

FCPA Update

A Global Anti-Corruption Newsletter



Also in this issue:

11 Mexico Adds a New Tool to its Anti-Corruption Enforcement Arsenal

[Click here for an index of all FCPA Update articles](#)

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email prohlik@debevoise.com, eogrosz@debevoise.com, or pferenz@debevoise.com

Airbus Reaches Record-Breaking Global Settlement

On January 31, 2020, Airbus SE (“Airbus”) reached a global resolution totaling €3.6 billion with French, U.K., and U.S. enforcement authorities to settle charges including alleged bribery of foreign officials and breach of U.S. arms export regulations. This is the largest-ever global bribery-related settlement, and the respective portions of the settlement represent the largest ever bribery-related enforcement actions in France and the United Kingdom. The Airbus settlement also represents a major coordinated resolution involving France, the United Kingdom, and the United States, with France joining the other two and a small number of other countries that have entered into monetarily significant corruption-related resolutions. The key takeaways of these three resolutions are outlined below.

[Continued on page 2](#)

Airbus Reaches Record-
Breaking Global Settlement
Continued from page 1

1. DPA-Style Resolution with French Authorities

On January 29, 2020, Airbus entered into a *Convention Judiciaire d'Intérêt Public* ("CJIP") with the French Financial National Prosecutor ("PNF"). Airbus agreed to pay €2.1 billion to settle criminal charges of alleged bribery, including bribery of foreign officials.¹ The PNF focused on Airbus' activities in China, UAE, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, Kuwait, and Colombia. The CJIP was approved by the President of the High Court of Paris on January 31, 2020.²

The CJIP is the French equivalent of a DPA, created by the Sapin II Law of December 9, 2016. In cases relating to corruption, influence peddling, tax fraud, and the laundering of the proceeds of tax fraud, the CJIP mechanism offers corporate entities the possibility to negotiate an outcome without an admission of guilt or a criminal conviction. The company, however, must agree to pay a fine proportionate to the benefit derived from the illicit activity (up to 30% of the corporation's average annual turnover over the previous three years) and also may have to agree to an enhanced compliance program for a maximum period of three years. A CJIP may be finalized only following approval by a judge at a public hearing. The judge's role is merely to verify the company's acknowledgement of the facts, their legal definition and the conformity of the fine to the statutory limit. There is no analysis, for example, of whether the agreement in fact is in "the public interest."³

The Airbus resolution is the tenth CJIP entered into so far in France;⁴ the third one involving alleged bribery of foreign officials;⁵ the second coordinated resolution with foreign authorities;⁶ and by far the largest-ever CJIP fine, as it is greater than all prior CJIPs combined. The key takeaways of this CJIP are as follows.

Airbus' "Exemplary" Cooperation. In France, the PNF and other prosecutors' offices have discretion to propose resolution of a case through a CJIP. In guidelines

Continued on page 3

1. The CJIP is available at <https://www.agence-francaise-anticorruption.gouv.fr/files/files/20200129%20CJIP%20AIRBUS%20sign%C3%A9.pdf> (an English version is available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP%20AIRBUS_English%20version.pdf).
2. The approval order is available at <https://www.agence-francaise-anticorruption.gouv.fr/files/files/ordonnance%20homologation%20CJIP.PDF>.
3. See Debevoise & Plimpton LLP, "The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions," FCPA Update, Vol. 8, No. 6 (Jan. 2017), available at <https://www.debevoise.com/insights/publications/2017/01/fcpa-update-january-2017>.
4. A list of CJIPs and documents related to each may be found on the website of the Agence Française Anticorruption at <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public>.
5. See "Convention judiciaire d'intérêt public entre le Procureur de La République Financier et SAS EGIS AVIA," available at <https://www.agence-francaise-anticorruption.gouv.fr/files/files/cjipEGIS.PDF>; "Convention judiciaire d'intérêt public entre le Procureur de La République Financier et Société Générale SA," available at https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/24.05.18_-_CJIP.pdf. ("Société Générale CJIP").
6. See Société Générale CJIP at ¶¶ 41-45 (detailing coordination with U.S. authorities).

**Airbus Reaches Record-
Breaking Global Settlement**
Continued from page 2

published in June 2019,⁷ the PNF listed factors to be taken into account before deciding to do so.⁸ These include self-reporting and cooperation, said to be key factors for any CJIP resolution.

According to the Airbus CJIP, Airbus did not self-report facts that triggered its internal investigation to the PNF, but only to the U.K. authorities. Self-reporting, however, is a mitigating but not a mandatory factor in a decision to enter into a CJIP. According to the PNF, Airbus's lack of self-reporting was balanced by the company's "exemplary" early cooperation with the PNF and Serious Fraud Office ("SFO") joint investigation team ("JIT"). In that context, the CJIP provides useful indications about the degree of cooperation expected by the PNF:

- The company instructed several law firms to carry out an internal investigation and made a clear commitment to fully cooperate with the JIT and allow it to interact directly with the company's Board of Directors and the Ethics and Compliance Committee.

“The Airbus settlement is significant not only because of the record amount of the fine. It was also the opportunity for France to indicate its eagerness to take control of the enforcement of its anti-corruption laws.”

- The company provided the prosecuting authorities with detailed presentations of its internal investigation findings as well as relevant documents such as organizational charts, emails, contracts, invoices and other evidence of payments to third parties, bank account details, and accounting documents.
- The company adopted a cooperative approach, indicating the reasons why it considered that a document was privileged in whole or in part.
- The company made available a team of internal accountants and external consultants to assist the JIT in reviewing the accounting and financial flows identified.
- The company appointed an “Independent Compliance Review Panel” to report on its compliance improvements and informed the JIT of the implementation of its new compliance program through a series of detailed presentations.

Continued on page 4

7. “Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public” (June 26, 2019), <https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf>.

8. See Debevoise & Plimpton LLP, “French DPAs—First CJIP Guidelines Published” (July 9, 2019), available at <https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines>.

**Airbus Reaches Record-
Breaking Global Settlement**
Continued from page 3

The CJIP also indicates that Airbus has committed to maintain its cooperation after the approval of the CJIP, and will inform the PNF of any new information relating to the facts included in the CJIP as well as any new facts that may be related to other offenses for which the CJIP mechanism is available (i.e., corruption, influence peddling, tax fraud, and the laundering of the proceeds of tax fraud). This self-reporting commitment is potentially very broad as it does not mention a time limit and seems to cover facts unrelated to the CJIP. However, because such a self-reporting commitment is not part of the statutory obligations that may be imposed on a company as part of a CJIP, it is unclear why such a commitment was included or if it is enforceable.

Determination of the Fine. The Sapin II Law provides that the fine agreed to in a CJIP must be proportionate to the benefit derived from the misconduct, up to 30% of the corporation's average annual turnover over the previous three years. In that regard, the theoretical maximum amount of the fine was close to €19 billion. As provided for in its guidelines, the PNF calculated the €2.1 billion fine using the following two-step methodology: calculation of the improper benefit secured by the company (the equivalent of a disgorgement); and the calculation of an additional penalty by applying a multiplier on the improper benefit based on relevant aggravating and mitigating factors.

- **Improper benefit:** €1.053 billion. The improper benefit derived through the alleged misconducts covered by the CJIP is said to have been “estimated” based on the investigations. Unfortunately, the CJIP does not provide more detail about that estimate.
- **Additional penalty:** €1.029 billion calculated by the PNF as follows:
 - **Aggravating factors:** The PNF applied a 275% multiplier to the improper benefit (i.e., an increase of €2.9 billion), taking into account the following aggravating factors: the alleged corrupt practice was repeated over a long period of time and concerned different contracts; the facts may involve the corruption of public officials; and the company used corporate resources to conceal the alleged corruption.
 - **Mitigating factors:** The PNF then applied a 50% discount rate on the amount of the aggravating factor (i.e. a deduction of €1.45 billion), based on the following mitigating factors: the exemplary level of cooperation to the JIT investigations provided by the company; the company's thorough internal investigation in coordination with the judicial investigation; and the early implementation of corrective compliance measures.

Continued on page 5

Airbus Reaches Record-
Breaking Global Settlement
Continued from page 4

- **Other deductions.** The PNF also deducted an amount of about €266 million in relation to alleged misconduct already covered as part of the DPA concluded with the U.S. Department of Justice (“DOJ”) and which the company agreed to pay as part of that DPA. The PNF finally deducted “various costs” which amounted to about €153 million.

The above-mentioned aggravating and mitigating factors are not new to practitioners, having been listed by the PNF in its guidelines. But the associated percentages are new. Neither the guidelines nor the previous CJIPs ever provided such indication before. Despite this clear improvement, it remains to be seen if future CJIPs will provide more clarity, for example by associating percentages with each of the aggravating and mitigating factors rather than a bulk rate.

Monitoring by the French Anticorruption Agency. The CJIP acknowledges that Airbus has already designed a robust anti-corruption compliance program, but emphasizes the need to monitor its correct implementation. The French Anticorruption Agency, the Agence Française Anticorruption (“AFA”), will therefore monitor its implementation through targeted audits during the next three years. The monitoring fees to be paid by Airbus are capped at €8.5 million, meaning that even if the AFA needs to spend more in monitoring it, Airbus will not be charged over this agreed figure.

Compliance with the French Blocking Statute. The French Blocking Statute prohibits French citizens and residents of France, including legal entities, from searching or disclosing commercial information for use in foreign judicial or administrative proceedings, unless accomplished under an existing treaty (such as the U.S.-France Mutual Legal Assistance Treaty). A breach of such prohibitions is punishable by up to six months’ imprisonment and/or a fine of €18,000 (€90,000 for legal entities). However, because the French Blocking Statute is unevenly enforced, foreign authorities often do not see it as a valid reason not to comply with discovery requests, thus creating a host of difficulties for French companies.

In that context, the CJIP indicates that the JIT agreement between the PNF and the SFO made it possible for Airbus to communicate the documents resulting from its internal investigation to the PNF only, which in turn shared them with the SFO in compliance with the French Blocking Statute. The CJIP also indicates that the PNF shared some of the evidence from its investigation with DOJ, in accordance with the French Blocking Statute; and that the PNF will inform the SFO and DOJ about Airbus’ monitoring in compliance with that same statute.

Continued on page 6

Airbus Reaches Record-
Breaking Global Settlement
Continued from page 5

2. U.K. DPA

On the same day that the French CJIP was approved by the court, the SFO entered into a record-breaking DPA with Airbus, following its approval by Dame Victoria Sharp, President of the Queen's Bench Division.⁹ This is the seventh DPA agreed between the SFO and a company since DPAs were introduced in the United Kingdom in 2013. The SFO announced its investigation into Airbus in August 2016.¹⁰

The suspended indictment¹¹ covers five counts of failure to prevent bribery, contrary to section 7 of the Bribery Act 2010. The conduct involves Airbus' Commercial and Defence & Space divisions across five jurisdictions: Sri Lanka, Malaysia, Indonesia, Taiwan, and Ghana, between 2011 and 2015. According to the DPA, persons associated with Airbus (though not exclusively its employees) offered very substantial sums of money by way of bribes to third parties, in order to secure the purchase of aircraft by civil airline companies in counts 1 to 4; and by the Government of Ghana in count 5.

Terms of the DPA. The DPA will last for three years. Airbus will pay a total financial sanction of €983,974,311 to the SFO (including €585,939,740 in disgorgement), and it will pay €6,989,401 towards the costs of the SFO's investigation. This financial sanction is greater than the total of all the previous sums paid pursuant to previous DPAs. Airbus agreed to continue to make improvements to its ethics and compliance policies and procedures, with ongoing cooperation and self-reporting. Although reached as part of an international settlement with French and U.S. authorities, the U.K. DPA notes that the approach taken to financial settlement reflects to an extent the French primacy in the investigation.

Seriousness. In her judgment, Dame Sharp said: "the seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave. The conduct took place over many years. It is no exaggeration to describe the investigation it gave rise to as worldwide, extending into every continent in which Airbus operates. The number of countries subject to intense criminal investigation by the various agencies, and the scale and scope of the wrongdoing disclosed in the Statement of Facts demonstrate that bribery was to the extent indicated, endemic in two core business areas within Airbus."¹² Despite this, Dame Sharp found that it was in the interests of justice to approve the DPA.

Continued on page 7

9. Case information is available on the SFO's website at <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/>.

10. The press release is available at <https://www.sfo.gov.uk/2016/08/08/airbus-group-investigation/>.

11. The DPA's statement of facts is available at <https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/>.

12. See SFO Approved Judgement § 64, available at <https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/>.

Airbus Reaches Record-
Breaking Global Settlement
Continued from page 6

Self-Reporting and Cooperation. Although described as a “slow start,” Airbus was credited with having provided exemplary cooperation to the prosecuting authorities to the fullest extent possible. It conducted an internal investigation, the findings of which it disclosed in full to the SFO. Airbus also accepted that the Bribery Act 2010 gave the SFO extended extraterritorial powers, which was described as “an unprecedented step for a Dutch and French domiciled company to take, in respect of the reporting of conduct which had taken place almost exclusively overseas.”¹³

The list detailing steps taken by Airbus to cooperate is a lengthy one, recited in full in the DPA. Twenty-four steps are identified, including Airbus confirming the existence of corruption concerns, identifying a comprehensive compilation of red flag cases across divisions of which the JIT was not aware, providing the SFO with a list of anti-corruption risk assessments, collecting in excess of 30.5 million documents, implementing a new compliance program, and signaling a clear commitment from the new Airbus Board to fully cooperate with the investigation.¹⁴

“Insofar as the United States is concerned, the Airbus DPA clearly signals that, whilst the U.S. authorities will continue to play a leading role in the biggest cases, they are also cognizant of the limits on their jurisdiction”

Remedial Measures and Cultural Change. Starting in late 2014, Airbus implemented a number of measures to address the weaknesses in oversight within its organization. Dame Sharp said that these “transformed Airbus into what is, for present purposes (in relation to issues of compliance, culture and the like) effectively a different company to the one that it was at the time the offences alleged in the indictment occurred.” The changes include the following:

- Changes to the management team, including removal of all wrongdoers from employment with Airbus;
- Changes to Airbus’ internal processes, including commissioning an Independent Compliance Review Panel to complete an independent review of Airbus’ ethics and compliance procedures;

Continued on page 8

13. See SFO Approved Judgement §72, available at <https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/>.

14. See *id.*

**Airbus Reaches Record-
Breaking Global Settlement**
Continued from page 7

- The creation of numerous new compliance roles and targeted Anti-Bribery and Corruption training plan;
- Revision of Airbus' Anti-Bribery and Corruption policies and procedures; and
- A significantly reduced use of consultants in relation to sales of aircraft.

3. U.S. DPA

On January 31, 2020, Airbus also entered into a DPA with DOJ and the United States Attorney's Office for the District of Columbia to settle charges of conspiracy to violate the FCPA and the Arms Export Control Act ("AECA") and its implementing regulations, the International Traffic in Arms Regulations ("ITAR").¹⁵ The company agreed to pay a total of \$527 million in penalties (a \$294.5 million fine for the FCPA-related violations and a \$232.7 million penalty for the ITAR-related conduct) plus an additional \$55 million as part of a civil forfeiture agreement and a \$5 million penalty to the U.S. Department of State's Directorate of Defense Trade Controls.¹⁶

FCPA-Related Conduct. According to the U.S. DPA, between 2008 and 2015, Airbus facilitated a bribery scheme in multiple countries. Since Airbus is neither a U.S. issuer nor a domestic concern, DOJ acknowledged that territorial jurisdiction over the conduct was limited.¹⁷ As a result, DOJ focused on a corruption scheme in China that involved conduct in the form of all-expenses-paid events held on American soil (Park City, Utah, and Maui, Hawaii).¹⁸ DOJ also acknowledged that France's and the United Kingdom's "interests over the company's corruption-related conduct, and jurisdictional bases for a resolution, are significantly stronger."¹⁹

The U.S. DPA calculated a fine range of between \$2.8 and \$5.6 billion for the FCPA conduct, applied a 25% discount off of the lower end of that range for cooperation and remediation, resulting in a penalty calculation of just under \$2.1 billion.²⁰ The 25% reduction under the corporate enforcement policy did not include any credit for self-reporting, highlighting DOJ's extremely narrow view of self-reporting. Specifically, although DOJ admitted that "the territorial jurisdiction over the corrupt conduct is limited," the company received no credit for self-reporting after the

Continued on page 9

15. Deferred Prosecution Agreement, *United States v. Airbus SE*, Case No. 1:20-cr-00021-TFH (D.D.C. Jan 31, 2020), <https://www.justice.gov/criminal-fraud/fcpa/cases/airbus-se> ("U.S. DPA").

16. U.S. Dep't of Justice, "Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case," Press Rel. No. 20-114 (Jan. 31, 2020), <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case> ("U.S. Press Release").

17. U.S. DPA at ¶ 4(i).

18. U.S. DPA, Attachment A at ¶ 39.

19. U.S. DPA at ¶ 4(i).

20. U.S. DPA at ¶ 8.

**Airbus Reaches Record-
Breaking Global Settlement**
Continued from page 8

commencement of the SFO investigation, even though the company promptly self-disclosed conduct related to the United States.

DOJ credited Airbus with \$1.8 billion of the fine to be paid to the PNF, resulting in an FCPA related payment to the U.S. Treasury of \$294.5 million. Given the size of the penalties paid to France and the United Kingdom, as well as DOJ's explicit recognition of "the strength of France's and the United Kingdom's interests over the company's corruption-related conduct, as well as the compelling equities of France and the United Kingdom to vindicate their respective interests as those countries deem appropriate,"²¹ it is surprising (or perhaps not) that DOJ did not use the Airbus case as an opportunity to apply its "no piling on" policy to defer to those countries entirely.²²

ITAR-Related Conduct. Airbus also admitted to having failed to provide accurate information related to political contributions, commission, or fees to the U.S. authorities in connection with the sale or export of defense articles and services in violation of the ITAR. Airbus also failed to keep records of the sales of ITAR-controlled defense articles. The territorial scope of these investigations was broader than that of the FCPA and covered several countries including Ghana, Indonesia, and Vietnam. Airbus voluntarily self-disclosed the ITAR-related matter and received credit for its cooperation.

Post-DPA Obligations. As part of its post-DPA obligations, Airbus committed to continue the implementation of its compliance and ethics program. The company also bears a reporting obligation with respect to the facts and conducts described in the U.S. DPA and will also cooperate in any ongoing investigations. Airbus' enhanced compliance program, the agreement to report to DOJ, and the supervision of the French authorities justified that no independent compliance monitor was appointed.

Conclusion

The Airbus settlement is significant not only because of the record amount of the fine. It was also the opportunity for France to indicate its eagerness to take control of the enforcement of its anti-corruption laws. The PNF indicates that, now that it is a player in the international anti-corruption field, French laws, including the French Blocking Statute, shall be enforced by its foreign counterparts. By imposing a record-breaking fine to one of its most renowned industrial companies, French authorities are also hoping that DOJ will now focus less on French corporations. By accepting that "exemplary" cooperation can compensate for a lack of self-reporting,

Continued on page 10

21. U.S. Press Release, *supra* n. 16.

22. Memorandum of Deputy Attorney General Rod J. Rosenstein, "Policy on Coordination of Corporate Resolution Penalties" (May 9, 2018), <https://www.justice.gov/opa/speech/file/1061186/download>.

**Airbus Reaches Record-
Breaking Global Settlement**
Continued from page 9

the French settlement aligns with the U.K. approach in the Rolls-Royce DPA. Moreover, the use of an express percentage multiplier to arrive at the starting point in the CJIP is a novel approach, which could be an inspiration from the applicable U.K. sentencing guidelines. These points further illustrate the cross-pollination of ideas and enforcement approaches.

For the United Kingdom, the DPA is also not only significant because of the size of the financial penalty. It signals a new U.K. approach of greater cross-border collaboration on international bribery. The success of the Airbus DPA indicates the potential for wider collaborative investigations, which may result in further victories for the SFO in combatting international bribery. However the recourse to JITs, used predominantly between EU member states operating under EU legal instruments, is likely to be complicated by Brexit. It therefore remains to be seen the extent to which the United Kingdom can achieve such collaboration in the future.

Insofar as the United States is concerned, the Airbus DPA clearly signals that, whilst the U.S. authorities will continue to play a leading role in the biggest cases, they are also cognizant of the limits on their jurisdiction and increasingly content to reach global resolutions in which primacy is ceded to the authorities of a company's home state.

Antoine F. Kirry

Karolos Seeger

Alexandre Bisch

Robin Lööf

Philip Rohlik

Aisling Cowell

Ariane Fleuriot

Antoine F. Kirry is a partner in the Paris office. Karolos Seeger is a partner in the London office. Alexandre Bisch is an international counsel in the Paris office. Robin Lööf is an international counsel in the London office. Philip Rohlik is a counsel in the Shanghai office. Aisling Cowell is an associate in the London office. Ariane Fleuriot is an associate in the Paris office. Full contact details for each author are available at www.debevoise.com.

Continued on page 11

Mexico Adds a New Tool to its Anti-Corruption Enforcement Arsenal

The administration of President Andrés Manuel López Obrador appears increasingly to be taking steps to address its campaign-trail promise to battle corruption in Mexico.¹ During the past year, the Mexican government has boosted its focus on anti-corruption enforcement at the federal level. This has included several high-profile investigations, most recently involving former President Enrique Peña Nieto.²

Of particular note, the government recently added a further tool to its enforcement arsenal, enacting a new national asset forfeiture law. This law is part of a broader effort by the López Obrador administration to expand Mexico's asset forfeiture regime, following amendments to the Mexican Constitution in March 2019 that established a constitutional framework for asset forfeiture.³ The new law, which applies retroactively, significantly expands the government's ability to seize assets tied to corruption, obstruction of justice, crimes committed by public officials, and crimes related to hydrocarbons, even where those assets are located abroad.⁴

The National Asset Forfeiture Law

The new *Ley Nacional de Extinción de Dominio* (National Asset Forfeiture Law) took effect on August 10, 2019. Under the law, when the legitimacy of an asset's origin cannot be proven and is connected to particular illicit activities, including corruption, the asset is subject to forfeiture.⁵ The new law also applies to assets with legitimate origins that have been mixed or commingled with illegitimate ones, as well as to legitimate assets used by third parties in committing a crime, if the owner of the assets knows of their use.⁶

Continued on page 12

-
1. See Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al. "A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), <https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020>.
 2. *Id.* at 72; Juan Montes & Jose de Cordoba, "Mexico is Investigating Ex-President Enrique Peña Nieto, Top Official Says," *Wall Street Journal* (Feb. 19, 2020), <https://www.wsj.com/articles/mexico-is-investigating-ex-president-enrique-pena-nieto-top-official-says-11582152342>.
 3. Decreto Por el que se reforma el artículo 22 y la fracción XXX del artículo 73, de la Constitución Política de los Estados Mexicanos, en materia de Extinción de Dominio, *Gobierno de Mexico* (Mar. 14, 2019), https://dof.gob.mx/nota_detalle.php?codigo=5552861&fecha=14/03/2019&print=true.
 4. *Id.*
 5. Ley Nacional de Extinción de Dominio, art. 7., *Gobierno de Mexico* (Jan. 22, 2020), <http://www.diputados.gob.mx/LeyesBiblio/ref/lned.htm>.
 6. *Id.*, art. 7-9.

Mexico Adds a New Tool
to its Anti-Corruption
Enforcement Arsenal

Continued from page 11

Additionally, the law:

- Prescribes an independent civil procedure for prosecuting asset forfeiture actions;⁷
- Allows for forfeiture even absent a judicial finding of criminal liability;⁸
- Enables the government to engage in the early sale of certain confiscated assets;⁹
- Allows judges to issue emergency interim measures regarding assets, even before the initiation of a forfeiture action;¹⁰ and
- Shifts to respondents the burden of proof regarding the *bona fide* origin of assets in question.¹¹

This law applies to all forfeiture actions, whether the facts giving rise to an action took place before or after the law came into effect.¹²

Under the new law, the Attorney General's Office has exclusive standing to file an asset forfeiture action.¹³ On October 1, 2019, that office created a Specialized Forfeiture Unit in charge of investigating, preparing, and commencing asset forfeiture proceedings.¹⁴ This specialized body will operate under the umbrella of the Unit for the Implementation of the Accusatory Criminal Procedure System at the Attorney General's Office.¹⁵ On January 22, 2020, an amendment to the new law established the *Instituto para Devolver al Pueblo lo Robado* (Institute for Returning to the People what was Stolen), which will manage assets seized under the law.¹⁶

During a public event earlier this month, Attorney General Gertz Manero handed President López Obrador a check for over US\$100 million, funds that he stated were recovered as part of a confidential anti-corruption investigation.¹⁷

Continued on page 13

7. *Id.*, art. 8.

8. *Id.*, art. 14.

9. *Id.*, art. 227.

10. *Id.*, art. 173-175.

11. *Id.*, art. 15.

12. *Id.*, Transitory Article Six.

13. The Mexican Congress approved a grant of similar powers to the UIF last November. However, the final terms of these new powers remain to be defined. "Diputados avalan, entre empujones, que UIF pueda congelar cuentas," *Politico.mx* (Nov. 6, 2019), <https://politico.mx/minuta-politica/minuta-politica-congreso/diputados-avalan-que-uif-pueda-congelar-cuentas-y-extinguir-recursos/>.

14. Acuerdo A/016/19, *Gobierno de Mexico* (Oct. 1, 2019), https://dof.gob.mx/nota_detalle.php?codigo=5573945&fecha=01/10/2019&print=true.

15. "Crean Unidad Especializada en materia de Extinción de Dominio," *Posta* (Feb. 25, 2020), <https://www.posta.com.mx/nacional/crean-unidad-especializada-en-materia-de-extincion-de-dominio>.

16. Comunicado No. 01/2020, *Gobierno de Mexico* (Jan. 22, 2020), https://www.gob.mx/cms/uploads/attachment/file/527048/Oficial_cambio_de_nombre_INDEP.pdf.

17. "Fiscalía General de Mexico entrego mas de US\$106 millones al instituto para Devolver al Pueblo lo Robado," *CNN en Español* (Feb. 10, 2020), <https://cnnespanol.cnn.com/2020/02/10/alerta-mexico-fiscalia-general-entrego-dos-mil-millones-de-pesos-al-instituto-para-devolver-al-pueblo-lo-robado/>.

**Mexico Adds a New Tool
to its Anti-Corruption
Enforcement Arsenal**

Continued from page 12

Legal Uncertainty and New Obligations

At the same time, certain provisions of this powerful enforcement tool have generated some controversy. There currently are two constitutional challenges pending before the Mexican Supreme Court.¹⁸ The National Human Rights Commission, a government body created by the Mexican Constitution and tasked with protecting the human rights enshrined in the Constitution, has filed both of these challenges.¹⁹ In these two suits, the Commission has argued, among other things, that the law is overly broad and violates the constitutional principles of legal certainty, presumption of innocence, and non-retroactivity.²⁰

“Notwithstanding that the new [asset forfeiture] law is currently facing some legal uncertainty, businesses operating in Mexico should be aware of the significant risks posed by the enforcement of this new law.”

Additionally, private citizens have filed several *Amparo* suits against the government, claiming that enforcement of the law violates their constitutional rights.²¹ This includes several individuals and some medium-sized businesses that have challenged the law’s extension to assets used for illicit purposes by third parties, and one federal court has suspended all enforcement of the early sale process prescribed by Article 227 of the law.²²

Even while the future of the law is now in the hands of Mexican courts, implementation of the law imposes new regulatory obligations on businesses operating in Mexico.²³ This includes requirements relating to the use of

Continued on page 14

-
18. The actions were filed by the National Commission of Human Rights, and until the Supreme Court rules on those actions, the asset forfeiture law continues to be considered good law. See <https://www.cndh.org.mx/documento/presenta-cndh-accion-de-inconstitucionalidad-contrala-ley-nacional-de-extincion-de>.
 19. *CNDH Mexico*, <https://www.cndh.org.mx/cndh/funciones>.
 20. Demanda de acción de inconstitucionalidad, promovida por la Comisión Nacional de los Derechos Humanos, https://www.cndh.org.mx/sites/default/files/documentos/2019-09/Acc_Inc_2019_100.pdf.
 21. Enrique Rodríguez, “Ola de amparo vs. Extinción de dominio” *El Heraldo* (Dec. 12, 2019), <https://heraldodemexico.com.mx/opinion/ola-de-amparos-vs-extincion-de-dominio/>.
 22. Victor Fuentes, “Prohíbe tribunal remate anticipado,” *Reforma* (Dec. 21, 2019), https://www.reforma.com/aplicacioneslibre/preacceso/articulo/default.aspx?urlredirect=https://www.reforma.com/prohibe-tribunal-remate-anticipado/ar1839511?v=2&referer=-https://aristeguinoticias.com/2112/mexico/suspende-tribunal-federal-remates-anticipados-de-bienes-sujetos-a-extincion-de-dominio/--&__rval=1.
 23. Albarrán Elizabeth, “Preocupa implementación de ley antifabricadoras y de extinción de dominio” *El Economista* (Dec. 10, 2019), <https://www.eleconomista.com.mx/economia/Preocupa-implementacion-de-ley-antifabricadoras-y-de-extincion-de-dominio-20191210-0139.html>.

**Mexico Adds a New Tool
to its Anti-Corruption
Enforcement Arsenal**

Continued from page 13

corporate assets by third parties, the functioning of internal channels for reporting misconduct, and practices related to recordkeeping. Businesses operating in Mexico should be aware also that the new law's reach extends to assets located abroad, including the possibility of interim measures or forfeiture orders on foreign assets via available channels of international cooperation.²⁴

Conclusion

With the enactment of the new National Asset Forfeiture Law, the administration of López Obrador has added a powerful tool to its anti-corruption arsenal. Notwithstanding that the new law is currently facing some legal uncertainty, businesses operating in Mexico should be aware of the significant risks posed by the enforcement of this new law.

Andrew M. Levine

Jonathan Florez

Andrew M. Levine is a partner in the New York office. Jonathan Florez is an associate in the New York office. Full contact details for each author are available at www.debevoise.com.

24. Ley Nacional de Extinción de Dominio, art. 244., *Gobierno de Mexico* (Oct. 1, 2019), <http://www.diputados.gob.mx/LeyesBiblio/ref/lned.htm>.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karlos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Andreas A. Gliemenakis
Associate Editor
+1 202 383 8138
aagliemen@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

All content © 2020 Debevoise & Plimpton LLP. All rights reserved. The articles appearing in this publication provide summary information only and are not intended as legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein. Any discussion of U.S. Federal tax law contained in these articles was not intended or written to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under U.S. Federal tax law.

Please note:
The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.