ALFA International
The Global Legal Network
Local Relationships Worldwide

CORPORATE ACCOUNTABILITY IN A CHANGING BUSINESS WORLD

INCREASING DEMANDS ON BOARDS AND COUNSEL

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Introduction

The ALFA International Corporate Transactions Working Group comprises member law firms that have expertise across the broad spectrum of corporate transactional work.

At the 2021 International Client Seminar, representatives of the CTWG will be giving a presentation relating to corporate accountability in a changing business world. The attached papers supplement that presentation and relate particularly to the fields of foreign corrupt practices and foreign investment regimes in several jurisdictions.

Corporations are facing a business world with changing cultural expectations and demands on directors, senior management and counsel for heightened accountability for business behaviour.

Every day somewhere there is a report of a corporation in trouble for a breach of law or a compliance failure that is traced back to poor corporate culture. Directors and senior management and the counsels who advise them are under increasing public scrutiny over environmental, social and governance (ESG) matters. Corporate performance that is perceived to amount to an ESG failing increasingly is being attributed to poor corporate culture developed and curated from the top. Increasingly, investors are adopting ESG investing strategies.

It used to be the case 15+ years ago that many businesses thought it was OK or at least not a hanging offence to pay "facilitation" fees or "grease money" even though that was not a company's publicly expressed policy. That culture has changed in most countries that will be represented at the ICS and the culture is still changing. Pressure to comply with high ESG standards is being applied by shareholders, proxy advisors and other stakeholders. The compliance bar is being raised steadily. Anti-bribery and anti-corruption are areas where we are seeing increasing demands for vigilance and compliance on the part of companies and their senior personnel.

- There is much greater awareness of the problems caused in societies where there is a culture of corrupt payments.
- Corporate culture in the US and most other western countries has changed and shareholders, proxy groups and stakeholders are far more tuned into ESG principles and companies not behaving badly. Increasingly, investors, together with governments, prosecutors and the media are keen to hold directors and senior managers and their advisors accountable for ESG and compliance failures.
- Boards and their advisors/GCs have to shape their organisations to adopt zero tolerance of and zero practice of corrupt behaviours, sometimes in the face of personnel in the field saying "that's fine but if you want sales etc, this is how things get done here".

Foreign Corrupt Practices

In a globalized business world, many ALFA International clients attending (virtually) the 2021 ICS will have dealings in foreign countries. Many clients conduct business in countries that don't rate so highly on the index for transparent and non-corrupt business practices. Having said that, many FCP[1] infringement actions have involved corrupt practices in non-red flag countries. It can be expected that many ALFA International clients will have dealings where they will be faced with pressures to engage in bribery or other corrupt practices.

The reach of FCP legislation, including extra-territorial application, the attention being paid by very well resourced departments of justice and other prosecutors and the extremely high penalties being imposed on or consented to by companies in the US and elsewhere make this a very hot topic.

Most ALFA International members and clients will be in jurisdictions that have strong anti-bribery and anti-corruption laws. A number of legislative regimes such as the FCP provisions in Division 70 of the Australian Criminal Code and in the UK *Bribery Act 2010* impose strict liability on companies and their officers so that they have the onus in some circumstances to prove that they have not committed offences.

Companies enunciating a zero tolerance policy is one thing. However, GCs and company officers actually dealing with pressures to engage in corrupt practices when faced with day-to-day business realities is another.

In-house counsel are increasingly being involved in business decisions or providing legal-business advice to directors and senior management. In this area, they face the ethical dilemmas of dealing with day-to-day, real world business imperatives and the fearless provision of clear and ethical legal advice.

Committee on Foreign Investment in the US

Since the commencement of COVID 19, many jurisdictions have introduced or strengthened their legislative regimes to dramatically restrict foreign acquisitions of or investments in their domestic businesses or other assets.[2] In a global market, businesses in many countries have long been subject to change of control transactions involving foreign entity acquirers. The increase in protectionism has led to reductions in transaction monetary thresholds, in many cases to zero, above which foreign investments or acquisitions need the consent of the government in the target's country.

Particularly when the company targeted for a foreign acquisition or inbound foreign investment has business that touches the target country's defence or national security, reporting and approval

[1] In this paper, FCP refers to the US *Foreign Corrupt Practices Act* regime and to the anti-bribery and anti-corruption regimes in force in many countries.

[2] ALFA International hosted a webinar in which some of our members included updates on their countries' legislative limitations on foreign investments in their domestic markets. A recording of the webinar can be heard here.

obligations of the US Committee on Foreign Investment in the US (CFIUS) and equivalent bodies in other countries such as the Australian Foreign Investment Review Board must be considered. The areas encompassed by the term 'the national security' are broad and can be relevant in a very diverse range of transactions.

Foreign corrupt practices and foreign investment

The attached Schedule includes papers that summarise the foreign corrupt practices legal frameworks and the foreign investment regimes for the following countries:

Argentina
Gonzalez & Ferraro Mila | Pablo Melhem and Ignacio Sanchez Vaqueiro

Australia
Cowell Clarke | Brett Cowell and Thomas Hill

Brazil
L.O. Baptista | Marta Rodrigues

Cyprus
LC Law Stylianou & Drakou LLC | Lora Stylianou

Germany
Tiefenbacher Rechtsanwälte | Christin Krämer and Dr. Sebastian Schneider

Israel
Dardik Gross & Co Law Firm | Dan Gross

Luxembourg
DSM Avocats à La Cour | Cathy Nelson

Mexico
Von Webeser Y Sierra | Javier Lizardi

Netherlands
Buren | Friederike Henke

New Zealand
Anthony Harper | Matt Smith

South Africa
Knowles Husain Lindsay Inc. | Aleksandra Burr Dixon

Spain
Bufete B. Buigas | Ignacio López-Balcells and Mireia Blanch

Switzerland
Wicki Partners | Rebecca Isenegger

Taiwan
LCS & Partners | Letitia Hsiao

United Kingdom
Charles Russell Speechlys LLP | Daniel Rosenberg

Schedule – Anti-corruption and foreign investment regimes

To access a paper for a particular country, click on the country name.

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ARGENTINA

Introduction

As a general principle, foreign investors wishing to invest in Argentina (either by setting up new businesses or entities or by acquiring businesses or entities), do not require prior governmental approval other than those related to regulated industries (energy, telecommunications, aviation) or general applicable regimes such as antitrust regulations (i.e. mandatory merger notification system).

Argentina has adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). Although bribery was already considered an offence under the Argentine Criminal Code (the "Code"), on March 1, 2018 Law 27,401 entered into force, which makes legal entities criminally liable for corruption and bribery.

This paper outlines the framework Argentina has in place to prevent corruption and bribery as well as an overall picture of certain legal matters applicable to foreign acquisitions of Argentinian land and businesses.

Foreign Corrupt Practices

Corruption and bribery offence

Under Argentine law, "corruption" is a generic term that includes one or more conducts such as bribery of public officials, commercial bribery, fraud among private parties, fraud and other crimes against the public administration, money laundering, misuse of public funds, tax evasion, organized crime, misuse of privileged information and other illegal or improper activities.

Although in the past only the individuals could be criminally liable for corruption offences, Law 27,401 amended the Code and established that legal entities can also be criminally liable for certain conduct that was already included in the Code. This conduct includes:

- Bribing local public officials, foreign public officials, or officials of international organizations;
- Local and transnational influence peddling;
- Negotiations that are incompatible with public office;
- Illegal payments made to public officials under the appearance of taxes or fees owed to the relevant government agency upon undue request by the official;
- Illegal enrichment of public officials and employees;
- Producing aggravated false balance sheets and reports to cover up local or transnational bribery or influence peddling.

Legal entities are liable for the crimes mentioned above "when they were committed, directly or indirectly, through intermediaries, with their intervention or in their name, interest or benefit". Legal entities are only exempted from liability if the individual who committed the crime acted exclusively in his/her own benefit and without benefit for the entity.

The Code applies to those offences that occur within the Argentina territory (and places under Argentine jurisdiction) or with effects therein. It also applies to offences committed abroad by agents or employees of Argentine authorities.

In case of bribery of local public officials, foreign public officials or officials of international organizations, if it occurs outside Argentina, the Code also applies if committed by Argentine citizens or legal entities with a legal address in Argentina (either the address contemplated in its By-laws or the address of its establishments or branches in Argentine territory).

A foreign public official is any person appointed or elected for public service at any level and in any territorial division, in any kind of office, organization, agency or company were the State holds a direct or indirect influence.

In line with the foregoing, foreign directors of an Argentine company who condone or permit the company to contravene the Code will be at risk of prosecution.

Consequences of non-compliance

The extent of penalties imposed due to corruption and bribery offences will depend on whether an individual or a legal entity has contravened the Code.

For individuals, a contravention can result in either or both of the following penalties:

- imprisonment for not more than 6 years;
- fines ranging from two to five times the undue benefit obtained or that could have been obtained through the actions incurred in breach of the Code; or both.

For a legal entity, penalties under Law 27,401 include:

- fines ranging from two to five times the undue benefit obtained or that could have been obtained through the actions incurred in breach of the Code;
- total or partial suspension of activities, for up to 10 years;
- debarment from participating in government bids and contracts or in "any other activity related to the government" for up to 10 years;

- dissolution and liquidation of the legal entity when it was created for the sole purpose of committing one or more of the crimes listed, or if the criminal actions constitute the principal activity of the company;
- suspension or termination of government benefits previously earned by the legal entities;
- publication of the conviction sentence at the cost of the convicted entity; and
- Confiscation of assets obtained through the illegal actions (judges may freeze or seize relevant assets during an investigation). In addition, judges may initiate a civil action and rule forfeiture without the need of a conviction pursuant to Emergency Decree 62/2019.

The Argentine Federal Register of Criminal Records has set up a register that must include records of legal entities related to corruption offences.

Defences

According to Law 27,401, legal entities may be exempted from penalties and administrative responsibility when they:

- Spontaneously self-report the crime as a consequence of internal detection and investigation; and
- established a proper compliance program before the facts which required an effort by the wrongdoers to breach its provisions; and they
- return the undue benefit obtained.

Additionally, legal entities may enter into effective collaboration agreements with the authorities seeking a reduction in penalties.

Compliance Programs

Compliance programs are relevant to minimize the risk of the company committing the listed crimes and to seek exception from or reduction in penalties.

Law 27,401 makes it mandatory for legal entities which engage in certain contracts with the government to implement an anti-corruption compliance program under such law that must be appropriate to the risks, size and economic capacity of the entity. Implementing such a program is voluntary for entities that do not engage in such contracts.

The Argentine Anti-corruption Office, which is a decentralized public agency of the Argentine Executive, has issued a set of guidelines to help legal entities comply with the provisions of Law 27,401 regarding the requirements for compliance programs, including, among others, provisions on delivering training, reporting line and developing internal investigations.

Foreign Investment in Argentina

Foreign investments in Argentina are regulated by a framework of international treaties and Argentine laws and regulations that cover a variety of aspects of foreign investment such as choice of law and jurisdiction, the legal treatment of foreign investors, monetary policies and foreign exchange. Argentina has entered into 60 bilateral treaties with different countries.

In particular, foreign investments are governed by the Argentine Foreign Investments Law Nbr. 21,382, as amended ("AFIL"). The AFIL sets forth, as a general rule, that foreign individuals or entities with a legal domicile outside of Argentina, investing in economic activities in Argentina, enjoy the same status and have the same rights and privileges as those provided to local residents and entities under the Argentine Constitution and other Federal and local laws.

AFIL defines as investment of foreign capital as: (i) all capital contributions from foreign investors applicable to local economic activities; and (ii) the acquisition of local companies by foreign investors. Also pursuant to AFIL regulations, a foreign investor is: (i) any individual or entity owner of any investment of foreign capital and with a legal domicile outside Argentina; and (ii) local companies of foreign capital (defined as local companies duly incorporated in any Argentine jurisdiction) where foreign individuals or legal entities own over 49% of the local company's capital stock or voting rights thereof.

As a general principle, foreign investors wishing to invest in Argentina (either by setting up new businesses or entities or by acquiring businesses or entities), do not require prior governmental approval other than those related to regulated industries (energy, telecommunications, aviation) or general applicable regimes such as antitrust regulations (i.e. mandatory merger notification system).

However, if a foreign company's investment will imply holding equity in an Argentine company, the foreign company must register in the Public Registry of Commerce of the jurisdiction where the Argentine company is incorporated and must comply with certain periodic reporting requirements.

Land

There are certain restrictions on foreigners for the purchase of land. For example, they must obtain prior government approval to purchase land in border and security areas, or to hold a controlling stake in a company owning such land.

Law 26,737 ("Rural Lands Law"), enacted in December 2011, limits the ownership or possession of rural lands (i.e. any land outside the urban grid) by foreign individuals or legal entities. In this sense, foreign individuals and legal entities can only own or possess up to 15% of the total amount of rural land in Argentina and foreign individuals or legal entities of the same nationality cannot hold or possess more than 30% of the 15% total. These percentages are also applicable at the provincial and municipal levels where the lands in question are located.

For properties near certain bodies of water the prohibition is absolute.

Decree 820/2016 amended the Rural Lands Law and allowed ownership by the same foreign owner to exceed 1,000 hectares. In addition, it eliminated restrictions on owning land in certain industrial areas which are not longer considered when determining the hectares of rural land owned by a foreign person or legal entity.

This paper is current as of 14 January 2021.

Pablo Melhem and Ignacio Sanchez Vaqueiro.

GONZALEZ & FERRARO MILA

AUSTRALIA

Introduction

Protection of national interests is an important part of the Australian legal framework. In 1999, Australia adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). The Convention has been codified by legislative provisions in the Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 (Cth) (the Code), often referred to as the Bribery Act.

Australia has also established the Foreign Investment Review Board ("**FIRB**") to monitor and approve the acquisition of Australian interests by foreign entities. FIRB reviews and makes recommendations to the Federal Treasurer regarding certain foreign investments.

This paper outlines the framework Australia has in place to prevent corruption and bribery as well as the limitations on foreign acquisitions of Australian land and businesses.

Foreign Corrupt Practices

Bribery Act offence

Division 70.2 of the Code makes it an offence to bribe a foreign official, subject to some limited defences. A person (which includes a body corporate) is guilty of an offence if that person:

- promises, provides or causes to be provided or offers a benefit;
- which is not legitimately due;
- with the intention of influencing another person, which may be a foreign public official (foreign official);
- in order to obtain or retain business or a business advantage that is not legitimately due.

A foreign official is broadly defined in the Code and includes an employee or official of a foreign government body; a member of the executive, legislature or judiciary of a foreign country; or an employee of a public international organisation in which 2 or more countries are members – such as a United Nations body or the Red Cross. Importantly, the other person is not required to be a foreign official. The provisions are triggered where there is an *intention* to influence a foreign official.

The Division applies to any person where the conduct constituting the alleged offence occurs wholly or partly in Australia. The Division will also apply to conduct occurring wholly outside Australia where at the time of the alleged conduct: the person committing the conduct was an Australian citizen or resident or in the case of a body corporate' was incorporated by or under a law of the Commonwealth or of an Australian State or Territory.

Foreign directors of an Australian company who condone or permit the company to contravene the Code will be at risk of prosecution.

Consequences of non-compliance

A person who breaches the Code and cannot make out a statutory defence will be guilty of an offence and subject to civil or criminal penalties or a combination of both. The extent of penalties imposed will depend on whether an individual or corporation has contravened the Code.

For individuals, a contravention can result in either or both of the following penalties:

- imprisonment for not more than 10 years;
- a fine not more than 10,000 penalty units (AUD$2,220,000 at the date of this paper); or both.

For a corporation, a contravention is punishable by no more than the greatest of the following:

- 100,000 penalty units;
- If the Court can determine the value of the benefit that the body corporate, and any related body, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence – 3 times the value of that benefit;
- If the Court cannot determine the value of the benefit – 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

Reforms

The Federal Government has proposed amendments to the Code would have two significant implications. First, the amendments would expand the reach of the laws by replacing "not legitimately due" with "improperly influence" a foreign public official in order to retain or gain an advantage. Therefore, it would be enough that the person intended to influence the foreign public official even if no particular official was intended to be influenced. Further, the bribe need not have been given or offered to the foreign public official. The offence will occur if the bribe is given or offered to another person with a view to improperly influencing an official. Thus, a benefit or an advantage, however small or lacking in value, given to, say, a family member or an associate of a foreign public official could trigger the offence.

Second, the amendments would deem a company to be guilty of the offence of failing to prevent foreign bribery where a company's associate (allegedly) committed bribery for the profit or gain of the company. "Associate" is broadly defined and could include a person over whom the company has little or no actual control. Thus, the company is automatically guilty unless it can make out the defence that it had "adequate procedures" in place to prevent foreign bribery by its associates. This is a blatant

reversal of the "innocent until proven guilty" principle. Companies with a "culture" that allows bribery or corruption or that lack adequate preventative procedures would be at high risk of being captured, if these reforms are made law. As at December 2020, the amendments appear to have been "parked" at least for the time being.

Defences

A person will not be guilty of an offence if:

- the benefit conferred on or offered to the foreign official is required or permitted by the written law of the foreign official's country; or
- the benefit conferred on or offered to the foreign official is appropriately characterised as a facilitation payment.

Allowance of Facilitation Payments

Pursuant to the Code, a benefit will be classified as 'facilitation' if the benefit offered or given to the official is of a minor nature and is given with the intention of expediting or securing the performance of a minor routine government action. Practically speaking, the facilitation payment should only expedite an action that would be done in any case. Expediting fees published by the foreign government would assist in proving the defence.

Routine government action is defined in the Code and expressly excludes encouraging a decision: about whether to award or continue business with a particular person; or the terms of new or existing business arrangements. Thus, any payment conferred with the intention of obtaining or retaining business will not qualify for the defence. Once the payment is made (assuming it falls within the ambit of 'routine government action'), the person who has offered or given the benefit must appropriately record all relevant details as prescribed by the Code. The record must be retained by the person: unless and until 7 years have passed since the alleged conduct; or through no fault of the person, the record has been lost or destroyed.

Best Practice

Taking into account the current law and possible future reforms, companies (both Australian or international with Australian operation) should have robust processes in place to monitor the risk of potential foreign corrupt practices and to avoid those practices. Companies should implement formal written anti-bribery policies, whistle-blower policies and employee communication and training procedures. These practices should be continually reviewed to show that the company has maintained adequate preventative procedures.

Foreign Investment Review Board

The Australian Government welcomes foreign investment to stimulate income, production and employment within Australia. Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975*. FIRB operates to review foreign investment proposals against Australia's national interest and national security on a case by case basis. The purpose is to determine whether a proposal may be contrary to the national interest or national security, and if it is, to reject the proposal or impose conditions on the foreign investor. The rejection of proposals is rare. However the imposition of conditions of approval is common, particularly for certain types of investment (such as the acquisition of vacant land). FIRB's role is to review proposals and make recommendation to the Federal Treasurer. If the Treasurer approves an acquisition, the Treasurer will issue a no-objection notification ("**FIRB Approval**").

Investments that are made by foreign persons may be classified as significant actions, notifiable actions, or both. Notifiable actions require FIRB Approval before the action can be taken. Significant actions may be called in for review by FIRB, but do not require pre-approval.

Significant Actions

The Federal Treasurer may make a range of orders in relation to significant actions. However, significant actions do not require FIRB Approval unless they are also notifiable actions.

Significant actions may include acquisitions of an entity or business where a foreign person takes an action resulting in a change in control and the action meets the stipulated monetary threshold. Businesses that are agribusinesses carry lower ownership thresholds before an action is a significant action.

Notifiable Actions

Any action that is a notifiable action requires FIRB Approval prior to the action being taken. Penalties apply if a notifiable action is taken without a notice having been given to FIRB.

A notifiable action is an action by a foreign person to acquire:

- a direct interest (typically 10%) in an Australian entity or Australian business that is an agribusiness;
- a substantial interest (typically 20%) in an Australian entity; or
- an interest in Australian land.

The action is only notifiable if the action meets the relevant monetary threshold test (see below).

2021 National Security Reforms

The Federal Government has announced that from 1 January 2021, an enhanced 'national security' test has been added to the existing 'national interest' test. Investments that are categorised as **notifiable national security actions** or **reviewable national security actions** may require FIRB approval or may be reviewed by FIRB at its discretion in the context of Australia's national security.

Notifiable national security actions are actions to acquire interests in **national security businesses** or **national security land**. Examples of national security businesses include operators of ports, responsible entities of gas, electricity or water assets, telecommunications providers, suppliers of critical goods and services to the defence and intelligence sector, and businesses with access to classified information or personal information of defence or intelligence personnel that could compromise Australia's national security. Examples of National security land include defence premises or land in which an agency within the national intelligence community has an interest.

Where actions are both notifiable actions and notifiable national security actions, they are reviewed using the processes for notifiable actions. The national security test forms part of the national interest test, so all notifiable actions are reviewed against Australia's national security in any event.

Notifiable national security actions require FIRB approval. Reviewable national security actions to not require FIRB approval but may be 'called in' for review by FIRB. An entity may wish to obtain FIRB approval for a Reviewable national security action to remove the risk of FIRB 'calling in' the action for review in the future (FIRB can do this up to 10 years from an acquisition). FIRB has published guidance on the types of actions that may constitute reviewable national security actions.

Last Resort Power

FIRB has a power to call in acquisitions on national security grounds using a 'last resort' power in exceptional circumstances. FIRB can do this regardless of whether FIRB approval had previously been obtained or whether the action had previously been called in using the call in power. Importantly, foreign investors cannot remove this risk so it is important that investors are aware of the last-resort power and if the acquisition is of a kind that is at risk of raising national security concerns in the future.

Monetary Thresholds

As mentioned above, one of the tests for determining whether an action is a significant action, notifiable action or national security action under the Act is whether the relevant transaction monetary threshold is exceeded. The monetary thresholds range from between $0 (e.g. for acquisitions of vacant land) and $1.192 billion for less sensitive acquisitions. These thresholds are dependent on what is being acquired and whether the acquirer is from a country that has a free trade agreement with Australia. The monetary threshold for notifiable national security actions and for acquisitions of any kind by foreign government investors is $0.

Assessment of Investment

Significantly, foreign investors need to consider that the Act contains significant anti-avoidance provisions. On this basis, FIRB will assess the practical effect that a transaction has rather than the legal structure of a proposal. For example, a foreign person may acquire shares in an Australian company that holds agricultural land. However, it is likely that due to the effect of the transaction, it will not be seen as an acquisition of a corporate entity but as an acquisition of land. This may give rise to a notifiable action even if the legal structure of the transaction is not a land acquisition.

The definition of 'foreign person' is also broad and includes, for example, Australian companies with foreign shareholders.

In the COVID 19 environment particularly, parties considering acquisitions of or investments in Australian assets should take into account the current monetary thresholds and timelines for FIRB review or approval when assessing transaction procedures.

This paper is current as at 11 January 2021.

Brett Cowell and Thomas Hill.

COWELL CLARKE

BRAZIL

Introduction

Since 1990, Brazil has been strengthening its anticorruption legislation. One of the most important legal frameworks in Brazil today is the Clean Company Act (Law No. 12.846), enacted in 2013 and regulated by Decree 8,420 of 2014. Inspired by the Foreign Corrupt Practices Act (FCPA), the UK Bribery Act and the OECD Recommendations, the Brazilian Clean Company Act imposes substantial administrative and civil liability on companies for corrupt acts against national or foreign public administration.

Brazil was the first country to enact an anticorruption law to hold companies liable for their employees' corrupt actions. The Clean Company Act imposes substantial liability on companies operating in Brazil for bribery committed both locally and abroad and provides no exception for facilitation payments.

This paper outlines the framework Brazil has in place to prevent corruption and bribery as well as the limitations on foreign acquisitions of sensitive and national security interests.

Corrupt Practices

Unlawful Acts

Pursuant to Section 5 of the Clean Company Act, the following acts committed against the national or foreign public administration, against principles of public administration or against the international commitments assumed by Brazil, are prohibited:

- to promise, offer or give, directly or indirectly, an undue advantage to a public official or a related third party;
- to finance, pay, sponsor or otherwise subsidize the performance of unlawful acts;
- to make use of any individual or legal entity with the intent to conceal or disguise the actual interests or the identity of the beneficiaries of the committed acts;
- to prevent or create obstacles to investigations or audits conducted by a public agency; and
- to take acts to prevent, manipulate, hinder or defraud public bids and contracts.

The Clean Company Act applies to *(i)* business organizations in Brazil (incorporated or not); *(ii)* any Brazilian foundation or association; and *(iii)* foreign companies active in Brazil (even if temporarily).

The Clean Company Act provides that these entities may be held liable for unlawful acts performed in their interest or to their benefit, whether directly – through their directors, officers and employees – or indirectly – through their business partners, distributors, representatives, agents, etc. And, what is more, the Clean Company Act provides for successor liability in case of a merger, change of corporate form, restructuring, incorporation, acquisition or creation of subsidiaries. The Clean Company Act also

covers unlawful acts committed against Brazilian or foreign public officials, particularly in the context of public bids.

Consequences of non-compliance

The penalties for violation of the Clean Company Act are severe and range from the obligation to return any profits resulting from bribery, suspension of the company's operations and in some cases, even dissolution of the company. Additional administrative penalties may include fines of up to 20% of the company's gross revenue and if it is not possible to use the criterion of company's gross revenue, the fine will be from R$ 6,000.00 (six thousand reais) to R$ 60,000,000.00 (sixty million reais).

To demonstrate that a violation was committed, the only thing that Brazilian authorities have to do is to demonstrate that an unlawful act existed; no proof of the company's or any public officer's intent (or knowledge) is required.

In spite of this, accusations on the grounds of the Clean Company Act can only be made against companies, not individuals. According to the Clean Company Act, individuals are subject to the provisions of the Administrative Misconduct Act, which stipulates that the accused must repair the damages caused or return the unlawfully obtained assets – in line with the Civil Code and the Companies Act (Law 6,404/75).

The main penalties applicable to individuals are set out in sections 332, 333 and 316 of the Brazilian Penal Code, which contain provisions regarding undue influence, bribery and solicitation. In Brazil, individuals who give or solicit bribes can face two to twelve years in prison plus a fine established by court. A person convicted of undue influence under the Penal Code may face two to five years imprisonment and a fine.

Best Practice

The Clean Company Act requires that companies operating in Brazil must constantly monitor risks of potential foreign corrupt practices, avoiding such practices and implement anti-bribery and whistle-blower policies, as well as internal communication and training. Such practices and policies shall be kept up to date and easily accessible, demonstrating that the company has been diligent with such matters.

Financial Institutions and Credit Unions

With respect to financial institutions and credit unions, on August 29, 2017, the Brazilian Central Bank published Resolution 4,595, which consists of a set of compliance guidelines aimed at strengthening the compliance structures of financial and other authorized institutions.

The institutions subject to the Central Bank's guidelines are required to create a compliance program compatible with their operations, nature, size, complexity, structure, risk profile and business model. According to the Resolution, the compliance policy must have, among other things:

- a clear definition of the purpose and scope of compliance;
- employees who are qualified to carry out activities related to compliance, with a clear division of responsibilities between the people involved, so as to avoid any conflicts of interest;
- sufficient allocation of resources to perform compliance-related activities;
- measures that ensure that the person in charge of compliance activities has the power to act independently; the department (if any) in charge of compliance should have no relation whatsoever with the internal audit department.

The compliance policy needs to be approved by the institution's executive board or, if no such board exists, by the Board of Directors. The institution must keep available for the Central Bank of Brazil, for at least 5 years, all relevant documentation related to the policy approved by the Board. In addition, it must provide a summary report of the outcome of its compliance-related activities and its own general conclusions.

Foreign Investment Limitations

Brazilian legal regime on investments is quite liberal, with few restrictions on foreign investment. There is no sole and specific law in Brazil that completely regulates foreign investments, neither a Brazilian equivalent to the Committee on Foreign Investment in the United States or similar control body for reviewing foreign investments on national security grounds.

The restrictions on the foreign investment are established by Brazilian Constitution of 1988 and infra-constitutional legislation. The Brazilian Constitution establishes a series of restrictions on the foreign investment based on areas of relevant national interest, restricting itself to the monopoly of the exercise of certain activities by the Union, the exclusivity of the exercise of some activities by Brazilians and the limitation of participation of foreigners in some activities.

The main sectors with restrictions on the foreign investment are the following:

- Nuclear energy, aerospace and the post office: no foreign investment is allowed;
- Journalism and broadcasting (open TV): foreign participation is limited to 30% of the voting and equity capital of the operating entity; and
- Ownership of rural properties and operations in border properties (particularly mining): foreign investors cannot have corporate control of the operating entity.

Foreign investments (in both equity and debt instruments) generally need to be registered with the Brazilian Central Bank electronic system, which has a declaratory nature and does not require any kind of approval by any governmental authority.

Any transactions (by Brazilians or foreigners) that involve an act of concentration may be subject to pre-closing approval by the Brazilian Antitrust Authority (Conselho Administrativo de Defesa Econômica - CADE) if the underlying transaction meets certain requirements (essentially, the test is whether one party has recorded revenues higher than BRL 750 million in Brazil in the last fiscal year, and cumulatively, any other party has recorded at least BRL 75 million). If the investor has no previous revenue in Brazil (directly or through its affiliates), no antitrust approval is required.

Concept of Brazilian legal entity equivalent to a foreign entity

Regarding the restriction on the acquisition or lease of rural property by foreigners, the Brazilian National Institute of Colonization and Agrarian Reform expressly defines in Normative Instruction No. 88, enacted in 2017, that a Brazilian legal entity is equivalent to a foreign entity if its foreign partner(s) hold a majority of the capital stock, or if its(their) shareholding have the power to conduct the deliberations of the general meeting, to elect a majority of the directors and officers, to direct the corporate activities and to guide the functioning of the corporate bodies.

Therefore, the Brazilian legal entity equivalent to a foreign entity is, in principle, prohibited from acquiring rural properties or operating in border properties, except if such acquisition or lease is intended for the implementation of agricultural, livestock, forestry, industrial, tourism or colonization projects, and provided that such acquisition or lease is approved by INCRA.

This paper is current as at December 2020.

Marta Rodrigues.

L.O. BAPTISTA

CYPRUS

Anti-corruption and foreign investment regime

Introduction

Cyprus was a British colony until 16 August 1960, when it became an independent sovereign republic. On 1 May 2004, Cyprus formally joined the European Union and on 1 January 2008 it became the fourteenth member of the Eurozone and the euro became its official currency.

Although approximately one-third of the island has been under Turkish occupation since 1974, this has no impact on the day-to day life of most people and Cyprus enjoys political and social security and stability, economic prosperity and a high quality of life. The so called "Turkish Republic of North Cyprus" is recognized only by Turkey; the application of the EU *acquis communautaire* has been suspended there and all references in this paper are to the legitimate government of the Republic of Cyprus and the legislation enacted by it to prevent corruption and bribery and attract foreign investment.

Foreign Corrupt Practices

The past decade has seen a significant increase in the implementation and enforcement of anti-corruption legislation around the world. Whether implementing a company-wide anti-corruption compliance code or planning a proposed overseas investment, it is imperative that organisations understand how relevant anti-corruption laws apply to the way in which they conduct their business.

Cyprus' first law against bribery and corruption of foreign public officials was introduced in 1920 when the island was still a British colony. Today, the legal framework against bribery and corruption involving foreign civil servants, employees of international organizations and agents in the private sector principally comprises:

- The Prevention of Corruption Law, Cap. 161; and
- The Criminal Law Convention on Corruption of the Council of Europe and the Additional Protocol to the Convention, as ratified by Law No. 23(III) of 2000.

Cyprus also joined the Group of States against Corruption of the Council of Europe in 1999 (GRECO) and is also a signatory to the following international anti-corruption conventions:

- United Nations Convention against Corruption (UNCAC), New York, 31 October 2003, entered into force 14 December 2005, ratified by Cyprus 23 February 2009.
- Agreement for the Establishment of the International Anti- Corruption Academy as an International Organisation (IACA), Vienna, 2 September 2010, entered into force 8 March 2011, ratified by Cyprus 19 August 2011.
- Criminal Law Convention on Corruption, Strasbourg, 27 January 1999, entered into force 1 July 2002, ratified by Cyprus 17 January 2001 (the Criminal Law Convention on Corruption).

- Additional Protocol to the Criminal Law Convention on Corruption ratified on 21 November 2006, entered into force on 1 March 2007.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990, entered into force 1 September 1993, ratified by Cyprus on 15 November 1996.
- European Framework Decision No. 2003/568/JHA, Combating Corruption in the Private Sector.

Article 3 of **the Prevention of Corruption Law, Cap. 161** makes it a criminal offence for:

a. an agent (which term includes a public employee) from corruptly obtaining, directly or indirectly, any gift or consideration, either for himself or for any other person, as an inducement or reward for doing or forbearing to do any act in relation to the affairs or business of his principal (or employer) or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business; and

b. any person from corruptly giving, offering or promising, directly or indirectly, any or consideration to any agent as inducement or reward for doing or forbearing to do any act in relation to the affairs or business of his principal (or employer) or for showing or forbearing to show favor or disfavor to any person in relation to the affairs or business of his principal (or employer).

A breach of Section 3 of Cap. 161 can result in up to seven years' imprisonment and/or a EUR100,000 fine.

The Criminal Law Convention on Corruption of the Council of Europe and the Additional Protocol to the Convention, as ratified by Law 23(III) of 2000 aligns Cyprus law with best practice in the field of bribery of foreign public officials, bribery in the private sector, trading in influence, money laundering of proceeds from corruption offences, account offences, participatory acts and corporate liability.

Section 4 of the Law 23(III) of 2000 provides that the bribery of foreign public officials, bribery of members of foreign public assemblies, bribery of officials of international organisations, bribery of members of international parliamentary assemblies and bribery of judges and officials of international courts are criminal offences.

A breach of Section 4 of the Law 23(III) of 2000 can result in up to seven years' imprisonment and/or a EUR 100,000 fine.

Furthermore, under section 27 of the Prevention and Suppression of Money-Laundering Activities Law of 2007 it is an offence for any person, who in the course of their trade, profession or business or employment acquires knowledge or reasonable suspicion that another person is engaged in money laundering or terrorist financing, not to report his knowledge or suspicion to the appropriate authority as soon as reasonably practical after the information came to their attention. Failure to report in these circumstances is punishable on conviction by imprisonment for up to five years, a fine of up to EUR 5,000 or both.

There is no definition of a foreign public official in Law 23(III) of 2000 or other legislation. Likewise there is no reported Cyprus case law on the matter to date. In such circumstances Cyprus courts give words their ordinary meaning. Accordingly, the court is likely to refer to the definition of "public official" found in article 4 of the Criminal Code, and adjust it appropriately.

Article 4 of the Criminal Code defines a public official as any person holding any of the following offices or performing the duties thereof, whether as a deputy or otherwise:

(a) any civil or public office or post, the power of appointing or removing a person to or from which is given to the President of the Republic the Council of Ministers or any public commission or board;
(b) any post to which a person is appointed or nominated by law or by election;
(c) any civil post, the power of appointing to which or removing from which is given to any person or persons holding a public office or post of any kind set out in (a) or (b) above; and
(d) any post of arbitrator or umpire in any proceeding or matter submitted to arbitration by order ow with the sanction of a court in pursuance of the law.

Furthermore, guiding reference may potentially be had – without any obligation of following – to section 6(5) of the United Kingdom Bribery Act 2010 which defines "foreign public official" as an individual who holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (in the present case Cyprus), exercises a public function for or on behalf of a country or territory outside the United Kingdom, or for any public agency or public enterprise of that country or territory, or is an official or agent of a public international organization.

Facilitating payments

Section 4 of the Law deals with trading in influence. It makes it a criminal offence, when committed intentionally, to promise, give or offer any undue advantage, directly or indirectly, to anyone who asserts or confirms that her or she is able to exert an improper influence over the decision-making of a wide range of persons in consideration therefor, whether the undue advantage is for himself or herself or for anyone else, in consideration of that influence, whether or not the supposed influence leads to the intended result. The categories of decision-makers include domestic public officials, members of domestic public assemblies, foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts.

Individual and corporate liability

Law 23(III) of 2000 makes no distinction between natural and legal persons.

Under Cyprus law, a company can be prosecuted in a similar way as an individual offender. The Interpretation Law, Cap. 1, defines a "person" to include any company, partnership, association, society, institution or body of persons, corporate or unincorporated. Consequently, whenever any statute makes

it an offense for a "person" to do or omit to do something, that offense can *prima facie* be committed by a legal entity as well, unless a contrary intention appears in the statute.

In view of the rules of interpretation mentioned above, the same types of sanctions that apply for individuals also apply *prima facie* to legal entities. However, since imprisonment cannot be imposed on corporate entities, only fines (and/or the payment of compensation) can be imposed. At the same time, there is no obstacle for both the legal entity and the individual offender to be convicted, i.e. both may simultaneously incur criminal liability and in particular, a director, shareholder or beneficiary may be imprisoned for the same actions that result in a company incurring a criminal fine.

In principle, there is no need to convict the individual offender in order to convict the company. Where there is no explicit provision as to criminal liability, a legal entity may be criminally liable on the basis of vicarious liability or on the basis of the identification doctrine. If the offense is a strict liability offense, the action of an employee/representative of the legal entity is an act of the legal entity. However, where *mens rea* is required, it is necessary for the acts and/or omissions by a natural person to be imputed to the legal entity, regardless of whether the natural person is prosecuted or not.

Foreign Direct Investment

Foreign investment has long been considered as one of the most important elements of the country's economic prosperity. All efforts have therefore been made to facilitate and further enhance the attraction of foreign investments and create a friendly environment for foreigners to establish a business on the island. Within these lines, the government has liberalized the Foreign Direct Investment (FDI) policy for both EU and non-EU nationals.

The growth performance of Cyprus over the last five years has been exceptional and even exceeded international expectations, while successive credit ratings upgrades and new incentives have attracted billions in foreign investment since 2015, with significant inflows from the US, Asia, Russia, China, Greece and the Middle East. Cyprus' return to an investment grade credit rating in 2018 gave both the economy and investor confidence a much-needed boost and the successful recapitalization of its major banks and numerous large-scale projects have all contributed to the resurgence of Cyprus as a top foreign direct investment (FDI) destination. The sectors that have seen the most significant FDI are banking, shipping, retail, tourism, pharmaceuticals and energy, while new luxury and infrastructure developments are underway across the country with significant foreign investor backing. A fast-track system is also encouraging international companies to set up international and regional headquarters on the island, which is becoming an increasingly attractive gateway to both established and emerging growth markets.

In all but a very few strategic sectors of the economy, particularly those perceived to relate to national and public security, foreign investors may now participate with no limits on equity holdings and without any prescribed minimum level of capital investment. In general, foreign investors no longer need approval from the Central Bank of Cyprus as was previously the case and they may invest and do business in Cyprus on equal terms with local investors.

Restrictions remain on acquisitions in the areas of real estate, tertiary education, public utilities, radio and television stations, newspapers and magazines and airlines. Where restrictions are imposed, investment proposals need to obtain a prior approval in consultation with the appropriate government department. Each investment proposal is considered on its merits.

- Non-EU entities (persons and companies) may purchase only two real estate properties for private use. This restriction does not apply if the investment property is purchased through a domestic company or a company incorporated elsewhere in the EU.
- Non-EU entities cannot invest in the production, transfer and provision of electrical energy. Additionally, the Council of Ministers may refuse granting a license for investment in hydrocarbons prospecting, exploration and exploitation to a third-country national or company if that third country does not provide similar treatment to Cyprus or other EU member states.
- Individual non-EU investors may not own more than five percent of a local television or radio station and total non-EU ownership of a local TV or radio station is restricted to a maximum of 25 per cent.
- The right to register as a building contractor in Cyprus is reserved for citizens of EU member states. Non-EU entities are not allowed to own a majority stake in a local construction company, but may bid on specific construction projects after obtaining a license from the Council of Ministers.
- Non-EU entities cannot invest in private tertiary education institutions.

Screening of Foreign Direct Investment into the European Union

The European Commission has for some time been focusing on acquisitions of EU companies active in critical industries, especially those that are State-owned, by non-EU companies. In order to control them, it has adopted, for the first time, a foreign direct investment ("FDI") screening coordination mechanism by virtue of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 ("**FDI Screening Regulation**"). The FDI Screening Regulation establishes a framework for the screening of foreign direct investments (excluding portfolio investments) into the Union and a cooperation mechanism between Member States.

The FDI Screening Regulation entered into force on 10 April 2019 and applies throughout the EU as from 11 October 2020. In cases of FDI made prior to 11 October 2020 which do not go through a screening process, national governments and the Commission may still submit opinions as of 11 October 2020 and within 15 months after completion of the FDI. Such opinions may lead to prohibition of the FDI or undertaking of 'necessary mitigating measures', such as commitments to meet vital needs within the Member State or the EU, at the discretion of the Member State, provided national law permits it.

In this framework, the Commission will issue opinions when an investment threatens the security or public order of more than one member state, or when an investment could undermine a project or programme of interest to the whole EU. The FDI Screening Regulation requires the acquisition of effective management control over the EU undertakings or assets as a result of the investment. If an investment does not render to the investor decisive influence, including veto rights, over the day-to-day

management of EU undertakings or assets, the Regulation will not apply. Veto rights of minority shareholders that protect the investment of such minority shareholders are not considered as conferring management control over a company as such veto rights do not affect the day-to-day management of a company.

Screening criteria

Whether FDI poses a risk to security or public order will be determined by taking into account, inter alia, the impact of the investment on:

- critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and land and real estate that is crucial for the use of such infrastructure;

- critical technologies, such as energy storage, artificial intelligence, robotics, semiconductors, cyber security, quantum, aerospace, defence, nanotechnologies, biotechnologies and nuclear technologies;

- the supply of critical inputs (such as energy, raw materials and food security);

- access to and ability to control sensitive information including personal data;

- the freedom and pluralism of the media;

EU member states will also be able to take into account:

- whether the investor is controlled (directly or indirectly) by the government of a third country;
- whether the investor has previously been involved in activities affecting the security or public order of an EU member state;
- whether the investor is considered to be at serious risk of engaging in illegal activities.

Information sharing and cooperation

On deciding to screen FDI, a member state will have to provide certain information to the Commission and the other member states, including providing a list of member states whose security or public order is deemed likely to be affected by the FDI.

Information shared comprises: (a) the ownership structure of the investor, (b) the value of the investment, (c) the business operations of both the investor and target, (d) the sources of funding of the investment and (e) the date of completion.

The said information may be requested by the Commission or other member states, on justifying grounds, even where the member state concerned opts not to screen the investment.

The Commission and member states are able to comment on FDI in a member state, irrespective of whether the member state receiving the investment has chosen to screen the FDI.

Member states are required to give "due consideration" to such comments but will be the final decision-makers on the investment concerned. However, member states will need to take "utmost account" of the Commission's opinion in relation to FDI that the Commission views serves the EU as a whole and represent an important contribution to its economic growth, jobs and competitiveness.

COVID-19

Ahead of the FDI Screening Regulation and in light of the COVID-19 pandemic crisis, the Commission published on 25 March 2020 guidance for Member States concerning FDI and free movement of capital from third countries and the protection of Europe's strategic assets ("Guidance"). Given that companies and critical assets in the EU may be currently undervalued, the main purpose of the Guidance is to streamline a pan-European response to the monitoring of foreign direct investment, particularly within the context of the current public health crisis and to safeguard essential capital, technology and assets from any prospective hostile takeovers by companies from third countries.

The Guidance itself highlights the increased possibility of takeover of critical enterprises in, including, but not limited to, healthcare-related industries, by non-EU companies, within the context of the present economic circumstances, such as attempts to acquire healthcare capacities in the production of medical or protective equipment or research establishments. Therefore, it effectively shifts the attention under the FDI Screening Regulation towards critical healthcare infrastructure and the supply of crucial commodities, rather than to acquisitions of European industries in the utilities sector and the area of technology, such as robotics, cyber security and artificial intelligence, which have received the most attention to date.

The Guidance largely seeks to clarify the matter of FDI screening, its scope and its importance in emergency situations, such as the current COVID-19 emergency situation, and at the same time urges national Member State governments to increase such screening, but also take action to secure such EU enterprises and help in the EU's economic turnaround. In light of the above, the Commission makes specific reference to new FDI screening mechanisms, as well as restrictions on free movement of capital.

On this basis, the Commission urges Member States to make "full use already now" of their FDI screening mechanisms and for Member States that have no such mechanisms to establish pertinent mechanisms and "use all other available options", such as compulsory licenses on medical patents or retention of 'golden shares' by Member States to block or limit specific types of investment, on the grounds that "[t]he resilience of these industries and their capacity to continue to respond to the needs of EU citizens should be at the forefront of the combined efforts both at European Union and at Member States level."

Currently, only 14 Member States have FDI screening mechanisms in place, whereas the remaining Member States, are either in the process of implementing or expanding their national screening

programmes. While Cyprus has yet to notify screening measures pursuant to the provisions of FDI Screening Regulation, the said Regulation applies in Cyprus and has entered into force on 11 October 2020, affecting investments completed as of 11 April 2019.

This paper is current as at January 2021

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GERMANY

Anti-corruption and Foreign investment regime

Introduction

In contrast to other legal systems, the German anti-corruption and anti-bribery law consists of numerous statutes and there is no comprehensive code on the subject. Most of the provisions can be found in the German Criminal Code ("*Strafgesetzbuch*"). Essentially, German law considers corruption and bribery as a matter of criminal law. However, the German criminal law distinguishes between bribery offences, embezzlement, bribery in the health care sector and political corruption. This paper outlines the framework Germany has in place to sanction and prevent corruption and bribery and also provides a basic overview of the foreign investment regime in the European Union and Germany.

Bribery and corruption offences

Bribery in the administration

Bribery offences are mainly addressed under sections 331 ff. Criminal Code. These regulations include "classical" offences of bribery of a public official and they intend to protect the general public´s trust in the incorruptibility of public officials and in the objectivity of state decisions. Given that background, until 1997, most third-party bribery in the private sector was not penalized at all.

Offences

Under sec. 331 para. 1 Criminal Code it is a criminal offence called "accepting benefits" if

- a public official, a European public official or a person with a special public service obligation
- demands, allows himself to be promised or accepts
- an advantage for himself or a third party
- for the performance of his official duties.

Pursuant to sec. 11 para. 1 nr. 2 Criminal Code ("*Strafgesetzbuch*") public officials include a civil servant, a judge or a person in another official relationship under public law.

An advantage means any benefit which objectively improves the legal, economic or even personal situation of the recipient and to which he or she has no legal claim. This element is to be interpreted broadly because the legislator's main intention is to protect the integrity of its own administration.

Monetary advantages can take a variety of forms e.g. money, discounts, invitations to special or sports events. However, advantages can also be non-monetary, e.g. awards, career opportunities or other services. Despite the aforementioned, socially appropriate benefits, like legitimate sponsoring,

representational tasks not worthy of punishment and invitations accepted by high-ranking public officials, campaign donations and legitimate third-party funds are excluded from the offence under section 331 Criminal Code.

Bribery in business

Since 1997, bribery in business is a criminal offence. Under sec. 299 para. 1 Criminal Code it is a criminal offence if

- an employee or an agent of the company
- demands, allows himself to be promised or accepts
- an advantage for himself or a third party
- in return for the purchase of goods or services or for granting unfairly favors to another company in domestic or foreign competition.

This offence is very similar to the one of accepting benefits in the administration as describe above.

Consequences of non-compliance

A violation is adjudicated in a criminal case. In the event of a conviction the court determines the penalty within a broad statutory penalty range based on factors such as the severity of the offence, whether there are previous convictions and whether the offence has been committed repeatedly.

The offence is punishable by imprisonment for a term of up to 3 years or a fine. If the offense was committed by a public official and he performed a public act (e.g., a state authorization) in return for the bribe, according to sec. 332 Criminal Code the offence will be punished by imprisonment of a minimum 6 month up to 5 years. Furthermore, all unlawfully obtained pecuniary advantages can be confiscated. Under German law, in contrast to other legal systems, only the induvial himself can be punished. Companies cannot commit a criminal offence and can therefore not be punished.

Embezzlement

Under sec. 266 Criminal Code embezzlement is a criminal offence. The culpability lies in the fact that the perpetrator misuses his authority to dispose of assets entrusted to him.

Offences

A person is guilty of embezzlement if that person

- abuses
- the power granted to him by law, official order or by contract

- to dispose of another person´s assets or to legally bind them to another person by contract or who violates the duty incumbent on him by virtue of law, official order or contract or a fiduciary relationship to look after another person´s assets
- and thereby causes disadvantage to the person whose interest he is responsible for.

For example, it would represent a typical case of embezzlement, if a person used the company's funds to bribe someone in order to receive a benefit – for example a commission or assignment – not for himself, but for the company. This misusing of company funds is liable to prosecution. A very well-known case is the bribery scandal of Siemens AG.[3] Employees used so called covered funds - "*schwarze Kassen*" – to bribe foreign government officials or employees of other companies to receive an assignment for the company.

Consequences of non-compliance

A violation is adjudicated in a criminal case. In the event of a conviction the offender will be subject to criminal penalties. The extent of penalties imposed depends on the individual facts of the case, such as the severity of the offence, whether there are previous convictions and whether the offence has been committed repeatedly.

The offence can be punished by imprisonment for a term of up to 5 years or a fine.

Bribery in the healthcare sector

Since 2016 bribery in the healthcare sector is regulated as a separate offence. Its aim is to protect the healthcare system from unfair influence as in Germany, the healthcare sector is mostly state-run. As corruption influences the competition, increases the cost of medical services and undermines patient confidence in the integrity of health professionals' decisions, the enactment of sec. 299a and 299b of the Criminal Code became necessary to close a legal loophole.

Offences

Under sec. 299a Criminal Code it is a criminal offence if

- any person who, as a member of a health profession which requires state-regulated training for the exercise of the profession or the use of the professional title,
- demands, allows himself to be promised or accepts, in connection with the exercise of his profession,

[3] Federal Court, judgment from 29th of August 2008 – II StR 587/07.

- an advantage for himself or a third party

    1. when prescribing medicines, remedies or aids or medical devices,

    2. procuring medication or health aids or medical devices which are designed for direct use by the member of the profession or one of their professional assistants, or

    3. when supplying patients or samples and diagnostic data.

Consequences of non-compliance

A violation is adjudicated in a criminal case. In the event of a conviction the offender will be subject to criminal penalties. The extent of penalties imposed depends on the individual facts of the case, such as severity of the offence, whether there are previous convictions and whether the offence has been committed repeatedly. This offence can be punished by imprisonment for a term of up to 3 years or a fine.

Political corruption

In general, political corruption refers to the abuse of public power for private advantage. Sec. 108e Criminal Code not only protects the objectivity of elections, but the integrity and functioning of the representative system as a whole. This separate law is necessary because members of parliament are not considered to be public officials. Therefore, sections 331 ff. Criminal Code is not applicable.

Offences

Under sec. 108e Criminal Code it is a criminal offence if

- any person who, as a member of a federal or state parliament,
- demands, allows himself to be promised or accepts
- an undue advantage for himself or a third party
- in return for performing or refraining from performing an act on behalf of or in accordance with instructions in the exercise of his mandate.

Any person who offers, promises or grants a member of a federal or state parliament an undue advantage for that member or a third party in return for the member performing or refraining from performing an act on behalf of or in accordance with instructions in the exercise of his or her mandate shall also be punished.

Included in the above are also:

- members of a local representative body,

- members of a body of an administrative unit established for a German territorial subarea or a local authority and elected in direct and general elections,
- members of the Federal Convention,
- members of the European Parliament,
- members of a parliamentary assembly of an international organization and
- members of a legislative body of a foreign state.

An advantage is not undue, if it is in line with the persons legal status, e.g. obtaining of a political mandate, a political function or receiving of a political donation under the political party act.

Consequences of non-compliance

A violation is adjudicated in a criminal case. In the event of a conviction the offender will be subject to criminal penalties. The extent of penalties imposed will depend on the individual facts of the case, e.g. the severity of the offence, whether there are previous convictions and whether the offence has been committed repeatedly. This offence is can be punished by imprisonment for a term of up to 5 years or a fine.

For companies

As stated above, German law sanctions a variety of actions regarding corruption and bribery. These are all criminal charges and the individuals acting in each case may be subject to a substantial fine or even imprisonment. Under these circumstances, every person involved is liable for anti-corruption-compliance. However, even if companies themselves are not subject to punishment under criminal law, the German authorities can impose a fine of up to EUR 10 million under Sec. 30 Act on Regulatory Offences ("*Ordnungswidrigkeitengesetz*"). In addition, they may suffer a severe loss of reputation and may be liable for the actions of their employees under foreign law as well. Therefore, companies should be very aware of corruption committed by their employees and take decisive action to prohibit and prevent such action. Furthermore, the legislator intends to enact a new Administrative Penalties Act this year, under which companies could be subject to criminal sanctions as well. However, due to the upcoming federal election it is uncertain whether or not it will be enacted.

Foreign investment regime

Germany and the European Union are open economies. In general, investments are possible and welcome in all areas within the framework of the applicable law. However, to prevent national security risks the legislator enacted four main acts to control certain areas of investments by foreign investors: the regulation on establishing a framework for the screening of foreign direct investments into the Union by the European Union (Regulation (EU) 2019/452), the Foreign Trade and Payments Act, the Foreign Trade and Payments Ordinance and the Money Laundry Act.

Approval

Under these laws some actions require the approval of the Federal Ministry of Economic Affairs and Energy ("*Bundesministerium für Wirtschaft und Energie*"). An approval is required if

- a non-EU resident acquires
- directly or indirectly
- a domestic company
- and the acquisition may be deemed a threat to public order or security.

A direct or indirect acquisition means that the voting rights of the acquirer of the domestic company must directly or indirectly amount to or exceed

- 10 percent of the voting rights of a company cited in Section 55 subsection 1 sentence 1 of the Foreign Trade and Payments Ordinance or
- 25 percent of the voting rights of another company.

Thereby, third-party voting rights may also be included. Third-party voting rights contain voting rights on which the acquirer has concluded an agreement on the joint exercise of voting rights.

Under German law a threat to public order or security may exist if a company is operating critical infrastructure or if the company is part of a critical branch defined by the Foreign Trade and Payments Ordinance.

Money Laundry Act

To prevent money laundering and to enhance transparency, German companies, foreign companies, which have committed to purchase a property in Germany and trustees with residence or headquarters in Germany are obliged to register on the Transparency Register ("*Transparenzregister*"). Under the Money Laundering Act ("*Geldwäschegesetz"*) certain professionals assisting in investment transactions (such as lawyers, tax advisors, real estate agents or notaries) are obliged to identify the ultimate beneficial owner in certain transactions (including the purchase of shares or real estate). The ultimate beneficial owner of a legal entity is a person who

- owns more than 25% of the shares of the company
- controls more than 25% of the voting rights of the company, or
- exercises control in a similar way.

Protectionism in Germany

In 2016 the Chinese-owned Midea Group purchased the German robotics company KUKA.[4] Furthermore, in 2018 the Chinese Owner of Geely acquired a stake of nearly 10% in Daimler AG basically overnight.[5] These massive foreign investments were a shock for German politicians. These events raised concerns about whether the growing investment volume of foreign companies in Germany imposes a major risk for the overall economy. To prevent a future "selloff" of high-quality domestic companies, Germany plans to take further steps to protect its domestic market and domestic companies. These new measures include strong penalties and enforcement power to scare off hostile takeover attempts. It is to be expected that further steps will be taken and foreign investments will be more restricted.

This paper is current as of January 2021

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[4] FAZ, article of 17th August 2016 – available at: https://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/wirtschaftsministerium-genehmigt-uebernahme-von-kuka-durch-midea-14391487.html.

[5] FAZ, article of 23th February 2018, available at: https://www.faz.net/aktuell/wirtschaft/unternehmen/geely-konzern-von-li-shufu-steigt-bei-daimler-ein-15465040.html.

ISRAEL

Anti-Bribery and Corruption in Israel

Anti-Corruption laws in Israel impose strict scrutiny and compliance requirements in conducting business in Israel or with Israeli agents and officials.

Anti-bribery provision

The Israeli Penal Code prohibits corrupt payments, offers or promises of money, valuable consideration, a service or any other benefit, to influence any act or decision (including a decision not to act) of a foreign or local government official to induce the official to use his or her influence to affect an administrative act (or failure to act) or decision, in order to obtain, to assure or to promote business activity or other advantage in relation to business activity.

Israel signed the OECD Convention on March 11, 2009, and it was ratified by the Knesset (Israel's parliament), entering into Israeli law on May 10, 2009.

Israel prepared the ground for its adherence to the treaty by amending the Criminal Code, inserting a new clause 291A which applies the same criminal provisions to the bribing of foreign public officials as those that apply to the bribery of public officials within the State of Israel. The section provides that:

(a) Someone who pays a bribe to a foreign public official in return for an act connected to his role in order to obtain, secure or advance a particular business activity, or other advantage in connection with business activity, is liable to the same punishment as that applicable under section 291

(b) No indictment shall be presented for an offence under this section except with the written consent of the Attorney-General.

(c) A "foreign state" includes any sovereign entity within a foreign state, including national, regional, or local institutions, and including a political entity that is not a state such as the Palestinian Authority.

A "foreign public official" includes all of the following:

(1) An employee of the foreign state and anyone who holds a public office or fulfils a public role on behalf of the foreign state, and this includes any office holder or in the legislature, the executive, or the judiciary of the foreign state, whether by choice, appointment, or under a contract;

(2) A holder of public office or someone fulfilling a public role on behalf of a public body that has been established by legislation of the foreign state, or who serves an entity that is either directly or indirectly controlled by the foreign state;

(3) An employee of an international public organization, and anyone who holds public office or who fulfils a public role on behalf of the such an organization; an international public organization is one that

has been established by two or more states or by organizations which themselves have been established by two or more states.

Penalties

Section 291 of the Criminal Code specifies that the criminal punishment for bribery is imprisonment for seven years, or a fine which can be either five times the fine specified in section 61(a)(4) of the Code, or four times the benefit which the person sought to acquire for himself by the act, whichever amount is the greater.

Liability of legal persons

The Israeli Ministry of Justice has engaged two legal scholars to conduct comprehensive research on the issue of liability of legal persons. The research includes an in-depth examination of the legal status of corporate liability in Israel including in case law, and an examination of how the matter is treated in other legal systems. The results of this research will form the basis of the Justice Ministry's working party on this issue.

The Attorney General's General Guideline No: 4.1110: The Investigation and Prosecution of the Foreign Bribery Offence, contains specific guidance on indicting legal persons for foreign bribery wherever possible.

The anti-bribery prohibition applies to more than just payments and offers and promises of payments: an offer or promise would (in itself) be sufficient to complete the offence of bribery. Non-pecuniary advantages such as sexual favors, or appointments to a public position are also strictly forbidden. Most importantly, Israel has chosen not to introduce an exception of small "facilitation" payments.

Conflict of interests

The prohibition on conflict of interests is a principle fundamental to Israeli administrative law. This prohibition holds that a public official may not serve in an office if there are reasonable grounds to suspect that he may be influenced by interests contradicting those he is supposed to promote in his office. This principle has wide applications. The prohibition applies not only to situations in which the public official might be influenced by personal interests (his own or those of relatives or friends). It also applies in situations in which the official serves in another public position, for the advancement of which he may need to support conflicting considerations. Compliance with this principle calls for thorough internal inquiries and disclosure whenever a corporation might be seen as to be wrongfully benefitting from its well-established connections within the government's higher echelons.

The prohibition on conflict of interests is one of the main reasons for the more specific prohibition on the delegation of statutory powers to private actors. This prohibition, which is especially important in the context of privatization and transactions on a national scale or national importance, derives, from among other things the concern that a private actor will be influenced by the desire to promote his own private interests at the expense of the public.

Responsibility of Legal Persons and Protection of Whistle-blowers

Legal persons, by virtue of the general provisions of the Penal Code, are held criminally liable for the offence of bribery of public officials.

In appropriate circumstances, both the legal person and the individuals responsible for committing the offence, or involved in the same, may be held criminally liable for the bribery offence. It is highly recommended to raise awareness amongst employees to the bribery offence, to develop training programs aimed at internalizing the severity of the action and to create internal mechanisms to prevent it.

It is also advisable to take measures to encourage employees to report to company management bodies on suspicions of acts of bribery of local and foreign public officials by the company. Israeli Law emphasizes the importance of exposing acts of corruption to the authorities and thus, the protection provided by law to whistleblowing employees according to the Protection of Employees (Exposure of Offences, of Unethical Conduct and of Improper Administration) Law, 1997 is broad. The procedure for reporting corruption and misconduct (and applying for the protection granted by law) is explicitly made simple – a form filled at any police station or even a call to the general police call center is usually sufficient in order to trigger a full investigation.

Legal Origins

Jewish sources, from the earliest times, have denounced bribery: "Do not take bribes: For bribery blinds the vigilant and perverts the words of the righteous.2" This is but the first example of a series of Biblical, Prophetic, and Rabbinic decrees which can be traced through the Talmudic literature. The Babylonian Talmud asks: "What is bribery? It is one." This is a play on words; by splitting the Hebrew word for bribery in two, a sentence stating "It is one" is created. Rabbi Shimon Yitzchaki (Rashi) comments: "The giver and the recipient become of one heart." Down the ages, the rabbinical courts have taken a strong line against even the whiff of bribery, and there are numerous rabbinical edicts cited in the texts in which it is stated to be forbidden under Jewish law for any form of bribery to take place.

The State of Israel in its Declaration of Independence made it clear that the State would embody the values of the Torah of Moses and the later Jewish Prophets when it declared that the State "will be based on freedom, justice and peace as envisaged by the Prophets of Israel." This constituted the catalyst from the very earliest days of the State for a concerted effort by both the legislature and the judiciary to take a very strong line against bribery and to extirpate it from commercial and public activity.

Case Law

An example of a case quoting these Jewish sources is *Hydrola Ltd v. The Tel Aviv Tax Inspector Dept. 1*, (Supreme Court) Civil Cases, 6726/05, decided in June of 2008, in which Supreme Court Justice Elyakim Rubenstein, considering the legal position in Israel of bribes of foreign officials, surveyed Jewish sources at length.

Another example of Israeli jurisprudential attitudes to the offence of bribery is reflected in the comments of Supreme Court Justice Shamgar in the case of *Klein v The State of Israel* [1977] Supreme Court 31, 2, p. 167, and subsequently quoted in full and approvingly by Supreme Court Justice Goldberg in the case of *Markado and another v The State of Israel* [1997]: Supreme Court 51, 5, p. 505.

These situations have the ability to severely erode the faith which the citizen places in those appointed by him to serve the general public; they muddy the atmosphere and sow disappointment and frustration. Someone who breaches the trust placed in him by exploiting his position and status in order to extract prohibited personal benefits, not only drags down with him into the mire those with whom he has dealt and before whom he has presented the payment of bribes as a precondition to dealing with their requests, and securing their entitlements. The damage goes wider and deeper than that. The supervisory function which is a requirement of an office-holder's job becomes the object of ridicule, moneys from the public purse go to waste, and worst of all, a perverse set of criteria take root and sprout in human relationships, and in the relationship between the government and the governed, which contains a latent danger to all of society.

Limitations on foreign acquisitions of sensitive/national security interests

Prior to November 2019, Israel did not have dedicated acquisition- and ownership-related mechanisms in place to safeguard its essential security interests.

On November 30, 2019, the Security Cabinet of the Israeli Government announced the establishment of an "Advisory Committee on Foreign Investment".[6]

The Advisory Committee began operations on January 1, 2020. The Advisory Committee is headed by the Ministry of Finance and involves several other Ministries. Its mandate is to examine national security aspects in the process of approving foreign investment. The Advisory Committee will only consider investments that require government approval, in the fields of finance, communications, infrastructure, transport and energy and only upon voluntary referral by the respective regulators.

Israel has several mechanisms in place that can substitute acquisition- and ownership-related mechanisms to manage risk to certain areas of its economy.

Acquisitions of real estate that lead to ownership are only possible for around 7% of Israel's territory, as the remainder is administered by the Israel Land Authority and allocated through long term-leases rather than sales. Essential security interests are considered in the context of the allocation of land under long-term leases.[7]

[6] "Statement by the Ministerial Committee on National Security Affairs", Prime Minister's office, 30 October 2019.
[7] OECD (2009) "Accession of Israel to the OECD: Review of international investment policies", p.13.

The government may hold "special shares" in enterprises that have resulted from the privatisation of previously government-owned companies, as provided for under section 59(b)A.(3a) of the Companies Law, 5735-1975.

Further to a 2003 amendment to the Companies Law, an enterprise that results from a privatization may be subject to an "essential interest" order asset set down in the Companies Law, 5735-1975. Section 59(h) prohibits any private investment in the defence industry.

In addition, Israel has rules on foreign government participation in broadcasting under the Communications (Telecommunications and Broadcasting) Law 5742–1982, Section 6H3(4). This restriction operates through a licensing procedure required for broadcasters which is provided with reference to security interests.

In addition, Israel maintains State ownership or control in about 50 individual enterprises outright, including enterprises that operate in sectors that are often object of acquisition and ownership-related mechanisms to safeguard essential security interests.

This paper is current as of December 2020.

Dan Gross.

DARDIK GROSS & CO. LAW FIRM

LUXEMBOURG

Anti-corruption and foreign investment regime

Luxembourg has one of the most open economies in the world and since 2002 its government has implemented policies and programs to promote economic diversification and foreign investment. The main industries upon which the government has focused include logistics; information and communications technology (ICT); health technologies, including biotechnology and biomedical research; clean energy technologies; space technology; and financial services technologies.

That said, Luxembourg signed and ratified the (i) 21 November 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (ii) 15 November 2000 United Nations Convention against Transnational Organized Crime and its protocols; and (iii) 31 October 2003 United Nations Convention against Corruption. The 21 November 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was codified into the Luxembourg Criminal Code and Criminal Procedure Code in 2001.[8]

Also, pursuant to Article 2 of the 31 October 2003 United Nations Convention against Corruption, in 2007, it formed the Corruption Prevention Committee (COPRECO),[9] an advisory inter-ministerial committee the purpose of which is to assist the government in the fight against corruption through studying and analyzing the effectiveness of anti-corruption measures to establish measures for the public administrative sector. The committee also coordinates activities of international anti-corruption bodies such as the Council of Europe's Group of States against Corruption (GRECO), and similar UN and OECD bodies.

I. Anti-corruption regime

A. Bribery

Article 252 of the Criminal Code applies its domestic bribery provisions to the prohibition against bribery of foreign officials. Bribery is defined as proposing or giving, directly or indirectly, to a person holding public authority, or charged with a public service mission or elected mandate, for oneself or a third party, any offer, promise, donation, gift or advantage, or to make an offer or promise of same to obtain either that they:

[8] Law of 15 January 2001 ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (*Loi du 15 janvier 2001 portant approbation de la Convention de l'Organisation de coopération et de développement économiques du 21 novembre 1997 sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales*)

[9] Law of 1 August 2007 ratifying the 31 October 2003 United Nations Convention against Corruption (Loi du *1er août 2007 portant approbation de la Convention des Nations Unies contre la corruption, adoptée par l'assemblée générale des Nations Unies à New York le 31 octobre 2003*).

- Do or refrain from doing an act of their position, mission or mandate or facilitated by their position, mission or mandate; or
- Abuse their real or assumed authority with a view to obtaining from a public authority or administration an award, employment, contract or any other favorable decision.

The provisions distinguish between "active" bribery, the act of proposing the bribe, and "passive" bribery, the act of accepting the bribe.

Pursuant to Article 252, foreign officials are:

- Persons entrusted with, or agents of, public authority or law enforcement, officers or persons holding elected office or charged with a public service mission in another jurisdiction;
- Persons sitting in a judicial body, even non-professional members of a collegiate body charged with adjudicating a dispute, or acting as arbitrators subject to foreign state regulations or those of a public international organization;
- European officials and members of the EU Commission, European Parliament, the European Court of Justice and European Court of Auditors, in full compliance with the relevant provisions of the treaties establishing the European Union, the Protocol on the privileges and immunities of the European Union, the Statute of the Court of Justice of the European Union, as well as their implementing regulations, with regard to the waiver of immunity; and
- Officials and agents of another public international organization, members of a parliament of a public international organization and persons in judicial or clerk positions in another international court whose competence is accepted by the Grand Duchy of Luxembourg, in full compliance with the relevant provisions of the articles of those public international organizations, public international organization parliaments or international courts, as well as their implementing regulations with respect to the waiver of immunity.

"European official" as used above means any person who is:

- A civil servant or agent hired under contract pursuant to the Statute of European Union Civil Servants or the regime applicable to other European Union agents; and
- Made available to the European Union by the Members States or by any public or private body, who carries out duties equivalent to those carried out by European Union civil servants or other agents.

When the Statute of European Union Civil Servants or the regime applicable to other European Union agents does not apply to them, the members of bodies created in implementation of the treaties establishing the European Union and the personnel of those bodies are assimilated as European officials.

Bribery committed by or to a public official is punishable by imprisonment of five to ten years and a fine of EUR 500 to EUR 187,500.

B. Other crimes

1. Corporate liability

Bodies corporate may also be held criminally liable for crimes committed by their legal bodies or one or several members of management, in law or in fact. The liability can extend to the natural persons who committed or were complicit in the crimes. Sanctions can be a fine ranging from EUR 500 to a maximum of EUR 750,000, but the maximum fine can be multiplied by 5 when the crime is committed in such contexts as national security, terrorism and terrorism financing, arms and organized crime and human trafficking.[10]

2. Whistleblowing

In 2011, Luxembourg introduced provisions into its Labour Code as well as into the laws on the general status of State and local government civil servants protecting them from retaliation for denouncing or refuting facts or actions they, in good faith, consider to represent an illegal interest, corruption or bribery, whether the acts were committed by their hierarchic superior, work colleagues or outside persons having a relationship with the employer.[11]

Finally, all local entities are encouraged to establish and maintain robust anti money laundering/financing of terrorism systems in place, regardless of whether they are a regulated entity.

II. Foreign investment regime

Other than local government approvals of certain projects, there is really no institutionalized review of foreign investment and neither are there any restrictions. The Luxembourg Board of Economic Development (BED) was established by governmental decree in 2007, the main purpose of which is to promote foreign investment in Luxembourg.[12] The decree also tasks the BED with promoting Luxembourg as a site for locating investment projects and maintaining relationships in all sectors to promote investment and economic development in the above-mentioned key sectors, as well as technology transfer to Luxembourg.

Generally, under the EU Common Reporting Standard ("**CRS**") and the Foreign Account and Tax Compliance Act ("**FATCA**"), Luxembourg financial institutions provide the Luxembourg Direct Taxation Administration (*Administration des Contributions Directes* or "**ACD**") information on "reportable financial

[10] Law of 3 March 2010 on criminal liability of legal persons (*Loi du 3 mars 2010 introduisant la responsabilité pénale des personnes morales dans le Code pénale et dans le Code d'instruction pénale*).
[11] Law of 3 February 2011 reinforcing the means to fight corruption (*Loi du 13 février 2011 renforçant les moyens de lutte contre la corruption*).
[12] Governmental Decree of 27 May 2007 on the missions, organization and composition of the BED (*Arrêté du Gouvernement en Conseil du 27 mai 2005 ayant pour objet les missions, l'organisation et la composition du Comité de Développement Economique du Grand-Duché de Luxembourg* - Luxembourg Board of Economic Development (BED))

accounts". Tax information must be submitted annually, on 30 June, covering the preceding calendar year. The ACD has until 30 September of the same calendar year to exchange this information with other relevant authorities, namely other CRS reportable jurisdictions and/or the U.S. Internal Revenue Service.

This paper is current as at December 2020.

Cathy Nelson.

DSM AVOCATS À LA COUR

MEXICO

Anti-corruption and foreign investment regime

Introduction

This article offers a brief guide to the Mexican anti-corruption regulation and foreign investment regime.

As to Mexican Anti-corruption regulation, this paper sets out a broad view of the constitutional and statutory architecture of the system and the different areas of law that we consider most relevant, such as criminal, administrative and asset forfeiture. We have not addressed how the current administration is enforcing these multiple regulations. Our analysis is an overview of this relatively new area of law.

In relation to foreign investment, Mexico has succeeded in becoming one of the principal countries receiving foreign investment, particularly in the manufacturing, transportation and communication sectors, as well as in the financial services sector. In addition, Mexican international trade has increased significantly in conjunction with the economic growth of the country. In presenting an overview of the rules applicable to all foreigners who wish to invest in Mexico, we will first address the rules applicable to the acquisition of real estate in Mexico and the trusts through which foreign individuals and entities can acquire the use and benefits of real estate located in the so-called *restricted zone* foreseen in the Mexican Constitution. We will also examine the basic rules applicable to both foreign investment in Mexican companies and direct investment by foreign entities to engage routinely in business activities in Mexico.

Anti-corruption legal framework in Mexico

Title Four of the Political Constitution of the United Mexican States

In 2015, the Mexican Constitution was amended to introduce the National Anti-corruption System. Title Fourth of the Mexican Constitution ("Constitution") regulates public servants' liability for corruption and individuals' and companies' liability linked to serious administrative offenses or acts of corruption ("Title Fourth").

A. Public servants

Under Title Fourth, public servants are: (i) representatives of popular election; (ii) members of the Judicial Federal Branch; (iii) officers of organizations to which the Constitution grants autonomy; and, in general, (iv) any person who holds a job, position or commission of any nature in the Congress of the Union or in the Federal Public Administration ("Public Servant"). Public

Servants will be liable for the acts or omissions they incur in the performance of their respective functions.[13]

Regarding the President, Title Fourth provides that during his or her time in office, he or she may only be accused of treason and serious crimes.[14]

Regarding state Public Servants, such as, (i) governors; (ii) local congressmen; (iii) state judges; (iv) state judicial council members, if applicable; (v) town halls members and mayors; and, (vi) members of organizations to which the local constitutions grant autonomy, liability may arise for (a) violations of the Constitution and federal laws; and, (b) improper management and application of federal funds and resources.[15]

Public Servants will be obliged to present, under oath, their declaration of assets and interests before the competent authorities.[16]

B. Sanctions

The Constitution provides the general basis of the sanctions applicable to Public Servants, companies and individuals linked to serious administrative offenses. Sanctioning proceedings shall be autonomous and sanctions of the same nature may not be imposed twice for a single conduct.[17] Additionally, tax and certain banking secrecy shall not be applicable to prosecuting authorities regarding administrative offenses and corruption.

Finally, the state shall be responsible for the damages caused by its irregular administrative activity on the assets or rights of companies or individuals, where companies or individuals shall be offered redress for their damages.[18]

C. Public Servants' constitutional immunity

To proceed criminally against (i) the Congress deputies and senators, (ii) the Supreme Court of Justice of the Nation justices , (iii) the Superior Chamber of the Electoral Tribunal magistrates , (iv) the federal judiciary counselors, (v) the office secretaries, (vi) the Republic's Attorney General, and (vii) the President counselor and the electoral counselors of the General Council of the National Electoral Institute for crimes perpetrated during the time of their assignment, the Chamber of Deputies will need to rule on the liability issue by an absolute majority of its

[13] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, art. 108, Diario Oficial de la Federación [D.O.], February 5, 1917 (Mex.).
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid*. Art. 109.
[18] *Ibid*.

members present in session, whether or not to proceed against the accused party. In civil lawsuits filed against any Public Servant, Chamber of Deputies' decision will not be required.[19]

The President of the Republic may only be charged before the Chamber of Senators (for treason and serious crimes of the common order) under article 110 of the Constitution regarding impeachment. In this case, the Chamber of Senators will decide based on the applicable criminal legislation.[20]

The same proceeding shall be applicable regarding local authorities in case of the perpetration of federal crimes.[21]

D. National Anti-corruption System

The National Anti-corruption System serves as a communication and coordination bridge between the competent authorities of all levels of government in the prevention, detection and sanction of administrative responsibilities and acts of corruption, as well as in the supervision and control of public resources.[22]

Mirroring the national regulation, the Constitution obliges the states to establish local anti-corruption systems to coordinate the competent local authorities in the prevention, detection, and punishment of administrative responsibilities and acts of corruption.[23]

General Law of the National Anticorruption System ("GLNAS")

The GLNAS is of public order and seeks to (i) establish principles, general bases, public policies and procedures for the coordination between the authorities of all levels of government in the prevention, detection, investigation and punishment of administrative offenses and acts of corruption; (ii) supervise and control public resources; and (iii) establish, articulate and evaluate the policy on anti-corruption matters.[24]

A. National Anti-corruption System Composition

The National Anti-corruption System is comprised by (i) the members of the Coordinating Committee; (ii) the Citizens' Participation Committee; (iii) the Governing Committee of the

[19] *Ibid*. Art. 111.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*. Art. 113.
[23] *Ibid*.
[24] Ley General del Sistema Nacional Anticorrupción [L.G.S.N.A.] [General Law of the National Anticorruption System], as amended, arts. 1 and 6, Diario Oficial de la Federación [D.O.], July 18, 2016 (Mex.).

National Audit System; and (iv) the Local Systems, who will attend through their representatives.[25]

a. Coordinating Committee

The Coordinating Committee of the National Anti-corruption System is responsible for (i) establishing coordination mechanisms among the members of the National Anti-corruption System; and (ii) designing, promoting and evaluating public policies to combat corruption.[26]

Also, the Coordinating Committee is made up of (i) a representative of the Citizens' Participation Committee, who will preside over it; (ii) the Superior Auditor of the Federation;[27] (iii) the Special Anti-corruption Prosecutor; (iv) the Secretary of Public Function; (v) a representative of the Council of the Federal Judiciary; (vi) the President of the National Institute of Transparency, Access to Information and Protection of Personal Data; and, (vii) the President of the Federal Court of Administrative Justice ("Administrative Court").[28]

i. Executive Secretariat of the National Anti-corruption System

The purpose of the Executive Secretariat is to act as the technical support body of the Coordinating Committee in order to provide technical assistance as well as the necessary inputs for the performance of its powers.[29]

Additionally, the Executive Commission is an auxiliary technical body of the Executive Secretariat made up of (i) the Technical Secretary; and, (ii) the Citizens' Participation Committee, except for its presiding member.[30]

b. Citizens' Participation Committee

The Citizens' Participation Committee serves as (i) contributor to the fulfillment of the objectives of the Coordinating Committee; and, (ii) liaising contact for social and academic organizations related to the matters of the National Anti-corruption System.[31] Such

[25] *Ibid*. Art. 7.
[26] *Ibid*. Art. 8.
[27] The Federal Superior Audit Body is the specialized technical body of the Chamber of Deputies, endowed with technical and managerial autonomy, it is in charge of supervising the use of federal public resources in the three Powers of the Union; the autonomous constitutional bodies; the states and municipalities; and in general, any entity, natural or legal person, public or private, that has captured, collected, administered, managed or exercised federal public resources.
[28] GLNAS, art. 10.
[29] *Ibid*. Art. 25.
[30] *Ibid*. Art. 30.
[31] *Ibid*. Art. 15.

committee shall be comprised of five citizens of integrity and prestige who have stood out for their contribution to transparency, accountability or the fight against corruption.[32]

The GLAR powers of the Citizens' Participation Committee, consist of (i) accessing information generated by the National Anti-corruption System; (ii) formulating proposals, on national policy; (iii) proposing to the Coordinating Committee: (a) projects of inter-institutional and intergovernmental coordination; and (b) mechanisms for society to participate in the prevention and reporting of administrative offenses and acts of corruption; (iv) proposing articulation mechanisms between civil society organizations and academia; (v) proposing rules and procedures for the receipt of petitions, requests and complaints that civil society files within the Federal Superior Audit and the state entities; and (vi) requesting the Coordinating Committee to issue public warrants when any act of corruption requires public clarification, the purpose of which will be to request information on such matter from the competent authorities.[33]

c. Governing Committee of the National Audit System

The National Audit System seeks to (i) establish actions and coordination mechanisms among its members;[34] and (ii) advance the exchange of information, ideas and experiences aimed at developing the control of public resources.[35]

The GLNAS provides that the National Audit System shall have a Governing Committee in charge of executing (i) the design, approval and fostering of comprehensive policies; (ii) the implementation of coordination mechanisms among all the members of the system; and (iii) the integration and instrumentation of mechanisms for the supply, exchange, systematization and update of the information generated by the competent authorities on inspection and control of public resources.[36]

d. Local Systems

The GLNAS orders states to develop in their respective laws the integration, powers and operation of the local systems which shall follow the same structure and design of the federal system.[37]

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[32] *Ibid*. Art. 16.
[33] *Ibid*. Art. 21.
[34] The National Audit System is comprised of (i) the Federal Superior Audit; (ii) the superior audit entities of the states; (iii) the Secretary of Public Function; and, (iii) the secretariats or equivalent bodies in charge of internal control in the states.
[35] *Ibid*. Art. 37.
[36] *Ibid*. Art. 39.
[37] *Ibid*. Art. 36.

B. National Digital Platform

The National Digital Platform of the National Anti-corruption System ("Platform") is designed to be constructed by information incorporated into it by the National Anti-corruption System authorities and should have, at least, the following information: (i) Public Servants' asset changes, declaration of interests and proof of tax declaration; (ii) Public Servants that intervene in public procurement procedures; (iii) Public Servants and sanctioned individuals; (iv) information and communication of the National Anti-corruption System and the National Audit System; (v) public complaints of administrative offenses and acts of corruption; and (vi) bidding proceedings information.[38]

Organizational Law of the Federal Public Administration ("Organizational Law")

Under the Organizational Law, the Secretary of Public Function is responsible for (i) organizing, coordinating and supervising the internal audit system and the evaluation of government management; (ii) inspecting the exercise of federal public spending and its consistency with the expenditure budgets; (iii) establishing general bases for conducting internal, transversal and external audits; (iv) verifying internal control and inspection standards compliance; (v) periodically informing the Coordinating Committee of the National Anti-corruption System, as well as the President of México, on the result of the evaluation regarding the management of the Federal Public Administration agencies and entities and file within the competent authorities, actions to correct the detected irregularities; (vi) implementing the coordination policies filed by the Coordinating Committee of the National Anti-corruption System, in matters of fighting corruption in the Federal Public Administration; and (vii) issuing the Code of Ethics for Public Servants of the federal government and the Rules of Integrity for the exercise of public function.[39]

General Law of Administrative Responsibilities ("GLAR")

A. Purpose of the General Law of Administrative Responsibilities

The GLAR is a public order statute which purpose is to (i) distribute powers among the levels of government to establish the administrative responsibilities of Public Servants; (ii) provide Public Servants' obligations; (iii) determine applicable penalties for acts or omissions incurred by Public Servants and those that correspond to companies and individuals associated with serious administrative offenses; and (iv) develop procedures for the GLAR's application.[40]

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[38] *Ibid*. Art. 49.

[39] Ley Orgánica de la Administración Pública Federal [L.O.A.P.F.] [Organizational Law of the Federal Public Administration], as amended, art. 37, Diario Oficial de la Federación [D.O.], December 29, 1976 (Mex.).

[40] Ley General de Responsabilidades Administrativas [L.G.R.A.] [General Law of Administrative Responsibilities], as amended, art. 1, Diario Oficial de la Federación [D.O.], July 18, 2016 (Mex.).

B. GLAR's personal jurisdiction

Public Servants - those who, having served as Public Servants, fall under the circumstances referred to in the GLAR (e.g., those that need to go through a cool-down period to return to private practice); and

Individuals linked to serious administrative offenses are all subjects to the GLAR's regulations.[41]

C. GLAR's enforcing authorities

Within the framework of the GLAR, there are three authorities in charge of the procedure for the application of sanctions for non-serious administrative offenses, serious administrative offenses, offenses of companies and individuals linked to serious administrative offenses, or offenses of individuals in a special situation ("Administrative Offenses"). These authorities are:

a. Investigating Authority

The following authorities may investigate potential acts of corruption contemplated under the GLAR: (i) the Secretary of Public Function and the equivalent state authorities ("Secretariats"); (ii) the internal audit agencies in charge of enforcing laws regarding the responsibilities of public servants ("Internal Audit Agencies"); (iii) the Federal Superior Audit; (iv) the superior audit entities of the states ("State Audit Entities"); and, (v) the audit units of the productive companies of the State.[42]

b. Substantiating Authority

The substantiating authority is the one that directs and conducts the administrative liability procedure from the filing of the Report of Alleged Administrative Responsibility[43] until the conclusion of the initial hearing.[44]

The following may be substantiating authorities (i) the Secretariats; (ii) the Internal Audit Agencies; (iii) the Federal Superior Audit; (iv) the State Audit Entities; and (v) the units of

[41] *Ibid*. Art. 4.
[42] *Ibid*. Art. 3.
[43] Article 3 GLAR. For the purposes of this Law, it will be understood by: (…)
XVIII. Report of Alleged Administrative Responsibility: The instrument in which the investigating authorities describe the facts related to any of the offenses indicated in this Law, stating in a documented way with the evidence and grounds, the reasons and presumed responsibility of the Public Servant or a particular in the commission of administrative offenses;
(…)
[44] *Ibid*.

responsibilities of the productive companies of the State. The substantiating authority cannot be the same as the investigating authority.[45]

c. Judging Authority

The judging authority is in charge of deciding whether (i) an Administrative Offense took place under a specific case; and where appropriate, (ii) to apply a penalty.

Under the GLAR, regarding non-serious administrative offenses, the unit of administrative responsibilities or the Public Servant assigned in the Internal Audit Agencies will be the judging authority; and regarding serious administrative offenses and acts of individuals linked to serious administrative offenses, the judging authority will be the Administrative Court.[46]

D. Non-serious administrative offenses

A Public Servant whose acts or omissions violate the content of the following obligations will have perpetrated a non-serious administrative offense:[47]

a. Comply with her powers and duties with discipline and respect, according to the code of ethics;

b. Report acts or omissions that may constitute administrative offenses;

c. Comply with her superiors' instructions, provided that they are in accordance with the provisions related to their public service. In case of receiving instruction contrary to said provisions, she shall report such circumstance;

d. Present her declarations of assets situation and interests in a timely manner;

e. Register, integrate, custody and take care of the documentation and information that due to her employment, position or commission, she has under her responsibility. Prevent or avoid such documentation and information's improper use, disclosure, theft, destruction, concealment or disabling;

f. Supervise that the Public Servants subject to her direction, comply with these provisions;

g. Accountability for the performance of her duties;

[45] *Ibid*.
[46] *Ibid*.
[47] *Ibid*. Art. 49.

h. Collaborate in the judicial and administrative procedures in which she is a party to;

i. Verify, before the execution of contracts for acquisitions, leases or for the sale of all types of assets, provision of services of any nature or public contracting, that the individuals state under oath that they do not hold a job, position or commission in public service or, where appropriate, that there is no Conflict of Interest;[48] and,

j. Verify and review that legal entities are properly incorporated, their partners, members of the boards of directors or shareholders who exercise control do not incur in a Conflict of Interest, prior to conducting out any legal act that involves public resources.

The damages caused by a Public Servant to the Public Treasury or to the assets of a public entity, in a culpable or negligent way and without incurring a serious administrative offence, shall be considered a non-serious administrative offense.[49]

The judging authority may refrain from imposing the corresponding penalty when the damage or harm to the Treasury or to the assets of public entities does not exceed two thousand times the daily value of the Measurement and Updating Unit[50] (approximately $8,740.00 USD at the December 2020 exchange rate) and the damage has been compensated or recovered.[51]

E. Serious administrative offenses

The GLAR regulates the following serious administrative offenses: (i) bribery; (ii) embezzlement; (iii) diversion of public resources; (iv) misuse of information; (v) abuse of functions; (vi) actions under conflict of interest; (vii) improper hiring; (viii) hidden enrichment or concealment of conflict of interest; (ix) simulation; (x) influence peddling; (xi) cover-up; (xii) contempt; (xiii) nepotism; and (xiv) obstruction of justice.

i. Bribery: The Public Servant who demands, accepts, obtains or intends to obtain, by himself or through third parties, due to his duties, any benefit not included in his remuneration as a Public Servant, which could consist of money; securities; movable or immovable property, or sale at a price that is well below the market price; donations; services; jobs and other improper benefits ("Improper Benefit") for himself or for his

[48] Article 3 GLAR. For the purposes of this Law, it will be understood by: (…)
VI. Conflict of Interest: The possible impact on the impartial and objective performance of the functions of Public Servants due to personal, family or business interests; ("Conflict of Interest" or "Conflicts of Interest")
(…)
[49] *Ibid*. Art. 50.
[50] The Unit of Measurement and Update (UMA) is the economic reference in pesos to determine the amount of payment of the obligations and assumptions provided for in federal laws, of the states, as well as in the legal provisions that emanate from the above. Currently its value is $ 86.88 MXN a day (approximately $4.37 USD).
[51] GLAR, art. 50.

spouse, blood or civil related persons or for third parties with whom he has professional, labor or business relationships, or for partners or companies of which the Public Servant or the aforementioned persons are part of ("Persons").[52]

ii. Embezzlement: The Public Servant who authorizes, requests or performs acts for him or herself or the Persons mentioned above regarding public resources, whether material, human or financial, without legal basis or against the applicable regulations.[53]

iii. Diversion of public resources: The Public Servant who authorizes, requests or performs acts for the allocation or diversion of public resources, whether material, human or financial, without legal basis or against the applicable regulations.[54]

iv. Improper use of information: The Public Servant who acquires for himself or for the Persons mentioned above, real estate, movable property and securities that may increase their value or, in general, improve their conditions or grant them any private advantage or benefit, as a result of inside information of which they had knowledge.[55]

v. Abuse of functions: The Public Servant who exercises powers that he lacks or uses those he has, to perform or induce someone to perform arbitrary acts or omissions, for his own benefit, for the benefit of the Persons, or to cause damage to any person or to the public service.[56]

vi. Actions under Conflict of Interest: The Public Servant who intervenes in any way by reason of his employment, position or commission, in attending, processing or deciding matters in which he has a Conflict of Interest or legal impediment.[57]

vii. Improper hiring: The Public Servant who authorizes any type of hiring, as well as the selection or appointment, of whoever is impeded by legal provision or disabled by decision of the competent authority to occupy a job, position or commission in the public service or disqualified from contracting with public entities National Anti-corruption System.[58]

viii. Hidden enrichment or concealment of Conflict of Interest: The Public Servant who does not provide truthful information or omits information on his statements of assets situation or interests, with the purpose of hiding the increase in his assets, the use and

[52] *Ibid*. Art. 52.
[53] *Ibid*. Art. 53.
[54] *Ibid*. Art. 54.
[55] *Ibid*. Art. 55.
[56] *Ibid*. Art. 57.
[57] *Ibid*. Art. 58.
[58] *Ibid*. Art. 59.

enjoyment of assets or services that are not explainable or justifiable, or a Conflict of Interest.[59]

ix. Simulation of legal act: The Public Servant who uses a legal identity which is different from his or her own, to obtain, for the benefit of himself or that of a family member up to the fourth degree by consanguinity or affinity, to obtain public resources in a manner contrary to the law.[60]

x. Influence peddling: The Public Servant who uses his job, position or commission to induce another Public Servant to carry out, delay or omit an act of her competence, to cause any benefit, profit or advantage for himself or for any of the Persons.[61]

xi. Concealment: The Public Servant who, when in the exercise of his functions, notices acts or omissions that could constitute administrative offenses and deliberately performs any conduct to conceal them.[62]

xii. Contempt: The Public Servant who, in the case of requirements or decisions of supervisory, internal control, judicial, electoral, human rights or any other competent authorities, provides false information, omits to respond, or deliberately delays without justification the requested information, despite the imposition of sanctions in accordance with the applicable provisions.[63]

xiii. Nepotism: The Public Servant who, using his position directly or indirectly, designates, names or intervenes to hire as an employee in the public entity in which he exercises his functions, someone with whom the Public Servant has kinship ties by consanguinity up to the fourth degree, affinity up to the second degree, or marriage or cohabitation.[64]

xiv. Obstruction of justice: The Public Servants responsible for the investigation, substantiation and judgment of administrative offenses will incur on obstruction of justice when (i) they carry out any act that simulates non-serious offense during the investigation of acts or omissions classified as serious offenses by the GLAR and other applicable provisions; (ii) do not initiate the corresponding procedure before the competent authority, within a period of thirty calendar days, from the date they become aware of any conduct that could constitute a serious administrative offense, offenses by

[59] *Ibid*. Art. 60.
[60] *Ibid*. Art. 60 Bis.
[61] *Ibid*. Art. 61.
[62] *Ibid*. Art. 62.
[63] *Ibid*. Art. 63.
[64] *Ibid*. Art. 63 Bis.

individuals or corporations or an act of corruption; and, (iii) reveal the identity of an anonymous whistleblower protected under GLAR.[65]

F. Acts of individuals linked to serious administrative offenses

The acts of companies and individuals linked to serious administrative offenses are: (i) bribery; (ii) unlawful participation in administrative procedures; (iii) influence peddling to induce the authority; (iv) use of false information; (v) obstruction of investigative powers; (vi) collusion; (vii) improper use of public resources; and (viii) improper hiring of former Public Servants.

a. Bribery: The individual who promises, offers or delivers any Improper Benefit to one or more Public Servants, directly or through third parties, in exchange for said Public Servants performing or refraining from performing an act related to their functions or those of another public servant, or else, abuse their real or supposed influence, with the purpose of obtaining or maintaining a benefit or advantage, for themselves or for a third party, regardless of the acceptance or receipt of the benefit or the result obtained.[66]

b. Unlawful participation in administrative procedures: The individual who (i) performs acts or omissions to participate in administrative procedures, be them federal, state or municipal, in which such individual is prevented or disabled to do so by law or decision of competent authority; or, (ii) intervenes on his own behalf but in the interest of one or more other persons who are impeded or disqualified from participating in federal, state or municipal administrative procedures, for the benefit of the third party. In the latter case, both individuals will be sanctioned.[67]

c. Influence peddling to induce the authority: The individual who uses his influence, economic or political power, real or fictitious, over any public servant, with the purpose of obtaining a benefit or advantage for him or for a third party, or to cause harm to any person or to the public service, regardless of the acceptance or the results obtained.[68]

d. Use of false information: The individual who presents false or altered documentation or information, or simulates compliance with requirements or rules established in administrative procedures, with the purpose of obtaining an authorization, a benefit, an advantage or to harm any person.[69]

e. Obstruction of investigative powers: The individual who, having information related to an investigation of administrative offenses, provides false information, deliberately and

[65] *Ibid*. Art. 64.
[66] *Ibid*. Art. 66.
[67] *Ibid*. Art. 67.
[68] *Ibid*. Art. 68.
[69] *Ibid*. Art. 69.

unjustifiably delays the delivery of the same, or does not respond to the authority's requirements or decisions, as long as enforcement measures have been previously imposed in accordance with the applicable provisions.[70]

f. Collusion: When two or more individuals (i) carry out, in matters of public contracting, actions that imply or have the object or effect of obtaining an improper benefit or advantage in federal, state or municipal public contracting; or, (ii) execute or enter into contracts, agreements, arrangements between competitors, the object or effect of which is to obtain an improper benefit or to cause damage to the Public Treasury or to the assets of public entities.[71]

g. Improper use of public resources: The individual who (i) performs acts by which he appropriates, misuses or deviates public resources, whether material, human or financial, when for any reason he handles, receives, manages or has access to these resources; or, (ii) fails to render accounts that prove the destination that was granted to such resources.[72]

h. Undue hiring of former Public Servants: The company or individual who hires someone who has been a Public Servant during the previous year, who has privileged information that he has directly acquired as a result of his employment, in public service, and directly allows the contracting party to profit in the market or be in an advantageous position over its competitors.[73]

G. Offenses of individuals in special situation

Offenses of individuals in a special situation are those incurred on by candidates for popularly elected public offices, members of electoral campaign teams or transition teams between public sector administrations, and leaders of public sector unions ("Special Situation Individuals"). These offenses sanction demanding, requesting, accepting, receiving or pretending to receive any improper benefit, either for these Special Situation Individuals, for their electoral campaign or for any of the Persons mentioned above, in exchange for granting or offering an improper advantage in the future in case of obtaining a Public Servant position.[74]

[70] *Ibid*.
[71] *Ibid*. Art. 70.
[72] *Ibid*. Art. 71.
[73] *Ibid*. Art. 72.
[74] *Ibid*. Art. 73.

H. Sanctions

a. Penalties for non-serious administrative offenses

In cases of administrative responsibilities other than those that fall within the competence of the Administrative Court, the Secretariats or Internal Audit Agencies will impose the following administrative sanctions: (i) public or private admonition; (ii) suspension of employment; (iii) removal from position; and (iv) temporary debarment to perform jobs, positions or commissions in the public service and to participate in acquisitions, leases, services or public works (it will not be less than three months nor may it exceed one year).[75]

The sanctioning authority shall weigh the following factors: (i) the elements of the job, position or commission that the public servant performed when he committed the offense; (ii) the hierarchical level and background of the offender, including length of service; (iii) the external conditions and the means of execution; and, (iv) the repetition of the breach of obligations.[76]

b. Penalties for serious administrative offenses

The administrative sanctions imposed by the Administrative Court on Public Servants, derived from the procedures for the perpetration of serious administrative offenses, will consist of (i) the suspension of employment, position or commission (30 – 90 days); (ii) dismissal from employment, position or commission; (iii) an economic sanction; and, (iv) the temporary debarment to perform jobs, positions or commissions in the public service and to participate in acquisitions, leases, services or public works ("Sanctions").[77]

One or more of the indicated Sanctions may be imposed on the offender, as long as they are compatible with each other and according to the seriousness of the serious administrative offense.[78]

In the event that the serious administrative offense perpetrated by the Public Servant generates economic benefits, to himself or to any of the Persons, (i) an economic sanction will be imposed that may reach up to two times the benefits obtained; and (ii) in no case may the economic sanction imposed be less than or equal to the amount of the

[75] *Ibid*. Art. 75.
[76] *Ibid*. Art. 76.
[77] *Ibid*. Art. 78.
[78] *Ibid*.

economic benefits obtained. The foregoing, without prejudice to the imposition of Sanctions.[79]

The Administrative Court will determine the payment of compensation in cases in which the serious administrative offense causes damages and losses to the Federal Public Treasury, local or municipal, or to the assets of public entities. In such cases, the Public Servant will be obliged to compensate all the damages caused and the persons who, if applicable, have also obtained an undue benefit, will be jointly and severally liable.[80]

The sanctioning authority shall weigh the following factors when imposing a sanction: (i) the elements of the job, position or commission that the public servant performed when he committed the offense; (ii) property damages and losses caused by acts or omissions; (iii) the hierarchical level and background of the offender, including length of service; (iv) the socioeconomic circumstances of the public servant; (v) the external conditions and the means of execution; (vi) repetition of the breach of obligations; and (vii) the amount of the benefit derived from the infraction obtained by the person responsible.[81]

c. Penalties for administrative offenses by companies and individuals

Individuals will be sanctioned administratively for the commission of acts linked to serious administrative offenses and these may consist of (i) economic sanction that may reach up to twice the benefits obtained or, lacking a benefit, an amount of ranging from US$437 to US$655,500 (which could vary depending on the exchange rate); (ii) debarment to participate in acquisitions, leases, services or public works, for a period that will not be less than three months nor greater than eight years; and (iii) redress for damages caused to the federal, state or municipal treasury or to public entities' assets.[82]

For corporations, the sanctions will vary from (i) economic sanction that may reach up to twice the benefits obtained, and, lacking a benefit, an amount ranging from US$4,370 to US$6,555,000 (which could vary depending on the exchange rate); (ii) debarment to participate in acquisitions, leases, services or public works, for a period that will not be less than three months nor greater than ten years; (iii) the suspension of activities, for a period that will not be less than three months nor greater than three years, which will consist of stopping, deferring or temporarily depriving companies of their commercial, economic, contractual or business activities; (iv) corporate liquidation; and (v) redress for

[79] *Ibid*. Art. 79.
[80] *Ibid*.
[81] *Ibid*. Art. 80.
[82] *Ibid*. Art. 81.

damages and losses caused to the federal, state or municipal treasury, or to public entities' assets.[83]

The sanctions provided for in paragraphs (iii) and (iv) above will only proceed in cases where (a) the company obtains an economic benefit and the participation of its management, internal audit or control or partners is proven, or (b) in those cases where the company's corporate veil is used in a systematic way to perpetrate serious administrative offenses.[84]

For companies facing an investigation and potential charges of administrative liability under GLAR, having an Integrity Policy (as defined below) will potentially serve as a defense against administrative liability.[85]

One or more of the outlined sanctions may be imposed on the offender, provided that they are compatible with each other and consistent with the seriousness of the offenses of individuals.[86]

When a company's management, its internal audit or partners (i) denounce or collaborate in the investigations by providing information and elements they possess; and, (ii) redress the damages, such conditions shall be considered as mitigating factors in the imposition of sanctions on legal entities.[87] Conversely, a company's failure to report shall be considered as an aggravating factor for the imposition of sanctions against it.[88]

Additionally, public servants, individuals and arguably entities shall be subject to a sanction reduction between 50 to 70 percent and up to 100 percent regarding debarments, if they confess their responsibility, as long as: (i) the authority has not notified the existence or beginning of a proceeding regarding such conducts; (ii) it is the first party to provide relevant information and evidence which can confirm the existence of an offence; (iii) such party fully cooperates; and (iv) the confessing party suspends its participation in the illegal conducts.

[83] *Ibid*.
[84] *Ibid*. Art. 81.
[85] *Ibid*. Art. 25.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.

I. Company's Integrity

Corporations will be sanctioned for individuals' actions constituting serious administrative offenses acting on the companies' behalf seeking to obtain benefits for such companies.[89]

In these cases, in assessing corporate liability, the judging authority will analyze whether companies have an integrity policy.[90]

Under the GLAR, an integrity policy is one that has, at least, (i) an organization and procedures manual that is clear and complete; (ii) a code of conduct duly published and publicized among all members of the organization; (iii) adequate and effective control, surveillance and audit systems; (iv) adequate reporting systems; (v) adequate training systems and processes regarding integrity measures; (vi) human resources policies aimed at avoiding the incorporation of people who could generate a risk to the integrity of the corporation;[91] and (vii) mechanisms that ensure transparency and publicity of their interests at all times ("Integrity Policy").[92]

J. General prevention mechanisms

GLAR regulates prevention mechanisms and accountability instruments whose implementation falls on the Secretariats and the Internal Audit Agencies, namely: (i) implementing actions to guide the criteria that Public Servants shall observe in specific situations; (ii) issuing the code of ethics that Public Servants shall observe; (iii) annually evaluating the result of the specific actions implemented; (iv) assessing the recommendations made by the Coordinating Committee of the National Anti-corruption System; and (v) randomly verifying Public Servants, their spouses, and economic dependents' financial statements.[93]

K. Accountability instruments

The accountability instruments in the GLAR consist of (i) the system of patrimonial evolution, declaration of interests and proof of presentation of tax declaration; (ii) the regime for Public Servants who participate in public contracts; (iii) the action protocol in hiring; and, (iv) the declaration of interests.

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[89] *Ibid*. Art. 24.
[90] *Ibid*. Art. 25.
[91] These policies will in no case authorize the discrimination of any person motivated by ethnic or national origin, gender, age, disabilities, social condition, health conditions, religion, opinions, sexual preferences, marital status or any other that violates human dignity and has the objective of nullifying or undermining the rights and freedoms of people.
[92] GLAR, art. 35.
[93] *Ibid*. Arts. 15 to 23.

Federal Criminal Code ("FCC")

A. Crimes for acts of corruption

Under the FCC, the following behaviors constitute crimes for acts of corruption (i) illegal exercise of public service; (ii) abuse of authority; (iii) coalition of public servants; (iv) illicit use of powers; (v) improper payment and receipt of salaries from public servants; (vi) concussion; (vii) intimidation; (viii) abusive exercise of functions; (ix) influence peddling; (x) bribery; (xi) bribery of foreign public servants; (xii) embezzlement; and, (xiii) illicit enrichment ("Crimes for Acts of Corruption").[94]

In addition to the prison penalties that each criminal typology provides, those responsible for the perpetration of such crimes will be subject to the penalty of dismissal and debarment from holding public employment, office or commission, as well as inability to participate in acquisitions, leases, services or public works, concessions for the provision of public service or exploitation and use of property owned by the Federation for a period of one to twenty years.[95]

For the individualization of the penalties provided for the perpetration of Crimes for Acts of Corruption, the judge shall weigh the following factors, (i) the hierarchical level of the Public Servant and his degree of responsibility; (ii) his length of employment; (iii) his service history; (iv) his payment and educational level; (v) the need to redress the damages caused by the illegal conduct; (vi) the special circumstances of the facts constituting the crime; and, (vii) the elements of the job, position or commission that he carried out when perpetrating the crime. The category of official or trusted employee will be a circumstance that may lead to an aggravation of the penalty.[96]

In the case of an individual, the judge must impose the sanction of debarment from holding public office, as well as debarment from participating in acquisitions, leases, concessions, services or public works, considering, where appropriate, the (i) damages caused by her acts or omissions; (ii) her socioeconomic circumstances; (iii) the external conditions and the means of execution; and (iv) the amount of the benefit she obtained.[97]

B. Corporate Criminal Liability

FCC provides that when any member or representative of a company, with the exception of state institutions, perpetrates a crime with means provided by the entity for such purpose, so that it is perpetrated in the name or under the protection of such company or for its benefit, the judge

[94] Código Penal Federal [C.P.F.] [Federal Criminal Code], as amended, title ten, Diario Oficial de la Federación [D.O.], August 14, 1931 (Mex.).
[95] *Ibid.* Art. 212.
[96] *Ibid.* Art. 213.
[97] *Ibid.* Art. 212.

may, in the cases exclusively specified by law, order the suspension of company's group or its dissolution, when deemed necessary for public safety.[98] The FCC imposes corporate criminal liability for corruption offenses such as bribery or influence peddling.[99]

National Code of Criminal Procedures ("NCCP")

A. Obligation to report a crime

Any person who knows of an act that probably constitutes a crime is obliged to report it to the Public Prosecutor and in an emergency, to any police officer.[100]

On the other hand, whoever, in the exercise of public functions, has knowledge of the probable commission of a crime, is obliged to report it immediately to the Public Prosecutor providing all the data she may have and placing the accused person at the disposal of the Public Prosecutor, if they are detained committing a flagrant crime.[101]

Individuals are exempt from the reporting obligation if at the time of the perpetration of the crime, they are the guardian, curator, ward, spouse, concubine, partner or relative of the accused person.[102]

B. Corporate criminal liability

Companies will be criminally liable for crimes committed in their name, on their own behalf, for their benefit or through the means they provide, when the company lacked proper internal compliance controls.[103]

The prosecutor's office may exercise criminal action against companies without prejudice of the criminal action that may be brought against the persons involved in the crime.[104]

On successor liability, corporate criminal liability will not cease to exist when (i) potentially liable companies are transformed, merged, absorbed or split;[105] nor, (ii) when potentially liable

[98] *Ibid*. Art. 11.
[99] *Ibid.* Art. 11 Bis.
[100] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], as amended, art. 222, Diario Oficial de la Federación [D.O.], March 5, 2014 (Mex.).
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.* Art. 421 Bis.
[104] *Ibid.*
[105] In these cases, the judgment may be graduated according to the relationship kept with the company originally responsible for the crime.

companies apparently dissolve, continuing their economic activity and maintaining the substantial identity of their clients, suppliers, employees, or the most relevant part of them all.[106]

Companies will be criminally liable only for the crimes set forth in the FCC and those set forth in the catalog established by the state criminal statutes.[107]

Penalties on corporate criminal liability will range from (i) pecuniary sanction or fine; (ii) confiscation of instruments, objects or products of the crime; (iii) publication of the judgment; and/or (iv) corporate liquidation.[108]

For the purposes of the sanctions, the court shall take into consideration, amongst others, (i) the magnitude of the lack of a proper compliance program; (ii) the amount of money involved in the crime; (iii) the company's annual turnover; (iv) the position held by the person or individuals involved in the crime, in the structure of the legal entity,; (v) the degree of compliance with the legal and regulatory provisions; (vi) the public interest of the social and economic consequences or, where appropriate, the damages that the imposition of the penalty could cause to society; and in the case of dissolution, (vii) the court must consider whether imposing said sanction is necessary to guarantee public or national security, prevent the national economy or public health from being put at risk or and whether dissolving the company will stop the commission of crime.[109]

Federal Law for the Prevention and Identification of Operations with Resources of Illicit Origin ("Anti-money Laundering Law")

A. Purpose of the Law

The purpose of the Anti-money Laundering Law is to protect the financial system and the national economy, establishing measures and procedures to prevent and detect acts or operations that involve resources of illicit origin, through inter-institutional coordination, whose purpose is to gather useful elements to investigate and prosecute the crimes of operations with resources of illicit origin, those related to the latter, the financial structures of criminal organizations and avoid the use of resources for their financing.[110]

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[106] *Ibid.*
[107] *Ibid.* Art. 421.
[108] *Ibid.* Art. 422.
[109] *Ibid.*
[110] Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita [L.F.P.I.O.R.P.I.] [Federal Law for the Prevention and Identification of Operations with Resources of Illicit Origin], as amended, art. 2, Diario Oficial de la Federación [D.O.], October 17, 2012 (Mex.).

B. Operations with resources of illicit origin

The crime of operations with resources of illicit origin is applicable when a person (i) acquires, transfers, manages, custodies, possesses, changes, converts, deposits, withdraws, gives or receives for any reason, invests, transfers or transports, within the national territory, from it to a foreign territory or vice versa, resources, rights or goods of any nature, when she becomes aware that they come from or represent the product of an illicit activity; or (ii) hides, conceals or pretends to conceal or conceal the nature, origin, location, destination, movement, ownership or ownership of resources, rights or assets, when she is aware that they come from or represent the product of an illicit activity.[111]

Resources, rights or assets of any nature are considered as a product of an illicit activity, when there are strong indications or certainty that they come directly or indirectly, or represent the profits derived from the perpetration of some crime and their legitimate origin cannot be accredited, such as Crimes for Acts of Corruption.[112]

The FCC provides for aggravating penalties in case the person who perpetrates the crime is (i) manager, official, employee, attorney-in-fact or service provider of any person subject to the prevention of operations with resources of illicit origin, or carried out such conducts within two years after having been separated from any of said positions; or (ii) Public Servants in charge of preventing, detecting, denouncing, investigating or judging the commission of crimes or executing criminal sanctions, as well as former Public Servants in charge of such functions who commit said conduct within two years after their termination.[113]

National Law of Asset Forfeiture ("NLAF")

A. Purpose

The NLAF's purpose is to regulate (i) asset forfeiture in favor of the state both through the federation and the states; (ii) the corresponding procedure; (iii) the mechanisms for the authorities to manage forfeited assets; (iv) the mechanisms for authorities to carry, keep, manage and eventually liquidate the assets subject to the process of forfeiture, including any such assets' interests or products; and (v) the criteria for the destination of the forfeited assets in the judgment and, where appropriate, their destruction.[114] NLAF punishes both the illicit origin and/or illicit destination of any specific asset under the typologies described below.

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[111] FCC, art. 400 Bis.
[112] *Ibid.*
[113] *Ibid*. Art. 400 Bis 1.
[114] Ley Nacional de Extinción de Dominio [L.N.E.D.] [National Law of Asset Forfeiture], as amended, art. 1, Diario Oficial de la Federación [D.O.], August 9, 2019 (Mex.).

Property shall only be subject to asset forfeiture if related to criminal investigations or criminal proceedings regarding: (i) corruption acts, (ii) concealment (iii) crimes perpetrated by Public Servants, (iv) organized crime, (v) vehicle robbery; (vi) operations with resources of illicit origin, (vii) crimes against public health, (viii) kidnapping, (ix) extortion, (x) human trafficking, and (xi) hydrocarbons, petroleum products and petrochemicals ("Forfeiture Acts").[115]

The asset forfeiture action is a civil action – independent of any criminal proceeding – and its purpose will be to forfeit assets in cases where the defendant may not prove legitimate ownership of such assets.[116]

B. Elements of the asset forfeiture action

The elements of the asset forfeiture action are (i) the existence of a Forfeiture Act; (ii) the existence of any asset of illicit origin or destination; (iii) the causal link between the two previous elements; and (iv) the knowledge that the owner has or should have had, of the destination of the property to a Forfeiture Act, or that it is the product of the illicit act.[117]

C. Subject matter jurisdiction for the asset forfeiture action

The asset forfeiture action may be brought by the public prosecutor against assets whose legitimate origin[118] cannot be proven. For example, against assets that are the product of the Forfeiture Act, without prejudice to the place of its perpetration, such as (i) goods that come from the transformation of the product, instruments or material objects of the Forfeiture Act; (ii) assets of legal origin used to hide other assets of illicit origin, or materially or legally mixed with assets of illicit origin; (iii) assets for which the owner of the asset does not certify their legal origin; (iv) goods of legal origin with an equivalent value, when the assets of illicit origin cannot be located, seized, secured or materially apprehended; (v) goods used for the perpetration of illicit acts by a third party, if its owner had knowledge of the illicit and did not notify the authority by any means or did nothing to prevent it; and (vi) assets that constitute income, products, yields, proceeds, accessories, earnings and other benefits derived from the assets referred to in this paragraph's preceding sections.[119]

[115] *Ibid*.
[116] Constitution, art. 22.
[117] NLAF, art. 9.
[118] The origin or lawful obtaining of the assets, or the lawful use or destination of the assets linked to the Illicit act.
[119] *Ibid*. Art. 7.

Foreign Investment

Acquisition of real estate by foreign individuals or entities

The right of foreigners, whether individuals or entities, to acquire real estate in Mexican territory depends on whether the real estate is located in the so- called "restricted zone" or not.

Real estate located within such restricted zone, which is a 62-mile strip of land along the borders and 31-mile strip along the beaches of Mexico, cannot be directly owned by foreigners under any circumstances. However, foreigners can acquire rights to the use and benefits of real estate located within the restricted zone through a trust with the authorization of the Ministry of Foreign Affairs ("MFA"). In this case, it is the credit institution that, as trustee, acquires rights over the real estate; the foreigner, as beneficiary, has the right of use and enjoyment thereof, including any fruits or products obtained and in general, any proceeds resulting from any profit-yielding operation or exploitation, through third parties or the fiduciary institution. The duration of these types of trusts is 50 years, which may be extended with the authorization of the MFA.

Real estate located outside of the restricted zone can be directly acquired by foreigners, whether individuals or entities, provided that (1) prior to the acquisition a writ is presented to the MFA in which the foreigner agrees to be considered a Mexican national with respect to such property and not to invoke the protection of its/his/her government ("Calvo Clause"), and (2) the MFA grants the corresponding authorization.

Acquisition of real estate by Mexican companies with foreign investment

For Mexican companies with foreign investment to be able to acquire rights over real estate located in Mexican territory, they must have a Calvo Clause in their company by-laws. Furthermore, the type of rights that these companies can acquire—either direct ownership or rights of use or enjoyment of the real estate—depends on where the real estate is located.

There is no restriction on Mexican companies with foreign investment acquiring ownership of real estate located outside of the restricted zone, provided their by-laws contain the Calvo Clause.

In the case of real estate located in the restricted zone, the purpose for which such property will be used must be taken into account.

- *Residential purposes*. Mexican companies with foreign investment cannot acquire direct ownership of real estate located in the restricted zone when it will be used for residential purposes, that is, for housing for the use of the owner or third parties. In this case, such companies may only acquire the rights of use or enjoyment of the real estate through a trust with the prior authorization from the MFA.

- *Non-residential purposes.* Mexican companies with foreign investment can acquire direct ownership of real estate located within the restricted zone provided such property will be

used for non-residential activities. In this case, a notice must be filed with the MFA after the acquisition;

Establishment of business operations in Mexico

Foreigners who wish to engage in economic and commercial activities in Mexico can do so through the incorporation of a Mexican company or by investing as partners or shareholders in existing Mexican companies. Foreign entities can also have a presence in Mexico by establishing a branch or a non-income-earning representative office.

Any foreign individual or company can become a partner or shareholder of a Mexican company without the need of an authorization, provided that such company does not engage in activities in which foreign investment is restricted or excluded.

In the case of newly created Mexican companies, it is sufficient to include the Calvo Clause in their bylaws. When foreigners wish to invest in companies already incorporated whose bylaws contain a clause excluding foreigners, such clause must be substituted by a Calvo Clause and the MFA must be notified of such a change.

A foreign company can also engage in business activities within Mexico by establishing a branch (permanent establishment). It is important to note that the legal and tax obligations of a branch are basically the same as those of a Mexican subsidiary. However, the establishment of a branch may take more time than the creation of a subsidiary since an authorization from the Ministry of Economy might be necessary and in addition, the branch cannot engage in business activities within Mexico until it is registered with the Public Registry of Commerce, which may take several weeks or months. Foreign entities legally established in Mexico may engage in all types of business activity and commercial operations, except with regard to those activities in which foreign investment is restricted or excluded.

Foreign companies that only intend to have a representative in Mexico, who will not perform commercial activities but will only analyze the Mexican market trend, gather information related to business in Mexico and/or identify potential clients and act as a contact between the foreign company and the Mexican clients, can establish a non-income earning representative office. The establishment of such office allows the foreign company to have a close contact with potential Mexican clients on a higher level than normal transnational relationships. In order for a representative office not to be considered a permanent establishment and consequently be subject to strict Mexican tax regulations, its representative cannot perform business activities, such as executing contracts, importing or exporting merchandise or assuming risks in the name of the foreign company.

Foreign entities that wish to establish a branch or a non-income earning representative office in Mexico must obtain a prior authorization from the Mexican Foreign Investment Bureau ("**FIB**"). It bears noting that such authorization is not necessary if the foreign entity (i) has been incorporated under the laws of any country that has a free-trade treaty with Mexico or (ii) has been incorporated under the laws of any country that is a member of the World Trade Organization and only intends to render services within Mexico. In this case, no authorization is necessary and the only requirement is filing a writ with the FIB.

Economic Activities Subject to Restriction

As a general rule, there are no legal restrictions on foreign individuals and entities engaging in economic activities in Mexico, either directly or as shareholders in Mexican companies. However, the Foreign Investment Law ("**FIL**") specifies certain activities in which foreign investment is not allowed and others in which it is limited.

Reserved activities

Foreign individuals and entities and Mexican companies having foreign investment cannot participate in activities related to the strategic areas that according to the law are reserved to the Mexican State, or in activities that are reserved exclusively for Mexicans and Mexican companies with a clause excluding foreigners.

- *Activities reserved to the Mexican State.* The following strategic areas are reserved exclusively to the Mexican State:

  - Exploration and extraction of oil and other hydrocarbons;
  - Electricity. This does not include the generation of electricity for self-supply, co-generation, or small production; generation by independent producers for sale to the Federal Electricity Commission; generation of electricity for export, derived from co-generation, independent production, or small production; nor energy for use in emergencies resulting from interruptions in the public power grid service. Also not included is the import of power by individuals or entities exclusively for self-supply for its own use;
  - Generation of nuclear power;
  - Radioactive minerals;
  - Telegraphs and radiotelegraphy;
  - Mail service;
  - Issuance of banknotes and minting;
  - Control, supervision and oversight of ports, airports and heliports.

- *Activities reserved for Mexicans.* The economic activities and companies mentioned below are reserved exclusively for Mexicans or Mexican companies having a foreigners exclusion clause:

  - National land transport of passengers, tourists and cargo, not including messenger and parcel services;
  - Development bank institutions, in accordance with the applicable law;
  - The provision of professional and technical services expressly indicated in the applicable laws.

Foreign investment is not allowed in the above-mentioned activities and companies, directly or through trusts, agreements, partnership agreements or bylaws, pyramid schemes or any other mechanism that grants them any control or share.

Notwithstanding the above, there is a mechanism through which foreign investment can participate in certain activities reserved for Mexicans: neutral investment, which is analyzed below.

Activities and acquisitions with a specific regulation

There are certain economic activities and companies in which foreign investment is not excluded but is limited to a certain proportion, ranging from 10 to 49 percent. There are also certain sectors in which even when the foreign investment is limited to 49 percent, it is possible to surpass such percentage with an authorization of the National Foreign Investment Commission ("FIC").

In order to determine the percentage of foreign investment in the economic activities subject to maximum limits of investment, the foreign investment made in such activities indirectly through Mexican companies with a majority of Mexican capital is not counted, provided the latter are not controlled by the foreign investment.

- *Limited activities.* In the economic activities and companies mentioned below, foreign investment is limited to the indicated percentages, which cannot be surpassed under any circumstances, except through the mechanism of neutral investment, which is discussed in Point 1.5 of this chapter.

- Up to 10%: producers' cooperatives
- Up to 49%:
    - Companies manufacturing and selling explosives, firearms, cartridges, munitions or fireworks, not including the acquisition and utilization of explosives for industrial and extractive activities or the preparation of explosive mixtures for the carrying out of such activities
    - Printing and publishing of newspapers for circulation exclusively in national territory
    - Series "T" shares of companies owning agricultural, livestock, and forestry lands (series "T" shares only represent capital contributed in agricultural, livestock, or forestry lands, or capital to be used for the acquisition of such lands)
    - Fishing operations in fresh and coastal waters and in the exclusive economic zone, not including aquaculture
    - Comprehensive port administration
    - Port pilotage services to ships for interior navigation operations, according to the applicable law
    - Shipping companies engaged in the commercial exploitation of ships for interior navigation and cabotage, except for tourist cruise ships and the exploitation of dredgers and naval artefacts for port construction, conservation and operation
    - Suppliers of fuel and lubricants for ships and aircraft and rail equipment

- Broadcasting. Within this maximum of foreign investment, the reciprocity that exists with the country of origin of the investor shall be taken into consideration.
- Regular and non-scheduled national air transport service; non-regular international air transport service in the form of air taxi; and specialized air transport service.

- *Limited activities in which 49% can be surpassed with an authorization from the FIC.* Foreign investment can hold a percentage greater than 49% in the economic activities and companies mentioned below if they obtain a favorable decisions of the FIC:

  - Port services for ships carrying out interior navigation operations, such as towing, tying up and launching
  - Shipping companies engaged in the exploitation of ships exclusively in high traffic
  - Concession or permit holding companies of airfields for service to the public
  - Private services of preschool, elementary, junior high, high school or college education or combinations thereof
  - Legal services
  - Construction, operation and exploitation of railways that are a general means of communication and provision of rail transport services to the public

It should be emphasized that the favorable decision of the FIC is only required for foreign investment to be greater than 49% in the economic activities and companies listed above when the total value of the assets of the companies involved at the time of submitting the acquisition request surpasses the amount that the FIC determines annually.

Neutral Investment

Neutral investment is a mechanism through which foreign investment can participate in certain reserved or specially regulated activities. The FIL defines neutral investment as investment in Mexican companies or in authorized trusts that will not be taken into consideration for determining the percentage of foreign investment in the capital stock of Mexican companies.

- *Neutral investment represented by instruments issued by trust institutions:* The Ministry of Economy has the power to authorize trust institutions to issue neutral investment instruments, which will only grant, with respect to companies, pecuniary rights to their holders and, if applicable, limited corporate rights, without granting to their holders the right to vote in their general ordinary meetings. Furthermore, the Ministry of Economy can authorize the creation or modification of all types of neutral investment trusts, as well as the transfer of stock thereto, regardless of the activity that the company conveying its shares in trust engages in.

- *Neutral investment represented by special series of shares:* The investment in non-voting stock or stock with limited corporate rights is considered neutral, provided advance authorization is obtained from the Ministry of Economy and when applicable, from the National Banking and Securities Commission. Companies already incorporated or to be

incorporated, regardless of the activity they engage in, must obtain the advance authorization of the Ministry of Economy to issue special series of stock as neutral investment.

- *Neutral investment made by international development financing institutions:* International development financing institutions are considered to be those foreign entities whose principal purpose is to promote economic and social development of developing countries by the contribution of temporary venture capital, granting of preferential financing or technical assistance of different types. International development financing institutions can invest through neutral investment in the capital stock of Mexican companies, provided they are recognized in advance by the FIC. Furthermore, international development financing institutions can invest in the capital of Mexican companies that engage in reserved or specially regulated activities, provided they obtain a favorable decision of the FIC.

This paper is current as at December 2020.

Javier Lizardi.

VON WEBESER Y SIERRA

THE NETHERLANDS

Introduction

This paper outlines the framework the Netherlands have in place to prevent corruption and bribery, which are contained in the Dutch Criminal Code. Furthermore, the limitations on foreign acquisitions of sensitive and national security interests will be outlined. These limitations under Dutch law are limited in number to date but a European Union regulation is about to change that by establishing a framework for the screening of foreign direct investments into the EU.

Foreign Corrupt Practices

Under Dutch law, there is no definition for the term 'foreign public official' or any case law defining which criteria apply to foreign public officials.

Partly in response to the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Dutch legislature introduced a provision in the Dutch Criminal Code (*Wetboek van Strafrecht*, "DCC") which stipulates that persons in the public service of a foreign state or of an organization of international law are considered public officials (*ambtenaren*)[120].

As a result, foreign and domestic public officials are under Dutch law treated equally.

In addition to the OECD Convention mentioned above and the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption (UNCAC) (Trb. 2006, 266), Dutch law is also influenced by EU law, in this regard the EU Directive 2017/1371 of the European parliament and of the council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

Bribery and corruption

With respect to official corruption, Dutch law distinguishes active (bribing)[121] and passive corruption (being bribed)[122].

Article 177 DCC defines active bribery of public officials as:

[120] Article 178(a) of the DCC.
[121] Articles 177/178 of the DCC (active bribery)
[122] Articles 363/364 of the DCC (passive bribery)

- making a gift or promise **to** a public official or providing or offering a service with the intention of inducing the public official to do something or refrain from doing something in his or her public office; or

- making a gift or promise **to** a public official or providing or offering a service as a result of or in connection with what he or she has done or refrained from doing in his or her present or past public office.

A similar definition applies to bribery of judges on the basis of article 178 DCC.

Article 363 DCC defines passive corruption as an act **by** a public official:

- who (i) accepts a gift or promise or a service, knowing or reasonably suspecting that it is made, granted or offered to him or her or (ii) requests a gift or promise or a service, in order to induce him or her to do something or refrain from doing something in his public office; or

- who (i) accepts a gift or promise or a service, knowing or reasonably suspecting that it is made, granted or offered to him or her or (ii) requests a gift or promise or a service, as a result of or in connection with what he or she has done or refrained from doing in his or her present or former public office.

A similar definition applies to bribery of judges on the basis of article 364 DCC.

Jurisdiction of Dutch courts

According to a directive on detection and prosecution of foreign corruption[123], the Dutch government is committed to a strict approach to foreign corruption. At the request of the Public Prosecutor's Office (*Openbaar Ministerie*) and the Fiscal Intelligence and Investigation Service (FIOD), the Dutch government provides targeted government-wide information with the aim of discouraging and preventing companies from committing corruption abroad, even if it concerns small amounts or payments to lower public officials.

Dutch criminal courts have jurisdiction with respect to:

- any person who bribes a public official (foreign or domestic) from within the Netherlands;

- a Dutch public official (not necessarily having Dutch nationality) or Dutch national bribed abroad;

[123] Aanwijzing opsporing en vervolging buitenlandse corruptie (2020A006): https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/specialistisch/aanwijzing-opsporing-en-vervolging-buitenlandse-corruptie-2020a006

- any person bribed abroad who is in the public service of an international organization having its seat in the Netherlands;
- a Dutch citizen who bribed a public official – foreign or otherwise – abroad; and
- a Dutch public official or a person in the public service of an international organization having its seat in the Netherlands and who committed the offence of bribery abroad.

A foreign public official bribed abroad by a Dutch citizen cannot be prosecuted in the Netherlands unless that public official is in the service of an international organization having its seat in the Netherlands or (part of) the act of bribery is committed within the territory of the Netherlands.

Consequences of non-compliance (penalties)

A person who is found guilty of bribery or corruption of a public official will be guilty of a criminal offense. The extent of penalties imposed will depend on whether an individual or corporation is involved.

For individuals, bribery or corruption of a public official can result in either or both of the following penalties:

- imprisonment for not more than 6 years; and/or
- a fine of up to EUR 87,000.-.

For a corporation, bribery or corruption can result in a penalty of EUR 870,000 or, if the court does not deem this amount appropriate, a fine of up to 10 per cent of the annual turnover of the preceding fiscal year.

FOREIGN DIRECT INVESTMENT

According to the 2018 OECD's Foreign Direct Investment Regulatory Restrictiveness Index[124], the Netherlands is one of the least restrictive countries for foreign direct investments worldwide.

Current Dutch screening mechanisms: Electricity Act, Gas Act and Telecommunications Act

The Electricity Act, the Gas Act and, since 1 October 2020, the Telecommunications Act require the parties to a transaction to notify such transaction to the Dutch Ministry of Economic Affairs (and Climate

[124] https://goingdigital.oecd.org/en/indicator/74/

Policy) in case such transaction would lead to any change of control with respect to an electricity, gas or telecommunications company.

This screening obligation applies to any change of control, regardless the identity of the investor, which leads to a change of "predominant control" in any electricity company, gas company or telecommunications company. A transaction may be prohibited or be subjected to certain conditions for reasons of public safety or supply security. If parties fail to notify the Ministry, a transaction is voidable.

Current Dutch screening mechanism: Financial Supervisions Act

The Dutch Financial Supervisions Act regulates supervision of financial institutions (such as banks, trust companies and insurers) and the entire financial system. Certain changes of control in companies and institutions that are subject to the Financial Supervisions Act are to be reported to the Authority for Financial Markets (*Autoriteit Financiële Markten*) or the Dutch Central Bank (*De Nederlandsche Bank*).

European Union ("EU") FDI Screening Regulation

In 2019, an EU regulation establishing a framework for the screening of foreign direct investments into the Union (Regulation (EU) 2019/452) (the "**FDI Screening Regulation**") entered into force. It applies to all foreign direct investments ("**FDIs**") into each of the EU Member States effective from 11 October 2020 and has retrospective effect on all such investments back to 10 April 2019.

The FDI Screening Regulation aims to increase the cooperation between EU Member States and the EU Commission with respect to FDIs. If an EU Member State is screening an FDI, it is required to inform the other EU Member States and the EU Commission about such FDI.

The EU screening framework introduced by the FDI Screening Regulation focuses on FDIs that are likely to affect security or public order of EU Member States or the EU as a whole, thereby aiming to protect strategically significant sectors which are included in the following, non-exhaustive, list:

- critical infrastructure (physical or virtual): energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, including land and real estate crucial for the use of such infrastructure;
- critical technologies: AI, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- supply of critical inputs including energy, raw materials and food security;
- access to, or control of, sensitive information, including personal data; or
- freedom and pluralism of the media.

If an EU Member State or the EU Commission is of the opinion that an FDI in an EU Member State could affect security or public order, such EU Member State or the EU Commission may provide comments to such EU Member State. If an EU Member State provides comments to another EU Member State, it will have to simultaneously inform the EU Commission about this. The EU Commission will then inform all other EU Member States. The EU Member State in which the FDI takes place will then be asked to share information about the FDI. Such comments may be drawn up until 15 months following completion of an FDI.

The information to be shared about an FDI shall include:

- the ownership structure of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;
- the approximate value of the FDI;
- the products, services and business operations of the foreign investor and of the undertaking in which the FDI is planned or has been completed;
- the Member States in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct relevant business operations;
- the funding of the investment and its source, on the basis of the best information available to the Member State;
- the date when the FDI is planned to be completed or has been completed.

Apart from the above list, an EU Member State or the EU Commission may request additional information.

Dutch implementation of screening mechanisms

Even though an EU regulation enters into force without implementation by national governments being required, certain aspects will need to be regulated on a national level in order to fit into the respective state's national system. In the Netherlands, the respective legislation is the draft "Screening of Economy and National Security Act" (*Wet toetsing economie en nationale veiligheid*) ("**Dutch Screening Act**") which is currently in the legislation process. If the Dutch Screening Act enters into force in its current form, the screening mechanism will apply retrospectively to investments made after 2 June 2020.

The Dutch Screening Act will require the notification of a change of control in certain Dutch companies to the Dutch Ministry of Economic Affairs (and Climate Policy). This notification obligation only applies to companies which are of fundamental importance for vital processes or active in the field of sensitive technologies. A specific list will be drawn up by ministerial decree. In this respect, the term "control" refers to the ability to exercise decisive influence on a target company, either through shareholding, or

on a *de facto* basis once the investment will have taken place. This notification obligation relates to both Dutch and foreign investors. The notification needs to be made either by the target company or by the acquirer. If another more specific national screening mechanism applies to the FDI, this more specific mechanism will prevail over the screening mechanism of the Dutch Screening Act.

Non-compliance with the Dutch Screening Act will be subject to sanctions, including the suspension of voting rights, information rights and other shareholder rights, and penalties of up to EUR 870,000 or 10% of the target company's turnover.

This paper is current as at December 2020.

Friederike Henke.

BUREN

NEW ZEALAND

Introduction

New Zealand criminalises bribery and corruption in both the public and private sectors through the Crimes Act 1961 and the Secret Commissions Act 1910. Bribery and corruption cause severe socio-economic and political problems and New Zealand is committed to participating in the global fight against this conduct.

In terms of foreign investment, the New Zealand Government's policy is to achieve a balance between the need for highly beneficial overseas investment and for New Zealand to maintain ownership and control of sensitive New Zealand assets. The rules governing foreign investment are set out in the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005.

This paper outlines the anti-corruption and foreign investment frameworks New Zealand has in place in order to combat bribery and corruption and secure the protection of sensitive New Zealand assets.

Private Sector Corruption – Secret Commissions Act 1910

The Secret Commissions Act sets out bribery and corruption offences related to the private sector. The key corruption offences relate to the giving or acceptance of bribes to or by an agent – someone that acts on behalf of a principal. It is an offence:

- to corruptly give or offer an agent a gift or other consideration to induce or reward the agent's actions in relation to the affairs or business of the principal; or
- for an agent to corruptly accept or obtain, or offer to accept or obtain, a gift or other consideration as an inducement or reward for actions in relation to the affairs or business of the principal.

Penalties for Non-compliance

A breach of the Secret Commissions Act can result in a maximum term of imprisonment of 7 years (or, at the discretion of a court under the Sentencing Act 2002, a fine in lieu of imprisonment).

Public Sector Corruption - Crimes Act 1961

Domestic bribery and corruption offences are contained in sections 100-105 of the Crimes Act. These sections criminalise bribery and corruption of New Zealand judges, government ministers, members of Parliament, police officers and other public officials. The offences generally concern:

- corruptly giving or offering a bribe with the intent to influence a public official in respect of any action in the public official's official capacity (as a judge, minister etc); and
- corruptly accepting or obtaining, or offering to accept or obtain, a bribe in respect of any action in the public official's official capacity (as a judge, minister etc).

Foreign bribery and corruption is contained in sections 105C and 105D of the Act. It is an offence to:

- corruptly give or offer a bribe to a person with the intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity in order to obtain or retain business or obtain any improper advantage in the conduct of business. This would not apply where the money or consideration given was for the sole or primary purpose of ensuring or expediting a routine government action and the value of the benefit is small; and
- corruptly accept or obtain, or offer to accept or obtain, a bribe in respect of any action in the foreign public official's official capacity. This would apply to foreign public officials while in New Zealand and outside of New Zealand where they are also a New Zealand citizen or ordinarily resident in New Zealand.

A foreign public official is defined to include a member or officer of the executive, judiciary, or legislature of a foreign country; or a person employed by a foreign government, foreign public agency, foreign public enterprise, or public international organisation.

A body corporate may be held liable for a foreign bribery offence committed by one of its employees, agents, directors or officers. The necessary elements for a body corporate to be held liable are:

- the employee, director etc was acting within the scope of their authority;
- the offence was committed at least in part with the intent to benefit the body corporate; and
- the body corporate had failed to take reasonable steps to prevent the offence.

Penalties for Non-compliance

Penalties for offences relating to domestic bribery and corruption offences range from a maximum term of imprisonment of either 7 years or 14 years (depending on the offence). A court would also have the discretion to impose a fine in lieu of imprisonment.

Penalties for offences relating to foreign bribery and corruption can include imprisonment for term not exceeding 7 years, a fine, or both. A fine cannot exceed the greater of:

- $5 million; or
- if the court is satisfied that the offence occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the offence.

The commercial gain formula acts as a deterrent to individuals and businesses making a commercial decision to pay bribes.

Foreign Overseas Investment Regime in New Zealand

Protecting national interests and sensitive assets is a crucial part of New Zealand's overseas Investment framework. Consent is required for certain transactions involving the acquisition of interests in sensitive land and significant business assets by overseas persons or their associates. An overseas person includes

an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand, a body corporate incorporated outside of New Zealand, and a body corporate incorporated in New Zealand which is more than 25% owned or controlled by overseas persons or body corporates.

The overseas investment regime is administered by the Overseas Investment Office ("OIO").

Overseas Investment in Sensitive Land

A transaction requires consent if it is an overseas investment in sensitive land. An overseas investment in sensitive land is the acquisition by an overseas person (or its associate) of:

- an estate or interest in sensitive land (which includes a leasehold interest for a term of 3 years or more); or
- securities in a person ("A") which owns or controls such an estate or interest, where as a result of the acquisition the overseas person will acquire or have an increase of a more than 25% ownership or control interest in A or A will itself become an overseas person.

Sensitive land includes residential land, non-urban land (including farm land) exceeding 5 hectares, and certain land which includes or adjoins a foreshore or seabed, the bed of a lake, or a reserve or public park.

The criteria for obtaining consent to the investment differs depending on the type of land being acquired. Relevant criteria can include an investor test (which considers matters such as relevant business experience and acumen, a financial commitment to the investment, and good character) and/or a benefit to New Zealand test (which considers matters such as the creation and retention of jobs, the introduction of new technology and business skills, added market competition, and greater efficiency or productivity).

A national interest test may also be applied to transactions (whether for sensitive land or significant business assets) of national interest. Transactions of national interest would include investments by overseas governments and investments in strategically important businesses (such as ports or airports, or those involved in supply of electricity, water, or telecommunications services).

Overseas Investment in Significant Business Assets

A transaction requires consent if it is an overseas investment in significant business assets. An overseas investment in significant business assets occurs when an overseas person (or its associate):

- acquires or increases a more than 25% ownership or control interest in a person ("A"), where the value of the securities or consideration provided, or the value of a A's New Zealand assets, exceeds NZ$100 million (or any other applicable threshold set out in regulations);
- acquires property (including goodwill and other intangible assets) of a New Zealand business for more than NZ $100 million (or any other applicable threshold set out in regulations); or

- establishes a new business in New Zealand for which the total establishment costs are expected to exceed NZ$100 million (or any other applicable threshold set out in regulations).

The criteria for obtaining consent include demonstrating relevant business experience and acumen, a financial commitment to the investment, and good character.

Temporary Emergency Notification Requirement

In response to the outbreak of COVID-19, the Government fast-tracked the Overseas Investment (Urgent Measures) Amendment Act 2020 with certain provisions designed to prevent 'fire sale acquisitions' of vulnerable and distressed businesses to predatory overseas investors.

These include a temporary notification requirement where the OIO now needs to be notified of all overseas investments (irrespective of value) resulting in:

- more than 25% overseas ownership of a New Zealand business;
- increases of an existing interest to or beyond certain levels (more than 50%, 75%, or 100%); or
- the acquisition of more than 25% (by value) of the property of a New Zealand business.

Upon receipt of a notification, the OIO will screen the investment to determine if it poses risks contrary to national security, public order or national interest. The Minister of Finance may then make an order to allow the transaction to proceed (with or without conditions) or to prohibit the transaction.

The emergency notification regime is intended to be temporary and is currently being reviewed by Government every 90 days.

The Government has also stated that the national interest test and temporary notification powers will be rarely used to decline or prohibit transactions. In a Cabinet Paper it acknowledged that "overuse of the national interest test during the pandemic, or at any time in the future, would risk being seen as protectionist and could reduce New Zealand's attractiveness to foreign investment." Regarding distressed businesses, it states that the Government remains committed to such investments proceeding, with or without conditions, to ensure business viability wherever possible.

Penalties for Non-Compliance

Failing to obtain the requisite consent to a transaction can result in:

- in the case of an individual, imprisonment for a term not exceeding 12 months or a fine not exceeding $300,000;
- in other cases, a fine not exceeding $300,000;
- an order for the disposal of property; or
- an order for payment of a civil pecuniary penalty (not to exceed $500,000 in the case of an individual, $10 million in any other case, or 3 times the quantifiable gain in relation to the property acquired).

Further Amendments Proposed

There is also an Overseas Investment Amendment Bill (No 3), currently at the Select Committee stage, which (if enacted) will make further amendments to the Overseas Investment Act. The proposed amendments include (among others) changes to certain tests under which requests for consent will be assessed and the removal of the need for consent for certain lower-risk transactions (such as transactions involving the acquisition of a lease of less than 10 years for non-residential land).

This paper is current as at December 2020.

Matt Smith.

ANTHONY HARPER

SOUTH AFRICA

Anti-corruption and foreign investment regime

Introduction

"In South Africa the fight against corruption is one of the major priorities of government" reads the Anti-Corruption Pledge on the South African Government's website[125]. One cannot deny that corruption has, and continues to be a real problem in South Africa, which continues to erode the confidence of both local and foreign investors. Despite the fact that South Africa has a well-developed legislative framework to fight corruption, it is the implementation and execution of these laws that has been perceived as lacking.

However, as South Africa's economy weakens, the country has been further downgraded to the sub-investment level by the main rating agencies and is suffering the consequences of hard lockdown measures imposed to counter the spread of Covid-19. The attracting of both foreign and local capital has become even more critical for the ailing economy. The government is putting in place various anti-corruption initiatives, of which the most notable is the establishment in January 2018, of The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, commonly known as 'Zondo Commission', after its chairperson, Deputy Chief Justice Raymond Zondo. The aim of the Zondo Commision is to uncover and refer for prosecution instances of corruption.

The purpose of this paper is to provide a brief overview of the main legislation regulating combating corrupt activities and foreign investments.

Anti-corruption legislation

South Africa is a signatory to a number of international conventions and treaties which aim to prevent and fight corruption. These include the United Nations Convention Against Corruption, the United Nations Convention against Transnational Organised Crime, the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the African Union Convention on Preventing and Combating Corruption.

The provisions giving effect to South African obligations under those conventions are included in a number of Acts. The broad framework starts with the South African Constitution[126] ("**Constitution**"), which Bill of Rights includes rights to equality and freedom of trade, occupation and profession, which rights the state is obliged to protect.

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[125] https://www.gov.za/anticorruption-pledge

[126] The Constitution of the Republic of South Africa, 1996

Prevention and Combating of Corrupt Activities Act, No. 12 of 2004 ("PACCAA")

The main legislative piece dealing with anti-corruption is PACCAA. In its preamble it states that "corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities."

Offences under PACCA

PACCAA sets out number of offences, including –

- general offence of corruption
- offences in respect of corrupt activities relating to –
    - public officers;
    - foreign public officials;
    - agents;
    - members of legislative;
    - members of prosecuting authority;
- offences of receiving or offering of unauthorized gratification by or to a party to an employment relationship; and
- number of offences in respect of corrupt activities relating to specific matters (including relating to witnesses and evidential material during certain proceedings, relating to contracts, relating to procuring and withdrawal of tenders, relating to acquisition of private interest in contract, agreement or investment of public body).

According to the definition in section 3 of PACCAA a person is guilty of an offence of general corruption, when the person, directly or indirectly, (a) agrees or offers to accept any gratification from any other person, whether for the benefit of himself/ herself or for the benefit of another person or (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner (i) that amounts to the (aa) illegal, dishonest, unauthorized, incomplete or biased; or (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation, (ii) that amounts to (aa) the abuse of a position of authority; (bb) a breach of

trust; or (cc) the violation of a legal duty or set of rules; (iii) designed to achieve an unjustified result; or (iv) that amounts to any other unauthorized or improper inducement to do or not to do anything.

This is a very wide definition and encompasses both the corruptors and the corrupted and the person is guilty of the offence if they have an intention of performing the corrupt act, disregarding whether that person has been successful in their endeavors. PACCAA also penalizes accessories to the offences and attempts, conspiring with any other person and inducement (which includes coercion, intimidation and threatening) to committing any other offence stated in PACCAA.

What is important to emphasize is that PACCAA applies to corruption in both the public and private sector.

The penalties for committing offences are fine or imprisonment, including imprisonment for life. In addition to any fine the courts may further impose an additional fine equal to five times the value of the gratification involved in the offence.

Duty to report corrupt activities

Another important provision of PACCAA is the obligation to report corrupt transactions. Section 34 provides that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any person has committed certain offences, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police officials in the Directorate for Priority Crime Investigation of the South African Police. Failure to report does constitute an offence under PACCAA.

Section 34(4) lists the person considered to hold a position of authority and includes, amongst others, any Director-General or head, or equivalent officer of a national or provincial department, any executive manager in a financial institution, any partner in partnership, any person appointed as chief executive officer or equivalent officer of any agency, authority, board, corporation entity, foundation, fund, institute.

Certain other Acts aimed at combating corruption

The Protected Disclosures Act, No. 2 of 2000 ("**PDA**"), has as one of its objectives "to create a culture which will facilitate the disclosure of information by employees and workers relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures". In terms of section 3 of PDA, no employee making a protected disclosure may be subjected to any occupational detriment by his/her employer on account of such disclosure.

PDA provides for a number of specific protected disclosures (including disclosures to legal advisers, employers, members of Cabinet or Executive Council) as well as a catch-all general protected disclosure (section 9). In order to be protected, the general disclosure must be made in good faith by an employee or a worker, who reasonably believes that the disclosed information is substantially true and who does

not make a disclosure for a personal gain (excluding any award payable in terms of any law), it is reasonable to make such disclosure and certain other conditions apply, such as that person making disclosure has a reason to believe that he/she will be subjected to an occupational detriment when the disclosure is made to his/her employer, or has a reason to believe that the evidence of impropriety will be destroyed, or previously made the disclosure of same information to the employer, or impropriety is of an exceptionally serious nature.

The Financial Intelligence Centre Act, No. 38 of 2001 ("**FICA**"), places a duty on accountable institutions (which include, amongst others, financial institutions, law firms, insurance companies, and estate agents) to report certain financial transactions as well as obligates the accountable institution to identity and verify the identity of their clients. The latter means in practice that prior to, e.g. opening bank accounts or instructing attorneys, the customers (whether local or foreign) need to provide the accountable institutions with the so-called "FICA documents" which include IDs, registration papers and tax documents confirming their tax identification numbers.

Regulation 43 of the South Africa's Companies Act, No. 71 of 2008 (the "**Companies Act**") provides for establishment of social and ethics committees in state owned companies, listed public companies and other qualifying companies. One of the specific tasks of such committees is to monitor the social and economic standing of the company, including standing in terms of the OECD recommendations regarding corruption. The Companies Act, in section 159, also further expands on the protection of whistle-blowers afforded under PDA.

Protection of Foreign Investments

South Africa's regime is open to foreign investments. The Companies Act allows for registration of companies with exclusively foreign directors and shareholders. The foreign companies may also choose to register an external company (in essence, a branch) once they commence profit or non-profit activities in South Africa.

When investing in South Africa it is important to take cognisance of a number of legislative provisions, most significant of which will be briefly discussed below.

Protection of Investment Act, No. 22 of 2015 ("PIA")

As of 13 July 2018, South Africa has uniform legislation governing foreign investments under the PIA. Prior to that various bilateral investment treaties ("**BITs**") with other countries governed foreign investments. The general objective of PIA is stated as "to provide for protection of investors and their investments; to achieve a balance of rights and obligations that apply to all investors". Further the preamble records, amongst other things, the state's commitment to maintaining an open and transparent environment for investments; promoting investment by creating an environment that facilitates process that may affect investments; to provide sound legislative framework for protection of all investments, including foreign investments; acknowledging that investment must be protected, in accordance with the law, administrative justice and access to information but also recognising the

obligation to take measures to protect or advance persons, or categories of persons, historically disadvantaged due to discrimination.

Investment is defined, in section 2 of PIA, as –

- any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of South Africa, committing resources of economic value over a reasonable period of time, in anticipation of profit;

- the holding or acquisition of shares, debentures or other ownership instruments of such enterprise; or

- the holding, acquisition or merger by such an enterprise with another enterprise outside South Africa to the extent that such holding, acquisition or merger with another enterprise outside South Africa has an effect on an investment contemplated by the above two paragraphs in South Africa.

An investor is defined as an enterprise (i.e. any natural or juristic person whether incorporated or not) making investment in South Africa regardless of nationality. This means that PIA provides equal protection to local and foreign investments. This is further confirmed in section 8, which provides that foreign investments must not be treated less favourably than South African investors in like circumstances, thus establishing the rule of national treatment. This is expanded on in section 9 that records that South Africa must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources, and in section 10 stating that the investors may, in respect of the investment repatriate funds, subject to taxation and other applicable legislation.

Whilst the national treatment is welcomed, it must be noted that some BITs might have provided more extensive protections to the foreign investors, in essence providing for their preferential treatment over national investors. One such additional protection would have been the prohibition of expropriation.

As it stands, the Constitution (section 25) allows for expropriation of property in terms of laws of general application for public purpose or a public interest, subject to just and equitable compensation taking into account the balance between public interest and the interest of those affected, and it is argued that the section in its current wording allows for expropriation without compensation in certain limited instances. There is also an on-going debate on whether the Constitution should be amended to specifically provide for expropriation without compensation. It must be noted though that any limitation of rights would need to be in terms of section 36 of the Constitution, which provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom and taking into account relevant factors such as a) the nature of the right, b) the

importance and purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose.

PIA also recognises (section 12) that the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures to, among others, redress historical social and economic inequalities and injustices. These include the promotion of the members of these groups of society which were disadvantaged under the apartheid regime. In this regard foreign investors should take note of Black Economic Empowerment legislation (BEE legislation).

Other legislation relevant for foreign investors

Investors tendering for state work as well as investing in certain industries, e.g. mining, need to be cognisant of the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 together with the codes issued pursuant to this Act and specific industry charters, together comprising the so-called BEE legislation. The aim of the BEE legislation is to provide for wider participation in the economy of the previously disadvantaged groups of society. The BEE legislation introduces various measures to reward, amongst others, the participation in management and ownership of previously disadvantaged persons.

South African exchange control regulations have been steadily relaxed over the years. However, foreign investors must be mindful that certain investments, such as acquisition of shares in South African companies or shareholders loans to such companies still require either approval or endorsement by the South African Reserve Bank (SARB). Most of these actions are efficiently performed by SARB's authorized dealers, i.e. major banks, and accordingly do not delay commercial transactions.

Control of foreign investments

Presently there is no specific government control of mergers with participation of foreign firms in South Africa. It is however envisaged to introduce controls in the pending amendments to the Competition Act, No. 89 of 1998 ("**Competition Act**"). The Competition Amendment Act, No. 18 of 2018, which was signed into law in 2019, proposes the addition of section 18A titled "Intervention in merger proceedings involving foreign acquiring firms". The effective date of section 18A is yet to be announced.

The proposed section 18A envisages that the President constitutes a committee ("**Committee**") comprising members of cabinet and other public officials which Committee will be responsible for considering whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa. The foreign acquiring firm is defined as an acquiring firm, which was 1) incorporated, established or formed under the laws of a country other than South Africa, or 2) whose effective management is outside South Africa. The latter part of the definition covers foreign acquiring firms such as South African subsidiaries of the foreign firms, which are controlled from abroad, e.g. where all the directors are based abroad.

The proposed section 18A(3) stipulates that the President will identify and publish in the Government Gazette a list of national security interests in South Africa, including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the

Committee. This would mean that the parties to such merger would be subject to double notification, i.e. to the Competition Commission and the Committee. The Competition Commission and the Competition Tribunal essentially will not have jurisdiction in respect of such merger and the decision as to whether to allow or prohibit such merger, on the basis that it will have an adverse effect on national security interests, will vest solely with the Committee. The Committee may however consult and seek guidance of the Competition Commission or any other relevant regulatory authority.

Conclusion

Overall the South African legal framework provides a good basis for foreign investments. The investors need to be aware though of certain specific requirements, including exchange control and in some instances, BEE legislation.

This paper is current as at December 2020.

Aleksandra Burr Dixon.

KNOWLES HUSAIN LINDSAY INC.

SPAIN

Anti-corruption and foreign investment regime

Antibribery regulations

What is the legal framework governing bribery in Spain?

The Spanish law that regulates bribery and corruption is the Código Penal (Spanish Criminal Code or SCC).

What constitutes a bribe?

The Supreme Court has identified three elements that contribute to corruption: (i) the existence of a power of official action (in public corruption) or of administration, direction or management of businesses (in private corruption); (ii) the search for or obtaining of an undue advantage (tangible or intangible outside socially admissible use); and (iii) the benefit for oneself or a third party.

Accordingly, the Spanish Criminal Code distinguishes between two offences: bribery of a public servant or authority and bribery of private entities or individuals.

Under the Spanish Criminal Code, bribery occurs whenever a public servant or authority receives or is offered a reward to carry out an act or omission breaching duties required of his/her position, or to carry out any act or omission relating to the performance of his/her duties. The offence can take the form of so-called passive bribery, where the initiative to commit the offence originates with the public official or authority, or active bribery, where a bribe is offered at the initiative of the individual paying it.

Corruption in business occurs when an offer, promise, concession or acceptance is made with the object of obtaining unjustified benefits or advantages, of any nature, within the framework of relations between private entities, as compensation for the undue promotion of the active subject over a third party "in the acquisition or sale of goods, contracting of services or in commercial relations." This also includes corruption in international economic transactions.

What is the jurisdictional reach of the legal framework?

Any offence linked to bribery and corruption committed in Spain shall be dealt with by the Spanish Courts.

Likewise, Spanish Courts will also investigate those acts committed abroad if (i) the responsible persons are Spanish citizens or foreigners who have acquired Spanish nationality, (ii) the act is punishable at the place of execution, unless, under an international treaty or a legal act of an international organization of which Spain is a party, this requirement is not necessary, (iii) there is a criminal complaint filed by the

aggrieved party or the Public Prosecutor files, and (iv) the defendant has not been acquitted, exonerated or sentenced abroad, or, in the last case, has not complied with the sentence imposed (Section 23.1 of Organic Act of Judiciary).

Under section 23.4.n of the Organic Act of Judiciary, Spanish judicial authorities may take jurisdiction where any act committed by Spaniards or foreigners abroad/outside the Spanish territory regarding the criminal offence of corruption between individuals (corruption in business) or in an international transaction, provided that:

- the procedure is directed against a Spanish citizen;
- the procedure is directed against a foreign citizen who is ordinarily resident in Spain;
- the offence has been committed by the director, manager, employee or partner of a business, association, foundation or organization that has it headquarter or registered office in Spain; or
- the offence had been committed by a legal person, company, organization, group or any other kind of entity or groups of persons having their seat or head in Spain.

Who may be liable for bribery?

Private individuals, public officials and the legal entity concerned can be prosecuted for bribery offences under the various sections of the Spanish Criminal Code.

Legal entities will be criminally liable for offences committed in their name or on their behalf and to their benefit by their legal representatives, directors de facto or de jure or those who, being subject to the authority of the individuals mentioned, may have performed such acts in the absence of due control over them.

Can a parent company be liable for its subsidiary's involvement in bribery?

In order to analyze whether the control of the parent company over its subsidiary exists, the following aspects, among others, should be assessed: (i) the percentage of participation of the parent company in the share capital of the dependent company; (ii) the existence or not of identity of material and human resources between the two companies; (iii) independence in the decision-making of one and the other; and (iv) the existence of a differentiated social activity.

Bearing this in mind, if the subsidiary has total autonomy and the capacity for initiative and control in its daily work, it would not be possible to additionally transfer criminal liability to the parent company in the event that a crime was perpetrated within the former, since the organizational defect would have occurred in the subsidiary and not in the parent company.

However, if the subsidiary is subject to the power of supervision, surveillance and control of the parent company (depending on what is entrusted to it by the management body of the parent company), the

aforementioned liability could be accumulated, provided that it can be demonstrated that the parent company also benefited directly or indirectly from the criminal offence committed in the subsidiary.

Are there any defenses for bribery offences?

Bribery offenses entail criminal liability for both individuals and legal entities. Corporations can be exempted from criminal liability if a compliance program is implemented and it is proven that the offender managed to overcome all the controls set by the company to prevent the crime to be committed. Also, to have criminal risk prevention programs helps to mitigate any eventual conviction.

Individuals shall be exempted from criminal liability who occasionally may have agreed to pay a bribe requested by the authority if this is reported to law enforcers prior to any investigation opened and within two months after the facts took place.

Foreign investment regime

The general rule under Spanish law, as set out under Law 19/2003 of 4 July, on the legal regime of capital exchanges, economic transactions with foreign countries and certain anti-money laundering provisions, as amended (Law 19/2003), is that FDIs, as well as transactions, deals and business between Spanish residents and non-residents are liberalized.

However, the liberalization principle has been suspended and prior administrative authorization is required for (1) non-Spanish residents (including non-Spanish EU residents), in relation to activities directly related to Spanish national defense, and (2) non-EU and non-EFTA residents for FDIs above certain thresholds, either in relation to specific sectors or made by certain types of investor.

In addition, air transportation and audiovisual service regulations set out restrictions for certain investments made by non-European Economic Area (EEA) nationals. Laws relating to other business sectors restrict the acquisition of significant holdings, but these restrictions apply regardless of the nationality or residence of the prospective acquirer.

General regime for foreign investments:

Law 19/2003 and Royal Decree 664/1999 of 23 April on external investments (RD 664/1999) established a liberalized system for foreign investments in Spain that provides two declaration regimes for informing the Investments Registry of the Ministry of Economy, Industry and Competitiveness:

a. an ex-ante declaration regime, which applies only to:
    i. investments made from a country or territory identified as a tax haven in Royal Decree 1080/1991 of 5 July. No ex-ante declaration is required if the investment is made in listed shares or investment funds registered with the Spanish Securities Market Commission (CNMV) or involves less than 50 per cent of the Spanish company's share capital; or
    ii. investments made in Spain by non-EU Member States acquiring property to be used as diplomatic or consular offices, except in cases where there is an agreement providing for

deregulation under reciprocity rules in compliance with Additional Provision No. 3 of RD 664/1999. The ex-ante declaration is not equivalent to a verification, non-objection or clearance requirement and once the investment has been declared, the investor may carry out the investment; and

b. an ex-post declaration regime, which applies to all foreign investors, including those subjects to an ex-ante declaration, for administrative, statistical and economic purposes only.

National defense-related activities:

RD 664/1999 suspended the general liberalization regime relating to foreign investments made in activities directly related to national defense, such as the manufacture or trade of weapons, ammunition, explosives and military equipment.

Any investment in any of these activities will require an authorization from the Council of Ministers, unless the investment is (1) made in listed companies that carry out activities in this sector, (2) equal to or below 3 per cent of the share capital, and (3) does not allow the foreign investor to become, directly or indirectly, part of the managing bodies.

Screening Mechanism for FDIs whose liberalization is suspended:

A new screening mechanism for certain FDIs made by non-EU and non-EFTA residents, based on public order, public health and public security considerations was introduced by the government in March 2020 as an amendment to Law 19/2003 (the Screening Mechanism). The Screening Mechanism aligns part of the Spanish foreign investment legal framework with the EU Screening Regulation.

Not all FDIs will be subject to the Screening Mechanism, only those made (1) in certain sectors, or (2) by certain investors, regardless of the sector of the target company.

The following sectors are subject to the Screening Mechanism:

- Critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, sensitive facilities, and land and real estate crucial for the use of such infrastructures.

- Critical technologies, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, and nanotechnologies and biotechnologies.

- Supply of critical inputs, including energy, raw materials and food security.

- Sectors with access to or control of sensitive information, including special categories of personal data, or the ability to control such information.

- Media.
- Other sectors designated by the Spanish government from time to time (currently there are none).

The following investors' FDIs will be subject to the Screening Mechanism regardless of the sector in which they invest:

- Investors directly or indirectly controlled by the government, including state bodies, armed forces or sovereign wealth funds, of a non-EU or non-EFTA country, pursuant to the control criteria set out in Article 42 of the Spanish Commercial Code.
- Investors that have already made an investment affecting national security, public order or public health in another EU Member State.
- Investors subject to ongoing judicial or administrative proceedings in any state for engaging in illegal or criminal activities.

Audiovisual services:

Investors who are citizens or residents in a country that is not a member of the EEA can only hold stakes and voting rights in a Spanish audiovisual communication services company that uses spectrum in accordance with the principle of reciprocity.

Additionally, the shareholding held, directly or indirectly, by a non-EEA person in these operators may not exceed 25 per cent of the share capital of the Spanish audiovisual communication services license holder, and the total shareholding in a Spanish audiovisual communication license holder by non-EEA persons must not exceed 50 per cent on aggregate.

Air transportation:

Law 48/1960 of 21 July on air navigation and Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September on common rules for the operation of air services in the Community together provide that holders of operating licenses for air transportation of passengers, cargo or mail, or both, for remuneration must be majority-owned and effectively controlled by EU nationals, except as provided for in an agreement with a third country to which the EU is a party. The airline in question must at all times be able, on request from the competent licensing authority, to provide evidence that it meets these requirements.

In this context, EU airlines must also notify the competent licensing authority in advance of any intended mergers or acquisitions and within 14 days of any change in the ownership of any single shareholding that represents 10 per cent or more of the total shareholding of the airline or of its parent or ultimate holding company.

Other sectors:

The acquisition of significant holdings in Spanish companies in certain sectors, regardless of the nationality or residence of the prospective purchaser, is subject to prior authorization or, with regard to ownership of certain types of key energy assets, ex post communication with the potential for conditions to be imposed. These sectors include:

- Regulated energy activities (regulated gas activities include regasification, primary storage, transportation and distribution of natural gas), certain types of key energy assets, market operators.
- Certain financial entities, such as credit entities, insurance or reinsurance companies and investment services entities, as well as Bolsas y Mercados Españoles.
- Gambling operators.
- Professional sports public limited companies (currently limited to football and basketball).

This paper is current as at January 14th, 2021

Ignacio López-Balcells and Mireia Blanch.

BUFETE B. BUIGAS

SWITZERLAND

Anti-Corruption and Foreign Investment Regime

Introduction

Legislation to combat corruption and bribery in Switzerland has been strengthened over the last 20 years. In 2000, Switzerland signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). The Convention has been codified by legislative provisions in the Criminal Code of Switzerland ("**Criminal Code**"). In 2006, Switzerland ratified the Criminal Law Convention on Corruption and the Additional Protocol of the Council of Europe and in 2009, the UN Anti Corruption Agreement. As in every country, the examination of international regulations is a cross-section task. For this reason, Switzerland created the Interdepartmental Working Group on Combating Corruption ("**IWGC**"). Furthermore, the Federal Council enacted in 2020 the Federal Council Strategy against Corruption (2021-2024) ("**Strategy 2021-2024**"). The IWGC is responsible for the monitoring and implementation of the Strategy 2021-2024 and gives recommendations to the Federal Government. This paper outlines the legal framework in Switzerland about anti-corruption, bribery and limitations on foreign investments.

Foreign Corrupt Practices

Bribery of Foreign Public Officials

Art. 322^{septies} (1) Criminal Code makes it an offence to bribe a foreign public official, subject to some limited defences. A person (which includes a body corporate) is guilty of (active) bribery if that person:

- offers, promises or gives an undue advantage, or gives such an advantage to a third party and
- carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion.

Art. 322^{septies} (2) Criminal Code makes it an offence as well to be bribed as a foreign public official, subject to some limited defences. A foreign public official is guilty of (passive) bribery if that person:

- accepts an undue advantage for himself or for a third party
- in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion.

A foreign public official is broadly defined in the Criminal Code and includes a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces who is acting for a foreign state or international organization.

Consequences of Contraventions

A person who breaches Art. 322^{septies} Criminal Code and cannot make out a statutory defence will be guilty of an offence and subject to civil or criminal penalties or a combination of both. The extent of penalties imposed will depend on whether an individual or corporation has contravened Art. 322^{septies} Criminal Code and whether there were previous convictions registered.

For individuals, a contravention can result in either or both the following penalties:

- imprisonment of not more than five years
- a monetary penalty of not more than 180 daily units

A corporation can be punished independently of the criminal liability of an individual if the corporation can be accused of not having taken all necessary and reasonable organizational precautions to prevent an act of corruption. Furthermore, a corporation is liable to prosecution if an act of corruption cannot be attributed to a specific individual due to deficient organization of the corporation.

For a corporation, a contravention can result in a fine of not more than five million Swiss Francs.

The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organizational inadequacies and of the loss or damage caused and based on the economic ability of the corporation to pay the fine.

Defences

According to Art. 322decies of the Criminal Code, a person (which includes a body corporate) will not be guilty of an offence if:

- the undue advantage is permitted under public employment law or contractually approved by a third party; or
- the undue advantage qualifies as a negligible advantage that is common social practice

Allowance of Negligible Advantages

Which advantages are considered as negligible and socially adequate must be assessed on the basis of all relevant circumstances, including the circumstances in the foreign country. It is relevant that no influence on the recipient can be achieved through the advantage. Social adequacy will probably be in a range of 0 to 150 Swiss Francs for negligible advantages in Switzerland.

Interdepartmental Working Group on Combating Corruption

The Strategy 2021-2024 pursues different approaches like sensibilization, risk-minimization, transparency, federalism, penalties as well as international cooperation in the field of corruption. The strategy and goals are of a general nature. The IWGC implements and monitors this Strategy 2021-2014, where the organization and cooperation with the respective Federal Departments will be the biggest

part of the implementation. It is also foreseen that an independent third-party evaluates the Strategy 2021-2024 in order to get feedback on the progress of implementation.

Foreign Investments Legislation

On 11 October 2020, the regulation establishing a framework for the verification of foreign direct investment entered into force in the European Union (EU) (Regulation (EU) 2019/452 of 19 March 2019; so-called Screening Regulation). Switzerland has no such investment controls, although direct investments in and from Switzerland are of great economic importance. Compared to other countries, Switzerland is considered liberal in the area of investment controls. Critical infrastructure is largely protected from foreign control because it is publicly owned. In addition, there are sector-specific and cross-sector regulations that can have an investment-inhibiting effect. With the adoption of motion 18.3021 Rieder in spring 2020, the Federal Council was instructed to submit a draft law to parliament as a basis for investment control of foreign direct investment in Swiss companies.

This paper is current as of December 2020.

Rebecca Isenegger.

WICKI PARTNERS

TAIWAN

Introduction

There is no single law in Taiwan concerning bribery . The act of giving or accepting a bribe may constitute a crime under "Offenses of Malfeasance in Office" of the Criminal Code of Taiwan (the "Criminal Code") or a breach of trust that constitutes a crime against personal property. In addition to the generality of the Criminal Code, the Anti-Corruption Act imposes more severe criminal sanctions on public officials who engage in any serious corrupt or fraudulent conduct. Commercial laws such as the Securities and Exchange Act and the Futures Trading Act impose heavier punishments on financial crimes such as a breach of trust. A foreign national/ entity making investments in Taiwan should be careful to ensure compliance with the general provisions of the Criminal Code on corruption and breach of trust by its/his/her invested enterprise and relevant personnel as well as other specific regulations contained in the Anti-Corruption Act and various commercial laws.

If a foreign national/entity commits the foregoing bribery or breach of trust within the territory of Taiwan, it/he/she is subject to relevant penalties and sanctions under Taiwan law unless an extradition treaty or similar agreement exists between Taiwan and such perpetrator's home country. Therefore, when a foreign national/entity wishes to invest in Taiwan, not only should the Taiwan investee and its local personnel be mindful of the foregoing laws and regulations, foreign nationals working in Taiwan should also comply with those laws and regulations.

The first part of this article will summarise the provisions of the Criminal Code, the Anti-Corruption Act, and various commercial laws that may be applicable to foreign investors offering bribes. The second part of this article will explain the general investment requirements for foreign investments in Taiwan.

Foreign Corrupt Practices

Crimes of bribery and breach of trust in the Criminal Code

Article 122, Paragraph 3 of the Criminal Code stipulates, "A person who offers, promises or gives a bribe or other improper benefits to a public official or an arbitrator for a breach of his official duties shall be sentenced to imprisonment for not more than three years; in addition thereto, a fine of not more than three hundred thousand yuan may be imposed, but, if such a person turns himself in for trial, his punishment may be reduced or remitted, and if such a person confesses during investigation or trial, his punishment may be reduced." The key elements constituting criminal liability for bribing a public official are as follows:

- A public official or an arbitrator as recipient of the bribe;
- A breach of duties; and
- Offering, promising, or giving a bribe or other improper benefits.

In Taiwan, to be considered a bribe, the recipient of the bribe generally should be a public official. With that said, however, bribery is not limited to those made to officers employed at government agencies but also applies to personnel working in state-owned enterprises. Generally speaking, it is considered a bribe if it is made to request the public officer to beach his or her duties; if a bribe is not given in exchange for any duty of such public official, then it will not constitute a bribe described under Article 122, Paragraph 3 of the Criminal Code. However, the Criminal Code also imposes penalties for bribing a public official to take actions not in breach of his or her duties (see below). In "offering, promising, or giving a bribe or other improper benefits," "offering" means the bribe giver expresses to the public official his or her intent of making such bribe and such expression of intent is sufficient to constitute bribery regardless of whether or not the public official accepts the bribe. "Promising" means the bribe giver makes a deal with the bribe-accepting public official pending only the delivery of the bribe or improper benefits at the designated time, and it is considered a bribe so long as both parties reach a consensus. Offering, promising, and giving a bribe are stages of bribery behaviour and the existence of any one of the aforementioned would establish a bribe being given. In addition, based on Article 123 of the Criminal Code, "[a] person who in anticipation of being a public official or an arbitrator demands, agrees to accept, or accepts a bribe or other improper benefits for an official act and performs such act after becoming a public official or arbitrator shall be subject to the punishment prescribed for a public official or an arbitrator who demands, agrees to accept, or accepts a bribe or other improper benefits." As such, even if one bribes a person before such person becomes a public official to promise, commit or agree to conduct certain action once such person becomes an official and such person subsequently performs the aforesaid promise, commitment or agreed action, a bribe would be established.

On the other hand, any personnel of an enterprise bribing a local government official may be breaching his or her duties to the company. Article 342, Paragraph 1 of the Criminal Code stipulates, "[a] person who manages the affairs of another for the purpose of taking an illegal benefit for himself or for a third person or to harm the interests of his principal and who acts contrary to his duties and thereby causes loss to the property or other interest of the principal will be sentenced to imprisonment for not more than five years or detention; in lieu thereof, or in addition thereto, a fine of not more than five hundred thousand yuan may be imposed." The key elements of this Article include:

- Handling affairs for others;
- Intending to take an illegal benefit for oneself or for a third person, or to harm the interests of the principal;
- Acting contrary to one's duties; and
- Causing losses to the property or other interests of the principal.

"Handling affairs for others" would include a person handling the affairs of others in his or her capacity as a director or an employee etc. of the company. If such person breaches his or her job duties thereby causing damages of losses to the property or other interests company for personal benefit or the benefit of any third party or to harm the interests of the company, he or she should be found criminally liable for a breach of trust.

Anti-Corruption Act

The Anti-Corruption Act imposes heavier penalties on corruption and fraud by public officials. It also imposes criminal punishments to bribe givers. Under Article 11, Paragraph 1 of this Anti-Corruption Act, bribe giving in exchange for breach of duties is punishable by imprisonment for a term of no more than seven years and no less than one year and may also be concurrently fined for an amount of no more than NT$3,000,000. Additionally, Paragraph 2 of the same Article provides that a person offering, promising, or giving bribes or other improper benefits to a public official in return for actions not in breach of his or her duties is punishable by imprisonment for a term of no more than three years or detention; in lieu thereof, or in addition thereto, a fine of no more than NT$500,000.

Furthermore, it is worth pointing out that Article 11, Paragraph 3 of the Anti-Corruption Act also covers offering, promising, or giving bribes or other improper benefits to foreign public officials to take actions. Whether or not in breach of their duties, in cross-border trade, investment or other commercial activities. In other words, this provision includes foreign public officials in the scope of application for receiving or accepting bribes, and the interpretation of the elements that constitute bribery, including "offering, promising, or giving a bribe", is the same as that applicable to the foregoing elements of breach of trust under the Criminal Code.

Relevant provisions in commercial laws

Apart from the foregoing laws on bribery, certain commercial laws, including financial acts such as the Futures Trading Act, Securities Investment Trust and Consulting Act, the Banking Act of the Republic of China, the Financial Holding Company Act and the Securities and Exchange Act, have specified criminal liabilities for bribery by personnel of financial institutions and in particular, criminal liabilities for bribery by financial executives and bribe givers. We summarize the key points of these laws and regulations as follows:

No.	Law	Article Number	Summary
1.	Futures Trading Act	113	Any director, supervisor, manager, appointee, or employee of a futures exchange, futures clearing house, or futures trust enterprise who requests, agrees to accept, or receives any illegitimate profit in connection with the performance of his duties shall be punished with imprisonment for a period not exceeding five years, detention, or in addition thereto a fine of not more than NT$2.4 million. Any person referred to in the preceding clause who demands, agrees to accept, or receives any illegitimate profits for actions in breach of his duties, shall be punished with imprisonment for a period not exceeding seven years, detention, and/or a fine of not more than NT$3 million.
		114	Any person who offers, promises, or delivers illegitimate profit to any person who acts contrary to his duties as specified in the preceding Article shall be punished with imprisonment for a period not exceeding three years' detention and/or a fine not exceeding NT$2 million. The punishment of the

			offense specified in the preceding clause may be pardoned if the offender voluntarily surrenders himself to the law enforcement authorities.
2.	Securities Investment Trust and Consulting Act	108	Any director, supervisor, manager, or employee of a securities investment trust enterprise or securities investment consulting enterprise who requests, agrees to accept, or receives any property or other improper benefits in connection with the performance of his or her duties shall be punished by imprisonment for not more than five years, detention, and/or a fine of not more than NT$2.4 million. Any person referred to in the preceding paragraph who requests, agrees to accept, or receives any property or other improper benefits for actions in breach of his or her duties shall be punished by imprisonment for not more than seven years and additionally may be fined a penalty of not more than NT$3 million.
		109	Any person who offers, promises, agrees to offer, or delivers any property or other improper benefit to any person who acts contrary to his or her duties as specified in the preceding article shall be punished by imprisonment for not more than three years, detention, and/or a fine of not more than NT$1.8 million. The punishment of the offense specified in the preceding paragraph may be mitigated if the offender confesses or voluntarily surrenders; the punishment may be mitigated if the offender confesses during investigation or trial.
3.	The Banking Act of the Republic of China	35	The responsible person or any personnel of the bank shall not, in any name, accept commissions, rebates or other unwarranted benefits from depositors, borrowers or other customers.
		127	In the event of a violation of Article 35 of this Act, punishment by imprisonment for not more than three years' detention and/or a fine of not more than NT$ 5,000,000 shall be imposed. However, if a more severe punishment is stipulated in other laws, such more severe punishment shall be imposed.
4.	Financial Holding Company Act	17IV	(Paragraph 4) The responsible person or any personnel of a financial holding company shall not, in any name, accept commissions, rebates or other unwarranted benefits from a transaction counterparty or a customer of such financial holding company or any of its subsidiaries.
		59	The responsible person or any personnel of a financial holding company who violates Article 17, Paragraph 4 of this Act by accepting commissions, rebates or other unwarranted benefits shall be punished with imprisonment for not more than three years' detention and/or a fine of not more than NT$5,000,000.
5.	Securities and Exchange Act	172	Any director, supervisor, or employee of a stock exchange who requests, agrees to accept, or receives any improper benefit in connection with the performance of his/her duties shall be punished with imprisonment for not more than five years' detention and/or a fine of not more than NT$2.4 million. Any person referred to in the preceding paragraph who requests, agrees to accept or receives any improper benefit for actions in breach of his/her duties shall be punished with imprisonment for not more than seven years and in addition thereto a fine of not more than NT$3 million may be imposed.

		173	Any person who offers, promises, or delivers any improper benefit to any person who acts contrary to his/her duties as specified in the preceding Article shall be punished with imprisonment for not more than three years' detention and/or a fine of not more than NT$1.8 million. The punishment of the offense specified in the preceding paragraph may be pardoned if the offender voluntarily surrenders himself/herself to law enforcement authorities.

Furthermore, the responsible person of a publicly listed company may be found guilty of *special* breach of trust under Article 171, Paragraph 1, Item 3 of the Securities and Exchange Act, which states, "[a] person who has committed any of the following offenses shall be punished with imprisonment for not less than three years and not more than ten years, and in addition thereto, a fine of not less than NT$10 million and not more than NT$200 million may be imposed: […] 3. A director, supervisor, or managerial officer of an issuer under this Act who, with intent to procure a benefit for himself/herself or for a third person, acts contrary to his/her duties or misappropriates company assets, thus causing damage of NT$5 million or more to the company." This provision, as opposed to general breach of trust under the Criminal Code, augments the criminal liabilities for breach of trust by extending the imprisonment for breach of trust from "not more than five years" to "not less than three years and not more than ten years". Note that this should apply to publicly listed companies where the damage resulting from bribery has amounted to NT$5 million. If this is not the case, then the criminal liabilities for general breach of trust would apply. Note that if the subject bribery involves only an ordinary employee of the publicly listed company rather than its director, supervisor or manager thereof, then penalties for a general breach of trust would apply.

Best practice

In light of the foregoing laws, foreign investors in Taiwan are advised to establish an internal control system and because bribery of foreign public officials falls within the scope of the Anti-Corruption Act in Taiwan, enhanced employee training is recommended to prevent relevant personnel from committing the foregoing bribery.

Regulations on foreign investors

Overview

Foreign investments in Taiwan are governed by the Statute for Investment by Foreign Nationals (last amended on November 19, 1997). The competent authority is the Ministry of Economic Affairs ("MOEA"). Except for those who have invested in a Taiwan listing company without exceeding 10% of the outstanding shares of such listing company and registered their investments with the Taiwan Stock Exchange/Taipei Exchange, any foreign investors who wish to make a direct investment in a Taiwan company are required to apply for a foreign investment approval with the Investment Commission of the MOEA or other relevant authorities in accordance with the Statute for Investment by Foreign Nationals. Foreign investors may invest by holding shares issued by a Taiwan company, contributing to its registered capital, establishing a branch office, a proprietary business, or a partnership in Taiwan. In addition, providing loans to the

invested business in Taiwan also requires investment approval from the Investment Commission of the MOEA, if such loan is for a period exceeding one year. If the period of the loan is less than one year, then investment approval from the Investment Commission of the MOEA is not required.

In addition, for an investor from the People's Republic of China ("PRC"), due in large part to the political tensions between Taiwan and the PRC, Taiwan has imposed very strict restrictions on PRC investors, which are completely separate and different from the regulations on foreign investors from other countries. The sections below will briefly identify the key takeaway for the relevant applicable regulations.

Restrictions

Generally, there is no limitation on the ultimate foreign ownership (not PRC) in a Taiwan company, except that certain business categories listed in the Negative Listings are not allowed investment by foreign investors or there are some investment restrictions, such as wireless and fixed line telecommunications, cable television broadcasting services and satellite television broadcasting services. Such Negative Listings promulgated by the MOEA may change from time to time.

Punishments for non-compliance

According to Article 18 of the Statute for Investment by Foreign Nationals, unless otherwise provided in the statute, if the foreign investor violates the provisions in that Statute for investment by foreign nationals or fails to comply with any instructions of the competent authority, the competent authority may impose the following punishments at its own discretion: (1) revoke the foreign investor's right of exchange settlement against his/her/its profit surplus from the investment or the interest accrued from the investment for a period of time; or (2) revoke the foreign investment approval.

COVID-19 Changes

Following the initial outbreak of COVID-19 in the beginning of 2020, the Investment Commission of the MOEA temporarily loosened the requirement on the notarization of power of attorney documents ("POA"). Under the temporary rule, foreign investors may provide a copy of the POA first and supplement the notarized original POA within 6 months after obtaining the foreign investment approval.

Amendment to the Statute for Investment by Foreign Nationals

Currently an amendment to the Statute for Investment by Foreign Nationals ("Amendment") has been proposed to the Legislature of Taiwan. According to the Amendment, foreign investors will not be required to obtain prior approval from the Investment Commission of the MOEA and will only be required to report the investment to the Investment Commission after closing, unless the investment proposal reaches a certain threshold of investment amount set by the competent authority or it is proposed to invest in certain restricted industries or it falls into a special restricted category announced by the competent authority. However, there is currently no time frame when the approval of the Amendment by the Taiwan Legislature may take place.

Regulations on PRC investors

Investment in Taiwan by PRC investors is governed by the Measures Governing Investment Permits to the People of the Mainland Area ("Measures"). "PRC investors" refers to any PRC entities and PRC invested companies from other jurisdictions ("PRC investors"): "PRC invested companies from other jurisdictions" refers to those entities incorporated outside of the PRC and invested into by PRC entities or persons that (i) directly or indirectly hold more than 30% of the shares of such entities, or (ii) have the ability to control such entities. There are detailed guidelines announced by the Investment Commission on what counts as "the ability to control." On December 30, 2020, an amendment to the Measures and several new administrative rules have been released and came into effect on the same date. The amendment further tightens the restrictions on PRC investors in every aspect, including a broader definition on the above interpretation of "PRC invested companies from other jurisdictions." The amendment changes the method of determining whether the 30% threshold is met by looking at each layer of the entire group's shareholding structure. Additionally, the amendment clearly provides the competent authority with the right and the discretion to reject or refuse any investments from PRC entities or persons that belong to or have been a member of any communist party, government administration or military of PRC.

Generally, PRC investors are required to apply for an approval before engaging in investment activities. PRC investors are only allowed to invest in a Taiwan company that operates businesses in the business categories listed as permitted in the Positive Listings. In addition, PRC investors with a military background or military purpose are banned from investing in Taiwan. In case of any non-compliance, the Taiwan authorities have the sole discretion to take a range of actions, including imposing fines, requesting the violator to divest some or all of its investment in Taiwan, suspending the rights of shareholders and revoking the corporate registration of the invested companies in Taiwan.

This paper is current as at January 2021.

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LCS & PARTNERS

UNITED KINGDOM

Introduction

Although, historically, the United Kingdom fell somewhat behind the curve in its anti-corruption enforcement efforts, its passing of the Bribery Act 2010 and resulting prosecutions and Deferred Prosecution Agreements point to the UK moving to the forefront of the global war against corruption.

A new foreign investment regime is currently being introduced in the UK and is expected to be in place during the course of 2021.

Anti-Bribery Offences

The Bribery Act 2010 (the **Act**) contains a number of offences - two of general application, one directed at the bribery of foreign public officials and one that looks to criminalise companies that fail to institute appropriate anti-bribery policies and procedures.

Offences of bribing another person

Section 1 of the Act makes it an offence for a person (**P**) to offer, promise or give a financial or other advantage to another person in one of two cases:

• Case 1 applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.

• Case 2 applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

'Improper performance' is defined at sections 3, 4 and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.

Offences relating to being bribed

Section 2 of the Act provides for offences relating to being bribed. The recipient or potential recipient of the bribe (**R**) is guilty of an offence in the following circumstances (cases 3 to 6):

• Case 3 applies where R requests, agrees to receive or accepts a financial or other advantage and R intends that a relevant function or activity is performed improperly.

• Case 4 applies where R requests, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself is the improper performance by R of a relevant function or activity.

• Case 5 applies where R "requests, agrees to receive or accepts" a financial or other advantage as a reward for the improper performance of a relevant function or activity.

• Case 6 applies where a relevant function or activity is "improperly performed" by R (or another person, where R requests, assents to or acquiesces in it) in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage.

Relevant function or activity, improperly performed

Section 3 of the Act defines the types of function or activity that can be improperly performed for the purposes of sections 1 and 2. The functions or activities in question include:

• All functions of a public nature.

• All activities connected with a business (which includes a trade or profession (section 3(7))).

• Any activity performed in the course of a person's employment.

• Any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).

There must be an expectation that the functions are carried out in good faith (condition A) or impartially (condition B), or the person performing them must be in a position of trust (condition C). It is difficult to conceive of any “function or activity”, at least in a commercial or governmental context, which would not satisfy the above definition.

Section 4 of the Act defines "improper performance" as performance or non-performance which breaches a relevant expectation. “Relevant expectation" means the expectation mentioned in either condition A or B above. In relation to condition C, it means any expectation of the manner in which, or the reasons for which, the function or activity will be performed which arises from the position of trust mentioned in that condition.

Although there is no definitive list of "expectation", it will usually be self-evident from the job role. For example, a procurement specialist will undoubtedly be expected to secure the most competitive services or goods.

Bribery of foreign public officials

Section 6 of the Act creates a separate offence - bribing a foreign public official. It closely follows the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A person is guilty of the offence if his intention is to influence the official in their capacity as a foreign public official. There is no requirement for any improper performance of a relevant function. A foreign public official includes government officials and those working for international organisations. The offence does not cover accepting bribes, only the offering, promising or giving of bribes.

A person commits the offence if and only if:

• Directly or through a third party, P offers, promises or gives any financial or other advantage to the foreign public official (**FPO**) or to another person at FPO's request or with FPO's assent or acquiescence.

• The FPO is neither permitted nor required by the written law applicable to the FPO to be influenced in the FPO's capacity as a foreign public official by such an offer, promise or gift.

• The person must intend to influence the FPO in the performance of the FPO's functions as a public official, including any failure to exercise those functions and any use of his position, even if he does not have authority to use the position in that way.

• Finally, the person must also intend to obtain or retain business or an advantage in the conduct of business.

The offence of the failure of commercial organisations to prevent bribery and the adequate procedures defence

Section 7 of the Act contains the Act's most innovative development. In effect, a strict liability offence in which companies can be found criminally liable even where the directors and managers of the corporate were not involved with and did not even know about some corrupt conduct by an employee or other person "associated" with the corporate.

A relevant commercial organisation (**C**) is guilty of an offence if a person associated with C bribes (within the meaning of sections 1 and 6) another person, intending to obtain or retain business or a business advantage for C. The offence can be committed both in the UK and internationally.

C has a defence if it can show, on the civil law balance of probabilities, that it had in place adequate procedures designed to prevent bribery

Guidance as to what is meant by "adequate procedures" was published by the UK government on 30 March 2011 (https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf).

A relevant commercial organisation is defined as:

• A body which is incorporated under the law of any part of the UK and which carries on a business anywhere (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).

• Any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the UK.

A person (**A**) is associated with C if, A is a person who performs services for or on behalf of C. It does not matter in what capacity A performs services for or on behalf of C, so A may be C's employee, agent or subsidiary.

Consequences of criminality

The penalties for a guilty individual or company under the Act are severe.

An individual guilty of an offence under section 1, 2 or 6 can be required to pay an unlimited fine and/or be imprisoned for a maximum term of ten years.

Any other person (for example, a company) guilty of an offence under sections 1, 2 or 6 will face a fine with, potentially, no limit.

A commercial organization guilty of an offence under section 7 can be required to pay an unlimited fine.

Deferred Prosecution Agreement

However, the UK has developed a way in which corporates can potentially avoid the stigma and related consequences (such as being banned from tendering for public sector contracts) of a guilty verdict through the mechanism of a Deferred Prosecution Agreement (**DPA**).

A DPA is a discretionary tool to provide a way of responding to alleged criminal conduct, the effect of which means that corporate bodies are not subject to formal prosecution, but agree to a course of conduct where any prosecution is deferred for a period of time. At the conclusion of the DPA, if the subject has complied with all the necessary obligations contained within the DPA, the matter is concluded without prosecution.

Unlike in the United States, where the equivalent procedure has been in use for many years, judicial ratification is required before a DPA becomes effective.

Foreign investment regime

The UK's new foreign investment regime is expected to be in place during the course of 2021. The new regime is set out in the National Security and Investment Bill which is currently going through the legislative process to become law, and so some of the provisions discussed in this note (which states the position as at 9 December 2020) may be subject to change.

The new regime will allow the UK Government to review mergers, acquisitions and other types of transactions that could threaten national security. In particular, the regime will require mandatory notification of certain types of acquisitions of shares or voting rights in companies and other entities operating in sensitive sectors of the economy. In such cases, completion of the acquisition will be prohibited unless and until approval has been given by the Government.

Transactions subject to the regime

The Government will be able to investigate transactions that involve the acquisition of a certain level of control or influence over an entity or asset.

An entity for these purposes includes a company, a limited liability partnership, any other body corporate, a partnership, an unincorporated association and a trust.

An asset for these purposes includes land, tangible moveable property and ideas, information or techniques which have industrial, commercial or other economic value (such as intellectual property).

For entities, the regime applies to any acquisition of:

- more than 25%, more than 50% or 75% or more of the votes or shares;
- voting rights that enable or prevent the passage of any resolution; or
- material influence.

For assets, the regime applies to any acquisition of the ability to:

- use the asset (or use it to a greater extent); or
- direct or control how the asset is used (or to do so to a greater extent).

The power to investigate a transaction will apply where the Government reasonably suspects that:

- one of the relevant types of acquisition has occurred or is in progress or contemplation; and
- the acquisition has given risen to or may give rise to a national security risk.

Mandatory notification

An acquirer will be required to notify the Government of certain types of acquisitions of shares or voting rights in entities operating in sensitive sectors of the economy.

The relevant types of acquisition are any acquisition of:

- 15% or more, more than 25%, more than 50% or 75% or more of the votes or shares; or

- voting rights that enable or prevent the passage of any resolution.

The Government is currently consulting on which sectors (and which types of entities within these sectors) should fall within the mandatory notification regime. The current proposed sectors are: Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Critical Suppliers to the Emergency Services, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Engineering Biology, Military and Dual Use, Quantum Technologies, Satellite and Space Technologies and Transport.

For transactions that are subject to mandatory notification, completion cannot take place until clearance has been received from the Government. If the acquirer completes the transaction without receiving clearance, the transaction will be legally void and completion will constitute a criminal offence. The acquirer can also be fined up to £10 million or 5% of its worldwide turnover (whichever is higher). However, the Government will also be able to validate retrospectively such acquisitions in certain circumstances.

Assessment of transactions

The Government has published a draft statement of policy intent setting out how it expects to use its new powers, including the three risk factors that it expects to consider when deciding whether to intervene to protect national security.

The three risk factors are:

- the target risk – the nature of the target entity or asset and whether it is in an area of the economy where the Government considers national security risks more likely to arise. The statement indicates that the areas where risks are more likely to arise are those covered by the mandatory notification regime;

- the trigger event risk – the type and level of control being acquired and how this could be used in practice to undermine national security. The statement gives the example of a transaction that would allow the acquirer to have unauthorised access to sensitive information;

- the acquirer risk – the extent to which the acquirer raises national security concerns. The statement indicates that relevant factors will include those in ultimate control of the acquiring entity and their track record in relation to other acquisitions or holdings.

Timing for the review process

Where a transaction is notified, the Government will have a maximum of 30 working days to decide whether to investigate the transaction.

Where a transaction is not notified, the Government will be able to investigate up to five years after completion, although there will be no time limit for investigating transactions that fall within the mandatory notification regime and are not notified.

In addition, transactions which take place after the date of the Bill's introduction to Parliament (11 November 2020) but before enactment will retrospectively fall within the scope of the power to investigate once the Bill is enacted.

Once it has decided to investigate, the Government has up to 30 working days to carry out a detailed national security assessment. This can be extended by a further 45 working days. If more time is needed beyond this, a further voluntary period may be agreed between the Government and the acquirer.

Any of these time limits can be extended where the Government requests information and it is not provided within the required deadline.

Remedies

If the Government considers that a transaction gives rise to national security concerns, it can issue orders prohibiting or requiring certain actions to be taken by the parties. Such orders can extend to prohibiting the transaction entirely or requiring the acquired entity or asset to be sold.

The Government will also have the power to impose interim measures while it is undertaking its review, including hold separate requirements.

This paper is current as at December 2020.

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