Corporate crime

A global perspective

Freshfields Bruckhaus Deringer

A cross-border guide to corporate criminal liability and enforcement

Society's relationship with business has shifted over recent years, bringing corporate conduct firmly into the spotlight. Often in response to calls for greater corporate accountability, governments and enforcement agencies have increasingly been turning to the criminal law to hold companies liable for misconduct occurring within their organisations or for their benefit. Across various jurisdictions, lawmakers have introduced a growing number of offences for which companies can be prosecuted. And many agencies with criminal powers are increasingly using them to pursue companies – in the areas of tax, antitrust, anti-bribery and corruption, financial services and environmental law, to name a few.

The risk of criminal enforcement action in many European jurisdictions and the US has long been a reality for multinational companies. But we are now seeing stronger laws and/or more enforcement activity in jurisdictions in Asia, Latin America and Africa as well. As such, global companies must actively manage their criminal law risks in all regions within which they operate.

With this in mind, we are delighted to present our overview of the key themes in corporate criminal law and practice impacting multinationals today, together with a guide to corporate criminal liability and enforcement in 17 jurisdictions across the world.

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We are pleased to present the key themes in corporate criminal law and practice impacting multinationals today, which bring together our insights from helping clients to address and defend against corporate criminal liability in various jurisdictions with those of senior former prosecutors in the firm in Germany, Singapore, the UK and the US.

Key themes at a glance

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Increasing use of the criminal law to address misconduct in the corporate context

Overall, the scope for corporate criminal liability (or quasi-criminal liability) has been growing. A number of countries have amended their laws in the past five years to introduce or strengthen laws relating to corporate criminal liability or to put in place tougher corporate administrative liability regimes to punish companies for economic crimes carried out in their name or for their benefit.

Combating bribery and corruption, including foreign corruption, is a stated priority of many governments around the world. As Trace International has reported, as of 31 December 2016, there were 255 ongoing investigations concerning alleged bribery of foreign officials being conducted by authorities in 29 countries. 106 of those investigations (42 per cent) were by authorities in Europe. And 2017 saw a number of new corruption cases being opened in various jurisdictions.

Whilst in some emerging economies the increased scope for liability focuses largely on bribery and corruption, elsewhere prosecutors are also focusing on a broader range of offences.

In the UK, in 2017 alone, the government introduced (i) two new corporate offences for failing to prevent the facilitation of UK and overseas tax evasion (with effect from 30 September 2017); (ii) a new corporate offence for contravening a requirement under the Money Laundering Regulations 2017; and (iii) a new offence, applicable to certain large companies and limited liability partnerships, for failing to report their payment practices. The government also revived plans to consult on a new corporate offence for failing to prevent economic crimes, such as false accounting, fraud and money laundering.

In addition to new statutes, some prosecutors have been using existing laws more forcefully to pursue companies for different kinds of misconduct. In the US, for example, prosecutors have instigated criminal investigations into companies' use of software amid allegations companies in different sectors have been using software to circumvent regulations. And the US Department of Justice (DOJ) Antitrust Division has also been turning its attention to the use of technology, specifically the use of price-setting algorithms set up and designed to distort the market. Also, the UK's Financial Conduct Authority (FCA) used its powers under s.384 of the Financial Services and Markets Act for the first time in 2017 to require a listed company to pay compensation for market abuse.

In the related civil and regulatory sphere, many financial services regulators are also taking an increasingly robust attitude to systems and controls failures relating to economic crime. In 2016, the US Federal Reserve imposed its first civil fine on a company in relation to US Foreign Corrupt Practices Act (FCPA) related misconduct in a co-ordinated action with the US Securities and Exchange Commission (SEC) and the DOJ. And the Singapore Monetary Authority has started publicly naming banks that have been the subject of regulatory enforcement action, particularly relating to anti-money laundering failings – in a move away from their previous practice of private sanctions.

In light of the above, the need to manage corporate criminal liability risks and respond to potential investigations by prosecutors, or to related enforcement action by regulators, is now the new norm for multinationals.

> **The new corporate offences in the UK demonstrate a political will and appetite amongst lawmakers and enforcers to bring companies to account under the criminal law. And new laws are just part of the picture. We are also starting to see the UK authorities looking to make greater use of statutes that have been on the books for some time in prosecutions of companies.**
>
> Ali Sallaway, Partner, London

International co-operation between prosecutors: understanding the issues that can arise when prosecutors work across borders

Reflecting the reality that the conduct under investigation in many corporate cases occurs in multiple countries, co-operation between law enforcement authorities across borders is increasingly the norm. Such cross-border co-operation has become a fixture of global bribery, money laundering, tax and fraud investigations. And many of the most significant economic crime investigations of recent years have been international in scope.

Law enforcement agencies now regularly make public statements highlighting the extent to which they co-operate with, and are assisted by, their counterparts abroad.

'All our cases have a significant international dimension. We have invested real effort in building strong co-operative relations with foreign agencies in key financial centres across the globe.'

Director of the UK SFO, September 2016

Cross-border co-operation takes many forms, including informal intelligence sharing (sometimes before a formal investigation has begun), case-specific co-ordination, formal mutual legal assistance to gather and share evidence, and other programmes to share experience and build capacity. The DOJ, for example, has long stationed prosecutors in countries around the world to provide, among other things, training and development. In 2017, for the first time, the DOJ sent a white-collar prosecutor on secondment to the UK's Serious Fraud Office (SFO) and the FCA. This secondment suggests that prosecutors in the US and the UK are committed to continued co-operation in the years to come. And there are plenty of other examples of relationship-building initiatives that have been ongoing for some time.

The Singapore Attorney General's Office, for example, has a long history of sending secondees to its counterparts, particularly in the UK and the US.

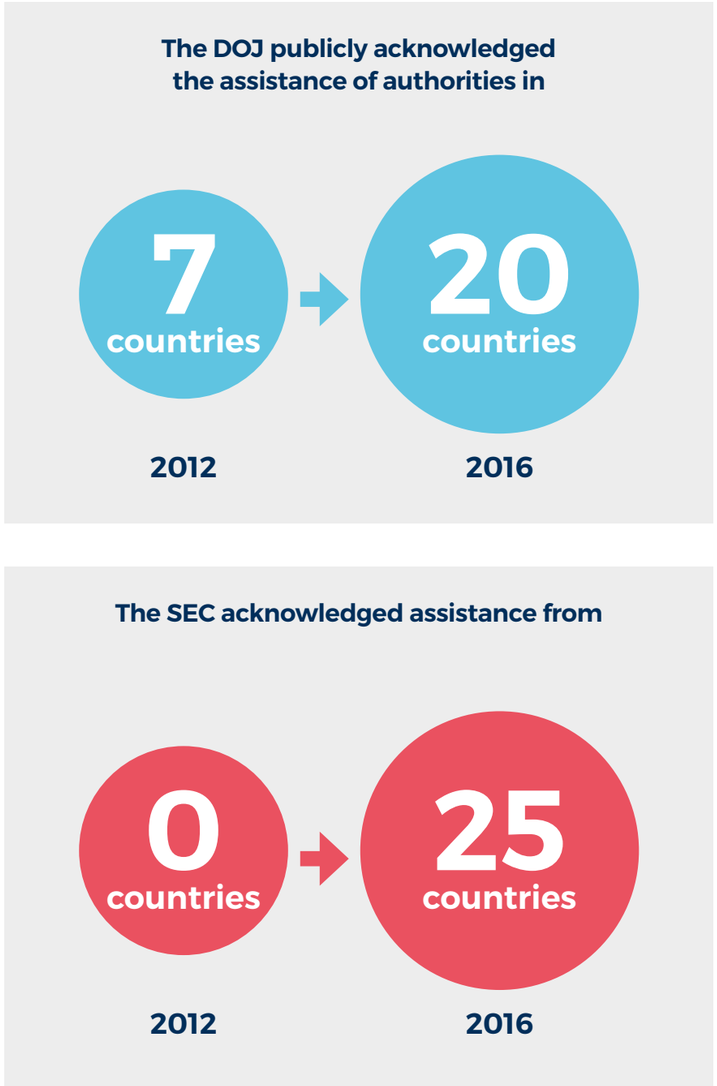
Of course, where enforcement agencies in multiple countries investigate the same conduct, the procedures and investigative techniques used in different jurisdictions may give rise to difficult legal and procedural issues. These differences may impact some of the strategic judgement calls a company has to make, and they may also affect how a company conducts its own investigations and its ability to reach a global resolution with the authorities in the relevant jurisdictions.

For example, in *United States v Allen*, the US Court of Appeals for the Second Circuit held that the prohibition against the use and derivative use of a defendant's compelled testimony applies even when the testimony was compelled by a foreign authority (in this case the UK's FCA). The DOJ must ensure that, when exchanging information with its counterparts, it does not allow its investigation to become tainted by compelled testimony (compulsion is a common practice in the UK). Companies looking to co-operate with US prosecutors should be mindful of this. Otherwise, there is a risk companies could prejudice any co-operation credit they may have built up by, inadvertently, including in their reports to the US authorities information derived from compelled testimony the company has received from an authority elsewhere in the context of a parallel investigation. Or a company that has had access to compelled testimony could find its ability to co-operate at all severely hampered if the DOJ views the company as tainted and prefers to keep the company at arm's length so as not to prejudice any subsequent prosecutions.

Whilst there are restraints on what prosecutors can share, companies should, nonetheless, assume authorities will share any information they legally can with relevant foreign counterparts with whom they have a close relationship – even if it is on an intelligence basis to build a case against a company. Understanding how the different pieces of the puzzle fit together will help companies anticipate what is happening behind the scenes and plan their strategy accordingly.

As cross-border co-operation increases, these types of differing legal and cultural practices will increasingly come to the fore.

FCPA resolutions



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Balancing corporate defence strategies with individual accountability

Enforcement agencies are increasingly focusing on individual liability as an additional means of deterring corporate misconduct. This focus on pursuing individuals and incentivising companies to identify individuals involved in corporate wrongdoing is a trend that is seen in various jurisdictions.

In the US, the DOJ Fraud Section has described 2017 as a 'record year' for individual prosecutions. This trend received significant attention in 2015 with the publication of what became known as the 'Yates memo' (the memorandum from former Deputy Attorney General Sally Q Yates to DOJ prosecutors and other law enforcement on individual liability for corporate misconduct). The Yates memo directed prosecutors to focus on individuals from the start of any investigation into corporate misconduct.

The Yates memo also put the onus on companies to assist in such investigations by requiring companies to provide all relevant facts about individuals to the DOJ before the company would be eligible for any co-operation credit.

In the UK, the SFO requires companies to undertake to co-operate in investigations into individuals when entering into deferred prosecution agreements (DPAs). And the Spanish High Court has focused its attention on the actions of senior managers, calling several high-level executives from a number of large institutions to testify as suspects in money laundering investigations relating to alleged tax evasion by the banks' customers.

In another example of the focus on individuals, prosecutors in Germany may, and often do, pursue board members under the German Regulatory Offences Act (Ordnungswidrigkeitengesetz) for company-related offences committed by staff members that could have been prevented (or made significantly more difficult to commit) by appropriate supervisory measures.

There are a number of issues that can arise when both the company and senior management are in the frame. This situation creates, for example, the distinct possibility that a company's interest in co-operating will be adverse to its individual employees' interests in protecting themselves. This greater potential for actual or perceived conflicts of interest can lead to more individuals requesting independent counsel at an early stage in investigations. It also underlines the importance of ensuring, at an early stage of an internal investigation on corporate criminal issues, that those individuals who have exposure are not involved in strategic decisions, such as self-reporting or the treatment of whistleblowers.

Equally, in light of this trend, it may be more difficult for companies to offer employees amnesty in the context of internal investigations. And companies with individuals based overseas may be constrained by the laws of foreign jurisdictions in fully co-operating with prosecutors, in their home jurisdiction, in the provision of data relating to individuals.

'The focus on individual accountability is increasing, giving rise to a number of important consequences. There is real potential for employer and employee interests to diverge, making any investigation process trickier to navigate. Employees' desire to protect themselves may lead them to request independent legal advice earlier in any investigation or to approach the relevant regulator directly with any concerns.'

Caroline Stroud, Partner, London

A focus on individual accountability: practical implications for companies

Whistleblowing

Some of the largest corporate criminal investigations of recent years have started with whistleblowers reporting their concerns directly to the authorities or leaking data to the press. Companies should create a whistleblowing framework and environment that encourages employees to air their concerns internally first, which will allow the company to have more control over the process.

Internal interviews

Once an investigation has started, some prosecutors may discourage the company from interviewing employees for fear of tainting the evidence. This can affect the company's ability to obtain the evidence necessary to demonstrate co-operation with authorities in other jurisdictions, and the company may have to tread a difficult path in order to ensure it complies with the expectations of both authorities.

Securing co-operation

The ability to secure employees' co-operation may also be impacted by the limited comfort that employers can now offer to potential wrongdoers. A focus on individual accountability means that employees are exposed to significant personal risks. In the face of such risks, a promise by an employer that it will not take disciplinary steps if the employee co-operates may be of little consolation.

Legal advice

Employees may face interviews at short notice in the context of a dawn raid or urgent inspection. Companies wishing to support employees with their own legal counsel may need to plan for this eventuality by ensuring independent counsel is identified in advance. In investigations generally, the possibility of employee and employer interests diverging means that separate legal representation may be required (giving rise to questions such as whether or not the employer should fund the employee's advice).

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The relevance of compliance to criminal investigations

When a company faces an investigation, the existence of an effective compliance programme is essential. Whether a compliance programme is legally required, is a defence to criminal conduct, or is considered as a mitigating factor by enforcement authorities, compliance programmes are an important factor in assessing corporate criminal liability globally. We look here at some of the ways compliance (and corporate culture) play into decisions regarding corporate liability.

Failure to put in place a compliance programme to address criminal risks as the basis for civil or criminal liability

France recently adopted the law Sapin 2, which addresses the prevention and punishment of corruption. It requires certain companies to implement a compliance programme to detect and prevent corruption and influence peddling. Russia's federal anti-corruption law similarly requires companies to implement compliance programmes.

In the US, if a company with securities on a US exchange fails to maintain sufficient 'internal controls' – including an effective compliance programme – that failure could be a violation of the FCPA.

In many jurisdictions the failure of relevant companies (such as professional or financial services) to maintain an effective anti-money laundering programme is also an offence. New money laundering regulations in the UK (the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the Money Laundering Regulations 2017)) go further in that they make it an offence for relevant businesses to fail to comply with a large number of compliance-related requirements set out in the regulations.

'Sapin 2 is a groundbreaking piece of law that has put anti-bribery compliance firmly in the spotlight in France, making robust bribery prevention procedures not just good corporate governance but a very clear legal requirement for those companies caught by the legislation.'

Dimitri Lecat, Partner, Paris

Compliance programmes as a defence

In the UK, 'adequate' or 'reasonable' procedures provide a defence for the offences of failing to prevent bribery or the facilitation of tax evasion, respectively. And there have been calls from within the UK Parliament to expand the 'failure to prevent' approach to other economic crimes and to human rights abuses, which would likely include a similar compliance procedures defence.

Similarly, in certain other countries – such as Italy, Spain, Russia and Japan, to name a few – companies may escape criminal liability for certain crimes if they had an effective compliance programme in place at the time.

'Compliance is often a battle for the hearts and minds – particularly amongst the sales force in emerging markets – it's not enough to tick a box saying "the team has had the training". The business needs to convince its employees that it actually wants them to behave in a compliant manner, not just create the appearance of doing so.'

Adam Siegel, Partner, New York

Compliance programmes as a mitigating factor

The existence of an effective compliance programme, either at the time of the wrongdoing or at the time charges are brought, is a mitigating factor in a number of jurisdictions, including the US, the UK, Brazil, the Netherlands and South Africa.

The extent of mitigation available can often be difficult to quantify, but some jurisdictions have provided more guidance than others.

In terms of offering guidance on how prosecutors assess and evaluate compliance, the US DOJ has been much more forthcoming that some of its counterparts in other jurisdictions. The DOJ has identified factors it considers in assessing compliance programmes and released a detailed list of questions it may ask in conducting such an evaluation.

'Cooperation is often essential to position a company for a favorable outcome. But so, too, is what the DOJ calls "timely and appropriate remediation," which includes the implementation of an effective compliance program. That's one of the three requirements (together with cooperation and self-reporting) that companies have to satisfy to qualify for a potential declination under the FCPA Corporate Enforcement Policy. And, more generally, the company's approach to compliance and remediation is a key factor the DOJ considers when exercising its prosecutorial discretion. It's important to keep that in mind from the outset and act accordingly.'

Brent Wible, Counsel, Washington

Assessing corporate compliance programmes

The DOJ considers whether a company has:

established a culture of compliance;

dedicated sufficient resources to the compliance function;

hired qualified and experienced compliance personnel;

established an independent compliance function;

conducted an effective risk assessment and tailored the compliance programme based on that assessment;

compensated and promoted compliance personnel on a par with other employees;

audited the compliance programme to ensure its effectiveness; and

established an appropriate reporting structure.

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Co-operating with the authorities and resolving criminal law disputes

Companies face a range of potential outcomes in settling criminal matters depending on the jurisdiction. In some jurisdictions, there is the possibility of reaching a negotiated resolution with prosecutors.

DPAs have long been a tool used by US prosecutors to resolve disputes (although they may also agree a guilty plea, a non-prosecution agreement (NPA), a declination with disgorgement in FCPA cases (which is a fairly new construct introduced in 2016) or a straight declination). And other jurisdictions are now starting to follow this example. Since February 2014, certain UK prosecutors have had authority to enter into DPAs rather than pursue full prosecution for certain economic crimes, and four such agreements have been entered into to date. Under the law Sapin 2, French prosecutors may also now enter into DPA-style agreements with companies in relation to allegations of bribery or laundering the proceeds of tax fraud. Such agreements in the UK and France are subject to greater judicial scrutiny than in the US.

As suggested by the recent decisions of two federal appeals courts, US courts play a limited role in reviewing DPAs to ensure that they are geared towards enabling companies to demonstrate compliance with the law during the period of the DPA. Courts in both the UK and France, by contrast, must review and approve the substance of DPAs to ensure that they are in the public interest. Moreover, while the US DOJ may enter into DPAs with both corporations and individuals as to any criminal offence, the UK and French equivalents are limited to organisations and certain specified offences.

In contrast, in many jurisdictions across Asia, there is no formal procedure for plea bargaining, let alone DPAs. However, Australia is considering introducing a DPA regime and Japan is set to introduce a new plea bargaining regime from June 2018. Similarly, the Singapore Attorney General announced in late 2017 that, as part of a resolution led by the US DOJ and involving Brazilian authorities, an oil and gas services company was served a conditional warning in lieu of prosecution for corruption offences and ordered to pay over US$105m to Singapore. This case represents the first such multijurisdictional corporate resolution by Singaporean authorities with counterparts abroad, and it likely signals the future of corporate crime investigations there.

Even in countries where there are no formal benefits to self-reporting and co-operating, there may be good reasons for doing so – particularly if the company chooses to self-report potential misconduct in that jurisdiction to authorities elsewhere.

'If there is an Asian element to a potential issue and you choose to self-report to and co-operate with US or European authorities, then you should assume the authorities in Asia will find out. So it is often in the company's best interests to anticipate that by reporting the issue in Asia at the same time as elsewhere. To do otherwise risks getting on the wrong side of the Asian authorities from the outset.'

Sandy Baggett, Counsel, Singapore

Whatever the form of a corporate criminal resolution, penalties generally include the payment of a substantial fine and can include other conditions, such as ongoing co-operation with law enforcement, improved compliance programmes, a monitorship and even debarment.

In many jurisdictions, prosecutors encourage companies to co-operate through the possibility of resolving a criminal matter on more lenient terms. But it is important to understand their expectations, as prosecutors in different jurisdictions have different approaches to corporate co-operation and different expectations of what the company should be doing in practice.

Prosecutors in the US and the UK, for example, both emphasise early and voluntary self-reporting and full co-operation as the most important factors. They have different views, however, as to what full co-operation entails. For example, there are substantial differences in views as to the scope of legal privileges that apply in internal investigations and the types of materials (such as witness interview notes) that a company should produce. And while the DOJ is accustomed to companies reporting the results of internal investigations conducted by outside counsel (and conducting its own, independent investigations), the SFO often prefers to be more closely involved in directing such internal investigations, particularly in terms of data collection and the sequencing of witness interviews.

'With more interagency co-operation across all regions, companies need to develop a global strategy. But it is important not to lose sight of local peculiarities. Understanding both the global and local view will help companies anticipate any challenges they may face in an investigation as a result of jurisdictional differences.'

Norbert Nolte, Partner, Germany

In another example of differing attitudes and rules relating to internal investigations across jurisdictions, in Germany, prosecutors have sought to seize materials produced during a corporate investigation that would be protected from disclosure in the US on the grounds of legal privilege. Although appeals on this point remain outstanding, this reflects a broader issue regarding differences in approaches to legal privilege across jurisdictions. Such differences can require careful management if a company is to maintain all applicable protections available over investigation materials in relevant jurisdictions.

Given the varying approaches to corporate co-operation across jurisdictions, an internal investigation may need to be tailored to the expectations of the enforcement agency with the primary claim to jurisdiction, or where there is greatest risk, to ensure that the company will be deemed co-operative.

Strategic considerations when investigating and reporting potential criminal conduct

To whom should the disclosure be made?

When should the company disclose?

How much investigation should be done before reporting?

What should the company disclose?

How can the company best preserve privilege to ensure its effectiveness?

Has an appropriate reporting structure been established?

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There is now also closer co-ordination on the resolution of investigations between prosecutors working across borders. For example, in connection with the Brazilian 'Car Wash' corruption investigation, a construction company resolved charges with authorities in the US, Brazil and Switzerland in a co-ordinated set of agreements. As part of the co-ordinated resolution, the US authorities agreed to take into account the amounts to be paid to the other countries in calculating the penalty levied in the US. Since then, senior DOJ officials have signalled the DOJ's willingness to continue to work with counterparts abroad to avoid 'piling on' additional penalties when calculating penalties for FCPA violations. And further co-ordinated resolutions have followed involving, for example, the US with Dutch and Swedish authorities and the US with Singaporean and Brazilian authorities, which are structured along similar lines – ie each country takes into account the amounts to be paid to the others in determining the level of penalty.

'In practice, global settlements can be quite complex for the prosecutors involved. But there are steps a company can take – and I saw this from the government side – to make the job easier for prosecutors, which can help nudge them in that direction if they are minded to explore a co-ordinated settlement.'

Daniel Braun, Partner, Washington

But whilst there is scope for global settlements, companies should not underestimate the challenges in reaching a co-ordinated settlement with all authorities in all jurisdictions – particularly where the means of disposing of investigations open to prosecutors is more restricted or their level of discretion much lower than that of their counterparts. English courts, for example, have far greater powers to scrutinise the terms of a DPA than their US counterparts.

Further, the US FCPA Corporate Enforcement Policy is unique in that it sets out a presumption that prosecutors will decline to prosecute FCPA violations where a company satisfies the standards of voluntary self-disclosure, full co-operation, and timely and appropriate remediation, provided there are no aggravating factors that would weigh in favour of prosecution and the company pays all disgorgement, forfeiture or restitution relating to the misconduct. DOJ officials have indicated the DOJ will look to this policy as non-binding guidance in other criminal cases, opening up the possibility of further declinations (with disgorgement/restitution) in a range of matters investigated by the DOJ where the company satisfies the requirements set out in the FCPA Corporate Enforcement Policy.

"Everyone talks a lot about the importance of co-operation to securing an offer of a DPA. But, in the UK, the test is whether it is in the public interest. Co-operation will be taken into account, but it's one of a range of factors.

Geoff Nicholas, Partner, London

The growth of alternative and co-ordinated multijurisdictional corporate criminal resolutions over recent years

'Developments over the last five years show a clear trend of new countries using DPAs or similar leniency agreements. These are a precursor to increased enforcement. From my experience, where a prosecutor has a method to resolve corporate criminal cases without a trial, it is more likely to commence them, and more likely to participate in cross-border resolutions where conduct overlaps with other jurisdictions.'

Ben Morgan, Partner, London

2014

JANUARY

Brazil:

Corporate leniency agreements introduced for bribery under the Clean Company Act.

2015

FEBRUARY

UK:

DPAs become available for certain offences.

NOVEMBER

Netherlands:

Prosecutors agree US$240m out-of-court settlement with oil and gas services company for foreign bribery charges.

2016

NOVEMBER

UK:

Prosecutors enter into first DPA. Resolution is co-ordinated with US SEC.

FEBRUARY

Netherlands and US:

Prosecutors agree US$795m joint resolution with telecoms company in first Dutch/US co-ordinated resolution of this kind. The Dutch company entered into an out-of-court settlement with Dutch prosecutors and a DPA in the US, and its Uzbek subsidiary pleaded guilty in the US.

OCTOBER

Brazil and US:

Aerospace company agrees to pay US$107m in plea deal with US DOJ and reaches related agreements with US SEC and Brazilian prosecutors.

DECEMBER

France:

France introduces DPA-style agreements for bribery and the laundering of tax proceeds.

Brazil, Switzerland and US:

A Brazilian company and its affiliate agree to pay US$3.5bn to US, Swiss and Brazilian authorities in relation to corruption charges (penalty later reduced due to inability to pay). Prosecutors agree to take into account payments to the others in determining the level of penalty to be paid in each country.

2017

JANUARY

UK, US and Brazil:

Aerospace company enters into first DPAs co-ordinated between UK SFO and US DOJ. Company agrees to leniency agreement in Brazil.

UK:

DPAs extended to sanctions offences.

MARCH

Australia:

Public consultation opens on introducing a DPA regime.

SEPTEMBER

Canada:

Public consultation opens on introducing a DPA regime.

Netherlands, Sweden and US:

Telecoms company agrees to a co-ordinated resolution and combined penalty with authorities in three jurisdictions.

NOVEMBER

France:

Prosecutors agree first French-style DPA (with a Swiss bank in relation to laundering the proceeds of tax evasion).

US:

FCPA Corporate Enforcement Policy introduces a presumption that the DOJ will decline to prosecute companies in FCPA cases if certain requirements are met.

2018

DECEMBER

Singapore, Brazil and US:

Singapore Attorney General issues first major public conditional warning to a company in lieu of prosecution. Penalty level is co-ordinated with US and Brazilian authorities.

Australia:

A bill to introduce DPAs is laid before Parliament.

FEBRUARY

Singapore:

Government publishes bill to introduce DPAs into Criminal Procedure Code.

Austria

Potential corporate liability for all types of criminal offence

In 2006, Austria introduced criminal liability for entities so that criminal offences contained in the Austrian Criminal Code and other laws were made applicable to legal persons.

This change was introduced through the Federal Statute on Responsibility of Entities for Criminal Offences (Verbandsverantwortlichkeitsgesetz (VbVG)).

Under the VbVG, a fine can be imposed on a company when either a decision maker or member of staff commits a criminal offence and the company either gains a benefit or one of the company's legal duties is neglected as a result.

The term 'decision maker' means a person who is (i) a managing director, (ii) an executive board member, (iii) an authorised officer, (iv) someone who is authorised in a comparable manner to represent the company, (v) a member of the supervisory board or board of directors, or (vi) who otherwise exercises controlling powers or relevant influence on the management of the company. The term 'staff' means, in summary, a person who works for the company on the basis of an employment relationship or is in a situation comparable to that of employees.

Criminal offences committed by a decision maker can be directly attributed to the company. Whereas the company may only be liable for any criminal offence committed by staff if (i) all elements of the case are made out in relation to that individual (eg if the offence requires intention then the staff member must have had the requisite criminal intent), and (ii) the commission of the offence was made possible, or considerably easier, due to the fact that decision makers failed to apply due and reasonable care to prevent such a criminal offence being committed.

Companies may face criminal liability for the actions of both senior decision makers and other members of staff.

Limited liability for foreign/ overseas conduct

As a general principle, Austrian criminal law only applies to offences committed in Austria. Under certain circumstances, criminal offences committed by Austrian citizens in a foreign country, or criminal offences committed by foreigners where the victim is an Austrian citizen, are also subject to Austrian criminal law. As yet, there are no clear rules or relevant court decisions regarding the liability of Austrian companies for misconduct by foreign subsidiaries.

Compliance programmes may allow a company to avoid criminal liability for the acts of employees but not for the acts of decision makers

A comprehensive compliance programme could allow a company to avoid criminal liability for the acts employees. This might be the case if appropriate supervisory measures have been undertaken within the company aimed at preventing staff from committing such criminal offences. However, a compliance programme will not exclude corporate criminal liability for criminal offences committed by decision makers.

In addition, a compliance programme may lead to a reduced fine. There are no explicit rules dealing with this question, but the court could, amongst other criteria, take a compliance programme into account when determining the amount of a fine. Moreover, the public prosecutor could decide to refrain from or abandon prosecution of an entity on the basis that it has established an appropriate compliance programme.

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The main enforcement authorities

The main enforcement authorities in Austria are the public prosecutors' offices. Each federal state in Austria has its own court districts with its own public prosecutor's offices. In 2011, the Public Prosecutor's Office against White-Collar Crime and Corruption was established and is the competent authority to prosecute white-collar crime, corruption and organised crime. It conducts complex procedures in commercial criminal law matters and investigates abuse of authority.

The Austrian Federal Criminal Police Office has prevailing competence in exceptional cases of (international) crime as defined by law either on its own initiative or whenever a public prosecutor's office puts it in charge of such investigations due to the significance of the criminal offence in question (competence in particular in cases concerning organised crime and politically motivated crime). In practice, the competent police, supervised by the prosecutor, effectively conducts the investigation.

There are other specialised enforcement authorities such as (i) the tax authorities, (ii) custom authorities, which investigate violations of foreign trade regulations, and (iii) cartel authorities, for example the Austrian Federal Competition Authority, which is exclusively competent in antitrust law cases.

The Financial Supervisory Authority supervises banks, insurers and other financial institutions handling securities and it has the power to impose regulatory fines. However, if the violation of law constitutes a criminal offence, the proceedings are transferred to the public prosecutor.

No clear guidance on the benefits of co-operation, although some penalty mitigation may be available

There is no general obligation to self-report offences to the public prosecutor's office under Austrian law. However, a company may have specific obligations, for example under anti-money laundering or tax law, to make certain disclosures to the relevant authorities.

There is no general legal provision or guidance in place addressing the co-operation of companies with the authorities. So the question of whether and to what extent co-operation with the relevant authorities is opportune is a strategic one. In the majority of cases, however, co-operation is likely to be acknowledged in a positive way by the authorities and may lead to a reduction of a fine.

Voluntary self-disclosure may help a company avoid certain criminal tax liabilities. Tax evasion (either wilful or grossly negligent) is a general criminal offence. However, criminal tax liability can be avoided if the misconduct is self-disclosed to the tax authorities before they have started an investigation. In cases of doubt (which may exist in a complex area like tax), a disclosure could be made on a precautionary basis to protect companies and their management from potential criminal exposure.

Potential outcomes: resolutions and penalties

The decision to impose a fine against a company (and the specific amount) is at the discretion of the court competent to decide in the criminal proceedings.

According to the VbVG, the fine shall be assessed in the form of daily rates. The fine shall amount to at least one daily rate and up to a maximum of 180 daily rates.

The daily rate shall be assessed on the basis of the income of the entity by taking into account its financial performance. The daily rate shall be equal to one 360th of the yearly proceeds or exceed or fall short of such amount by not more than one-third. In any event, the daily rate shall be not less than €50 and not more than €10,000. And the maximum fine for a company under the VbVG is €1.8m.

There has been some ongoing debate in Austria on whether the maximum fine of €1.8m under the VbVG is appropriate.

Proponents of change argue that the maximum fine under the VbVG is relatively low in comparison to regulatory fines levied for breaches of the Austrian Cartel Law (which are not classified as criminal).

In addition to fines, other sanctions are possible, for example exclusion of the right to trade, the confiscation of objects that were used in or intended for use in committing the offence or were the product of the offence, or exclusion from public procurement (in the case of certain offences, including bribery and corruption offences, and money laundering).

Austrian authorities regularly co-operate with counterparts abroad

Austria is a party to numerous international and European conventions and bilateral agreements on mutual legal assistance, and in practice authorities regularly co-operate and exchange information with foreign authorities.

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Belgium

Broad scope for corporate criminal liability

The Belgian Criminal Law Code (BCC) provides that a corporation may be held criminally liable for offences that are intrinsically related to its aim or its interests or that are committed on the corporation's behalf. Although not addressed in the BCC, it is generally understood that a corporation's *mens rea* can be established based on an individual officer or employee's state of mind, or a more general attitude or culture within the corporation that reflects the corporation's position towards the conduct.

Compliance and culture may be relevant to establishing a company's 'state of mind' or intention to carry out an offence.

To establish corporate criminal liability, it is not necessary to identify a specific individual who is culpable. Any such individuals, however, can be held jointly liable with the corporation. Criminal liability may also exist for unintentional offences, committed out of neglect or ignorance. For such offences, criminal liability will be exclusively attributed to either the corporation or the individual, depending on who committed the most serious violation. A draft amendment abolishing the exclusive attribution has been presented to Parliament, and while expected to be approved, the amendment will most likely not be implemented before the end of 2018, or later.

A parent company can be liable for its subsidiary's conduct either as a direct perpetrator or under the rules of criminal participation. The parent company may be considered a direct perpetrator when it violates a criminal provision either through its own conduct or when it uses a subsidiary as an instrument to commit the act in question. A parent company may be considered an accessory or accomplice to an offence committed by its subsidiary if it provided any form of help or incited its subsidiary to commit the offence. Although the law does not expressly provide for successor liability where criminal liability is incurred by a predecessor company, prosecutors may have viable arguments to support such an argument.

A corporation can be held criminally liable for any offence that can be attributed to it. Corporations are prosecuted most often for tax fraud, money laundering, forgery of documents, bribery, financial offences, environmental offences and social law infringements.

Belgian courts have jurisdiction when part of the criminal conduct occurred in Belgium and extra-territorial jurisdiction over foreign conduct, inter alia, when committed by a Belgian national or resident. In addition, there are specific rules for certain offences, such as bribery. Foreign companies can be prosecuted in Belgium for bribery occurring outside the country when the bribery involves a Belgian public official or a Belgian national operating as a public official in a foreign country or for an international governmental organisation, or when the bribery involves a public official in an international governmental organisation with an established place of business in Belgium, such as the European Union or the North Atlantic Treaty Organisation.

Compliance programmes may be relevant to charging and sentencing decisions

While the existence of a corporate compliance programme is not a legally recognised defence, an effective programme could demonstrate the corporation's efforts to prevent misconduct and may be taken into consideration by prosecuting authorities deciding on declination, settlement or guilty plea. The criminal court may take the existence of such a programme into account in assessing the corporation's *mens rea* or determining the penalty to impose.

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Similarly, the absence of a compliance programme is not a criminal offence. Under sector-specific laws, however, administrative fines may be levied if certain compliance policies or measures are not in place, relating to, for example, whistleblowing in the financial sector or detecting and reporting money laundering. Also, in certain cases, the failure to prevent an offence from being committed could qualify as an unintentional offence or as criminal participation by neglect if the corporation was aware of the conduct – or of the possibility of it occurring – and through its failure to act allowed the offence to occur or to be committed.

Individuals may face liability for corporate criminal misconduct through attribution rules

Although there are no guidelines addressing when to seek individual and corporate liability, prosecutors generally take action against both individuals and corporations where possible. As a general rule, individuals incur criminal liability only when their own conduct meets the test for the criminal provision infringed. Some provisions, however, designate a person who is assumed to be responsible for the violation (legal attribution) or require the corporation to designate such a person (conventional attribution). In these circumstances, the designated person can be held criminally liable when a violation is committed within the corporation unless the designee can demonstrate that he or she is not guilty. Legal attribution is common in social law, where the 'employer, its agents or representatives' (eg the human resources manager) is assumed to be responsible for criminal violations of certain social law provisions. Conventional attribution occurs, for example, in environmental law, where the corporation is ordered to appoint an individual who is responsible for the corporation's compliance with its environmental obligations and who will be considered criminally liable in the event of a violation.

The enforcement authorities

Criminal investigations are initiated by the public prosecutor or by the victim of the offence (by means of a civil complaint) and are conducted under the authority of either the public prosecutor (in the case of a police investigation) or the judicial magistrate (in the case of a judicial investigation) with the assistance of the judicial police. Regulators in certain sectors such as tax, finance, telecommunications and nuclear power have investigative authority and are required to report the results of their investigation to the public prosecutor's office in the case of potentially criminal conduct. The government's National Security Plan for 2016 to 2019 emphasises as priorities the combating of tax and social fraud and the tracing of the illicit proceeds of domestic and foreign corruption.

Few formal incentives to self-report and co-operate, but it may be relevant to plea or settlement discussions or sentencing

Belgium does not have a leniency programme or any other formalised incentive to report violations and co-operate with prosecutors. There is an exception to this general rule for voluntary disclosures to tax authorities, which can lead to immunity from prosecution for related tax offences. With the recent adjustments to judicial settlements and the introduction of guilty pleas, however, offenders have offered to self-report violations in exchange for a settlement or plea. While there are no guidelines for assessing self-reporting and co-operation, judicial magistrates may take these factors into account in determining the penalty to impose in a particular case.

A range of outcomes is possible, including judicial settlements (without trial or conviction) and plea agreements

A corporate investigation could result in a declination, judicial settlement, guilty plea or conviction with a fine imposed.

Judicial settlements and guilty pleas may be proposed for all but the most serious offences, ie for offences where the law allows a prison sentence for individuals to be reduced to two years and the prosecutor would not pursue a higher sentence. Both types of agreement require a statement of facts and identification of the charges, or potential charges, at issue.

With judicial settlements, the corporation is requested to pay a sum of money, and, if the charges involve tax or social law offences and/or have caused damage to others, the corporation must pay the outstanding taxes or social contributions and/or compensate the victim or accept civil liability. The public prosecutor then declines prosecution, and the judicial settlement is registered in the criminal record (but is not reflected in extracts taken from that record). In cases involving judicial investigation, and further to legislative amendments that are expected to be approved and implemented in 2018, judicial settlements will require court evaluation and validation before payment can be made and a declination obtained. If the court refuses to validate the agreement, the case returns to the public prosecutor, who may refile it at a later date before a different court magistrate.

A guilty plea, by contrast, involves an admission of criminal liability by the corporation as well as an agreement as to the penalties that will be imposed. A criminal court must evaluate the agreement before it can become final. If the court validates the agreement, the court imposes the agreed penalties and sets out rules governing any claims for civil damages. Similar to judicial settlements, if the court refuses to validate the agreement, the case returns to the public prosecutor for a decision on further action.

The public prosecutor determines whether to accept a judicial settlement or guilty plea. While there are no formal guidelines setting forth the factors to be evaluated in determining how to treat a corporation that faces corporate criminal liability, public prosecutors generally consider the nature and seriousness of the offence and its impact on society and victims, any co-operation by the corporation, the pervasiveness of wrongdoing within the corporation and its history of similar conduct, the feasibility of obtaining a criminal conviction taking into account potential defence arguments such as time-barring, and the adequacy of remedies such as civil or regulatory enforcement actions.

In the criminal context, courts can impose fines (for most offences, using a formula to convert the sentence that would apply to an individual into a corporate fine) and require corporations to pay restitution to victims, and to forfeit both ill-gotten gains and assets related to the offence. In rare circumstances, a court could require dissolution of the corporation or closure of part of the corporation. Courts can also require that the judgment be publicly announced.

New penalties for corporations are currently being considered, including a new type of fine based on the gain from illegal activity, community service and exclusion from certain public contracting for a period of one to 10 years.

International co-operation

Belgian criminal authorities co-operate with their counterparts in the EU and around the world, although much of the co-operation relates to terrorism matters and non-white-collar offences.

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Brazil

Limited corporate criminal liability, but companies may still face significant economic crime related penalties

In Brazil, companies can be held criminally liable for only a limited number of environmental crimes. However, companies may face significant penalties and other administrative sanctions for certain economic crimes – such as bribery, bid rigging and criminal cartels – committed on their behalf by individuals. These civil and administrative actions against companies are often intertwined with criminal proceedings against individuals; within which, it is also possible that investigators request and criminal judges order certain measures against corporations – such as dawn raids, search and seizure warrants and freezing of assets. Companies operating in Brazil can, therefore, find themselves at the centre of investigations by Brazilian criminal authorities in an enforcement environment that, in recent years, has been increasingly robust.

The basis for corporate liability depends on the law in question. Under the Environmental Criminal Law (Federal Law No. 9,605/1998), for example, two conditions must be met before a company will be held criminally liable: (1) the act or omission must have been attributable to a decision of the company's legal or contractual representative or its governing body; and (2) the wrongdoing must have been committed in the company's interest or for its benefit.

The Clean Company Act (Federal Law No. 12,846/2013) makes companies strictly liable on an administrative and civil basis for the bribery of officials carried out in the company's interest or for its benefit. The liability is strict and so there is no need to prove any intent on the part of the company's senior management, board or other governing body. Nor does it matter who carried out the corrupt act: companies may be held liable for the actions of third parties as well as employees – provided the individual was acting in the company's interest or for its benefit.

It is important to emphasise that, under the Clean Company Act, there is no requirement for the third parties to have been acting under the company's authority, approval or even knowledge. Companies can be held liable if the third party was merely acting for its benefit or in its interest. In addition, companies can face an administrative fine even if no individual is prosecuted or found criminally liable.

The Clean Company Act covers bribe payments made to domestic officials by Brazilian companies or foreign companies operating in Brazil (even temporarily). It also has extraterritorial reach in that Brazilian companies may face liability for the bribery of foreign officials, regardless of where the misconduct occurred.

Companies within the same group or consortium partners may be jointly liable under the Clean Company Act for any administrative fines or other monetary penalties levied on a related company for corruption.

In addition, under Art. 932 of the Brazilian Civil Code, employers may face civil liability for the acts of employees in the exercise of their functions. Although there is no consensus in Brazilian law as to how criminal acts of employees may be attributed to the company, companies may have to indemnify other parties for any damages arising from the unlawful acts of employees.

Companies may also face civil and administrative penalties for bid rigging and corruption under the Improbity Law and the Bidding Law (Federal Laws Nos. 8,429/1992 and 8,666/1993, respectively).

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Compliance programmes can be a key mitigating factor to reduce administrative fines

The absence of a compliance programme will not, in itself, form the basis for liability. However, in imposing penalties under the Clean Company Act, authorities will consider the company's anti-bribery compliance procedures and controls at the time of the misconduct.

Administrative fines under the Clean Company Act are, in general, calculated as a percentage of the company's gross revenue in the fiscal year immediately prior to the start of the investigation. Fines can be as high as 20 per cent of gross revenue. Where a company can demonstrate it had implemented an effective anti-corruption programme at the relevant time, the percentage basis for such fine may be reduced by between 1 per cent and 4 per cent (ie, a company facing the maximum fine of 20 per cent of its gross revenue for the previous year could, on the basis of its compliance programme, have this reduced to 16 per cent if given full credit for its compliance programme).

Federal Decree 8,420/2015 sets out the key elements of an anti-corruption compliance programme. An accused company's compliance system is measured against the following list to determine what, if any, mitigation is available:

- senior management are committed to the programme (ie, the 'tone at the top' is set);
- the company establishes standards, a code of ethics and related policies both internally and for third parties;
- there is periodic training on the compliance programme;
- a periodic assessment of the risks facing the company is carried out, with any necessary adjustments made to the compliance programme to address evolving risks;
- accurate accounting records are kept and controls are put in place to ensure financial statements and reports are prepared in a timely and accurate manner;
- specific procedures are put in place to prevent fraud and other misconduct in the context of public tenders and other interactions with government, regardless of whether such contact is direct or through an intermediary;
- the compliance department is independent;
- whistleblowing channels are established and their existence is widely communicated within the organisation, and mechanisms are in place to protect whistleblowers;
- disciplinary action is taken against those who violate the programme and issues identified are remediated;
- appropriate compliance procedures are in place when contracting parties and steps are taken to supervise them;
- due diligence is carried out during any M&A transactions or restructuring to identify misconduct or the risk of misconduct having taken place;
- the effectiveness of the compliance programme is continually monitored; and
- donations made to political parties, campaigns and candidates are fully transparent.

Fines under the Clean Company Act can be as high as 20 per cent of the gross revenue of the previous year.

Individual criminal liability for corporate misconduct

Board members and senior executives are not criminally liable for offences committed by the company's employees or other individuals acting for the company's benefit, unless they were also complicit in the wrongdoing. Such board members and senior management may, however, face civil liability if the illegal acts were carried out as a result of their own negligence, wilful misconduct or violation of the company's policies or statutes.

Brazilian authorities have been active in pursuing individuals, including senior managers of large corporations, who are suspected of being involved in white-collar crimes. In doing so, however, there have been cases in which board members and senior executives have faced investigations or even criminal charges relating to the acts of employees or other individuals. In these cases, prosecutors and judges have been accused of placing the burden on senior managers to demonstrate they are not liable (even though it is the burden of the authorities to prove liability in the criminal context) and defendants have argued they have been targeted simply because of their senior position within the company.

Car Wash is one of several investigations in recent years in what is seen as a new era of anti-corruption enforcement in Brazil.

Enforcement authorities amongst most active in the world

The civil and federal police are responsible for starting criminal investigations. Thereafter the federal and state public prosecutors' offices will pursue the case and propose charges, where appropriate.

A large number of public bodies have authority to start civil/administrative investigations relating to corruption and file administrative proceedings before a judge. These include the Ministry of Transparency, Supervision and Control (CGU); other Comptrollerships; and federal and state public prosecutors, including the federal Attorney General's Office. These entities have been particularly active since the start of 'Operation Car Wash' – the investigation into corruption involving Brazil's state-owned oil company, Petróleo Brasileiro SA, or Petrobras – in 2014. This investigation has led to numerous arrests, leniency agreements, plea bargains and convictions of individuals, as well as debarments and large monetary penalties for several companies – including Brazilian subsidiaries of multinational groups.

Car Wash is one of several investigations in recent years in what is seen as a new era of anti-corruption enforcement in Brazil.

The Administrative Council for Economic Defence (CADE) – the authority in charge of cartel enforcement in Brazil – has also been increasingly active over the past five years. CADE has been involved in investigating anti-competitive conduct arising from a range of well-known investigations, including Operation Car Wash and the LIBOR investigations into benchmark manipulation.

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Self-reporting and co-operation may lead to reduced penalties

In recent investigations in Brazil involving complex economic crimes, prosecutors have adopted a strategy of providing whistleblowers with reduced penalties or immunity, agreeing not to prosecute them if they co-operate with investigations into others.

Settlements are possible under the Clean Company Act. Such settlements, referred to as 'leniency agreements', often require the company to pay a lesser penalty than it might otherwise have paid had the matter gone to court, provided the company agrees to co-operate in the investigation and remedy its compliance issues. At federal level, for example, the agency with jurisdiction to enter into leniency agreements is the CGU. However, most recent settlements have been entered into by the federal prosecutors. There is an ongoing discussion on whether such agreements entered into exclusively with the prosecutors – without the participation of the authorities with jurisdiction over the violations, such as the CGU – are entirely valid. In one case a federal court of appeal held that such an agreement was defective because not all relevant agencies participated, although the agreement was not declared null and void for reasons of legal certainty.

A provisional measure was put in place in 2015 that allowed companies to potentially escape all sanctions for bribery and corruption if the company co-operated with prosecutors in the investigation into the company and others and remediated its compliance issues. However, that provisional measure has since been revoked.

Even without formally entering into a leniency agreement of this nature, companies that co-operate with investigations may still receive co-operation credit mitigating the penalties they face under the Clean Company Act and Federal Decree No. 8,420/2015.

Whilst such leniency agreements under the Clean Company Act mean the company will not be pursued by the enforcement agency with whom it has signed the agreement, there is still a risk other agencies may pursue the company for fines related to the same allegations. And these leniency agreements do not cover individuals. Both of these are factors a company will have to take into account when considering whether it is in the company's interest to self-report any suspected bribery that has benefited the company.

In contrast, in relation to cartel conduct, the leniency programme run by the Administrative Council for Economic Defence (CADE), Brazil's competition law enforcement authority, is well-established and offers a greater degree of certainty that the company will not be pursued by any other agency for cartel conduct arising from the same conduct. CADE's leniency programme also protects all employees of the successful leniency applicant from prosecution.

'[O]ver the last few years, Brazil has become one of the US Justice Department's closest allies in the fight against corruption. Thus far, the Department of Justice and Brazilian authorities have entered into four global resolutions and assisted one another in dozens of other cases... On a nearly daily basis, our prosecutors and agents are in touch, exchanging information and assisting one another as appropriate.'

Then Acting Principal Deputy Assistant Attorney General in the Criminal Division of the US DOJ, speaking in May 2017

Investigations may result in huge penalties and other consequences but negotiated resolutions are possible

Companies may face administrative fines and other monetary penalties (eg disgorgement or compensation orders) where economic crimes such as corruption, bid rigging and cartel behaviours have been carried out in their interest or for their benefit.

In addition to fines (which may be up to 20 per cent gross revenue from the previous year), companies can be punished under the Clean Company Act with a prohibition from receiving incentives, subsidies, grants, donations or loans from public entities and public banks. And companies may be placed on a blacklist for irregularities in bidding processes, tax fraud and non-compliance with public contracts. While (as noted above) companies within the same group or consortium partners may be jointly liable for any fines or other monetary penalties under the Clean Company Act, only the entity actually implicated in the corruption may face debarment. In addition to such penalties, companies are also required to compensate the government for damages caused by the violation.

But, as noted above, it is possible for companies to enter into a leniency agreement or negotiated settlement, and there have been several such agreements in recent years – some of which have resulted in huge penalties. A Brazilian meatpacking company, for example, agreed to pay US$3.2bn in 2017 to end several probes into its business in a negotiated settlement with the Brazilian authorities.

Brazilian authorities working arm in arm with foreign counterparts

Brazilian authorities regularly co-operate with counterparts abroad on investigations into economic crime, most notably with prosecutors in the US and Switzerland.

In late 2016, and after almost a year of negotiations, the Brazilian, Swiss and US authorities agreed to resolve a foreign bribery and corruption investigation with a Brazilian engineering conglomerate and its subsidiary, with the companies agreeing to pay penalties in each jurisdiction. The investigations found the companies had engaged in bribery in 12 countries across Latin America and Africa, including a large number of kickbacks paid in relation to contracts with Petrobras. This case has led to investigations in several Latin American countries and information requests from authorities in these countries to their Brazilian counterparts.

In another Petrobras-related case, a UK aerospace company agreed with the Brazilian public prosecutor to pay US$25m to settle charges it had bribed officials at Petrobras in a resolution announced in co-ordination with agreements, totalling nearly US$800m, entered into with the UK Serious Fraud Office and the US Department of Justice relating to conduct in a number of countries. Brazil has also, alongside the US DOJ, co-ordinated a resolution with the Singaporean prosecutors in relation to charges a Singaporean company paid bribes in Brazil.

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China

Basis for corporate criminal liability

The concept of corporate criminal liability was first introduced into the Criminal Law in China in 1997.

A company may be held criminally liable in China if it has been found to have committed one of the offences expressly set out in the Criminal Law. More than 200 offences could be committed by a company, which range from terrorism, threats to state security, environmental pollution, various economic crimes (eg bribery, tax evasion, securities fraud or bid rigging), false advertising, and fraudulently creating corporate records or inducing investment through fraud.

Acts of employees may be attributed to the company if the employee acts on behalf of the company and the illegally obtained proceeds are owned by the company.

A company, no matter where it is incorporated, may face prosecution if it commits a criminal offence within China or if the consequences of such offence occur within China.

The relationship with individual liability

In principle, the company and the culpable individual(s) may be convicted of the same crime in relation to the same misconduct. But there are exceptions to this under law and in practice.

Those individuals who are 'directly in charge' of the company (eg its legal representatives or general managers) or 'directly responsible' for the criminal offence itself (eg the employee who commands, authorises or carries out the actual misconduct) may be prosecuted in relation to the crime in question. The terms 'directly in charge' and 'directly responsible' are broad and vague, and could, potentially, cover a board member or senior executive who has no direct involvement in the offence.

The relevance of compliance procedures to corporate prosecutions

There are no specific provisions under the Criminal Law expressly allowing a company to rely on adequate compliance procedures as a mitigating factor or a defence against liability. However, in practice, a prosecutor or a judge, at his or her discretion, may decide not to prosecute or impose a lower penalty if the company shows it has discontinued the crime and made genuine efforts to prevent future violations.

The enforcement authorities

Corporate criminal investigations are generally conducted by Public Security Bureaus, which will submit the case to the People's Procuratorates for prosecution. However, a case that involves the potential misconduct of a governmental official or a state-owned enterprise may be investigated directly by the People's Procuratorates or, in the future, by the Supervisory Committees that are being established to investigate officials' corruption and dereliction of duty. In some cases, investigations are started by other government bodies (eg the tax authorities), but need to be referred to the Public Security Bureau when such bodies suspect a criminal offence has occurred.

In recent years, the Chinese authorities have taken an aggressive stance against corruption, and prosecution of corporate bribery crimes has increased significantly. Other enforcement priorities include capital market abuse and crimes in those industries that directly affect the public – for example medical care, environmental protection and food safety.

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Reporting and co-operation

Article 108 of the Criminal Procedural Law provides that '[a]ny entity or individual, upon discovering facts of a crime or a criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a People's Procuratorate or a People's Court'. However, there is no penalty for failing to comply with this 'duty'. Self-reporting of a violation before a criminal investigation is initiated may result in leniency in sentencing or exemption from penalties pursuant to Article 164 and Article 390 of the Criminal Law. This option for potentially more lenient treatment is available to both corporates and individuals.

'Any entity or individual, upon discovering facts of a crime or a criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a People's Procuratorate or a People's Court.'

The criminal authorities may demand evidence from a company or individual and, in those circumstances, the company or individual has an obligation to co-operate and truthfully provide the evidence in question.

Further, co-operation may result in a mitigated punishment or exemption from punishment if certain conditions are met, for example if the company/individual plays a crucial role in resolving an important case. On the other hand, a company that fails to co-operate may face tougher penalties than would otherwise have been the case.

Resolutions and penalties

The Chinese law does not recognise plea bargaining. Nor is there a concept of deferred prosecution agreements in Chinese law. However, in practice and within the discretion of the procuratorate, there may be room for companies to negotiate the charges and/or the level of the penalty. This depends on a range of factors. For example, if a company defendant and the victim reach a settlement such as a payment of compensation to the victim, the procuratorate may choose not to prosecute the defendant or may recommend a more lenient sentence.

Where a company is found guilty of a crime, the court can impose a fine. There is no limit on the level of fine imposed on companies, and the law requires the court to take into account the circumstances of the crime. Historically, the fines imposed by Chinese authorities tended to be much lower than some other jurisdictions, notably the US, but this is changing, with an international pharmaceutical company receiving a criminal fine of about US$500m in a bribery case in recent years

In addition to fines, companies could face other penalties under administrative laws, including disciplinary warnings, administrative fines, confiscation of unlawfully obtained property, suspension of business and revocation of a regulatory permit or licence.

Further, the person in charge of the company or directly responsible for the misconduct may face one or more types of penalty, including forfeiture of the illegal proceeds, criminal detention, imprisonment and confiscation of personal property.

"The Chinese authorities have taken an aggressive stance against corruption, and prosecution of corporate bribery crimes has increased significantly. Other enforcement priorities include capital market abuse and crimes in those industries that directly affect the public.

John Choong, Partner, Hong Kong and China

France

Corporate criminal liability exists for all offences

Under French law, a corporate entity may be prosecuted for any offence committed on its behalf by its organs (ie directors, officers, members of the board of the general assembly, etc) or representatives (ie individuals empowered to act on behalf of the corporate entity, such as a managing director, a receiver, etc). A company cannot incur any direct criminal liability for the actions of employees who are not organs or representatives of the company. Proceedings are often initiated against corporations, however, for offences committed by their organs or representatives, who, in turn, are liable for the actions of employees. Directors may also delegate powers to employees, whose misconduct could then lead to criminal liability on the part of the company.

When an offence requires criminal intent, the *mens rea* of the corporation may be established through the criminal intent of the individual who committed the offence. An individual, however, need not be convicted for a corporate entity to be held criminally liable.

A parent company generally cannot be held liable for its subsidiary's conduct in light of the principle of personal liability under French criminal law and because the concept of corporate groups does not exist under the criminal law. There are limited exceptions to this general rule, however, such as where there is joint liability of the parent company with its subsidiary in the case of concealed work (*travail dissimulé*), which is an offence specific to labour law. More broadly, a parent company may be held liable as a co-perpetrator, or accomplice in, or receiver of the proceeds of, any criminal activity of its subsidiary.

Most commonly, corporate prosecutions in France involve fraud, breach of trust, corruption and forgery. Prosecutions are also brought in specific areas of corporate law (such as misuse of company assets, publication of inaccurate financial statements), finance (such as insider trading, market manipulation), tax, customs, labour and environmental law.

Some limited jurisdiction for offences committed abroad

Corporate entities may be prosecuted in France for offences committed outside the country in certain circumstances. Most notably, French corporations can be prosecuted for felonies committed abroad and for misdemeanours committed abroad where the conduct is punishable in the jurisdiction where it was committed. Prosecutions may also be brought in France for any felony or misdemeanour committed abroad by a French or foreign national where the victim was a French national at the time of the offence. Additionally, a French corporation can be prosecuted in France as an accomplice to conduct that resulted in a conviction in a foreign jurisdiction where the conduct violates the law of both jurisdictions. In the case of multinational companies, a final judgment must have been rendered in the country where the main violation occurred before a parent company may be prosecuted, as accomplice or co-perpetrator for example, for the acts of its subsidiary.

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Sapin 2: a strengthened approach to anti-corruption

Corporate compliance programmes are increasingly important in France with the enactment of Sapin 2 in December 2016. The law requires certain companies and their representatives to implement programmes to detect and prevent corruption and *traffic d'influence* (influence peddling). The law also established an anti-corruption agency (Agence Française Anticorruption), which is empowered to impose penalties for the failure to implement compliance programmes, including fines of up to €1m for a legal entity and €200,000 for individuals. The absence of a compliance programme is not, however, a basis for criminal liability, and there is no compliance defence available to corporate entities. Sapin 2 also contains protections for whistleblowers and introduces French-style deferred prosecution agreements (DPAs) for corporate entities.

New law extends limitation period for criminal prosecutions

In February 2017, the criminal statute of limitations law was amended to double the limitation period for crimes and misdemeanours (respectively, from 10 to 20 years and from three to six years) from the time the offence was committed or, in the case of hidden or concealed infringements, from the time the infringement was discovered by the authorities. That said, the prosecution of hidden infringements becomes time-barred after 12 years for misdemeanours and 30 years for crimes, starting from the day the offence was committed, regardless of when the infringement was discovered.

Individual liability for corporate crimes

There is an emphasis in France on holding both individuals and corporate entities criminally liable. Directors and officers may be held criminally liable when acting for the company even if they lacked criminal intent. Individuals who created or contributed to creating the circumstances that allowed criminal conduct to occur – or who failed to take steps to prevent the conduct – may be held criminally liable if they did not respect a statutory or regulatory duty of care (in a manifestly deliberate manner). Directors and officers may also be held criminally liable if they commit a specific act of misconduct that exposed another person to a particularly serious risk of which they must have been aware.

The enforcement authorities

The main criminal enforcement authority is the Ministère Public, or 'Parquet' (the office of the director of public prosecutions), which is under the authority of the Minister of Justice. The National Financial Prosecutor's Office ('Parquet National Financier' or PNF), created in February 2014 to combat corruption and complex financial fraud, is part of the Ministère Public and has exclusive jurisdiction for certain types of financial offences. There are also a number of administrative agencies with enforcement powers, such as the Autorité des marchés financiers (Financial Markets Authority) and the Autorité de la concurrence (the French Competition Authority).

Reporting and co-operation

In terms of corporate liability, there are no formal leniency programmes or opportunities for discounted fines in France. The enforcement authorities are nonetheless free to take remediation into account in considering whether to impose corporate liability and in determining the amount of the penalty.

Save that under competition law, the corporate entity that reveals to the French Competition Authority the existence of a cartel of which it was a member will be exonerated from liability. The French Competition Authority has no power to impose criminal sanctions or bring criminal enforcement proceedings. But it may refer cases to the public prosecutor. However, leniency is a legitimate reason for not referring a company or its employees to the prosecutor.

Alternatives to prosecution and trial

Two alternatives are available for corporate entities to settle a criminal matter. A company may enter into a guilty plea agreement referred to as Comparution sur Reconnaisance Préalable de Culpabilité (CRPC), roughly translated as 'court appearance on a pre-trial guilty plea'. CRCP settlements were introduced in 2004 and expanded in 2011. In January 2016, France entered into its first corporate plea deal with a Swiss bank for laundering tax fraud proceeds.

In November 2017, the High Court in Paris approved the first French-style DPA.

Alternatively, a company may be offered a deferred prosecution agreement (DPA) style resolution, created by Sapin 2. French-style DPAs are available to entities suspected of bribery, influence peddling, and/or laundering of tax fraud proceeds.

In November 2017, the High Court in Paris approved the first French-style DPA. The €300m agreement was between the PNF and a Swiss private bank; but it also resolved an investigation into the bank's holding company. Specifically, the PNF had accused the bank of laundering the proceeds of tax fraud, enabling its customers to evade paying €1.6bn in tax.

A range of potential penalties may be applied

In determining the penalty to impose, judges take into account a variety of factors, including the existence of criminal intent and whether the corporate entity had previously committed an offence. A corporate entity may be fined up to five times the amount applicable to individuals. The corporate entity can also be sentenced to additional penalties, such as (i) in limited circumstances, winding-up of the company; (ii) exclusion from public procurement, either permanently or for a period of up to five years; (iii) prohibition, either permanently or for a period of up to five years, from making a public offer of securities or having its securities admitted to trading on stock exchanges; (iv) confiscation of any object that was used in or intended for use in committing the offence or was the product of the offence; and (v) publication of the judgment.

International co-operation

France has signed several international treaties to ensure international co-operation in law enforcement. French authorities have co-operated with their counterparts abroad in the investigation and prosecution of white-collar crime. For example, in July 2017, a Latvian bank was sentenced to pay a fine of €80m and was banned from practising in France for a period of five years in connection with a tax evasion and money laundering scheme. The investigation involved co-operation between French and Latvian authorities.

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Germany

Companies may face regulatory fines arising from certain criminal activity

German law draws a distinction between criminal offences and regulatory offences. Criminal offences can be committed only by individuals and can be punished by imprisonment or a fine. Regulatory offences, by contrast, can be sanctioned only with a fine. Although regulatory offences are mostly committed by individuals, fines can be imposed on companies if the offences committed by an officer or employee of the company can be attributed to the company.

A fine can be imposed on a company where, among other things, a person authorised to represent the company (for example the manager or a member of the management board) has committed a regulatory or criminal offence that (i) caused the company to violate its duties; or (ii) enriched or was intended to enrich the company (s.30 of the German Act on Regulatory Offences (Ordnungswidrigkeitengesetz (OWiG)).

Offences committed by operational staff can, indirectly, be attributed to a company if the owner, or an authorised representative/board member, fails to take appropriate supervisory measures to prevent criminal or regulatory offences from being committed (s.130 and s.30 of the OWiG). In this case, the company (as well as the representative/board member) can be fined if that offence could have been prevented, or rendered significantly more difficult to commit, had there been appropriate controls.

Introducing corporate criminal liability has been frequently and widely discussed in Germany, with many differing viewpoints. The ministry of justice of the federal state North Rhine-Westphalia presented a draft bill in September 2013 that provided for the introduction of a Corporate Criminal Liability Act. This and other proposals have been widely discussed, but so far they have not been implemented.

Parent company liability for subsidiaries

It is unclear whether a company can face regulatory sanctions for failing to take appropriate supervisory measures in relation to subsidiaries. To date, there has been no decision by the German Federal Court of Justice (BGH) on this issue. The Higher Regional Court of Munich, however, stated in a 2014 decision that the duty to take appropriate supervisory measures may extend to subsidiaries if the management of the parent company has influence over the subsidiaries. This may include foreign subsidiaries.

In the area of cartels, German law was amended in June 2017 to introduce regulatory parent company liability in cases where the parent company has a decisive influence on the subsidiary.

'In Germany, prosecutors are obliged to investigate if they have reason to suspect criminal activity, and during my time as a prosecutor I launched some major investigations on the back of newspaper reports. Prosecutors and journalists increasingly exchange information with each other, which adds to the risk for business.'

Simone Kämpfer, Partner, Düsseldorf

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Compliance management systems may lead to a reduced fine or even an exclusion of liability

The establishment of compliance measures or a comprehensive compliance management system (CMS) may lead to a complete exclusion of regulatory liability. If the CMS ensures that appropriate supervisory measures have been undertaken within the company, then no supervisory duties are violated if an employee commits an offence. Liability is not excluded, however, if authorised representatives/members of management have themselves committed a regulatory or criminal offence.

Apart from a complete exclusion of liability, a CMS may also lead to a reduced fine. There are no explicit rules dealing with this issue, but an enforcement authority could, amongst other criteria, take a CMS into account when determining the amount of a regulatory fine. In previous cases, some authorities have taken compliance measures into account while others (the German Federal Cartel Office, for example) have not. In a recent decision, however, the BGH (the Federal Court, Germany's highest court) ruled that an effective CMS should be taken into account when determining the amount of a regulatory fine.

Instituting enhanced compliance measures as a result of an investigation to prevent, or at least make it significantly more difficult to commit, similar violations in the future can also be important. Just recently, a company that co-operated with prosecutors and adopted a new compliance programme avoided a fine in a foreign bribery settlement with German prosecutors. The company, which signed a €48m disgorgement agreement with the Bremen prosecutor's office, was given credit for co-operating with prosecutors, creating a new compliance programme and undertaking an internal investigation.

Individual liability may be based on a lack of due supervision

Board members can be held liable for personally committing a criminal offence or for participating in offences committed by others. They can also be held liable if company-related offences committed by staff members could have been prevented (or at least made significantly more difficult to commit) through appropriate supervision (s.130 of the OWiG).

The enforcement authorities

The main enforcement authorities in Germany are the public prosecutor's offices. Each federal state has its own court districts with its own public prosecutor's office, some of which have specialised units that focus on white-collar crime. In practice, the police, supervised by prosecutors, conduct investigations. Specialised authorities investigate tax offences, violations of foreign trade regulations and antitrust violations.

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) supervises banks, insurers and other financial institutions handling securities and also has the power to impose regulatory fines. If a violation constitutes a criminal offence, however, the proceedings are transferred to the public prosecutor for investigation.

While German authorities usually do not publicly set out their priorities, enforcement is common in many areas such as bribery and corruption, fraud, tax evasion, cartel offences, insider trading and market manipulation, and environmental offences.

Reporting and co-operation

No general law or guidance exists addressing co-operation and the impact it can have on the nature and amount of a corporate resolution. The Federal Cartel Office, however, has a leniency programme. Additionally, the BaFin regulatory fine guidelines for breaches of the German Securities Trading Act provide that self-reporting and co-operation are mitigating factors when determining the amount of a fine. As to individuals, the law provides for a mitigation of penalties if an individual contributed to the discovery of certain criminal offences.

'Prosecutors can, but are not specifically required to, take co-operation into account in determining the amount of a fine to impose.'

Thomas Helck, Counsel, Germany

Practice varies in Germany and co-operation is generally assessed on a case-by-case basis. In the majority of cases, however, co-operation is acknowledged in a positive way by the authorities and may lead to a reduction of a fine. In some prominent cases, the company's co-operation was taken into account by prosecutors when determining the amount of the fine.

When a company chooses to co-operate, prosecutors usually expect full and proactive co-operation. This may include, among other things, providing sources of information and the results of internal investigations, obtaining consent for interviewing employees first, and supplying information on compliance measures taken.

Resolutions and penalties

Many corporate cases are settled in Germany. There are no deferred or non-prosecution agreements, but the public prosecutor and the company may negotiate a deal resulting in a fine. The decision to impose a fine against a company (and the specific amount) is at the discretion of the prosecuting authority.

A fine of up to €10m can be levied on a company for intentional offences, while the maximum fine for negligent offences is €5m (s.130 of the OWiG). The maximum fine for intentional offences may be exceeded, however, where the economic advantage gained through the offence is higher than €10m, and any profits exceeding the regulatory fine may be confiscated. The fine is determined based on the significance of the offence, the charge the offender faces and the financial situation of the company. The extent and consequences of the damage caused may also be taken into account.

In addition to fines, other sanctions are possible, such as the confiscation of the proceeds of crime and debarment. A company may be excluded from public tenders if a person whose conduct can be attributed to the company (such as the manager) has been convicted or the company itself has been fined for certain offences, including bribery and corruption offences and money laundering.

International co-operation

Germany is a party to numerous multilateral and bilateral mutual legal assistance agreements, and the enforcement authorities regularly exchange information with their foreign counterparts.

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Hong Kong

Corporate liability – basis for liability

Generally, absent any express or implied indication to the contrary, a statutory offence for which a person is criminally liable is prima facie applicable to a corporation, except, for example: (i) where imprisonment is the only penalty (for example murder); or (ii) where only a natural person may commit the offence (for example perjury).

Further, there are certain statutory offences that expressly apply to corporations, for example:

- the Companies Ordinance (Cap 622) (general prohibition on acquisition of own shares);
- the Prevention of Bribery Ordinance (Cap 201) (giving of a bribe, although not receipt of a bribe);
- the Securities and Futures Ordinance (Cap 571) (insider dealing and market misconduct offences);
- the Theft Ordinance (Cap 210) (false accounting provisions);
- the Trade Descriptions Ordinance (Cap 362) (consumer mis-selling offences); and
- the Competition Ordinance (Cap 619) (provision of false or misleading information to the Competition Commission).

In terms of attributing acts of employees to the company, the position in Hong Kong is the same as that in England at common law – that is, the acts and state of mind of those individuals who make up a corporate's 'directing mind and will' are attributable to the corporation. This may extend to (past) directors' possession of fraudulent knowledge – for example the inflation of profits when the corporate filed its tax returns (*Moulin Global Eyecare Trading Limited (in liquidation) v The Commissioner of Inland Revenue* [2014] 3 HKC 323).

Further, vicarious criminal liability may arise where an employer has wholly delegated managerial functions and responsibilities to an employee and that employee commits a crime.

Liability for foreign/ overseas conduct

The Criminal Jurisdiction Ordinance (Cap 461) provides that a corporation may be liable for criminal conduct that occurs outside Hong Kong in relation to a number of offences under the Theft Ordinance (Cap 210) (false accounting, for example) and Crimes Ordinance (Cap 200) (forgery, for example), provided any relevant part of the offence occurred in Hong Kong. And specific statutes may also contain criminal provisions that have an extraterritorial dimension. For example, sections 4 and 5 of the Prevention of Bribery Ordinance provide that bribing prescribed public officers 'whether in Hong Kong or elsewhere' may be a criminal offence in Hong Kong. In 2010, the Hong Kong Court of Final Appeal held that offering a bribe in Hong Kong to a foreign official is also subject to prosecution under the Prevention of Bribery Ordinance (*B v The Commissioner of the Independent Commission Against Corruption* (28 January 2010, FACC6/2009)).

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The relationship between compliance programmes and corporate criminal liability

In relation to strict liability offences, the Court of Final Appeal in *Hin Lin Yee v HKSAR* [2010] 3 HKC 403 recognised the defence of 'honest and reasonable mistaken belief' or having taken 'all reasonable care'.

In limited circumstances (for example section 26 of the Trade Descriptions Ordinance), the relevant statute sets out a reasonable care or reasonable due diligence defence to a strict liability offence. In the case of the Trade Descriptions Ordinance, it is a defence for a company to show that it took reasonable care to ensure that its employees did not commit an offence under that Ordinance (for example that the Company had a good system in place to prevent misleading advertising/selling practices by its sales persons).

As a general proposition, the absence of a compliance programme is not, in itself, the basis for any criminal liability. However, specific statutes may confer more onerous duties on a corporation. For example, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) stipulates detailed requirements in relation to 'customer due diligence measures' and a failure to implement a system that observes such measure may lead to criminal liability.

Individual criminal liability for corporate misconduct

Section 101E of the Criminal Procedure Ordinance (Cap 221) stipulates that where a corporation is criminally liable, and if the offence was committed with 'the consent or connivance' of (i) a director; (ii) a manager; or (iii) any person purporting to act as (i) or (ii), the relevant person is similarly liable. In the case of *R v MG Mirchandani* [1977] HKLR 523 the court extended the 'consent or connivance' principle to include wilful blindness.

There is also a focus on holding those in supervisory roles to account, particularly in the financial services sector. The Securities and Futures Commission has recently required licensed corporations to designate 'managers-in-charge' of specific areas (risk management, finance and accounting, IT, compliance, etc). The new regime does not create additional liability for individuals but it is likely to make it easier for the authorities to identify which individuals should be responsible (including in respect of any criminal liability) if something does go wrong. These changes took effect as of July 2017.

The main enforcement authorities

The main criminal enforcement agencies in Hong Kong include:

- the Department of Justice;
- the Securities and Futures Commission;
- the Independent Commission Against Corruption;
- the Hong Kong Monetary Authority; and
- the Competition Commission.

The Department of Justice is currently focused on (i) securities and revenues fraud; (ii) anti-bribery and corruption; and (iii) customs and excise matters.

The Securities and Futures Commission has listed its enforcement priorities as including the investigation of (i) corporate fraud; (ii) misfeasance; and (iii) anti-money laundering.

The Hong Kong Monetary Authority largely focuses on prudential supervision and policy, and consumer protection – but it also has a focus on investigating anti-money laundering and terrorist financing related matters.

Reporting, co-operation and potential settlement

There is no formal leniency regime for criminal offences, yet early self-reporting may impact prosecutorial discretion when bringing criminal proceedings. Furthermore, as a general principle, co-operation and remediation are often recognised by the courts as a mitigating factor in sentencing.

There is no current provision under Hong Kong law for deferred prosecution agreements.

Corporations can, and sometimes do, reach a settlement with the relevant enforcement agencies before criminal proceedings are brought.

International co-operation with other prosecutors

Hong Kong authorities are generally active in co-operating with international enforcement authorities, including those in mainland China.

In the regulatory sphere, the constitutionality of the transmission of data across borders through formal international co-operation between authorities is currently subject to judicial review proceedings before the High Court of Hong Kong. In the case in question, the Securities and Futures Commission of Hong Kong transmitted data to the Financial Services Agency and the Securities and Exchange Surveillance Commission of Japan, purportedly pursuant to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding (see *AA and EA v Securities and Futures Commission* HCAL 41/2016). That action is now the subject of a judicial review, which could impact such sharing of data on investigations in the future.

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Italy

Companies face administrative liability for certain crimes

Since 2001, companies and other entities in Italy may face administrative liability for certain crimes committed by their directors, managers and 'employees' (ie people who are subject to the supervision of the company's directors and managers) – provided the individual's actions were in the interests of or to the benefit of the company (Law 231 of 8 June 2001). If the individuals acted exclusively for their own or another person's benefit, and not in the company's interests, then the company will not be liable.

Whilst the liability of companies is defined as 'administrative', such matters are dealt with by the criminal courts, applying criminal procedure, and are often pursued jointly with criminal proceedings against the individuals who are accused of carrying out the crime. Given the quasi-criminal nature of the proceedings, companies are afforded the same rights as individuals facing criminal prosecution.

The list of corporate crimes for which a company may be held liable includes a range of economic crimes (eg corruption, false accounting, insider trading, market manipulation, money laundering). Other kinds of crime for which a company can be found liable include certain health and safety offences, environmental law violations, fraud, certain data protection breaches, intellectual property related offences and obstruction of justice.

For corporate liability of this nature, a limitation period of five years applies from the date the misconduct occurred.

With regard to groups of companies, liability of one of the group's companies does not, per se, lead to liability of other companies within the group, not even of the parent company itself. However, according to Italian case law, where the liable subsidiary, along with other companies of the group, is directed and co-ordinated by the parent company, the latter may be liable for the subsidiary and its managers' conduct. To this extent, it must be proven that the parent company had an effective influence on the subsidiary's behaviour with regards to the commission of the offence (ie an effective participation in the commission of the crime) and the actions were in the interests of the parent company.

Law 231 also includes provisions relating to corporate liability for crimes occurring before mergers, disposals or acquisitions. These provisions seek to ensure companies do not escape liability simply because they are subject to a transaction of this kind. These provisions define, for example, the liability of the transferor and transferee when a business within which a relevant crime has been committed is sold. The transferor and transferee are jointly and severally liable, subject to certain conditions.

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Scope of territorial jurisdiction

Italian courts will have jurisdiction if the crime is committed, even partially, in Italy or if it gives rise to consequences in Italy. In the case of bribery of a foreign public official, for example, the Italian courts would have jurisdiction provided some part of the unlawful conduct occurred in Italy (eg the decision to pay the official). Foreign companies may be subject to such administrative liability under Law 231 if they operate, even in part, in Italy.

Companies headquartered in Italy may also be liable for crimes committed abroad by 'employees' (ie anyone who is subject to the supervision of the company's directors and managers), provided that the authorities in the jurisdiction where the crime took place have not taken action against the company for the same issue.

The relationship between liability and compliance

A company may escape liability if it can show it had an effective compliance programme in place aimed at preventing the misconduct in question. To avail itself of this defence, the following conditions must be met:

- the company must have adopted and implemented appropriate organisational, management and control procedures to prevent the offence(s);
- the company must have entrusted an internal body with the power of supervising the functioning of, and the company's effective compliance with, the programme;
- that body must have sufficiently exercised its supervisory powers; and
- the people who committed the crime must have fraudulently eluded the controls the company put in place.

In determining whether the company may avail itself of this defence, the judge may consult an expert in compliance to assess the effectiveness of the company's compliance programme at the relevant time.

Individual liability

Directors, officers and others in management positions will not incur individual criminal liability unless they are personally complicit in the crime in question.

Whilst the case against the company is often pursued jointly with that against the accused individuals, the company's role as a defendant is separate from the individuals. This means the company may be prosecuted even where the prosecutor is not bringing, or has not yet brought, a case against individuals (eg because the individuals in question cannot be identified or there is some other reason, except amnesty, which extinguishes the crime or the person is exempt from punishment, for example due to lack of capacity or a pardon).

Penalties

Under Law 231, companies may face the following administrative sanctions:

- fines;
- confiscation of profits and/or a seizure of assets;
- a ban from carrying out the ordinary activities of the company;
- revocation or suspension of government authorisations or licences;
- disqualification from certain kinds of contracts (eg commercial contracts with public bodies, access to public subsidies or financing); and
- a prohibition on advertising goods and services.

The judgment may also be publicised, which can lead to reputational damage.

Where a company is found guilty, it will almost always face a fine. But some of the other potential sanctions, in particular disqualification, are rarer and, in any event, depend on the specific crime being committed (ie some of the sanctions may be triggered by certain specific offences only). The company will only be disqualified if it is a repeat offender or the company made a significant profit from the misconduct of its senior managers or others reporting to those mangers and, if the latter, the misconduct occurred because of, or was facilitated by, a serious organisational weakness.

The level of fine depends on the seriousness of the crime and the extent of the company's culpability. The company's financial position may also be taken into account, as will the degree to which it benefited from the misconduct. Mitigating factors, which may reduce the penalty by up to 50 per cent, include remediation of harm or compensation, improved compliance measures and surrender of any profits.

Dealing with the authorities and potential outcomes

The Office of the Public Prosecutor of the place where the offence was perpetrated is responsible for investigating and prosecuting both individuals and companies. Unlike some other jurisdictions, there is no formal process in place that would allow a company to self-report a crime in return for leniency.

Plea bargaining is allowed under the Italian Code of Criminal Procedure, and companies may be able to negotiate a plea agreement to avoid some of the more serious sanctions like disqualification. However, there is no concept of settlement agreements or deferred prosecution agreements under Italian law in relation to the quasi-criminal liability of corporations.

As regards future developments, an extension of the list of crimes, so to include tax fraud and other fiscal crimes, is likely to occur to cover a broader set of criminal offences.

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Japan

Companies may face liability for certain crimes carried out by officers and employees

Companies in Japan do not face general criminal liability for all kinds of crimes. However, there are a number of statutory provisions that impose specific liability on companies for crimes carried out by the company's representatives or employees (regardless of seniority) where the misconduct in question relates to the company's activities. Such dual-liability provisions, holding both the company and the individual(s) to account, exist in relation to insider trading, as well as certain antitrust, tax, environmental and Companies Act crimes. In addition, companies may also be held liable for bribing foreign public officials under Japan's Unfair Competition Prevention Act.

Individuals may be prosecuted at the same time as the company

Where dual-liability provisions exist, the company and the individuals involved may be prosecuted simultaneously. The company may only be convicted if the individuals are also convicted. However, a company may choose to accept liability at an early stage to conclude the proceedings against it even if the case against the individual(s) remains pending.

The relevance of prevention procedures as a defence or mitigating factor

The company may have a defence (or may escape prosecution) if it can show that there was no negligence on the part of the company in relation to the misconduct (which would include negligence in relation to the appointment and supervision of officers and employees). In other words, the company may be able put forward a defence based on the fact it took reasonable measures to prevent the crime – although this can be a very difficult defence to run successfully in practice.

Even if the company is unable to escape liability on the basis of its compliance programme (which is possible although rarely successful), the company may still put forward its compliance procedures as a mitigating factor during sentencing.

The investigating and prosecuting authorities

The police, the national Public Prosecutor's Office and certain regulatory bodies (including, for example, tax, customs, securities and competition authorities) have the power to investigate potential criminal misconduct. Only the Public Prosecutor's Office may initiate a criminal prosecution, and such decisions are at their discretion.

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Potential outcomes include fines and debarment

Where a company is found guilty of a crime, it will usually have to pay a fine. There are no publicly available sentencing guidelines setting out how such fines will be calculated. In practice, the court will consider a number of factors, including precedents and the recommendation of the prosecutor. It may also consider the company's compliance programme as a potential mitigating factor. Other mitigating factors include voluntary compensation of victims for any harm done and the company's co-operation with the investigation.

Apart from criminal fines, companies may also face other related administrative sanctions including the loss of business licences or exclusion from pubic tenders.

A new plea bargaining system for Japan

A plea bargaining system will be introduced in June 2018 in relation to crimes such as antitrust, fraud, bribery and tax evasion.

Under the new system, a prosecutor can negotiate to drop or reduce charges if a defendant provides testimony or evidence on these types of crime committed by another individual or company. This provides an incentive to companies as well as individuals to provide information about tax, bribery or antitrust violations of others in return for lesser penalties themselves.

Voluntary disclosure of one's own potential violations can be an informal mitigating factor that leads to a lesser penalty – even if there is no formal mechanism for this – and the extent of the mitigation available depends on all other factors and the discretion of the court.

Under a new plea bargaining system to be introduced in 2018, companies and individuals in Japan may be able to negotiate with the prosecutor provided they can provide evidence for crimes committed by another party.

Netherlands

Wide scope for corporate criminal liability

In recent years, international fraud and corruption have been high on the Dutch enforcement agenda, with some high-profile cases pursued in close co-operation with US authorities. With respect to criminal liability, Dutch law treats corporations, in principle, in the same manner as natural persons. A corporation can, in principle, commit and subsequently be prosecuted for any kind of offence. But in practice, there are limitations to this as certain physical offences, by their nature, cannot be committed by an entity. The offences for which companies are generally pursued are environmental, economic and tax related.

A corporation will be liable for illegal acts or omissions that can 'reasonably' be attributed to the corporation. This broad norm encompasses conduct that may be regarded as within 'the domain' of the company. According to Supreme Court case law, conduct is within the company's domain if one or more of the following circumstances apply: (i) the criminal conduct was executed by a representative or employee of the company acting in their formal capacity; (ii) the conduct is part of the normal business activities of the company; (iii) the company benefited from the conduct; and/or (iv) the company had control over the conduct and had accepted the conduct or similar conduct in the past.

Any employee or contract personnel can incur liability on behalf of a corporation. In general, conduct of highly placed officials is more easily attributed to the company. A series of acts by different employees that would, viewed separately, not constitute a criminal offence may, as a whole, constitute a criminal offence by the company.

Individual criminal liability for corporate misconduct and parent company liability

In principle, an individual director or employee will incur criminal liability where he or she is personally responsible for the criminal conduct and all elements of the criminal offence have been met. Where a criminal offence has allegedly been committed by a corporation, the prosecutor may instigate criminal proceedings against (i) the corporation; (ii) those who have ordered or directed the commission of the criminal offence or were de facto responsible for it (the Principal); or (iii) the corporation and the Principal jointly. Whether the corporation and/or one or more Principals are prosecuted is at the discretion of the prosecutor.

A Principal may be liable if he or she did not act to prevent the offence and knowingly accepted the reasonable possibility that the offence would occur. Putting in place adequate compliance programmes may prevent a Principal from facing such personal liability.

A parent company may be held criminally liable for its subsidiary's conduct when the conduct is attributable to the parent or when the parent qualifies as the Principal.

A company may still be held criminally liable even if the employee acted against corporate policy or express instructions – although this will be assessed on a case-by-case basis.

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Liability for foreign/ overseas conduct

Dutch companies may be prosecuted in the Netherlands for (any) crimes committed abroad if any of the acts partially took place on Dutch territory or if the conduct qualifies as a serious offence under Dutch law and is also punishable in the country in which it was committed.

Further, Dutch corporations may be prosecuted for bribery of foreign officials and violating economic sanctions, even if the conduct was not punishable in the country where the conduct took place. In recent years, there have been several cases in which companies were prosecuted in relation to the payment of bribes to foreign officials. In addition, a company may face prosecution for any economic crime committed in the Netherlands, even if the company is incorporated abroad.

The relationship between compliance programmes and corporate criminal liability

The absence of a compliance programme does not, in itself, constitute a basis for criminal liability, though it may be a relevant factor in determining criminal liability of the company – although there is no decisive compliance defence. Enforcement authorities will consider whether the company has taken all reasonable steps to prevent the criminal offence and this assessment will influence the nature and magnitude of a resolution.

Reporting, co-operation, resolutions and penalties

Companies are under no obligation to self-report crimes to the public prosecution department. However, there are certain reporting duties to supervisory authorities in regulated sectors. For instance, Dutch anti-money laundering legislation contains a reporting requirement for suspected money laundering whereby every institution providing designated services is required to report unusual transactions to its supervisory authority. Note that any corporate tax evasion or tax fraud is, in itself, already a specific offence, and almost automatically qualifies as money laundering.

Plea bargaining is not allowed as a matter of strict policy of the Dutch public prosecutor. Matters can, however, be resolved by an out-of-court settlement, at the sole discretion of the public prosecutor.

In recent cases, the prosecutor has publicly signalled that self-disclosure, full-co-operation, remediation and efforts to ensure compliance in the future are factors it will consider when determining the nature and magnitude of a resolution. However there are no public guidelines on what may be expected in return for such co-operation.

With respect to tax offences, in certain circumstances the entity or individual may be able to reduce or extinguish their exposure to criminal sanction if they pro-actively correct the incorrect tax position before he/she/it knows (or should know) that the tax authorities are aware of the issue.

Corporate entities face a number of punishments in the criminal context. The focus is primarily on financial penalties such as fines and the forfeiture of ill-gotten gains. Fines are categorised by offence. The highest category applies only to corporations and is, in principle, no more than €820,000. Nevertheless, if the maximum fine does not constitute a 'suitable' punishment, a fine up to 10 per cent of the annual turnover of the company may be imposed. While the categories of fine do provide a framework, so far there is little guidance on how penalties and disgorgement amounts are calculated.

The enforcement authorities and international co-operation with other prosecutors

The Openbaar Ministerie is the public prosecutor in the Netherlands for all criminal offences. Criminal investigations are executed by the National Police as well as several specialised institutions, most notably the Fiscal Information and Investigation Service (Dutch abbreviation: FIOD). The criminal enforcement and investigative bodies, the Dutch tax authorities, the supervisory authorities (such as the Authority for Financial Markets (Dutch abbreviation: AFM) and the Dutch central bank (Dutch abbreviation: DNB) increasingly take a collaborative approach. Investigations and enforcement are also increasingly thematically organised. The AFM, DNB and the tax authorities may issue administrative fines. A criminal sanction cannot be combined, however, with an administrative sanction (ie *una via*).

'[The company] benefits from the favorable business climate in The Netherlands. The company must adhere to Dutch laws and regulations, also when trading abroad.'

The Dutch Public Prosecution Service when announcing a close to US$400m settlement with a telecoms company to resolve foreign bribery charges

In recent years, the Dutch authorities have increasingly co-operated with law enforcement authorities from jurisdictions around the world. For the Dutch prosecutor, international fraud and corruption have been relatively high on the agenda. In 2016 a major telecoms company entered into a joint settlement of US$795m with US and Dutch authorities in a case involving bribery and corruption.

Other examples of high-profile cases are the US$240m settlement with an oil and gas services company in 2014 in relation to a bribery investigation relating to Equatorial Guinea, Angola and Brazil, as well as the €17.5m settlement with a construction and engineering company in 2012 in relation to suspected bribes in Saudi Arabia. In the latter case, the company's auditors also settled with the Dutch prosecutor for €7m following allegations the firm failed to properly verify the suspicious payments.

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Russia

Corporate liability

In Russia, only individuals may face criminal prosecution for offences listed in the Criminal Code. There is no corporate criminal liability.

However, crimes committed by a company official may lead to various forms of non-criminal liability for the company. For example, corruption offences may lead to both criminal prosecution of the responsible corporate officers and administrative liability for the company under the Russian Code of Administrative Offences. Similarly, tax offences committed by a corporate officer may result in personal criminal liability for the relevant officer along with financial (tax) liability under the Russian Tax Code (however, tax issues are not covered in this guide).

The Administrative Code provides for administrative liability of legal entities for a significant number of criminal offences that may be committed by corporate officers, including for antitrust, environmental, money laundering, exchange and export control, market manipulation, insider trading, consumer protection and other offences.

The basis for corporate liability under the Administrative Code depends on the offence in question. In general, however, the company may be held liable provided the person in question was acting on the entity's behalf. Corporate liability is not limited to the actions of the corporate's top management team.

Companies are not liable for administrative or tax offences carried out by their subsidiaries purely by virtue of the parent company holding shares in the subsidiary.

The relationship between compliance programmes and corporate liability

Article 2.1 of the Administrative Code provides that a legal entity will be liable for an administrative violation only if the legal entity failed to take all possible measures to ensure compliance with the law. Accordingly, an adequate compliance programme may be helpful in mitigating corporate liability for administrative offences. There can be no assurance, however, that the existence of such a programme would be deemed sufficient to prevent corporate administrative liability.

In relation to bribery and corruption offences, legal entities operating in Russia have a positive obligation to implement measures to prevent corruption. The types of measures specified include:

- designating departments or officers responsible for preventing corruption and other offences;
- developing and implementing standards and procedures designed to ensure the bona fide business conduct of the organisation;
- adopting a code of ethics and professional conduct for all employees;
- preventing and resolving conflicts of interest;
- preventing the creation of unofficial accounts and the use of forged documents; and
- ensuring the company co-operates with law enforcement.

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Senior management liability for corporate misconduct

With the exception of the personal liability referred to in the next paragraph, board members or senior management are not, generally, liable for offences committed within their organisations, unless such individuals played a role in the commission of the offence – for example as an instigator, accessory or accomplice. Nor will board members or senior management automatically face any personal liability under the Administrative Code for offences for which their organisation is found guilty.

Article 2.4 of the Administrative Code, however, provides for the liability of members of a board of directors, senior management (CEO and management board) and other specific employees (collectively referred to by the Administrative Code as 'officials' (*dolzhnostnye litsa*)) for a number of offences, such as for failure to satisfy the statutory requirements relating to the retention of corporate documents, the registration of legal entities and the holding of general meetings of shareholders (participants).

Where a manager or an employee is convicted of a crime carried out in the corporate context, Russian law enforcement authorities will often begin administrative proceedings against the company as well.

The main enforcement authorities

Corporate administrative offences are investigated by an authority designated in the Administrative Code. For example, the Central Bank of the Russian Federation investigates insider dealing and market manipulation; the Federal Service of Financial Monitoring investigates money laundering and terrorist financing; the Federal Antimonopoly Service investigates antimonopoly and advertisement offences; the General Prosecutor's Office of the Russian Federation investigates corruption and bribery offences; and the Federal Service for Supervision of Natural Resources investigates environmental offences. Tax offences are investigated by the Federal Tax Service.

Depending on the nature of the offence, the relevant authority either imposes liability by its own out-of-court order (which can be appealed to a court), or brings the case to court.

Potential penalties

If a company is found guilty of an administrative offence it may face a warning, fine, forfeiture of property that was obtained as a result of the offence or used for it, or suspension of its operations – depending on the type of offence in question and its significance.

Fines for different offences may vary significantly. Fines for some offences are fixed or fall within a specific set range. Others are calculated based on related values such as:

- the value of goods or services sold or provided in breach of the applicable law;
- the amount of unpaid taxes, undeclared amounts of money, stamp duties or unlawful currency operations;
- the proceeds from the sale of goods (including services) (such proceeds may be calculated in respect of the calendar year preceding the year in which a relevant offence has been revealed) or the amount of funds spent to obtain such goods in breach of applicable laws;
- the proceeds from the sale of all goods (including services) of the wrongdoer obtained in the calendar year preceding the year in which a relevant offence has been revealed (this penalty is common for antitrust offences);
- the value of a public tender contract or the amount of unlawfully received or spent budget funds; or
- the official value of land, etc.

Although companies found guilty of administrative offences are not generally debarred from public tenders in Russia, companies guilty of an administrative offence stipulated by Article 19.28 of the Administrative Code ('[Payment of] Unlawful Remuneration on Behalf of a Legal Entity') are not allowed to participate in public tenders for a period of two years.

Reporting and co-operation

Companies are under no obligation to self-report offences committed by the company. Nor is there any formal mechanism for companies to disclose violations of the Administrative Code in exchange for lesser penalties.

There is no mechanism for companies to bring administrative proceedings to an end through a settlement or other resolution with the authorities. In determining the penalty to impose, however, courts may take into account the fact that a company voluntarily reported a violation and co-operated with authorities.

Other factors the court may consider in setting the penalty under the Administrative Code include the level of damage caused to the public by the offence; whether the company has voluntarily compensated victims and repaired the damage; whether it is a first or a repeated violation; and whether the company stopped the actions violating the law after the relevant authority issued an order against the company.

International co-operation with other prosecutors

Russia is a party to a number of multilateral and bilateral treaties on international assistance and co-operation in criminal matters, such as extradition and prosecution of liable persons.

However, there have been a number of cases in 2017 where Russian authorities refused to provide information to foreign authorities despite such treaties. For instance, Russian authorities refused to assist the US Department of Justice's investigation of alleged money laundering in connection with a purchase of property.

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Singapore

Companies face general criminal liability under the penal code and other statutes

In Singapore, the definition of 'person' under both the Penal Code (Cap. 224) (PC) and the Interpretation Act includes any company or association or body of persons, corporate or unincorporate. This definition is applied to criminal offences in the PC and in other statutes such as, for example, money laundering under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) (CDSA), and bribery and corruption under the Prevention of Corruption Act (Cap. 241) (PCA).

Corporate criminal liability is based on the identification principle

It is generally accepted that a company being a legal entity cannot act and/or have a mind of its own and must act through living persons. In order for any company to be held liable for an offence, the relevant actions and/or guilty mind required to commit an offence must necessarily be that of a living person who can, also, be held criminally liable for his or her actions. In this regard, Singapore has closely followed English common law and adopted the 'identification principle'.

Under this approach, the illegal acts/guilty mind of a living person may, generally, be attributed to a company such that the company would be regarded as having committed those acts/possessed that state of mind – so long as that person is sufficiently senior in that company's corporate hierarchy. Sometimes described as 'an embodiment of the company' or the 'directing mind and will of the company', those persons include the board of directors, managing directors and possibly other senior officers who carry out functions of management who may, in certain circumstances, be regarded as the company.

Alternatively, should the person not be in a sufficiently senior position to be considered an embodiment of the company, the company may still be liable for an individual's acts if they are 'within the scope of a function of management properly delegated to him' (*Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] SLR(R) 327 (*Tom-Reck*)). This approach has been codified in certain Singapore statutes.

Corporate criminal liability may also be imposed by statute. The English courts previously accepted that corporate liability may also be determined by the purpose and construction of a particular statute, irrespective of who had performed the offending act (known as the Meridian principle). In other words, it is possible to attribute criminal liability to a company even if the individual(s) performing the offending act are not the 'directing mind and will of the company', provided the relevant statute may be construed in that manner. The Meridian principle was approved by the Singapore Court of Appeal in *Singapore Airlines v Fujitsu Microelectronics (Malaysia) Sdn Bhd* [2000] 3 SLR(R) 810 and recently applied by the Singapore Court of Appeal in *Ho Kang Peng v Scintronix Corp Pte Ltd* [2014] 3 SLR 329. However, these cases did not, directly, deal with attributing criminal liability to companies.

Parent company liability

Singapore courts generally recognise the separate legal personality doctrine such that a foreign parent company would, generally, not be liable for the acts of employees at a subsidiary located in Singapore – unless the parent was using the subsidiary as an instrument of crime or otherwise complicit in a material manner.

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Limited criminal liability for acts abroad

The criminal law of Singapore has limited extraterritorial application. Extraterritorial jurisdiction applies for certain more serious crimes, one of which is corruption under the PCA, which extends to acts of Singapore citizens committed abroad.

The relationship between compliance programmes and liability

The presence of an appropriate compliance programme and evidence showing that all reasonable checks and/or inquiries had been made may be a strong mitigating factor in a company's favour when faced with criminal charges.

Main enforcement authorities

The primary criminal prosecution authority in Singapore is the Attorney-General's Chambers (AGC). Some government agencies, such as the tax authority (the Inland Revenue Authority of Singapore), have agency prosecutors embedded within the organisation.

The Monetary Authority of Singapore (MAS) has criminal investigation powers, but criminal enforcement actions arising out of those investigations are generally conducted by the AGC. That said, the MAS is also empowered to deal with civil enforcement matters and may, for example, commence civil penalty enforcement action against those accused of breaching certain rules and regulations set out in the Securities and Futures Act (Cap. 289).

Other examples of agencies with criminal investigation powers include the Singapore Police Force, which consists of specialised departments such as the Commercial Affairs Department that investigates fraud, money laundering, securities and other complex financial crimes, and the Corrupt Practices Investigations Bureau, which falls under the Prime Minister's Office and is the primary agency for bribery and corruption investigations.

No clarity on the extent to which co-operation may benefit a company

From a corporate perspective, there have traditionally been limited, if any, benefits to self-reporting a crime in Singapore. Co-operation once an investigation is underway is often used as a mitigating factor for sentencing, but the amount of benefit is not often clear or predictable. There are no public guidelines on co-operation credit or the extent of co-operation necessary to receive mitigation. That said, failure to report certain crimes may, potentially, be a breach of section 424 of the Criminal Procedure Code (Cap. 68), which sets out a positive duty on a person to give information on wrongdoing and/or misconduct to the authorities in certain limited circumstances. In addition to this, section 39 of the CDSA, in certain circumstances, imposes a duty to disclose knowledge or suspicion that any property represents the proceeds of, or is linked to, 'drug dealing' and/or 'criminal conduct' (as defined in section 2 of the CDSA) to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable.

A move towards alternative resolutions

Singapore does not, currently, have a formal deferred prosecution agreements regime. But in February 2018, the government published draft legislation to amend the Criminal Procedure Code to introduce such agreements. For now, the primary modes for the resolution of criminal investigations against companies are usually a decision not to prosecute the company at all, the issuance of a stern/conditional warning in lieu of prosecution, a composition fine (which, if paid, will not result in any conviction in criminal proceedings) or a criminal charge and prosecution with a fine as a penalty. In December 2017 the Singapore Attorney General announced that, as part of a resolution led by the US DOJ, a Singapore oil and gas services company was served a conditional warning in lieu of prosecution for corruption offences punishable under the PCA and ordered to pay over US$105m to Singapore. In total, the company agreed to a combined penalty of US$422m to resolve charges with authorities in the United States, Brazil and Singapore arising out of a scheme to pay bribes to officials in Brazil. This case represents the first such joint corporate resolution by Singaporean authorities.

Singapore's choice of a conditional warning as a means for imposing such a large voluntary fine is an unusual one. Conditional warnings are a form of prosecutorial discretion and not governed by statute. They have usually included the condition that the offender remain crime free for a period of time or else authorities reserve the right to prosecute the offender for the original offence as well as any fresh charges. It has been assumed that conditional warnings do require the consent and acquiescence of the offender before they may be imposed. Conditional warnings have, at times, included the requirement to pay restitution or to return stolen property, but nothing of the order of the voluntary payment agreed in the co-ordinated settlement with the US and Brazil.

The Singapore Attorney General stated that, in issuing the conditional warning, consideration was given to substantial co-operation, self-reporting to Singaporean authorities (not just US authorities), and the extensive remedial measures taken.

The prescribed penalties for companies depend on the offence (for example under section 44(5) of the CDSA, this can be up to US$1m per offence of assisting another to retain the benefits of criminal conduct).

Singapore prosecutors often co-operate with counterparts abroad

Singapore has been fairly active in co-operating with government agencies from other jurisdictions, primarily because it is a global financial centre with significant cross-border money flows. In this regard, the AGC frequently sends its prosecutors on secondment or attachment trips to overseas prosecuting agencies, such as the US DOJ or the UK's CPS or SFO. Singapore has also received prosecutors from such overseas agencies on integrated assignments. Further, Singapore has recently co-operated with multiple countries in the investigations and prosecutions arising from the 1MDB investigation into allegations of fraud and money laundering related to the Malaysia state development fund. The MAS has also entered into a number of Memoranda of Understanding on co-operation in securities-related investigations, and Singapore recently ratified the Convention on Mutual Administrative Assistance in Tax Matters in 2016. Finally, as noted above, in late 2017 Singapore entered into the first joint corporate resolution alongside US and Brazilian authorities to resolve corruption charges against a Singaporean company.

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South Africa

Broad scope for corporate criminal liability

Companies may face corporate criminal liability in South Africa for a wide range of offences. They may be prosecuted for any crime unless the law specifically limits liability for a particular offence to natural persons.

S.332 of the Criminal Procedure Act No. 51 of 1977 (the CPA) contains express provisions deeming certain acts and omissions of the directors and 'servants' of the company to be the acts and omissions of the company itself. In general, the acts and omissions of a company's directors or 'servants', (i) when exercising their powers or performing their duties or (ii) undertaken in furtherance of the company's interests, are attributed to the company for the purposes of imposing criminal liability on the company for any statutory or common law offence.

Furthermore, it is contemplated under the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PACCA) that any person who conspires with, aids, induces, instructs, commands or counsels another person to commit an offence under PACCA is guilty of an offence. Accordingly, a company may be liable if a director or servant of that company, when exercising their powers or performing their duties in furtherance of the company's interests, instructs or is complicit in a third party's commission of an offence.

The concept of 'wilful blindness' is also contemplated under South African law. Knowledge may be attributed to a person where a person believes that there is a reasonable possibility of the offence having been committed and fails to obtain information to confirm that the offence has in fact been committed. Therefore, a company may not escape liability for the actions of its directors, servants or third parties if there is a reasonable suspicion that an offence has been committed and the company deliberately refrains from making any enquiry to determine whether the belief is groundless, so as to avoid learning anything to confirm it with reasonable certainty.

Whilst there is no definition of 'servant', the term is understood to encompass not only employees, but anyone whose work falls under the company's control. In general, for a company to incur criminal liability, a degree of supervision and control by the company over the relevant individual is required.

In other common law jurisdictions, under the principle of *respondeat superior*, companies will not, generally, be criminally liable for the conduct of individuals acting outside the scope of their duties. In South Africa, however, companies may face criminal liability if an individual commits a crime while acting to further the company's interests, regardless of whether such conduct was within the scope of the individual's duties. This aspect of corporate criminal liability in South Africa poses a particular risk to companies.

As separate legal entities, parent companies will not, usually, face criminal liability for the conduct of their subsidiaries.

Limited extraterritorial application

The general rule is that South African laws do not have extraterritorial application, but there are exceptions. S.35 of PACCA provides for its extraterritorial application in limited circumstances. In terms of companies, if a company performs an act that constitutes an offence under PACCA anywhere in the world but that company is registered under any law in South Africa, a South African court would have jurisdiction over a criminal prosecution of that company.

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The liability of the company is not dependent on the liability of individuals

Both a company and the individuals involved may be prosecuted for the same crime. A company is a legal person without any physical existence and has no mind or will of its own. For this reason, the acts, omissions, intentions, purposes and knowledge of certain individuals within the company are regarded as being the acts, omissions, intentions, purposes and knowledge of the company. However, even if the individuals who committed an offence are not prosecuted in their personal capacities, a company may be prosecuted for the offence. Senior managers, directors and officers will face criminal liability only if they were complicit in wrongdoing.

The enforcement authorities

While a number of entities may investigate corporate crime in South Africa, most such investigations are led by specialised units within the South African Police Service, most notably the Directorate of Priority Crime Investigation (known colloquially as the 'Hawks') and the commercial crimes unit, which focus on the investigation of sophisticated economic offences. The National Prosecuting Authority (NPA) is empowered to institute and prosecute criminal proceedings on behalf of the state. The Special Investigating Unit (a specialised unit constituted by legislation) and the Asset Forfeiture Unit (a specialised unit established within the NPA) may also become involved in corporate criminal investigations. However, the capacity of the South African Police Service to investigate sophisticated white-collar crime and the perceived lack of independence of the Hawks as an anti-corruption agency remain significant obstacles in the investigation and ultimate prosecution of corporate crime in South Africa.

In addition to the Police Service, certain other regulatory bodies may refer criminal matters to the NPA. These include the Financial Services Board (the non-banking financial services regulator) and the South African Reserve Bank (responsible for banking regulation).[1] Following such a referral, the regulators may assist the NPA in building its case – particularly given the complex and specialised nature of some financial crimes and the fact that the referral may have been preceded by an in-depth regulatory investigation. The Financial Intelligence Centre also assists the Police Service and the NPA in the identification of the proceeds of unlawful activities, combating money laundering activities and the financing of terrorist and related activities, and by providing financial intelligence for use in the fight against crime.[2]

The Competition Commission and the Competition Tribunal are two other, highly active, enforcement authorities that (i) conduct investigations into unlawful corporate conduct, including cartel conduct and restrictive business practices; and (ii) determine the punishment for these offences. The Competition Commission has various powers, including the power to raid premises and search for and remove information pursuant to a warrant or, in limited circumstances, without a warrant. In a highly publicised investigation, the Competition Commission has recently charged 14 banks operating in South Africa (including local and international banks) with collusion relating to direct and indirect price-fixing in respect of spot trades between the US dollar and the South African rand.

1. It must be noted that the South African government has recently passed the Financial Sector Regulation Bill, in terms of which the Financial Services Board will be replaced with two new regulatory authorities, namely the Prudential Authority and the Financial Sector Conduct Authority. At the time of publication, the South African government has not published the relevant notice in the *Government Gazette* providing the proclamation date for the new legislation to take effect.
2. The Financial Intelligence Centre Amendment Act No. 1 of 2017 was recently signed into law by the president of South Africa. The amendments have increased the obligations of accountable institutions under the Financial Intelligence Centre Act No. 38 of 2001, particularly within the sphere of (i) such institutions' dealings with 'domestic prominent influential person[s]' (as defined) or 'foreign prominent public official[s]' (as defined); and (ii) in the case of determining beneficial ownership behind companies and trusts. Certain of these amendments took effect on 13 June 2017, while other amendments took effect on 2 October 2017.

Self-disclosure of violations and co-operation may count towards mitigation

No formal mechanism exists for a company to receive a reduced penalty as a result of its disclosure of criminal violations and co-operation with authorities. But 'self-disclosure' and a willingness to co-operate may be recognised by the courts as grounds for mitigating any sentence in the event the company is found guilty of a crime.

Further, the Competition Commission has implemented a corporate leniency policy, pursuant to which a corporation involved in cartel conduct may self-report in return for immunity. Immunity is only available to the first cartel member that approaches the Competition Commission. In the investigation by the Competition Commission into collusion surrounding spot trades between the US dollar and the South African rand mentioned above, the Competition Commission excluded one of the banks that was allegedly involved as it blew the whistle on the traders' alleged actions.

Directors and senior management's duty to report economic crimes

One aspect of South African criminal law that companies, including multinationals with entities registered in South Africa, should keep in mind is the duty to report arising under s.34 of PACCA. The law applies to persons in a 'position of authority', including directors and managers of companies. It requires any such person who knows or suspects, or ought to know or suspect, that another person has committed any of the offences of corruption, theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100,000.00 or more, to report the matter to the Directorate of Priority Crime Investigation within the Police Service. While the law has rarely been enforced to date, an individual obliged to make such a report who fails to do so may be liable for a fine or imprisonment for up to 10 years.

The Financial Intelligence Centre Act No. 38 of 2001 (FICA) also creates an obligation to report suspicious and unusual transactions to the Financial Intelligence Centre.

These reporting obligations can create a potential area of conflict between a company and its directors when allegations of economic crime arise within a company. It may be in the company's interests to investigate any allegations internally before any approach is made to the authorities. Individual directors, however, may prefer to report the matter at an early stage to protect against any allegation they failed to report their suspicions. In investigating allegations of economic crime within a company, corporate counsel should be prepared to help manage this potential conflict.

These reporting obligations can create a potential area of conflict between a company and its directors when allegations of economic crime arise within a company.

Companies face fines and, when convicted of corruption, they may also face debarment from public contracts

Companies may negotiate plea and sentencing agreements with prosecutors (s.105A of the CPA). Such plea bargains, however, are subject to judicial supervision and approval, and the court is under an obligation to examine the veracity of the plea and sentencing agreement. Deferred prosecution agreements do not exist in South Africa.

Fines and, in certain circumstances, the confiscation and forfeiture of assets are the only forms of punishment courts may impose on companies found guilty of a crime. The size of the fine depends on the nature and scope of the crime and the existence of aggravating and mitigating factors (such as co-operation with the investigation). Legislation also imposes

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restrictions on the extent of the fine that may be imposed. The company may raise other factors in mitigation, such as the strength of its compliance programme at the time of the criminal conduct, as well as improvements made to the compliance environment after discovery of the misconduct. The weight accorded to such arguments will depend on the specific circumstances of the case.

Where a company is convicted under PACCA, details of the company's particulars and its conviction are entered in the Register for Tender Defaulters. Information about any director, manager or other person in a position of control within the company who was involved in the offence (or knew or ought reasonably to have known or suspected the company was involved in such an offence) may also be entered in the register. Once this information has been entered, government departments are prohibited from entering into new business relationships with the company or individual for a period of up to 10 years (as determined by the National Treasury after a court has ordered that the register be endorsed) and they may terminate any existing relationships.

International co-operation

South Africa is a party to several bilateral and multilateral agreements aimed at facilitating co-operation with foreign counterparts on criminal investigations and prosecutions, and it has enacted a comprehensive domestic legal framework to give effect to those agreements and generally to facilitate the investigation and prosecution of unlawful conduct. The International Co-operation in Criminal Matters Act sets out the basis for South Africa's co-operation with foreign states on the provision of evidence, the execution of criminal sentences and restraint orders in South Africa, and the confiscation and transfer of the proceeds of crime. Such co-operation is offered on a reciprocal basis. South Africa has also entered into treaties on mutual assistance in criminal matters with a number of countries, and has, in the past, acceded to requests for such mutual assistance from countries with which it has no treaty.

Increased enforcement of the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act has had a significant impact on South African companies doing business abroad and global companies doing business in South Africa. In the first-ever deferred prosecution agreement under the UK Bribery Act, a former London branch of a South African bank agreed to pay nearly US$33m in penalties in an alleged bribery scandal involving a sister office of the bank based in Tanzania, where certain executives of the sister office had allegedly bribed Tanzanian government officials to secure a bond mandate.

In the first FCPA enforcement action relating to alleged misconduct in South Africa, a Japanese conglomerate agreed to pay US$19m to settle charges that it violated the FCPA when it inaccurately recorded improper payments to a politically connected front company for South Africa's ruling political party, in connection with contracts to build two multibillion-dollar power plants involving its South African subsidiary.

These examples of legislation with extraterritorial effect, along with the recent amendments to FICA, may well result in an increased focus on international co-operation within South Africa.

Increased enforcement of bribery and corruption laws in other countries, like the UK and US, has had a significant impact on the way companies do business in South Africa.

Spain

Corporate criminal liability a relatively new concept

Spain is a relative newcomer to corporate criminal liability, with the concept having first been introduced into the Criminal Code in 2010. Since then, the law has been amended by Organic Law 1/2015 to emphasise the importance of the exercise of 'due control' (or lack of such control) over the company's employees in establishing corporate criminal liability.

Companies may be held liable in Spain for certain business-related crimes committed for the company's direct or indirect benefit. They are liable for such crimes committed (i) in the name or on behalf of the company, for its direct or indirect benefit, by its legal representatives or persons otherwise entitled to make decisions on behalf of the company – whether that is individually or in a committee; and (ii) on behalf of the company, for its direct or indirect benefit, by anyone else who commits a crime in the performance of their corporate duties, where that person was able to commit the crime because management grossly breached its duties of supervision and control.

Companies cannot be held criminally liable for any crime – only those listed in the Criminal Code. The list includes economic crimes such as cartels and criminal anti-competitive behaviour, corruption, money laundering, tax fraud, securities fraud, market manipulation and insider trading. And the code extends corporate criminal liability to other kinds of business-related crime, such as environmental crimes, crimes related to intellectual and industrial property, and urban planning offences.

Where the alleged misconduct took place outside of Spain, prosecutors may prosecute companies with a registered office in Spain for certain offences (such as corruption) – if the crime was allegedly committed by the entity itself or by an executive, director, employee or collaborator of such entity.

If a company can show that it had a suitable compliance programme in place, it may escape criminal liability

The law providing for such a defence operates differently depending on who committed the crime.

Where the crime was committed by an employee or someone under the control of the directors, the company may escape liability if it can show it adopted and effectively implemented a compliance programme to address the risk at issue.

Where the crime was committed by one of the company's legal representatives or by someone who is otherwise entitled, alone or with others, to make decisions on behalf of the company, the compliance defence is similar. The company may escape liability if it can show it had adopted and implemented an adequate compliance programme (ie control and monitoring procedures to prevent or significantly reduce the risk of the crime in question occurring). But it must also show that:

- a person or body with independent supervisory powers was authorised to oversee the programme (eg a compliance officer or an independent committee);
- that person or body did, in fact, sufficiently carry out their supervisory functions; and
- the individuals who carried out the offence wilfully disregarded the programme.

For the defence to succeed, the compliance programme must have been in place before the crime was committed and should contain:

- a risk assessment identifying the activities covered by the programme;
- standards and controls to mitigate the criminal risks detected;
- financial controls to prevent crimes;
- an obligation to report any violations of standards and controls through a whistleblowing channel;
- a disciplinary system to sanction violations of the programme; and
- reviews of the programme on a periodic basis and also following serious violations or organisational, structural or economic changes to the company.

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Even if all the conditions are not satisfied so as to avoid liability altogether, a compliance programme may still be relevant to the question of mitigation and help a company obtain a lesser penalty.

Individual liability

Both the company and an individual may be convicted of the same crime in relation to the same misconduct. But one does not depend on the other — a company may be found guilty of an offence even if no individual is convicted. Board members and senior management are not automatically liable for crimes committed by the company. For certain crimes, however, they may face personal liability if the misconduct occurred as a result of their serious negligence.

The enforcement authorities

Corporate criminal investigations are generally conducted by the Public Prosecutor's Office. In some cases, investigations are started by other government bodies (eg the tax authorities), but these investigations are stayed and the matter referred to the Public Prosecutor's Office whenever such bodies suspect a criminal offence has occurred.

Self-reporting and co-operation may act as mitigating factors on sentencing

If a company admits a crime before an official investigation has begun, that fact will be considered as a mitigating factor under article 31 quarter of the Criminal Code, which may lead to a reduced penalty. How a company conducts itself once an investigation has commenced may also affect the penalties it faces. The other mitigating factors listed under article 31 quarter of the Criminal Code focus on co-operation, remediation and improved compliance to prevent and detect offences.

Under article 259 of the Spanish Criminal Procedure Act any person with knowledge of a public crime (such as bribery) is obliged to report it to the authorities. This obligation extends to professionals such as external auditors, but not to lawyers. In practice, the sanctions imposed for the breach of this obligation are minimal.

No DPAs or formal plea bargaining, but some negotiation may be possible

While Spanish law does not recognise formal plea bargaining, companies may negotiate with the prosecutor to resolve a matter through a guilty plea. There is no concept of deferred prosecution agreements in Spanish law. Where a company is found guilty of a crime, the court must (with only a few exceptions) impose a fine.

Penalties include fines and a range of other consequences

In determining the fine to impose, the court will take into account the effect the fine will have on employees, creditors, shareholders and bond holders, as well as the survival of the company. The fine must serve as a deterrent and is calculated by reference to a daily amount, which ranges from €30 to €5,000 per day. The minimum fine is 10 days and the maximum fine (for companies) is five years. If specifically provided for in relation to the relevant offence, the court may also calculate the fine as a 'proportional fine', determined by reference to the damage caused, the value of the criminal product or the benefit obtained by it. After assessing the severity of the offence and taking into account aggravating and mitigating factors, the court will either apply a daily amount to the severity level or calculate the proportional fine. The court must also take into account the amount of any fines imposed on individuals when calculating the company's fine (and vice versa), although there is no obligation to offset or reduce the company's fine on this basis.

In addition to fines, companies could face other penalties under article 33.7 of the Criminal Code, including:

- the dissolution of the company;
- a suspension of the company's operations for up to five years;
- a closure of the company's premises or facilities for up to five years;
- a temporary (ie up to 15 years) or even a definite prohibition on carrying out future activities that may be related to the crime in question;
- disqualification from receiving public subsidies or debarment from entering into public contracts for up to 15 years; and
- court intervention in the company's business for up to five years.

Criminal liability of a company will also involve joint and several civil liability with the individuals convicted of the same crime. This liability provides for restitution and requires the company to repair any damage caused by the misconduct in question and to pay compensation for damages.

In 2017, Spanish prosecutors secured their first convictions for bribery of a foreign official. The proceedings against two executives of a Spanish company for paying bribes in Equatorial Guinea did not involve the company (the misconduct took place before corporate criminal liability was introduced). Even so, this is a wake-up call for Spanish companies that anti-corruption prosecutors are willing to investigate and prosecute foreign bribery.

Rafael Murillo, Partner, Madrid

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Corporate criminal liability focuses, in general, on economic crimes and the company's failure to prevent such crimes

Under Swiss law, corporate criminal liability arises only in a limited set of circumstances. Broadly, there are two bases for corporate criminal liability.

First: where a crime is committed in the exercise of a business activity and, due to 'a deficient corporate organisation', the acts in question cannot be attributed to a specific individual, the company may be held criminally liable for the crime. The punishment is a fine of up to CHF 5m (approx US$5.2m). (Article 101(1) of the Swiss Criminal Code.)

Second: a company may be held criminally liable if it failed to take all necessary and reasonable organisational measures to prevent certain crimes from occurring – this is irrespective of whether or not the liability can be attributed to an individual. The listed crimes include terrorist financing, active bribery of a Swiss or foreign official, bribery in the private sector and money laundering. The offence, therefore, punishes a company for not having an adequate compliance framework in place; conversely, having a sufficient framework acts as a defence. As the law does not provide further guidance on what constitutes 'necessary and reasonable organisational measures', the prosecuting authorities take available international good practice standards into account. Swiss jurisdiction usually exists whenever a group's parent company is domiciled in Switzerland (regardless of whether the compliance failure occurred at a foreign subsidiary) or if the compliance failure occurred in Switzerland. (Article 101(2) of the Swiss Criminal Code.)

Some extraterritorial jurisdiction for economic crimes committed abroad where perpetrator is in Switzerland

Generally, Swiss authorities have jurisdiction to prosecute crimes committed in Switzerland or those that have an impact in Switzerland. In addition, Swiss jurisdiction extends in certain circumstances to economic crimes committed outside the jurisdiction where the perpetrator is in Switzerland.

In theory, this provides Swiss prosecutors with broad jurisdiction to prosecute economic crimes committed abroad. In practice, given most of the evidence may be in the jurisdiction where the act was committed, it can be difficult for the Swiss authorities to prosecute crimes committed abroad. For this reason, the Swiss authorities will often opt to prosecute related offences where the act took place in Switzerland. For example, rather than prosecute foreign bribery, the Swiss authorities may investigate and prosecute money laundering committed in Switzerland or compliance failures that had their effect in Switzerland, for example those failures committed in Switzerland that led to money laundering or foreign bribery.

Forfeiture proceedings may also take place in Switzerland, even where the underlying offence occurred abroad.

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Senior managers will only be liable if they, too, are culpable

The criminal liability of the company does not, in itself, lead to criminal liability of directors or other senior managers. The criminal liability of individuals is determined independently of that of the company and will depend on the individual's own culpability, including the individual displaying the requisite intent to carry out the offence or his/her intentional failure to prevent it from being committed by an employee he/she is responsible for.

The enforcement authorities have a renewed interest in pursuing companies

Investigations may be started by the police or the public prosecutor. For large, multinational corporate investigations, the main prosecutor is often the Office of the Attorney General (the OAG).

In principle, the authorities are under a statutory duty to prosecute both the individual and the company, where possible. In practice, however, the authorities have, in the past, largely focused on prosecuting individuals, even where it may also have been possible to mount a self-standing prosecution against the company under the second limb of corporate criminal liability. But, in recent years, there has been a shift in attitude with prosecutors displaying a renewed interest in pursuing companies, where possible. This mainly concerns large-scale international investigations where bribery or money laundering offences took place in Switzerland. Very frequently, a key focus of these proceedings is the confiscation and return of proceeds of foreign crimes.

No concept of deferred prosecution agreements but there is the possibility of limited de facto plea bargaining

Deferred and non-prosecution agreements do not exist under Swiss law. In theory, therefore, if the prosecutor is aware of the commission of a crime, it must prosecute it. Although, given workloads, the prosecutors will be selective in the cases they pursue.

Plea bargaining has existed in Switzerland on a de facto basis for many years, with prosecutors willing to negotiate with the accused to resolve the matter by way of a summary penalty order, without the need for a full trial. As the content of these penalty orders is agreed with the accused beforehand, they are, in practice, not subject to a review by the courts.

Benefits of self-reporting and co-operation exist, but they are difficult to calculate

Swiss courts have traditionally been willing to agree reduced penalties for those defendants who confess and co-operate in the investigation. But there are no formal rules governing such discounts on penalties so it can be difficult to assess, at the outset, the likely impact of such co-operation on the penalty to be paid. Further, being co-operative will not help a company avoid a prosecution that would otherwise take place. Co-operation is only relevant to the question of the level of penalty rather than to the question of whether or not the prosecutors will charge the company in the first place.

Cartel law, however, is a notable exception where the impact of self-reporting and co-operation is more clearly defined in the regulations.

No formal sentencing guidelines exist, but courts will take into account aggravating and mitigating factors when assessing penalties

Under Swiss law, there are no binding sentencing guidelines or rules – so the court has considerable discretion in determining the amount of the fine. Apart from being fined, there is a risk any proceeds obtained from a crime obtained by a company may be confiscated or have to be repaid. In practice, the confiscation amount can by far exceed the actual fine. In addition, convicted companies may, indirectly, face non-criminal consequences of a conviction, such as exclusion from tenders, cross-debarments, etc.

In determining the level of penalty, the courts will usually take into account the gravity of the infringement, whether the company could have done more to avoid the commission of the offence (ie the gravity of its organisational/compliance failings), whether a compliance programme was missing entirely or only slightly deficient, the level of damage caused and the company's capacity to pay the fine.

As noted above, co-operation in the investigation and self-reporting are mitigating factors that may be taken into account at the sentencing stage. In a recent case where the company self-reported and co-operated in an exemplary manner, the OAG essentially limited the sanction to the confiscation of illegal profits and a purely symbolic fine. Other mitigating factors include if there have been any attempts to repair the harm caused or improve the company's compliance procedures.

Swiss authorities generally supportive of cross-border criminal investigations

Switzerland is a member of many international treaties on cross-border co-operation in criminal matters. In addition, the International Legal Assistance in Criminal Matters Act governs the Swiss approach to co-operation with states with which it has no treaty. In general, the Swiss authorities are supportive of legal assistance requests in criminal matters. Given Switzerland's relevance as a financial centre, the Swiss prosecuting authorities are particularly experienced in seizing assets by means of legal assistance proceedings. The Swiss courts exercise considerable restraint when it comes to reviewing the authorities' activities.

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Companies face criminal liability for a broad range of offences

Companies can be held liable for a wide range of criminal offences in the UK, including but not limited to economic crimes such as market misconduct, bribery and fraud. This is separate and apart from any liability a company may face in connection with civil or regulatory proceedings. Even so, the ease with which a prosecutor can secure a successful conviction will often depend on establishing that at least one sufficiently senior individual was complicit in the wrongdoing. However, certain new corporate offences, introduced within the last seven years, have moved away from this model to a failure to prevent form of corporate criminal liability (explained below) in relation to bribery and the facilitation of tax evasion. And, in the future, potential legislative changes now being considered may result in more economic crimes being modelled in this way.

The basis for liability depends on the nature of the offence

Corporate criminal liability in the UK can be established either under a statutory framework or pursuant to the common law principles of the identification principle and vicarious liability:

- **Liability under statute –** There are a number of statutes that expressly create criminal liability for companies in relation to certain offences. For example, under section 7 of the Bribery Act 2010, companies can be prosecuted for failing to prevent bribery when a person associated with the company engages in bribery on the company's behalf to obtain or retain business or a business advantage. (This is a strict liability offence, subject to the defence of having adequate procedures in place to prevent bribery, as explained below.) Other offences for which a company may be liable under statute include corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007 and the new offences of failure to prevent the facilitation of evasion of UK or foreign tax under the Criminal Finances Act 2017, which came into effect on 30 September 2017.
- **Liability arising from the 'identification principle' –** In the case of an offence requiring the element of *mens rea* (ie the intention or knowledge of wrongdoing), a company can be prosecuted if the facts satisfy the 'identification principle'. Under this principle, a company may be liable if at least one sufficiently senior individual who can be regarded as the company's 'directing mind and will' has the relevant criminal intent, which is then imputed to the company. The 'directing mind and will' of a company is generally (but not always) the company's directors or senior managers close to the board level. Senior prosecutors in the UK have noted the identification principle can make it difficult to establish corporate liability in practice, particularly in relation to large companies with complex management structures.
- **Vicarious liability –** In some circumstances, a company can be prosecuted for the unlawful acts of its employees or agents even if they are not regarded as the company's 'directing mind and will'. This type of vicarious liability usually applies in the case of strict liability offences, where no *mens rea* element is required. For example, many traffic offences fall within this category in that they do not require intention, recklessness or negligence or any other express intent. This kind of corporate criminal liability is most common in the context of an employment relationship (when an employer company could be prosecuted for strict liability offences committed by its employee if there is a sufficient connection between the criminal conduct and the employment).

In most cases, prosecutions will be commenced against both the company and individuals responsible for an offence. A company can be prosecuted, however, even if no cases are brought against individuals.

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Parent companies are not, generally, criminally liable for the acts of their subsidiaries

Under English law, the liability of a parent company and that of its subsidiary are, as a general principle, regarded as separate and distinct. The acts of a subsidiary (even if wholly owned) will generally not be directly attributable to the parent company solely by virtue of the holding relationship. In certain circumstances, however, such as in the case of fraud, English courts are willing to 'pierce the corporate veil' and hold parent companies responsible for the acts of their subsidiaries. In addition, under some statutes, a parent company could be prosecuted for the acts of its subsidiary. For example, if a foreign subsidiary commits bribery to obtain a business advantage for its parent, the parent company could be held liable for failing to prevent bribery under section 7 of the Bribery Act 2010 – provided the foreign subsidiary is an associated person of the parent (ie it performs services for or on behalf of the parent). Similar extended liability can apply in relation to the failure to prevent the facilitation of tax evasion under the Criminal Finances Act 2017, although in that case there is no need for the defendant company to benefit (or be intended to benefit) from the actions of the associated person.

'The enforcement environment in the UK has transformed in the past decade. In 2007/08 the SFO referred to two companies of size in its annual report of ongoing cases. By the start of 2018, there were close to 20 companies of size referred to in its public list of ongoing cases.'

Companies may be prosecuted for certain overseas conduct

Generally, prosecutorial agencies in the UK are only able to enforce against corporate wrongdoing committed within the jurisdiction. But for certain types of offence, companies can be prosecuted for overseas conduct. For example, one of the important aspects of the Bribery Act 2010 is its extraterritorial reach. The statute applies to any company that carries on a business or part of a business in the UK, even if the acts of bribery take place wholly outside of the UK and the company is predominantly active outside the UK.

The offences of failure to prevent the facilitation of tax evasion under the Criminal Finances Act 2017 similarly have extraterritorial application. Where there is facilitation of a UK tax evasion offence, any relevant body is in scope. Neither of the predicate offences nor the organisation's acts or omissions need to take place in the UK.

Where there is facilitation of a foreign tax evasion offence, a company is a potential defendant if it is incorporated or formed in the UK; it carries on a business or undertaking (or part of one) in the UK (although note there need be no nexus between the UK business and the facilitation); or any act or omission constituting part of the offence takes place in the UK.

For offences such as false accounting, forgery or cheating the public revenue, for example, the criminal courts may have jurisdiction if any element of the alleged offences took place within the jurisdiction.

Compliance programmes may be relevant to the question of whether a prosecutor presses charges

Under the criminal law, companies have no general obligation to maintain compliance programmes. In relation to money laundering and sanctions, however, certain statutes impose obligations on businesses in what is known as the regulated sector (eg financial institutions, audit, accounting, legal and tax advisers, trust company service providers, etc) to establish appropriate compliance policies and procedures.

Further, a compliance-based defence can be available for certain corporate offences. For example, it is a complete defence to the offence of failure to prevent bribery under section 7 of the Bribery Act 2010 if a company can show that, at the time of the criminal conduct, it had adequate procedures in place designed to prevent bribery. A similar defence of having 'reasonable procedures' is available in the case of the failure to prevent the facilitation of tax evasion pursuant to the Criminal Finances Act 2017.

'In the context of a criminal investigation, when prosecutors are looking at a company's compliance, or its efforts to fix any compliance issues identified during an investigation, much of the focus will be on questions of culture and tone from the top rather than simply procedures.'

Matthew Bruce, Partner, London

Even if the existence of a compliance programme does not amount to a complete defence against criminal liability, the existence of a genuinely proactive and effective compliance programme is a factor in a prosecutor's assessment of whether it would be in the public interest to pursue a prosecution against the company. The existence of such a programme is also a factor prosecutors consider in determining whether it is appropriate, and in the public interest, to offer a company a deferred prosecution agreement (DPA). And in either a prosecution or a DPA, the quality of a company's compliance programme is most likely to be an important factor when calculating the financial sanction.

Criminal investigations into companies may be started by a range of authorities

The main prosecuting authorities in the UK in relation to corporate crime are the Director of Public Prosecutions (as head of the Crown Prosecution Service (CPS)), the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA). Other authorities with investigative powers in relation to corporate crime include Her Majesty's Revenue and Customs (the UK tax authority (HMRC)) and the National Crime Agency (NCA), with any prosecutions arising from those investigations being carried out by the CPS.

The SFO has the power to carry out intelligence gathering, initiate investigations, and prosecute cases of complex fraud and bribery and corruption. The SFO's cases are increasingly high profile and have involved a number of large multinational companies.

The NCA is a government department with responsibility for tackling serious and organised crime in the UK. The NCA's Economic Crime Command co-ordinates with the SFO and FCA, and it is the UK's financial intelligence unit and central authority for receiving suspicious activity reports in connection with suspected money laundering or terrorist financing. Unlike the SFO, the NCA does not have its own powers of prosecution.

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Investigations carried out by the police, the NCA or HMRC are then prosecuted by the Director of Public Prosecutions (as head of the CPS). The FCA not only regulates the financial services industry but it is also responsible for policing the market and may bring criminal prosecutions against listed companies – for example in relation to market abuse.

For the offences of failing to prevent the facilitation of tax evasion, the investigating and prosecuting authority will depend on the nature of the tax allegedly evaded. For UK tax, HMRC will investigate and the CPS will prosecute. For overseas tax, the SFO may investigate and prosecute.

The Competition and Markets Authority has joint responsibility with the SFO for the investigation and prosecution of individuals for the cartel offence under the Enterprise Act 2002.

Reporting and co-operation

Even if a company does not have mandatory reporting obligations (such as those applying to regulated entities under the Proceeds of Crime Act 2002), it may still be in the company's interests to self-report suspected offences and to co-operate with enforcement authorities in any subsequent investigations.

The Deferred Prosecution Agreement Code of Practice, a binding code issued jointly by the heads of the SFO and the CPS, states that 'considerable weight' will be given to a 'genuinely proactive approach' by the corporate's senior management after they learn of the misconduct. A timely report, however, is not, in itself, sufficient to meet this standard.

The SFO has stated that co-operation will be considered by reference to all the circumstances, including the company's broader attitude to the investigation. Aside from early self-reporting, factors that indicate co-operation by the company could include facilitating access to witnesses and voluntarily disclosing materials to which the SFO might not, otherwise, have had access (including providing interview notes on a limited waiver of privilege basis, which is permitted under English law).

In evaluating co-operation, the SFO, in particular, has adopted an increasingly sceptical approach to internal investigations conducted by companies. Among other things, the SFO has discouraged companies from interviewing witnesses and handling evidence without first consulting with it.

Potential outcomes: resolutions and penalties

If there is sufficient evidence that there is a realistic prospect of convicting a company upon investigation, the prosecutor must consider whether it would be in the public interest to do so. Successful prosecutions can result in penalties being imposed on the company, such as the payment of fines and compensation to victims, the imposition of confiscation orders to disgorge companies of the proceeds of crime, and debarment from public procurement.

In 2014, DPAs were introduced into English law as an alternative to corporate prosecution. They are not available to individuals and are only available in respect of certain specified economic crimes.

Similar to their US counterparts, a UK DPA provides for a deferral of prosecution in exchange for the company fulfilling certain conditions, which could include payment of significant fines and disgorgement of profits, and other measures such as a review of a company's compliance programmes and the implementation of monitorships and other ongoing compliance measures. DPAs may be offered to companies by the Director of Public Prosecutions and the Director of the SFO on a discretionary basis, but (unlike in the US) court approval is required before any such agreement becomes effective. This oversight is something the English courts take seriously, and this level of oversight is a material distinction from the US system.

Voluntary self-reporting and co-operation may increase the chances of a more favourable outcome for a company. They can be taken into account as mitigating factors in any subsequent prosecutions, potentially leading to reduced fines and sanctions. They may even weigh against the decision to take further investigative or enforcement action. And in the context of DPAs, English courts may be willing to approve substantial discounts on financial penalties for self-reporting, full disclosure and co-operation with the relevant authorities. In one case, the 'extraordinary' levels of co-operation demonstrated by the company resulted in a 50 per cent reduction in its financial penalty.

UK authorities regularly co-operate with counterparts abroad

The UK is party to a significant number of multilateral and bilateral mutual legal assistance treaties, pursuant to which enforcement authorities can request assistance in gathering evidence. In recent cases the SFO has used mutual legal assistance requests to gather evidence and co-ordinated with prosecutors abroad who were conducting parallel investigations. A resolution was reached, for example, in co-ordination with the US and Brazilian prosecutors.

Outside of the formal process, there is a sense that the mode of co-operation is shifting – communications and the sharing of intelligence between enforcement authorities in the UK and abroad are becoming increasingly informal and flexible. While enforcement authorities in each country retain their own jurisdiction to investigate and prosecute offences, it would be prudent to assume that information known to UK authorities is likely to be shared with others and that UK authorities will be informed of reports elsewhere that may be of interest to them.

Growing use of the criminal law in the corporate context and the possibility of even broader corporate criminal liability in the future

In 2017 alone, the government introduced (i) two new corporate offences for failing to prevent the facilitation of UK and overseas tax evasion; (ii) a new corporate offence for contravening a requirement under the Money Laundering Regulations 2017; and (iii) a new offence, applicable to certain large companies and limited liability partnerships, for failing to report their payment practices.

Further, in early 2017, the government set out a call for evidence on the reform of corporate criminal liability laws, following criticism that the current regime (including the application of the 'identification principle') has made it too difficult to hold companies criminally liable for most economic crimes. This move follows a trend towards the introduction of 'failure to prevent' type corporate offences, like those in the Bribery Act 2010 and the Criminal Finances Act 2017. The call for evidence outlined five possible models for reform, and invited submissions on questions such as whether a new corporate offence of failing to prevent economic crime was appropriate and whether any new offence should be extraterritorial. While the scope of any proposed change to the law is still unclear, as is the timing, this may be the first step towards significant changes to the existing regime.

Looking ahead, it is difficult to foresee the impact that the UK's withdrawal from the European Union (which is expected by March 2019) might have on corporate criminal law and enforcement in the UK. While no significant legislative changes have yet been proposed, areas that could potentially be affected include the mode of international co-operation between the UK and the European Union member states (for example in relation to the use of the European Arrest Warrant and the mutual legal assistance procedures).

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Broad scope for corporate criminal liability

Under principles of *respondeat superior*, a corporation may be held criminally responsible for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the corporation. A corporation is liable for the criminal conduct of its agents even if such actions were against corporate policy or express instructions. Although seldom used as a basis for prosecution, courts have also recognised a doctrine that imputes to the corporation the collective knowledge of all its employees where no individual employee possesses the requisite knowledge to commit a criminal offence.

Any employee or contract personnel can incur liability on behalf of a corporation – a director, officer, or other high-level personnel need not be liable. At the same time, corporate liability does not shield officers and directors from individual liability. While no individual need be convicted in order for a company to face liability, there is an emphasis on individual accountability in the US.

A parent company may also be liable for its subsidiary's conduct under agency principles. In assessing such liability, law enforcement authorities evaluate whether the parent controls the subsidiary, including through knowledge and direction of the subsidiary's actions. If an agency relationship exists, the criminal conduct of the subsidiary can be imputed to the parent. Additionally, when a company merges with or acquires another company, the successor company assumes the predecessor company's liabilities, including criminal liabilities. US enforcement authorities, however, have declined to take action against companies that conducted comprehensive pre-acquisition due diligence and, where issues were identified, voluntarily disclosed and remediated conduct.

A corporation can be held criminally liable for any offence committed by its agents, so long as Congress has not explicitly exempted corporate entities from liability under a particular statute. The most common corporate prosecutions in the US are for Foreign Corrupt Practices Act (FCPA), fraud, money laundering, sanctions, export control, healthcare, tax, antitrust and environmental offences.

US corporate prosecutions may relate to conduct abroad

Corporations can be prosecuted in the US even where most of the criminal conduct was committed abroad. But the extent to which this is so depends upon the offence at issue.

The FCPA's anti-bribery provisions, for example, apply to the worldwide operations of (i) US issuers – companies with securities listed on an exchange in the US or that are required to file periodic reports with the US Securities and Exchange Commission (SEC); and (ii) domestic concerns – corporations organised under the laws of the US or its states or that have their principal place of business in the US where they use any means of interstate commerce (such as an email or telephone call or using the US banking system) in furtherance of a corrupt payment to a foreign official, even if the payment itself and much of the scheme occurred outside the US. Other non-US companies may be subject to the FCPA if they carry out 'any other act' in the US in furtherance of such corrupt payments to foreign officials, or if they aid, abet, conspire with or act as agent for a US issuer or domestic concern in relation to such corruption.

In the LIBOR cases, banks were prosecuted in the US for fraud based on conduct by bank employees in London and elsewhere that involved electronic funds transfers or communications in the US. And foreign banks have been prosecuted in the US for violating US economic sanctions by processing US dollar transactions between foreign countries through the US financial system.

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Relevance of compliance to decisions on corporate prosecutions

Corporate compliance programmes are a key aspect of corporate criminal liability in the US. While the existence of an effective compliance programme is a factor authorities consider in determining the nature and magnitude of corporate resolutions, there are some criminal offences in the US for failing to maintain adequate compliance programmes. For example, the FCPA includes an 'internal controls' provision that requires issuers to maintain a system of internal accounting controls sufficient to assure management's control, authority and responsibility over the firm's assets. US enforcement authorities have described an effective compliance programme as a 'critical component' of an issuer's internal controls. The FCPA provides criminal penalties for internal controls violations. And the failure to maintain an effective anti-money laundering programme is a felony offence, with several prominent corporate resolutions for violations of this provision in recent years.

Prosecutors emphasise importance of individual liability

Guidance issued by US Department of Justice (DOJ) leadership in September 2015 emphasises the importance of individual accountability as one of the most effective ways to combat corporate misconduct. The guidance, referred to as the 'Yates Memo' after former Deputy Attorney General Sally Yates and incorporated into the Principles of Federal Prosecution of Business Organizations, provides that '[t]o be eligible for any co-operation credit, corporations must provide to the [DOJ] all relevant facts about the individuals involved in corporate misconduct'. The Yates Memo further states that corporate investigations should focus on individuals from the outset and that corporate resolutions will not provide protection from criminal liability to individuals, absent extraordinary circumstances. It also emphasises that corporate cases should not be resolved without a 'clear plan' to resolve related individual cases.

In nearly all circumstances, directors or officers of a corporation incur individual criminal liability only when they are personally responsible for a violation and act with the requisite intent. For some crimes, however, directors and officers can be criminally prosecuted in the absence of either personal involvement or intent. Under the so-called Park Doctrine, a company official can be prosecuted for violating the Food, Drug, and Cosmetic Act (FDCA) – including for the adulteration or misbranding of any drug, food item or cosmetic – even if the official was unaware of the violation. A 'responsible corporate officer' who was in a position of authority to prevent or correct the violation and did not do so can be prosecuted for a misdemeanour offence. Notwithstanding this doctrine, however, most prosecutions brought under the FDCA have concerned a company officer's own conduct or, at a minimum, an official who was aware of the conduct giving rise to the violation but failed to correct it.

'To be eligible for any co-operation credit, corporations must provide to the [DOJ] all relevant facts about the individuals involved in corporate misconduct.'

The enforcement authorities

At the federal level, the DOJ prosecutes corporate crime. The DOJ has many components, organised both regionally and based on subject matter expertise. The DOJ actively pursues corporate prosecutions in a broad range of areas. Recent notable corporate cases include investigations into and prosecutions for FCPA violations; fraud relating to manipulation of the financial markets; fraud arising from product liability issues; Bank Secrecy Act violations for failing to maintain an effective anti-money laundering programme; and violations of US sanctions and export controls laws.

A number of federal regulatory agencies have related civil enforcement powers, including, for example, the SEC and the Commodity Futures Trading Commission. These agencies often bring civil enforcement actions alongside criminal charges filed by the DOJ. States' Attorneys General and local prosecutors' offices also have substantial criminal and civil enforcement authority. And the Attorney General of New York and the district attorney in Manhattan have traditionally played an active role in prosecuting white-collar matters.

The DOJ has sought to emphasise its expectations on self-reporting and co-operation and to define the benefits

The US Sentencing Guidelines – which are used to calculate fines in connection with guilty pleas and serve as a benchmark for determining fines imposed pursuant to other resolutions – provide for fine reductions if a company voluntarily, and in a timely manner, self-disclosed misconduct, co-operated fully in the investigation, and clearly demonstrated acceptance of responsibility.

Under the Yates Memo, the identification of responsible individuals is a 'threshold requirement' to receive any co-operation credit. In other words, the DOJ expects companies to 'identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the [DOJ] all facts relating to that misconduct'. The Yates Memo explains that 'if a company seeking co-operation credit declines to learn of such facts or to provide the [DOJ] with complete factual information about individual wrongdoers, its co-operation will not be considered a mitigating factor'. Thus, if a company is seeking co-operation credit from the DOJ, it must be prepared to conduct a thorough investigation and identify all responsible individuals and to assist the DOJ in investigating and possibly prosecuting those individuals. The extent of that co-operation credit 'will depend on all the various factors that have traditionally applied in making this assessment (eg the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc)'.

Building upon the Yates Memo, the DOJ issued a memorandum in 2016 announcing a pilot programme to encourage companies to voluntarily self-disclose FCPA-related misconduct, co-operate with the DOJ in related investigations, and remediate flaws in the companies' internal controls and compliance programmes. Since then, the DOJ has updated the US Attorneys' Manual to make the pilot programme permanent, with some modifications. The FCPA Corporate Enforcement Policy provides that when a company satisfies the standards of voluntary self-disclosure, full co-operation, and timely and appropriate remediation, there will be a presumption that the DOJ will resolve the company's case through a declination. That presumption may be overcome if there are aggravating circumstances related to the nature and seriousness of the offence or if the company is a repeat offender. To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture and/or restitution resulting from the misconduct at issue.

Key themes
Austria
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South Africa
Spain
Switzerland
United Kingdom
United States

Further, the policy states that where a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, the DOJ will recommend a 50 per cent reduction off the low end of the Sentencing Guidelines fine range. Here again, criminal recidivists may not be eligible for such credit. Companies that fail to voluntarily self-disclose misconduct but satisfy the other requirements may be eligible for up to a 25 per cent discount off the low end of the Sentencing Guidelines fine range.

This FCPA Corporate Enforcement Policy is unique in setting out a presumption that, in certain circumstances, a declination will be appropriate and it is formally only applicable in the FCPA context. However, DOJ officials have indicated the DOJ will look to the FCPA Corporate Enforcement Policy as non-binding guidance in other criminal cases. We have already seen the DOJ decline to prosecute a large bank for possible fraud offences relating to the misappropriation and misuse of confidential information. The DOJ indicated the bank had satisfied the requirements of voluntary self-reporting, co-operation, remediation and the payment of restitution.

So the FCPA Enforcement Policy may provide key guidance for achieving favourable outcomes in a wide variety of other kinds of cases – particularly given the policy reflects aggravating and mitigating factors already set out in the US Sentencing Guidelines.

Indeed, in late 2016, the DOJ component responsible for prosecuting sanctions and export controls violations issued guidance emphasising those same factors.

Finally, in the antitrust context, the DOJ has a leniency programme for detecting cartel activity. If a corporation reports such activity before the DOJ has received information about it from any other source (or, at a minimum, before any other corporation has come forward and at a time when the DOJ does not yet have sufficient evidence to prosecute) and the corporation meets the other requirements of the programmes, it can avoid criminal conviction and fines.

Prosecutors have discretion to agree a range of outcomes with corporate defendants

Several alternatives are available for corporate entities to settle a criminal matter. A company could enter a guilty plea, sign a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA), or receive a declination (possibly conditioned on the disgorgement of criminal proceeds). The DOJ may be willing to negotiate whether the parent company or a subsidiary should be a party to such a resolution.

In contrast to a guilty plea, with a DPA, criminal charges are publicly filed but deferred for a set period of time. No charges are filed with an NPA, which is a private agreement and, unlike a DPA, does not involve court proceedings. Both forms of agreement, however, require a statement of facts in which the company admits misconduct. Both types of agreement also require the satisfaction of other conditions, which can include, among other things, the payment of a fine, continued co-operation with government authorities (for example to investigate individuals) and enhanced compliance programmes. With both DPAs and NPAs, the corporation is ultimately released from criminal prosecution for certain specified conduct unless the company has breached the agreement.

The Principles of Federal Prosecution of Business Organizations require prosecutors to consider 10 factors in determining the proper treatment of a corporate entity that faces criminal liability. These factors are:

- the nature and seriousness of the offence;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar conduct;
- the corporation's willingness to co-operate in the investigation of its agents;
- the existence and effectiveness of the corporation's pre-existing compliance programme;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions;
- collateral consequences;
- the adequacy of remedies such as civil or regulatory enforcement actions; and
- the adequacy of the prosecutions of individuals responsible for the corporation's malfeasance.

As discussed, key factors for securing a DPA or NPA, rather than a guilty plea, are timely and voluntary self-disclosure, full co-operation (which includes identifying all individuals involved in the conduct regardless of their position, status or seniority) and remediation.

Corporate entities face a number of punishments in the criminal context. Financial penalties include fines, the payment of restitution to victims and the forfeiture of ill-gotten gains. Corporations can also be put on court-supervised probation and required to implement monitorships, enhance compliance programmes, or take other steps to reduce recidivism and detect and deter future wrongdoing.

In sentencing corporate defendants following guilty pleas, judges are required to consider the factors set forth in 18 USC § 3553(a) and Chapter 8 of the US Sentencing Guidelines (the Guidelines). Prosecutors also use these sources as benchmarks in negotiating fines to be paid pursuant to DPAs and NPAs. The Guidelines take into account, among other factors, the involvement in or tolerance of criminal activity by high-level personnel and any history of similar misconduct at the corporation. Companies receive credit under the Guidelines if they voluntarily self-disclosed misconduct and co-operated fully with the DOJ. Unlike in individual cases, where judges typically retain discretion to fashion an appropriate sentence, most corporate guilty pleas are structured so that the judge, in accepting the plea, commits to sentence the corporation as agreed with the DOJ in the plea agreement.

International co-operation

Increasingly, the DOJ co-operates with law enforcement authorities around the world. Such international co-operation is particularly common, but not exclusively seen, in FCPA matters. In late 2016, for example, the DOJ announced three notable FCPA resolutions in parallel with Brazilian authorities. This continued in 2017 with the US authorities agreeing FCPA-related resolutions co-ordinated with Dutch, UK, Swedish and Singaporean authorities – often agreeing to take into account penalties to be paid to authorities abroad when calculating the penalty payable. And in the LIBOR and foreign exchange matters, the DOJ co-operated with law enforcement authorities in many countries, perhaps most notably the UK. In addition, US tax treaties entitle the DOJ to enlist treaty partners in gathering information or otherwise assisting in investigating tax crimes or other tax-related matters.

Key themes
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