluded.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

**3.3.3 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: the Public Prosecutor.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes. The penalty for non-compliance is the continuance of the criminal proceeding.

**3.4 Outcome of the structured settlement**

**Statutory Provisions:**

Financial penalties – yes – Criminal procedure code.

Disgorgement of profits – yes – Criminal procedure code.

Compensation to third parties – yes – Criminal procedure code.

Obligations to cooperate with other agencies – yes – Criminal procedure code.

Corporate compliance programmes – yes – Criminal procedure code.

Personal liability – yes – Criminal procedure code.

**3.5 De facto or de jure**

*Editor's note: The settlement process (suspension of prosecution) is not contingent upon an admission of guilt. (See section 3.1 and section 6.2). This would constitute a de jure settlement process following the classification used in this report.*

**4. Transparency**

**4.1 Public access to information on settlements**

**4.1.1 Is information about settlement available to the public?**

No.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

The existing framework encourages cooperation between the prosecuting authority and alleged wrongdoers, since the possibility to defer criminal prosecution enables the Public Prosecutor to finish a case more quickly, without the need to bring an indictment and go to trial; it is thus more cost effective and efficient for the public authorities. On the other hand, it is favourable for the suspect since the consequences of fulfilling the undertaken obligation(s) are dismissal of the criminal complaint/allegation and no conviction.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Cooperation between the authorities and alleged wrongdoers in relation to corruption offence should be discouraged because the state, which declares zero tolerance to corruption, should have a system which effectively prosecutes and punishes wrongdoers for corruption offence. Providing the possibility to defer criminal prosecution and potentially to dismiss the allegation under very broad conditions and the discretion of the Public Prosecutor would not have much influence on the prevention of corruption. Consequently, inefficient prosecution of corruption offences could lead to an increase in the costs of doing business, and corrode public trust and undermine the rule of law.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

Amendments to the Criminal Procedure Code should be made in a way that structured agreements which dismiss the criminal complaint/allegation as a consequence in lieu of conviction) could not be concluded in relation to corruption offences.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is no clear advantage to companies in cooperating with the authorities.

*Juan Valderas (FTI Consulting-Spain), Joaquin Bruckhalter (Cuatrecasas), Gabriel Castro (Garrigues), Carlos Gómez – Jara (Corporate Defence)*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

The Spanish Criminal Code (SCC, *Código Penal*) establishes the anti-bribery rules in force in Spain. Articles 419 through 431 of the SCC regulate public corruption (bribery and influence peddling). Furthermore, Article 286 *bis* considers private corruption as an autonomous crime, as does Article 286 *ter* regarding foreign corruption of public officials. Finally, Article 427 establishes specific provisions for the Bribery of European Union Officials.

#### 1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?

- The Spanish Criminal Code;
- European Union: The Convention on the Fight against Corruption Involving Officials of the European Union or Officials of Member States of the European Union, Brussels, 26 May 1997 (Convention on European Officials);
- Council of Europe: the Council of Europe Criminal Law Convention on Corruption (ETS 173) and Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), the Council of Europe Civil Law Convention On Corruption (ETS 174);
- OECD: The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions; and
- United Nations: The United Nations Convention Against Corruption.

#### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

Article 286 *ter* SCC establishes the offence of corruption in international economic activities. Also, under Articles 23.2 and 23.3.n of the Judiciary Act, several crimes committed outside Spain come under Spanish jurisdiction. Regarding bribery laws, the extraterritorial principle is applied when (1) the criminally responsible person is Spanish or a foreigner who acquired Spanish nationality before perpetrating the act, and (2) the proceeding is brought against a Spanish citizen or foreign citizen whose main place of residence is in Spain; the crime was perpetrated by a director, administrator, employee or collaborator of a commercial company, association, foundation or organisation based in Spain or with a registered address in Spain; or the proceeding is brought against a legal entity, undertaking, organisation, group or any other nature of body or association of people that is based or has a registered address in Spain.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are not allowed under any circumstance, even if they are small or meaningless.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Article 31 *bis* SCC establishes the criminal liability of legal entities. This article also establishes an affirmative defence based on a robust compliance programme.

Non-legal persons (ie, entities lacking legal personhood such as branches) are subject to ancillary consequences. Article 31 *quinquies* also establishes that state public entities are exempt from corporate criminal liability.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

Technically, the Public Prosecutor's Office's anti-corruption department is in charge of prosecuting. However, in Spain, the Investigating National Criminal Court carries out such investigations.

### **2. Exercise of prosecutorial discretion**

#### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

##### **2.1.1 Deciding whom to charge with a crime?**

No.

Based on the principle of legality, a prosecutor must act when there is strong evidence that a crime has been committed.

##### **2.1.2 Deciding what charges to file?**

No.

Prosecutors are bound by the principle of legality (ie, they must charge according to the evidence in the case file).

##### **2.1.3 Deciding whether to drop charges?**

No.

Prosecutors are bound by the principle of legality (ie, they must charge according to the evidence in the case file).

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Under Articles 655 and 656 of the Spanish Criminal Procedure Act, it is possible to reach an agreement and avoid trial. This agreement is called ‘*conformidad*’ (conformity) and means that the accused party accepts liability before the trial, in return for a reduced penalty. The *conformidad* is only available for offences that carry penalties of up to six years’ imprisonment and can be applied to foreign bribery. Also, the judge must confirm the content of the agreement in a court ruling. Since Article 286 *ter* came into force in the last amendment of the SCC in 2015, only a few cases related to foreign bribery have been investigated in Spain. Most recently, the National High Court sentenced the owners of a publishing house for paying off officials in Equatorial Guinea to maintain contracts there. This is the first criminal conviction in international business transactions and the parties reached a settlement.

#### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Prosecutors are subject to the rule of law under the principle of legality, which is established in Article 6 of the Statute of the Prosecution Service.

#### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

Some courtesy gifts with a low value are allowed, which the jurisprudence has called ‘socially acceptable attention’. It depends on the traditions in the specific place and such giving may not be considered an offence.

##### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

As in any other felony case, prosecutors are entitled to negotiate a guilty plea in exchange for a sentence reduction. However, there are possibilities depending on the prosecutors to

structure an agreement, although this is not a clearly regulated process.

The Spanish Prosecutors Office (General Attorney) has issued some guidelines to help evaluate corporate conduct in response to an offence (reactive fault).

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

In addition, the prosecutor may decide not to impose a sanction on a company if outstanding compliance is proved, even if there has been no admission of guilt.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Acuerdo de Conformidad* (Acceptance Plea).

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

##### **Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures;

assistance in investigating and prosecuting individuals; and

other: reparation of damages.

#### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

#### **3.2.4 What form(s) can a structured settlement take?**

Most of the time it is a verbal commitment that later is reflected in writing.

#### **3.2.5 What are the usual terms of such an agreement?**

It depends on the prosecutor. The guidelines are quite recent (January 2016).

#### **3.2.6 Are there limits on what the prosecution can offer?**

Yes. The prosecutors are bound by the legality principle.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes. A reversal is possible although extremely rare.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. The Court must check that the terms of the agreement abide by the law.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

Other administrative authorities might be involved when either debarment or the suspension of activities is at issue (Article 33 (c), (e), or (f) of the SCC).

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes.

Although no case law is available, if the activities of the company have been suspended for a period of time but nevertheless the company pursues its activities further, the administrative authority may impose sanctions.

### 3.4 Outcome of the structured settlement

Are there any rules that provide guidance about the outcome of such negotiations with respect to the following? Please select all options that apply and provide further information in the field next to each box you tick.

	Statutory Provisions	Guidelines	Past cases
Financial penalties	Yes – SCC.		Case law provides in some instances a reasonable expectation of where within the range the financial penalty will be set.
Compensation to third parties	Yes – SCC in tax offences (compensation to tax authorities on top of financial penalties).	Yes.	There is relevant case law that has determined that a payment structure for taxes due must be in place before other penalties are enforced.

### 3.5 De facto or de jure

*Editor's note: The 31 March 2015 Organic Law exemption from criminal liability based on existence of organisation and management model for the prevention of crime is not contingent upon an admission of guilt. (See section 3.1 and 3.2 above). This constitutes a de jure, settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

There are no rules regarding the publicity of settlements. However, information about a settlement based on a plea bargain is available to the public when the court ruling is officially published.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Limited.

The terms of the negotiation between the parties and the Public Prosecutor are not made public until the judgment is published.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

**4.2.1 If yes, is this data publicly available?**

No.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Article 23 Judiciary Act states when Spain can make a claim. However, the International Covenant on Civil and Political Rights and the Spanish Constitution recognise that no one can be tried or punished for an offence for which that person has already been convicted or acquitted under the law and penal procedure of another country. This means that Spain can start a claim initially but, according to the subsidiarity principle, if the case has closer links with another country, Spain can decline its jurisdiction. If someone has already been convicted or acquitted for the same facts in another country – whose jurisdiction is recognised by Spain through a treaty or it is a member of the European Union – Spain must decline its jurisdiction.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

Inside the borders of the European Union, the effects of a conviction or a settlement are automatic. However, when it is a foreign settlement or conviction (ie, from a third state), it will depend on the requirements established by the specific convention between Spain and that state.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Yes. Cooperation is highly encouraged by the Public Prosecutor and the Spanish legal system.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

It should be encouraged, to get a better deal and promote a more efficient legal system in terms of time. Cooperation may also reduce the penalty required by the Public Prosecutor.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The opportunity principle should be introduced to the Public Prosecutor's Office activities, as this would give public prosecutors more discretion in their activity.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

In the current system, there are several factors that make cooperating with the authorities a way to gain relevant advantages. First, it could help to decrease the penalty requested initially. Second, even without a specific financial advantage, in terms of reputation, it is always better for the entity to have a collaborative and sensitive image with the authorities, to help mitigate the potential impact of the press during the proceeding, which may also affect the development of the process.

*Elisabeth Eklund, Partner, Advokatfirman Delphi (Law Firm)*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The basic provisions on bribery are found in the Swedish Penal Code (SFS 1962:700) (in Swedish, *Brottsbalken*), Chapter 10, headed ‘On Embezzlement, Other Acts of Breach of Trust and Bribery’, which includes the following crimes: section 5 breach of trust, section 5(a) giving of bribes, section 5(b) taking of bribes, section 5(c) gross giving and taking of bribes, section 5(d) trading in influence and section 5(e) negligent financing of bribery. Acts of corruption may, in addition to the provisions on bribery, violate other Swedish laws such as the Marketing Act (SFS 2008:486) (*Marknadsföringslagen*), the Competition Act (SFS 2008:579) (*Konkurrenslagen*), the Income Tax Act (SFS 1999:1229) (*Inkomstskattelagen*) and the Public Procurement Act (SFS 2016:1145) (*Lagen om offentlig upphandling*).

### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Sweden is a signatory to a number of anti-corruption conventions. In July 2012, revised Swedish anti-bribery legislation, with new criminal provisions on trading in influence and negligent financing of bribery, entered into force. According to the legislator, the revision was made in part to ensure Sweden was fulfilling its international commitments and in particular the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe Criminal Law Convention on Corruption (ETS 173) and the United Nations Convention against Corruption. However, there is still international criticism regarding the rare use and low levels of corporate fines.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The Swedish provisions on bribery do not differentiate between bribery of foreign public officials and domestic public officials. For the provisions to apply, however, it is necessary to establish Swedish jurisdiction.

The jurisdiction of the Swedish courts is laid down in Chapter 2 of the Swedish Penal Code. According to Chapter 2, section 2, crimes committed abroad shall be adjudged according to Swedish law and by a Swedish court (eg, where the crime has been committed by a Swedish citizen or an alien domiciled in Sweden). However, the act has to be criminalised under Swedish law as well as the law of the foreign state (ie, dual criminality), which is derived from the public international principle of non-intervention.

In summary, if all of the aforementioned requirements are fulfilled, the Swedish foreign bribery law will have extraterritorial effect. The low level of interventions in relation to corruption abroad has, however, been subject to criticism.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Swedish anti-corruption regulation does not exempt facilitation or grease payments from the criminalised area. Even a reward of low value (approximately US\$10) may constitute an illicit bribe if the key elements of the bribery provisions are met, depending on the circumstances.

#### **1.5 Does your country provide for corporate criminal liability?**

No.

According to established legal principles in Swedish law, only physical persons can be held criminally responsible, which eliminates legal entities from criminal charges. If, for example, a company makes illicit payments, the physical persons who participated in the corrupt activity, such as board members or employees, will be held responsible. The category of persons that can be held liable for bribery has widened in the revised Swedish legislation on bribery to cover all employees and persons performing assignments, including management. For example, the persons who can be held liable for negligent financing of bribery include representatives of the company.

However, a corporation may under certain conditions be subject to corporate fines. According to Chapter 36, section 7 of the Swedish Penal Code, corporate fines may be issued for a crime committed in the exercise of business activities in two situations: first, if the undertaking has not done what could reasonably be required for prevention of the crime, and second, if the crime was committed by either (1) a person who has a leading position based on a power of representation of the undertaking or the authority to take decisions on behalf of it, or (2) a person who has a special responsibility for supervision or control of the business. However, the provision does not apply if the crime has been directed against the company. According to Chapter 36, section 8, the range of corporate fines is SEK 5k to SEK 10m (approximately US\$550k to US\$1.1m).

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The National Anti-Corruption Unit (*Riksenheten mot korruption*) and the National Anti-Corruption Police (*Nationella korruptionsgruppen*).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

According to Chapter 20, section 6 of the Swedish Procedural Code (SFS 1942:740) (*Rättegångsbalken*), Swedish prosecutors have, unless otherwise prescribed by law, an obligation to prosecute crimes subject to public prosecution (ie, Swedish prosecutors adhere to the principle of legality and mandatory prosecution).

The status of mandatory prosecution, however, has swayed from being a strong and general rule to a rule with some exceptions; there may be special considerations of charges and a waiver of prosecution.

For example, according to Chapter 10, section 10.3 of the Swedish Penal Code, the giving and taking of bribes, trading in influence and negligent financing of bribery should be prosecuted only if prosecution is of public interest. This is a form of discretionary prosecution, as it includes an assessment of opportunity. However, the gross giving and taking of bribes are subject to public prosecution. Moreover, if one of the aforementioned crimes is committed by an employee in the public sector, it is also subject to public prosecution, see Chapter 20, section 5.

### **2.1.2 Deciding what charges to file?**

No. See 2.1.1.

### **2.1.3 Deciding whether to drop charges?**

No.

According to Chapter 20, section 7.1 of the Swedish Procedural Code, prosecution can only be waived where there is no compelling public or private interest in prosecution. In general, this means that waiver of prosecution is used for minor offences only.

### **2.1.4 Deciding whether or not to plea bargain?**

No.

In contrast to several other jurisdictions Swedish law does not provide for plea bargain or settlement agreements. The prosecutor may, however, decide on a summary penalty order forgoing a formal trial. In such cases the prosecutor decides that the defendant will be sentenced to probation and/or pay a fine, provided that the defendant pleads guilty to the crime.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

See 2.1.1

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

As said above, according to Chapter 20, section 6 of the Procedural Code, the Swedish prosecutor has, unless otherwise prescribed by law, an obligation to prosecute crimes subject to public prosecution (ie, the Swedish prosecutors adhere to the principle of legality and mandatory prosecution). The statute does not prescribe when the conditions for prosecution are satisfied. In the literature, reference is usually made to the term ‘sufficient reasons’, that is, ‘when the prosecutor on objective grounds can expect a conviction by the court’. To summarise, the threshold to be met is ‘sufficient reasons’.

### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

The factors of the threshold ‘sufficient reasons’ are rather vague, as neither the aforementioned Chapter 20, section 6 of the Procedural Code nor any other provision in Swedish law prescribes when the conditions for prosecution are satisfied. The Swedish courts have to rely on case law, preparatory work and legal doctrine.

### **2.4 Do these standards differ for individual and corporate defendants?**

No. Swedish law does not provide for corporate criminal liability.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

*Editor’s note: The form of settlement process (summary penalty order) is contingent upon an admission of guilt. (See section 2.1.4 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No. Swedish law does not provide for settlements in criminal proceedings.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent. See 4.1.1.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent. See 4.1.1.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

The principle of public access to information is a fundamental principle in Swedish law and means that everyone as a rule is entitled to obtain copies of the authorities' public documents, although there are some exceptions where certain information is classified as confidential, see Chapter 2, section 1 and Chapter 14, section 5 of the Freedom of the Press Act (SFS 1949:105) (*Tryckfrihetsförordningen*) and the Public Access to Information and Secrecy Act (SFS 2009:400).

Thus, as soon as a document is deemed official it is possible to obtain it from Swedish authorities. A document is official if it is held by a public authority and, according to special rules, is considered to have been received or drawn up there. As a general rule, up until prosecution, an investigatory file is classified as confidential. However, judgments and court submissions are public (although certain pieces of information may be classified as confidential). In order to read a judgment or order documents in a specific case, it is possible to contact the court which handled the case. Judgments are also available through commercial databases.

However, there is no public authority that specifically collects and processes data regarding the investigation, prosecution and resolution of foreign bribery. Notwithstanding, a good source of information is the website of the Swedish Anti-corruption Institute (IMM), which is a non-profit organisation, see [www.institutetmotmutor.se](http://www.institutetmotmutor.se).

**4.2.1 If yes, is this data publicly available?**

No. See 4.2.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Not applicable. See 4.1.1.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes. See 5.2.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

According to Chapter 2, section 5(a) of the Swedish Penal Code, the Swedish Courts adhere to a principle of international *ne bis in idem*. However, the provision does not include all foreign judgments, but only ‘a judgment which has entered into legal force’. It is uncertain whether a foreign settlement agreement fulfils the requirement of a legally binding judgment, as it has not been assessed in case law. It is further required that the act was committed in the foreign state or that the foreign state in question had acceded to certain agreements listed in the provision (ie, not all foreign states are included). Moreover, the foreign judicial review must have had a certain result (eg, the accused must have been acquitted or declared guilty of the crime without a sanction being imposed.) The provision was enacted to implement Swedish commitments under the European Convention of 28 May 1970 on the International Validity of Criminal Judgments and the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters.

EU law may be a source of interpretation and affect a Swedish interpretation of ‘legally binding judgment’, (compare to the principle of conform interpretation). In this respect, the Court of Justice of the European Union (ECJ) has stated, in the joined cases of *Gözütok* and *Brügge* (C-187/01 and C-385/01), that an agreement between a prosecutor and defendant, where the defendant has pleaded guilty and also paid a sum of money, bars prosecution and criminal proceedings in other Member States.

According to the Government Bill Prop 2005/06:59, Chapter 2, section 5 (a) applies to foreign judgments whereby a company has been held criminally liable, even though Swedish law does not provide for corporate criminal liability.

In summary, if all of the aforementioned requirements are fulfilled, the status of a foreign conviction with respect to the same transaction has legally binding effect. By contrast, the status of a foreign settlement is legally uncertain and most likely does not have legally binding effect in Sweden.

## **6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Not applicable.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Not applicable.

*Yvonne Pieles, Attorney at Law and Managing Associate, Vischer Ltd. (Law Firm)*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

- Article 322 *ter* of the Swiss Criminal Code (SCC) (Bribery of Swiss public officials);
- Article 322 *quinquies* SCC (Granting an advantage to Swiss public officials);
- Article 322 *sexies* SCC (Acceptance of an advantage by Swiss public officials);
- Article 322 *septies* SCC (Bribery of foreign public officials);
- Article 322 *octies* SCC (Bribery of private individuals);
- Article 322 *novies* SCC (Accepting bribes by private individuals);
- the European Convention on Mutual Assistance in Criminal Matters, signed 20 March 1967;
- the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, signed 8 November 2001;
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of the Council of Europe, signed 1 September 1993;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Council of Europe Criminal Law Convention on Corruption (ETS 173) and Additional Protocol to the Criminal Law Convention on Corruption (ETS 191);
- the United Nations Convention against Corruption;
- the Cooperation agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other part, to combat fraud and other illegal activity to the detriment of their financial interests, signed 26 October 2004.

#### 1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?

See 1.1 above.

#### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

Article 322 *septies* SCC (Bribery of foreign public officials) is explicitly directed to offences in connection with foreign officials. Furthermore, according to SCC Article 102, paragraph 2, companies are liable for offences committed under SCC Article 322 *septies* by their employees, irrespective of the criminal liability of those employees themselves.

The recent *Petrobras* case is an example of the extraterritorial effect of the SCC in this regard, and shows that the Swiss prosecution authorities are willing to enforce extraterritorial offences.

On 21 December 2016, the Swiss Federal Attorney's office closed the Swiss end of the matter, which had involved complex legal assistance procedures among Brazil, Switzerland and the United States, and with a so-called summary penalty order.

The illegal activities involved the transfer from Brazil by Brazilian construction companies of assets, and the further transfer of those assets through several offshore companies, in order to facilitate bribery payments to Brazilian public officials.

Among the companies making these transfers were Odebrecht SA and its subsidiaries Construtora Norberto Odebrecht SA (CNO) and Braskem SA, all with headquarters in Brazil.

The Swiss Federal Attorney's office found Odebrecht SA and CNO guilty of a breach of SCC Article 102 paragraph 2, as the companies had failed to take all reasonable organisational measures to prevent said offences. The two companies were ordered to pay CHF 117m. The proceedings against Braskem SA were closed in exchange for a compensation payment of CHF 94.5m. The payment consisted of confiscated funds, criminal fines, compensation payments and procedural costs. The actual fine imposed was only CHF 4.5m. This is because Swiss law limits fines to CHF 5m, which is relatively low compared to the fines imposed by other countries.

In these proceedings, the Swiss Federal Attorney's office emphasised that it is willing to enforce SCC Article 102 *abs 2* even in an international context. The case is also an excellent example of successful collaboration between the criminal prosecution authorities of different countries. The goal of the proceedings was the confiscation of gains from illegal activities and the allocation of those confiscated funds among the countries involved. For Switzerland, this case was a landmark in the combating of corruption.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. Facilitation payments are prohibited by law; compare to 1.1 above.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Article 102 SCC provides for corporate criminal liability. Pursuant to paragraph 1 of Article 102 SCC, a fine may be imposed on a company if a felony or misdemeanour is committed in the exercise of commercial activities and if it is not possible to attribute this felony or misdemeanour to the individual who committed it due to the inadequate organisation of the undertaking. In cases in which the responsible individual cannot be ascertained or can

only be ascertained with disproportionate effort, the company is accused of being so badly organised that one cannot find the person ultimately responsible for the commission of the offence. That is why the companies themselves are subsidiarily subject to criminal liability. The consequence in these cases are fines of up to CHF 5m.

Paragraph 2 of this provision catalogues certain serious offences allowing the imposition of a fine on a company irrespective of the criminal liability of any responsible individual, if it can be shown that the company has failed to take all the reasonable organisational measures that are expected in order to prevent such an offence. The offences of the SCC listed in 1.1 above are part of this catalogue, with the exception of Article 322 *sexies* and Article 322 *novies* SCC. No upper limit for fines apply under Article 102 paragraph 2 SCC.

## **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. According to Article 24 paragraph 1(a) of the Swiss Criminal Procedure Code ('CrimPC'), federal jurisdiction applies and the Office of the Attorney General of Switzerland has the power to investigate and to prosecute cases of corruption in international business transactions committed abroad.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

In theory, the Swiss prosecutors have limited discretion in deciding whom to charge with a crime. However, in practice especially within the scope of Article 102 paragraph 1 SCC, Swiss prosecutors exercise considerable discretion in deciding whether to charge the individual or the undertaking.

#### **2.1.2 Deciding what charges to file?**

Yes.

Prosecutors generally can decide what charges to file. However, the criminal courts are not bound by those charging decisions.

#### **2.1.3 Deciding whether to drop charges?**

No.

In Switzerland, prosecution authorities have to close investigation proceedings by formal decision, either by issuing a summary penalty order (appealable) or by a decision to take no proceedings (appealable). Alternatively, the prosecution can conduct so-called 'accelerated proceedings' according to Article 358 *ff* CrimPC. Once a formal decision is rendered, it can only be changed under restricted conditions (see 3.2.7. below).

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Strictly speaking, Swiss law does not provide for plea bargaining. However, in practice the number of pleas is growing. The legal basis for plea bargaining is either Article 352 *ff* CrimPC (summary penalty order proceedings) or Article 358 *ff* CrimPC (accelerated proceedings). For the limitation of such plea bargaining, see 3.2.6 below.

#### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Defence mitigation argued to a judge.

Defence mitigation argued to the prosecutor.

Other: Human rights (right to fair trial, especially the right to be heard).

Swiss law regards all of the above-mentioned principles equally and does not favour any of them.

#### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The principle of legality obliges the prosecutor to commence and conduct an investigation once he is aware of or has grounds for suspecting that an offence has been committed.

However, the prosecutor may refrain from prosecuting an offence if:

- the level of culpability and consequences of the offence are negligible (Article 52 SCC);
- the offender has made reparation for the loss, damage or injury, or
- made every reasonable effort to right the wrong that he has caused, the requirements for a suspended sentence are fulfilled, and the interests of the general public and of the persons harmed in prosecution are negligible (Article 53 SCC); or
- if the offender is so seriously affected by the immediate consequences of his act that a penalty would be inappropriate (Article 54 SCC).

Furthermore, according to the administrative criminal law ('VStrR'), the prosecution may charge the company directly, if the costs for investigating the offender would be disproportionate to the importance of the matter.

##### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The wording of the provisions is not precise and the prosecutor has a wide range of discretion in deciding if the requirements are met or not.

## 2.4 Do these standards differ for individual and corporate defendants?

No.

## 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

In theory, all forms described are applicable (see 2.1.4): summary penalty order proceedings pursuant to Article 352 *ff* CrimPC as well as accelerated proceedings pursuant to Article 358 *ff* CrimPC. Furthermore, Article 53 SCC as mentioned above (2.3) is applicable. For examples of a relevant recent case, see the *Petrobras* case under question 1.3.

### 3.2 Form, features and terms of structured settlements

#### 3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?

The admission of guilt is not necessary for summary penalty orders pursuant to Article 352 *ff* CrimPC. If a summary penalty order is issued and the accused does not appeal against it, it is regarded as accepted by the accused and enters into legal force.

To enter a settlement within accelerated proceedings, however, the accused does not need to admit his guilt, but has to admit the matters essential to the legal appraisal of the case and recognise, if only in principle, the civil claims.

##### 3.2.1.1 If yes, what is such a structured settlement called in your language?

Investigations can either be finished by settlement with the prosecutors, which is called '*Strafbefehl*' (summary penalty order) or by consent to the indictment of the prosecutor, in which case the court issues a judgment in the accelerated proceedings, which is called '*abgekürztes Verfahren*'.

#### 3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

##### Existing prevention and detection measures:

risk assessment;

training;

detection mechanisms such as internal, anonymous; and assistance in investigating and prosecuting individuals.

In Switzerland, the behaviour of an accused during investigation procedures as well as during trial is taken into account when assessing the punishment imposed. The culpability of the offender, their previous conduct and personal circumstances are also taken into account (Article 47 paragraph 1 SCC).

Culpability is assessed according to the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, the offender's motives and aims, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage (Article 47 paragraph 2 SCC).

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

Under Swiss law, it is not possible to waive statutory privilege entirely pursuant to Article 321 SCC (breach of professional confidentiality).

### **3.2.4 What form(s) can a structured settlement take?**

A structured settlement under Swiss law may either take the form of a summary penalty order or the form of a formal judgment issued by the court in accelerated proceedings after the offender has agreed to the indictment (see 3.2.1.1).

A summary penalty order is appealable in court. If not appealed, it enters into legal force and is regarded as a formal judgment.

If accelerated proceedings apply, the prosecution has to apply for confirmation of the settlement – which is the indictment – to the criminal court, which has to issue a formal judgment according to the conditions of the settlement. The requirements for judicial confirmation by judgment are (Article 362 CrimPC):

- the conduct of accelerated proceedings is lawful and reasonable (*lit a*);
- the charge corresponds to the result of the main hearing and the files (*lit b*); and
- the requested sanctions are equitable.

Eventually, the prosecution authorities may also refrain from imposing punishment, if the requirements of Article 53 SCC are met (compare to 2.3).

### **3.2.5 What are the usual terms of such an agreement?**

Settlements have the following structure: the settlement outlines as briefly but precisely as possible the acts that the accused is alleged to have committed with details of the locus, date, time, nature and consequences of their commission, as well as the offences that are in the opinion of the Public Prosecutor constituted by these acts, with details of the applicable statutory provisions, the sentence, any measures, the ruling on any

civil claims made by a private claimant, and the ruling on costs and damages, followed by the rationale for the settlement. The settlement is on condition of and enters into legal force as formal judgment either if it is not appealed (summary penalty order) or if it is accepted and issued as formal judgment by the court (accelerated proceedings). Both kinds of settlement include the waiver of rights to ordinary proceedings and to appeal.

If proceedings are withdrawn according to Article 53 SCC, the accused must have made reparation for the loss, damage or injury they have caused or they must have made every reasonable effort to right the wrong that they have caused.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Pursuant to Article 352 paragraph 1 CrimPC, a summary penalty order can only be issued if one of the following punishments is applicable:

- a fine (*lit a*);
- a monetary penalty of no more than 180 daily penalty units (*lit b*);
- community service of no more than 720 hours (*lit c*); or
- a custodial sentence of no more than six months (*lit d*).

Pursuant to Article 358 paragraph 2 CrimPC, accelerated proceedings can take place in those cases where the Public Prosecutor requests a custodial sentence of no more than five years.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If the agreement has been approved by the criminal court and consequently been issued as formal judgment, deferral is no longer possible except by formal revision pursuant to Article 410 CrimPC. Legal grounds for such a revision are:

- new circumstances that arose before the decision or new evidence have come to light that are likely to lead to an acquittal, a considerably reduced or more severe penalty for the convicted person or the conviction of an acquitted person (*lit a*);
- the decision is irreconcilably contradictory to a subsequent criminal judgment relating to the same set of circumstances (*lit b*); or
- it has been proven in other criminal proceedings that the result of the proceedings was influenced by a criminal offence; a conviction is not required; if it is not possible to conduct criminal proceedings, proof may be adduced in another way (*lit c*).

Pursuant to Article 410 paragraph 2 CrimPC, the revision of a formal judgment is also required if the European Court of Human Rights has held in a final judgment that the European Convention on Human Rights (ECHR) or its Protocols have been violated and that the consequences of the violation cannot be compensated for by the payment of damages.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. See 3.2.1.1 and 3.2.4.

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. The courts only get involved after the settlement has been reached (see 3.2.1.1 and 3.2.4.).

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

Summary penalty orders do not have to be filed in court pursuant to Article 352 *ff* CrimPC, nor does the abandonment of proceedings pursuant to Article 53 SCC.

However, if accelerated proceedings apply, the prosecutor shall file a formal indictment with the court that entails the following (see 3.2.5 above):

- the details required for an indictment in regular proceedings (name and address of the accused, place, date, etc) (*lit a*);
- the sentence (*lit b*);
- any measures (*lit c*);
- instructions related to the imposition of a suspended sentence (*lit d*);
- the revocation of suspended sentences or parole (*lit e*);
- the ruling on any civil claims made by a private claimant (*lit f*);
- the ruling on costs and damages (*lit g*); and
- notice to the parties that by consenting to the indictment, they waive their rights to ordinary proceedings and their rights of appeal (*lit h*).

### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. See 3.2.4. above.

If a summary penalty order is challenged by the accused, the court will assess whether the prosecutors applied the law correctly.

If accelerated proceedings apply, the court will assess whether the criteria of Article 362 paragraph 1 CrimPC are met, which are:

- is the conduct of accelerated proceedings lawful and reasonable? (*lit a*);
- does the charge correspond to the result of the main hearing and the files? (*lit b*); and
- are the requested sanctions equitable? (*lit c*).

The courts have a considerable range of discretion.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge. See 3.2.4 above.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

The court cannot impose penalties as such. However, it can reject a settlement if it was issued as a summary penalty order and appealed by the accused or if it was filed in court in accelerated proceedings. The offence will then be judged in ordinary proceedings (ordinary public trial according to the provisions of the CrimPC).

## **3.4 Outcome of the structured settlement**

### **Statutory Provisions**

Financial penalties – yes – fines/monetary penalties in daily units (SCC and CrimPC).

Disgorgement of profits – yes – SCC and CrimPC; compare to Petrobras case above 1.3.

Compensation to third parties – yes – SCC and CrimPC.

## **3.5 De facto or de jure**

*Editor's note: The settlement processes (Article 352 ff CrimPC summary penalty order) is not contingent upon an admission of guilt. (See section 3.1 and 3.2.1). This constitutes a de jure settlement processes following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

Interested people may inspect judgments and summary penalty orders pursuant to Article 69 paragraph 2 CrimPC. Usually, summary penalty orders are not published on the internet but could be inspected at the Prosecutors' Offices.

Formal judgments usually have to be made public according to Article 30 paragraph 3 of the Federal Constitution of the Swiss Confederation ('publicity of court proceedings') and the case law of the Swiss Federal Supreme Court (see eg, the decision of the Swiss Federal Supreme Court No 1C-123/2016 of 21 June 2016). Exemptions are only admissible for the protection of personality of people involved.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

Formal judgments (including summary penalty orders and judgments rendered in accelerated proceedings) have to be made public (see 4.1.1 above). However, the information retained only in the files cannot be inspected by the public.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Very limited. See 4.1.1 above.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

The right to a fair trial (pursuant to Article 6 paragraph 3 ECHR and Article 29 paragraph 2 of the Federal Constitution of the Swiss Confederation) entails the duty of the prosecution authorities to keep records on investigation proceedings.

#### 4.2.1 If yes, is this data publicly available?

No. See 4.1.2 above.

### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

See the *Petrobras* case mentioned above under 1.3.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

If the offender has served a sentence in full or in part for the offence in another country, the Swiss court must take the sentence served into account in determining the sentence to be imposed (Article 3 paragraph 2 SCC).

The principle of *ne bis in idem* takes effect if the offender has been prosecuted in a foreign country at the request of the Swiss authorities. In that case, the offender will not be prosecuted in Switzerland for the same offence if:

- he has been acquitted of the offence abroad in a legally binding judgment (*lit a*); or
- if the sentence that was imposed abroad has been executed or waived, or has prescribed (*lit b*).

If the offender has been convicted of the offence abroad and if the sentence imposed abroad has been partly served, the court will take the part served into account in the sentence to be imposed. The court decides whether a measure ordered abroad but only partly executed there must be continued or taken into account in the sentence imposed in Switzerland (Article 3 paragraph 4 SCC).

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

See the provisions mentioned under 5.1 above.

## 6. The following questions call for your opinion

### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability

Reasonable predictability.

If cooperation and negotiation are possible the outcome of it should be predictable – at least to a certain degree – due to the principle of equal treatment and legal security, and for surveillance reasons.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Encouraged. The possibility to cooperate is often used, especially in summary penalty order proceedings. The main reason is the overload of the prosecutors and the courts.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

It should be encouraged (cost saving; relief of authorities). However, it should not lead to a ransom by rich people or companies.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There are advantages, financial and reputational.

*Gönenç Gürkaynak, Managing Partner, ELIG Attorneys-at-Law*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The main rules applicable to bribery are set out in Article 252 of the Turkish Criminal Code No 5237 (TCC). Bribery is defined as providing a benefit to public officials or any other person a public official indicates, directly or via intermediaries, in order for the public official to perform or not perform a task in relation to his duty. Accordingly, both direct and indirect bribery are criminalised and there is no requirement that the subject of bribery should be anything of monetary value. Both the public official and the briber are deemed to be the perpetrators of the crime. They shall be punished with imprisonment from four to 12 years. Pursuant to the Article, when a person and public official agree to exchange a benefit, bribery is deemed to be committed; actual transfer of money or another benefit is not a requirement. The Article also criminalises bribery of foreign public officials and private commercial bribery (for publicly traded joint stock companies). Legal persons cannot be held criminally liable under Turkish law. However, a combination of security measures and administrative fines can be imposed upon those legal persons who have secured an unlawful benefit through bribery.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Turkey has ratified the following European and international anti-corruption conventions which advise that corruption in international business transactions should be criminalised:

- the Council of Europe Criminal Law Convention on Corruption (ETS 173);
- the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations Convention against Transnational Organised Crime; and
- the United Nations Convention against Corruption.

In addition to the multilateral treaties above, Turkey has been a member of the Group of States against Corruption since 1 January 2004 and the Financial Action Task Force since 1991.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No.

The general jurisdiction principle under Turkish criminal law is the principle of territoriality. Turkish courts do not have jurisdiction to enforce their authority outside their jurisdiction's territory. However, under certain conditions, the commission of the crime of bribery of foreign public officials constitutes an exception to the rule.

Bribery of foreign public officials is criminalised under Turkish law, as mentioned under question 1.1. Provisions of domestic bribery are also applicable to those who (directly or indirectly) provide, offer or promise a benefit to the below individuals, or to the below individuals when they (directly or indirectly) request or accept the same (1) for the performance or non-performance of a task in relation to their duty or (2) in order for a transaction or unjust benefit to be obtained or preserved in international commercial transactions:

- public officials who have been elected or appointed in a foreign country;
- judges, jury members or other officials who work at international or supranational courts or foreign state courts;
- members of international or supranational parliaments;
- individuals who carry out a public duty for a foreign country, including public institutions or public enterprises;
- a citizen or foreign arbitrator who has been entrusted with a task within an arbitration procedure resorted to in order to resolve a legal dispute; and
- officials or representatives working at international or supranational organisations that have been established based on an international agreement.

The sanctions imposed against individuals and legal persons for domestic bribery apply to the bribery of foreign public officials as well.

If bribery of foreign public officials is committed abroad by a foreigner, and if this type of bribery is committed in relation to a dispute to which (1) Turkey, (2) a public institution in Turkey, (3) a private legal person incorporated pursuant to Turkish laws or (4) a Turkish citizen is a party, or in relation to the performance or non-performance of an activity with regard to these institutions or persons, and the perpetrators are in Turkey, then an ex officio investigation and prosecution will be conducted with regard to those:

- who provide, offer or promise to bribe;
- who accept or request a bribe, or accept the promise or offer of a bribe;
- who mediate such; or
- to whom a benefit is provided due to this relationship.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Turkish law does not accept the facilitation payment exception, unlike the US Foreign Corrupt Practices Act. Accordingly, even small amounts of payments provided to public officials in order to expedite public procedures could be considered as bribery under Turkish law, if these payments are considered to fall under the definition of bribery.

## **1.5 Does your country provide for corporate criminal liability?**

No.

Legal persons cannot be held criminally liable under Turkish Law. However, security measures can be imposed against legal persons for certain crimes such as bribery. These security measures are (1) invalidation of a licence granted by a public authority; (2) seizure of goods which are used in the commitment of, or are the result of, a crime by the representatives of a legal entity; and (3) seizure of pecuniary benefits arising from or provided for the commitment of a crime (Article 60, TCC).

Further, Law No 5326 on Misdemeanours imposes administrative sanctions on legal persons in cases where bribery is committed for the benefit of the legal person by a representative of a legal person or by persons who are discharging duties within the scope of the activities of the legal person. The amount of the administrative fine ranges from TL 16,409 (approximately US\$4,313) to TL 3,282,503 (approximately US\$862,861).

## **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other: the prosecution of crimes ultimately rests with the Public Prosecutors. Administrative authorities investigate financial and tax crimes prior to prosecution. In particular, the Financial Crimes Investigation Board (MASAK) has the general role of developing policies, improving legislation, and collecting specific data to analyse and evaluate suspicious transaction reports in the context of financial crime. The Prime Ministry Inspection Board (the 'Board'), as authorised by and on behalf of the Prime Minister, has the authority to inspect the finances and the alleged corrupt conduct of all public and private institutions. Both MASAK and the Board may transfer their respective investigation files to the authorised prosecutor for the initiation of criminal processes.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

As a result of the principle of mandatory prosecution, prosecutors do not have discretion as to whom to charge with a crime under Turkish law. Prosecutors are to charge those towards whom the evidence points. Turkish doctrine does not consider that the evaluation the prosecutor engages in while deciding to whom the evidence points (ie, whom to charge with a crime) qualifies as 'discretion'.

The statutory threshold to charge someone with a crime (ie, the threshold to prepare an indictment) is requirement that the prosecutor has 'sufficient suspicion' that a crime has been committed. The exceptions for this mandatory prosecution threshold could be leniency, certain types of personal immunity, or a prosecutorial decision to postpone the initiation of a criminal lawsuit, etc. The exceptions are set out under Article 171 of the Law on Criminal Procedure No 5271 ('Law on Procedure').

### **2.1.2 Deciding what charges to file?**

No.

As a result of the principle of mandatory prosecution, prosecutors do not have discretion as to which crime to charge a suspect with under Turkish law. Prosecutors are to decide which crime to charge by relating the elements of the crime to the evidence.

### **2.1.3 Deciding whether to drop charges?**

No.

As a result of the principle of mandatory prosecution, the prosecutor does not have discretion to drop charges. Article 170/2 of the Law on Procedure provides that the prosecutors are to prepare an indictment if the evidence collected at the end of the investigation period constitutes sufficient suspicion with regard to the commission of a crime. That said, Article 172/1 of the Law on Procedure empowers the prosecutor to issue a decision of non-prosecution, if (1) the evidence collected at the end of a criminal investigation was not sufficient to constitute sufficient suspicion as to the commission of a crime or (2) there is no possibility of prosecution (eg, the suspect is deceased).

### **2.1.4 Deciding whether or not to plea bargain?**

No. There is no plea bargaining system under Turkish criminal law.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

The principle of mandatory prosecution is applicable under Turkish law. This means that when a prosecutor has sufficient suspicion with regard to the commission of a crime, the prosecutor must prepare an indictment. The exceptions to this rule are laid out in Article 171 of the Law on Procedure.

Article 171 of the Law on Procedure states that (1) in cases where the conditions for the application of the provisions of leniency or personal immunity exist, the prosecutor may decide that there is no ground for prosecution or (2) the prosecutor may decide to postpone the initiation of a criminal lawsuit for a duration of up to five years for certain crimes.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The threshold for public prosecutors to prosecute a crime is the existence of ‘sufficient suspicion’ that a crime has been committed (Article 170 of the Law on Procedure).

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The concept ‘sufficient suspicion’ is defined in doctrinal writings as a logical and objective suspicion that a crime has been committed. If the possibility that the defendant will be sentenced is higher than the possibility that he will be acquitted, it can be said that there is sufficient suspicion.

#### **2.4 Do these standards differ for individual and corporate defendants?**

This question was left intentionally unanswered as there is no corporate criminal liability under Turkish criminal law system.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.2 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

There is no settlement system under Turkish criminal law.

*Editor’s Note: based on the information in this report there is no structured settlements for corruption offences process envisaged within this jurisdiction.*

### **4. Transparency**

#### **4.1 Public access to information on settlements**

##### **4.1.1 Is information about settlement available to the public?**

There is no settlement system under Turkish criminal law.

##### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

There is no settlement system under Turkish criminal law.

##### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.**

Non-existent.

There is no settlement system under Turkish criminal law.

#### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

The Ministry of Justice’s Judiciary Record and Statistics Directorate (the ‘Directorate’) collects information and provides general statistics with regard to criminal files. However, as per the publicly available sources, there is no information or data on foreign bribery allegations at the time being.

**4.2.1 If yes, is this data publicly available?**

Yes.

Public access to the statistics of criminal files is possible. The directorate website can be accessed on: [www.adliscil.adalet.gov.tr/index.html](http://www.adliscil.adalet.gov.tr/index.html). Please kindly note that the records are in Turkish.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

There is no structured settlement system under Turkish law.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

The main principle stipulated under the TCC is that Turkish law applies to crimes committed in Turkey. If an act has been partially or completely perpetrated in Turkey or the consequences of the crime took place in Turkey, the perpetrator will be adjudicated in Turkey, even if the perpetrator has been adjudicated in another state. Further, as there is no corporate criminal liability under Turkish law, the *ne bis in idem* principle would be inapplicable in Turkey with regard to corporate convictions abroad.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

There is no corporate criminal liability under Turkish law. Further, Turkish criminal law system does not recognise any dispute resolution apart from litigation.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Under Turkish law, cooperation between alleged wrongdoers and the prosecuting authorities regarding the decision whether or not to prosecute is not possible.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Under Turkish law, cooperation between alleged wrongdoers and the prosecuting authorities regarding the decision whether or not to prosecute is not possible.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

The encouragement of cooperation between the authorities and alleged wrongdoers could increase the enforcement of anti-bribery laws. We believe such cooperation should be encouraged where the estimated result would be more enforcement and less impunity. Such encouragement could entail providing mitigation for cooperation and, at best, for self-reporting.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Turkish law already provides for a leniency mechanism for those who report a crime before the authorities become aware of the act. However, this is solely applicable to individuals, as legal persons cannot be held criminally liable. Without corporate criminal liability, the only mitigation that can be provided to legal persons for bribery is mitigating the administrative fine provided under Law No 5326 on Misdemeanours.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There is no cooperation mechanism for companies under Turkish law.

*Volodymyr Rudnychenko, Counsel, Head of White-Collar Crimes Practice, INTEGRITES (International Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Our country has no single set of Anti-Bribery Rules but Anti-Bribery legislation is contained in several legislative acts. The relevant acts include the Law of Ukraine ‘On Preventing Corruption’ No 1700-VII, dated 14 October 2014 (the ‘Anti-Corruption Law’), the Criminal Code of Ukraine No 2341-III, dated 5 April 2001 (the ‘Criminal Code’), and the Code of Ukraine on Administrative Offences No 8073-X, dated 7 December 1984 (the ‘Code of Administrative Offences’).

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

The United Nations Convention against Corruption; the Council of Europe Criminal Law Convention on Corruption (ETS 173); the Council of Europe Civil Law Convention on Corruption (ETS 174.)

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Ukraine has no particular foreign bribery law.

Generally, Ukrainian citizens are liable for any crime committed outside Ukraine according to the Criminal Code except other provisions of international agreement, adopted by the Ukrainian parliament.

However, page 2 of Article 8 of the Criminal Code provides that individuals, regardless of citizenship, are subject to Ukrainian liability under the Criminal Code, if they committed outside Ukraine a bribery offence involving Ukrainian officials. They may also be subject to liability if they offered, promised, or gave an improper benefit to such officials or accepted an offer or promise, or received an improper benefit from them.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. There is no such concept under Ukrainian law.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Such provisions are included in Criminal Code, but legal entities are not considered to be the subjects of criminal offences. Legislation provides (Article 96-3 of the Criminal Code) for the application of criminal law measures to legal entities in the following cases:

- commission by an authorised person on behalf or in the interests of a legal entity of any crime, such as money laundering, offering, promise or giving a bribe or other improper remuneration to an official;
- failure to fulfil the duties assigned to an entity's authorised person by law or by statutory documents with regard to taking measures to prevent corruption, as a result of which any of the crimes, such as money laundering, offering, promising or giving bribes or other improper benefit, were committed;
- commission by the authorised person on behalf of a legal entity of any crimes related to terrorism; and
- commission by an authorised person on behalf of or in the interests of the legal person of any crime, such as a coup, violation of territorial integrity, sabotage, kidnapping, abuse in financing a political party or bribing voters, creating illegal military groups, embezzlement of weapons, or international law and order offences.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

In international business transactions which are under Ukrainian jurisdiction, as in internal ones, investigation is conducted by units of the National Police of Ukraine, investigative units of the Public Prosecution Service of Ukraine and the National Anti-Corruption Bureau of Ukraine (NABU), which is regulated by Article 216 of the Criminal Procedural Code of Ukraine (the 'Criminal Procedural Code').

The NABU investigates corruption offences committed by leading government officials, judges, leading officials of the Public Prosecution Service, law enforcement, tax, customs, military authorities, officials of public enterprises more than 50 per cent state owned, and any official where the loss resulting from the crime is more than 500 non-taxable minimum income for citizens (UAH 800k (approximately US\$30k)).

Investigative units of the Public Prosecution Service investigate corrupt offences committed by lesser-ranking officials of State authorities, the Public Prosecution Service, law enforcement, tax, customs and military authorities.

The National Police bodies investigate corrupt offences committed by other officials.

If corruption offences are related to offences against national security, smuggling, creation of illegal military groups, leak of state secrets, border offences or military offences, they can be investigated by The Security Service of Ukraine, unless the offences are under the jurisdiction of the NABU.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

According to page 4 of Article 22 of the Criminal Procedural Code, a charge is brought by a Notice of Suspicion. That Notice could be applied by the investigator only in acceptance of the prosecutor or by the prosecutor him/herself.

#### **2.1.2 Deciding what charges to file?**

Yes.

The prosecutor is obliged to comprehensively, fully and impartially investigate the circumstances of the criminal activity, discover how those circumstances expose and justify the suspect, or how the circumstances aggravate or mitigate punishment, to give the circumstances a proper legal assessment and to ensure that legitimate and impartial judicial decisions are rendered (page 2 of Article 9 of Criminal Procedural Code).

#### **2.1.3 Deciding whether to drop charges?**

Yes.

The prosecutor can close criminal proceedings during the pre-trial investigation. If there were no charges in criminal proceedings, the investigator has a power to close too. In any case, the decision can be rejected by a higher-level prosecutor or investigative judge. (Article 36, 284 Criminal Procedural Code).

At trial, the prosecutor must confirm the decision to drop or to amend charges with a higher-level prosecutor. If the higher-level prosecutor does not accept the prosecutor's decision, he declines it and changes the prosecutor (Article 338–341 Criminal Procedural Code).

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The prosecutor is obliged to inform the suspect about the opportunity of a plea bargain. While deciding on the settlement or the admission of guilt, the prosecutor must take into account the following factors:

- the degree and nature of assistance of the suspect or the accused in the conduct of criminal proceedings against him or others;
- the nature and gravity of the accusation (suspicion);
- if there is a public interest in ensuring a faster investigation and court proceedings, or in exposing more criminal offences; and

- the public interest in preventing, detecting or stopping more criminal offences or other more serious criminal offences. (Article 470 Criminal Procedural Code).

## 2.2 Which rules determine the exercise of prosecutorial discretion in your country?

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Defence mitigation argued to a judge.

Prosecution is mandatory, but the prosecutor must give a proper legal assessment to all the evidence and ensure legitimate and impartial decisions are rendered (Article 9 Criminal Procedural Code, Law on The Prosecution Service).

The principle of competitiveness and the freedom in presenting evidence in order to prove its credibility is followed in court. *De jure* the judge appears as an arbiter (Article 22 Criminal Procedural Code).

## 2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?

Yes.

Generally, supporting the prosecution is a statutory function of the Public Prosecutors Service of Ukraine. Therefore, the prosecutor should make a decision to prosecute in any case of the appearance of *corpus delicti*. The only threshold is stated by page 2 of Article 11 of Criminal Code: an act or omission which has, technically, all the elements of *corpus delicti*, but due to its insignificance, causes no social danger, in that it neither did nor could cause considerable harm to any natural or legal person, community, society or the state, is not considered a crime (so-called ‘insignificance’).

### 2.3.1 How clearly are the factors of this threshold defined?

Defined, but not clearly.

The legislation is very broad. The problem of implementation is the impossibility to determine whether the act could cause harm and whether the harm is considerable in a particular situation.

## 2.4 Do these standards differ for individual and corporate defendants?

Yes.

The aforementioned clauses are used for individuals’ liability. For the decision to prosecute against a legal entity, the basis of the particular crime committed by a suspect and whether he was acting on behalf or in the interests of the legal entity is necessary.

### 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

#### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

As was mentioned in question 1.3, if the subject of a crime is charged under Ukrainian laws, he has a right to enter into a settlement in Ukraine and under Ukrainian laws. However, the Criminal Procedural Code stipulates the possibility of resolving allegations through a settlement only between the prosecutor (or the victim) and the individual charged (Article 469 of Criminal Procedural Code). Structured settlements with legal entities are impossible in criminal proceedings.

#### 3.2 Form, features and terms of structured settlements

##### 3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?

Yes.

A settlement must contain an unconditional admission of guilt (Article 472 of the Criminal Procedural Code).

##### 3.2.1.1 If yes, what is such a structured settlement called in your language?

Only settlements on reconciliation (*Угода про примирення* [*uhoda pro prymyren'ya*]) and on admission of guilt (*Угода про визнання винуватості* [*uhoda pro vyznan'ya vynuvatosti*]) in criminal proceedings (Article 468 of the Criminal Procedural Code) are allowed.

##### 3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

Other: any help given to a victim by the perpetrator after committing the crime; the commission of crime by certain categories of persons (ie, pregnant women, minors, etc); and the particular circumstances of the crime (ie, family affairs, material dependence, etc) should be taken into consideration. All these factors are mitigating ones (Article 66 of Criminal Code). The Criminal Code also provides for aggravating circumstances.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

Measures on whistleblowers defence are stipulated by Anti-Corruption Law. But there are no waivers of privilege or any type of protection in criminal proceedings.

### **3.2.4 What form(s) can a structured settlement take?**

An agreement on reconciliation and on admission of guilt (Article 468 of the Criminal Procedural Code).

### **3.2.5 What are the usual terms of such an agreement?**

A settlement on reconciliation shall state the period of reimbursement or list of other actions which the alleged suspect is obliged to make in favour of the victim, the term of the commission, the agreed penalty and the parties' consent to its appointment, or on sentencing and release from probation, the consequences of concluding and approving the agreement, and the consequences of non-fulfilment of the agreement (Article 471 of the Criminal Procedural Code).

An agreement on the admission of guilt shall contain an unreserved admission of guilt in a criminal offence, the obligation to cooperate in exposing criminal offences committed by another individual, partial release of a suspect/accused of civil liability in the form of compensation of state losses as a result of an offence, agreed penalties and consent of the suspect/accused, its purpose or the punishment and release of serving on probation, the consequences of signing and approval of the agreement, and the consequences of non-fulfilment of the agreement (Article 472 of the Criminal Procedural Code).

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The offer is limited by sanctions, in particular *corpus delicti* and by sentencing rules (ie, rules on reduced sentences, probation periods, etc), (Article 65 of the Criminal Code). Probation is impossible in corrupt offences (Article 75 of the Criminal Code).

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

Settlements must be confirmed by the court. Non-compliance with a settlement will result in the refusal of confirmation. Such decisions were quite typical in 2012–2013 at the beginning of the Criminal Procedural Code's entry into force. Re-entering a settlement is impossible (Article 474 of the Criminal Procedural Code).

### 3.3 Role of the court in regards to structured settlements

Please explain the role of the courts with respect to any structured agreement reached.

#### 3.3.1 Prior to the settlement:

##### 3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?

No.

Settlements on reconciliation can be concluded on the initiative of the victim, or the suspect/accused. Settlements on admission of guilt can be concluded on the initiative of the prosecutor or the suspect/accused (Article 469 of the Criminal Procedural Code).

##### 3.3.1.2 Does the court have any other involvement before settlement has been reached?

No.

#### 3.3.2 Once the settlement has been reached:

##### 3.3.2.1 Is the structured settlement filed in court?

Yes.

If a settlement is signed during pre-trial investigation, the accusing act with the settlement must be filed in court without undue delay (Article 474 of the Criminal Procedural Code).

##### 3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?

Yes.

According to page 7, Article 474 of the Criminal Procedural Code, the Court must examine a settlement to determine compliance with the Criminal Procedural Code and/or the law. A court must refuse to approve a settlement where:

- contrariness of the terms of the settlement, including incorrect legal qualification of the criminal offence, especially for getting opportunity of settlement;
- the terms of the settlement are inimical to the public interest;
- the terms of the settlement violate the rights, freedoms or interests of parties or other persons;
- there are reasonable grounds to believe that a settlement was not voluntary, or the parties have not reconciled;

- the accused is unable to perform the obligations assumed under the settlement; or
- there is no factual basis for the admission of guilt.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

In Ukraine there is no possibility for a company to enter into a settlement.

In case of non-fulfilment, the prosecutor or victim can apply to the court which approved the settlement with the individual. The court can reject its own judgment upon the settlement and reverse the case for pre-trial investigation or trial, depending on the stage of filing the settlement (Article 476 of the Criminal Procedural Code).

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

Criminal liability should be imposed for deliberate non-compliance with the settlement. However, it would be investigated as the new criminal proceedings. It is punishable by arrest for up to six months or restraint of liberty for up to three years (Article 389-1 of Criminal Code).

### **3.4 Outcome of the structured settlement**

#### **Statutory Provisions**

Compensation to third parties – yes – one of the key terms in settlement by reconciliation.

Obligations to cooperate with other agencies – yes – could be the key term in settlement by admission of guilt or an obligatory term in settlements of corrupt offences investigated by NABU.

The information is only provided for settlements with individuals. Settlements with legal entities are impossible.

### **3.5 De facto or de jure**

In Ukraine there is no possibility for a company to enter into a settlement. The information is only provided for settlements with individuals.

*Editor's note: The settlement process (reconciliation and on admission of guilt) is contingent upon an admission of guilt. (See section 3.1, 3.2.1 and 3.2.1.1 above). This constitutes a de facto, plea-based settlement process following the classification used in this report. This only applies to natural persons.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Information about settlements before judgment is protected by investigatory privilege. However, any judgment in Ukraine is public, so a settlement approved by the court in its judgment becomes available to the public.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

The information is almost comprehensive, except for personal data.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

Settlements are not possible for companies in Ukraine, so they cannot negotiate the contents.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

The Uniform State Register of Perpetrators of Corruption or Related to Corruption Offences is used in Ukraine. It is drawn up on the basis of decisions of Ukrainian courts.

#### 4.2.1 If yes, is this data publicly available?

No.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

No.

Exceptions include some rules in treaties on legal assistance in criminal or other matters. Generally, Ukraine retains the privilege to charge its own citizens for offences, committed anywhere.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

A corporate conviction will have an effect to use the *ne bis in idem* principle. But a settlement will have no effect because it was not established in Ukraine.

**6. The following questions call for your opinion**

**6.1 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

It is discouraged in Ukraine, especially for corruption offences. The existing framework significantly deprives the prosecutor of the opportunity to offer worthy terms.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

It should be encouraged. It is much better to convince such an official to tell the truth about others and the corrupt schemes in authority instead of not punishing him. This way is more successful. An effective level of investigation would be an essential point to believe in settlement.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Amendments to the law should be implemented to give the prosecutor an opportunity to offer the relief of liability instead of full information and future cooperation. The US's experience is a good example of this.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Firstly, reputational. At the same time, one will have financial problems if one has a bad reputation. In jurisdictions where authorities do their job well, any company which understands its violations also understands that upon settlement it can negotiate terms, but it could not do so in case of a verdict.

### 40. CANADA

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*Elisabeth Danon; Simon Laliberté, KPMG; Office of Inspector General of Montréal*

#### **1. Background: normative framework**

##### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes

Rules governing domestic bribery are included in the Criminal Code. Sections 119 to 125 cover various forms of bribery, corruption, fraud on the Crown and breach of trust by public officials. Section 426 covers secret commissions received by an agent (including a public official). Foreign bribery is prohibited by the Corruption of Foreign Public Officials Act (CFPOA). Since 2013, the CFPOA also includes a books and records offence.

##### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

Canada has signed and ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Organisation of American States Inter-American Convention against Corruption and the United Nations Convention against Corruption. Most obligations under the United Nations Convention against Corruption have been implemented. However, facilitation payments are still allowed under Canadian law. An amendment was passed in 2013, but it has not yet come into force (the government must adopt a decree, at a time of its choosing).

##### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Before the 2013 amendment to the CFPOA (introduced by the Fighting Foreign Corruption Act), the Crown had to prove a 'real and substantial connection' between the offence and the jurisdiction for Canadian courts to establish jurisdiction on acts committed abroad. However, the 2013 Bill introduced nationality jurisdiction (in addition to the existing territorial jurisdiction), which allows Canada to prosecute Canadian companies, Canadian citizens, and permanent residents present in Canada after they have committed the offence of bribing a foreign public official.

##### **1.4 Are facilitation payments allowed in your jurisdiction?**

Yes.

The 2013 amendments to the CFPOA mandated the prohibition of facilitation payments but, to this day, no decree has been taken to give effect to this provision. Therefore, facilitation payments are still legal in Canada.

## 1.5 Does your country provide for corporate criminal liability?

Yes.

Under the Criminal Code, the notion of a ‘person’ who can be held criminally liable includes legal persons. The CFPOA incorporated the broad definition of ‘person’ contained in the Criminal Code to establish criminal liability of legal persons for foreign bribery.

## 1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?

Yes.

The Royal Canadian Mounted Police (RCMP) is in charge of investigating and laying foreign bribery charges. The Anti-corruption Unit, operating under the Commercial Branch of the RCMP, is fully dedicated to foreign bribery investigations. The CFPOA offences can be prosecuted by either federal or provincial prosecutors.

The Anti-Corruption Regulation 2016 report of *Getting the Deal Through* provides that:

‘Since mid-2012, the RCMP’s policy has been to refer CFPOA matters exclusively to the Public Prosecution Service of Canada (PPSC), which represents the federal Crown in criminal prosecutions. The PPSC has designated a subject-matter expert based in Ottawa to support CFPOA prosecutions, and in March 2014 issued a Guideline on the importance of coordinating CFPOA prosecutions at a national level.’ (M Barutciski in the Canada section of Anti-Corruption Regulation 2016, *Getting the Deal Through*)

## 2. Exercise of prosecutorial discretion

### 2.1 Do prosecutors have unfettered discretion in regards to the following:

#### 2.1.1 Deciding whom to charge with a crime?

Yes.

The authority to lay foreign bribery charges belongs exclusively to the RCMP (federal police). At the federal level, the Public Prosecution Service makes the decision on how to handle and manage the prosecution.

While it is not absolute, prosecutorial discretion has been reaffirmed many times over the years by Canadian courts. For example, the Supreme Court recently stated in *R v Anderson, 2014 SCC41*, that ‘prosecutorial discretion’ is an expansive term. It covers all decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it. Prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers.

Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown’s conduct is egregious and seriously compromises trial fairness or the integrity of the justice system.

### **2.1.2 Deciding what charges to file?**

No. Refer to answer 2.1.2.

### **2.1.3 Deciding whether to drop charges?**

Yes.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of opportunity.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

While the fleshing out of the threshold may slightly vary from province to province, it generally rests on the requirement of public interest, opportunity and whether there is sufficient evidence (or a reasonable prospect of conviction). For example, in Québec, the prosecutor's decision to authorise the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute.

On the notion of public interest, the OECD *Review of Implementation of the Convention and 1997 Recommendations by Canada* provides the following:

‘The Attorney General exercises a broad discretion in the public interest. [...] This discretionary power is fully set out in relevant public policy documents. For instance, according to the Crown Counsel Policy Manual [...], generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued. One of the public interest factors that may arise on the facts of a particular case include “whether prosecution would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.”’

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined. Please refer to answer 2.3.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

In Canada, prosecutors have the option to settle foreign bribery charges by entering a plea deal with the accused. Plea deals rely on an admission of guilt and result in a conviction. That being said, plea deals cannot be said to be ‘structured settlements’, since there is no formal structure that governs them.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

When it comes to foreign bribery, three cases out of four have been concluded through a plea deal and, each time, the accused has pleaded guilty. That being said, there is no structured programme that requires the accused to plead guilty in order to obtain a settlement under the CFPOA. In theory, under the Canadian system, it would be possible for the accused and the prosecution to reach a settlement that would not require an admission of guilt. In practice, however, this has never been done under the CFPOA.

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Commitments to institute new prevention and detection measures.

Sentencing principles are detailed in section 718 and following of the Criminal Code. All of the factors detailed above may be taken into consideration and have been in past cases but, contrary to the US or other jurisdictions, there are no specific guidelines outlining how voluntary disclosure and cooperation with enforcement authorities will weigh on the sanction imposed on the accused. The OECD reports the following:

‘Canada has informed the Secretariat that there is no express statutory provision concerning these mitigating factors. Canadian courts, however, consider self-reporting and cooperation with the investigation as factors that can influence the eventual sanction imposed. On the other hand, Canada maintains that simply having a corporate compliance system in place is not a

mitigating factor on sentencing.’ (OECD (2016), *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*)

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

Privilege is a right guaranteed in Canadian law and recognised many times over by Canadian courts. However, even though they may not demand waiver of privilege, prosecutors can ask the accused/client to waive privilege.

### **3.2.4 What form(s) can a structured settlement take?**

They can take the form of a plea deal or of alternative measures. Furthermore, in the case of a plea deal, the agreement can either be executed before sentencing (eg, complete a therapy and receive a lesser sentence or a conditional or absolute discharge) or after sentencing and included in the offender’s parole or release parameters. In the latter case, violation of such terms could result in the offender returning before the judge.

### **3.2.5 What are the usual terms of such an agreement?**

The terms of a settlement can vary from one case to the next. In one of the cases successfully concluded with a settlement, the court imposed a monetary sanction and issued a three-year probation order. This order required the company to:

- report to the federal police any evidence of corrupt payments made by the company;
- adopt an anti-corruption compliance programme with elements determined by the court; and
- retain an independent auditor to prepare an annual compliance report to the court, the prosecution and the RCMP.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes. Refer to Section 717 of the Criminal Code.

### **3.2.4 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If criminal proceedings have been delayed to allow the offender the time to complete the agreed-upon alternative measures, said proceedings may be reinstated. If settlement occurred following a guilty plea (as stated above under 3.2.4), there may be a variety of consequences.

### **3.3 Role of the court in regards to structured settlements**

Please explain the role of the courts with respect to any structured agreement reached

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. Refer to answer on prosecutorial discretion above.

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. Refer to answer on prosecutorial discretion above.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

If charges have been laid and either alternative measures have been agreed to or a plea deal has been reached, the parties will submit to the court an agreed statement of facts and detail the agreement reached.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

If a settlement has been reached between the prosecutor and the accused without a guilty plea, the prosecutor will withdraw the charges once the agreement has been fully executed. In such a case, the court must authorise the withdrawal, and generally will.

In cases of plea bargaining (ie, when the accused pleads guilty as part of the settlement), under section 606 of the Criminal Code, the judge must be satisfied that the accused is making the plea voluntarily, that he understands that the plea is an admission of the essential elements of the offence, the nature of the consequences of the plea and of the fact that the judge is not bound by the agreement made between the prosecutor and the accused. In *R v Anthony-Cook, 2016 SCC 43*, the Supreme Court stated that a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

Therefore, the court's discretion on the sentence (or the terms of an agreement) will generally be present after the accused has pleaded guilty.

### 3.3.3 During the implementation of the settlement:

#### 3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?

Another authority: usually a report will be issued by an expert in the field related to the accused's rehabilitation (eg, social worker). This report will be sent to the prosecutor, who will then file it in court.

#### 3.3.3.2 Can this authority impose penalties for non-compliance?

Yes.

Yes. If the agreement was reached between the prosecutor and the accused before any plea was entered, the penalty will most usually be a reinstating of the criminal proceedings. If the breach occurs after the entering of a guilty plea, the discretion will rest with the court.

### 3.4 Outcome of the structured settlement

	Statutory Provisions	Past cases
Financial penalties	Yes	Yes
Disgorgement of profits	Yes	Yes
Compensation to third parties	Yes	Yes
Obligations to cooperate with other agencies	Yes	Yes
Monitors (and paying for them)	Yes	Yes
Corporate compliance programmes	Yes	Yes

Refer to section 718.21 Criminal Code.

### 3.5 *De facto or de jure*

As explained under question 3.2.2, there are no existing guidelines or other type of material describing the settlement process in foreign bribery cases.

The OECD Phase 3 Report on Canada's implementation of the OECD Anti-bribery Convention provides the following:

'The Canadian Criminal Code does not directly address the use of plea agreements or provide sentencing guidelines. However, in sentencing natural persons, a court is required to take into account a number of principles in section 718.2 of the Criminal Code, the most important of which is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 606 of the Criminal Code states that a court may accept a plea of guilty only if it is satisfied that the accused made the plea voluntarily, and understands the nature and consequences of the guilty plea, including that the court is not bound by any agreement made between the accused and the prosecutor. Section 726.2 of the Criminal Code requires that courts provide the terms and reasons for their sentences.'

*Editor's note: The settlement process (plea deal) is contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

Yes.

Yes, documents are entered into court and the publication of a sentence is imposed. However, not all court decisions and documents are made readily available online. It is important to note that three of the four successfully concluded foreign bribery cases in Canada were concluded with a plea bargain. In each case, the guilty plea was entered with an agreed statement of facts between the Queen and the accused in the Alberta Court of Queen's Bench. These statements of facts are not available on the website of the Court, where only judgments can be accessed.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive. Refer to answer 4.1.1.

#### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Very limited.

Most likely, very limited. This scenario is uncommon and, most likely, what could be negotiated is the contents of the agreed statement of facts.

### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Each year, the Canadian government publishes a report on the state of the implementation of the OECD Anti-bribery Convention. This report provides the number of ongoing investigations. It also provides information on cases for which charges have been laid, and on cases successfully concluded since the adoption of the Convention.

#### **4.2.1 If yes, is this data publicly available?**

Yes. [www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng).

#### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

Below is a summary of successfully concluded cases under the CFPOA. This summary can be found in the Canadian Government's *Seventeenth Annual Report to Parliament on the Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Enforcement of the Corruption of Foreign Public Officials Act*:

##### 'Matters Concluded

**Nazir Karigar** – On August 15, 2013, Nazir Karigar was convicted by the Ontario Superior Court of Justice for agreeing with others to offer bribes to foreign public officials contrary to paragraph 3(1)(b) of the CFPOA. The RCMP laid charges against Nazir Karigar under the CFPOA on May 28, 2010, for making a payment to Indian government officials to facilitate the execution of a multi-million dollar contract for the supply of a security system by Cryptometrics, a Canadian high-tech firm. On May 23, 2014, Nazir Karigar was sentenced to three years' imprisonment. The conviction marks the first time that an individual has been convicted under the CFPOA, and the first time that a matter has gone to trial under the CFPOA.

**Griffiths Energy International Inc.** – Griffiths Energy International Inc., a privately held oil and gas company based in Calgary, pleaded guilty on January 22, 2013 to one count of bribery under the CFPOA and was sentenced on January 25, 2013 to pay a \$9,000,000 fine with a 15% victim surcharge, for a total financial penalty of \$10,350,000, the largest to date under the CFPOA, in relation to its dealings in Chad.

**Niko Resources Ltd.** – Niko Resources Ltd. is a publicly-traded company based in Calgary, Alberta. On June 24, 2011, the company entered a guilty plea in the Court of Queen's Bench in Calgary for one count of bribery, contrary to paragraph 3(1)(b) of the CFPOA, covering the period from February 1, 2005 to June 30, 2005, in relation to its dealings in Bangladesh. As a result of the conviction, Niko Resources Ltd. was fined \$8.26 million plus a 15 per cent victim fine surcharge, for a total of \$9,499,000.00. In addition, the company was placed under a probation order, which put the company under the Court's supervision for three years to ensure that audits were completed to examine the company's compliance with the CFPOA.

**Hydro-Kleen Group Inc.** – Hydro Kleen Group Inc., based in Red Deer, Alberta, entered a guilty plea in the Court of Queen's Bench in Red Deer, on January 10, 2005, to one count of bribery, contrary to paragraph 3(1)(a) of the CFPOA and was ordered to pay a fine of \$25,000. Along with its president and an employee, the company had been charged under the CFPOA with, among other things, two counts of bribing a US immigration officer who worked at the Calgary International Airport. The charges against the director and the officer of the company were stayed. The US immigration officer pleaded guilty in July 2002 to accepting secret commissions, contrary to subparagraph 426(1)(a)(ii) of the Criminal Code. He received a six-month sentence and was subsequently deported to the U.S.'

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

Yes, the factors to be considered have been stated by the Supreme Court in *United States of America v Cotroni*; *United States of America v El Zein*, [1989] 1 S.C.R. 1469 as follows:

- where was the impact of the offence felt or likely to have been felt;
- which jurisdiction has the greater interest in prosecuting the offence;
- which police force played the major role in the development of the case;
- which jurisdiction has laid charges;
- which jurisdiction has the most comprehensive case;
- which jurisdiction is ready to proceed to trial;
- where is the evidence located;
- whether the evidence is mobile;
- the number of accused involved and whether they can be gathered together in one place for trial;
- in what jurisdiction were most of the acts in furtherance of the crime committed;
- the nationality and residence of the accused; and
- the severity of the sentence the accused is likely to receive in each jurisdiction.

Canada also follows the Mutual Legal Assistance Treaties (MLAT) it has established with different countries.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

Section 11(h) of the Charter of Canadian rights and freedoms guarantees the right 'if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again'. Section 607 Criminal Code also states that an accused may plead the defence of *autrefois acquit* or *autrefois convict*. To make out the defence of *autrefois acquit*, the accused must prove that the two charges laid against him are the same, in particular that: (1) the matter is the same, in whole or in part; and (2) the new count must be the same as at the first trial, or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at

that time to make the necessary amendments (compare to S 608 CrC, *R v Van Rassel*, [1990] 1 SCR 225).

Furthermore, the accused must have been placed in jeopardy (which is from the moment issue is joined before a judge having jurisdiction and the prosecution is called upon to present its case in court) and there must have been final determination of the matter by rendering of the verdict.

## **6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Yes. Even though the potential benefits of cooperation are not formalised through guidelines, case law has showed that voluntary disclosure and cooperation of the accused are taken into account when determining the sanction.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

We believe that cooperation should be encouraged, and that the rules regarding cooperation, voluntary disclosure, or any other element that might weigh on the sanction should be formalised.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

There should be adoption of a legal framework similar to what has been adopted in the UK. Such a model guarantees more transparency, predictability and consistency than the discretionary US model. The involvement of the courts is also useful in protecting both the rights of the accused as well as the public's interest.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Cooperation with authorities has an impact on the amount of the fine.

*Diego Sierra, Moisés Castro Pizaña, Partner, Von Wobeser y Sierra SC, Founding Partner, Bufete Castro Pizaña*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

Mexican anti-bribery rules can be found in the Federal Criminal Code for federal corruption offences, in the local criminal codes for local corruption offences, and in the new General Law on Administrative Responsibilities and the state laws for administrative responsibilities, for administrative corruption-related offences.

Bribery is a federal crime if the public official is a federal public official or if the public official acts in federal matters, for instance, because federal funds are involved or because a local authority investigates or prosecutes a federal crime. Bribery is also a federal crime if: (a) it is initiated, prepared or committed abroad, but produces or is intended to produce effects in Mexico or (b) it is initiated or prepared abroad but is committed in Mexico.

The following is an unofficial translation of the relevant federal, criminal bribery rules:

Federal Criminal Code, Art 222:

‘The crime of bribery is committed by:

The public official who, directly or through a third party, requests or receives unlawfully for himself or for another person, money or any benefit, or accepts a promise in order to perform or omit an act forming a part of the duties that are inherent to his employment, position or commission;

He who gives, promises or delivers any benefit to a person mentioned in Article 212 of this Code, in order for them to perform or omit an act related to their duties, work, position or commission (...).’

Federal Criminal Code, Art 222 *bis*:

‘The penalties established in the preceding Article shall be imposed on a person who, with the purpose of obtaining or retaining for himself or for another person, an undue advantage in the development or conduct of international commercial transactions, offers, promises or gives, directly or through an intermediary, money or any other gift, be it goods or services:

To a foreign public official, for their benefit or for a third party, for that public official to manage or refrain from managing the process or resolution of issues related to the functions inherent to their employment, position or commission;

To a foreign public official, for their benefit or for the benefit of a third party, in order for the public official to manage the process or resolution of any matter outside of the scope of the duties inherent to his employment, office or commission, or

To any person, in order for that person to appear before a foreign public official to require the public official, or propose to the public official, to carry out the process or resolution of any matter related to the functions inherent to the employment, position or commission of the foreign public official.’

The following is an unofficial translation of the relevant administrative bribery rules, applicable to both local and federal public officials:

General Law on Administrative Responsibilities (entry into force July 2017), Article 52:

‘A public official shall be liable for bribery if he demands, accepts, obtains or seeks to obtain, directly or through third parties, due to his position, any benefit not included in his compensation, which may consist of money, securities, movable or immovable property, including through sale at a price that is clearly inferior to the market price, donations, services, employment and other undue benefits for himself or for his spouse, blood relatives, civil relatives or third parties with whom he has professional, labor or business relations, or partners or corporations in which the public official or the aforementioned persons participate.’

Both administrative and criminal responsibility can materialise in the context of international business transactions, as long as the authority is a Mexican authority. If the authority is a foreign authority, only in certain cases criminal and administrative responsibility can materialise (Article 222 *bis* of the Federal Criminal Code and Article 70 of the General Law on Administrative Responsibilities).

As a general consideration, the responses in this questionnaire, with regard to the criminal procedure, are based on the new National Code on Criminal Procedures. However, the old criminal procedure is still applied in the proceedings that had been initiated prior to the entry into force of the new code in June 2016. The Article 222 of the Federal Criminal Code was partially modified in July 2016 and will be in force until the prosecutor in charge of the Prosecutors Office against Bribery is named by the Mexican Senate.

## **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Mexico has signed and ratified the following corruption-related treaties: OEA Inter-American Convention against Corruption (provides for the criminalisation of certain acts of corruption); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (provides for the criminalisation of bribery of foreign public officials in international business transactions); UN Convention against Corruption (provides for the criminalisation of corruption); and UN Convention against Transnational Organised Crime (provides for the criminalisation of corruption as a part of combating against transnational organised crime).

### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

Mexico asserts jurisdiction for domestic federal crimes, including the bribery of foreign public officials (Article 222 *bis* of the Federal Criminal Code) committed outside Mexico in the following main scenarios: the crime is committed outside Mexico, but produces or is intended to produce effects in Mexico; continuing crimes initiated outside Mexico, but continued in the national territory; single-scheme criminal conducts initiated outside Mexico and continued in Mexico; when the crime is committed outside Mexico, but the active or passive subject is a Mexican national (the latter scenario with additional requirements).

### 1.4 Are facilitation payments allowed in your jurisdiction?

No.

Facilitation payments are considered illegal payments, as offering cash or any other goods or services is prohibited. As previously detailed, the Federal Criminal Code punishes the public official who, directly or through a third party, requests or receives unlawfully for himself or for another person, money or any benefit, or accepts a promise in order to perform or omit an act forming a part of the duties that are inherent to his employment, position or commission. The same way, the Federal Criminal Code punishes the individuals who give, promises or delivers any benefit to a person mentioned in Article 212 of this Code (any kind of public officials), in order to perform or omit an act related to their duties, work, position or commission.

### 1.5 Does your country provide for corporate criminal liability?

Yes.

In federal criminal matters corporate criminal liability is established under Article 11 and 11 *bis* of the Federal Criminal Code, for specific crimes, including bribery, and reads as follows (unofficial translation):

Article 11:

‘When any member or representative of a legal person, or of a society, corporation or enterprise of any kind, with the exception of institutions of the State, commits a crime using the means provided to him or her for that purpose by the concerned entities, so that it is effectively committed in the name or under the protection of the social entity or for its benefit, the judge can, in those cases exclusively specified by the law, decree the suspension of the entity or its dissolution when he considers it necessary in the interests of public security.’

Article 11 *bis*:

‘For purposes of Title X, Chapter II, of the National Code of Criminal Procedure, legal persons can be subjected to some or various legal consequences when they have intervened in the commission of the following crimes: A. Of those established in this Code: [...] VI, Bribery, established in Articles 222, sub-section II, and 222 *bis* [...] XIII.

Cover-up, established in Article 400; XIV. Operations involving resources derived from illicit sources [money laundering], established in Article 400 *bis* [...].

National Code of Criminal Procedure: Article 421, Prosecution and Autonomous Criminal Responsibility:

‘Legal persons shall be criminally responsible for crimes committed in their name, on their account, in their benefit or through means provided by them, if, in addition, it is determined that the legal person disregarded due control within its organisation. The foregoing is without prejudice to the criminal responsibility of their representatives and managers. The Prosecutor’s Office can prosecute the legal person, except state institutions, regardless of the prosecution of the natural persons involved in the committed crime. The criminal responsibility of legal persons shall not be extinguished if the legal person transforms, merges, is absorbed or is part of a spin off. In these cases, the transfer of the sanction may be adjusted depending on the relationship maintained with the legal person originally responsible for the crime. Criminal responsibility of legal entities shall also not extinguish through apparent dissolution, if the entity continues its economic activity and substantially maintains its identity through clients, suppliers, employees, or the most relevant portion of them. The causes for the exclusion of the crime or the statute of limitations to bring criminal proceedings, which may concur for a natural person involved, shall not bear on the proceedings against the legal entity, except if the natural person and the legal entity committed or participated in the commission of the same acts and those acts have not been qualified as criminal in a prior decision. [...].’

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other: a special Prosecutor’s Office for corruption-related crimes is currently being implemented in Mexico. The new prosecutor is expected to be nominated in 2017 and the office is expected to start operations in 2018. The special prosecutor will function under the federal attorney general’s office and will be in charge of the prosecution of all corruption related crimes, not limited to international business transactions. Local corruption related crimes are, and will be, prosecuted by the local attorney general’s offices. Separately, in 2018, the existing federal attorney general’s office will be transformed into a general prosecutor’s office, independent of the federal executive branch. The special prosecutor for corruption-related crimes will, as of then, be functioning under the general prosecutor’s office with technical and operational independence.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

The discretion is not unfettered but linked to evidentiary standards. The criminal proceedings shall serve to clarify the facts, protect the innocent, to ensure that the offender does not go unpunished and that damage caused by the offence is repaired. Two different procedural moments are relevant: so-called linking to the proceedings of the suspect (*vinculación a proceso*) and the indictment.

After the initial investigation, for the investigation to continue, the prosecutor shall show that the case file contains evidence suggesting that a crime was committed and that it is probable that the defendant committed the crime or participated in its commission. If this threshold is not met, the court will not order to 'link the defendant to the proceedings' (*vinculación a proceso*) and the proceedings shall be terminated. If defendant is linked to the proceedings (defendant is '*vinculado a proceso*') is ordered, the proceedings continue with a complementary investigation. For the prosecution to formulate the indictment or charge a person, the complementary investigation must provide sufficient information for the prosecutor to be able to meet the criteria for the indictment, including a clear and precise narrative of the facts and mode of participation of the defendant, all supported by evidence. The prosecutor is obliged to charge a person if the threshold is met, unless a cause for dropping the investigation or the charges materialises (see answer to 2.3.1 below).

### **2.1.2 Deciding what charges to file?**

Yes.

The prosecutor decides the charges to be filed. In the *vinculación a proceso*, which is a step that precedes the formulation of the indictment, the prosecution must, however, show to the judge that the facts exist and probably a crime was committed. The *vinculación* of the defendant is ordered with respect to such facts that shows that crime probably was committed and the subsequent indictment must be for the same facts. However, the prosecutor may re-classify the type of the crimes that he considers were committed to be mentioned in the indictment.

### **2.1.3 Deciding whether to drop charges?**

No.

The prosecutor may drop the investigation or the charges in various different ways, always observing the requirements of the law.

The prosecutor is obliged to initiate and carry out the investigation when he receives information about the existence of an act qualified in the law as a crime. The investigation may only be suspended under the conditions established in the law.

The prosecutor may opt for:

- temporally archiving the investigation (Article 254 of the National Code of Criminal Procedure), if the available information is so insufficient that no line of investigation can be established;

- not to prosecute (Article 255 of the National Code of Criminal Procedure), if the information in the case file permits the conclusion that a cause for acquittal materialises (eg, the act was not committed; the act is not a crime; the innocence of the defendant appears clear; after the investigation, the prosecution does not have sufficient elements to form the indictment);
- abstain from investigating (Article 253 of the National Code of Criminal Procedure), if the acts described in a criminal complaint, or its equivalent, do not constitute a crime or when the available information permits the conclusion that the right to bring criminal proceedings or the criminal responsibility of the defendant has expired; or
- abstain from prosecuting by applying a criterion of opportunity (Article 256 of the National Code of Criminal Procedure), if damages have been repaired, in the following cases: (1) the penalty established for the crime does not exceed five years' imprisonment and the crime was not committed employing violence; (2) property crimes committed without employing violence against persons or negligent offences, if the defendant did not act under the influence of alcohol or drugs; (3) when the defendant has suffered serious damage as a consequence of the crime; (4) the penalty that could be imposed would lack relevance considering another judgment that has already been imposed or could be imposed; when the defendant delivers essential and useful information to the prosecution regarding another more serious crime (or the same crime given that the accused had a lesser degree of participation) and agrees to testify; (5) if criminal prosecution would be disproportional or unreasonable considering the causes or circumstances surrounding the commission of the crime.

Criterion of opportunity can never be applied in certain categories of crimes, including human trafficking, domestic violence and tax offences. The exercise of the prosecutorial discretion to apply a criterion of opportunity (by federal prosecutors) is further governed by *Acuerdo A/003/16* of 21 January 2016.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Plea bargains, as understood in other jurisdictions (such as the US) as an agreement between the prosecutor and the defendant with mutual concessions (guilty plea and concessions in the indictment) do not, as such, exist in Mexico.

However, the application of a criterion of opportunity in cases where the defendant delivers essential and useful information to the prosecution regarding another more serious crime and agrees to testify (Article 256(V)) is akin to a plea bargain under Mexican law. In such cases, the application of the criterion by the prosecutor extinguishes the criminal action and, in return, the defendant agrees formally to testify in another trial.

The prosecutor must apply the criterion based on objective reasons, without discrimination. He or she must also evaluate the circumstances of each case.

For the prosecutor to apply the criterion in such cases, the prosecutor must ensure that the information provided by the accused contributes in an efficient manner to the investigation and prosecution of the other crime. The accused must expressly accept, in the presence of a defence counsel, to testify with regard to such information. The effects of the criterion of opportunity in such cases are suspended until the accused testifies (Article 7 of *Acuerdo A/003/16* of 21 January 2016). After the accused has appeared to testify, the prosecutor has 15 days to decide definitively whether the criminal action shall be considered extinguished.

In addition, the prosecutor has the power to request special proceedings, which may bear similar effects to a plea bargain. Such requests, however, must comply with the requirements established in the law for each case.

First, the victim and the defendant can enter into a compensation agreement, which, once approved by the prosecutor or the judge, extinguishes the criminal action (Articles 186–190 of the National Code of Criminal Procedures). Compensation agreements may be entered into for complainant offences, crimes of negligence (*delito culposo*) or non-violent property offences (such as bribery). If the victim of bribery is an authority, the compensation agreement is an agreement between the authority and the wrongdoer. If the federation is the victim, it would be represented by the federal prosecutor's office, however, the prosecutor's office would not, in such capacity, be acting as an enforcement authority. Therefore, such a compensation agreement could resemble a plea bargain or a settlement with enforcement authorities.

Second, the prosecutor may request a 'conditional suspension of the proceedings' (Articles 191–200 of the National Code), thus suspending the proceedings on the condition that the defendant provides a damage-reparation plan and complies with other conditions (eg, remain in a certain place, abstain from consuming drugs and alcohol) of the suspension. If the plan is complied with, the right to bring criminal proceedings for the crime extinguishes at the end of the suspension period. The court may grant the prosecutor's request for suspension, if the following criteria are met: the defendant is investigated for a crime where the arithmetic average of the penal sanction is less than five years; the victim does not oppose; and three years have passed from a prior suspension, five years if the defendant did not comply with the conditions of such prior suspension.

Finally, the prosecutor may request an 'abbreviated trial' (Articles 201–207 of the National Code). The conditions for granting an abbreviated trial are: request from the prosecutor and formulation of the indictment; the victim does not oppose; the defendant waives his right to an oral trial, expressly consents to an abbreviated trial; pleads guilty; and accepts to be convicted based on the evidence presented by the prosecutor in the indictment. The effect of the abbreviated trial on the sanctions is: if the defendant has not been previously sentenced for an intentional crime and if the

crime subject to the abbreviated trial has an arithmetic average of the penal sanction less than five years, the prosecutor may request a reduction of the minimum sentence by a half (criminal negligence) or by two-thirds (intentional crimes); if the conditions of the first scenario are not met, the prosecutor may request the reduction of the minimum sentence by up to one-third (criminal negligence) and one-half (intentional crimes).

Compensation agreements are agreements between the victim and the defendant and are therefore not the same as plea bargains. They may be entered into as a result of one of the alternative mechanisms in criminal matters, established in the *Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal* (National Law of Alternative Dispute Resolution Methods in Criminal Matters) – mediation, conciliation or restorative meeting.

Compensation agreements and conditional suspension are alternative solutions to criminal proceedings, whereas the abbreviated trial is a form of anticipated termination of the proceedings (Articles 184–185 of the National Code).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Criterion of opportunity.

The duties of loyalty, objectivity and due diligence are the guiding principles for prosecutorial activity in Mexico, including the exercise of discretion (see answers to 2.1 above). Criterion of opportunity is the exception to the rule (see answer 2.1.3 above).

The duties of the prosecution oblige it to provide truthful information about the acts and not to conceal from the parties (the defendant, the victim, and their representatives) any element that could be favourable to their respective positions, and to carry out an objective investigation of both inculpatory and exculpatory elements.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. See answer to 2.1.1 above.

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

The threshold for *vinculación a proceso* and the indictment are somewhat clearly defined. For the first, it is only necessary to have some information that shows the existence of facts that probably are crimes and they must be investigated. However, to execute an indictment, it shall be necessary to have evidence that proves a crime occurred and that an individual is liable of such crime (Article 335 of the National Code of Criminal Procedures). If there are evidentiary elements for an indictment, the prosecutor is ready to start the intermediate phase of the criminal procedure or trial preparation phase.

## 2.4 Do these standards differ for individual and corporate defendants?

No.

The standards are the same for all defendants. However, it is important to point out that corporations will not be prosecuted for the crimes. Corporations will be prosecuted because of the omission of proper controls inside the companies to prevent crimes. Corporations will be criminally liable for crimes committed in their name, on their own, on their behalf or through the means that they provide, if it is established that failure to observe proper control existed in the corporation. The above regardless of criminal liability that may be incurred by its representatives or managers.

## 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

The instrument is not a structured settlement, but an agreement between the prosecutor and the accused for the latter to testify in another case, based on the application of a criterion of opportunity. See answer to 2.1.4 above.

### 3.2 Form, features and terms of structured settlements

#### 3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?

No.

The National Code of Criminal Proceedings does not require the admission of guilt in the application of the opportunity criterion (where the defendant agrees to testify).

#### 3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting

Cooperation with enforcement authorities through the investigation

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures;

assistance in investigating and prosecuting individuals; and

Other.

The judiciary has very broad powers when determining punishments within the statutory sentencing limits. Thus, judges can consider a very wide range of factors, including the wealth or education of the wrongdoer, the negative effects of the conduct to be punished on society, etc. If an opportunity criterion is applied there is no punishment to the wrongdoer.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No. There is no specific provision in this regard.

**3.2.4 What form(s) can a structured settlement take?**

There is no specific provision in this regard.

**3.2.5 What are the usual terms of such an agreement?**

The reparation of damages and express agreement to testify in the other case must be included in the agreement.

**3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The prosecution shall limit its offerings to extinguishing the criminal action, once the accused has testified in the terms detailed in the National Code of Criminal Proceedings and the document called: *Acuerdo A/003/16*.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

There is no provision in this regard. Moreover, since the applicable legislation only came into effect in June 2016, there are no relevant precedents. If the accused does not testify or does not repair the damage, the agreement will not enter into effect and the proceedings will continue as if the prosecutor had not applied the criterion of opportunity in the first place.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The discretion to apply the criterion lies with the prosecutor. However, the victim has the right to ask to a judge review such decisions. The judge will have the final say in the matter (Article 258 of the National Code of Criminal Proceedings).

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. Not applicable.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

No. Not applicable.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. Just in terms detailed in point 3.3.1.1 above.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: the Prosecutor's Office.

The Prosecutor's Office is responsible for ensuring that information provided is useful for the investigation, reparation has been paid or that payment has been guaranteed. It can also apply any appropriate measures established in the National Code of Criminal Proceedings to ensure compliance; including ensuring that reparation is paid to the victim (Articles 2, 7, *Acuerdo A/003/16*).

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes. See answer 3.3.3.1.

**3.4 Outcome of the structured settlement**

**Statutory Provisions:**

Financial penalties – yes.

Disgorgement of profits – yes.

Compensation to third parties – yes.

Corporate compliance programmes – yes.

Personal liability – yes.

On the criminal front, statutory regulations entered into effect in June 2016. The Attorney General's office has not issued any type of guidelines in connection with the factors referred above and there are almost no cases that have generated precedent. All these types of agreements and negotiations with the authorities are something novel for the Mexican forum and they are only beginning to be tested and put in practice. On the administrative front, the General Law of Administrative Responsibilities entered into force in July 2017. However, both the criminal and administrative regulations provide financial penalties, disgorgement of profits, compensation to third parties, obligations to cooperate with other agencies (eg, anti-trust), highlight the importance of having a compliance programme (having one will be the main affirmative defence a corporation will be able to present against criminal liability and also against administrative liability) and personal and corporate liability may be imposed both on individuals and corporations (both criminal and administrative.) It is worth stressing that new criminal and administrative regulations in Mexico now allow even the possibility of winding down and liquidating a company facing liability deriving from corruption.

### **3.5 *De facto or de jure***

*Editor's note: The settlement processes (compensation agreements and conditional suspension) are not contingent upon an admission of guilt. (See section 2.1.4 and 3.2.1). This constitutes de jure settlement processes following the classification used in this report. This however only applies to natural persons. In 2017, the General Law of Administrative Responsibilities (GLAR) came into force. This, establishes the elements of a compliance programme that will mitigate administrative liability, potentially as an affirmative defence, as including voluntary disclosure, cooperation with authority, adoption of compliance programmes and adoption of mitigation measures. This process occurs in the administrative sphere and would therefore constitute a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

The information contained in any opportunity criterion, compensation agreements and conditional suspension of the procedure is not available to the public.

#### **4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

In November 2016, the Attorney General's office together with the Secretary of Finance of Mexico entered into a settlement agreement for MXN 421 million with two legal entities that both invested equity and provided financing to such entities. The cash behind these operations originated illegally from the state of Veracruz through certain shell companies. When the company in question knew of the illegality of the source of such funds, it allegedly approached the Attorney General's office to enter into such settlement agreement voluntarily and it returned such funds directly to the state of Veracruz. (See press release 1927/16

by the Mexican *Procuraduría General de la República*: [www.gob.mx/pgr/prensa/mensaje-a-medios-del-titular-de-la-procuraduria-general-de-la-republica-raul-cervantes-andrade-comunicado-1927-16](http://www.gob.mx/pgr/prensa/mensaje-a-medios-del-titular-de-la-procuraduria-general-de-la-republica-raul-cervantes-andrade-comunicado-1927-16)).

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

The specific applicable rules would be determined by the applicable, if any, extradition treaty. Mexico generally exercises jurisdiction, unless such a treaty exists and the other country requests extradition.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

In accordance with Article 4 of the Federal Criminal Code, an individual (or a corporation) cannot be prosecuted in Mexico for a criminal offence if such crime has already been judged and is *res judicata* in the foreign jurisdiction where the criminal offence took place. Mexican law is silent regarding foreign settlements.

## 6. The following questions call for your opinion

### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability

Reasonable predictability.

Cooperation with wrongdoers and prosecuting authorities in order to avoid prosecution is very new in Mexican legislation. Cooperation had not been regulated by Mexican law until the issuance of the new National Code on Criminal Procedure in 2014 in effect until 2016. Therefore, at this moment it is not very clear how the new system will work. On the other hand, the cases where a criterion of opportunity can be applied, are defined in the law. Furthermore, the interaction between the criminal and administrative liability that will certainly arise in complex corruption investigations is yet to be seen. The administrative regulations do provide certain leniency (between 50 to 70 per cent of a potential sanction) on those wrongdoers who come forward and voluntarily disclose. There are similar benefits under antitrust regulations and there is also an interaction between the administrative and antitrust regulations in connection with fight against corruption. In this complex context, our opinion is that the predictability will lie in that offenders will receive a benefit by coming forward with the authorities and disclosing the magnitude of the schemes in which they participated.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Encouraged, since the main purpose of Mexican criminal law system is not to punish but to ensure the victim's full damage repair and to ensure that the wrongdoer will be reinserted into society as good citizens. The same goes for the administrative regulations, they encourage individuals and corporations to cooperate and receive sanction reductions.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Encouraged, as long as full reparation of the victim's damage is ensured. Granting benefits to some, in order to go after the biggest offenders in the only way to crack down complex organised criminal operations and large-scale schemes and organisations of corruption. The perfect example of this, in Latin America, is Brazil. The way in which they have been able to seriously commence tackling corruption is by means of cooperation between authorities and the alleged wrongdoers who have declared and accused those higher in the corruption structure in exchange for reduced sanctions and penalties.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

In our country, there are several structural reforms outstanding in order for the criminal system to operate according to its new constitutional design. In particular one item strikes out: the Attorney General's office (*Procuraduría General de la República*) needs to change into General Prosecutor's Office (*Fiscalía General de la República*) – the name is the least important aspect. With the new structure of the *Fiscalía General de la República*, the Attorney General will be independent of the President (today it is still *de facto* an employee of the President) and will last for a term of nine years (Presidential terms in Mexico are limited to six years – no re-election allowed). Once this independent General Prosecutor's Office comes into office, a special prosecutor to fight corruption shall be appointed. These changes are stuck in the legislative agenda (there is a need for the Senate to legislate on final structural aspects of the new General Prosecutor's Office that directly impact the individual to occupy such office). Without all these structural changes, we believe that the Mexican authorities' room to effectively operate change and encourage collaboration today is hampered because authorities will be working under an organisation structure whose continuity might be undermined. Lastly, President-Elect Andrés Manuel López Obrador (AMLO) publicly announced on 1 July 2018 that eradicating impunity and corruption will be his administration's principal mission. With absolute majority in Congress he will have ample freedom to pass legislation. AMLO will surely bring new plans for the structure of the Attorney General's office.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

The clearest advantage is to avoid prosecution, which prevents all type of criminal sanctions and negative publicity. The best example of a cooperating company so far is the return of MXN 421 million to the state of Veracruz referred to above. (See section 4.3 above.) Moreover, the advantage is also financial, since they can avoid confiscation of assets from criminal authorities. Furthermore, from an administrative point of view, there are also reduced sanctions offerings to cooperating companies (reductions in 50 to 70 per cent of the potential sanction). Reputational benefits may also be obtained from cooperating with authorities as we have seen in several international instances (eg, Siemens).

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### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The anti-bribery provisions of the US Foreign Corrupt Practices Act (FCPA), 15 USC sections 78dd-1, 78dd-2, 78dd-3, and 78ff, prohibit bribery of foreign government officials. The US Department of Justice (DOJ) has enforcement authority with respect to criminal violations of the FCPA. DOJ and the US Securities and Exchange Commission (SEC) both have enforcement authority with respect to civil violations of the FCPA, though the SEC's authority pertains only to issuers of US securities and any officers, directors, employees, agents, and shareholders acting on their behalf. In addition, various federal, state, and local laws prohibit and have been used to prosecute bribery of domestic government officials and private parties.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The United States is a party to both the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The FCPA's anti-bribery provisions apply to conduct outside the United States, subject to certain legal requirements. Any US 'domestic concern' (meaning any US citizen, national, or resident, or any corporation, partnership, association, or other business entity organised under US federal or state law or having its principal place of business in the US); or any officer, director, employee, agent, or shareholder acting on behalf of any of the foregoing may be prosecuted for bribery of foreign officials anywhere in the world. Any issuer of US securities that is not itself a domestic concern may be prosecuted if it uses any instrumentality of US interstate commerce directly or indirectly in furtherance of a corrupt payment to a foreign official. Such use could include, for example, sending a wire transfer through the US banking system, even if the other conduct in question takes place entirely outside the US. Foreign entities and nationals may be prosecuted if they directly or indirectly engage in any act in furtherance of a corrupt payment while in the territory of the US. Additionally, foreign entities and nationals may be prosecuted if they aid or abet, conspire with, or act as an agent of a US issuer or domestic concern.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

Yes.

The FCPA's anti-bribery provisions contain an exception for 'any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.', (15 USC Sections 78dd-1(b), 78dd-2(b), 78dd-3(b)). The exception is written and construed narrowly, applying only to facilitation payments, typically modest, made in furtherance of routine governmental action that involves non-discretionary acts, such as processing visas or providing telephone or mail service.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

Under US law, corporations are legal persons and may be held criminally liable. Corporate criminal liability generally extends to offences committed by the corporation's officers, employees, or agents within the scope of their employment and for the benefit of the corporation.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The Fraud Section of DOJ's Criminal Division has an 'FCPA Unit', a group of prosecutors specifically focused on enforcing the FCPA. This group works closely with prosecutors in the various US Attorneys' Offices throughout the country. (As noted above, the SEC shares responsibility for civil enforcement of the FCPA, which is beyond the scope of this questionnaire.)

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No. See below.

**2.1.2 Deciding what charges to file?**

No. See below.

**2.1.3 Deciding whether to drop charges?**

No. See below.

**2.1.4 Deciding whether or not to plea bargain?**

No. See below.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Defence mitigation argued to a judge.

Defence mitigation argued to the prosecutor.

US prosecutors have extremely broad but not unlimited discretion with respect to whether to file charges and against whom, what charges to file, whether to drop charges, and whether and how to negotiate a plea or other resolution. The US Attorneys' Manual sets forth the policies of DOJ that govern such decisions and discretion. Many steps in a criminal case in the US, including the filing or amendment of charges and any plea or change of plea, also involve court filings and proceedings, in which the court may play an active role.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

In order to commence prosecution, a prosecutor first must conclude that there is probable cause to believe that the defendant has committed the offence to be charged. See US Attorneys' Manual, Section 9-27.200, available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal); *Branzburg v Hayes*, 408 US 665, 686 (1972). Prosecutors then bear the burden of proving every element of each crime charged beyond a reasonable doubt. Before filing charges, prosecutors therefore assess both whether probable cause exists (the threshold standard to commence prosecution) and whether the available evidence, taking into account the potential factual and legal arguments based on that evidence, will be sufficient to establish the defendant's guilt beyond a reasonable doubt.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

The burden of proof for criminal charges is extremely well established and clearly defined under US case law.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

Corporations are legal persons for purposes of the criminal law. The same burden of proof, therefore, applies regardless of whether the US defendant is a corporation or natural person.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

An alleged criminal violation of the FCPA may be resolved by means of a settlement negotiated between DOJ and the potential defendant (and the defendant's counsel). Such a settlement may take one of three forms: a plea agreement, a deferred prosecution agreement (DPA), or a non-prosecution agreement (NPA).

In a plea agreement, the defendant admits guilt and is convicted of the crimes charged. The plea agreement is filed with a court, which reviews its terms and imposes a sentence.

In a DPA, DOJ files a charging instrument with the court but requests postponement of the prosecution for a specific period in order for the defendant to demonstrate good conduct. The defendant typically pays a penalty, waives the statute of limitations, admits relevant facts (but not guilt), agrees to cooperate with the government, and often agrees to other terms. At the end of the period of deferral, if the defendant has met its obligations, the government asks the court to dismiss the charges.

In an NPA, DOJ retains the right to file charges, but refrains from doing so on the condition that the settling company complies with the terms of the NPA. The company may agree to terms similar to those imposed under a DPA. An NPA is not filed with a court.

DOJ also has the option of declining prosecution and may choose to do so on its own or following negotiation with the potential defendant. A declination ordinarily does not involve a court filing, formal documentation, or other characteristics of a ‘structured settlement’. However, certain recent declinations under DOJ’s FCPA ‘Pilot Program’ (the April 2016 *Foreign Corrupt Practices Act Enforcement Plan and Guidance*), which has been revised and extended by the November 2017 *Policy on Corporate Enforcement of the Foreign Corrupt Practices Act*, have involved the public posting of information about the declination on DOJ’s website and disgorgement by the potential defendant company. See [www.justice.gov/criminal-fraud/pilot-program/declinations](http://www.justice.gov/criminal-fraud/pilot-program/declinations).

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

See above. DPAs and NPAs typically involve admissions of material facts, but do not require admission of guilt, as with a plea agreement.

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

##### **Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals.

DOJ considers all these factors, and any others it considers relevant, in negotiating the terms of a resolution. DOJ has provided extensive written guidance, including in the *Resource Guide to the US Foreign Corrupt Practices Act* (2012), the *Foreign Corrupt Practices Act Enforcement Plan and Guidance* (also known as the ‘Pilot Program’) (2016), the *Evaluation of Corporate Compliance Programs* (2017), and the *Policy on Corporate Enforcement of the Foreign Corrupt Practices Act* (2017), regarding factors that it considers relevant to enforcement decisions.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

The US Attorneys’ Manual, which reflects the policies of DOJ governing federal prosecutors, provides that ‘prosecutors should not ask for [privilege] waivers and are directed not to do so.’ US Attorneys’ Manual, section 9-28.710, available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal). The Manual also provides that a company’s eligibility for credit for its cooperation with a criminal investigation may not be predicated on a waiver of privilege (*ibid* at section 9-28.720).

### **3.2.4 What form(s) can a structured settlement take?**

See above at 3.1.

### **3.2.5 What are the usual terms of such an agreement?**

See above at 3.1.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The prosecution must take into account DOJ policy, as set forth in the US Attorneys’ Manual, and cannot, for example, agree to a settlement that involves a charge unsupported by the probable cause requirement stated in the response to 2.3, above. So, for example, the prosecution could not agree to a plea by the defendant to a less serious criminal violation without probable cause to believe the defendant had committed that crime. The penalty range for a particular criminal violation also is constrained by any minimum or maximum sentences specified in the corresponding statutes.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If a company violates the terms of a DPA or NPA, DOJ may file the criminal charges that it had agreed to defer or not to prosecute at the time of the underlying agreement. The company, in the agreement, already will have admitted to the material facts and will have agreed to waive or extend the statute of limitations, making it easier for the government to prove its case.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The parties are free to negotiate a settlement without involving a court. As noted above, certain forms of settlement – in particular plea agreements and DPAs – must be filed in court.

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

If no proceeding has been filed, the court will not be involved before settlement has been reached. If a proceeding already has been filed, the court will continue to oversee the proceeding even if the parties simultaneously engage in settlement negotiations.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

As noted above, certain forms of settlement – plea agreements and DPAs – must be filed in court. The court then may choose to take a more or less active role in reviewing, approving or rejecting, and overseeing the settlement.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

In order for a plea agreement or DPA to become final, binding, and enforceable, the agreement must be reviewed and approved by a court. See Federal Rule of Criminal Procedure 11; US Attorneys' Manual at CRM 623, available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal). Judicial review of plea agreements may be searching and rigorous, and sometimes results in rejection of a plea agreement, but typically is more deferential with respect to a DPA. See, for example, *US v Fokker Services BV*, 818 F3d 733 (DC Cir 2016) (limiting lower court's authority to 'scrutinise the prosecution's discretionary charging decisions').

#### **3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

Issues of compliance or noncompliance with the terms of a federal criminal settlement may be raised and addressed first with DOJ. In the case of a settlement that involved a court filing (eg, a plea or DPA), such issues then may be addressed with the court. In the case of an out-of-court settlement (eg, an NPA), issues of compliance typically would not involve a court, but rather only DOJ and the settling party. Furthermore, some settlements involve the appointment of a monitor to oversee compliance by the company. The monitor ordinarily will have the authority to request documents and other information, and an obligation to report periodically to DOJ and/or the court regarding the company's compliance or noncompliance.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes. See above.

**3.4 Outcome of the structured settlement**

**Are there any rules that provide guidance about the outcome of such negotiations with respect to the following? Please select all options that apply and provide further information in the field next to each box you tick.**

	Statutory Provisions	Guidelines	Past cases
Financial penalties	Yes	Yes	Yes
Disgorgement of profits	Yes	Yes	Yes
Compensation to third parties	No	Yes	Yes
Obligations to cooperate with other agencies	No	Yes	Yes
Monitors (and paying for them)	No	Yes	Yes
Corporate compliance programmes	Yes	Yes	Yes
Personal liability	Yes	Yes	Yes

US criminal statutes generally include provisions regarding potential liability and penalties, and the accounting provisions of the FCPA (15 USC Section 78m) provide some guidance regarding compliance requirements for issuers of US securities. The US Sentencing Guidelines, the US Attorneys' Manual (including, among other sections, 9-28.000 (*Principles of Federal Prosecution of Business Organizations*) and CRM 166 (*Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*), available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal)), the *Resource Guide to the US Foreign Corrupt Practices Act*, and other written guidance from the US enforcement agencies, together with US criminal statutes and past cases, provide extensive guidance regarding each of these components of potential resolutions of criminal charges.

**3.5 De facto or de jure**

*De jure* but with considerable prosecutorial discretion, as described above.

*Editor's note: The settlement processes (deferred prosecution agreements and non-prosecution agreements) are not contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). These are de jure settlement processes following the classification used in this report.*

#### 4. Transparency

##### 4.1 Public access to information on settlements

###### 4.1.1 Is information about settlement available to the public?

Yes.

DOJ makes publicly available, on its website, information regarding convictions, plea agreements, DPAs and (in many but not all cases) NPAs. For example, such documents for FCPA cases are available at [www.justice.gov/criminal-fraud/related-enforcement-actions](http://www.justice.gov/criminal-fraud/related-enforcement-actions). Plea agreements and DPAs must be filed in court and those filings also are publicly available in the courts' records. In addition, DOJ recently has made available information about several FCPA resolutions in which it has exercised its discretion to decline to bring charges: information about these declinations is at [www.justice.gov/criminal-fraud/pilot-program/declinations](http://www.justice.gov/criminal-fraud/pilot-program/declinations).

###### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

The filings described above are typically reasonably extensive, providing the prosecution's key factual allegations and identifying the charges filed or resolved, albeit not necessarily in a comprehensive or exhaustive manner.

###### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

DOJ controls the contents of its filings regarding a resolution but in a settlement, typically, will engage in some limited negotiation regarding what is said about the facts of the case.

##### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes.

DOJ maintains a public website with extensive information on FCPA enforcement activity, including the filing of charges, convictions and settlements. The website is at [www.justice.gov/criminal-fraud/foreign-corrupt-practices-act](http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act). DOJ is not required to disclose publicly the initiation or closure of investigations that do not result in charges or a formal resolution, and

typically does not do so, though it has provided limited, anonymised information regarding certain FCPA declinations (ie, decisions by DOJ to exercise its discretion not to prosecute potential violations of the FCPA despite having what it considers sufficient evidence to do so). DOJ historically has not always disclosed NPAs, either.

#### **4.2.1 If yes, is this data publicly available?**

Yes. [www.justice.gov/criminal-fraud/foreign-corrupt-practices-act](http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act).

See above.

### **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

#### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

As a general matter, the Fifth Amendment to the US Constitution makes it unconstitutional to prosecute criminally a second time for the same offence a defendant who has been acquitted or convicted of that offence: ‘nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...’. However, criminal enforcement authority exists at both the federal level and the state level in the US and the Fifth Amendment’s double jeopardy clause does not provide a constitutional bar to a federal prosecution for the same conduct that previously has formed the basis of a state prosecution, or vice versa. DOJ has adopted a policy (the ‘Petite Policy’, named after *Petite v US*, 361 US 529 (1960)) that provides that, following a state criminal prosecution, there should be no federal criminal prosecution for the same conduct in the absence of substantial federal interests that were left demonstrably unvindicated in the earlier proceeding. See US Attorneys’ Manual, Section 9-2.031, available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal). The policy reflects an exercise of prosecutorial discretion, though, and does not create any enforceable rights against such successive prosecution.

#### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country’s legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

The US constitutional prohibition of double jeopardy does not prevent prosecution by separate sovereigns, such as the US and another country (or even the US federal government and a US state), for the same conduct. Indeed, there have been many FCPA settlements that involved parallel resolutions with non-US authorities for alleged violations of non-US law for the same conduct. However, DOJ has adopted policies that federal prosecutors, in determining whether to bring charges, should consider whether the potential defendant has been subject to effective prosecution in another jurisdiction. Factors to be considered are the strength of the other jurisdiction’s interest in prosecution, the other jurisdiction’s ability and

willingness to prosecute effectively, and the sentence or other consequences if the defendant has been convicted in the other jurisdiction. See US Attorneys' Manual, Section 9-27.240, available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal).

On 9 May 2018, DOJ announced a *Policy on Coordination of Corporate Resolution Penalties*, providing that DOJ should consider penalties imposed by other enforcement authorities. The policy appears intended to address the risk that companies face competing, sometimes uncoordinated enforcement actions and overlapping penalties for the same underlying conduct. Although the policy is light on detail, it reinforces the importance of coordination, including among US authorities and with non-US counterparts.

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

The US enforcement authorities have a long and well-established track record of negotiating resolutions regarding potential violations and generally seek a degree of consistency in how they approach such negotiations and resolutions. Although they exercise considerable discretion, they also take into account the US Sentencing Guidelines, the US Attorneys' Manual (including Title 9, Chapter 9-28.000, *Principles of Federal Prosecution of Business Organizations*, available at [www.justice.gov/usam/title-9-criminal](http://www.justice.gov/usam/title-9-criminal)), case law and other written guidance (both formal and informal), which lends some predictability to the outcome of negotiations in which a potential defendant cooperates with the enforcement authorities. In April 2016, DOJ issued *Foreign Corrupt Practices Act Enforcement Plan and Guidance* (also known as the 'Pilot Program'), which described the requirements for a company to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation, as well as the specific potential credit (with respect to penalties) that could be obtained if the specified criteria are met. In November 2017, as noted above, DOJ issued a *Policy on Corporate Enforcement of the Foreign Corrupt Practices Act*, which extended the Pilot Program and provided expanded guidance on the potential credit for voluntary self-disclosure, cooperation, and remediation.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Cooperation is encouraged. The US Sentencing Guidelines, the US Attorneys' Manual, and other guidance expressly encourage cooperation and take cooperation into account in calculating penalties.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Yes. Cooperation facilitates the identification, investigation and resolution of offences.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

US enforcement authorities should provide clear, specific guidance to the business community regarding the benefits of cooperation, including especially the factors and circumstances that would lead the authorities to exercise their discretion to decline prosecution despite evidence of a potential violation. DOJ has made some progress in this regard with the Pilot Program and recent *Policy on Corporate Enforcement of the Foreign Corrupt Practices Act*. However, the proof of such policies – and ultimately their success in encouraging collaboration with authorities – lies in the policies' consistent, predictable and equitable application, including with respect to potential aggravating factors.

It also remains to be seen whether the new policy on the coordination of corporate resolutions will provide the type of finality that companies seek, as well as how authorities will better apportion penalties. In any event, the issuance of this new policy reflects the trend of increased international cooperation and coordination in investigations and resolutions, underscoring the importance of limiting 'piling on' by enforcement authorities, including to promote fairness and to encourage collaboration.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

See above.

### 43. COSTA RICA

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*Juan Carlos Tristán (Director), Sergio Segura (Associate), BLP Legal (Costa Rica)*

#### 1. Background: normative framework

##### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

- Act No 8422: Law against Corruption and Illicit Enrichment in Public Service (2004);
- Act No 8204: Law on Narcotics, Psychotropic Substances, Unauthorised Drugs, Related Activities and Financing of Terrorism (2002);
- Act No 8754: Law against Organised Crime (2009);
- Act No 8292: General Law on Internal Control (2002);
- Act No 6227: General Law on Public Administration (1978);
- Act No 7428: Organic Law of the Comptroller General of the Republic (1994);
- Act No 7494 and its regulations: Public Procurement Act (1995);
- Act No 8131 and its regulations: Law on Financial Administration of the Republic and Public Budgets (2001);
- Regulation of the Law Against Corruption and Illicit Enrichment in Public Service – Executive Decree No 32333-MP-J (2005);
- Manual of General Internal Control Standards, M-1-2002-CO-DDI of the Comptroller General of the Republic (2002);
- General Guidelines on Ethical Principles and Statements to be Observed by the Heads, Directors, Subordinates and Officials of the Comptroller General of the Republic's Office, Internal Audit Offices and Public Servants in General – No D-2-2004-CO (2004); and
- Criminal Code of Costa Rica (1970).

##### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

- United Nations Convention against Corruption;
- Inter-American Convention against Corruption; and
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Yes, cross-border/transnational bribery (known locally as ‘transnational bribery crime’) is punished under Costa Rican laws. On 21 July 2016, a Reform Bill was approved to amend the transnational bribery crime as typified in the Law against Corruption and Illicit Enrichment in Public Service (Article 55). The amendment was made in order to punish cross-border bribery in line with the highest international standards. Through this reform, some loopholes for bribery were closed, specifically concerning promises of undue payment and acts performed through third-party intermediaries, in accordance with international best practices.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No, they are absolutely prohibited.

### **1.5 Does your country provide for corporate criminal liability?**

No.

There is no corporate criminal liability in Costa Rica. However, the conduct established in Article 38 (m) and 55 of the Law Against Corruption and Illicit Enrichment in Public Service, and in Articles 340 to 345 *bis* of the Costa Rican Criminal Code (providing, offering or promising anything of value in representation of an entity), sets a fine from 20 to 1,000 times minimum salaries to the entity (regardless of the criminal and civil liabilities that may be imposed over the individuals involved). Alternative or additional penalties include the definitive or temporary closure of the entity, suspension of activities, restriction from dealing with the government, cancellation of permits and/or loss of tax benefits.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. Ethics Procuratory Office (*Procuraduría de la Ética*) and the General Prosecutor Office (*Fiscalía General de la República*).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

According to Articles 16 and 22 of the Criminal Procedures Code and Article 35 of the Organic Law of the Public Prosecution Office, whenever a prosecutor has knowledge of the possible existence of a crime, an investigation is mandatory. The prosecutor can drop the investigation but has to provide to a reasoned decision to a criminal judge for doing so and, then, the judge must rule if approves or not the prosecutor’s request.

### **2.1.2 Deciding what charges to file?**

Yes.

The prosecutor can provide a reasoned decision to prosecute certain charges and abandon others, based on available evidence.

### **2.1.3 Deciding whether to drop charges?**

Yes.

Prosecutors can decide whether to drop charges but they cannot do it discretionally. In fact, they do not have the final decision. Prosecutors must provide a reasoned decision to a criminal judge to close an investigation. This decision has to be approved or rejected by the criminal judge.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

According to Article 14 of the Organic Law of the Public Prosecution Office, the prosecutors have freedom to settle a particular charge. This means that prosecutors have discretion to decide whether to plea bargain.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Prosecutors can only act according to what is specifically authorised by law and they cannot arbitrarily omit investigating certain crimes.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

There is no threshold.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

In Costa Rica, only individuals can be prosecuted, not corporations. Within the criminal proceedings, there is the possibility to file a civil action against corporations when these have, according to the law, civil responsibility for damages that took place because of the committed crime.

### 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

#### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?

Yes.

There are several openings for a procedure that leads to a result similar to a structured settlement. According to Article 36 of Criminal Procedures Code, an agreement (conciliation) can take place between the victims and the defendant. On the other hand, according to Article 391 of the Criminal Procedures Code, a special procedure can take place where the prosecutor and the alleged wrongdoer can negotiate the punishment that will be proposed for the judge. Also according to Article 25 of Criminal Procedures Code, a conditional suspension of the proceedings can take place upon an agreement.

#### 3.2 Form, features and terms of structured settlements

##### 3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?

There are several options to close a criminal investigation by settlement. Not all of them require an admission of guilt.

###### 3.2.1.1 If yes, what is such a structured settlement called in your language?

Settlement: *Conciliación*.

Guilty Plea: *Procedimiento Abreviado*.

Conditional Suspension of the Proceedings: *Suspensión del Proceso a Prueba*.

##### 3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

According to Article 71 of the Criminal Code, the judge must consider the conduct of the wrongdoer after committing the crime.

##### 3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?

Yes.

According to Article 391 of the Criminal Procedures Code, in order to prosecute a high official that has protection against prosecution; the Congress can approve to waive the protection.

### **3.2.4 What form(s) can a structured settlement take?**

In case of a conciliation the defendant does not have to admit guilt. However, this is required if he/she seeks the special abbreviated proceedings. If the defendant pleads guilty and the judge rejects the application of the special procedure, the criminal proceedings will continue its regular course and the admission of guilt cannot be used as evidence against the defendant. In the scenario of the conditional suspension of the proceedings, the defendant also has to plead guilty.

### **3.2.5 What are the usual terms of such an agreement?**

In the guilty plea, the terms are very simple, the defendant pleads guilty and prosecution offers to reduce the charge. Economic compensation cannot be negotiated or offered; having said that, that the only aspect that can be negotiated is the actual punishment applicable to the committed crime or felony. In case of the conditional suspension proceedings, the terms may include the payment of the damages caused to the victim, whereas the charge may be reopened if the defendant again commits a crime during the ensuing three to five years.

### **3.2.6 Are there limits on what the prosecution can offer?**

In case of a guilty plea procedure, the prosecutor can only offer to reduce the charge in one-third of the punishment that is within the punishment legal scale. If the law establishes that the punishment for foreign bribery is between two and eight years of prison, the prosecutor can only offer to charge a punishment within one year, four months and eight years of prison.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If the defendant violates the terms set by the conditional suspension, the settlement will be reversed and the criminal proceeding will continue its regular course.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

Both parties can initiate a negotiation. Formally, a settlement can be reached only upon a court's approval.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

The parties must attend a hearing with a judge where the defendant seeks approval of the settlement.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

According to Articles 25 and 26 of the Criminal Procedure Code, the court will approve or not approve the settlement based on reasonability criteria. There is no guideline establishing court's criteria.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

Another authority: *Dirección General de Adaptación Social*.

Companies are not involved in these settlements, only individuals.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No. The criminal case will be reopened upon non-compliance.

### **3.4 Outcome of the structured settlement**

#### **Statutory Provisions:**

Compensation to third parties – yes.

Obligations to cooperate with other agencies – yes.

Personal liability – yes.

According to Article 25 of the Criminal Procedures Code, the possible terms that can be negotiated are listed.

### **3.5 De facto or de jure**

*Editor's note: The settlement processes (Conciliation and Conditional Suspension of the Proceedings) are not contingent upon an admission of guilt. (See section 3.1, 3.1.1 and 3.1.3 above). This constitutes a de jure settlement process following the classification used in this report. However, this only applies to natural persons.*

#### 4. Transparency

##### 4.1 Public access to information on settlements

###### 4.1.1 Is information about settlement available to the public?

Yes.

###### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

The terms can be verified by the court's resolution, but the personal information of the defendant may be protected.

###### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent. Companies cannot negotiate with the enforcement authorities.

##### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. The judiciary has a public digest of all resolutions issued by the national courts.

###### 4.2.1 If yes, is this data publicly available?

Yes. [www.pgrweb.go.cr/scij](http://www.pgrweb.go.cr/scij).

#### 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

##### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

There are no specific rules if the claims are simultaneous, so, if two countries are competent, the procedure will be held in the country where the defendant is present. If a procedure has already take place in other country and there was a final ruling, Article 9 of the Costa Rican Criminal Code establishes that foreign sentences will not be recognised in Costa Rica if the felony was committed in Costa Rican territory or if it was a crime committed by a government official in exercise of his/her job. Nevertheless, Article 9 of the Costa Rican Criminal Code may not be applicable since it may be considered that it violates Article 8.4 of the American Convention on Human Rights.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

Corporations cannot be prosecuted, so any foreign conviction or settlement will have no effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

High predictability.

Most cases of settlements are archived due to compliance.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Currently, the authorities encourage cooperation that leads to settlement in order to avoid prison convictions.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Pre-trial settlements should be encouraged in order to avoid jail over-population and procure more expedited processes.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Authorities are currently encouraging such collaboration with individuals.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Provided there are no criminal liabilities for companies, then such companies cannot settle with the enforcement authorities. In case of individuals it will certainly mitigate the reputational risk and event will prevent from certain financial contingencies derived from the process.

*Fernando Farrar (Associate), Marcella Romero (Associate), BLP Legal (El Salvador)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes

- United Nations Convention against Corruption; Dominican Republic – Central America Free Trade Agreement (DR-CAFTA), Chapter 18, Section B;
- Criminal Code, Law against Money and Assets Laundering (AML law) probe;
- Special Law for the Extinction of Property and the Administration of Goods of Illicit Origin or Destination;
- Probity Law;
- Law for the Illicit Gains of Public Officials and Employees;
- Law for the Acquisitions and Contracting of the Public Administration (LACAP for its acronym); and
- Law of Governmental Ethics and Civil Service Law.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Chapter 18 of DR-CAFTA and the United Nations Convention against Corruption.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The Salvadoran Criminal Code provides in its Article 9 that the aforementioned law shall also be applied to the crimes committed by Salvadorans in a foreign country or in a location that is not subject to the jurisdiction of any particular state.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

They are expressly forbidden and are considered as a felony under Salvadoran law according to the envisaged in Articles 331 and 335 of the Criminal Code. They also are an administrative sanctionable conduct under the following laws: Law for the Acquisitions and Contracting of the Public Administration as regulated in Article 153 applicable to public servants and Article 158 related to participants in government procurement procedures; Law of Governmental Ethics according to the prohibitions established in Article 6 (a) and (b); and Civil Service Law under the provision of Article 31 (d) that establishes as a duty for every public servant to reject gifts, promises or rewards offered as retribution, even if they are facilitation payments.

## 1.5 Does your country provide for corporate criminal liability?

No.

The Salvadoran Criminal Code (Article 121) only recognises a special subsidiary civil responsibility for corporations and other legal entities. Article 115 of the Criminal Code defines civil responsibility as ‘the civil consequences of a felony’ to be declared by a criminal judge and includes:

- the restitution of any illegal gains or goods acquired through the commission of a felony;
- the reparation of any damages produced by the felony;
- indemnification for the victims or their families for any material or moral injuries; and
- procedural costs.

## 1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?

Yes. *Unidad Fiscal Especializada contra Delitos de Corrupción* (Special Prosecutor Unit for Corruption Crimes), dependent of the Attorney General, according to its *Organisation Manual and Description of Competences*: [www.fiscalia.gob.sv/wp-content/uploads/portal-transparencia/organigrama/Descripcion-de-las-Competencias-y-Facultades-de-Unidades-FGR.pdf](http://www.fiscalia.gob.sv/wp-content/uploads/portal-transparencia/organigrama/Descripcion-de-las-Competencias-y-Facultades-de-Unidades-FGR.pdf); and [www.fiscalia.gob.sv/wp-content/uploads/pdf-organigrama/1-UNIDAD-FISCAL-ESPECIALIZADA-DELITOS-DE-CORRUPCION.pdf](http://www.fiscalia.gob.sv/wp-content/uploads/pdf-organigrama/1-UNIDAD-FISCAL-ESPECIALIZADA-DELITOS-DE-CORRUPCION.pdf)

Unlike other countries, the private sector has no laws regarding prevention of bribery; therefore, no complete avoidance or coercion for private companies exists. There is no law that mandates that private companies must implement controls and other measures to identify and deter from acts of bribery.

In addition to the lack of regulation for the private sector, currently, there is no administrative authority to supervise and prevent acts of bribery in the private sector.

## 2. Exercise of prosecutorial discretion

### 2.1 Do prosecutors have unfettered discretion in regards to the following:

#### 2.1.1 Deciding whom to charge with a crime?

No.

The prosecutors have to act within the Criminal Prosecution Policy (the Policy), which is a binding document issued by the Attorney General by mandate of the Criminal Procedures Code (Article 23). Article 30 of the mentioned policy states that a prosecutor has to charge crimes whenever the law demands it. However, the prosecutor is limited by the Principle of Unity of Action and Hierarchical Dependence, regulated under Article 10 of the mentioned policy, which states that a prosecutor has to act in accordance with the general criteria given by the policy. If a prosecutor believes a policy is in conflict with the Constitution, an international treaty or any

other law, he or she has the right to ask the Attorney General to amend the policy. If this is not done, the prosecutor can only request to be replaced by another prosecutor in the particular case.

#### **2.1.2 Deciding what charges to file?**

No.

A prosecutor has discretion within the criteria established in the said policy.

#### **2.1.3 Deciding whether to drop charges?**

No.

In the case of the dismissal of charges for informants, Article 27 of the Policy expressly states that such action can only be taken with the authorisation of the prosecutor's superior.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Article 9 of the Policy provides explicit criteria for any of the legal competencies in Salvadoran law that allow a pre-trial termination of the criminal process. The factor in favour of early termination of the criminal process is basically the absence of a material effect over the public interest, which is established if one of the following circumstances occur:

- it is an act of organised crime (could very well include white collar crimes);
- it is an act of violent criminality; or
- there is an express mandate of the law.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Other.

The Policy expressly lists the principles under which prosecutorial discretion shall be exercised in El Salvador. Articles 1 to 10 mention the principles: Human Dignity, Legality, Rationality, Proportionality, Equality, Objectivity, Efficiency, Efficacy, Conflict Solution and Unity of Action and Hierarchical Dependency.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

### 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

#### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?

No.

The prosecutor cannot settle on corruption charges.

*Editor's Note: No settlements allowed for corruption charges (see section 4 and 6.2). Based on information in this report there is no structured criminal settlements for corruption offences process envisaged within the El Salvador legal system.*

### 4. Transparency

#### 4.1 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

Very limited data about crime reports, including corruption crimes, is collected by the Civil National Police. However, they do not have a special statistic for foreign bribery allegations.

##### 4.1.1 If yes, is this data publicly available?

Yes. [www.transparencia.pnc.gob.sv/portal/page/portal/transparencia/gestion\\_estrategica/estadisticas](http://www.transparencia.pnc.gob.sv/portal/page/portal/transparencia/gestion_estrategica/estadisticas).

### 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

#### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

Articles 8 and 9 of the Criminal Code establish the criteria to determine if Salvadoran criminal law is applicable to a particular case: El Salvador has jurisdiction over crimes committed totally or partially in Salvadoran territory or committed by Salvadorans in a foreign country. However, Article 9 of the Criminal Procedures Code states that principle *ne bis in idem* and expressly mandates that an absolatory judgment emitted in a foreign country about acts that could be trialled by Salvadoran courts, shall be considered *res iudicata*.

#### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

The principle *ne bis in idem* is applicable only when the subject has been prosecuted.

## **6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

Under our perspective, there is still not sufficient institutional strength in the Attorney General's office to trust that, given the broad discretion to decide whether to prosecute criminal corruption offenders, it will operate towards the best interest of Salvadoran society.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

It is highly discouraged. Salvadoran law does not allow corruption charges to be settled and any benefit to informants or other collaborators to the investigation are only permitted under very strict criteria. Also, because corruption is only now beginning to be systematically investigated and prosecuted by the Attorney General's office and the Probity Section of the Supreme Court of Justice, the current cases are highly advertised and therefore any actions toward dropping the charges of any wrongdoer would be heavily criticised by public opinion.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Currently, cooperation should only be encouraged if the wrongdoer who is cooperating is indispensable for the prosecution of the heads of a corruption network, be they government officials or corporations' representatives or administrators.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The Attorney General's office must identify the most significant activities and actors that contribute to the problem of corruption in the country. Only then, can they learn what forms of collaboration might be necessary for the conviction of the main wrongdoers and/or the eradication of the practice.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Taking the current state of Salvadoran criminal law, there is no clear advantage for companies in cooperating with the authorities.

*María Inés Arenales Brodtmann, Partner, BLP Legal (Guatemala)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

There are no specific Anti-Bribery Rules in force in Guatemala. However, there are some criminal-specific legal dispositions regulating bribery such as Article 442 *bis* and 442 *ter* of the Criminal Code. According to Article 442 *bis*, transnational active criminal bribery is committed by any person who offers or delivers an official or public employee of another state or international organisation, directly or indirectly, any object of pecuniary value or other benefit, by virtue of favour, gift, promise, advantage or any other concept, for yourself or for another person, to perform, order, delay or omit an act of his office. The person responsible shall be punished with imprisonment of five to ten years and a fine of 50,000 to 500,000 Quetzales. According to Article 442 *ter*, transnational passive bribery is committed by the official or public employee of another State or international organisation, who solicits or accepts, directly or indirectly, any object of pecuniary value or other benefit, by way of favour, gift, present, promise, advantage or any other concept, for himself or for another person, to perform, order or omit an act of his own position. The person responsible shall be punished with imprisonment of five to ten years and a fine of 50,000 to 500,000 Quetzales.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

- United Nations Convention against corruption (UNCAC);
- Inter-American Convention against corruption;
- International Convention for the suppression of the financing of terrorism; and
- Inter-American Convention against terrorism.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No.

No, under the foreign bribery laws, a State Party is not allowed to exercise jurisdictions or functions in the territory of another State Party which according to the domestic law of the latter are subject exclusively to domestic law. Furthermore, an interpretation of the Guatemalan foreign bribery laws must include the disposition contained in Article 4 of the Guatemalan Criminal Code, which states that for any crime to be pursued by Guatemalan authorities, it has to be committed in Guatemalan jurisdiction. In the specific acts described in Articles 442 *bis* and 442 *ter*, those acts, although contemplated as transnational due to its effects, both would have to be committed in Guatemalan jurisdiction.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Under Article 38 of the Criminal Code regulating criminal liability of legal entities, with respect to legal entities, an entity's directors, managers, executives, representatives, administrators, officials or employees will be considered responsible for crimes in which they have intervened and without whose participation the crime would have not been committed. If so, they can be punished with the penalties indicated in the Criminal Code for individuals.

Legal entities will be responsible in all cases where, with their authorisation or consent, their directors, managers, executives, representatives, administrators, officers or employees thereof participate; additionally, when any of the following circumstances take place:

- when the crime is committed by omission of control or supervision and the results end up benefiting the legal entity. Though the beneficial results are not a condition to pursuit of the responsible persons, the legal entity does not have a will of its own, so the beneficial results are necessary to impose any given fines to the legal entity;
- when the crime is committed by decision of the decision-making body; and
- in all crimes where legal entities are responsible, and no penalty has been indicated, a fine in the range of US\$10,000 up to US\$625,000 shall be imposed, or its equivalent in national currency.

The fine shall be determined in accordance with the economic capacity of the legal entity and upon consideration of the circumstances under which the crime was committed.

Article 38 of the Criminal Code indicates that in the case of recidivism, the legal entity will be cancelled definitively, meaning there is no remedy to reactivate the entity.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

The Public Prosecutor's Office (*Ministerio Público* in Spanish) is the authority in charge of promoting criminal prosecution and directing the investigation of crimes of public action, among others. The Public Prosecutor's Office allocates authority to different enforcement agencies, such as the Public Prosecutor's Office against corruption, Public Prosecutor's Office against organised crime, Public Prosecutor's Office against money laundering and other assets. Under the Public Prosecutor's Office, the specific units which investigate corruption are the *Fiscalía Especial Contra la Impunidad* (FECI) and *Fiscalía Contra la Corrupción*.

## 2. Exercise of prosecutorial discretion

### 2.1 Do prosecutors have unfettered discretion in regards to the following:

#### 2.1.1 Deciding whom to charge with a crime?

No.

According to the Criminal Procedure Code (*Código Procesal Penal* in Spanish), if the Public Prosecutor's Office considers that an investigation provides serious basis for a public accusation, the judge will grant an investigating period of time during which the prosecutor must collect all possible evidence. Once that period concludes, the prosecutor will try to convince the judge, with the evidence collected, why he should allow the prosecutor to continue to trial. If the judge considers that there is enough evidence to prove the person guilty, he will open up the trial, in which phase another judge will hear both parties to determine the guilt of the accused. In other words, prosecutors may try to charge anyone, but it is the judge who will finally decide if the person will be taken to trial or not. The person being investigated may also convince the judge of why he shouldn't be taken to trial, presenting arguments against the prosecutor's.

In the case of legal entities, the offender to be held responsible will be, in principle, its legal representative. A charge must include:

- relevant information to identify and individualise the accused, the name of the defender and place to receive summons;
- the clear, precise and detailed description of the punishable act and its legal qualification;
- the basis for the accusation, expressing the means of investigation used and that determine the probability that the accused committed the crime for which he is accused;
- the legal classification of the punishable act, reasoning the crime that each individual has committed, the form of participation, the degree of execution and the applicable aggravating or mitigating circumstances; and
- an indication of what court is competent court for the trial.

#### 2.1.2 Deciding what charges to file?

No.

According to the Criminal Procedure Code, the criminal action will be exercised in three categories: (1) public action, (2) public action depending on a private instance or requiring states authorisation, and (3) private action. The crimes of public action are prosecuted ex officio by the Public Prosecutor's Office on behalf of society (except crimes relating to transit safety and those whose main penalty is a fine, which will be processed and resolved by complaint of the competent authority according

to the judicial process of faults). The Public Prosecutor's Office can decide what charges to file as long as it refers to crimes of public action and all the elements of crime are present.

### **2.1.3 Deciding whether to drop charges?**

Yes.

The Criminal Code and the Procedural Criminal Code contemplate some cases where the prosecutor may suspend, or even terminate, the accusation. Each contemplated case by the law is different but, in general, it would be when the accused has repaired any damaged caused, when he is a first time offender, when the social interest has not been damaged, *et al* (all of these conditions usually have to be present altogether).

### **2.1.4 Deciding whether or not to plea bargain?**

No.

According to the Criminal Procedure Code, the Public Prosecutor's Office may reach an agreement. However, the agreement is for specific crimes and subject to the resolution of a judge.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

According to the Criminal Procedure Code, the Public Prosecutor's Office will require in writing to the judge the decision to open trial when it considers that the investigation provides serious basis for the public prosecution of the accused.

### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

By law, the Prosecution Office (*Ministerio Público*) must pursue all and every crime, since private justice is not permitted, and failing to do so may result in a crime itself. Nevertheless, there are some specific exceptions where the prosecutor may consider stopping the prosecution, as stated in question 2.1.2.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

The process of investigation of the Public Prosecutor's Office does not differ for individuals and corporate defendants. Note, however, that the Public Prosecutor's Office will mainly prosecute the individual responsible for the crime. In the case of a corporate offender, it would be the legal representatives of the corporation.

### 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

#### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

According to the Law Against Organised Crime, except for some crimes, the cooperative witness (*colaborador eficaz* in Spanish) may be granted with some benefits for its effective cooperation, such as:

- a specific reduced process (specifically *criterio de oportunidad* in Spanish) or the conditional suspension of the criminal prosecution;
- the dismissal for the accessory or the reduction of the penalty for the perpetrators; and
- parole or controlled release to anyone who is serving a sentence.

The benefits are granted considering the following four elements jointly:

- the degree of effectiveness or relevance of the cooperation in clarifying the crimes under investigation and the penalties to the principal responsible;
- the seriousness of the crimes subject to the effective cooperation;
- the degree of responsibility of the cooperative witness in the criminal organisation; and
- the seriousness of the crime and the degree of responsibility of the cooperative witness.

#### 3.2 Form, features and terms of structured settlements

##### 3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?

Yes.

According to the Law Against Organised Crime, the cooperative witness has to be a person that has been involved/participated in a criminal act, whether or not part of an organised criminal group that helps and effectively cooperates in the investigation and prosecution of the members of the organised criminal group.

##### 3.2.1.1 If yes, what is such a structured settlement called in your language?

*Acuerdo de colaboración eficaz.*

##### 3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

(You can choose more than one option)

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

Other.

According to the Law against Criminal Organisations, it is considered as effective cooperation if the information provided by the cooperative witness allows any of the following results:

- avoid the continuity and consummation of crimes or to diminish their magnitude;
- knowledge of the circumstances in which the crime was planned and executed or the circumstances in which it is being planned or executing;
- identify the perpetrators or participants of a crime committed or to be committed, or to the leaders or directors or the criminal organisation;
- identify the members of a criminal organisation and its functioning and operating, which allows to dismantle, reduce or stop one or various of its members;
- to ascertain the whereabouts or destination of instruments, assets, effects and profits of the crime as well as to indicate the sources of financing and supporting criminal organisations; and
- the delivery of the instruments, effects, profits or goods derived from the illicit activity of the competent authorities.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

According to the Law against Criminal Organisations, the benefits are granted subject to the condition that the cooperative witness does not commit a felony for a period of time no less than twice the maximum penalty established by law for the committed crime for which the benefit was granted. Also, the cooperative witness must accept his guilt in the perpetration of the crime, in any participating way. If the cooperative witness fails to not commit another felony, the benefit will be revoked. In addition, if the information provided cannot be verified, the Prosecutor will deny the benefit and the criminal investigation will go on including him. However, they can never demand any waiver, since it would be against the Constitution, and can only offer conditioned benefits.

### **3.2.4 What form(s) can a structured settlement take?**

The agreement shall be in writing and shall be approved by a competent judge.

The criminal procedure is broken into three different stages, each developed before different judges to ensure impartiality. Also, the judge's competence is divided into levels of seriousness and complexity of the crimes, there being a Peace Judge, for small crimes, judge of first instance for more serious crimes, and Judge of High Impact for even more serious and complex crimes.

### **3.2.5 What are the usual terms of such an agreement?**

According to the Law against Criminal Organisations, the agreement shall include:

- the benefit granted;
- the information provided by the cooperative witness and the inquiries or surveys that have verified such information;
- if necessary, the personal measures to ensure the safety of the cooperative witness, the compromise or commitment of the person involved to continue cooperating during the development of the criminal process, on the understanding that this does not imply a reduction to its right to not testify against himself; and
- the obligations to which the beneficiary is subject.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Apart from certain crimes unrelated to corruption, the Law against Criminal Organisation establishes that the benefits that can be granted are:

- a specific reduced process (specifically *criterio de oportunidad* in Spanish) or the conditional suspension of the criminal prosecution;
- the dismissal for the accessory or the reduction of the penalty for the perpetrators;
- parole or controlled release to anyone who is serving a sentence.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

According to the Law against Criminal Organisations, the benefits are granted subject to the condition that the cooperative witness does not commit a felony for a period of time no less than twice the maximum penalty established by law for the committed crime for which the benefit was granted. If the cooperative witness commits another crime, the benefit will be revoked.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

According to the Law against Criminal Organisations, the prosecutor may request the competent judge the celebration of an agreement to grant the benefits aforementioned for persons being investigated, prosecuted or condemned. To that end, the prosecutors, during the investigation period or any other process, may hold meetings with the cooperative witness.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

According to the Law against Criminal Organisations, once the agreement has being reached, it is subject to the authorisation of a competent judge.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

According to the Law against Criminal Organisations, the agreement is subject to a competent judge's authorisation. When considering the case, the judge may modify the agreement to adequate the benefits to the obligations of the cooperative witness according to the nature and mode of the crime. The judge may deny the agreement and its denial must be argued with all legal dispositions considered. Once corrected, the agreement may be filed again.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. See answer to question 3.3.2.1.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: Public Prosecutor's Office.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

No. The Public Prosecutor's Office shall request to the competent judge to revoke the benefit.

### 3.4 Outcome of the structured settlement

	Statutory Provisions	Past cases
Financial penalties	No	Yes
Disgorgement of profits	No	Yes
Compensation to third parties	No	Yes
Obligations to cooperate with other agencies	Yes	Yes
Monitors (and paying for them)	Yes	Yes
Corporate compliance programmes	Yes	No
Personal liability	Yes	Yes

### 3.5 *De facto or de jure*

It can be said that the implementation of the governing rules by the Public Prosecutor's Office, and the sentences by the judges are recent and, given the judicial system is not strong enough, there is uncertainty about the application of the governing rules specifically for legal entities for which, in most cases, their legal representatives are criminally responsible. The settlements are relatively new and haven't been used as much since cases against organised crime were not usual before the entry of the Commission created by an agreement between the United Nations Organisation and the State of Guatemala, so it is difficult to determine the level of certainty that these settlements provide.

*Editor's note: The settlement process (cooperative witness) is contingent upon an admission of guilt. (See section 3.1, 3.2.1 and 3.2.3 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Limited.

Since the cases are under reserve and its details are usually confidential, exclusive to the parties involved, the public only knows that there is a collaborative witness – but does not know the conditions, benefits or extent of the settlement, only that it exists. When the trial ends, the public learns of the benefit granted but not its details.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Somewhat extensive.

Public statements are ‘somewhat free’, with the exception of some details that the judge, or the prosecutor, ask to be confidential for the case’s benefit (eg, a protected witness, or if the prosecutor estimates that due to the risk it is necessary to keep certain information confidential).

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

All investigation and prosecution matters are in the charge of the Public Prosecutor’s Office.

**4.2.1 If yes, is this data publicly available?**

No. The information is confidential.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

For those cases and following the legal process, the extradition process may be requested by Guatemala for common crimes. If the extradition process is contained in international treaties, the extradition process has to be reciprocal.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country’s legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

The foreign conviction and the foreign settlement has to be enforceable and executed in Guatemala.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

If the information provided is verified and consistent it will be considered as effective cooperation and the cooperative witness will be subject to the benefits granted by law. The scope of negotiation would be in respect to the obligations imposed to the cooperative witness and the decision subject to the judges' approval.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

The cooperation of the cooperative witness is encouraged by the existing framework of rules in Guatemala mainly because of the advantages that the benefits granted by law represent to the alleged wrongdoer which are greater than the risks the cooperative witness may face for which the law also protects him.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

The cooperation should be encouraged, especially considering the high level of corruption and high level of deficiency of the Public Prosecutors Office and judicial system, as it provides another way of finding people responsible and finding out the truth. However, such cooperation under any circumstance shall not result in the exoneration of the legal consequences of the participant. Benefits may be granted but the person involved shall assume the criminal consequences of his acts, although reduced.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The process to determine the effective cooperation during the investigation or process shall be efficient and the integrity of the person cooperating shall be guaranteed and ensured even after the process has concluded. For companies, the process and legal penalties shall be clarified indicating the level of responsibility of the legal representatives, shareholders and the legal entity itself.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

No, there is no clear legal advantage to companies cooperating, but it will certainly represent a reputational advantage for the company cooperating.

*Rafael Chicas, Associate, BLP Legal (Honduras)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Decree No 36-2007 Public Servant Code of Conduct; Decree 144-83 Honduran Penal Code.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

No international laws have been implemented.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No.

Honduran Criminal Laws regarding bribery can only be applied for crimes committed within the Honduran Jurisdiction. The only exemption to this is for diplomats and public officials on official trips.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Any public official who solicits, receives or accepts, directly or indirectly, donations, presents, offers, promises or any other improper advantage to perform an act related to the exercise of his office, even if this act is not constituting a criminal offence, may be prosecuted for bribery charges.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Corporate Criminal Liability, including jail sentence for Legal Representatives of the Company who committed the crime. Economic (fines) and Administrative Sanction (temporal suspension of business).

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The National Anticorruption Council (*Consejo Nacional Anticorrupción – CNA*).

Other: the CNA is also supported by the Superior Court of Accounts (*Tribunal Superior de Cuentas – TSC*).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Prosecutors or members of the CNA can open an investigation and draw up charges under the complaint of a third party or under their discretion if the proof is sufficient.

#### **2.1.2 Deciding what charges to file?**

Yes.

Yes, as long as proof is sufficiently clear for the charges being brought up.

#### **2.1.3 Deciding whether to drop charges?**

No.

Once a case has begun, it must be seen through to sentencing, which may be a guilty sentencing or a dismissal.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Prosecutors may reach an Agreement or Plea Bargain with the offender, but it must be signed off by the Attorney General and General Prosecutor of Honduras before it is presented to a Court.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Prosecutors are responsible for carrying out special investigations, ex officio or at the request of a party, when in their opinion they consider that there are real indications of violations of the provisions of this Code, as well as to fix, qualify and apply the sanction, in accordance with current legal regulations.

The Code states these indications may be tied to cases when a public servant directly or indirectly, for himself, or for third parties, requests or accepts money, gifts, benefits, valuables, favours, travel, travel expenses, promises or other advantages or material or immaterial values by any persons or entities in the following situations:

- to do or to stop doing, unduly accelerate or delay tasks related to its functions or obviate requirements demanded by the Law, regulations, manuals and instructions: or
- to assert its influence before another public servant, in order for it to do or fail to do, unduly accelerate or delay tasks related to its functions or obviate requirements required by law, regulations, manuals and instructions.

**2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

Corruption and its different types are clearly stated in the law. Any act where a public servant or official receives a material or immaterial benefit to perform any of the above actions will be taken as corruption.

**2.4 Do these standards differ for individual and corporate defendants?**

No.

There is, however, a difference from public servants/officials and private entities or persons.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

Our Criminal Procedure Code allows for what is called an opportunity criterion, whereas assistance in prosecution can result in an agreement for reduced sentencing. As for the process, Article 403 of the CPC establishes that if the prosecutor deems it appropriate, an abbreviated procedure may be followed, within which the penalties shall be reduced in exchange for the admission of guilt and assistance to the prosecution.

Notwithstanding the foregoing, some offences/crimes cannot enter into agreements as per our current law.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

Agreement.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

A decisive factor is that the alleged briber assists in the indictment of someone with a more serious criminal involvement (Penal Code Article 28.5).

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

**3.2.4 What form(s) can a structured settlement take?**

Only as an agreement. The agreement is initially negotiated and set in writing among the offender and the prosecution. This agreement is then presented to the judge who leads the proceedings and he will approve or indicate any modifications he deems necessary. Once all parties approve, a written sentencing of the agreement is emitted by the court.

**3.2.5 What are the usual terms of such an agreement?**

Acceptance of guilt and assistance in criminal prosecution of other participants. Acceptance of guilt is key, as there may not always be other participants, or these cannot be prosecuted under Honduran Law.

**3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Our Criminal Procedures Code states what the prosecution can offer. Usually leads to reduced sentencing, generally in one-quarter of the original time to be served, up to one-third. In some special cases, if the judge allows, more can be offered.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If the information provided by the offender is found to be false, incomplete or inaccurate, the prosecution can, and usually will, request the agreement be overturned. In cases where a third party has been damaged, the third party, through a private prosecutor, can also petition a judge to overturn the agreement.

### **3.3 Role of the court in regards to structured settlements**

Please explain the role of the courts with respect to any structured agreement reached.

#### **3.3.1 Prior to the settlement:**

**3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

Yes.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

Yes.

Prosecution must present the court with the agreement. The court will then review and make any changes it deems necessary, as well as ask the offender if he has in fact agreed to and understands the terms of the agreement. Once all this has happened, the court will sign off on the agreement and emit sentencing according to it.

#### **3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes. Penal Code Article 28.5.

#### **3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes.

### **3.4 Outcome of the structured settlement**

#### **Statutory Provisions:**

Obligations to cooperate with other agencies – yes – assistance to the Attorney General office.

Personal liability– yes – forbidden to hold public office.

### 3.5 *De facto or de jure*

*Editor's note: The settlement process (agreement for reduced sentencing) is contingent upon an admission of guilt. (See section 3.1, 3.2.1 and 3.2.5 above). This constitutes a de facto, plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

Usually people who enter these settlements are protected witnesses.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

If it cannot meet the guidelines and criteria of the judge or prosecutor, a settlement will not be negotiated.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. The Criminal Courts and the CNA

#### 4.2.1 If yes, is this data publicly available?

No.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

No.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

If the prosecution agrees to settle, the outcome will most likely be a reduced sentencing.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Encouraged, however, not commonly known.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Encouraged, however, information about them should have more publicity.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Explain the process to the public and the benefit of cooperation, rather than long court battles that cost the state money and may no end up in a conviction.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Reputational, as settlements are kept out of the public eye.

*Federico Barrios, Director, BLP Legal (Nicaragua)*

**1. Background: normative framework**

**1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

- Law No 641 – Nicaraguan Penal Code, specifically its Title XIX, Chapter V;
- Law No 438 – Public Servants Probity Law; and
- Law N0 581 – Special Law for Bribery and Crimes against Commerce and Foreign Investments.

**1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

- The United Nations Convention Against Corruption (UN); and
- Inter-American Convention against Corruption (OAS).

**1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Bribes paid to a Nicaraguan official are considered a felony ‘against the public administration’ according to our Penal Code (Title XIX of Penal Code). Both nationals and foreigners who commit the offence, inside the country or from abroad, are subject to this regulation (Article 15 Penal Code).

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

According to our Penal Code corporations can be held criminally liable and they can be subject to claims for compensation for damages if deemed responsible of a felony or an offence. Other penalties such as dissolution or suspensions can also be established.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Public Ministry by means of the General Attorney’s Office and the General Comptroller. Those institutions are not exclusively dedicated to the prosecution of corruption in international business transactions, but are general institutions dedicated to the prosecution of crimes. They allocate responsibilities based on the investigation and trial process.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Law No 346 – Organic Law for the Public Ministry gives discretion to the General Attorney’s Office regarding the prosecution of felonies.

#### **2.1.2 Deciding what charges to file?**

Yes.

#### **2.1.3 Deciding whether to drop charges?**

No.

Public Ministry (PM) is instructed to not desist or neglect cases. If a case is not properly filed or if neglected, a penal judge has the authority to drop the charges.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Mediations, bargains and other expressions of the opportunity principle are not applicable to ‘crimes against the public administration’ as deemed against the state. Settlements prior to an injunction are not regulated nor encouraged.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Defence mitigation argued to a judge.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

### **2.4 Do these standards differ for individual and corporate defendants?**

No. There is no jurisprudence nor official instructions regarding this matter.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

Mediations, bargains and other expressions of the opportunity principle are not applicable to ‘crimes against the public administration’ according to the Penal Procedure Code. Settlements prior to an injunction are not regulated nor encouraged.

*Editor’s Note: based on the information in this report there are no structured settlements for corruption offences process envisaged within this jurisdiction (See section 3.1).*

### **4. Transparency**

#### **4.1 Public access to information on settlements**

##### **4.1.1 Is information about settlement available to the public?**

No.

Settlements prior to an injunction are not regulated nor encouraged. If such practices were to occur, information would not be available to the public.

#### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

Direction of Economic Investigations (DIE) from the National Police collects and processes data on all economic crimes and share information with foreign governments, but there is no institution dedicated to foreign bribery allegations.

##### **4.2.1 If yes, is this data publicly available?**

No. Information is only shared within the institution and with interested countries.

### **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

#### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

If an individual was deemed non-guilty over the same charges that are being prosecuted in Nicaragua, such foreign sentence can be recognised by national courts. This according to Article 6 of the Penal Process Code, Law No 406.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

*Ne bis in idem* principle is applicable in such cases. If the foreign settlement entails absolution, amnesty or pardon to the corporation, then it can be opposable to a Nicaraguan indictment.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

There is no official framework regulating such cooperation, hence it is not officially encouraged.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Prosecution in such cases is limited as it is. If a system for cooperation and bargaining were to encourage the Public Ministry (PM) to initiate more enforcement reactions against these crimes, then yes.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Regulate the process and limit the scope for the bargain. Establish parameters (or thresholds) to investigate or prosecute. Give publicity to the final settlements.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

No, since there is no official framework to regulate this cooperation.

### 48. ARGENTINA

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*David Gurfinkel (Partner), Andrés Tarakjdian (Senior Lawyer), Allende & Brea*

#### **1. Background: normative framework**

##### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Law No 27,401, passed on 1 December 2017 and in force as from 1 March 2018, provides for criminal liability for legal entities regarding the following crimes: (a) public officers' bribery or influence peddling (applicable to local and foreign public officers); (b) transactions prohibited for public officials; (c) illegal levies; (d) illegal enrichment of public officials and employees; and (e) books and records related crimes ('Anti-Corruption Law').

Section 258 (b) of the Argentine Criminal Code provides that any person who offers or gives a public official from a foreign state or from an international public organisation, personally or through an intermediary, money or any object of pecuniary value or other benefits such as gifts, favours, promises or benefits, for his own benefit or for the benefit of a third party, for the purpose of having such official do or not do an act related to his office or to use the influence derived from the office he holds in an economic, financial or commercial transaction, shall be punished with imprisonment from one to six years and special disqualification for life in respect of the exercise of any public office.

In addition, individuals who have been appointed or elected to perform public duties on behalf of a foreign state, agency or public company shall be considered as foreign public officers.

##### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Argentina is part of the following international conventions criminalising corruption:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Inter-American Convention against Corruption;
- the United Nations Convention against Corruption; and
- the United Nations Convention Against Transnational Organised Crime.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Section 1.2 of the Argentine Criminal Code only provides extraterritorial effect regarding: (1) crimes committed abroad by agents or employees of Argentine officials while in the performance of their duties and (2) bribery regarding foreign public officers committed abroad by Argentine citizens or legal entities domiciled in Argentina (whether according to the company's bylaws or to the company's branch's address).

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Section 256 of the Argentine Criminal Code provides that any public official who personally or by means of an intermediary, receives money or any other gift, or directly or indirectly accepts promise of such in order to carry out, delay, or not to do something in relation to his duties, shall be punished with imprisonment or jailing from one to six years and special disqualification for life.

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

According to the Anti-Corruption Law, the following sanctions may be imposed to those legal entities which are found guilty of the crimes under investigation:

- fines between two and five times the amounts illegally obtained or that the company may have obtained as a consequence of the crime;
- suspension of its activities and the use of its brands and patents;
- publication of the judgment at its cost;
- loss or suspension of state benefits; inability to participate in public bids or any other activity related to the government; and
- cancellation of the legal entities' capacity.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The authority in charge of investigating and prosecuting of corruption in international business transactions will be the appointed prosecutor for that specific case. Prosecutor will allocate responsibility by means of section 258 (b) of the Argentine Criminal Code (please see answer to question 1.1 above).

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

Although there is no clear rule in this respect, prosecutors shall decide whom to charge with a crime in accordance with the facts and the evidence produced during the criminal proceedings.

#### **2.1.2 Deciding what charges to file?**

No.

Although there is no clear rule in this respect, prosecutors shall decide what charges to file in accordance with the facts and the evidence produced during the criminal proceedings.

#### **2.1.3 Deciding whether to drop charges?**

Yes.

Although there is no clear rule in this respect, prosecutors are entitled to drop certain criminal charges while investigating very complex criminal schemes.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

According to the Anti-Corruption Law, public prosecutors are entitled to execute a structured settlement agreement with a company, by means of which the latter obliges itself to provide useful information, identify the wrongdoers, and allow the reimbursement of the monies illegally obtained.

According to Law No 27,304, passed in October 2016, which amended sections 41 (c) and 276(b) of the Argentine Criminal Code ('Repentance Law'), prosecutors are entitled to enter into a structured settlement agreement if the information and the evidence provided by the individual currently being charged for a crime could be helpful to:

- prevent the commission of a crime or a crime which is currently being committed;
- solve the case under investigation;
- disclose the identity or whereabouts of the perpetrators or its accomplices;
- make significant advances in the investigation;
- recover assets or profits obtained from the wrongdoing; or
- provide the source of funding of the criminal organisation involved in the commission of the crime.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

The principle of legality derives from the Argentine National Constitution, the Argentine Criminal Code and the Argentine Criminal Procedural Code. According to section 25 of Law No 24,946 prosecutors shall comply with mandatory prosecution.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

Although there is no clear rule in this respect, prosecutors shall make a decision to prosecute based upon the facts and the evidence produced during the criminal proceedings.

## **2.4 Do these standards differ for individual and corporate defendants?**

No. Standards for individual and corporate defendants shall not differ.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

According to section 16 of the Anti-Corruption Law, a legal entity may enter into a structured settlement agreement with the prosecutor in order to reduce the applicable sanctions.

According to section 7 of the Repentance Law, individuals who are currently being charged for crimes such as foreign bribery, among others, are entitled to execute a structured settlement agreement in order to reduce their criminal conviction.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Under the Anti-Corruption Law, entering into a structured settlement agreement is not contingent upon an admission of guilt by the legal entity.

As provided in the Repentance Law, a structured settlement agreement shall be executed upon admission of guilt by the individual bribe payer

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

According to section 16 of the Anti-Corruption Law, a structured settlement is called *Acuerdo de Colaboración Eficaz*.

According to section 3 of the Repentance Law, a structured settlement is

called *Acuerdo de Colaboración*.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Cooperation with enforcement authorities through the investigation.

Voluntary disclosure of wrong doing/self-reporting.

Other.

According to section 8 of the Anti-Corruption Law, in order to impose the punishment to legal entities, the enforcement authorities shall consider the following factors:

- the company's compliance with its internal rules and procedures;
- the number and seniority of the executives, collaborators or employees involved in the wrongdoing;
- the omission to duly control the wrongdoers' activities;
- the damaged caused, the monies involved, the size, nature and economic capacity of the company;
- self-reporting and collaboration with the official investigation;
- the company's willingness to mitigate or to repair the damage caused and recidivism (the existence of recidivism is given by the commission of a second crime within three years of a prior judgment); and
- payment of economic sanctions may be fractionated in as much as five years if needed to allow the continuity of the company and the protection of the source of work.

According to section 5 of the Repentance Law, the enforcement authorities will consider the following factors:

- the nature and scope of the information provided by the wrongdoer;
- the usefulness of the information provided;
- the stage of the criminal proceedings in which the wrongdoer decides to cooperate;
- the seriousness of the crimes which were solved or prevented as a consequence of the wrongdoer's cooperation; and
- the seriousness of the crimes charged to the wrongdoer.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

Neither the Anti-Corruption Law nor the Argentine Criminal Code or the Argentine Criminal Procedural Code entitle prosecutors to demand a waiver of privilege or an equivalent protection from individuals or legal entities subject to a criminal investigation.

### **3.2.4 What form(s) can a structured settlement take?**

In accordance with section 19 of the Anti-Corruption Law, the structured settlement agreement shall be executed in writing by the entity's legal representative, the legal entity's counsel and the prosecutor.

According to section 7 of the Repentance Law, the structured settlement agreement shall be executed in writing by and between the prosecutor and the wrongdoer.

### **3.2.5 What are the usual terms of such an agreement?**

In accordance with section 18 of the Anti-Corruption Law, the structured settlement agreement shall:

- (i) describe the nature of information or evidence that the legal entity will provide to the prosecutor; as well as:
- (ii) (a) the payment of a fine equivalent to the amounts illegally obtained as a consequence of the illegal activity; (b) reimbursement of the amounts illegally obtained; and (c) delivery of the assets that would have presumably been confiscated if a judgment was issued;
- (iii) structured settlements may also include: (d) remediation actions; (e) community services; (f) disciplinary measures against individuals involved in the wrongdoing; and (g) implement an adequate compliance programme or amend the one in place.

According to section 7 of the Repentance Law, the structured settlement agreement shall describe the following requirements:

- the facts, the degree of participation of the wrongdoer and the evidence which sustains the criminal action;
- the nature of the information provided: name of other wrongdoers or participants and their contact information, bank accounts, names of the legal entities which received or wired the illegal money obtained as a result of the wrongdoing or any other document that could be useful to solve the case; and
- the benefit that will be granted to the wrongdoer for its cooperation.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

According to section 18 of the Anti-Corruption Law, prosecutors shall only offer the legal entities to enter into structured settlement agreements which contain the provisions described in (i), (ii) and/or (iii) of the answer to question 3.2.5 above.

According to section 1 of the Repentance Law, prosecutors may only offer to reduce the punishment scale up to the punishment applicable to an attempt to commit the crime subject to investigation.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

According to section 21 of the Anti-Corruption Law, the structured settlement agreement entered with the legal entity may get reversed if the legal entity fails to comply with its commitments set forth in the respective agreement.

According to section 2 of the Repentance Law, the executed structured agreement may be reversed if the individual under investigation maliciously provided false information.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

According to section 16 of the Anti-Corruption Law, the structured settlement agreement shall only be negotiated and executed by and between the prosecutor and the legal entity subject to investigation.

According to section 9 of the Repentance Law, the structured agreement shall only be negotiated and executed by and between the prosecutor and the individual subject to investigation.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. Please see answer to question 3.3.1.1.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

According to section 19 of the Anti-Corruption Law, the structured settlement agreement entered by and between the legal entity subject to investigation and the prosecutor shall be filed in court in order to obtain its approval.

According to section 10 of the Repentance Law, the structured settlement agreement entered by and between the prosecutor and the individual subject to investigation shall be filed in court in order to obtain its approval.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

According to section 24 of the Anti-Corruption Law, the court shall analyse if the executed agreement is in compliance with the law.

According to section 10 of the Repentance Law, the court shall approve the executed structured agreement provided that the individual subject to investigation:

- voluntarily executed the agreement; and that
- the agreement states: (a) the facts, the degree of participation of the wrongdoer and the evidence which sustains the criminal action; (b) the nature of the information provided: name of other wrongdoers or participants and their contact information, bank accounts, names of the legal entities which received or wired the illegal money obtained as a result of the wrongdoing or any other document that could be useful to solve the case; and (c) the benefit that will be granted to the wrongdoer for its cooperation.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

According to section 21 of the Anti-Corruption Law, either the appointed court or the appointed prosecutor will be in charge of determining whether the settling company has properly complied with the terms of the executed settlement agreement.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

Yes. Please see second paragraph of answer to question 3.2.7.

### 3.4 Outcome of the structured settlement

#### Statutory Provisions:

Disgorgement of profits – yes.

Personal liability – yes.

Financial penalties – yes.

Compensation to third parties – yes.

Corporate compliance programmes – yes.

Please note that we have completed the above based upon the rules governing the Anti-Corruption Law. Please see answer to question 3.2.5 above.

According to section 7 of the Repentance Law, one of the conditions to enter into a structured settlement agreement is to provide useful information to recover assets or profits obtained from the wrongdoing.

### 3.5 *De facto or de jure*

*Editor's note: The settlement process (Acuerdo de Colaboración Eficaz) under the Anti-corruption law (ACL) is not contingent upon an admission of guilt. (See section 3.2.1 above). This would constitute a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

As the criminal proceedings are only available to be reviewed by the parties involved thereof, in case of an executed settlement agreement, it is likely that very limited information about its content will be disclosed.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. Please see answer to question 4.1.1.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

The Anti-Corruption Law does not provide any provision regarding contents of public statements.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Data regarding investigation, prosecution and resolution of foreign bribery allegations is collected and processed by the Federal Criminal Court of Appeals of the City of Buenos Aires.

**4.2.1 If yes, is this data publicly available?**

Yes. [www.cij.gov.ar/causas-de-corrupcion.html](http://www.cij.gov.ar/causas-de-corrupcion.html).

The website briefly provides information about criminal proceedings regarding corruption cases pending before the Federal Criminal Courts of the City of Buenos Aires.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Since the Anti-Corruption Law is in force as from 1 March 2018, there are still no precedents in such respect.

As the Repentance Law has been passed in October 2016, it is not feasible to provide an overview of cases dealing with structured settlements in Argentina.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Anti-Corruption Law will be applicable to public officers' bribery or influence peddling (local and foreign public officers).

Section 1 of the Argentine Criminal Code provides that such code shall be applied to crimes: (1) committed, or the effects of which are produced in the territory of the Argentine Nation, or in a place subject to its jurisdiction; (2) crimes committed abroad by agents or employees of Argentine officials while in the performance of their duties and (3) bribery regarding foreign public officers committed abroad by Argentine citizens or legal entities domiciled in Argentina (whether according to the company's bylaws or to the company's branch's address).

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

A foreign conviction/settlement would not have any effect in Argentina.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

Since the Anti-Corruption Law is in force as from March 1st, 2018, there is still no predictability regarding the outcome of cooperation between alleged wrongdoers and prosecuting authorities.

As the Repentance Law is in place since October 2016, it is not feasible to predict the outcome of a cooperation agreement by and between individuals subject to investigation and prosecutors.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

The cooperation between the prosecuting authority and the alleged wrongdoers is discouraged by the existing framework. Criminal proceedings regarding corruption crimes tend to last more than ten years to be solved and, in many cases, the convictions are not severe. Although the Anti-Corruption Law is in force as from 1 March 2018, we are of the opinion that this scenario has still not changed.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

The cooperation between the authorities and the alleged wrongdoers should be encouraged in order to solve more corruption cases in a shorter period of time, reach more convictions of other individuals involved in the wrongdoing, and try to recover the assets obtained as a result of the wrongdoing.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

In order to encourage such cooperation, prosecutors and judges should try to speed up the criminal proceedings. In this respect, there must be a clear message to the Argentine society stating that those individuals who commit corruption cases will have a fast trial.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Please see answer to question 6.1.

*Lindsay Sykes (Partner), Estefania Paz (Associate), Ferrere (Law Firm)*

**1. Background: normative framework**

**1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The Bolivian Criminal Code (Law 1768) sanctions Active and Passive Bribery of National Public Officials in Articles 158 and 145, 147, 151 and 173 *bis* of the Criminal Code. Active and Passive Transnational Bribery are sanctioned through Articles 30 and 31 of Law 004 (Bolivia's Law on the Fight against Corruption, Illicit Enrichment and Investigation of Wealth.)

**1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Bolivia is not a signatory country to the Convention on Combating bribery of Foreign Public Officials in International Business Transactions – OECD.

Bolivia is signatory to both the United Nations Convention against Corruption and the Inter-American Convention Against Corruption, which include corruption in international business.

**1.3 Do your foreign bribery laws have extraterritorial effect?**

No. Bolivian criminal law applies to crimes committed in Bolivian territory.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No. The scope of the regulation regarding bribery is broad enough to enclose facilitation payments.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

Bolivia provides for corporate criminal liability only with regard to the crime of private illicit enrichment. In such cases, the legal entity may be sanctioned with a fine equal to 25 per cent of corporate assets.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Attorney General's Office (Public Prosecution Service) directs all criminal investigations under the supervision of a judicial authority, and prosecutes any corruption acts. The Ministry of Justice and Institutional Transparency, the Comptroller-General's Office, the Bolivian Police and the Financial Investigation Unit will aid the Attorney General's Office in its investigative actions for corruption cases.

The Bolivian criminal system allocates responsibility after an oral trial that allows equal opportunities for the parties to substantiate their case.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Before charging a person with a crime, the Public Prosecutor should have conducted previous investigations with judicial supervision. Once the Public Prosecutor considers he/she has enough evidence, he/she may decide whom to charge with a crime.

#### **2.1.2 Deciding what charges to file?**

Yes.

Public Prosecutors may only press charges in regards to ‘public’ crimes, which are those found in Article 20 of the Criminal Procedural Code (CPC) and those not mentioned in Articles 19 or 20 of the CPC.

In Bolivia crimes may be of ‘private’ or ‘public’ nature.

Crimes of ‘private’ nature are those set in Article 19 CPC. The victims are the plaintiffs for the purposes of the prosecution of such crimes.

Crimes of ‘public’ nature can be:

- ‘public crimes upon request by the victim’, (prosecuted only upon formal request by the victim) (Article 20 CPC); and
- simple ‘public crimes’ (initiated by the Public Prosecutor without any previous request.)

Public prosecutors must be plaintiffs to all ‘public’ crimes. Independently, victims may request to become plaintiffs along with the Public Prosecutor. Corruption crimes are crimes of public nature.

#### **2.1.3 Deciding whether to drop charges?**

No.

Public Prosecutors can request that a judge terminate criminal proceedings if any of the following circumstances:

- the overall social benefit from prosecuting the alleged criminal are not substantial;
- the alleged criminal has suffered moral/physical consequences worse than those that could be imposed through a sanction; or
- a situation in which the possible sanctions are non-substantial compared to sanctions already imposed for other crimes;

- a judicial pardon is foreseeable; or
- when the crime will be subject to prosecution abroad.

The judge will be the one ultimately deciding whether charges can be dropped.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Any alternatives to an ordinary judicial process, such as an abbreviated process or the dropping of charges, are decided exclusively by a judge. (Paroles and judicial pardons are prohibited for corruption cases.)

Any reduction of penalties for corruption cases, as derived from cooperation by the wrong-doer, will also be decided by a judge.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Prosecutorial discretion is determined by the principle of legality, by which the Public Prosecutor must always fulfill its duty to investigate and prosecute public crimes.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

The Criminal Procedure Code only states that, after the investigative phase, the Public Prosecutor must prosecute if she/he considers there is enough evidence.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

The Public Prosecutor must prosecute if he/she considers there is sufficient evidence.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Conciliation settlements are not available for corruption crimes. A judge has discretion to reduce a wrongdoer's penalty by up to two-thirds, based on the wrongdoer's voluntary cooperation with the prosecution. The crime is still prosecuted and no settlement agreement is executed between the prosecution and the accused.

It should be noted that an alleged bribe payer could also agree to give up the right to a complete trial and access an abbreviated procedure if he/she admits to the crime. In such case, the Public Prosecutor will propose a sanction according to the case and available evidence (such sanction is likely to be previously discussed with the alleged bribe payer) according to the case and available evidence. If the judge agrees that a complete trial is unnecessary, he/she will immediately decide a sanction within the proposal. The judge decides on such abbreviated process. This is not a structured settlement, but rather a request for an express procedure due to the admission of guilt. No written document is issued expressing any agreement between the parties/prosecutor.

## **3.2 Form, features and terms of structured settlements**

### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

In order to access any reduction of penalties or an abbreviated process, the alleged bribe payer would have to admit his/her part on the corresponding crime.

#### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Reducción de la pena* (penalty reduction) or *proceso abreviado* (abbreviated process).

### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Voluntary disclosure of one's own wrongdoing as well as collaboration in the prosecution of others are considered in penalty reduction.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

Prosecutors may demand such a waiver in order for the defendant to receive the penalty reduction.

### **3.2.4 What form(s) can a structured settlement take?**

Judges are to decide on any reduction of penalties or abbreviated processes in regards to corruption cases/crimes of public nature, through their judicial resolutions.

### **3.2.5 What are the usual terms of such an agreement?**

Not applicable.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

A judge can offer a reduction of penalties of up to two-thirds, for cooperation in corruption crimes, or an abbreviated process upon the admission of guilt for crimes of public nature.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No. Non-compliance is not possible under the available options.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

Yes.

The judges are the ones to decide on any reduction of penalties or abbreviated processes; it is not negotiated with prosecutors.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

Yes.

The judges decide any reduction of penalties or abbreviated processes.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

The judges decide any reduction of penalties or abbreviated processes.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The judges decide any reduction of penalties or abbreviated processes.

### **3.3.3 During the implementation of the settlement**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

The judges decide any reduction of penalties or abbreviated processes.

### 3.3.3.2 Can this authority impose penalties for non-compliance?

No. Non-compliance is not possible, given the available options.

## 3.4 Outcome of the structured settlement

**Are there any rules that provide guidance about the outcome of such negotiations with respect to the following? Please select all options that apply and provide further information in the field next to each box you tick.**

There are no rules on such matters.

## 3.5 *De facto or de jure*

Conciliation settlements are not available for corruption crimes. A judge has discretion to reduce a wrongdoer's penalty by up to two-thirds based on the wrongdoer's voluntary cooperation with the prosecution. The crime is still prosecuted and no settlement agreement is executed between the prosecution and the accused. Cooperation and admission of guilt may give place to a judicial decision rewarding cooperation; however, there is no clear legal framework on the matter.

*Editor's note: An alleged bribery wrongdoer could agree to give up the right to a complete trial and access an abbreviated procedure by admitting to the crime. (See section 3.1 and 3.2.1 above). This would constitute a de facto, plea-based settlements process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

There are no express provisions on the matter. A reduction of penalties/an abbreviated process in regards to crimes of 'public' nature are not reflected through settlements but are subject to a publicly available judicial decision.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. See 4.1.1 above.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

This practice is not developed in Bolivia.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

The Ministry of Justice and Institutional Transparency, through the Vice Ministry of Transparency and Fight Against Corruption, informs the public on general information regarding corruption cases through its website.

**4.2.1 If yes, is this data publicly available?**

Yes. [www.transparencia.gob.bo](http://www.transparencia.gob.bo). (The information available to the public is very limited and general.)

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Settlements between the parties as derived from negotiation/mediation are available for crimes of private nature (which do not include corruption crimes) and are usually not available to the general public.

The alternatives available in regard to ‘public’ crimes (the reduction of penalties/abbreviated processes) are decided through judicial resolutions. Case law on such matters is not readily available.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

When a crime is to be prosecuted abroad, the Public Prosecutor may petition the local judge to decline proceeding in regards to such case.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country’s legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

Bolivian Criminal Law does not rule differently for corporations and individuals. An individual cannot be convicted twice for the same crime and, therefore, Bolivian courts recognise any judgments or documents issued abroad in regards to a corporation, that have *res judicata* effects.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

There are no publicly available precedents on the matter. This concept is unknown in Bolivia.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Discouraged. Cooperation is not expressly allowed or prohibited; however, the overall treatment of corruption crimes leans towards discouraging cooperation, as demonstrated through the express prohibition for corruption crimes to be allowed to access mechanisms such as judicial pardons or requests for parole. Such cooperation would be viewed with suspicion and as condoning corruption.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

It should be encouraged, as it may provide information needed for the unveiling of corruption networks. This would need to be done carefully, however, to avoid corruption in the cooperation process or the appearance thereof.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The regulation should provide legal clarity regarding how these situations should be handled and the rewards/conditions that the prosecutor can/cannot negotiate with the alleged wrongdoers.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Yes. Voluntary disclosure of one's involvement in a corruption crime may result in a two-thirds reduction of the penalty.

*Adriana Dantas, Head of Corporate Ethics/Compliance and International Trade areas, Barbosa Müssnich Aragão (BMA) Avogados (Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

- Brazilian Criminal Code (Decree-Law No 2,848, of 7 December 1940); and
- Anticorruption Law (Law No 12,846, of 1 August 2013).

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Decree No 3,678, of 30 November 2000, enacts the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris, on 17 December 1997.

Sections 337-B, 337-C and 337-D of the Brazilian Criminal Code (Decree Law No 2,848, of 7 December 1940), which set forth penalties for crimes committed by private parties against Foreign Public Administration.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

As a general rule, Brazilian criminal law is only applicable to conducts committed in the Brazilian territory. However, there are some exceptions. For instance, Brazilian criminal law can be applied to conducts committed abroad by Brazilian citizens or to combat crimes committed abroad that were object of international treaties signed by Brazil (section 7, item II, of the Brazilian Criminal Code).

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are not allowed in Brazil. Section 337-B of the Brazilian Criminal Code establishes that it will also be considered a crime to promise, to offer or to give any undue advantage to a foreign public official for him/her to execute an act that he/she is already obligated to execute by law.

#### **1.5 Does your country provide for corporate criminal liability?**

No.

As a rule, Brazilian law does not provide for corporate criminal liability. The exception to this general rule is criminal liability imposed on corporate entities for environmental crimes (Law No 9,605/1998).

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

Federal and State Prosecution departments in Brazil have several different offices all over the country with their own jurisdictions. An electronic system draws who will be the prosecutor responsible for a new case.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

Once the prosecutor receives information about the occurrence of a wrongdoing, he/she must press criminal charges against all the individuals involved in the case and in regard to all the crimes that were committed (Sections 24 and 42 of the Brazilian Criminal Procedure Code). In few cases, the victim has to present his/her consent for the prosecutor to press charges.

**2.1.2 Deciding what charges to file?**

No. See item 2.1.1 above.

**2.1.3 Deciding whether to drop charges?**

No.

The prosecutor cannot drop charges (sections 42 and 576 of the Brazilian Criminal Procedure Code).

**2.1.4 Deciding whether or not to plea bargain?**

Yes.

In case of misdemeanors (penalties of up to two years of imprisonment), the prosecutor can present a plea bargain to the defendant. There are some objective conditions for this offer:

- the defendant must not hold previous criminal convictions; and
- the defendant must have accepted a plea bargain in the last five years (section 76, section 2, of the Law 9,099, of 26 September 1995).

The law also establishes that the plea bargain will only be granted when the defendant's personal background, social conduct, personality and the motives and circumstances of the case indicate that such measure will be appropriate. This last condition gives some discretion to the prosecutor, but the prosecutor must justify a decision of not offering the plea bargain.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Please refer to item 2.1.1 above.

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No. Please refer to item 2.1.1 above.

**2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

Please refer to item 2.1.1 above.

**2.4 Do these standards differ for individual and corporate defendants?**

No. Please refer to item 2.1.1 above.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

Yes, both corporations that wish to enter into an administrative leniency agreement and individuals who want to enter into a criminal cooperation agreement must admit guilt (section 16, III, of Law No 12,846/2013 Anticorruption Law, and section 4, of Law No 12,850/2013). (*Editor's note under the Clean Company Act 2014 Law No. 12,846 the legal entity must admit its involvement in wrongdoing as this is an administrative proceeding.*) Please note that the criminal cooperation agreement can only be adopted in corruption cases when the offence is committed by a criminal organisation.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

In the administrative/civil sphere, it is called *acordo de leniência*. In the criminal sphere it is called *colaboração premiada*.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

**3.2.4 What form(s) can a structured settlement take?**

The criminal cooperation agreement must be entered into and between the chief of police or the Public Prosecutor and the investigated party/defendant.

The leniency agreement must be entered into and between the highest authority of the public agency that was victim of the corruption and the investigated party.

The agreements must take a written form.

**3.2.5 What are the usual terms of such an agreement?**

**Leniency agreement:**

The beneficiary company must admit its participation in the wrongdoing, provide effective collaboration in the investigation, and identify the other parties involved in the offence and/or present documents and information that evidence the occurrence of the wrongdoing. In case all these requirements are fulfilled, the beneficiary company will be granted immunity from the penalties and the final will be reduced up to two-thirds.

**Criminal cooperation:**

The beneficiary individual must cooperate with the authorities and his/her help must result in the identification of the other members of the criminal organisation, prevention of other criminal offences by the organisation, recovery of assets and location of other victims. In case these requirements are fulfilled, the beneficiary individual will have his sentence reduced up to two-thirds, or have his/her prison sentence substituted by an alternative penalty, or will receive judicial pardon.

**3.2.6 Are there limits on what the prosecution can offer?**

Yes. Please refer to item 3.2.5 above.

**3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

The criminal cooperation agreement is discussed only between the defendant/investigate party and the Public Prosecutor or the chief of police (section 4, paragraph 6, of Law No 12,850/2013).

The leniency agreement, by its turn, is only negotiated between the beneficiary company and the highest authority of the public agency that was victim of the corruption practice.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

The criminal cooperation agreement must be approved in court. The judge must verify if the agreement regularity, legality and confirm if the investigated party/defendant voluntarily agreed with it (section 4, paragraph 7, of Law No 12,850/2013).

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The scrutiny of the court is limited, as set forth in Section 4, paragraph 7, of Law No 12,850/2013 (see item 3.3.2.1 above).

### 3.3.3 During the implementation of the settlement:

#### 3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?

In the criminal cooperation agreement, the judge will determine if the individual has properly observed the terms of the settlement.

In the leniency agreement, the maximum authority of the public agency that was victim of the corruption practice will decide if the settlement was properly observed by the beneficiary company.

#### 3.3.3.2 Can this authority impose penalties for non-compliance?

Yes.

If the individual does not comply with the criminal cooperation agreement, all evidence presented by him/her will be able to be used against him/her in court. In addition, the individual will not be granted with any benefit regarding his/her criminal penalty.

In the leniency agreement sphere it is possible to impose penalties for non-compliance. Also, in case of non-compliance, the company will not be able to enter into a leniency agreement with the same public authority for three years (section 16, paragraph 8, of Law No 12,846/2013).

### 3.4 Outcome of the structured settlement

	Statutory Provisions	Past cases
Financial penalties	Yes – Criminal Cooperation/Leniency Agreement.	Yes
Financial penalties	Yes – Criminal Cooperation/Leniency Agreement.	Yes
Compensation to third parties	Yes – Criminal Cooperation/Leniency Agreement.	No
Obligations to cooperate with other agencies	Yes – Leniency agreement.	No
Monitors (and paying for them)	No	Yes – Leniency agreement.
Corporate compliance programmes	Yes – Leniency agreement.	No
Personal liability	Yes – Criminal Cooperation.	No

### 3.5 De facto or de jure

*Editor's note: Under the Clean Company Act 2014 Law No 12,846 the legal entity must admit its involvement in wrongdoing for an administrative leniency agreement. This takes place in the administrative sphere and therefore constitutes a de jure process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

The negotiations of the criminal cooperation agreement (section 7 of Law No 12,850/2013) and the leniency agreement (section 39 of Decree No 8,420/2015) will be conducted under seal. The criminal cooperation agreement will become public after the judge accepts the criminal charges filed by the prosecution (section 7, paragraph 3, of Law No 12,850/2013). However, some measures can be adopted to preserve the identity of the individual who is cooperating (section 5 of Law No 12,850/2013). The leniency agreement will become public after its signing (section 16, paragraph 6, of Law 12,846/2013), but it can remain under secrecy, if necessary, to guarantee a better result for the administrative investigation.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

As a rule, the settlement is public but parts of it can remain under seal (Please refer to item 4.1.1 above).

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Limited. Please refer to item 4.1.1 above.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

Laws regarding criminal cooperation and leniency agreements are relatively new in Brazil and several points must be improved.

One point of attention is that there is not a central authority who can negotiate agreements with both the companies and the individuals regarding civil, administrative and criminal penalties. As a result, the great challenge for companies and individuals is to conduct simultaneous negotiations with different authorities and try to avoid leaving anyone exposed.

Besides that, there are few case laws about criminal cooperation and leniency agreements, which brings some uncertainty regarding the outcome when such agreements are tested in court.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

As a rule, Brazilian Criminal law is applied to all facts that occur in Brazilian territory (section 5 of the Brazilian Criminal Code). In some cases, Brazilian Criminal law can also be applied to offences that occur abroad (section 7 of the Brazilian Criminal Code).

### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

The sentence enforced abroad reduces the penalty imposed in Brazil for the same crime. (Section 8, of the Brazilian Criminal Code).

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

Please refer to item 4.3.

### **6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Yes, it is encouraged.

### **6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

It should be encouraged, since the recent Brazilian experience with the Car Wash Operation is showing that cooperation agreements are essential to gather evidence and prosecute corruption cases involving higher authorities.

### **6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Brazilian authorities should establish a unified procedure to allow individuals and companies to negotiate a coordinated settlement in a single agreement.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Yes, there is a clear advantage to companies in cooperating with authorities. From a reputational standpoint, the cooperating company will not have to publish its conviction in a newspaper; from a commercial point of view, the company will be allowed to continue entering into financing agreements with public agencies and to be hired through public contracts; from a financial point of view, the company will be granted a reduction of up to two-thirds of the fine – which can reach, by its turn, up to 20 per cent of the gross revenue of the company.

*Maximiliano Portales, Associate, Carey (Law Firm)*

## 1. Background: normative framework

### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

- Sections 248 *et seq* of the Chilean Criminal Code (CCC) sanctions bribery of a local and foreign public official.
- The 2009 Chilean Corporate Criminal Liability Act (CCLA) sanctions corporations (incorporated locally) for bribery or other predicate offences.

As described in the CCC, bribery of a local public official is perpetrated through the following conducts and under the following conditions:

- passive bribery sanctions a local public official who:
  - (a) solicits or accepts greater rights of those allocated or assigned to his/her position or an economic advantage for himself or a third party for acting or having acted in relation to the performance of official duties (CCC Section 248);
  - (b) solicits or accepts an economic advantage for himself or a third party for refraining or having refrained from acting in relation to the performance of official duties or for carrying out or having carried out an act in violation of the duties proper to his office. Should the violation of the duties proper to his office consist in exerting undue influence on another public official with a view to obtaining from him a decision that may give rise to an advantage for a third party, the delinquent official shall be punished too [...] (CCC Section 248 *bis*);
  - (c) solicits or accepts an economic advantage for himself or a third party to commit any of the crimes or misdemeanors listed under CCC Title V or Title III paragraph 4 (eg, embezzlement and/or frauds against public coffers, secrecy/confidentiality violations by public officials) (CCC Section 249);
- active bribery sanctions any individual offering or consenting to give an economic advantage to a public official, to his benefit or to a third party, to perform or having performed an act or an omission under Articles 248, 248 *bis* and 249 (CCC Section 250).

The CCC also prohibits bribery of foreign public officials by sanctioning any individual who offers a foreign public official an economic advantage for that official or a third person to act or refrain from acting in order to obtain or retain – for him or a third party – a business or advantage in the field of international business transactions (CCC Section 251 *bis*).

## 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

Chile has signed and ratified a number of international agreements and treaties on the fight against corruption, including:

- on 29 March 1996, Chile adopted the Inter-American Convention Against Corruption in Caracas, Venezuela. This Convention was adopted by the National Congress, as stated in Official Letter No 2,145, dated 15 September 1998, of the House of Representatives. It was finally enacted by Decree No 1879, dated 2 February 1999, of the Ministry of Foreign Affairs;
- on 17 December 1997, Chile adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This Convention was adopted by the National Congress, as stated in Official Letter No 3,222, on 8 March 2001, of the House of Representatives. This Convention was published internally by Decree No 496, dated 30 January 2002, of the Ministry of Foreign Affairs; and
- on 31 October 2003, Chile adopted in New York the United Nations Convention Against Corruption, signed by Chile on 11 December of the same year. This Convention was adopted by the National Congress, as stated in Official Letter No 6223, on 20 June 2006, of the House of Representatives. This Convention was enacted on 23 November 2006, by Supreme Decree No 375 of the Ministry of Foreign Affairs.

Likewise, as of December 2000, Chile has been an active member of the South American Financial Action Task Force (GAFISUD), now called the Financial Action Task Force of Latin America (FATFLA), an intergovernmental organisation with a regional basis to promote continuous implementation and improvement of policies to combat money laundering and terrorist financing. GAFISUD was created under the model of the Financial Action Task Force (FATF), a body established by the G-7 in 1989 and to which the 34 largest economies in the world currently belong. In that sense, Chile has signed the Memorandum of Incorporation and, therefore, agrees to the FATF's 40 recommendations.

## 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

In principle, Chilean courts can only claim jurisdiction for criminal actions, including bribery, if committed within the Chilean territory. However, Chilean Courts claim jurisdiction over a catalogue of criminal offences committed abroad if:

- the given act is a criminal offence listed in Section 6 of the Chilean Statute Code (in Spanish *Código Orgánico de Tribunales* or CSC), including but not limited to bribery of a local or foreign public official, malfeasance of public funds, fraud of public coffers and extortion, only committed by persons serving the government abroad (including foreigners); or
- committed by Chilean or a person who has habitually residence in the country (CSC Section 6).

#### 1.4 Are facilitation payments allowed in your jurisdiction?

No.

Facilitating payments are prohibited under section 248 of the CCC, which states that any person ‘who offers or agrees to offer an economic benefit to a public official who requests or accepts greater fees than those applicable in connection with an action that is customary for his or her position or that does not require the payment of any fees, may be subject to imprisonment, fines and impediments to hold public office positions’.

#### 1.5 Does your country provide for corporate criminal liability?

Yes.

Law No 20,393 Corporate Criminal Liability Act (CCLA), enacted in December 2009, imposes criminal liability on legal entities for conduct where the relevant behaviour:

- is a crime of, inter alia, bribery of local or foreign public officials (per Article 248 *et seq* Chilean Criminal Code), money laundering (per Article 27 of the Money Laundering Act (Law No 19,913), terrorism financing (per Article 8, Law No,18,314), and/or willfully or negligently receiving of stolen goods (per Article 456 *bis A* of the Chilean Criminal Code) hereinafter ‘predicate offence’;
- is perpetrated in the legal entity’s own interest, directly or indirectly by its owners, representatives, main executives, or other individuals in charge of carrying out the relevant entity’s business (eg, agents); and
- results from the entity’s non-compliance with its due supervision and control obligations (ie, prevent such predicate offences in their daily operations/business). Such obligations are deemed fulfilled if the company has effectively implemented internal controls or regulations to prevent the relevant crimes. The CCLA provides one mechanism accepted to evidence such control and supervision (ie, implementing an internal compliance programme complying with CCLA Section 4 requirements).

CCLA extends criminal liability only for companies incorporated in Chile (based on general local jurisdictional principles), notwithstanding extraterritorial laws (eg, UK Bribery Act, FCPA). Furthermore, corporate criminal liability may be passed along from one legal entity to another (eg, mergers, fusions) and is independent from the individual’s liability.

Sanctions for CCLA violations include:

- temporary or perpetual prohibition to enter into contracts with governmental entities;
- partial loss of or absolute prohibition during two to five years to opt for governmental benefits;
- fines ranging from 200 to 10,000 UTM (US\$15k to US\$1.5m);
- dissolution (only applicable under specific and aggravated circumstances); and
- other ancillary sanctions, such as publication of an excerpt of the judicial decision.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The responsibility for overseeing corruption investigations, pressing charges, and prosecuting cases falls on the Public Prosecutor's Office (*Ministerio Público*). In addition, its National Anticorruption Unit is responsible for (1) inter-institutional coordination between public agencies which collaborate in anti-corruption investigations (eg, Comptroller General, State Defence Council, the Police, Ministry of Foreign Affairs, etc), and (2) representing Chile before international agencies that have undertaken the elaboration of anti-corruption treaties and conventions.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

Pursuant to Law No 19,640, Title I, section III and Article 248 of the Chilean Criminal Procedural Code (CCPC) prosecutors are entitled to either charge the defendant or dismiss the case. According to Title I, section I and Articles 167 to 169, prosecutors are able to dismiss charges administratively (referred to as *archivo provisional* or *principio de oportunidad*) and do not require judicial authorisation to do so.

**2.1.2 Deciding what charges to file?**

Yes.

Charging discretion is part of the prosecutor's authority, though with some judicial oversight. Deciding what charges are filed remains one of the central responsibilities of prosecutors in the Chilean criminal procedure.

**2.1.3 Deciding whether to drop charges?**

Yes. Please see point 2.1.1 above.

**2.1.4 Deciding whether or not to plea bargain?**

No.

The prosecutor is entitled to offer a plea bargain, in principle, when the proposed incarceration period for the defendant does not exceed five years. Pursuant to section 248 *et seq* of the Criminal Code, bribery of local public official is sanctioned with imprisonment ranging from 541 days to three years; and bribery of foreign public official is sanctioned with imprisonment ranging from three to five years. Exceptionally, for specific crimes (eg, robbery) the prosecutor can offer a plea-bargaining that does not exceed ten years. Nevertheless, pursuant to section 407 of the Criminal Procedural Code, the decision whether to accept or not a plea bargain finally

relies on the court, which in practice is very deferent to the agreement. Pursuant to section 27 of the Corporate Criminal Liability Act (Law No 20,393), corporate defendants prosecuted for certain offences (eg, bribery) would be subject to the rules of Section 407 of the Criminal Procedural Code (plea bargain procedures).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Section 166 of the Criminal Procedural Code mandates that the Public Prosecutor shall investigate all crime reported. The principle of mandatory prosecution is not constitutionally protected but legally envisioned as a general maxim of action for the prosecutor, who may suspend, interrupt or dismiss the prosecution in the cases provided by local law (Section 166 of the Criminal Procedural Code).

Furthermore, if the wrongdoing does not represent a serious compromise for the public interest, the prosecutor is entitled to either (1) not initiate a criminal prosecution; or (2) dismiss an initiated prosecution. In this regard, the exercise of the principle of opportunity is subject to the following limitations: (1) the sanction imposed by the law shall not exceed 61 to 541 days of imprisonment; and (2) the offence shall not be committed by a public official in the exercise of their functions.

For these purposes, the prosecutor must issue a reasoned decision, which will be informed to the court.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Yes, pursuant to section 166 of the CPC, when the prosecutor becomes aware of a fact that configures a criminal offence, he or she is obliged to initiate a prosecution, without being able to suspend or interrupt its course, except in the cases provided by the law. Regarding the opportunity principle's conditions and limitations please refer to section 2.2.

Note: as long as there has been no intervention by the court, the prosecutor may refrain from initiating any investigation if (1) the facts reported in the complaint are not constitutive of a criminal offence; or (2) when the background and data provided permits to conclude the extinction of the criminal liability (eg, death of the defendant, amnesty, pardon, statute of limitations, etc).

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

Please see section 2.2.

## 2.4 Do these standards differ for individual and corporate defendants?

Yes.

Yes, the principle of opportunity (section 170 CCPC) does not apply for corporate defendants (CCLA section 24).

## 3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences

### 3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Yes, under the CCPP the prosecutor who is leading an investigation is under certain conditions allowed to propose to one or more defendants an alternative mechanism to adjourn the investigation, known as a conditional adjournment of the investigation (*suspensión condicional del procedimiento*). Section 237 of the CCPC states ‘the prosecutor, in agreement with the defendant, might request the criminal judge to adjourn the investigation. The court might request the supporting evidence considered necessary for such purposes.’

Under the CCPC, and in particular Section 237, a conditional adjournment of the investigation is only permissible if the following conditions are met:

The defendant to be subject to the adjournment must be first charged by the prosecutor with a criminal offence;

- the foreseeable conviction for the charges brought against the defendant cannot exceed three years of imprisonment (ie, imprisonment in its medium degree);
- the defendant has to have no prior criminal records; and
- the victim or the claimant (if any) must be heard before entering a conditional adjournment of the investigation.

The conditional adjournment will follow the agreement reached between the parties (ie, law enforcement, claimants and defendants).

Additionally, local law permits a plea bargain agreement (*procedimiento abreviado*), under which the defendant expressly accepts either the facts of the accusation and the background of the investigation, and the prosecutor requests a penalty that will not exceed ten years of imprisonment (in some crimes, the limit is ten years). Under such an agreement, a court verifies whether the legal requirements are recognised and, if so, may convict the accused and impose a penalty that is limited to the charge and/or sentence proposed by the prosecutor.

## 3.2 Form, features and terms of structured settlements

### 3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?

Yes.

Yes, section 406 *et seq* of the CCPC (*procedimiento abreviado*) allows the prosecutor and defendant to agree upon a reduction of charges (solely for minor sentences) in exchange for a guilty plea by the defendant. This mechanism may be applied only to criminal cases carrying less than five years of imprisonment. The final decision regarding the plea bargain is made by the court, which holds the ultimate authority over the sentence and responsibility for reviewing legal requirements and evidence.

#### 3.2.1.1 If yes, what is such a structured settlement called in your language?

*Procedimiento abreviado.*

### 3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

#### Existing prevention and detection measures:

risk assessment;

training;

detection mechanisms such as internal, anonymous; and

commitments to institute new prevention and detection measures.

The CCLA provides the following mitigating circumstances for corporate defendants:

- the corporate defendant's substantial collaboration in the criminal investigation;
- whether the entity accurately remedied the harm caused or prevented the future harmful effects of the offence including, for example, where the company itself files a complaint against a manager, or other natural person, who had committed the offence;
- if the corporate defendant implemented (following the offence but before the beginning of the trial) effective measures to prevent and discover the same type of offences being investigated that might be committed in the future; and
- the presence of a compliance programme (ie, risk assessment, training, detection mechanisms) before the predicate offence.

Please note the two first mitigating circumstances are also available for individuals.

### 3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?

No.

No, prosecutors are not authorised to demand a waiver of privilege. Pursuant to Section 220 of the CCPC, prosecutors are not entitled to (1) seizure or registering documents or other physical, electronic or any other kind of material which contains information subject to confidentiality; and (2) intercept client-attorney communications.

Exceptionally, such communications can be intercepted if it is ordered by the court upon relevant evidence of the attorney's involvement in the investigated facts.

### 3.2.4 What form(s) can a structured settlement take?

Conditional adjournment: pursuant to CCPC section 238, the defendant may be subject to one or more of the following conditions:

- to reside or not to reside in a certain place;
- refrain from frequenting certain places and persons;
- undergo medical, psychological treatment;
- to exercise a work, trade, profession or employment, or attending an educational programme or training;
- to pay a compensation for damages in favour of the victim;
- visit the Public Prosecutor's Office periodically, providing evidence that conditions set by the settlement are met;
- set an address and report to the Public Prosecutor's Office; and/or
- another condition that is adequate in consideration of the circumstances of the case.

Notwithstanding the above, conditions can vastly differ in nature and extent, and they ultimately rely on the agreement reached between the prosecutor and the defendant.

In the case of corporate defendants, conditions include but are not limited to:

- pay a certain amount for tax benefit;
- provide services in favour of the community;
- report periodically their financial statement;
- implement a compliance programme; and
- any other condition that is appropriate considering the circumstances of the case and reasonably proposed by the prosecutor.

Guilty plea or *procedimiento abreviado*: please see 3.1. and 3.2.1 above.

### **3.2.5 What are the usual terms of such an agreement?**

Please see 3.1, 3.2.1, and 3.2.4 above.

### **3.2.6 Are there limits on what the prosecution can offer?**

No.

Conditional adjournment: no, the prosecutor is entitled to offer any condition which results suitable considering the specific circumstances of the case (see 3.2.4). Please note that the agreement reached between the parties (ie, the prosecutor, claimants and defendants) shall be approved by the defendant and approved by the court.

Guilty plea or *procedimiento abreviado*: please see 3.1. and 3.2.1 above.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

Upon request of the victim or the prosecutor, the court can revoke the conditional adjournment if the defendant seriously and repeatedly fails to comply with the imposed conditions, or is subject to new criminal charges (section 239 of the CCPC).

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

No, the court's consent is not required as a prior condition to engage in a settlement.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

However, settlements reached between the defendant and the prosecutor are subject to the court's approval.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

Yes, the settlement is filed before the court upon the agreement reached between the defendant and the prosecutor.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

Yes, the agreement reached between the defendant and the prosecutor is subject to the court's approval. Section 238 of the CCPC provides guidelines regarding which conditions can be reached through a settlement (please see 3.2.4).

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

Generally, the court will schedule a hearing in order to verify whether the settling company has observed the terms of the agreements. Please also see 3.2.7.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

No. Please see point 3.3.3.1 above.

**3.4 Outcome of the structured settlement**

**Statutory Provisions:**

Financial penalties – yes.

Compensation to third parties – yes.

Corporate compliance programmes – yes.

Pursuant to section 25 of the CCLA, the following outcomes of such negotiations can be imposed to corporate defendants:

- pay a certain amount for tax benefit;
- provide services in favour of the community;
- report their financial statement periodically;
- implement a compliance programme; and
- any other condition that is appropriate considering the circumstances of the case and reasonably proposed by the prosecutor.

**3.5 *De facto or de jure***

*Editor's note: The settlement process 'conditional adjournment of the investigation' is not contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). This would constitute a de jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

Yes, criminal settlements are filed in public hearings before a criminal court. Access to hearings is granted to the public. Nevertheless, in order to protect the privacy of the parties, the court is entitled to restrict publicity, denying the access of the general public to the hearing. In addition, the settlement conditions are set out in a formal document publicly available.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

The terms are publicly disclosed with certain limitations: (a) the court minutes tend to be incomplete; (b) there are no public records of negotiations; (c) there are no public records regarding the monitoring of the settlement's conditions; and (d) communications between the defendant and law enforcement (including inter-institutional communications) are not available for the public.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

There are no regulations or legal safeguards for such negotiations.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

Generally, criminal investigations are confidential. We understand that verbal reports have been provided to the OECD Working Group on Bribery in the phase of implementation of anti-corruption treaties, notwithstanding there are no government agencies responsible for gathering that information.

#### 4.2.1 If yes, is this data publicly available?

No. Please see 4.2.

### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

*Ceresita*: A local company bribed several public officials in order to illicitly obtain construction permits not allowed under local zoning laws. The case was highly scrutinised by authorities

and the press. The case was resolved through a ‘conditional adjournment of the proceeding’ thus avoiding a trial and/or conviction. As a result, the company agreed to abide ten conditions in order to adjourn the ongoing criminal investigation, including the donation of a property to the government (valued in more than US\$2.5m), construction of a recreational park and implementation of a compliance programme. Although the case did not end in a conviction – whether to the individuals and/or the legal entities – the broad coverage on local media and the severity of the conditions imposed to the defendant made this case one of the most recurrent examples of enforcement actions against legal entities in Chile.

*Salmones Colbún*: This is the first conviction based on CCLA. Nevertheless, it should be kept in consideration it was reached through a plea-bargain agreement (*procedimiento abreviado*). The court convicted both the liable individuals and the company without the benefit of a process where opposing arguments between the defence and the Public Prosecutor’s Office were presented and judged independently by a court.

Two individuals were convicted for instructing the company’s in-house lawyer to offer corrupt payments to a Chilean court official to obtaining irregular water rights in forged decision-making proceedings. The water rights were granted under the company’s name. According to the sentence, bribes up to CLP 3.8m (approximately US\$1.8k–6.8k) were paid to the public official. Ultimately, five defendants were convicted and each was sentenced to a five years’ imprisonment through probation mechanisms, absolute and indefinite disqualification of political rights and a five-year ban from holding office. Fines imposed ranged from CLP 3m–3.8m (US\$5.4k–6.8k).

The investigation resulted in two corporate defendants subject to plea bargain procedures, sentenced to pay fines of 500 UTM (*Unidad Tributaria Mensual* – a Chilean currency unit to calculate taxes, fines and custom duties) (equivalent to CLP 20m or approximately US\$37k) and a public excerpt of the sentence being published. The companies also lost 40 per cent of fiscal benefits for three years and their water use permit. The convictions also resulted in a temporal debarment from public procurement contracts.

*Aridos Maggi Limitada*: The second local conviction on CCL, also this on the basis of a plea bargain. According to the District Prosecutor, both representative of and the Chief Executive Officer of Aridos Maggi Limitada bribed two public officials of the Department of Transportation in Chillán in order for them to breach their fiduciary and probity duties. The individuals were convicted to a three years’ imprisonment (with probation mechanisms) and fines. The company was convicted by CCLA to (1) temporary prohibition to enter into contracts with governmental entities for two years (until May 2014); (2) prohibition for three years to opt for governmental benefits; and (3) ancillary fines.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Yes, pursuant to section 6.6. of the Chilean Statute Code (*Código Órgánico de Tribunales*) local courts can claim jurisdiction over criminal offences committed by Chileans against Chileans if the perpetrator returns to Chile without having been judged in the country where the offence was committed.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

As stated in section 13 of the CCPC, foreign criminal sentences are locally recognised. Therefore, no one shall be judged or punished for an offence for which he or she has already been convicted or acquitted in accordance with a foreign law enforcement process.

The effect of foreign settlements in Chile are not regulated.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

First of all, there are no legal regulations or even guidelines on that regard nor instructions from the Public Prosecutor's Office to reach other similar settlements (eg, non-prosecution agreements).

Although there are rules governing the prosecutors' decision of whether to prosecute or not (eg, *archivo provisional*, *principio de oportunidad*, *decision de no perseverar*) their nature is strictly administrative, thus such decision does not rely upon settlements with the defendants and/or judicial authorisations. In other words, the prosecutors' discretionary powers on this matter essentially rely on the sufficiency of the evidence gathered and the investigative results needed for the defendant's conviction before local courts.

Although not regularly, we have seen cases where prosecutors and defendants have negotiated precautionary measures (eg, pre-trial detentions) in exchange for voluntary disclosures and cooperation. However, prosecutors are not legally compelled to abide such informal arrangements (eg, refraining from requesting precautionary measures or refraining from filing charges in exchange of cooperation) with individual and/or corporate wrongdoers.

As a result, the existing framework may not guarantee sufficient predictability regarding the outcome of such cooperation, which may prevent defence attorneys from conducting adequate assessments regarding the benefits and risks (for their clients) resulted from such practice.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

In relation to the decision of whether to prosecute or not, such cooperation is definitely not encouraged by the existing framework. The lack of predictability (please see answer 7.3. above) might clearly represent an obstacle for engaging in such non-regulated practices. Notwithstanding, cooperation with authorities is considered as a mitigating circumstance for individual and corporate defendants, being able to opt for a reduction of the penalty (section 11.9. of the Criminal Code).

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Encouraged.

Under an economic analysis of the law, cooperation between authorities and the alleged wrongdoers may bring efficiency to enforcement actions against corruption allegations. Voluntary disclosures relying on leniency agreements would probably facilitate stronger evidence for the prosecutor in order to achieve convictions in shorter periods.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Law-makers and local law enforcement shall provide clear guidance and standards for regulating non-prosecution agreements. Authorities must grant at least certain presumptions for the offender related to either declining prosecution or reducing penalties if (1) the offender meets specific and defined standards of cooperation with the authority (eg, admission of facts); and (2) other objective conditions are met (eg, non-recidivism, the absence of aggravating circumstances).

Any serious proposal for incorporating such agreements under local procedural law shall be consistent with (1) the aims of local penal polices (eg, deterrence of corruption and corporate crime) and (2) the basic principles of the rule of law (eg, legality, equality before the law, and proportionality).

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Yes, under the existing local framework, cooperation with authorities is considered as a mitigating circumstance for sentencing, meaning that individuals and corporate defendants may opt for a reduction of the penalty. In the context of non-prosecution agreements (permitted by other jurisdictions) wrongdoers could avoid being charged and, therefore, (although hard to be measured) reduce the legal and reputational impact resulted from wrongdoing.

*Pablo Rabelly (Partner), Lorena Barragan (Associate), Gómez-Pinzón Zuleta Abogados SAS (Law Firm)*

## 1. Background: normative framework

### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

The government has signed and implemented a legal anti-corruption framework, consisting on the following rules:

- Colombia's Penal Code (CP) – Law No 599 of 2010;
- Anti-Corruption Act (Law No 1474 of 2011); and
- Liability of Legal Entities related with the Commission of Acts of Transnational corruption (Law No 1778 of 2016).

These rules criminalise abuse of office, active and passive bribery, the bribery of foreign officials, the promising or offering of gifts or undue advantage, facilitation payments, extortion, trading in influence and money laundering.

The offence of foreign bribery (or 'transnational bribery') is regulated by Article 433 of the CPC (Title XV, crimes against the Public Administration), in the following terms:

'Whoever gives or offers a foreign public official, for his own benefit or that of a third party, directly or indirectly, any money, object of financial value or any other good in exchange for committing, omitting, or delaying any action related to a financial or commercial transaction, shall incur in imprisonment for a period of nine to 15 years and a fine of 650 to 50,000 current minimum legal monthly wages.'

From the paragraph:

'For the purposes of this Article, a foreign public official is any person with a legislative, administrative or judicial position in a country, its political divisions or local authorities, or a foreign jurisdiction, whether elected or appointed. As well as anyone who exercises public functions for a foreign country, its political divisions or local authorities, or a foreign jurisdiction, whether it be in a public entity or in a state-owned company. Any officer or agent of an International Public Organisation is also considered a foreign public official.'

Pursuant liability of legal entities for the commission of transnational bribery, Article 3 of Law 1778 of 2016 empowers the Superintendence of Corporations to investigate and punish acts provided in Article 2, such as: give, offer or promise to a foreign public official, sums of money, anything of monetary value, or other utility benefit in exchange of performing, omitting or delaying any act related to the exercise of his/her functions and in connection with a business international transaction.

## **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Inter-American Convention Against Corruption and the United Nations Convention Against Corruption (UNCAC) and the US Foreign Corrupt Practices Act.

## **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Article 16 of the CP clearly provides the possibility to exercise nationality jurisdiction over Colombian natural persons who have allegedly committed offences against the public administration (including foreign bribery) in foreign territories.

In case of jurisdiction over Colombian legal entities, the Superintendency of Corporations shall have jurisdiction over conducts set out in Article 2 of Law 1778 of 2016, committed by (1) a legal entity domiciled in Colombia, or (2) Colombian subordinates and branches of foreign companies within the national territory (internal forum).

Regarding external forum, the Superintendency shall have jurisdiction over conducts set out in Article 2 of Law 1778 of 2016, committed in foreign territory, as long as:

- the legal person or the branch of a foreign company allegedly responsible is incorporated in Colombia, and/or
- such acts are executed by its subordinates and branches abroad with the consent of the parent company.

## **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Articles 405 and 406 of the CP prohibits government officials from knowingly requesting, receiving or accepting money or any other benefits, or from accepting promises of benefits, for their own benefit or for the benefit of a third party to undertake their duties (improper bribery) or to delay or omit something related to their duties or to carry out an action that contravenes their official duties (proper bribery).

Article 407 of the CP further prohibits any individual from giving or offering money or other illegal profit (bribery by giving or offering) to a public servant for his or her benefit or that of a third party:

- to unduly influence the performance of duties that the public servant must comply with;
- to influence the servant to delay or omit the performance of his or her duties; or
- to unduly influence the public servant to carry out an action that contravenes his or her official duties.

Article 433 of the CP prohibits transnational bribery in the following terms:

‘Whoever gives or offers a foreign public official, for his own benefit or that of a third party, directly or indirectly, any money, object of financial value or any other good in exchange for committing, omitting, or delaying any action related to a financial or commercial transaction, shall incur in imprisonment for a period of nine to 15 years and a fine of 650 to 50,000 current minimum legal monthly wages.’

### **1.5 Does your country provide for corporate criminal liability?**

No.

Colombia’s anti-corruption laws do not provide for criminal proceedings (prosecution) against legal persons. Colombia’s corporate liability regime for foreign bribery is essentially administrative and proceedings against legal persons for the imposition of fines are the sole responsibility of the Superintendency of Corporations. Under Colombian law, Article 34 of Law 1474 of 2011 and Article 2 of Law 1778 of 2016 provide for liability of legal persons for offences against the public administration or public property, which includes foreign bribery, in the following terms: Article 34 of Law 1474 of 2011:

‘Regardless of individual criminal liability that might arise, the measures referred to in Article 91 of Law 906 of 2004 shall apply to legal persons who have sought to benefit from the commission of crimes against public administration, or any criminal offence related with public property, made by its legal representative or managers, directly or indirectly. (...)’

Article 91 of Law 906 of 2004 – suspension and cancellation of the legal status – states:

‘At any moment before the Indictment, on petition of the office of the prosecutor, the judge with functions of guarantee control can order the competent authorities to proceed with the cancellation of the legal status or the temporary closure of the shops or establishments of legal or natural persons, subject to prior fulfilment of the requirements established by the law, whenever there are well founded motives to infer that they have been totally or partially used in criminal activities. The above cited measures will be made final in the conviction sentence whenever there is proof beyond a reasonable doubt of the circumstances that created them.’

Article 2 of Law 1778 of 2016, creates corporate liability for any Colombian company or any of its foreign subsidiaries, as well as for subsidiaries of foreign companies registered to do business in Colombia, when:

‘[...] the company, through one or more of its employees, contractors, directors or shareholders gives, offers or promises, to a foreign public official, directly or indirectly, any sum of money, any object of pecuniary value, or any other benefit or gain, in exchange for the foreign public official performing, omitting or delaying any act related to the exercise of the foreign public official’s functions and that is related to international business or international transactions.’

This regulation extends the effects of sanctions to companies absorbed or created companies under merger transactions, divided companies and/or beneficiaries under spin-off transactions and the acquirer in change of control situations. Additionally, the effects are extended to any other associative form different to corporations and to parent companies, if such parent company ‘tolerated or consented’ the bribery of the Colombian entity or branch.

Furthermore, this law is clear in stating that the administrative liability of a legal entity for acts of transnational corruption does not depend upon a previous finding of criminal liability by a criminal court against its officers or directors (Article 4).

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other.

In Colombia, two types of investigations can be conducted in the context of a foreign bribery case: criminal and administrative:

1. in criminal investigations (conducted against natural persons), Article 200 of CPC sets out the relevant investigative authorities in Colombia. The Prosecutor General’s Office (*Fiscalía General de la Nación*) is responsible for coordinating the investigation of Penal Code offences, including through direction, legal control, technical and scientific verification and supervision of activities carried out by authorities exercising judicial police functions; and
2. in administrative investigations (conducted against legal entities), the Superintendence of Corporations is the competent authority to investigate and initiate administrative investigations against legal entities for foreign bribery in international business transactions.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

Article 322 Criminal Procedure Code (CPC), Law 906 of 2004, sets out the legality principle, which requires the *Fiscalía General de la Nación* to open a criminal case if there is a reasonable suspicion that a crime has been committed. In addition, Article 336 of the CPC indicates that the prosecutor will submit the indictment only when the evidence or information legally obtained shows serious evidence of a criminal act, including the defendant’s role as perpetrator or accomplice.

In this regard, the prosecutor may only file an accusation when there is reasonable inference and evidence that the person charged is the author of the crime. This decision shall be unbiased and not decided on a discretionary basis by the prosecutor.

In terms of the administrative liability, Article 2 of Law 1774 of 2016 prescribes that legal entities might be held responsible in cases of bribery in international business transactions. Also, Article 12 states that in order to file charges, the Superintendence of Corporations shall indicate the facts and the persons under investigation. This decision will result in a law enforcement process showing action against illegal conduct.

Based on the above and as a regulated procedure, all decisions shall be motivated and on legal basis.

#### **2.1.2 Deciding what charges to file?**

No.

In terms of the administrative liability of corporations, charges must correspond to any of the activities contained in Article 2 of Law 1778 of 2016, so the Superintendence of Corporations do not have unfettered discretion in this matter.

#### **2.1.3 Deciding whether to drop charges?**

No.

In terms of the administrative liability of corporations, charges must correspond to any of the activities contained in Article 2 of Law 1778 of 2016, so the Superintendence of Corporations do not have unfettered discretion in this matter.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Criminal law: Colombia legal system allows acceptance of the charges for all offences including foreign bribery, if there is a minimum of proofs that permits the inference of the authorship or participation in the conduct. These so-called ‘preliminary agreements’ are regulated under Articles 348–354 CPC and have the effect to end the criminal trial.

Article 350 CPC provides in particular that ‘from the time of the hearing of formulation of imputation up to before the writ of Indictment is presented, the prosecution and the accused can reach a preliminary agreement concerning the terms of the imputation.’ These agreements imply an admission of guilt on the part of the accused, who, in turn, may benefit from a reduction of up to one-half of the sanction foreseen by the law. In addition, and where applicable, the accused must have returned any proceeds gained from the commission of the crime. Preliminary agreements must be presented to the judge in charge of the case, although the judge may not oppose such agreements, unless they breach ‘fundamental liberties’.

Preliminary agreements may also be reached after the indictment and up to the moment when the accused is interrogated at the beginning of the oral trial; in this case, sanctions may only be reduced by one-third.

Despite that the prosecutor is free to conclude these preliminary agreements, Article 348 indicates that they must observe the directives of the *Fiscalía General de la Nación* and the guidelines drawn as criminal policy, so as not to discredit the administration of justice and avoid their questioning.

In terms of the administrative liability of corporations, the admission of guilt is a mitigating factor for calculating fines and may result in a penalty discount if the following conditions are fulfilled (Article 19 Law 1778 of 2016): (1) provision of useful information for the investigation and prosecution of the individuals involved in the transnational bribery; and (2) the promptness of the cooperation with the Superintendence of Corporations.

Waiver of the penalties is available only if the legal entity self-reports before the superintendence has initiated its investigation and has not performed the contract (if any) that is derived from the international transaction tainted by corruption. If the legal entity cooperates after the superintendence initiated an investigation, it may still benefit from a reduced sanction (up to 50 per cent reduction).

Notwithstanding, please note that the decision to waive or reduce fines is an unilateral decision of the public authority taken through an administrative act and not the result of a negotiation with the legal entity under investigation.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Criminal law: Under Article 250 of the Colombian Constitution, the prosecutor has the obligation to prosecute and investigate the facts that could be characterised as crimes brought to its attention through routine channels, formal accusations, special petitions and legal notifications, on the condition that there are sufficient reasons and factual circumstances that indicate the possible existence of the offence.

Article 322 CPC sets out the legality principle, which requires the prosecutor to prosecute offences except when the opportunity principle applies. Under Article 323 CPC, the principle of opportunity is defined as:

‘the Constitutional faculty that permits the *Fiscalía General de la Nación*, notwithstanding the existence of a basis for proceeding with a criminal investigation, to interrupt, renounce or suspend it for reasons of criminal policies according to causes clearly defined in the Law subject to the regulations emitted by the *Fiscalía General de la Nación* and submitted for legal control before a supervisory judge.’

According to the Constitutional Court, the opportunity principle is exceptional and has been classified as a ‘regulated’ power, as opposed to a discretionary power. Therefore, prosecutors are unable to suspend, discontinue or abandon criminal proceedings except in cases falling under the opportunity principle set out in Article 324 CPC.

As mentioned in question 2.1.3 the opportunity principle may be applied in cases where: (1) the victim has been compensated; (2) the defendant is extradited to another country; (3) the defendant collaborates before the judgment hearing to prevent the continuation of the crime or agrees to serve as a prosecution witness against other defendants; (4) the defendant has suffered serious physical or moral harm; (5) or when the criminal procedure implies risk or serious threat to the Foreign Security of the State.

In administrative proceedings, Article 209 of the Colombian Constitution set out the principles that determine the exercise of administrative functions, which are equality, morality, efficiency, economy, speed, impartiality and publicity.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

There are no thresholds that determine when a prosecutor should make a decision to impose charges.

In administrative proceeding, it is worth mentioning that the economic benefit obtained is a factor to be taken into account when establishing the amount of the fine (Article 7 of Law 1778 of 2016).

#### **2.3.1 How clearly are the factors of this threshold defined?**

It is not defined in the law nor is guidance provided on the application of this aggravating or mitigating criterion.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Criminal law: is possible under preliminary agreements (see section 2.1.4).

Administrative law: all resolutions of foreign bribery allegations shall be made through an administrative act, wherein the Superintendence of Corporations unilaterally reviews if the conditions for granting benefits were met by the wrongdoer and defines the corresponding sanction or its exemption, if applicable. In any case, it is an agreed solution with the legal entity.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

As mentioned in section 2.1.4 the admission of guilt is an essential condition for entering into preliminary agreements.

### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Preacuerdos.*

### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Commitments to institute new prevention and detection measures.

Assistance in investigating and prosecuting individuals.

Administrative liability: Law 1778 of 2016 (Article 7) sets forth specific rules for calculating fines (aggravating and mitigating factors), including:

- the economic benefit obtained or sought by the transgressor;
- financial solvency of the legal entity;
- whether the legal entity is a repeat offender;
- whether the legal entity sought to obstruct the investigation or refused to cooperate;
- use of an intermediary or any means to obscure the infraction or the benefits bestowed upon the public official;
- admission of guilt before the formal evidence-gathering by the superintendence begins (for first-time offenders);
- existence and implementation of compliance programmes;
- compliance with interim measures;
- adequacy of the pre-transaction due diligence (for assessing liability of the successor in interest); and
- whether the legal entity has denounced the employees involved in the commission of the transnational bribery.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. Please see section 2.1.4.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No. Please see section 2.1.4.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes. Please see section 2.1.4.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No.

Please see section 2.1.4, Article 351 of CPC: preliminary agreements concluded between the prosecutor and accused are mandatory for the judge of knowledge, except if it violates fundamental guarantees.

**3.5 De facto or de jure**

*Editor's note: no corporate criminal liability. The settlements process for foreign bribery occurs in the administrative sphere, see Law 1778 of 2016. All resolutions of foreign bribery allegations shall be made through an administrative act (see section 3.1). This constitutes a de jure settlement process following the classification used in this report. In addition 'preliminary agreements' regulated under Articles 348–354 Criminal Procedure Code can have the effect to end the criminal trial (See section 2.1.4).*

**4. Transparency**

**4.1 Public access to information on settlements**

**4.1.1 Is information about settlement available to the public?**

Yes.

Under Article 74 of the Colombian Constitution: 'all persons have the right to access public documents except in cases established by law.' Article 2 of Law 1712 of 2014 established that all information in the possession, custody or under the control of a public authority is public and may not be reserved or limited but by constitutional or statutory provision. This regulation makes it possible to keep confidential information that affects public interests (Article 19) and classified information that affects private interests (Article 18). Classified information refers to information that if disclosed, it may cause damage to certain rights of natural persons or legal entities, especially related to their intimacy.

Referring to preliminary agreements, as we are not criminal lawyers we cannot provide information on this matter. Regarding resolutions on foreign bribery allegations of legal entities, we might believe that it will be in the public domain, but as no foreign bribery cases have been decided to date in Colombia, we cannot confirm the position of the Superintendence of Corporations.

**4.1.2 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

As no foreign bribery cases have been decided to date in Colombia, we cannot provide information on this matter.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Criminal investigations (natural persons): the Attorney General's Office and criminal judges.

Administrative investigations (legal entities): the Superintendence of Corporations.

**4.2.1 If yes, is this data publicly available?**

No.

As no foreign bribery cases have been decided to date in Colombia, we cannot provide information on this matter.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

Regarding administrative proceedings, the law determines the benefits for collaboration in cases of foreign bribery. Nevertheless, the decision regarding the application of such benefits is based on subjective criteria that make it difficult to determine the outcome of such cooperation.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Regarding the administrative liability of corporations, we believe that the existing framework encourages cooperation. The penalties are significantly reduced depending on the quality of the information provided and the opportunity in which the information is received by the Superintendency of Corporations. However, as foreign bribery regulations regarding corporate liability are only recently adopted in Colombia, it is too early to issue a statement on this matter.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Regarding the administrative liability of corporations, the cooperation should be encouraged to collaborate to obtain clarity and efficiency of law enforcement and detection of corruption offences.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Regarding the administrative liability of corporations, the lack of regulations regarding double jeopardy or outcomes of a foreign conviction or settlement (title 5 of the questionnaire), may lead to a possible loophole that may discouraged such cooperation in a near future.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

As mentioned previously, there are clear advantages if companies cooperate with the Superintendence of Corporations, as it may be exempted, totally or partially, from the penalties prescribed by law.

*Ernesto Velasco Granda and Esteban Baquero Correa, Associates at Ferrere, Ecuador Office (Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Article 280 of the Organic Integral Criminal Code of Ecuador (COIP), published in Official Gazette 180, dated 10 February 2014, provides that bribery elements are; the delivery, transfer, offer or promise of an undue payment, or gift, or anything of value; or the taking or omission of an official action that leads to either an appropriate or inappropriate result. Sanctions imposed on public officials and individuals could be between one and seven years in prison.

Article 281 of COIP establishes the offence of extortion by a public official of a state authority or by others, as well as for those who order or demand undue rights, quotas, contributions, income, interests, salaries or gratifications. Public officials could get prison time between three and five years or, in cases where violence or threats were used, five to seven years.

COIP also determines the punishment for influence peddling or for the mere offer of influence peddling. As per Articles 285 and 286 public officials who commit the crime, as well as those who offer to influence peddling in exchange for something of value, will be sanctioned with three to five years in prison.

Embezzlement consists of a public official or individuals acting under state authority, obtaining for their own benefit or on behalf of third parties, or appropriating, abusing or arbitrarily using public property. Prison sanctions could be between ten to 13 years (Article 278 COIP).

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Ecuador has ratified the United Nations Convention against Corruption (UNCAC) published in the Official Gazette 166 on 15 December 2005 and the Inter-American Convention against Corruption (IACAC) published in the Official Gazette 153 on 25 November 2005. Ecuador is also a participant in the Andean Plan of Action against Corruption. However, Ecuador has not enacted specific laws implementing the provisions of these conventions.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No. There are no foreign bribery regulations in Ecuador.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No. Facilitation payments are strictly forbidden because they are considered as plain bribes.

**1.5 Does your country provide for corporate criminal liability?**

No. There is no corporate criminal liability for corruption-related crimes.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

All sort of investigations and prosecutions are in centralised of the State Prosecutor's Office, which is entitled to investigate and prosecute corruption-related crimes. In addition, the State Comptroller's Office audits public funding and expenses. Therefore, it is able to determine within its audit reports the existence of initial evidence for prosecuting corruption-related crimes. These reports are handled to the State Attorney's Office. Finally, the Financial and Economic Analysis Unit (UAFE) is also a key stakeholder on the anti-corruption enforcement, it is in charge of investigate and prevent money laundry. Usually the UAFE sends reports to the State Prosecutor's Office in order for it to initiate/reinforce prosecutions.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

These prosecutors' attributions are contained on Article 444 of the COIP though they may be subject to appeals.

**2.1.2 Deciding what charges to file?**

Yes.

These prosecutors' attributions are contained on Article 444 of the COIP though they may be subject to appeals.

**2.1.3 Deciding whether to drop charges?**

Yes.

These prosecutors' attributions are contained on Article 444 of the COIP though they may be subject to appeals.

**2.1.4 Deciding whether or not to plea bargain?**

No.

There is no plea bargain itself within Ecuadorian criminal legislation. The closest would be the speedy trial, in which a sanction is mandatory and is limited to crimes with prison time up to ten years, there must be a guilt acknowledgement from the defendant and the sanction cannot be higher than the proposed by the prosecutor during the criminal trial. Another possibility is 'effective cooperation', by which

the defendant pleads guilty and at the same time collaborates with the prosecutor by sharing evidence that lead to conviction of related major crimes. In no case shall the sanction can be less than 20 per cent of the minimum prison time for the collaborator's crime. Fines cannot be waived.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Defence mitigation argued to a judge.

Defence mitigation argued to the prosecutor.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

In order to comply with principles such as efficiency and opportunity, prosecutors must present properly based cases in order to charge and continue prosecutions.

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

There are no specific factors, they are assessed in a case-by-case basis and it is upon the findings and investigations obtained by the prosecutors.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

### **3.5 *De facto or de jure***

*Editor's Note: voluntary disclosure by natural persons before the justice authorities and/or effective collaboration in investigation can lead to a speedy trial or reduction of penalty. The process of 'effective collaboration' is contingent upon an admission of guilt (see section 2.1.4). This constitutes a de facto, guilty plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

There are no settlements in Ecuadorian criminal legislation. As stated above the closest scenarios are the speedy trial and the effective cooperation, for both cases information is publicly available.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

All criminal cases related to corruption crimes are publicly available.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

There is no crime such as foreign bribery within Ecuadorian criminal legislation.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

Foreign bribery is not an offence, though the *ne bis in idem* principle is guaranteed by the Ecuadorian Constitution on letter (i), number 7 of Article 76 and number 9 of Article 5 of the COIP.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

As stated above, there is no chance that cooperation leads to a non-prosecution, the closest scenarios are the speedy trial and the effective cooperation, for both there must be a conviction with prison time and fines.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Both, speedy trial and effective cooperation could get defendants significant prison time reductions. Recent cases have shown that even high-profile wrongdoers have applied for these alternative prosecutions and their convictions were substantially reduced. See previous comment.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

COIP's penalties reductions are too flexible for corruption-related crimes. Cooperation should be encouraged but reductions should be no more than 50 per cent of the prison time and fines.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

According to the previous answer, Congress should reduce the benefits for cooperation and speedy trials related to bribery, embezzlement, extortion and influence peddling. Alternatively, prosecutors should apply their discretion wisely when agreeing to reduce penalties for corrupt individuals and public officials, considering the great damage they have caused to society.

*Federico Silva, Counsel, Ferrere (Law Firm)*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Receiving Bribes (*Cohecho Pasivo*): Under Articles 300 and 301 of the Criminal Code, a public employee who requests, allows him/herself to be promised, or accepts a benefit in exchange of an act related to the functions performed by such person, can be sanctioned with up to ten years of imprisonment or be fined.

Paying a Bribe (*Soborno*): Under Articles 302 and 303 of the Criminal Code, whoever offers, promises or guarantees a benefit to a public employee in exchange for an act related to the functions performed by such person, can be sanctioned with up to five years of imprisonment or be fined.

#### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Paraguay is a party to:

- the United Nations Convention Against Corruption, ratified by Law 2,535/04;
- the United Nations Convention against Transnational Organised Crime, ratified by Law 2,298/03;
- and the Inter American Convention Against Corruption, ratified by Law 977/96.

However, up to this date Paraguay has not enacted special rules implementing the provisions of these instruments as ‘anti-corruption laws’.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

No.

The anti-bribery provisions of the Paraguayan Criminal Code only apply to local public officials and persons bribing them. These provisions neither extend to bribes paid to persons who are not local public officials nor beyond Paraguay’s territorial limits. Foreign bribery does not fall within any of the exceptions for application of Paraguayan criminal laws to crimes committed abroad established by Articles 7 and 8 of the Criminal Code.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

A facilitation payment is a payment made to a public official that acts as incentive for the official to complete some action or process expeditiously, to the benefit of the party making the payment. Articles 300 and 301 of the Criminal Code only make reference to ‘allow being promised’ or accepting ‘a benefit’ in exchange of an act related to the official’s functions. Hence, any benefit paid in exchange of an act related to the official’s functions may amount to bribery, so facilitation payments are not legally allowed in Paraguay.

**1.5 Does your country provide for corporate criminal liability?**

No.

No. Under Article 16 of the Criminal Code natural persons acting as members of the bodies of legal entities or as proxies of legal entities are personally liable for criminal offences committed by the legal entity in whose name they perform. Corporations are not liable for criminal offences.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other.

Corruption offences are not typified as private wrongs by Article 17 of the Code of the Criminal Process. Hence, they are deemed to be public wrongs, which, as per Article 14 of the Code of the criminal process, have to be investigated and prosecuted by agents of the Attorney General’s Office (*Ministerio Publico*). The Attorney General’s Office has a Unit of Economic Crimes and Anticorruption, but it only investigates and prosecutes criminal offences related to corruption affecting assets of public entities. Hence, criminal offences related to corruption that do not affect assets of public entities have to be investigated and prosecuted by ordinary agents of the Attorney General’s Office. Liability will be determined by ordinary criminal courts taking into account the findings of the investigation conducted by the competent agent of the Attorney General’s Office.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

Agents of the Attorney General’s Office are free to decide who to charge with a crime considering the circumstances of each case, based on objective criteria supported on evidence.

**2.1.2 Deciding what charges to file?**

Yes. See 2.1.1.

### **2.1.3 Deciding whether to drop charges?**

Yes.

Agents of the Attorney General's Office can request charges against a person to be dropped if there is not enough evidence to prosecute. However, the competent court has the final decision regarding this matter.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Under a plea bargain, upon an agreement in a criminal case between the prosecutor and defendant, the latter agrees to plead guilty to a particular charge in return for some concession from the prosecutor. In Paraguay, the chance of obtaining a reduced penalty upon negotiations among the competent agent of the Attorney General's Office and the accused person is possible, under Articles 21 (conditional suspension of criminal proceedings), 420 and 421 (summarised proceedings) of the Code of the Criminal Process.

As per Article 21, of the Code of the Criminal Process, when the penalty does not exceed two years of imprisonment and it can be expected that because of the conditions of life in freedom of the person and subject to obligations, conduct rules or subjection to a parole advisor, the person can provide satisfaction for the offence committed and that another crime will not be committed, with the scope of Article 44 of the Criminal Code, the person may request the conditional suspension of the criminal proceedings upon admitting the facts attributed to him/her, if the harm has been repaired, if an agreement has been signed with the victim or if a will to repair has been shown. These conditions are cumulative.

At the same time, under Articles 420 and 421 of the Code of the Criminal Process, resorting to a summarised proceeding is another alternative to obtain a reduced penalty. According to these sections, the parties can assess the weight of the evidence against the suspect under investigation. It can be used in criminal offences sanctioned by up to five years of imprisonment if the accused person admits to the facts. To resort to it, the competent public prosecutor, the plaintiff and the accused person jointly or separately have to file a brief where the facts are admitted and the pretensions of the involved parties are detailed. After this the court has to hear the accused person, the victim or the plaintiff and issue a pronouncement absolving or convicting, as it may correspond.

In both instances the Public Prosecutor has wide discretion to decide whether or not to plea bargain.

## 2.2 Which rules determine the exercise of prosecutorial discretion in your country?

(You can choose more than one option)

Principle of opportunity.

As per Article 19 of the Code of the Criminal Process, which establishes the opportunity principle, with the consent of the competent court, the Public Prosecutor may not prosecute a criminal offence if:

- ‘(i) the proceedings involve insignificant facts or if because of the reduced degree of reproach of the author or participant there is no public interest in prosecution; or
- (ii) if the Criminal Code or other law allows disregarding the penalty; or
- (iii) if the penalty expected for the criminal act lacks importance considering that: another sanction has already been imposed; or a sanction is expected for other criminal acts already prosecuted; or another sanction may be imposed in proceedings abroad; or
- (iv) if the suspect’s extradition or expulsion from Paraguay has been ordered because of a crime committed in the country.’

To apply the principle of opportunity in the instances referred to in (i) and (ii), the accused person must have had repaired the damages caused, entered into an agreement with the victim in that regard, or shown a will to repair.

As per Article 20, the decision not to prosecute a criminal offence extinguishes the public criminal action regarding the favoured participant. If the decision is founded on the insignificance of the facts, it benefits all the participants. However, if the case involves the situation described in 19 (iii), prosecution is just suspended until the respective sentence is issued, when the cancellation or continuation of prosecution has to be decided. If the pronouncement does not satisfy the above expectations because of which criminal prosecution was suspended, the court may order its recommencement.

## 2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?

Yes.

On one hand, as per Article 18 of the Code of the Criminal Process, the competent prosecutors of the Attorney General’s Office (*Ministerio Publico*) are obliged to prosecute all public wrongs that they may get to know, as long as there is enough evidence about their existence. On the other hand, Article 17 of the Code of the Criminal Process determines that the following conducts are deemed to be private wrongs: physical mistreatment; injury; threat; medical treatment without consent; property trespass; breach of privacy; breach of communications secrecy; false accusation; defamation; slander; libelling of death; harm; unauthorised use of motor vehicles; and breach of copyrights or patents. Hence, save in these cases, where prosecution must take place at the instance of the victim, the competent public prosecutors of the Attorney General’s Office are obliged to prosecute all public wrongs that they may get to know, as long as there is enough evidence about their existence. This obligation includes acts of public bribery. Private bribery is not a stand-alone offence

in Paraguay. It may fall under the criminal offence of ‘breach of trust’ of Article 192 of the Criminal Code, but it will have to be proved that the offender had taken up the obligation to protect a relevant economic interest for a third party under a contract and within the scope of such contract caused or failed to avoid an economic harm to the principal.

### **2.3.1 How clearly are the factors of this threshold defined?**

Somewhat clearly defined.

As explained in the previous point, Article 17 of the Code of the Criminal Process explicitly states the conducts deemed to be private wrongs that should not be prosecuted at the motion of agents of the Attorney General’s Office.

### **2.4 Do these standards differ for individual and corporate defendants?**

Yes.

As explained in 1.5, the Paraguayan Criminal Code does not provide for corporate criminal liability. Under Article 16 of the Criminal Code, natural persons acting as members of the bodies of corporations or as proxies of corporations are personally liable for criminal offences committed by the corporation in whose name they perform.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

Foreign bribery is not a criminal offence in Paraguay.

*Editor’s Note: based on the information in this report there is no structured settlements for corruption offences process envisaged within this jurisdiction (see section 3.1).*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

Yes.

As explained in Section 2.1.4, in Paraguay the only ways to obtain a reduced penalty upon negotiations among the competent agent of the Attorney General’s Office and the accused person (plea bargaining) and enter into an agreement are: (1) the conditional suspension of criminal proceedings (Article 21 Code of the Criminal Process); and (2) the summarised proceedings (Articles 420/1 of the Code of the Criminal Process). These two channels must necessarily end in a judicial sentence issued by the competent court.

As per Article 2.1 (c) of Law 5,284/14 Access to Public Information, the judiciary and the Attorney General's Office are public sources of information. Hence, information regarding settlements should be extensively available to the public if the channels established by Law 5,284/14 are followed to request such information. Neither the Code of the Criminal Process nor the Criminal Code nor any other piece of legislation classifies judicial pronouncements as confidential information, which is a condition under Article 22 of Law 5,284/24 to refuse disclosure.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

As the judiciary and the Attorney General's Office are public sources of information under Law 5,284/14, applicants should be able to obtain extensive information regarding a settlement. This includes the whole file through which the process was conducted.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Very limited.

The Code of the Criminal Process does not have specific rules allowing a company to negotiate with an agent of the Attorney General's Office the contents of public statements that will be made in a case to reach an agreement. Since the criminal process should be conducted according to the legality principle, we understand that negotiations regarding statements are likely to be very limited. All will depend on the circumstances of each case.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

As already mentioned, in Paraguay foreign bribery is not a criminal offence. Nonetheless, in Paraguay all data regarding investigation, prosecution and resolution of criminal offences is collected and processed either by an agent of the Attorney General's Office or a Criminal Court.

**4.2.1 If yes, is this data publicly available?**

Yes.

As explained in 4.1.2, the judiciary and the Attorney General's Office are public sources of information under Law 5,284/14. Hence, people who ask for the information they produce and process following the proceedings established in such law should be able to access to such information. Article 12 allows requesting the information by email. The website of the judicial branch is: [www.pj.gov.py](http://www.pj.gov.py). The website

of the Attorney General's Office is: [www.ministeriopublico.gov.py](http://www.ministeriopublico.gov.py). However, in practice it is difficult to obtain the information by requesting it by email, so filing the request in writing at the respective entity is advised.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

As long as the requirements for conditional suspension of criminal proceedings (Article 21 Code of the Criminal Process) or to resort to summarised proceedings (Articles 420/1 of the Code of the Criminal Process) explained in Section 2.1.4 are met, a structured settlement regarding a case may be reached among the defendant, the Attorney General's Office and the competent court. All will depend on the circumstances of each case.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

Corruption offences committed abroad are not typified as criminal offences in Paraguay under the Criminal Code. Hence, there are no specific rules that would apply when Paraguay is competent to make a claim regarding a foreign corruption offence and other domestic jurisdictions are competent as well. In principle, the only jurisdiction with competence over the offence would be that where such offence was committed.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

Paraguay has not yet introduced corporate liability for corruption offences. Corruption offences committed abroad are not criminal offences under the Paraguayan Criminal Code. Hence, if a corporation has been engaged in a transaction that allegedly violates Paraguayan anti-corruption laws, neither a foreign conviction nor a foreign settlement with respect to the same transaction will have effect in the country.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

As explained in Section 2.1.4, in Paraguay the only ways to obtain a reduced penalty upon negotiations among the competent agent of the Attorney General's Office and the accused person (plea bargaining) and enter into an agreement are: the conditional suspension of criminal proceedings (Article 21 Code of the Criminal Process); and the summarised proceedings (Articles 420/1 of the Code of the Criminal Process). If the conditions required by these rules are met, the outcome of negotiations within them is likely to be reasonably predictable.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Yes. In Paraguay cooperation between the prosecuting authority and alleged wrongdoers is encouraged by the existing framework of rules. Article 21 of the Code of the Criminal Process allows getting a reduced punishment if the suspect admits the facts attributed to the person, the harm has been repaired and an agreement has been signed with the victim. Besides, Articles 420 and 421 of the Code of the Criminal Process allow resorting to a summarised proceeding and subsequently obtaining a reduced penalty if the accused person admits to the facts and files a brief stating his/her pretensions.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Yes. In Paraguay cooperation between the authorities and alleged wrongdoers should be encouraged in order to alleviate the work burden that public prosecutors and criminal courts face.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Publicising the available means for cooperation among alleged wrongdoers and the competent authorities, as well as the benefits that this cooperation may bring, is likely to serve as a useful step to encourage this cooperation.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

As already mentioned, corruption offences committed abroad are not typified as criminal offences in Paraguay. Hence, the advantages for companies in cooperating with the authorities in this kind of situations are rather likely to be reputational.

*José Luis Medina Frisancho, Lawyer, Rodrigo, Elias & Medrano Abogados (Law Firm)*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes

- Law No 27806, Law of Transparency and Access to Public Information; and Supreme Decree No 072-2003-PCM, which approved its Regulation;
- Law No 28024, Law that regulates lobbying in the Public Administration; and Supreme Decree No 099-2003-PCM, which approves its Regulation;
- Law No 27815, Law on a Code of Ethics in Civil Service;
- Supreme Decree No 033-2005-PCM, which approves the Regulation of the Law on a Code of Ethics in Civil Service;
- Law No 29976, which creates the Anticorruption High Level Commission;
- Supreme Decree No 119-2012-PCM, which approves the National Plan against Corruption;
- Supreme Decree No 089-2013-PCM, which approves the Regulation of the Law that created the Anticorruption High Level Commission;
- Law No 27588, Law that establishes prohibitions and incompatibilities of public officials and servants, as well as of the people who render services to the State under any contractual modality; and its Regulation (Supreme Decree No 019-2002-PCM);
- Law 29542, Law on protection of whistleblowers in the administrative field and effective collaboration in criminal matters; and Regulation (Supreme Decree No 038-2011-PCM);
- Peruvian Criminal Code (with last amendments introduced by Legislative Decree 1243, published on 22 October 2016);
- Law No 30424 that regulates the administrative liability of legal entities for the commission of bribery, money laundering and financing of terrorism (amended by Legislative Decree No 1352);
- Criminal Procedure Code (Legislative Decree No 957), recently modified by Legislative Decree 1307 (published on 30 December 2016) and in force at national level for corruption offences;
- Law 30225, Law on Public Procurement and Regulation (Supreme Decree No 350-2015-EF), which establish the general framework for public procurement, as well as duties, impediments, incompatibilities and prohibitions for individuals or companies that participate or intend to participate in these procurement procedures (recently modified

by the government, through Legislative Decree No 1341, to incorporate impediments for natural and legal persons involved in corruption offences);

- Law 30161, Law that regulates the filing of an affidavit of incomes and assets of public officials and civil servants of the State (until the regulations of this law is approved, governs the previous Law on the same subject, Law 27482);
- Law 30353, Law that creates the Registry of Debtors of Civil Compensations (REDERECEI);
- Legislative Decree 1295, amending Article 242 of Law 27444, Law of General Administrative Procedure and establishes provisions to guarantee integrity in public administration;
- Legislative Decree No 1327 and its regulation (Supreme Decree No 010-2017-JUS), which establishes measures of whistle-blower protection, such as reservation of identity, labour protection and other additional measures for those who report in good faith alleged acts of corruption committed by civil servants;
- Legislative Decree No 1353, which creates the National Authority for Transparency and Access to Public Information, which is tasked with proposing policies on public transparency, monitoring compliance with the rules of the matter and resolving disputes of citizens with public entities in this area;
- Urgency Decree No 003-2017 and its Guidelines (Ministerial Resolution No 0061-2017-JUS, No 0066-2017-JUS and No 0071-2017-JUS), which are exception rules approved by the Peruvian government to avoid the shutdown of public works or public-private partnerships and disruption of the chain of payments as a result of acts of corruption committed by concessionaires or contractors or by their partners or members of the consortium who have been convicted or have admitted to committing crimes against public administration or money laundering; for such purposes, establish limitations to said companies regarding the availability of their assets, in order to guarantee the payment of civil reparations judicially imposed in favour of the Peruvian State;
- Supreme Decree No 027-2017-PCM, which applies the reward benefit established in Legislative Decree No 1180 to promote the capture of persons responsible for serious corruption offences;
- Legislative Decree No 1279 and Regulation (Supreme Decree No 003-2017-JUS) establishing the duty to register the relationships of kinship and other links arising from the registrations carried out by the National Registry of Identification and Civil Status (RENIEC) oriented to contribute to the effectiveness of the fight against corruption;
- Supreme Decree No 092-2017-PCM, approving the National Policy on Integrity and Fight against Corruption;
- Supreme Decree No 42-2018-PCM, which establishes measures to strengthen public integrity and fight against corruption;

- Supreme Decree No 44-2018-PCM, which approves the National Plan for integrity and fight against Corruption 2018-2021;
- Law No 30737, that ensures the immediate payment of civil damages in favour of Peruvian State in cases of corruption and related crimes; and its Regulation (Supreme Decree No 096-2018-EF);
- Law No 30742 that strengthens the General Controller's office and the National Control System; and
- Law No 30057 Civil Service Law and Regulation (Supreme Decree No 040-2014-PM).

## **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Peru has signed and ratified both regional and international instruments, such as: Interamerican Convention against Corruption (Organization of American States) and the United Nations Convention against Corruption. In addition, Peru is in the internal process of formally adhering the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, after being incorporated as a full member of the OECD Working Group on Bribery in October 2016.

## **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

According to Article 1 of the Criminal Code, Peruvian criminal law applies to any person who commits an offence in the territory of the Republic, with the exceptions under international law (principle of territoriality). However, there are exceptions to this principle, provided for in Article 2 of the Criminal Code (principle of extraterritoriality). Among these exceptions is the so-called 'active personality principle', according to which Peruvian criminal law applies to all crimes committed abroad, when committed by Peruvians, provided that the following conditions are met: (1) the offence is provided as extraditable under Peruvian law; (2) the offence is punishable also in the country in which it was committed; and (3) the perpetrator enters the Peruvian territory in any way.

In application of these general rules, if, for example, a Peruvian citizen commits the offence of foreign or transnational bribery (Article 397-A of the Criminal Code: offering or delivering to a foreign public official an undue gift or benefit to obtain or retain a business) in a foreign country, he/she could be sanctioned according to the Peruvian law when the conditions indicated above are fulfilled.

It is relevant to point out that pursuant to Article 2 of the new Corporate Liability Law in corruption and money laundering offences (Law 30424, amended by Legislative Decree 1352), parent companies will be liable only if the executives or employees of its affiliates or subsidiaries who commit acts of corruption or money laundering, acted under said parent's orders, authorisation or with its consent.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

In Peru, there is no rule that specifically allows facilitation payments, such as the one provided for in the FCPA (section 78dd-1 (b), 78dd-2 (b), 78dd-3 (b)). On the contrary, giving money or economic benefits (regardless of the amount) to a public official to perform or expedite routine acts could lead to the commission of the crime called ‘improper active bribery’ (Article 397 Criminal Code), which punishes who offers or grants an economic benefit to a public official, even if it is to carry out acts of his/her office, without failing to fulfill his obligations (eg, giving money or gifts to a licensing officer, in order to obtain the licence or permit certificate more expeditiously). Peruvian legislation does not set maximum or minimum limits on gifts to public officials, nor does it allow expressly courtesy gifts or ‘facilitation payments’.

Simple invitations, gifts or courtesy acts that are usual in the commercial field (eg, low value Christmas presents, lunch invitations) are not considered per se illegal since they are not aimed to influence the behaviour of the public officer (ie, the performance or omission to perform certain activity). However, such invitations, gifts or courtesy acts generate a legal risk, as they may trigger criminal investigations, insofar as there is circumstantial evidence pointing out that they are a form of disguised bribery, for example in the following cases: disproportion between the value of the invitation or gift and the alleged reason for the invitation or gift (eg, an extremely expensive Christmas gift); the existence of a decision or act by the involved public officer or its imminent production, which results favourable to the individual who offers the invitation or gift; the concealed or informal character of the invitation, among others.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Under Law No 30424 – enacted in April 2016, amended by Legislative Decree 1352 – legal persons may be ‘administratively’ liable for corruption offences (domestic and foreign), money laundering and financing of terrorism, when the offence is committed on behalf of the legal person and in its direct or indirect benefit by: (1) its administrators or representatives in the exercise of the functions of their office; (2) natural persons providing any service to the legal person who, being under the authority or control of the managers or representatives, act on the orders or authorisation of the latter; and (3) natural persons mentioned in the preceding item, when control and monitoring is not duly exercised on them by managers or representatives.

Although the law refers to an ‘administrative’ liability of the legal person, it must be considered that the applicable procedural rules are of a criminal nature, according to the constitutional guarantees of the criminal process, the investigation is directed by a criminal prosecutor and the sanction is imposed by a criminal judge. Therefore, it is considered that the law establishes, in the end, a criminal responsibility.

This law expressly states that the legal entity involved in the commission of any of the indicated crimes shall be exempted from liability if, prior to the commission of said crimes, it adopted and implemented a prevention programme within the organisation suited to its nature, risks, needs and characteristics. If despite having implemented an effective crime prevention programme, the organisation's representatives, administrators, executives or employees were able to evade it in order to commit criminal acts of corruption and/or money laundering, criminal liability will be limited to the individuals involved in committing the crime, and will not extend to the organisation itself.

Law No 30424 entered into force on 1 January 2018.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

In Peru, there is no authority that is solely and exclusively responsible for investigating and prosecuting corruption in international business transactions. The offence of foreign bribery, as well as all other crimes that may be prosecuted for public action, is investigated by the Prosecutor's Office, with the assistance of the National Police. The sanction is imposed by a criminal judge. As indicated above, the same will happen with companies involved in acts of corruption or money laundering.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

In Peruvian criminal justice system, prosecutors do not have absolute and unfettered discretion in order to make decisions about prosecuting a person. They are fundamentally linked to the principle of legality, so they are subject to the mandates of the law in the exercise of their criminal prosecution functions. In fact, Article 1 of the Organic Law of the Prosecutor's Office establishes as one of the main functions of prosecutors, the defence of the principle of legality. The law establishes the discretionary spaces that prosecutors have in criminal prosecution.

There are different levels of discretion for the prosecutor to charge someone with a crime. These vary depending on the stage of the criminal investigation and process.

In the initial stage (preliminary proceedings), the prosecutor may initiate an investigation against a person on the basis of a minimally reasonable suspicion (ie, when he becomes aware of the suspicion of the commission of a fact that has the characteristics of an criminal offence) (Article 329.1 of the Code of Criminal Procedure).

In order to move to the next stage (formalisation of preparatory investigation), in which the prosecutor imputes specific charges and formally initiates the criminal process, the prosecutor requires more solid evidence (probable cause) revealing the existence of an criminal offence (Article 336.1 of the Code of Criminal Procedure).

The next stage (indictment) (in which the prosecutor presses charges before the judge) requires the prosecutor to have conviction about the commission of the crime and the criminal responsibility of the accused (Article 349 *et seq* of the Code of Criminal Procedure).

### **2.1.2 Deciding what charges to file?**

No. Please consider response to question 2.1.1.

### **2.1.3 Deciding whether to drop charges?**

No.

As noted previously, prosecutors are defenders of legality, so the exercise of their duties is subject to what the law provides. According to Peruvian law, the prosecutor may close a case following these rules:

1. in the preliminary proceedings, if after evaluating the case and having carried out investigative acts, the prosecutor considers that the facts denounced do not constitute an offence, there is no minimum evidence which supports them or the criminal action is extinguished (statute of limitations, death of the defendant , etc); and
2. in the preparatory investigation stage, the prosecutor may request the dismissal of the process to the judge, when:
  - the fact was not performed or cannot be attributed to the defendant;
  - the fact does not conform to the legal requirements of the offence, is justified by the law or there is an exemption from criminal responsibility;
  - the criminal action has been extinguished; or
  - there is no reasonable possibility of incorporating new evidence to move to trial against the defendant.

### **2.1.4 Deciding whether or not to plea bargain?**

No.

Pursuant to Peruvian law, there are mainly three legal mechanisms to ‘plea bargain’ and abbreviate the criminal process:

1. principle of opportunity (Article 2 of the Code of Criminal Procedure), according to which prosecutors may abstain from prosecuting. These cases, specifically provided by law, are mainly related to offences of minimum or low sensitivity or that do not seriously affect the public interest. In order to apply the principle

of opportunity, the alleged perpetrator must accept the charges and reach an agreement with the victim in order to repair the damage caused by the offence;

2. 'anticipated termination', under which the prosecutor and the defendant and his/her defence attorney, after accepting the charges, reach an agreement on the penalty – and other sanctions to be imposed, like fines, disqualification, etc, as appropriate – and civil compensation. Anticipated termination allows reducing the penalty in a sixth part. This agreement is presented to the judge, who is empowered to approve or disapprove it (Article 468 *et seq* of Criminal Procedure Code), following a hearing with the participation of the prosecutor, the accused and his defence attorney. If the judge approves it, the process ends. This procedural mechanism proceeds with respect to any type of offence. However, the reduction benefit is not applicable for members of criminal organisations; and
3. 'anticipated conclusion of the trial': it is a legal figure that can occur at the beginning of the trial. The judge asks the accused if he/she admits to being the perpetrator and responsible for civil damages; if the defendant responds affirmatively, the judge will declare the conclusion of the trial (Article 372 of Criminal Procedure Code).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

The content and scope of the principles of legality and opportunity according to Peruvian regulations were explained in the previous answers.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Please consider response to question 2.1.1.

In addition, it is necessary to consider that the Peruvian criminal process (according to the Criminal Procedure Code) has defined deadlines.

The preliminary stage (preliminary proceedings) has an initial period of 60 days, which can be extended by the prosecutor in view of the complexity and particular characteristics of the case (Article 334.2 of the Code of Criminal Procedure). The Supreme Court of Justice has established that this stage cannot be extended for more than 120 days.

The preparatory investigation stage has duration of 120 days, renewable for an additional 60 days. In complex cases, this stage can last for eight months, extendable for the same time. In cases involving criminal organisations, it can last 36 months, extendable for the same period.

When the prosecutor does not comply with these legal deadlines, the affected party can request the judge to take the corresponding measures. Therefore, there are temporary limits that the prosecutor must inevitably consider to make decisions in the criminal prosecution.

### **2.3.1 How clearly are the factors of this threshold defined?**

Very clearly defined.

As shown in response to questions 2.1.1 and 2.3, thresholds regarding standard of proof and legal deadlines are clearly defined.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

Pursuant to Article 93 of the Code of Criminal Procedure, legal persons duly incorporated in criminal proceedings, enjoy all the rights and guarantees granted by the legal system to the defendant-natural person. This is reiterated by the Third Complementary Final Provision of the Law No 30424, on liability of legal persons in crimes of corruption and money laundering, which establishes that the legal person has all the rights and guarantees that the Political Constitution and the law recognises in favour of the defendant.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

As regards the offence of transnational bribery (Article 397-A of the Criminal Code), the only settlement permitted by law is the so-called 'early termination', in the terms explained in the answer to the question 2.1.4.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

As stated above (2.1.4), anticipated termination requires acceptance of the charges imputed by the defendant.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

Anticipated termination (*terminación anticipada*).

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

### **Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals.

With regard to defendants-natural persons, the law contemplates several factors that directly influence the penalty to be imposed:

- going voluntarily to the authorities after having committed the crime, to admit responsibility, is considered a mitigating circumstance, which allows the judge to reduce the penalty (Article 46.1.g of the Criminal Code);
- the confession (admission of charges), corroborated with evidence, allows the judge to reduce the penalty by one-third (Articles 160 and 161 of the Code of Criminal Procedure); and
- the anticipated termination (in the terms already described above) determines that the judge reduces the penalty to be imposed by one-sixth part (Article 471 of the Code of Criminal Procedure).

In the case of legal entities, Law 30424 (which entered into force on 1 January 2018), establishes that companies that adopt ‘prevention models’ (compliance programmes) to prevent offences or reduce the risk of its commission, are exempted from liability. These prevention models must have the following minimum elements:

- an official responsible for implementing and conducting the prevention model;
- identification, evaluation and mitigation of risks to prevent the commission of crimes;
- implementation of reporting procedures;
- dissemination and periodic training of the prevention model; and
- evaluation and continuous monitoring of the prevention model.

Likewise, the confession of the offence by the authorised representatives of the legal person, corroborated by evidence, allows the judge to reduce the penalty to be imposed on the legal person.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

The terms and limits of negotiation in criminal proceedings between the prosecutor and the accused (always accompanied by his defence attorney) are provided by law. For this reason, the benefit for defendants who accept an anticipated termination, is the reduction of the penalty (sixth part), as established in Article 471 of the Code of Criminal Procedure. Naturally, there is a discretionary area of the prosecutor to carry out the negotiation of penalty and civil compensation, but the prosecutor cannot offer beyond what the law allows.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

No.

Once the judicial decision approving the agreement acquires the status of *res judicata* (ie, if it is not appealed; or being appealed, it is confirmed in the second judicial instance), the terms of the agreement cannot be modified or reversed.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

Yes.

As explained above, the final agreement reached by the prosecutor and the accused must necessarily be approved by the judge in order to obtain a sentence with a reduced sentence. However, prior to this agreement, the law permits both to hold informal preparatory meetings and approaches to negotiate the terms of the agreement (Article 468.2 of the Code of Criminal Procedure).

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes. Please consider responses to questions 2.1.4 and 3.2.7.

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The judge plays a fundamental role in the process of anticipated termination.

First, before summoning the corresponding hearing, the judge must verify if the request of the prosecutor and the accused for these purposes meets the formal legal requirements.

At the hearing, the judge must ensure that the accused knows well the scope and consequences of the agreement.

After the parties present the agreement, the judge must exercise a legality check (correct legal classification of the facts imputed, legality of the sentence and sufficient evidence) and reasonableness of the penalties agreed (that penalties are proportional to the offence committed; and that the interests of the victim are not unduly affected).

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

(Remember that Law 30424, on corporate liability for corruption and money laundering offences, which provides for the possibility of agreements between the prosecutor and the representative of the company, entered into force on 1 January 2018).

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

### **3.5 De facto or de jure**

*Editor's note: Law 30424 (which entered into force on 1 January 2018), establishes that companies that adopt 'prevention models' (compliance programmes) to prevent offences or reduce the risk of its commission, are exempted from administrative liability. This would constitute a de jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

According to the binding jurisprudence of the Supreme Court of Justice, the anticipated termination hearing is private, as one of the additional benefits of this process for the accused is not publicly airing their case (Plenary Agreement 5-2009/CJ-116). Accordingly, although some final rulings related to anticipated termination processes are published, the settlements between the prosecutor and the accused are not publicly available.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited.

Consider previous response.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

In accordance with Law 30424 (which entered into force on 1 January 2018), companies can access the process of anticipated termination under the same conditions as natural persons. Therefore, the negotiating space is substantially the same as that of natural persons, as explained above.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

The judiciary has an archive office in which are stored the files of cases closed definitively.

**4.2.1 If yes, is this data publicly available?**

Yes.

The judiciary publishes only the sentences: <http://jurisprudencia.pj.gob.pe>.

While the criminal process is not concluded, the information is not publicly accessible; it is accessible only to the parties to the criminal proceedings.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Due to the scarce publicly available information on the settlements, it is not possible to give an overview on this point.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

No.

Although there are no specific rules, the general standard provided by Peruvian law establishes that the relations of the Peruvian authorities with the foreign ones are governed by the international treaties subscribed and ratified by Peru and, failing that, by the principle of reciprocity (Article 508 of the Code of Criminal Procedure).

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

In the event of a final judgment or an settlement finally approved by foreign authorities, the Peruvian authorities could not investigate or punish the natural or legal person for the same acts, since this would constitute a violation of the principle *ne bis in idem*, as established by Article III of Preliminary Title of the Code of Criminal Procedure, which prohibits multiple criminal prosecution.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

As explained above, there are many factors, formal and substantial, that influence the success (or not) of criminal negotiation. For example, the negotiating capacity of the prosecutor, the personality of the accused and the possibility of accepting the charges; and also the rigorousness of the judge at the time of checking the legality and reasonableness of the settlement. All this makes it difficult to predict the outcome of criminal negotiation.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Peruvian regulations reasonably promote and encourage the adoption of agreements and settlements with the prosecutor, as it has important advantages such as shortening the time of the criminal process, the benefit of reducing the sentence and the privacy of the hearing (in the case of anticipated termination). In addition, it should be considered that the benefit of anticipated termination may be added to the reduction of one-third of the sentence in cases of confession of charges, which entails an undeniable incentive to request the application of this mechanism. These circumstances have determined that anticipated termination is one of the mechanisms of greater application in Peru.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Because of the advantages indicated in the previous response, which benefit the accused, the victim and the justice system in general, we believe that the application of simplification and abbreviation procedural mechanisms should be encouraged.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

An interesting measure would be the dissemination and training of the effects and benefits of the application of the mechanisms of procedural simplification, but remembering that they are subject to judicial control in order to avoid arbitrariness, abuse or perverse effects in criminal negotiation.

**6.5 If, in your opinion, such cooperation should be discouraged, what steps should be taken by your country authorities to discourage such collaboration?**

This kind of collaboration should be encouraged.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Law 30424 (already in force) contemplates interesting benefits for companies involved in acts of corruption or money laundering that requests the application of the anticipated termination. These include reduction of punishment, civil compensation (as a result of negotiation with the prosecutor) and mitigation of reputational impact, considering not only that the process will be significantly shortened (avoiding long and cumbersome criminal proceedings) but also that, as we have seen, anticipated termination has a reserved nature.

*Carla Arellano, Counsel, Ferrere (Law Firm, Uruguay)*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Articles 156, 157, 158, 158a and 159 of the Criminal Code regulate the actions of taking bribes, taking an aggravated bribe, offering a bribe and influence peddling, as modified by Law 17,060. According to Articles 156, 157 and 158a of the Criminal Code, public officials who request, allow themselves to be promised or accept a benefit in exchange of something obtained or to be obtained through a conduct related to the services provided by the public official, can be sanctioned with up to six years of imprisonment, a two- to six-year suspension, and fines. The sentence can be increased by one-third to half in the following cases:

1. if these actions result in the granting of a public job, stipends, pensions, honours or the advantage or disadvantage of the litigation parties in a civil or criminal trial; and
2. if said actions result in the conclusion of an agreement in which the section to which the official belongs is interested or if it is carried out through the abusive use of legal procedures of the Public Administration in the acquisition of goods and services.

Under Article 159 of the Criminal Code, whoever offers, promises or guarantees a benefit to a public official in exchange for an act related to the functions performed by such a person, can be sanctioned with a half to two-thirds of the sentence established for said public official. The following will be considered special aggravating circumstances:

1. if the official induced is a police officer or in charge of prevention, investigation or repression of illegal activities, provided that the offence was committed as a result or during the exercise of his/her functions, or as a result of his/her capacity as such and that this last circumstance was evident to the author of the offence; and
2. that the induced official is one of the people included in Articles 10 and 11 of the Law against Corruption. This regulation expressly mentions the heads of all state bodies.

Under Article 175 of the Criminal Code, public officials are defined as all those individuals occupying positions or exercising functions onerously or gratuitously, permanently or temporarily, of legal, administrative or judicial nature, in the State, Municipality or any other public entity or non-state public entity.

### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The Inter-American Convention against Corruption and the United Nations Conventions against corruption.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The payment to a foreign public official is considered bribery in our jurisdiction according to Article 29 of Law 17,060. This article prohibits transnational corrupt activity and bribery and establishes that any individual who for purposes of executing or facilitating a Uruguayan foreign trade transaction offers or gives in Uruguay or abroad, to a government employee of the other country, money or other economic gain for such employee or for another, shall be punished by three months in prison to up to three years in penitentiary.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments, understood as payments made with the intention of expediting an administrative process, are prohibited in our jurisdiction according to Article 157 of the Criminal Code.

### **1.5 Does your country provide for corporate criminal liability?**

No.

Under Uruguayan laws only individuals (as opposed to entities) can be held criminally liable. Entities can only be held liable for damages and fines.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

Law 17,060 creates the International Criminal Law Cooperation Unit that depends on the Central Authority from the Ministry of Education and Culture.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

No.

In order to charge an individual with a crime there shall be evidence that he or she committed a criminal offence. Provided such evidence exists, prosecutors do not have discretion to decide whether to pursue a criminal action or not, as a general rule.

#### **2.1.2 Deciding what charges to file?**

No.

Prosecutors do not have discretion to decide with which criminal offence the accused individual shall be charged.

### **2.1.3 Deciding whether to drop charges?**

No. See 2.1.2.

### **2.1.4 Deciding whether or not to plea bargain?**

No.

The Criminal Procedure Code currently in force does not allow plea bargains. Law 18,494, applicable to money laundering and finance of terrorism, allows plea bargains and so does the new Criminal Procedure Code which will entry into force on 16 July 2017.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

The most important principle in our criminal law system is legality and mandatory prosecution: provided an offence has occurred, prosecutors do not have discretion to choose whether to prosecute or not, which offence to seek indictment for and, later, which punishment shall be applied (they do have, however, certain discretion regarding punishment within the minimum and maximum limits set by the laws).

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Once the investigation stage of a proceeding has been completed and an indictment is issued, the prosecutor shall determine whether there is sufficient evidence to obtain a conviction. Should that be the case, the prosecutor will then file an accusation and request a specific punishment in accordance with sections 233 to 239 of the Criminal Code. The general standard is that existing evidence shall reasonably suffice to secure a conviction. In turn, to request an indictment at the beginning of the criminal investigation it suffices with evidence being enough to suggest preliminarily that a crime has occurred and the indicted individual took part in such crime.

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The notion of whether sufficient evidence to secure a conviction or seek an indictment exists is rather broad and there is no clear threshold in the law.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

As explained above, only individuals can be named defendants in criminal proceedings.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

As mentioned in 2.1.4, it is not possible as a general rule to enter a structured settlement. Only Article 6 of Law 18,494 regarding money laundering and financing of terrorism provides for collaborators and undercover agents in Article 7.

*Editor's Note: based on the information in this report there is no structured settlements for corruption offences process envisaged within this jurisdiction (see section 3.1).*

### **4. Transparency**

#### **4.1 Public access to information on settlements**

##### **4.1.1 Is information about settlement available to the public?**

Yes.

Article 382 of the new Criminal Procedure Code establishes that the judicial power will have a registry in order to file arrangements, no matter if they were accomplished or not.

##### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

There is no background on this matter yet.

##### **4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.**

Non-existent.

Actually, it is not possible to negotiate the contents of the public statements on the case.

#### **4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

The judicial power is in charge of processing the information.

**4.2.1 If yes, is this data publicly available?**

Yes. <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSimple.seam>.

All judges' verdicts are in the above-mentioned website.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

To the date in our jurisdiction there is no background on this matter.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Articles 9, 10 and 11 of Criminal Code state the rules in case of double jeopardy. The general rule is that the Uruguayan jurisdiction will be competent in crimes committed in Uruguay, no matter if the authors were national or foreign.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

Article 9 of the Criminal Code states that the punishment will be taken into account. Regarding settlements we do not have any disposition that accepts it.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Nowadays, cooperation is discouraged by the framework rules, because there aren't rules regarding the issue.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Since cooperation between the authorities and alleged wrongdoers has given good results in the region, it would be a good alternative to motivate it.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

As it has been done by legislators, the first step is to create a rule based mechanism in order to regulate the process of collaboration.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Cooperating with the authorities is a financial and reputational advantage for companies. Cooperating with the authorities gives credibility to the company and boosts its reputation. Press information about non-cooperative companies will undoubtedly have reputational repercussions and these will always have financial implications (also, in case of being a listed company). Besides, cooperation helps to develop business and consequently it has a positive impact on the financial development of the company.

## 57. INDONESIA

*Anita S Putra, Partner, William Soerjonegoro & Partners Ferrere*

## 1. Background: normative framework

### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

- Law Number 11 of 1980 on Criminal Act of Bribery ('Bribery Law');
- Law Number 28 of 1999 on Clean and Corruption-Free State Management;
- Law Number 31 of 1999 on Eradication of Corruption as amended by Law Number 20 of 2001 (hereinafter referred to as the 'Corruption Law');
- Law Number 30 of 2002 on Commission for the Eradication of Criminal Acts of Corruption; Law Number 46 of 2009 on Judicial Court for Criminal Acts of Corruption; and
- Government Regulation Number 71 of 2000 on Procedure of Community Participation and Grant of Reward Regarding Prevention and Eradication of Criminal Acts of Corruption.

### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

So far, regarding to corruption matters, Indonesia has ratified the United Nations Convention Against Corruption (UNCAC) 2003 through Law No 7 of 2006 on Ratification of the United Nations Convention Against Corruption 2003 with a reservation to Article 66 paragraph 2 and United Nations Convention Against Transnational Organized Crime (UNTOC) 2000 through Law No 5 of 2009 on Ratification of the United Nations Convention Against Transnational Organized Crime with a reservation to Article 35 paragraph 2. In these reservations, the Republic of Indonesia does not consider itself bound by the provisions regarding the dispute settlement concerning the interpretation and implementation of the Conventions through the International Court of Justice. This gesture is taken on the consideration that Indonesia does not recognise the jurisdiction of the binding climate (compulsory jurisdiction) of the International Court of Justice. It can only be settled through International Court of Justice if there is any consent of the parties to the disputes.

### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

There are two regulations concerning this matter. First, in Article 16 Corruption Law states that, any person outside the territory of the Republic of Indonesia that provides assistance,

opportunity, facilities, or information for the criminal act of corruption shall be punished with the same penalties as referred in Article 2, Article 3, Article 5 up to and including Article 14 of the Corruption Law. Second, in Article 4 Bribery Law, if the criminal act as referred in Article 2 (granting or promising something to someone in order to persuade them to conduct an act or to not conduct an act that contradicts with their authority or their obligations), and Article 3 (receiving something or a promise, whereas they understand that the grant or the promise was intended for them to conduct an act or to not conduct and act that contradicts with their authority or their obligations) are conducted outside the territory of the Republic of Indonesia, the provisions in this Bribery Law shall also prevail.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Such payments to government officials shall be considered as a criminal act of bribe or gratuity which fall under the scope of Article 12B of Corruption Law. According to Article 12B paragraph (2) of the Corruption Law, the sanction for such violation is up to a life-sentence.

#### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Few Articles in the Corruption Law, for example in Articles 2, 3 and 5 state: 'Any person'. 'Person' itself is defined under Article 1, point 3 of the Corruption Law to include a company. Furthermore, in Article 20 of the Corruption Law: 'In the event that a criminal act of corruption is committed by or on behalf of a company, the charges and verdict may be conducted against the company and/or its executives.'

Criminal acts of corruption are committed by the company if such act is committed by persons pursuant to an employment relationship or other relationship, either individually or jointly.

Recently, Indonesia has just issued Regulation of the Supreme Court No 13 of 2016 on Case Handling Procedures for Corporate Crimes. In Article 4 paragraph (1) of such regulation, corporate shall be accountable for the criminal act according to the corporate criminal provisions in the laws governing corporate.

#### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Corruption Eradication Commission of the Republic of Indonesia (*Komisi Pemberantasan Korupsi Republik Indonesia – KPK*) as regulated by Law No 30 Year 2002 on Commission for the Eradication of Criminal Acts of Corruption (responsible for prevention, investigation of corruption and recovery of proceeds of crime), as well as the Public Prosecutor as regulated by Law No 16 Year 2004 on Public Prosecutor of Republic of Indonesia. These authorities are not especially dedicated to corruption in international business transactions but act mainly for domestic transactions.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Even though prosecutors have the privilege to decide who will be prosecuted, the making and forming of the indictment relies heavily on the investigation report made by the investigators (police officer or KPK officer). The decision by the prosecutors to decide whom to charge with a crime is strictly guided by a limited condition and provision in the Law No 81 of 1981 on Criminal Procedure Code ('Criminal Procedure Code') and the Attorney General Regulation No PER-036/A/JA/09/2011 on Standard Operational Procedure in Handling General Crime ('Attorney General Regulation').

#### **2.1.2 Deciding what charges to file?**

Yes.

As the only authority eligible to conduct a prosecution in a court of law, the Indonesian prosecutor has every right to decide which charges are qualified to be processed in a court hearing. However, if a prosecutor declines to take on a case filed by the investigator, the rejection should be based on a rational ground such as lack of sufficient evidence or other reason acceptable by Indonesian law.

This is in accordance with Article 14a of Criminal Procedure Code which grants the authority to the Public Prosecutor to accept and examine the dossier of a case under investigation submitted by an investigator or an assistant investigator; and Article 120 paragraph 2a which limits the reasons to cease prosecution to only three reasons, namely: (1) absence of evidence, (2) unproven allegation, or (3) the case has been closed for the interest of the law.

#### **2.1.3 Deciding whether to drop charges?**

Yes.

According to Article 120 Paragraph 2a of Criminal Procedural Code, if the prosecutor decides to cease prosecution due to the absence of sufficient evidence or it has become clear that said event did not constitute an offence; or the case has been closed in the interest of the law; the prosecutor shall set this forth in a written decision. Therefore, even though Indonesian prosecutor is competent to drop charges, the reason to do so is strictly limited by (1) lack of sufficient evidence, (2) unproven allegation, or (3) the case has been closed for the interest of the law.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

Generally, the Indonesian legal framework does not recognise any form of prosecution bargaining. However, since the ratification of UNCAC, Indonesian Courts along with

the law enforcers have opened the possibility to enter a plea bargain mechanism. The procedure of such bargaining does not solely rely on the prosecutor. The procedure requires a coordination between the prosecutor, police and the Agency of Witness and Victim Protection.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of legality and mandatory prosecution.

Principle of opportunity.

Prosecutorial discretion in Indonesia is exercised based on the principle of legality. It is explicitly written in the consideration chapter of the Criminal Procedural Code, stating: ‘Whereas the Republic of Indonesia is a rule of law State based on Pancasila and the 1945 Constitution, which upholds human rights and guarantees that all its citizens shall have equal legal status in law and government and shall be obligated to respect law and government without exception’.

However, in limited situations, the principle of opportunity may apply when the prosecutor may disregard a lawsuit in respect to the public interest. This principle is admitted in the Reference Book of Criminal Procedural Code published by Department of Justice of Republic of Indonesia stating that ‘Indonesian Criminal Code acknowledges the existence of the principle of opportunity’.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

The appointment of the prosecutor is regulated by the Attorney General Regulation. The appointed prosecutor may be an individual or a member of a team. In deciding whether to carry on or drop a charge, the prosecutor in charge needs to conduct an internal case examination. The decision should be approved by the head of the working unit. If the prosecutor decides to drop the charge, a prior approval from the Head of District Prosecutor is a prerequisite (Articles 13, 14 and 25 of Attorney General Regulation).

### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

There is no clear provision regarding the prosecutor threshold in Indonesian law and regulation. The Attorney General Regulation solely requires an internal case examination and approval from the head of the working unit or the Head of District Prosecutor.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

The Attorney General Regulation does not differ in the procedure to prosecute individual or corporate defendants.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

The Indonesian legal framework does acknowledge a type of structured settlement. Through the settlement, even though the cooperating wrongdoer shall not be fully exempt from the criminal charge, their testimony may be considered as a reason to reduce the potential punishment from the court or provide access to a special treatment by the law enforcer.

However, the bribe payer is not eligible for such a settlement process. Pursuant to point 6 and 9 of the Circular Letter of Supreme Court Number 4 of 2011 on Treatment for Whistle-blower and Justice Collaborator in Particular Criminal Act ('Circular Letter of Supreme Court'); and Article 4 of the Joint Regulation of Ministry of Law and Human Right, Attorney General, National Police, KPK, and Agency of Witness and Victim Protection of 2011 on Protection for the Informer, Informer-Witness, and the Justice Collaborator ('Joint Regulation'), the qualified subject that may enter to such a settlement process is a person who is not the main actor of the criminal allegation. A bribe payer, on the other hand, shall be deemed as a main actor and thus it is not possible to enter the settlement.

The request to be appointed as Justice Collaborator can be filed by the alleged wrongdoer to the Attorney General or the Head of KPK. Thereupon the Attorney General or the Head of KPK will consider the request in accordance with the requirements provided by the prevailing laws and regulations as well as the recommendation from the Agency of Witness and Victim Protection. The decision whether or not to grant the request is stated in the indictment letter. However, even though the applicant and the authorities may engage in a negotiation during the process, the result of the imposed sanction is heavily reliant on the consideration, judgment and discretion of the panel of judges.

#### **3.5 *De facto or de jure***

*Editor's Note: cooperating wrongdoer: a bribe payer is not eligible for a settlement process as a cooperating wrongdoer. Based on the above information there is no structured settlements for corruption offences process envisaged within this jurisdiction (see section 3.1).*

### **4. Transparency**

#### **4.1 Public access to information on settlements**

##### **4.1.1 Is information about settlement available to the public?**

Yes.

Indonesia recognises a Justice Collaborator as a way to lessen the claim as we already stipulated in point 3.1 above. Information regarding settlement could be available to public, in a form of Indictment Letter or Verdict.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited.

Unlike the information given to the public foreign countries for example, by publishing the information in the internet (regarding to the recovery, the settlement, legal basis, position, status, assets, disposition, etc), in Indonesia, the public can only obtain information through a verdict. This is not as detailed as the information available abroad.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

Every criminal act will be prosecuted pursuant to the prevailing law, and such negotiations cannot occur.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Several cases have come to the attention of Indonesia's Anti-Corruption Commission (KPK), a recent on-going foreign bribery case which is the *Rolls Royce-Garuda* case. In this matter, KPK is the public authority which is authorised to collect and process the data. KPK together with Serious Fraud Office (SFO) England and Corrupt Practices Investigation Bureau (CPIB) Singapore teamed up to investigate this allegation.

**4.2.1 If yes, is this data publicly available?**

No.

For the time being, this kind of data can only be used privately by the KPK and cannot be exposed to the public.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

One of the most notable cases in Indonesia concerning an agreement to cooperate with the authorities is the case of the former treasurer of Democratic Party, Muhammad Nazaruddin. Nazaruddin, a graft and a money laundering convict, who was declared as a Justice Collaborator by KPK in 2014, following his admission of guilt for helping a party to win an open tender of the Ministry of Youth and Sports. Palembang Athletes Dorm development was sentenced to only seven years' imprisonment for the crime involving approximately

US\$212m. In exchange, Nazaruddin is now obligated to continuously help KPK with its corruption investigation and prosecution. The latest assistance he gave was his testimony in a court hearing session of *Electronic ID* corruption trial.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

Yes.

Normatively, the Penal Code adopts three principles to determine the validity along with the subsequent application of the Penal Code. The three principles applied are:

1. the Territorial Principle;
2. the Active Nationality Principle; and
3. the Passive Nationality Principle.

The Territorial Principle in Articles 2 and 3 of the Penal Code specify that the Penal Code may be applied if the locus of the crime is within Indonesian territory irrespective of the accused's citizenship. The Active Nationality Principle in Article 5 of the Penal Code specifies that the Penal Code may be applied if the accused has Indonesian Citizenship. Finally, the Passive Nationality Principle in Article 4 of the Penal Code, provides that the Penal Code may be applied if there is an Indonesian legal interest that has been violated.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

Neither any foreign conviction nor foreign settlement have any impact on a legal proceeding in Indonesia. Pursuant to *Hukum Acara Perdata*, a book written by M Yahya Harahap, referring to Article 436 of *Reglement of the Rechtsvordering* (Civil Procedure Code for European and Foreign East – 'Rv'), a foreign court decision cannot be executed in the territory of the Republic of Indonesia unless the laws provide otherwise. There could also be an exception if it is included in a bilateral agreement or a multilateral agreement. Furthermore, the procedure to execute a foreign court decision, referred to in Article 436 paragraph (2) of the Rv, the only way to execute a foreign court decision is to use that court decision as the legal basis to file a new lawsuit in an Indonesian court. For the foreign settlement, it is not binding on the Indonesian proceedings, remembering that Indonesia does not recognise a full settlement in the first place (Indonesia only recognises a Justice Collaborator).

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

There can be no condition where an alleged wrongdoer and the prosecuting authorities might have a cooperation before the prosecution is conducted. Every criminal act in Indonesia will be prosecuted pursuant to the prevailing law. However, if in the prosecution the wrongdoer (in this case other than the main wrongdoer) is granted the status of a Justice Collaborator, then the possibility for a cooperation might be viable.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Such cooperation might be deemed discouraged by the existing framework. Remembering that every criminal act will be prosecuted pursuant to the prevailing law, yet as we already stipulated above in point 7.3, if in the prosecution, the wrongdoer (in this case other than the main wrongdoer) is granted the status of a Justice Collaborator, then the possibility for a cooperation might exist as regulated in a Circular Letter of the Supreme Court.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

This is quite interesting. Cooperation between the authorities and alleged wrongdoers definitely can send a wrong signal and deviate from the existing judicial legal frameworks. However, looking at several notable corruption cases in Indonesia, sometimes the notable cases were built after detailed investigation in smaller cases – for instance, one small case of corrupt practices in tax office can be an opening to bigger corruption cases in the tax office. Sometime these big cases are derived from the smaller case. The cooperation of the alleged wrongdoers in the smaller case to go after the subsequent big case is greatly needed. Hence, the implementation of a Justice Collaborator witness protection programme could be the legal formal groundwork for cooperation between authorities and alleged wrongdoers.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

As mentioned before, these steps have been taken in Indonesia's corruption court case through Justice Collaborators or Witness Protection Programme. Hopefully, these types of programmes may encourage individuals (who are not the main actor) implicated in corruption cases to collaborate with the Government and to expose other corruption cases. However, such individuals will still be implicated in his or her current on-going corruption case. As explained before, most of the time, any type of cooperation to pursue other corruption cases will be rewarded by reducing his or her current criminal sentence.

Another step deemed necessary is a better coordination between the prosecutor and the judge. Since Indonesian judges are somehow able to annul the Justice Collaborator status granted by the prosecutor to the wrongdoer, this may bring the cooperating offender into an uncertainty of their 'reward' for being cooperative. There are several cases in Indonesia where the panel of judges denied the Justice Collaborator status was granted by the KPK. This is why prosecutors and the judges need to develop comprehensive coordination in regard to the treatment for the cooperating offender.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Indonesia's Corruption Law does not limit the scope of alleged wrongdoers that includes individuals but also companies. Usually, any corruption case involving a company means such company is also liable under Money Laundering Law. There are few potential advantages that may be obtained by the cooperating companies. At this moment, Indonesia is entering an era in which the law enforcer and the society are having serious intention in combating the crime of corruption. Most of the Indonesian are even consider corruption as an extraordinary crime that threatens the life of the nation itself. That being said, there is a need to maintain reputation and market standing before the public. However, a company can inform the general public that a corruption case involving them derived from rogue and irresponsible individuals, hence the blame remains on the individuals and not the company. Another potential advantage is financial. Note that if a company is declared as a defendant in a court of law, the only allowed punishment is financial penalties. Therefore, if the alleged wrongdoer company is willing to cooperate, there is a possibility that the judge may consider such cooperation as a reason to reduce the amount of the financial penalties.

*Yoshihiro Kai, Partner, Anderson Mori & Tomotsune*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The Penal Code prohibits domestic public officials from receiving, demanding or promising to receive a bribe and also prohibits anyone (only individuals) from giving, or offering or promising to give a bribe to a domestic public official in connection with the public official's duties (Articles 197 to 198 of the Penal Code).

The Unfair Competition Prevention Act (the UCPA) prohibits anyone (both individuals and legal entities) from giving, or offering or promising to give a bribe to a foreign public official in connection with the public official's duties, in order to obtain a wrongful gain in business with regard to international commercial transactions (Articles 18, 21 and 22 of the UCPA).

### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Japan is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which was signed in 1997 and amended the UCPA in 1998 in order to criminalise bribery to foreign public officials (see 1.1). Japan is also a signatory to the United Nations Convention against Corruption, which was signed in 2003.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Japanese nationals who have committed bribery to foreign officials outside of Japan are punishable under the UCPA (Article 21, paragraph 8 of the UCPA and Article 3 of the Penal Code).

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

There is no provision of facilitation payments in Japanese anti-corruption laws.

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Not only individuals but also companies can be held criminally liable for bribery to foreign public officials (Article 22, paragraph 1 of the UCPA).

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

Police and public prosecutor's offices conduct the investigation and prosecution of corruption in international business transactions.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

Public prosecutors have unfettered discretion to decide whether they prosecute a suspect or not (Article 247 of the Code of Criminal Procedure). Public prosecutors have discretion to decide not to prosecute a suspect if prosecution is deemed unnecessary owing to the character, age, environment, gravity of the offence, circumstances or situation after the offence (Article 248 of the Code of Criminal Procedure).

**2.1.2 Deciding what charges to file?**

Yes. See 2.1.1.

**2.1.3 Deciding whether to drop charges?**

Yes. See 2.1.1.

**2.1.4 Deciding whether or not to plea bargain?**

No.

The Code of Criminal Procedure was amended in 2016 to introduce prosecutorial bargaining and agreements with suspects or defendants so that, in return for (1) making a true statement to the Public Prosecutor, (2) cooperating with investigation authorities in collecting evidence or (3) giving true testimony as a witness at trial regarding another person's crime, the Public Prosecutor will refrain from prosecuting the suspect or suggest a lenient sentencing opinion to the court (new Articles 350-2 to 350-15 of the Code of Criminal Procedure). In the Japanese prosecutorial bargaining system, public prosecutors take lenient measures to suspects or defendants when they cooperate with public prosecutors in investigation of 'another person's crime'. Suspects and defendants cannot gain lenient measures merely by admitting their own guilt. This new prosecutorial bargaining system will be enforced by June 2018.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of opportunity.

Defence mitigation argued to the prosecutor.

See 2.1.1.

**2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes. See 2.1.1.

**2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly. See 2.1.1.

**2.4 Do these standards differ for individual and corporate defendants?**

No.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

As noted in 2.1.4, the prosecutorial bargaining system will be enforced by June 2018 and this new system will be applicable to foreign bribery cases.

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

As noted in 2.1.4, a public prosecutor can enter an agreement with the alleged bribe payer that, in return for (1) making a true statement to the Public Prosecutor, (2) cooperating with investigation authorities in collecting evidence or (3) giving true testimony as a witness at trial regarding the guilt of the public official who received a bribe, the Public Prosecutor will refrain from prosecuting the suspect or suggest a lenient sentencing opinion to the court.

**3.2.1.1 If yes, what is such a structured settlement called in your language?**

*Shiho-torihiki* (judicial bargaining).

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures;

assistance in investigating and prosecuting individuals; and

other.

The Public Prosecutor's offices do not disclose the factors which they take into consideration to determine the punishment imposed on the alleged bribe payer. Given the punishment imposed on the bribe payers in the past, all the factors noted above could be taken into consideration by public prosecutors.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

**3.2.4 What form(s) can a structured settlement take?**

After the Public Prosecutor, suspect or defendant and defence counsel enter an agreement, they prepare a cosignatory written agreement.

**3.2.5 What are the usual terms of such an agreement?**

As for the suspect or defendant, he/she will (1) make a true statement to the Public Prosecutor, (2) cooperate with investigation authorities in collecting evidence or (3) give true testimony as a witness at trial regarding another person's crime.

As for the Public Prosecutor, he/she will (1) refrain from prosecution, (2) dismiss prosecution, (3) prosecute on a specific charge, (4) add, withdraw or change a specific charge, (5) suggest a lenient sentencing opinion to the court, (6) make a petition for a speedy trial procedure, or (7) request summary proceedings (new Article 350-2 of the Code of Criminal Procedure).

**3.2.6 Are there limits on what the prosecution can offer?**

Yes. See 3.2.5.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

If any of the parties (ie, the Public Prosecutor, suspect or defendant) violates any terms of the agreement, the adversary party can withdraw from the agreement (new Article 350-10 of the Code of Criminal Procedure).

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

#### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

Yes.

The Public Prosecutor will submit the written agreement to court as evidence (new Articles 350-7 to 350-9 of the Code of Criminal Procedure).

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.2.3 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority: police and public prosecutor's offices.

#### **3.3.2.4 Can this authority impose penalties for non-compliance?**

Yes.

If a suspect or defendant (1) makes a false statement, (2) gives false testimony or (3) submits false evidence in violation of the terms of the agreement, he/she shall be punished by imprisonment for not more than five years.

### 3.4 Outcome of the structured settlement

#### Statutory Provisions:

Financial penalties – yes.

Personal liability – yes.

See 2.1.4.

### 3.5 *De facto or de jure*

*Editor's note: The Code of Criminal Procedure was amended in 2016 and due to come into effect in June 2018, introduces a prosecutorial bargaining process that is not contingent upon an admission of guilt as the prosecutor may decide to refrain from prosecuting the suspect (see section 2.1.4 above). This constitutes a jure settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

The Public Prosecutor will submit the written agreement to the court as evidence. After the trial has ended and sentence has been finalised, anyone may request the disclosure of criminal case records (including written agreement) from the Public Prosecutor's office in accordance with the Act on Final Criminal Case Records. But the Public Prosecutor's office can refuse the request to disclose the written agreement if such disclosure could impede improvement or rehabilitation of the defendant or could harm the fame or peaceful existence of the persons concerned (Article 4 of the Act on Final Criminal Case Records).

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Very limited. See 4.1.1.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

As noted in 4.1.1, the Public Prosecutor's office has discretion to decide whether they will disclose the criminal case records and there is no room for a company to negotiate with public prosecutor's office regarding the disclosure.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

After the trial of foreign bribery case has ended and the sentence has been finalised, the Public Prosecutor's Office shall take custody of the criminal case records (not electromagnetic records but paper documents only) for a certain legal period (Article 2 of the Act on Final Criminal Case Records).

**4.2.1 If yes, is this data publicly available?**

No.

Data of criminal case records is not available on an internet website. As noted in 4.1.1, if anyone would like to access criminal case records, he/she should request the disclosure of the criminal case records to the Public Prosecutor's Office in accordance with the Act on Final Criminal Case Records.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

The new prosecutorial bargaining system has not been enforced yet and so there is no case so far.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Foreign conviction does not trigger issues of the principle of *ne bis in idem* under the Japanese jurisdiction. Article 5 of the Penal Code provides that '[e]ven when a final and binding decision has been rendered by a foreign judiciary against the criminal act of a person, it shall not preclude further punishment in Japan with regard to the same act; provided, however, that when the person has already served either the whole or part of the punishment abroad, execution of the punishment shall be mitigated or remitted.'

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

See 6.1

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

As the new prosecutorial bargaining system has not been enforced yet and there is no precedent so far, it is difficult to answer this question.

*Hoi Jack S'ng, Lawyer, Lee Hishammuddin Allen & Gledhill*

**1. Background: normative framework**

**1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The Malaysian Anti-Corruption Commission Act 2009 (the 'MACC Act').

**1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The United Nations Convention against Corruption.

**1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

The MACC Act possesses limited extra-territorial effect in relation to citizens and permanent residents of Malaysia. In this regard, where an offence under the MACC Act is committed in any place outside Malaysia by any citizen or permanent resident of Malaysia, that person may be dealt with in respect of such offence as if the offence had been committed within Malaysia.

Reference: section 66(1) of the MACC Act provides that it shall '[...] in relation to citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in any place outside Malaysia by any citizen or permanent resident, he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.'

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are caught by s 16(B) of the MACC Act, which read:

'Any person who by himself, or by or in conjunction with any other person:

- (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or
- (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to or a reward for, or otherwise on account of:
  - any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or
  - any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the

public body is concerned, commits an offence.’

**1.5 Does your country provide for corporate criminal liability?**

No.

The MACC Act does not expressly provide for the liability for the acts of agents.

However, under the Interpretation Acts, ‘person’ includes ‘a body of persons, corporate or unincorporated’. Hence, the provisions of the MACC Act apply equally to companies as they do to individuals. A company may accordingly be charged with and found liable for corruption.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The Malaysian Anti-Corruption Commission.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

Article 145(3) of the Federal Constitution provides: ‘The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Sharia court, a native court or a court-martial.’

Also, pursuant to section 376(1) of the Criminal Procedure Code, the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

**2.1.2 Deciding what charges to file?**

Yes. Same as above.

**2.1.3 Deciding whether to drop charges?**

Yes. Same as above.

**2.1.4 Deciding whether or not to plea bargain?**

No.

In short, the plea bargaining process in Malaysia is initiated by the accused, supervised by the court and to be agreed between the accused and the Public Prosecutor. See section 172C of the Criminal Procedure Code which is re-produced below:

1. An accused charged with an offence and claiming to be tried may make an application for plea bargaining in the Court in which the offence is to be tried.
2. The application under subsection (1) shall be in Form 28A of the Second Schedule and shall contain:
  - (a) a brief description of the offence that the accused is charged with;
  - (b) a declaration by the accused stating that the application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and
  - (c) information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.
3. Upon receiving an application made under subsection (1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.
4. When the Public Prosecutor and the accused appear on the date fixed for the hearing of the application under subsection (3), the Court shall examine the accused in camera:
  - (a) where the accused is unrepresented, in the absence of the Public Prosecutor;
  - (b) or where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor;as to whether the accused has made the application voluntarily.
5. Upon the Court being satisfied that the accused has made the application voluntarily, the Public Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.
6. If the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.
7. Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.
8. In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with the provisions of the Code.

9. In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of opportunity.

Defence mitigation argued to the prosecutor.

In relation to the principle of opportunity, the prosecutor will ordinarily take into account factors such as the strength of the evidence, public policy considerations, and availability of witnesses.

In relation to defence mitigation argued to the prosecutor, a person under investigation may attempt to convince the prosecutor not to initiate criminal proceedings against him or if criminal proceedings have already been initiated, an accused person may submit letters of representation (on a 'without prejudice' basis) to the Public Prosecutor to negotiate the possible withdrawal, amendment or reduction of charges.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No. Not that the public is aware of.

### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all. Not that the public is aware of.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Malaysia has no structured settlement procedure for bribery (or even other corporate) offences. The decision on whether to proceed with a prosecution is simply a choice between proceeding through the court system or not proceeding with a prosecution at all.

### **3.5 *De facto or de jure***

*Editor's note: defence mitigation argued to the prosecutor – the prosecutor may decide to initiate or not initiate proceedings depending on the representations made by the alleged wrong-doer. This process is not contingent upon an admission of guilt (see sections 2.2 and 2.1.4 above). This would constitute a de jure settlement process following the classification used in this report.*

#### 4. Transparency

##### 4.1 Public access to information on settlements

###### 4.1.1 Is information about settlement available to the public?

No.

###### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

###### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

##### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

Yes. The public authority is the MACC itself.

###### 4.2.1 If yes, is this data publicly available?

Yes. [www.sprm.gov.my/index.php/en](http://www.sprm.gov.my/index.php/en). The data is not very comprehensive.

##### 4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?

None.

#### 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

##### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

No.

##### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

#### 6. The following questions call for your opinion

##### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability

No predictability.

I do not think there will be any predictability. Prosecuting authorities in Malaysia while guided by the usual considerations when deciding whether to prosecute, I believe there are also other important external factors such as political motivations or the protection of public interest – protecting integrity of the economy and rule of law; discouraging unlawful business practices at the expense of the public interest.

At the end of the day, cooperation is only a mitigating factor. An alleged wrongdoer can gain credit but cooperation in itself does not mean the alleged wrongdoer is automatically entitled to immunity from prosecution or a favourable resolution of its case. It also depends on the extent and the value of the cooperation – whether the cooperation is proactive, timely, truthful, useful or relates to essential and relevant facts to the case.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

I believe the answer to the question is neither. The existing framework of rules neither encourages nor discourages cooperation of the sort. It is up to the alleged wrongdoer to cooperate or not.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

Yes, it should be encouraged. Cooperation that can lead to more efficient prosecution, quicker resolution or even settlements.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

Policy and rules should be drawn up to guide prosecuting authorities and advise the alleged wrongdoers on what sort of cooperation is expected, the credit or consideration given to the cooperation and its consequences. Thought should also be given to incentivise the alleged wrongdoers to cooperate. Training must also be given to the prosecuting authorities on dealing with the alleged wrongdoers.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

From a financial viewpoint, it may benefit the corporation, its shareholders, employees whereby cooperation enables the prosecuting authorities to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. From a reputational viewpoint, gaining credit and the acknowledgement from the prosecuting authorities that a corporation is cooperative and law abiding can only be a positive.

*Wendell Wong, Director, Drew & Napier LLC*

**1. Background: normative framework**

**1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The relevant provisions are found in the Prevention of Corruption Act: sections 5 to 8 criminalise the giving and receipt of gratification, the general offence of bribery. Sections 10 to 12 prohibit the bribery/offering and acceptance of gratification to and by any persons in the employment of the government or in any public body. 'Gratification' under the Prevention of Corruption Act is defined broadly with no express exceptions or permitted minimum values prescribed.

**1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

Under section 37 of the Prevention of Corruption Act (Cap 241, Rev Ed 1993), the Act has extra-territorial powers over a Singapore citizen to deal with corrupt acts outside Singapore as though it were committed in Singapore.

Section 37 of the Prevention of Corruption Act states as follows:

'37(1) The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.'

Separately, Singapore has ratified the United Nations Convention Against Corruption (UNCAC) on 6 November 2009.

**1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Yes. Please see response to question 1.2.

**1.4 Are facilitation payments allowed in your jurisdiction?**

Please see response to question 1.1. 'Gratification' under the Prevention Corruption Act is defined broadly and facilitation payments are likely to fall within the ambit of the offences stated in the Prevention of Corruption Act.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

Yes, the Penal Code.

Under the Interpretation Act of Singapore and Section 11 of the Penal Code (Cap 224, 2008 Rev Ed) a 'person' includes any company or associations or body of persons, whether incorporated or not.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes. The Corrupt Practices Investigation Bureau (CPIB).

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

Article 35(8) of the Constitution of the Republic of Singapore states that the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

However, the discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose for which it was intended. The exercise of prosecutorial discretion is subject to judicial review in two situations: first where the prosecutorial power is abused and, second, where its exercise contravenes constitutional protections and rights (*Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49).

**2.1.2 Deciding what charges to file?**

Yes. Please see response to question 2.1.1.

**2.1.3 Deciding whether to drop charges?**

Yes. Please see response to question 2.1.1

**2.1.4 Deciding whether or not to plea bargain?**

Yes. Please see response to question 2.1.1.

**2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Other.

1. Internal prosecution guidelines which are not publicly available but considered and applied based on the AGC's assessment of public interests and competing interests. This is as set out in a press release dated 20 January 2012 prepared by the AGC, which can be accessed at [www.agc.gov.sg/home/the-exercise-of-prosecutorial-discretion](http://www.agc.gov.sg/home/the-exercise-of-prosecutorial-discretion).
2. Article 35(8) of the Singapore Constitution.

The AGC have stated in the press release that prosecutorial discretion is exercised based on a consideration of a range of factors such as the strength of evidence against each accused person, the level of cooperation provided by the accused persons to the investigation authorities as well as the existence of personal mitigating circumstances, including any mental impairment or even physical illness which might warrant the taking of a compassionate approach. Where the reason for prosecuting or not prosecuting raises a question of importance for the public and disclosure would not impact the proper resolution of the case, the Attorney-General may provide brief reasons for its decisions.

General common law principles of (1) evidential sufficiency and (2) public interest also apply in Singapore. Reference: Professor Kumaralingam Amirthalingam in *Prosecutorial Discretion and Prosecution Guidelines*, [2013] SJLS 50.

The prosecution must first be satisfied that there is sufficient evidence for a realistic or reasonable prospect of conviction. In assessing the sufficiency of evidence, the prosecution would consider the admissibility, reliability and credibility of the evidence, as well as the availability of relevant witnesses.

If the first stage is passed, the second stage of whether it is in the public interest to prosecute would be considered.

Article 35(8) of the Singapore Constitution states that the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Yes, general common law principles of (1) evidential sufficiency and (2) public interest apply in Singapore. Reference: Professor Kumaralingam Amirthalingam in *Prosecutorial Discretion and Prosecution Guidelines*, [2013] SJLS 50. Please see response to question 2.2.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

The Attorney General does not publish guidelines on the exercise of its prosecutorial discretion in Singapore. However, where the reason for prosecuting or not prosecuting raises a question of importance for the public and disclosure would not impact the proper resolution of the case, the Attorney-General may provide brief reasons for its decisions. Reference: Attorney General's Chambers Press release dated 20 January 2012.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

Please see response to question 2.3 on the exercise of prosecutorial discretion and question 1.5 on the definition of a 'person' under the Penal Code and Interpretation Act.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

**Existing framework: Criminal Case Management System and Criminal Case Review:**

Save that the system in Singapore does not entail a structured and signed settlement agreement, the defence and prosecution can meet for informal criminal case management system (CCMS) meetings to discuss or enter into plea bargains. The Singapore plea bargain system is informal and flexible and the ultimate discretion rests with the prosecution in determining the terms and conditions of the plea bargain and how the matter proceeds. In this regard, we have provided responses where relevant below.

In the state courts, once the defendant is charged and the matter is before the courts, the state courts have a mechanism called Criminal Case Review (CCR) where there is a limited avenue for the judge to be involved in sentence indication (on the facts of each case) to assist defence and prosecution in plea bargaining where necessary or appropriate. The CCR judge plays a facilitative role rather than an evaluative role. He may give a sentence indication in an appropriate case but these sentencing indications given at CCR are strictly non-binding on the courts and the session is conducted on a without prejudice basis.

**Proposed new legal framework: deferred prosecution agreements:**

Further, a new legal framework incorporating deferred prosecution agreements (DPA) has recently been proposed and there may be changes to Singapore's criminal laws in 2018.

Under the proposed framework, the Public Prosecutor can agree to dismiss the charges against companies for certain corporate offences, as long as the companies agree to undertake strict obligations or comply with specific requirements.

All DPAs will require the approval of the High Court, which must be satisfied that the DPA is in the interests of justice and its terms are fair, reasonable and proportionate. The DPA must also be published upon Court's approval. The mechanism aims to promote corporate reform.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

See response to question 3.1.

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

detection mechanisms such as internal, anonymous;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals

The Attorney General does not publish guidelines on the exercise of its prosecutorial discretion in Singapore. However, the prosecution may take into account all the factors above and other mitigating/aggravating factors during plea bargaining.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

Section 131 of the Evidence Act (Cap 97, Rev Ed 1997) states that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

**3.2.4 What form(s) can a structured settlement take?**

Please refer to our response in 3.1 above.

**3.2.5 What are the usual terms of such an agreement?**

Please refer to our response in 3.1 above.

**3.2.6 Are there limits on what the prosecution can offer?**

Yes. Please refer to our response in 3.1 above.

**3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

**3.3.1 Prior to the settlement:**

**3.2.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No. Please refer to our response in 3.1 above.

### **3.3.2 Once the settlement has been reached:**

#### **3.3.2.1 Is the structured settlement filed in court?**

No. Please refer to our response in 3.1 above

#### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

No.

### **3.3.3 During the implementation of the settlement:**

#### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Please refer to our response in 3.1 above.

#### **3.3.3.2 Can this authority impose penalties for non-compliance?**

Please refer to our response in 3.1 above.

### **3.4 Outcome of the structured settlement**

**Are there any rules that provide guidance about the outcome of such negotiations with respect to the following? Please select all options that apply and provide further information in the field next to each box you tick.**

Please refer to our response in 3.1 above.

### **3.5 *De facto or de jure***

*Editor's note: the existing process is a plea bargain contingent upon an admission of guilt (see section 3.1). This would constitute a de facto, plea-based settlement process following the classification used in this report. However, on the 19 March 2018, Singapore passed the Criminal Justice Reform Act introducing deferred prosecution agreements. This constitutes a jure settlement process following the classification used in this report.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No. Please see response to question 3.

#### **4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

Please see response to question 3 and 4.1.1.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

Please see response to question 3 and 4.1.1.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Offences under the Prevention of Corruption Act are under the purview of the Singapore Corrupt Practices Investigation Bureau.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Please see response to question 1.2. Section 37(2) of the Prevention of Corruption Act states as follows:

‘Any proceedings against any person under this section which would be a bar to subsequent proceedings against that person for the same offence, if the offence had been committed in Singapore, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Singapore.’

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country’s legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

No express provision prescribing that a foreign conviction will have any effect on the country’s legal system.

**6. The following questions call for your opinion**

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

Encouraged.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

Encouraged.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

One option may be to consider alternate sentencing regimes eg, independent monitors for companies.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There could be reputational or financial advantages.

*Jin Wook Song (Partner), Jeena Kim (Partner), Bae, Kim & Lee LLC*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

In Korea, the Criminal Code sets out general provisions that prohibit corrupt practices including official bribery (ie, bribery to public officials) and commercial bribery (ie, bribery among private parties).

Alongside the Criminal Code, the Act on the Aggravated Punishment of Specific Crimes (Specific Crimes Act) and the Act on the Aggravated Punishment of Specific Economic Crimes (Specific Economic Crimes Act) operate to deal specifically with certain types of criminal conduct. Among others, the Specific Crimes Act expands the scope of public officials to encompass officials of government-owned or controlled entities and the Specific Economic Crimes Act prohibits the bribery to employees of certain financial institutions.

In addition, the Framework Act on the Construction Industry and the Special Act on the Prevention of Insurance Fraud make anti-corruption provisions specifically for the respective industries concerned.

Bribing a foreign public official is covered under the Act on Combating Bribery of Foreign Public Officials in International Business Transactions.

Recently, the Improper Solicitation and Graft Act (also known as Kim Young Ran Act) came into force as of 28 September 2016. This law significantly expands the scope of prohibited corrupt practices mainly in the following three ways:

- first, it includes in the scope of illegal conduct a new concept known as ‘improper solicitation’, which makes it illegal to solicit public officials on certain matters of public concern even though no giving or taking of material or economic benefit (ie, bribery) is involved;
- second, the definition of a public official is broadened to include those who are commonly known to owe a duty of integrity to the general public such as media representatives or journalists, school teachers and other persons performing duties of public nature under a law (eg, surveyors); and
- third, and most notably, companies can now be vicariously liable for the corrupt practices of its employees and agents.

**1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

The OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions was implemented by the Act on Combating Bribery of Foreign Public Officials in International Business Transactions.

**1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

The laws of the Republic of Korea do not expressly allow ‘facilitation payments’ and thus there are no criteria for distinction with general bribes.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

There are no general corporate criminal liabilities. However, there are certain laws that provide for corporate criminal liabilities (eg, the Act on Combating Bribery of Foreign Public Officials in International Business Transactions, the Improper Solicitation and Graft Act, the Framework Act on the Construction Industry, etc).

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Prosecutor’s Office has authority to investigate and prosecute crimes including corruption in international transactions. The police can also investigate crimes, but only under the command of prosecutors and do not have authority to prosecute.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

Yes.

In Korea, prosecutors generally enjoy prosecutorial discretion. Article 195 of the Criminal Procedure Act of Korea provides that where there is a suspicion that an offence has been committed, a prosecutor shall investigate the offender, the facts of the offence and the evidence. However, under Article 247 of the Criminal Procedure Act, even if a prosecutor considers there is a suspicion that an offence has been committed as a result of his/her investigation, he/she may decide not to institute a prosecution in consideration of various matters, including age, character and conduct, intelligence and environment of the offender, offender’s relation to the victim, the motive for the commission of the crime, the means

and the result of the crime, circumstances after the commission of the crime. In practice, however, a suspension of prosecution is exceptionally granted only in cases where damage is minimal, and there are no clear standardised internal criteria, including any monetary threshold of the damage within the prosecution.

#### **2.1.2 Deciding what charges to file?**

Yes. Refer to the response 2.1.1 above.

#### **2.1.3 Deciding whether to drop charges?**

Yes. Refer to the response 2.1.1 above.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Other. Refer to the response 2.1.1 above.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No. Refer to the response 2.1.1 above.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

Refer to the response 2.1.1 above.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

Prosecutors decide whether to prosecute or not, considering various circumstances, and there are no separate standards for individuals and corporations.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

#### **3.5 De facto or de jure**

*Editor's Note: based on the above information a prosecutor may decide not to institute a prosecution in consideration of various matters. However, there is no indication in this report that the cooperation of the alleged wrongdoer is a consideration in this regard (see section 2.1.1). Furthermore, suspension of prosecution is exceptionally granted (see section 2.1.1). Based on the information in this report there is no structured settlements for corruption offences process envisaged within this jurisdiction (See section 3.1).*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

No.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Non-existent.

#### 4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

### 4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?

No.

#### 4.2.1 If yes, is this data publicly available?

No.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

No.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

The circumstance that a prosecution was already initiated in another country can be considered by a prosecutor when he/she investigates and prosecutes, but the said circumstance cannot legally bind the prosecutor.

*Daniel Y M Song (Partner), Wen-Ping Lai (Associate Partner), Lee & Li, Attorneys-at-Law*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Articles 121 through 123 and 342 of the Criminal Code and the Anti-Corruption Statute. The link for the Criminal Code: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0000001>.

The link for the Anti-Corruption Statute: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0000007>.

### **1.2 Do your foreign bribery laws have extraterritorial effect?**

Yes.

Under Paragraph 6, Article 11 of the Anti-Corruption Statute, any person giving bribes to a foreign government official is punishable.

### **1.3 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payment is forbidden in Taiwan. Taiwanese law prohibits civil servants from receiving facilitation or ‘grease’ payments. Article 16 of the Civil Servant Work Act of Taiwan prohibits civil servants from receiving any kind of gifts in relation to the matters they have handled and, on top of that, civil servants who receive grease payments are subject to imprisonment or a fine under Article 11 of the Anti-Corruption Act.

But if the gift for the civil servant is occasional and could not affect specific rights or obligations and meets any of the conditions under Article 4 of the Code of Ethics for Civil Servants, receipt of such gift is permitted. For example, a gift is permitted if it is received out of ‘public affairs etiquette’, as part of any activities based upon courtesy, general practices or customs that are conducted for the purposes of public affairs and during domestic or overseas visits, hosting of foreign dignitaries, business growth, and communication and coordination. It is also permissible when received for engagement, marriage, birth, relocation, taking of office, change of office, retirement, resignation, leaving of office, or sickness, injury or death of the civil servant, his/her spouse or his/her lineal relative. However, the market value of the gift cannot exceed the ‘Standards for Normal Social Activity Customs’. The ‘Standards for Normal Social Activity Customs’ allow a gift with a market value not exceeding NTD 3,000 provided that the total value of gifts received from the same source within one year does not exceed NTD 10,000.

#### **1.4 Does your country provide for corporate criminal liability?**

No.

Taiwan's criminal law punishes only individuals, with very limited exceptions where corporate entities bear criminal liability. For corruption cases, there is no special provision penalising legal entities. But if an employee of a legal entity is held liable in a bribery case and the legal entity obtains benefits derived from the criminal offence, such benefits will be confiscated.

#### **1.5 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

No.

The Public Prosecutors' Office is the main government agency that conducts bribery investigations and prosecutions. The Investigation Bureau of the Ministry of Justice and the anticorruption agency under the Ministry of Justice will assist the public prosecutors in investigating domestic and international corruption cases. Generally, the investigation is carried out within their own jurisdictions.

### **2. Exercise of prosecutorial discretion**

#### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

##### **2.1.1 Deciding whom to charge with a crime?**

Yes.

The prosecutor decides whether a suspect should be charged and what the charge should be in accordance with Article 251 of the Code of Criminal Procedure. Article 251 states that the prosecutor should initiate a prosecution if the evidence obtained by the prosecutor sufficiently shows a person is suspected of having committed an offence.

##### **2.1.2 Deciding what charges to file?**

Yes.

The prosecutor may decide what charges to file. However, if the court finds that it is another crime that the defendant has committed based on the same facts, the court can convict the defendant of such other crime.

##### **2.1.3 Deciding whether to drop charges?**

Yes.

If the prosecutor finds that there is not sufficient evidence to prosecute the defendant, he has to render a written decision to drop the charge. If the suspect committed a minor offence (one with a maximum punishment of no more than three years' imprisonment, burglary, or breach of trust) and the behaviour is forgivable, the prosecutor may render a discretionary dismissal decision to drop the charge.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

If the defendant has committed an offence whose minimum punishment is imprisonment for less than three years, the prosecutor may, either of his own discretion or upon the defendant's or his lawyer's request, enter into negotiation with the defendant.

Plea bargaining can be conducted any time in the trial before the final argument session.

#### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Principle of opportunity.

The prosecutor may exercise his discretion to determine (1) not to prosecute when the offence committed is minor and forgivable (discretionary non-prosecution); and (2) deferring a prosecution if the suspect agrees to the conditions set forth by the prosecutor.

#### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

Unless the prosecutor makes a discretionary non-prosecution or deferred prosecution decision, he shall make a decision to prosecute when 'there is sufficient evidence to confirm that the suspect has committed a crime'.

##### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

It may be arguable to what degree the evidence is 'sufficient enough' to confirm the suspect's commission of a crime. How to define the threshold of prosecution properly is a perennial issue. Deciding whether there is 'clear and convincing evidence' to bring prosecution remains highly subjective.

#### **2.4 Do these standards differ for individual and corporate defendants?**

No.

In principle, only individuals are subject to criminal liability, unless there is a special provision penalising corporate entities. The standards to prosecute an individual or a corporate entity, if it is subject to criminal liability, are the same.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

The bribe payer could enter into a settlement with the prosecutor before indictment for a deferred prosecution and after indictment for a plea bargain.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

Although by law, the deferred prosecution process for individuals is not contingent upon an admission of guilt, in practice, the prosecution will agree to deferred prosecution only when the individual defendant has admitted guilt. By law, plea bargain is possible only when the individual defendant has admitted guilt. Both deferred prosecution and plea bargain are subject to the legal framework (please see Articles 253-1, 253-2 and 253-3 of the Code of Criminal Procedure for deferred prosecution, and Articles 455-2, 455-3 and 455-4 of the Code of Criminal Procedure for plea bargain.)

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

A structured settlement before indictment is called 緩起訴 (*huan qi su*) and a settlement during the trial is called 認罪協商 (*ren zuei shei shang*) in Chinese.

#### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Assistance in investigating and prosecuting individuals.

All of the factors we ticked above are mitigating factors. Because a corporate entity is not subject to criminal liability under the Anti-Corruption Statute, a company's existing prevention and detection measures or its commitments to institute new prevention and detection measures would not become a factor to affect the punishment of an individual defendant.

#### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

#### **3.2.4 What form(s) can a structured settlement take?**

Deferred prosecution is formed by the prosecutor's written decision, which lays out all the conditions the suspect agreed to. Settling through plea bargains is initiated by the prosecutor's submission of a request to the court and all the conditions agreed upon by the prosecutor and the defendant will be transcribed in the court's records and written in the court's judgment.

### **3.2.5 What are the usual terms of such an agreement?**

The usual terms of a plea bargain are that the defendant admits his guilt; accepts the sentence; apologises to the victim; pays a certain amount as compensation; or the defendant pays a certain amount to the national treasury, a certain percentage of which may be appropriated by the prosecutors' office for non-profit, public-interest organisations or local autonomous organisations.

As for the usual terms of deferred prosecution, the defendant may be ordered to perform acts such as apologising to the victim, writing a statement of repentance, paying the victim an appropriate sum as compensation for property or non-property damage, or performing 40 to 240 hours of community service for a government agency or the non-profit, public-interest institution designated by the prosecutor.

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

Yes. The prosecutor can offer only less harsh sentences, but cannot offer a less serious charge. Furthermore, the death penalty, life imprisonment and imprisonment for not less than three years, plus civil disturbance, treason and interference with relations with other states are not subject to negotiation by the prosecutor and the defendant.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

In plea bargaining, before the court enters a judgment based on the settlement between the defendant and the prosecutor, either the defendant or the prosecutor could withdraw the settlement. The defendant can withdraw the settlement without conditions, but the prosecutor can withdraw the settlement only when the defendant breaches the settlement terms.

As for deferred prosecution, the prosecutor may revoke the deferred prosecution decision and proceed with the investigation or initiate a prosecution if: (1) the accused violates his/her agreement with the prosecutor; (2) the prosecutor indicts the accused for another offence which is committed during the deferred prosecution period and is punishable by imprisonment; or (3) before the deferred prosecution decision, the accused commits another offence and is therefore sentenced to imprisonment during the deferred prosecution period.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

Yes and no.

For plea bargaining during the trial, the court's consent is required for the prosecutor and the defendant to engage in settlement negotiation. As for deferred prosecution, it is not necessary for the prosecutor and the defendant to obtain the court's consent.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

In plea bargaining, once a settlement has been reached, the prosecutor will petition the court to enter a judgment based on the terms of the settlement. All the terms will be written in the court's judgment.

**3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

Yes. The Code of Criminal Procedure grants the court the authority to reject the settlement if the defendant did not enter into the settlement of his own free will, the punishment should be remitted, the defendant should be exempted from prosecution, the case should be dismissed, or the facts agreed upon by both parties are inconsistent with the facts found by the court. Under such circumstances, the court should reject the settlement between the prosecutor and the defendant and continue the trial.

As for deferred prosecution, the court does not have scrutiny or approval power, but the High Prosecutors' Office does.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

A judge.

Firstly, a corporate entity will never be a party to a settlement for bribery or corruption cases. As we stated in 1.5, Taiwan's criminal law punishes only individuals, with very limited exceptions where corporate entities bear criminal liability. For corruption cases, there is no special provision penalising legal entities. It is always the prosecutor's responsibility to enforce the criminal judgment, even when the judgment is based on the parties' settlement. Therefore, the prosecutor is responsible for monitoring whether the defendant has properly observed the terms of the settlement.

### 3.3.3.2 Can this authority impose penalties for non-compliance?

No.

No. But the terms of compensation to a victim and monetary penalties can be grounds for civil compulsory execution.

## 3.4 Outcome of the structured settlement

### Statutory Provisions:

Financial penalties – yes. Articles 455-2, 253-2 of the Code of Criminal Procedure.

Disgorgement of profits – yes. The court will pronounce to confiscate the profits from the crime according to Article 38 of the Criminal Code.

Compensation to third parties – yes. Articles 455-2, 253-2 of the Code of Criminal Procedure.

Personal liability – yes. Articles 455-2, 253-2 of the Code of Criminal Procedure.

## 3.5 *De facto or de jure*

*Editor's note: the criminal settlement process in Taiwan is a de jure process following the classification used in this report. Although by law, the deferred prosecution process for individuals is not contingent upon an admission of guilt, in practice, the prosecution will agree to defer prosecution only when the individual defendant has admitted guilt. Furthermore, as there is no corporate criminal liability for corporations in Taiwan, this applies only to natural persons. (See generally section 3 above).*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

In plea bargaining, the terms of the settlement will not be published independently; the conclusion of the settlement (ie, the settlement terms) will be disclosed as part of the judgment online. In deferred prosecution, the settlement terms will not be published.

#### 4.1.2 How detailed is the information provided about the settlement to the public?

(Extensive = very detailed, transparent public statement) Please mark only one option.

Extensive.

The judgment, which will be published online, will contain all the settlement terms agreed on by the prosecutor and the defendant in the plea bargain.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Non-existent.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

Yes, all the files with respect to the investigation, the trial and appeal process will be transferred back to the prosecutors' office which are not accessible to the public.

**4.2.1 If yes, is this data publicly available?**

No. [www.judicial.gov.tw](http://www.judicial.gov.tw).

No. It is not publicly available, except the judgment, which will be published online.

**5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

**5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Despite a final judgment rendered by a foreign court, the same act of corruption or bribery is still punishable in Taiwan according to Article 9 of the Criminal Code. If the defendant has served his sentence in a foreign state, the execution of the punishment imposed by Taiwan courts may be entirely or partly remitted in Taiwan.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

**6. The following questions call for your opinion**

**6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

Reasonable predictability.

The prosecutor will welcome the wrongdoer's admission of paying the bribe to government officials. It will help the prosecutor successfully prosecute and convict the government officials receiving the bribe. The outcome of the alleged wrongdoer's cooperation with the prosecuting authorities is reasonably predictable. If the alleged wrongdoer cooperates

with the prosecuting authorities and admits to guilt, the probability of having a deferred prosecution or a less harsh sentence through plea bargaining is high.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

It is encouraged. Under the Anti-Corruption Statute, if the bribe payer turns himself in and admits his guilt, he will be exempt from the penalty. If he admits his guilt in the course of prosecutorial investigation or trial, his sentence will be reduced or remitted in full.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.**

It should be encouraged. In most corruption cases, it is always difficult to trace the money from the bribe payer to the receiving government officials. The bribe payer's admission of his payment to the government officials can help the law enforcement authorities successfully prosecute the government officials.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

The Anti-Corruption Statute already provides incentives for the bribe payer to cooperate with prosecuting authorities.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

There are no clear advantages to companies in cooperating with the authorities. Firstly, the companies whose employees bribed government officials do not bear criminal liability. Therefore, such companies' offering of cooperation will not help them gain any financial benefits, such as reducing the fine. Secondly, when a company's employee bribes government officials, his motivation is always to help the company (such as winning a government contract). The company's cooperation with the prosecuting authorities will not help the company's reputation. On the contrary, if the company cooperates with the prosecuting authorities, the company will have to explain whether the employee's action was motivated by someone else in the company, or even by the company's policy.

## 63. NIGERIA

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*Emmanuel Akomaye, Attorney, Emmanuel A Akomaye & Co*

### 1. Background: normative framework

#### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

The rules are contained in various legislations including:

- the Corrupt Practices and Other Related Offences Act, 2000 that establishes the Independent Corrupt Practices Commission (ICPC) otherwise known as the ICPC Act;
- the Economic and Financial Crimes Commission (EFCC) Establishment Act, 2004;
- the Code of Conduct & Bureau Act;
- the Penal Code;
- the Criminal Code; and
- the Public Procurement Act 2007, etc.

All these laws have provisions prohibiting bribery in businesses, whether local or international.

#### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

- The United Nations Convention against Corruption (UNCAC);
- The African Union Convention on Preventing and Combating Corruption; and
- The ECOWAS Protocol on the Fight Against Corruption, 2001.

These international instruments have been domesticated in the laws mentioned above.

#### 1.3 Do your foreign bribery laws have extraterritorial effect?

Yes.

Yes. Once an aspect of the bribery occurs or is connected with Nigeria, jurisdiction is ignited. It is immaterial that the bribery or some aspect of it occurred abroad. Under Section 22 of the EFCC Act, assets of a convict located abroad are forfeitable subject to a treaty with the foreign country. Under Section 24 of the same Act, if the assets are located in Nigeria and represent the proceeds of crime of an offence of a foreign country and also punishable in Nigeria (if it had occurred here), it is also subject to forfeiture to the Federal Government. Under Section 46 of the ICPC Act, any property which is the subject matter of an offence

under the Act, including bribery, located outside Nigeria, may be restrained by an order of court prohibiting any person by whom it is held from dealing with it. Section 13 of the ICPC Act also makes it a felony for any person to receive anything including a property outside Nigeria which would constitute a felony had it been received in Nigeria. Concealing of property which is a subject of bribery within or outside Nigeria is also an offence under S24 of the ICPC Act

**1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Any form of facilitation payments amount to bribery in Nigeria and it is an offence. Sections 8, 17, 18 and 22 of the ICPC Act provide for offences of gratification and facilitation payments. Under Paragraph 6 (1–3) of the Code of Conduct of Public officers in the 5th Schedule to the 1999 Constitution, public officers are prohibited from accepting property or benefits of any kind in the course of discharging their duties.

**1.5 Does your country provide for corporate criminal liability?**

Yes.

Under our laws a corporate entity is criminally liable for the criminal acts or omissions of its directing minds done or omitted to be done on its behalf. The Interpretation Act defines ‘person’ to include a body corporate. Therefore, where a criminal responsibility is prescribed against a ‘person’ in any legislation, the word ‘person’ includes a body corporate or legal entity. The decisions of the superior court have also defined a ‘person’ to include a corporate entity. Some legislations, such as the ICPC Act, EFCC Act, Public Procurement Act and the Money Laundering Prohibition Act, specifically provide for corporate criminal liability. The Money Laundering Act in Sections 9 and 10 provides that a corporate entity may have its licence suspended and pay heavy monetary fines if it violates money laundering regulations or fails to report mandatory thresholds.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Other.

Two major authorities have overlapping mandates for the investigation and prosecution of corruption including corruption in international business transactions. They are the Independent Corrupt Practices and other Related Offences Commission; and the Economic and Financial Crimes Commission. The Code of Conduct Bureau also have provisions prohibiting facilitation payments, maintaining of foreign bank accounts and participation of public officials in business, local or foreign.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

The prosecutor upon studying the file is guided by the complicity or otherwise of a suspect in the offence and chances of success if charges are pressed. Public interest also plays a great role in deciding whether to press charges.

#### **2.1.2 Deciding what charges to file?**

Yes.

The charges to file are dependent on the evidence available, strength of such evidence and whether it satisfies the elements of the offence, the legislation and the jurisdiction of the court.

#### **2.1.3 Deciding whether to drop charges?**

No.

He can only make a recommendation, with cogent reasons on why a charge should be dropped, to the supervising authority, the Attorney-General of the Federation (AGF), who takes the final decision on whether to drop the charges or not. Under Section 174 of the 1999 Constitution, the AGF has the overall power over Federal criminal offences and may institute, take over and continue or discontinue any criminal proceedings.

#### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

The new Administration of Criminal Justice Act, 2015 (ACJA) has elaborate provisions on plea bargain (S270). The prosecutor may offer or receive from the defendant a plea bargain subject to prescribed conditions including: if the evidence is insufficient to prove the charge, the defendant has agreed to return the proceeds of crime and has cooperated fully with the investigation. In this case the court has to sanction the plea bargain agreement.

### **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Other.

Availability of good evidence, complicity or otherwise of a suspect, chances of success if prosecution is undertaken, public interest.

Prosecutorial discretion is often a dodgy issue. Several factors influence the decision including public interest and the political environment at the time. Public interest is omnibus and sometimes political exigency may take precedence over legality.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

There is no specified threshold. However, the nature and magnitude of the offence, level of defendant's involvement, the quantum of assets involved and public disapproval of the conduct of the defendant may influence the decision of the prosecutor

### **2.3.1 How clearly are the factors of this threshold defined?**

Not defined at all.

The political inclination of the suspect may sometimes be more critical in determining whether to prosecute or not than consideration of a threshold.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

However, when multinational corporations are involved the inclination is often tilted to a settlement or resolution of the matter rather than embarking on a full-blown prosecution. It is to be noted that the Federal Government has recently developed a National Policy on Prosecution aimed at fast-tracking the prosecution of corruption and related cases. The AGF recently sought the buy-in of all the states for its adoption and implementation. Once rolled out, it will give clearer guide on all prosecutorial matters on corruption including when to prosecute.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Section 14 of the EFCC Act provides for the compounding of offences by the Commission with an offender subject to sanctioning by the Attorney-General. In the past, Nigeria resolved several high profile foreign related bribery cases using structured settlements without going through the courts. The Administration of Criminal Justice Act (ACJA), however, now provides for plea bargain which has to be sanctioned by the court.

### **3.2 Form, features and terms of structured settlements**

#### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

Under S14(2) of the EFCC Act, admission of guilt is not a pre-condition. However, under the ACJA, plea bargain agreement under Section 270, is contingent on a plea

of guilt by the defendant. The settlements reached with MNCs before the coming into force of the ACJA were generally referred to as plea bargain. However, there was no admission of guilt by the offenders and they were not processed through the courts.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

**Existing prevention and detection measures:**

risk assessment;

training;

commitments to institute new prevention and detection measures; and

assistance in investigating and prosecuting individuals.

Punishment is usually provided by the law creating the offence, ICPC, EFCC, CCB, etc. Where the provision gives a range of punishment, the punishment to be imposed will necessarily fall within that prescription. Where no specific punishment is prescribed, resort may be held to the general provisions under the Criminal or Penal Code.

**3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

No.

The prosecutor does not have the power to demand a defendant to mandatorily waive his rights or privileges. The defendants' privileges or rights are constitutional and must be obeyed. The defendant may however, subject to constitutional safeguards and with the guidance of a lawyer of his choice, waive his right to be silent or to plead guilty to a charge. Under the ACJA the court must first be satisfied that the defendant entered into the plea bargain agreement voluntarily before it will proceed to convict and sentence.

**3.2.4 What form(s) can a structured settlement take?**

It can take the form of a simple agreement between the defendant and the state specifying in clear terms what have been agreed upon by the parties.

**3.2.5 What are the usual terms of such an agreement?**

1. The parties to the agreement, ie, the offender and the State and where appropriate all the enforcement and or prosecution authorities involved in the case.
2. What necessitates the agreement.
3. The specific offences alleged against the defendant and the laws breached.
4. Admission or otherwise of guilt by the defendant.

5. The assets agreed to be forfeited and or returned by the offender pursuant to the admission of guilt or whether the assets are returned or paid as an *ex gratia* payment to terminate the investigation/prosecution.
6. Full disclosure on the part of the offender.
7. Responsibilities of each party to the agreement.
8. Effective date of the agreement.
9. Confidentiality Clause.
10. Post-Agreement monitoring and the institution of a robust anti-corruption programme by the offending Corporation in the case of a corporate body.

### **3.2.6 Are there limits on what the prosecution can offer?**

No.

He will, however, be guided by public interest, interest of justice, public policy and the need to prevent the abuse of legal process. Generally, the prosecutor would weigh all relevant factors including the defendant's cooperation with investigators, defendant's criminal history, likelihood of obtaining a conviction, expenses involved in the trial and appeal, willingness of the defendant to pay restitution and the need avoid delay in disposing the case, etc. However, under the ACJA, the plea agreement must conform with the law creating the offence otherwise the court will reject the plea agreement as being inconsistent with the law.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

It depends on the terms of the settlement. Where the defendant breaches his obligations or responsibilities under the settlement agreement it may be a ground for the AGF/Enforcement Authority to repudiate it.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

Negotiations normally take place between the state and the defendant without recourse to the court. Even under Section 270 ACJA, a plea bargain may be offered or accepted by the prosecutor without the consent of the court but the prosecutor must consult the investigator and have regard to the nature of the offence and public interest. The court has no role in negotiations.

**3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

Under the ACJA the court shall not participate in the discussion leading to a plea bargain. Similarly, in compounding offences the EFCC does not involve the court in reaching an agreement with the defendant.

**3.3.2 Once the settlement has been reached:**

**3.3.2.1 Is the structured settlement filed in court?**

Yes.

A plea bargain reached under the ACJA must be filed in court and sanctioned. Once satisfied, the court proceeds to conviction and sentence. A court may reject a plea agreement that does not conform with law. Note, however, that settlements reached with corporations before the ACJA came into force were not filed in court. The process was largely administrative and the courts were not involved.

**3.3.3.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The ACJA provide guidelines. The court may even reject a plea agreement if it is of the view that the defendant cannot be convicted for the offence to which he has pleaded guilty, or the right of the defendant to legal representation in course of negotiating the agreement was breached. The EFCC Act, however, does not provide guidelines and the court does not play a role in the course of negotiating the compounding of an offence. However, when the charges are filed in court, the court will necessarily scrutinise the terms of settlement.

**3.3.3 During the implementation of the settlement:**

**3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority.

The AGF oversees the whole process of monitoring but in collaboration with enforcement authorities or another designated authority which investigated or is prosecuting the offender with whom the terms of settlement were discussed and agreed.

The AGF may also appoint an independent expert to monitor compliance and report to him. The monitoring period is usually one to three years.

**3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

While the Attorney-General of the Federation does not have the power to unilaterally impose penalties for non-compliance he may invoke his prosecutorial powers under S174 of the Constitution to file a fresh charge which, if successful, may lead to the imposition of penalties. Generally, the essence of monitoring is to ensure that the defaulting person, particularly corporations, institute and strengthen their internal anti-corruption programmes and improve personnel ethical standards.

### 3.4 Outcome of the structured settlement

	Statutory Provisions	Past cases
Financial penalties	Yes – the sections of the laws creating the offences.	Yes –the previous settlement.
Disgorgement of profits	No.	Yes.
Compensation to third parties	Yes – the ACJA.	No.
Obligations to cooperate with other agencies	No.	Yes.
Monitors (and paying for them)	No.	Yes.
Corporate compliance programmes	No.	Yes.
Personal liability	No.	Yes.

A limited number of cases have been concluded through settlements which provide guidance for subsequent ones.

### 3.5 *De facto or de jure*

*Editor's note: Plea bargains under the new Administration of Criminal Justice Act, 2015 (ACJA) are contingent on an admission of guilt (see section 2.1.4). This will constitute a de facto, plea-based settlement process following the classification used in this report.*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

While the entire agreement reached with a defendant is not published, substantial information on it is made known to the public, particularly the quantum of assets forfeited or returned.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Limited.

Some of the settlements reached before the coming into force of the ACJA contained confidentiality clauses.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Somewhat extensive.

Under a plea bargain in the ACJA, negotiation of the contents will now be limited.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

No.

There is no distinct data on foreign bribery cases. The available data is on all corruption cases.

**4.2.1 If yes, is this data publicly available?**

No.

The Freedom of Information Act 2011 has now made it possible for any person to demand information not protected by law.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

There are two categories of structured settlements so far concluded in Nigeria involving bribery or other corruption related cases. The first group concerned largely domestic cases where cross-border money laundering may have been involved. These cases were charged to court but settled with the defendants without going through a full trial. The defendants pleaded guilty, forfeited assets involved in the crime and were convicted and given a light sentence by the court. The second category involved the bribery of Nigerian public officials by multinational corporations. Some of these corporations were charged to court. However, the settlements were reached without reference to or involvement of the court. Detailed NPAs were signed between the state and the corporations. The MNCs paid substantial sums to the state as *ex gratia* payments without admitting guilt. There was no conviction or sentence of any person.

## 5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy

### 5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?

No.

No rule bars Nigeria from making a claim on assets involved in bribery when other jurisdictions claim as well. Nigeria may however cooperate with other jurisdictions.

### 5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?

(a) Foreign conviction: No effect.

(b) Foreign settlement: No effect.

Though a foreign conviction may not have any binding effect, it may, however, be taken into consideration in imposing punishment by the Nigerian court in the event of a prosecution and conviction. In the case of a settlement, it has no binding effect in Nigeria.

## 6. The following questions call for your opinion

### 6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability

No predictability.

Every case is decided on its own merit and public interest. The availability of evidence, or the cost of obtaining additional evidence, is also a factor. The prevailing political will of the highest authority may also influence the outcome of the cooperation

### 6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.

It is encouraged by practice. There was, until recently, no existing framework or rules governing this. However, the ACJA has provided guidelines on plea bargaining and encourages plea agreements so far as they comply with the law.

### 6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged? Please motivate your answer.

It should be encouraged. It will help in quick resolution of cases and also save costs and delays in trials. Some people argue that such cooperation encourages impunity. There is no evidence that full trials have provided sufficient deterrence either. Cooperation brings quick closure in complicated multi-jurisdictional corruption cases, leading to recovery of proceeds of crime in good time.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

There should be clear guidelines, preferably elaborated in a non-conviction based asset recovery law or in the Proceeds of Crime law.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

The advantage is both financial and reputational. Cooperation affords the company the opportunity of continuing its business without interruption and avoid losses that may be occasioned by a full investigation and trial as well as the huge cost of defence and indeed the reputational damage associated with the corruption scandal.

### 64. EGYPT

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*Ibtissem Lassoued, Tamimi Law Firm*

#### 1. Background: normative framework

##### 1.1 Are there Anti-Bribery Rules in force in your country?

Yes.

Anti-bribery provisions are contained in Egypt's Penal Code (Law No 58 of 1937, as amended by Law No 50 of 2014). A range of bribery offences by public officials are provided, which entail punishments of hard labour, imprisonment and fines of up to twice the amount of the original bribe.

##### 1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?

Egypt has signed and ratified both the UN Convention Against Transnational Organised Crime, on 5 March 2004, and the UN Convention Against Corruption (UNCAC) on 25 February 2005. As a member of the Arab League, it is also party to the Arab Convention to Fight Corruption, established on 21 December 2010.

##### 1.3 Do your foreign bribery laws have extraterritorial effect?

No.

The Penal Code applies only to offences committed within the national territory. However, Egypt retains jurisdiction whereby offences have been committed abroad but the accomplice to the crime committed acted at least in part within Egyptian territory.

##### 1.4 Are facilitation payments allowed in your jurisdiction?

No.

The anti-bribery provisions of the Penal Code prohibit facilitation payments, stating that public officials are prohibited from accepting incentive payments in exchange for the performance of legitimate duties attached to their office. Acceptance of the same is punishable by hard labour and a fine of up to the commensurate value of the bribe.

##### 1.5 Does your country provide for corporate criminal liability?

No.

Under Egyptian law it is not possible to raise criminal charges against a corporation, as juridical persons are not criminally liable under the criminal procedures law. However, the legal representative of a juridical person can be held criminally liable for offences committed by the same as if he had committed the crime in a personal capacity. Moreover, a company's assets may be seized if they have been used in the commission of an offence.

**1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

Egypt has several authorities tasked with detecting public sector corruption. The Administrative Control Authority (ACA) has a legal mandate to detect and prevent corruption in the public sector. The Administrative Prosecution Authority (APA), established by Law No 117 of 1958, is authorised to investigate all administrative and financial crime committed at all levels of government ministries and agencies, while also functioning as the internal reporting mechanism for public officials. The Illegal Profiting Apparatus (IPA) is not responsible for investigating corruption cases but is charged with referring cases forward to the public prosecution in instances where public officials have suspected illegal income. Finally, the Central Auditing Organisation was established by Law No 129 of 1960 to monitor the finances of civil service agencies but amendments made to its function by Law No 144 of 1988 made it directly subordinate to the President and negated a large part of its functionality and self-efficacy.

**2. Exercise of prosecutorial discretion**

**2.1 Do prosecutors have unfettered discretion in regards to the following:**

**2.1.1 Deciding whom to charge with a crime?**

No.

Under Article 2 of the Criminal Procedures Law Code 23 of 1971, as amended, the public prosecution has exclusive jurisdiction over the filing and handling of all criminal law suits, except in the instances determined by other provisions of Egyptian law.

**2.1.2 Deciding what charges to file?**

No. Please see previous answer.

**2.1.3 Deciding whether to drop charges?**

No.

Article 2 of the Federal Criminal Procedures Law states that no criminal case may be suspended, delayed or abandoned except in the instances provided for in the law itself.

**2.1.4 Deciding whether or not to plea bargain?**

No.

Egyptian laws contain no provisions for prosecutors to reach plea bargain agreements. However, Article 107 (*bis*) of the Penal Code states that, in bribery cases, the briber or mediator will not face any punitive measures if he or she self-reports the offence to the authorities, or admits to being guilty of the same.

**2.2 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

No.

Upon conclusion of the investigation, the investigating magistrate must decide if there has been a breach of law and send the pertinent files to the relevant competent court.

**2.2.1 How clearly are the factors of this threshold defined?**

Not defined at all.

Please refer to previous answer.

**2.3 Do these standards differ for individual and corporate defendants?**

Yes.

There are no provisions for the criminal prosecution of corporate entities in Egyptian law.

**3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

**3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

The Egyptian Criminal Procedures Law provides that settlements are permissible in cases where a contravention or misdemeanour has been committed and is subject to punitive measures of either an obligatory fine or an optional imprisonment of up to six months. If a settlement is agreed, the criminal case is abated. For crimes of embezzlement of public funds, settlements must be agreed by an expert committee, formed by virtue of a Prime Minister's Decree.

**3.2 Form, features and terms of structured settlements**

**3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

No.

There are no conditions specified where the expert committee is formed.

**3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Other.

There are no details provided regarding the criteria for the expert committee to consider. However, the permitted terms of a settlement agreement are provided in the form of minimum and maximum fines.

### **3.2.3 What are the usual terms of such an agreement?**

If the settlement is accepted by the accused prior to the case being filed before the competent court, the amount paid must be equivalent to one-third of the fine applied to the crime. If the payment is accepted after the case has been filed, the accused must pay either one-third of the maximum fine, or the full minimum amount applicable, whichever sum is greater.

### **3.2.4 Are there limits on what the prosecution can offer?**

Yes.

Minimum and maximum parameters are provided for settlement fines, dependent on the offence, as set out above.

## **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

### **3.3.1 Prior to the settlement:**

#### **3.3.1.1 Is the structured settlement filed in court?**

Yes.

## **3.5 *De facto or de jure***

*Editor's note: the settlement process (expert committee) is not contingent upon an admission of guilt. (See section 3.1 and 3.2.1 above). This would constitute a de jure settlement process following the classification used in this report. However, as there is no corporate criminal liability in this jurisdiction this only applies to individuals.*

## **4. Transparency**

### **4.1 Public access to information on settlements**

#### **4.1.1 Is information about settlement available to the public?**

No.

This is not relevant to Egypt.

## **5. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

Article 298 of the Egyptian Civil and Criminal Procedures Law provides for reciprocity regarding foreign judgments and orders. The enforcement of foreign judgments in Egypt is subject to review by the competent court and will only be approved in cases where the Egyptian courts do not have jurisdiction to settle the dispute itself.

**5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: Binding effect.

As explained previously, foreign convictions are only enforced in instances where the foreign jurisdiction has a basis of reciprocity with Egypt, Egyptian courts have no jurisdiction over the crime in question and the competent courts are satisfied with the legality and standards of the criminal case file.

Settlements that have been agreed outside of Egypt may be enforced if they have been issued under one of the international arbitration conventions to which Egypt is signatory, though cases are reviewed on an individual basis.

**6. The following questions call for your opinion**

**6.1 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Discouraged. The lack of provisions for prosecutorial discretion over mandatory prosecution promotes and evidences the zero-tolerance approach to bribery.

*Joseph (Yossi) Ashkenazi, Partner, Herzog Fox & Neeman*

## **1. Background: normative framework**

### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

The Israeli Penal Law 1977 (sections 290 and 291) prohibits bribery. In this regard, the taking of bribe by a public official as well as the payment of a bribe to a public official in the domestic context, are considered as constituting a criminal offence. Under the Penal Law, the definition of a ‘public official’ is expanded in order to include employees of corporations which provide service to the public.

The Penal Law sets out a series of rules that define the giving and receiving of a bribe and includes the components of a bribe and how these are to be interpreted. In 2008, the Penal Law was amended in order to prohibit the payment of a bribe to a foreign public official. The definition of ‘foreign public official’ includes any of the following:

1. a foreign state employee and any person who holds a public office or performs a public function on behalf of the foreign state, including a person who holds an office or serves in the legislative, executive or judicial branches of the foreign state, whether by election, appointment or agreement;
2. an employee of, and a person holding or performing a public office on behalf of, a public body established under the enactment of a foreign State or on behalf of an entity directly or indirectly controlled by a foreign state; and
3. an employee of, and a person holding or performing a public office on behalf of, an international public organisation; for this purpose, the term ‘international public organisation’ means an organisation founded by two or more states or by organisations founded by two or more states. It should also be noted that the Public Service Law (Gifts), 1979, prohibits the receipt of gifts by a public official, under certain circumstances (and under various rules relating to this prohibition).

### **1.2 What regional or international laws criminalising corruption in international business have been implemented in your country?**

In 2008, Section 291A, which prohibits the payment of bribery to a foreign public official, was added to the Penal Law, following Israel’s accession to the UN Convention against Corruption and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the OECD.

### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

According to Section 15 of the Israeli Penal Law, any offence or omission committed by a citizen or resident of Israel falls within the jurisdiction of the Israeli courts, subject to certain restrictions as stated in that section.

### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

The interpretation given to Israeli anti-bribery rules by the Supreme Court is that any payment to a public official in connection with his public position is deemed to constitute bribery, even if the payment was made in return for an action which the public official was obliged to undertake within the context of his duties.

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

A corporation may be held criminally liable based on the 'organ theory', namely if an organ of the corporation (an organ comprises an officer or employee whose position is senior or central, such that his acts and *mens rea* can be identified with those of the company) is found to be criminally liable for an offence committed as part of discharging its duties, then the corporation will also be criminally liable for the same offence(s).

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

A special team has been established in the Ministry of Justice, which includes representatives of the Israel Police Investigation Unit and the Intelligence Department, the National Fraud Investigation Unit and representatives of the Ministry of Justice. The team also includes representatives from the Tax Authority and the Money Laundering Prohibition Authority.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Prosecutors have a discretion whether or not to prosecute and for which offences. The criteria for the application of this discretion are the existence of prima facie evidence and the public interest in prosecuting. This discretion is subject to judicial review by the Supreme Court (High Court of Justice).

### **2.1.2 Deciding what charges to file?**

Yes.

### **2.1.3 Deciding whether to drop charges?**

Yes.

A prosecutor has the discretion not to proceed with charges, as long as the court has not entered a judgment.

### **2.1.4 Deciding whether or not to plea bargain?**

Yes.

Prosecutors have discretion whether to enter a plea bargain and in respect of which charges. Such discretion should be exercised according to the strength of the evidence in the case and the public interest in pursuing charges to a full trial. The court is not bound by a plea bargain and has a discretion to impose a greater sentence (although according to case law, the exercise of such discretion should only be undertaken in rare circumstances).

## **2.2 Which rules determine the exercise of prosecutorial discretion in your country?**

(You can choose more than one option)

Other.

See above: prima facie evidence and public interest. Under the public interest criteria, a variety of considerations may apply, including mitigation.

## **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

A prosecutor should file charges if they are convinced that there is a reasonable chance for a conviction occurring at the end of the trial, based on the existence of prima facie evidence (subject to a lack of public interest in a conviction being rendered in the relevant case).

### **2.3.1 How clearly are the factors of this threshold defined?**

Defined, but not clearly.

The above-mentioned criteria (prima facie evidence and public interest) are stipulated in the Criminal Procedure Law, and further explained and interpreted in Supreme Court cases, as well as the internal instructions of the State Attorney and the Attorney General. It should, however, be emphasised that the exercise and application of such criteria does provide the prosecutor with a broad discretion.

## **2.4 Do these standards differ for individual and corporate defendants?**

No.

The criminal liability of corporations is a derivative of the criminal liability of individuals which are deemed as 'organs' of the corporation. Hence, the application of these standards is similar with regard to both individual and corporate defendants.

### **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

#### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

Yes.

Structured settlements are regulated under various enactments. Although the general arrangement is stipulated in the Criminal Procedure Law, currently it does not apply to bribery (or to any other offence for which the maximum punishment is more than three years' imprisonment). Bribery offences can be the subject of a structured settlement under the Israeli Securities Law provided that the bribery offence was committed in connection with traded securities.

Another option is to enter a plea bargain with a suspect in which he will receive a concession with respect to the charges or a reduction in the applicable punishment.

#### **3.2 Form, features and terms of structured settlements**

##### **3.2.1 Is the possibility to enter a structured settlement contingent upon an admission of guilt by the alleged bribe payer?**

Yes.

The alleged bribe payer should admit the underlying facts of the alleged offence, but does not have to admit guilt.

It should be noted that the Securities Law does not expressly state that the suspect must confess to the facts within the framework of the settlement. However, Section 54E(c)(1) of the Securities law stipulates that the settlement shall include the facts constituting the offence, and that the suspect is required to sign the settlement.

##### **3.2.1.1 If yes, what is such a structured settlement called in your language?**

Closing a case through a settlement (קית תריגס).

##### **3.2.2 Which one of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer?**

(You can choose more than one option)

Voluntary disclosure of wrong doing/self-reporting.

Cooperation with enforcement authorities through the investigation.

Commitments to institute new prevention and detection measures.

Assistance in investigating and prosecuting individuals.

With regard to the punishment sought by the prosecution, and imposed by the court, it is reasonable to assume that the existence, and the effective application, of a compliance programme will be taken into account with respect to punitive considerations. However, this particular issue has not been dealt with under Israeli case law to date.

### **3.2.3 Can prosecutors demand a waiver of privilege or equivalent protections?**

Yes.

The prosecutor has a broad discretion regarding the terms of a plea bargain with a suspect and, in general, can also demand waiver of privilege. This does not apply to a structured settlement under the Securities Law.

### **3.2.4 What form(s) can a structured settlement take?**

A structured settlement under the Criminal Procedure Law; a structured settlement under the Securities Law; a state witness agreement; and a plea bargain.

### **3.2.5 What are the usual terms of such an agreement?**

In a structured settlement, the suspect is subject to enforcement measures and undertakes to carry out the actions or prohibitions that apply to him, within a period stipulated in the arrangement. An indictment will be filed against him if he fails to comply with the terms of the agreement.

In a plea bargain, the suspect admits the facts of the offence and, in return, the prosecution will agree to a concession with respect to the charges and/or will ask the court to impose a reduced punishment (in comparison to the punishment that would have been imposed after the trial).

### **3.2.6 Are there limits on what the prosecution can offer?**

Yes.

With respect to a structured settlement under the Securities Law or under the Criminal Procedure Law, the limitations are those stipulated under the applicable law. In plea bargains, the discretion is broader but subject to judicial review.

### **3.2.7 Do settlements ever get reversed for non-compliance in your jurisdiction?**

Yes.

The law allows cancellation of an agreement for non-compliance. However, since the law in this regard was only enacted a few years ago, there is insufficient experience regarding this matter.

### **3.3 Role of the court in regards to structured settlements**

**Please explain the role of the courts with respect to any structured agreement reached.**

#### **3.3.1 Prior to the settlement:**

##### **3.3.1.1 Is it necessary to obtain the court's consent before engaging in a settlement negotiation?**

No.

There is no judicial involvement in the process of engaging in a settlement negotiation.

##### **3.3.1.2 Does the court have any other involvement before settlement has been reached?**

No.

#### **3.3.2 Once the settlement has been reached:**

##### **3.3.2.1 Is the structured settlement filed in court?**

No.

A structured settlement is not filed to the court. However, a plea bargain is filed to the court.

##### **3.3.2.2 Does the court have some level of scrutiny or approval power over the terms of the settlement?**

Yes.

The court does not scrutinise structured settlements. However, plea bargains are subject to court approval in the sense that the court is not bound by the plea bargain and may deviate from the agreements in the plea bargain and impose a harsher sentence. According to Supreme Court case law, this only occurs in rare circumstances and, in most cases, the court should defer to the prosecution's discretion in entering the plea bargain.

#### **3.3.3 During the implementation of the settlement:**

##### **3.3.3.1 Which authority is involved in determining whether the settling company has properly observed the terms of the settlement?**

Another authority.

The prosecution division, which negotiated and executed the structured settlement.

##### **3.3.3.2 Can this authority impose penalties for non-compliance?**

No.

This authority cannot impose penalties, but it can revoke the structured settlement and pursue charges.

### 3.4 Outcome of the structured settlement

#### Statutory Provisions:

Financial penalties – yes.

Disgorgement of profits – yes.

Compensation to third parties – yes.

Corporate compliance programmes – yes.

#### Past cases:

Personal liability – yes.

Most of the rules which regulate the outcome of the structured settlement (with an emphasis on the sanctions which can be imposed on the suspect), are stipulated in the Criminal Procedure Law and in the Securities Law. In addition, there are certain instructions and guidelines of the prosecution which deal with these matters, as well as agreed-upon terms that were included in previous structured settlements.

### 3.5 *De facto or de jure*

The process is essentially a mix of *de jure* guidelines and *de facto* practice. Since most of the corruption offences cannot be subject to a structured settlement under the Criminal Procedure Law, the stipulated rules under this statutory scheme do not apply. There are certain rules which are stipulated under the Securities Law. However, they are relevant only if the corruption took place within the context of traded securities. In all other cases, the settlement of corruption offences can only take place through plea bargains, the rules for which are not clearly stipulated. Although there are some guidelines for plea bargains set by the Attorney-General, they still leave the prosecutor with a broad discretion.

*Editor's note: Bribery offences can be the subject of a structured settlement under the Israeli Securities Law provided that the bribery offence was committed in connection with traded securities. This is not contingent on an admission of guilt and constitutes a de jure settlement process following the classification used in this report. (See section 3.1).*

## 4. Transparency

### 4.1 Public access to information on settlements

#### 4.1.1 Is information about settlement available to the public?

Yes.

See answer to question 4.1.5 below.

**4.1.2 How detailed is the information provided about the settlement to the public?**

(Extensive = very detailed, transparent public statement) Please mark only one option.

Somewhat extensive.

Plea bargains are conducted in court and therefore have a public exposure. A structured settlement must be published both under the Criminal Procedure Law and the Securities Law. The structured settlement is published on the Ministry of Justice's website and on the Securities Authority website. The publication mainly includes a brief description of the facts that consist of the offence in which the suspect confessed, as well as the terms of the settlement.

**4.1.3 Please indicate to what extent can a company negotiate the contents of the public statements on the case** (Extensive = a lot of room to negotiate) Please mark only one option.

Limited.

The ability is fact dependent and changes from case to case.

**4.2 Is data regarding investigation, prosecution and resolution of foreign bribery allegations collected and processed by a public authority?**

Yes.

This data is collected as part of the Ministry of Justice's annual reports to the OECD.

**4.2.1 If yes, is this data publicly available?**

No.

The Ministry of Justice has, to date, not made such information publicly available.

**4.3 Please provide an overview (if possible) of cases dealing with structured settlements in your jurisdiction?**

Summaries of the four major structured settlements entered into in Israel during the past few years, are as follows:

**The Psagot case**

The Psagot Investment House ('Psagot') was controlled by a private equity fund (York). At the end of 2009, an agreement for the sale of Psagot's shares was signed between York and Apax Partners. The closing of the transaction was supposed to take place in June 2010, one of the closing conditions being the receipt of approval by the regulators.

In early 2010, before the transaction was closed, the Israel Securities Authority (ISA) began an open investigation against Psagot and some of its senior officers, for suspected fraudulent trading through Psagot's *Nostrro* account. This investigation presented a potential risk to Psagot's regulatory licences and, therefore, was a threat to the closing of the transaction.

In the aforementioned matter, a settlement was reached with the State Attorney Office according to which Psagot paid a fine of NIS 150 million, and undertook to execute a series of measures that will meet the public interest (including the implementation of a compliance programme). Against these undertakings, the State Attorney decided to refrain from pursuing criminal charges against Psagot (but not against its officers) and the relevant regulators refrained from taking administrative measures against Psagot.

### **The Siemens case**

During 1999 to 2005, Siemens AG (hereinafter 'Siemens') and Israel Electric Corporation (IEC) executives formed a 'give and take' relationship in which IEC executives were receiving bribes from Siemens. These bribes were used to promote Siemens' interests in the IEC and relate to IEC tenders which took place during the relevant period.

In February 2016, an arrangement was signed, under the Securities Law, between the State Attorney's Office for Taxation and Economics and the Siemens Company, in which it was decided that Siemens would pay NIS 160 million to the State as well as appoint an external supervisor for two years in order to assimilate social norms that would prevent the repetition of the bribery offence. In return, Siemens will not be indicted for this case.

### **The CAL case**

Israel Credit Cards Ltd (CAL), an Israeli credit cards company, was investigated for the following suspicions: false coding of online gambling transactions; and reopening businesses and splitting offences of fraud.

CAL entered into a structured settlement that included the following conditions: CAL committed to implement organisational changes which will prevent the recurrence of the aforementioned offences, including the continued operation of a hotline for CAL's employees, which enables anonymous reporting to CAL's internal audit system for any suspected violations.

In addition, CAL committed to continue to act in accordance with the Code of Corporate Governance and undertook to continue operating the Prohibition of Money Laundering Department and to subject the Compliance Officer to the Chief Risk Officer. By doing so, various 'compliance trustees' were incorporated into the company.

In addition, the Company paid NIS 85 million (this payment was classified as a forfeiture of the funds received by CAL as a result of the acts underlying the settlement).

### **The NIP case**

NIP Global Ltd (NIP) is an Israeli company specialising in the development of electronic national infrastructure, with a focus on projects involving the distribution of smart identity cards.

In December 2016, NIP was found guilty, through a plea bargain, of bribing a government official in Lesotho, where the company was involved in a national project for the development and implementation of a border control and electronic passport system.

According to the plea bargain, NIP was required to pay a fine of NIS 2.25 million. In addition, the company forfeited an additional amount of NIS2.25m thus bringing the total cumulative monetary damage to the company to NIS 4.5 million.

Furthermore, as part of the plea bargain NIP undertook, on behalf of itself and its principals and employees, to fully cooperate with the ongoing investigations in Lesotho.

Finally, the company also provided evidence that it had adopted supervision and enforcement standards which would prevent the recurrence of such violations.

In its decision to confirm and adopt the plea bargain, the Tel Aviv Magistrate's Court noted that the agreed monetary fines and forfeitures appear rather small when compared to the value of the Lesotho project to the company (\$30m). Nevertheless, the court decided to accept the plea bargain, in part due to the fact that this was the first ever case in Israel relating to foreign bribery and invoking Article 291A of the Penal Code.

## **5. Competing domestic claims and the principle of ne bis in idem/double jeopardy**

### **5.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

According to the Israeli Penal Law, if a person has been convicted in a foreign state and served his sentence, he cannot be charged again in Israel for the same offences. If he did not serve his sentence (at all, or partially), then the Israeli prosecutor may press charges or alternatively ask the court to order that the defendant will serve the rest of his sentence in Israel.

### **5.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

Regarding a foreign conviction – see above. Regarding a foreign settlement – there is no reference to this situation in the relevant statutes and, therefore, there is no binding effect. It is likely to be taken into consideration by the prosecution when deciding on the scope and nature of the prosecution and by the court when imposing a sentence.

## **6. The following questions call for your opinion**

### **6.1 If cooperation between alleged wrongdoers and prosecuting authorities regarding the decision whether or not to prosecute is possible, is there, in your opinion, predictability regarding the outcome of such cooperation? Please discuss under one of the following headings. (a) no predictability; (b) reasonable predictability; (c) high predictability**

No predictability.

Cooperation during an investigation is likely to mitigate sentencing but not to prevent prosecution. If a suspect wishes to receive immunity from prosecution against his cooperation, he will need to negotiate a plea bargain prior to providing his cooperation.

**6.2 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country?**

This is encouraged, as it may lead to a plea bargain thereby preventing prosecution, or at least serve as a mitigating factor in sentencing. It may also serve to reduce regulatory fines when such are imposed.

**6.3 In your opinion, should such cooperation between the authorities and alleged wrongdoers be encouraged or discouraged?**

It should be encouraged, since it may lead to the exposure and prosecution of corruption that otherwise would not have been discovered; but with the necessary constraints in order not to incentivise false accusations aimed at evading prosecution.

**6.4 If, in your opinion, such cooperation should be encouraged, what steps should be taken by your country authorities to encourage such collaboration?**

First, to include corruption offences as part of the offences subject to the structured settlement scheme under the Israeli Criminal Procedure Law. Second, to enact more clear and detailed rules as to the outcome of voluntary disclosure and self-enforcement by corporations.

**6.6 Is there a clear advantage to companies in cooperating with the authorities? If so, is that advantage financial? Reputational? Of some other form?**

Yes, for the reasons described above and even more so for corporations which decided to dismiss of the individuals that were involved in the wrongdoing. The benefit is both financial (reduction of sentencing or regulatory fines) as well as reputational.

*Ibtissem Lassoued, Tamimi Law Firm*

### **1. Background: normative framework**

#### **1.1 Are there Anti-Bribery Rules in force in your country?**

Yes.

Legislation regarding bribery of public officials is contained within Law No 3 of 1987, (The UAE Penal Code) as amended by Federal Law No 7 of 2016. A maximum sentence of five years will be passed on any person who is found guilty of bribing or attempting to bribe either a domestic or foreign public official. The same is applied to anyone who instigates or assists in the occurrence of the bribe.

Acceptance or solicitation of a bribe is also criminalised by the Penal Code, regardless of the person's intent to commit or refrain from the incentivised act.

#### **1.2. What regional or international laws criminalising corruption in international business have been implemented in your country?**

The UAE signed and ratified the United Nations Convention Against Corruption (UNCAC) on 22 February 2006, which contains provisions for criminalising all instances of offering and soliciting bribes concerning officials of national public office, foreign public office and international organisations. These measures are implemented in addition to those included in the UN Convention Against Transnational Organised Crime, which the UAE ratified on 7 May 2007. It is also party to the Arab Convention to Fight Corruption, established on 21 December 2010, which obliges states to criminalise bribery of public officials, bribery in public sector companies, joint stock companies, associations and institutions or public interest nature, bribery in the private sector, bribery of foreign public officials and officials of public international organisations in connection with international trade within a state party.

#### **1.3 Do your foreign bribery laws have extraterritorial effect?**

Yes.

As per Article 239 *bis* (1), the provisions of the UAE Penal Code concerning bribery offences are applicable to any acts that occur outside of the state, where the crime involves a UAE national or an employee of the public or private sector of the state, or affects a public property.

#### **1.4 Are facilitation payments allowed in your jurisdiction?**

No.

Facilitation payments are prohibited in the bribery provisions of the Penal Code in that incentive payments or gifts for the commission or omission of an act that is a legitimate duty of the public officer's function are also criminalised.

### **1.5 Does your country provide for corporate criminal liability?**

Yes.

Article 65 of the Penal Code states that all legal persons, excepting public entities, are criminally liable for the conduct of their representatives or employees acting on their behalf. Companies can be criminally liable for fines of up to five hundred thousand dirhams, forfeiture and criminal measures limited to fines. The individual guilty of committing the offence is personally liable for the full punishment prescribed by the law.

### **1.6 Is there a public authority/unit dedicated to the investigation and prosecution of corruption in international business transactions?**

Yes.

An Anti-Corruption Unit was established in May 2015 under the Abu Dhabi Accountability Authority (Abu Dhabi Law No 14 of 2008) tasked with investigating financial irregularities and corruption and auditing the government's financial statements. We are yet to witness the extent to which the Anti-Corruption Unit will be utilised and how effective it will be.

## **2. Exercise of prosecutorial discretion**

### **2.1 Do prosecutors have unfettered discretion in regards to the following:**

#### **2.1.1 Deciding whom to charge with a crime?**

Yes.

Article 7 of Federal Law No 35 of 1992 as amended (the Criminal Procedures Law) grants the Public Prosecution exclusive jurisdiction over the initiation and prosecution of criminal proceedings. For some crimes, however, it is necessary for the victim of an offence to file a complaint before criminal action can be initiated.

#### **2.1.2 Deciding what charges to file?**

Yes. See previous answer.

#### **2.1.3 Deciding whether to drop charges?**

No.

In the case that the victim withdraws his or her complaint in the circumstances where applicable in law, the associated criminal action will lapse if eligible under the law. Criminal cases also lapse after a determined period defined by the severity of the offence. The maximum term for violations is one year while cases for felonies can extend for 20 years. For some offences, such as bribery, the UAE Penal Code has now removed all statutes of limitation.

#### **2.1.4 Deciding whether or not to plea bargain?**

No.

UAE law contains no provisions to give the public prosecution discretionary powers to accept plea agreements over conviction in bribery offences. Judges are only permitted to exercise discretion in their application of a high or low-end punishment within the statutory range.

### **2.3 Is there a threshold that determines when a prosecutor should make a decision to prosecute?**

Yes.

As per Article 47 of the Criminal Procedures Law, the public prosecution should question the accused within 24 hours of receiving the case from the relevant judicial officer and then order either his arrest or release.

If the prosecution decide to proceed with the investigation, the decision to refer misdemeanour and petty offence cases to the competent court is based on the presence of 'sufficient evidence'. In the case of a felony offence, which may only be charged to an individual, the decision on the sufficiency of evidence is taken by the Head of the Prosecution Department or his Deputy, then referred to the Court of Assizes.

#### **2.3.1 How clearly are the factors of this threshold defined?**

Vaguely defined.

The level of sufficient evidence is discretionary for the Public Prosecution and is not explicitly defined.

### **2.4 Do these standards differ for individual and corporate defendants?**

No.

The law does not distinguish between individual and corporate defendants in this instance.

## **3. Cooperation between the prosecuting authority and alleged wrongdoer for corruption offences**

### **3.1 Possibility for the alleged bribe payer to enter a structured settlement with enforcement authorities**

**Regardless of whether the process is formalised by law or regulations, is the resolution of foreign bribery allegation through a structured settlement possible in your country?**

No.

*Editor's Note: no plea bargaining allowed (see section 2.1.4). No defined structured settlements process. Based on the information in this report there is no structured settlements for corruption offences process envisaged within this jurisdiction (see section 3.1).*

## **4. Competing domestic claims and the principle of *ne bis in idem*/double jeopardy**

### **4.1 Are there specific rules that would apply when your country is competent to make a claim and other domestic jurisdictions are competent as well?**

Yes.

The UAE retains sovereign jurisdiction over criminal prosecutions in its territory and is not obliged to enforce a foreign judgment in lieu of its own, as decided by its competent judicial authorities. As a signatory to the Riyadh Arab Agreement for Judicial Cooperation 1983, the UAE will recognise foreign judgments originating in the jurisdictions of other States party to the convention.

**4.2 If a corporation has been engaged in a transaction that allegedly violates your domestic anti-corruption rules, what status does (a) a foreign conviction (b) a foreign settlement with respect to the same transaction have within your country's legal system?**

(a) Foreign conviction: Binding effect.

(b) Foreign settlement: No effect.

The UAE will enforce foreign judgments, subject to a number of conditions. The original jurisdiction of the foreign judgment must recognise reciprocity with the UAE, and the criminal case must meet the review standards set by the UAE system. Enforcement of foreign settlements is not subject to a uniform process in the UAE and the standing of settlement agreements is reviewed on a case by case basis.

**6. The following questions call for your opinion**

**6.1 In your opinion, is such cooperation between the prosecuting authority and alleged wrongdoers encouraged or discouraged by the existing framework of rules in your country? Please motivate your answer.**

Discouraged.

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