

# FCPA Update

A Global Anti-Corruption Newsletter



## In this issue:

- 2 United States
- 30 United Kingdom
- 44 France
- 50 Germany
- 52 Russia
- 55 Asia
- 61 Latin America

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

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## The Year 2020 in Review: Another Record-Breaking Year of Anti-Corruption Enforcement

Despite complications and challenges posed by COVID-19, 2020 was marked by record-breaking corporate resolutions and significant cases against individuals in the United States, as well as continued enforcement and legislative activity elsewhere in the world. U.S. monetary recovery in FCPA cases reached an all-time high of nearly \$2.8 billion, eclipsing last year's record fines and, with the filing of the 1MDB-related case against Goldman Sachs in October, shattering the prior record for largest FCPA case in history. Beyond the United States, 2020 also saw historic resolutions by enforcement counterparts in France, Malaysia, and the United Kingdom.

In this first issue of 2021, we survey the past year's most significant anti-corruption developments in the United States, the United Kingdom, France, Germany, Russia, Asia, and Latin America.

[Continued on page 2](#)

## United States

In 2020, U.S. authorities announced the resolution of 12 corporate enforcement actions. These accounted for the largest total recovery by U.S. authorities under the FCPA in a single year. Before looking more closely at noteworthy corporate and individual resolutions, case law, and policy announcements, here are a few highlights:

- **Largest Total Recovery in A Single Year:** In 2020, the SEC and DOJ assessed approximately \$6 billion in penalties under the FCPA in just these 12 corporate actions. A record \$2.8 billion of this was to be paid to the SEC and DOJ, with the remainder credited against resolutions coordinated with foreign authorities.<sup>1</sup> By comparison, in 2019, DOJ and the SEC assessed penalties of \$2.9 billion in 14 actions and collected \$2.6 billion.
- **Higher Percentage of Bribery Charges, Including Against Parent Companies:** Eight of the 12 total corporate resolutions involved anti-bribery allegations (67%); the rest charged only violations of the accounting provisions. This was a slightly higher percentage than last year (57%) and significantly higher than the six-year average (~45%). Two of these cases involved guilty pleas to bribery charges by a parent company (J&F Investimentos and Sargeant Marine).
- **No Monitors:** For the first time since 2003, the U.S. agencies did not impose any independent compliance monitors. This perhaps reflects the importance of the FCPA Corporate Enforcement Policy's ("CEP") remediation credit in encouraging companies to address compliance weaknesses prior to a final resolution. In two cases, though, DOJ credited monitorships required by overseas authorities (Airbus and J&F), signaling a further maturing of the worldwide enforcement and compliance regime.
- **New Guidance on Compliance Programs and a Revised FCPA Resource Guide:** DOJ issued updated guidance to assist prosecutors with evaluating corporate compliance programs, and the SEC and DOJ together released an updated edition of the FCPA Resource Guide.
- **Legislation Expanded SEC's Powers:** At the very end of the year, Congress authorized the SEC to seek disgorgement in federal court actions. It set a 10-year limitations period for the SEC to seek disgorgement for scienter-based violations and a five-year period for non-scienter based violations.

Continued on page 3

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1. That number jumps to more than \$3 billion when including amounts collected by the Federal Reserve, CFTC and other federal and state regulators. The global penalty tally in foreign bribery cases in 2020 (not limited to penalties assessed under the FCPA) jumped to more than \$10 billion.

## United States

Continued from page 2

- **CFTC Participates in its First Foreign Bribery Resolution:** In March 2019, the CFTC Division of Enforcement issued an advisory to firms regarding self-reporting and cooperation for violations of the Commodity Exchange Act (“CEA”) involving foreign corrupt practices.<sup>2</sup> In December 2020, the CFTC brought its first enforcement action alleging that corruption violated the CEA. Vitol Inc., the U.S. affiliate of Swiss-based Vitol S.A., agreed to pay \$135 million (with approximately one-third directed to Brazilian authorities) to resolve DOJ charges that it violated the FCPA’s anti-bribery provisions in connection with a bribery scheme spanning Brazil, Ecuador, and Mexico.<sup>3</sup> The company also resolved CFTC charges of fraudulent and manipulative conduct – including

“In 2020, U.S. authorities announced the resolution of 12 corporate enforcement actions . . . [that] accounted for the largest total recovery by U.S. authorities under the FCPA in a single year.”

conduct relating to foreign corruption – under the CEA.<sup>4</sup> The CFTC based its case on violations of a rule prohibiting manipulative schemes in connection with U.S. derivatives markets. Although DOJ initiated the case, the CFTC’s involvement demonstrates the agency’s interest in pursuing FCPA cases that affect the commodities markets. The Vitol resolution also reflects that U.S. government agencies are being more aggressive in pursuing public corruption through other means at their disposal. As a result, firms need to widen the circle when assessing the fallout from a potential FCPA violation. Various authorities can pursue the same underlying conduct, including (among others) DOJ, the SEC (if the entity is an issuer), the Federal Reserve and federal or state prudential regulators (if the entity is a bank), and the CFTC (if the entity is involved with the commodities market).<sup>5</sup>

Continued on page 4

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2. CFTC Release No. 7884-19, “CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices” (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7884-19>.
  3. Deferred Prosecution Agreement, *United States v. Vitol Inc.*, Case No. 20-CR-539 (ENV) (E.D.N.Y. Dec. 3, 2020), <https://www.justice.gov/opa/press-release/file/1342896/download>.
  4. CFTC Release No. 8326-20, “CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation” (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>.
  5. Aaron Nicodemus, “CFTC’s Foray into FCPA Enforcement Creates New Risk Factors,” *Compliance Week* (Jan. 5, 2021), <https://www.complianceweek.com/regulatory-enforcement/cftcs-foray-into-fcpa-enforcement-creates-new-risk-factors/29892.article>.

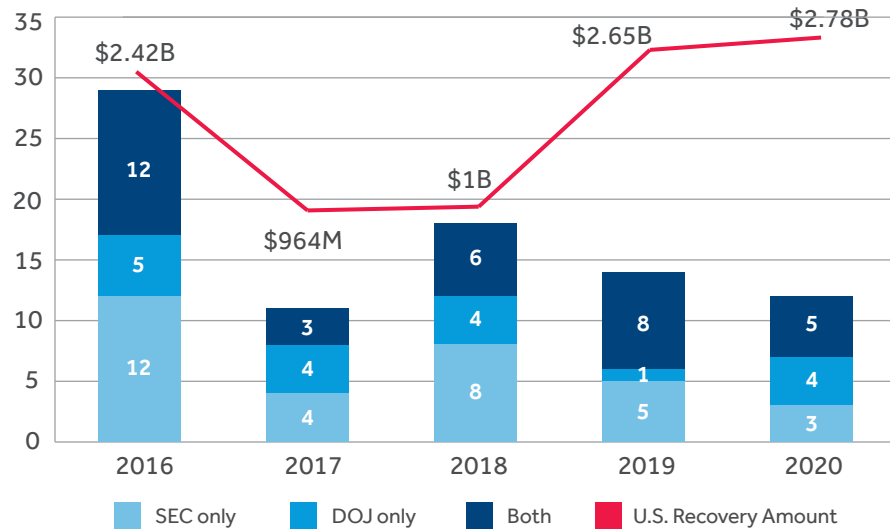
United States  
Continued from page 3

**I. Corporate Enforcement Trends**

**A. Enforcement Actions**

This year saw a slight rise in SEC- or DOJ-only cases, with fewer of the 2020 corporate resolutions involving parallel resolutions:

**FCPA Corporate Enforcement Actions**



The SEC resolved all of its corporate actions through settled cease-and-desist orders. DOJ resolved its actions through three guilty pleas (including two by parent companies, the first since 2016), six DPAs, zero NPAs (for the first time since 2017), and one declination with disgorgement pursuant to DOJ’s CEP. These are discussed in more detail below.

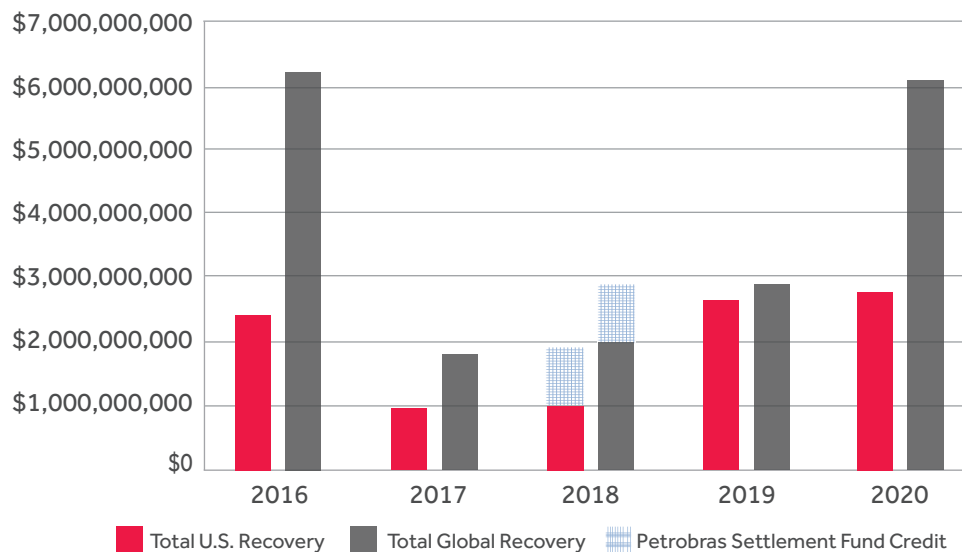
As reflected in the chart below, the United States imposed over \$6 billion in disgorgement and penalties from these corporate resolutions. Not counting the Odebrecht recovery that was reduced from \$4.5 billion to \$2.6 billion (and ultimately to \$93 million) due to inability to pay, this was the largest sum in a single year by U.S. authorities in the FCPA’s history:

Continued on page 5

United States

Continued from page 4

### U.S. Share of Global Recovery in FCPA Actions



Here are our key corporate enforcement takeaways from 2020:

- A Year of Record-Breaking Penalty Amounts and International Participation.*  
On January 31, 2020, multinational aerospace company **Airbus SE** reached the then-largest-ever global bribery-related settlement, totaling \$3.7 billion (for the foreign bribery charges) with French, U.K., and U.S. authorities.<sup>6</sup> Airbus entered into DPA equivalents with France’s PNF and U.K.’s SFO to pay €2.1 billion and more than €990 million, respectively, to settle criminal charges of alleged bribery regarding Airbus’s activities in 20 countries across Asia, the Americas, and Europe.<sup>7</sup> These were record-breaking penalties by both the French and U.K. authorities. In the United States, Airbus entered into a DPA with DOJ to settle charges of conspiracy to violate the FCPA and violations of the Arm Export Control Act and International Traffic in Arms Regulations. DOJ assessed a nearly record-breaking \$2.09 billion penalty for the FCPA-related conduct, taking \$294.5 million and crediting the remainder for amounts paid to France.<sup>8</sup>

Continued on page 6

6. Antoine F. Kirry et al, “Airbus Reaches Record-Breaking Global Settlement,” FCPA Update, Vol. 11, No. 7 (Feb. 2020), <https://www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020>.

7. These include Brazil, China, Colombia, Ghana, India, Indonesia, Japan, Kuwait, Malaysia, Mexico, Nepal, Russia, Saudi Arabia, South Korea, Sri Lanka, Taiwan, Thailand, Turkey, Vietnam, and United Arab Emirates.

8. DOJ’s \$2.09 billion penalty – the majority of which credited amounts paid to France – was the then-largest DOJ penalty assessed (excepting Odebrecht’s penalty, which was lowered due to inability to pay). 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> [hereinafter “Airbus DPA”]. The company agreed to pay a total of \$527 million in penalties to U.S. authorities (\$294.5 million for the FCPA-related violations and a \$232.7 million penalty for the violations of the International Traffic in Arms Regulations (“ITAR”)) plus an additional \$55 million as part of a civil forfeiture agreement and a \$5 million penalty to the United States.

## United States

Continued from page 5

Some nine months later, on October 22, **The Goldman Sachs Group, Inc.** agreed to pay more than \$2.9 billion to settle coordinated actions related to the 1MDB matter, involving various regulators from the United States and abroad.<sup>9</sup> Goldman's Malaysia-based subsidiary also pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions. The settlement involved the largest allegations in terms of alleged bribes (\$1.6 billion) and lost funds (\$2.7 billion allegedly siphoned from 1MDB) in any FCPA matter.<sup>10</sup> The settlement required disgorgement of approximately \$606 million and imposed the largest penalty paid to U.S. authorities in an FCPA case (\$2.3 billion assessed), with some \$1.6 billion total due to the SEC and DOJ. This resolution, therefore, surpasses Ericsson's December 2019 \$1.06 billion resolution as the largest U.S. recovery in an FCPA case. The case also involves the largest number of authorities participating in parallel resolutions in connection with an FCPA case, including the Federal Reserve and the New York State Department of Financial Services, and multiple authorities in Hong Kong, Singapore, and the United Kingdom. DOJ and the SEC thanked no fewer than 17 regulatory or law enforcement agencies and offices for their assistance.<sup>11</sup>

- *Whither the Anti-Piling On Policy?* 2020's headline-grabbing global resolutions – particularly Airbus, Goldman, and J&F Investimentos – highlight some questions about DOJ's 2018 Policy on Coordination of Corporate Resolution Penalties (the "Anti-Piling On Policy").<sup>12</sup> The Airbus matter is a good example of this. DOJ acknowledged in its settlement papers that its territorial jurisdiction over the conduct was limited, given that Airbus is neither a U.S. issuer nor a domestic concern. Further, DOJ recognized explicitly 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."<sup>13</sup> Nevertheless, and notwithstanding that the United Kingdom and France clearly were poised to address the conduct, DOJ participated by focusing on a corruption scheme in China that involved all-expenses-paid events held on American soil (Utah and Hawaii). Although U.S. authorities clearly are cognizant of the limits on their

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9. Jane Shvets, Bruce Yannett, & Andreas A. Glimenakis, "Goldman Sachs' 1MDB Settlement Brings Record Breaking FCPA Recovery for U.S. Authorities," FCPA Update, Vol. 12, No. 3 (Oct. 2020), <https://www.debevoise.com/insights/publications/2020/10/fcpa-update-october-2020>.
  10. U.S. Dep't of Justice, "Acting Assistant Attorney General Brian C. Rabbitt Delivers Remarks Announcing Goldman Sachs/1mdb Enforcement Actions" (Oct. 22, 2020), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-c-rabbitt-deliversremarks-announcing-goldman> [hereinafter "Oct. 22, 2020 AAAG Remarks"].
  11. Memo from David M. Solomon, "Goldman Sachs' Statements Relating to 1MDB Government and Regulatory Settlements" (Oct. 22, 2020), <https://www.goldmansachs.com/media-relations/press-releases/current/goldman-sachs-2020-10-22.html>.
  12. U.S. Dep't of Justice, Memo from 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>.
  13. Airbus DPA ¶ 4(i), Attachment A ¶ 39.

## United States

Continued from page 6

jurisdiction and increasingly comfortable reaching global resolutions in which primacy is ceded to authorities with “significantly stronger” interest over a company’s corruption-related conduct, it appears likely that U.S. authorities will look for ways to continue to play a leading role in the biggest cases.

There is also a question of whether universal participation in the Goldman resolution is truly efficient anti-piling on or, rather, a regulatory feeding frenzy in a particularly high-profile case. DOJ described this case as “historic because of the unprecedented coordination” that led to “parallel resolutions with no fewer than nine other U.S. and foreign authorities.”<sup>14</sup> Relatedly, it seems noteworthy that Malaysia itself – which reached a separate \$3.9 billion settlement with Goldman in July – does not appear to have split any portion of DOJ’s penalty (though the SEC did credit the entirety of its disgorgement assessment for amounts paid to Malaysia).

“Although U.S. authorities clearly are cognizant of the limits on their jurisdiction and increasingly comfortable reaching global resolutions in which primacy is ceded to authorities with “significantly stronger” interest over a company’s corruption-related conduct, it appears likely that U.S. authorities will look for ways to continue to play a leading role in the biggest cases.”

In October 2020, the SEC and DOJ settled with Brazil-based investment company **J&F Investimentos S.A.** (parent company of the world’s largest meatpacking company, JBS S.A.) after the company settled with its home enforcement authorities (here, the Brazilian government) for the same core conduct.<sup>15</sup> J&F agreed to pay a \$256 criminal penalty (half of which was credited for amounts previously paid to Brazil), pleaded guilty, and entered into a three-year cooperation plea agreement with DOJ. The charges stemmed from a scheme to bribe Brazilian officials in exchange for obtaining financing and other benefits for J&F Investimentos and related entities.<sup>16</sup> The company and its subsidiary JBS agreed to pay \$27 million to settle a parallel action with the SEC.<sup>17</sup>

Continued on page 8

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14. Oct. 22, 2020 AAAG Remarks.

15. See Plea Agreement, *United States v. J&F Investimentos S.A.*, No. 20-cr-365 (MKB) (E.D.N.Y. Oct. 13, 2020), <https://www.justice.gov/usao-edny/press-release/file/1327471/download>.

16. Andrew M. Levine, Ada Fernandez Johnson, et al., “Latin American Anti-Corruption Enforcement: Walking a Tightrope of Challenges and Opportunities,” FCPA Update, Vol. 12, No. 3 (Oct. 2020), <https://www.debevoise.com/insights/publications/2020/10/fcpa-update-october-2020>.

17. Order, *In re J&F Investimentos, S.A. et al.*, Securities Exchange Act Release No. 90170 (Oct. 14, 2020), <https://www.sec.gov/litigation/admin/2020/34-90170.pdf> [hereinafter “J&F Investimentos SEC Order”]. Two individuals were also involved in the SEC resolution.

## United States

Continued from page 7

One of the objects of the bribery scheme was to obtain a lending facility to help acquire U.S. issuer Pilgrim's Pride. Like the Airbus action, J&F highlights U.S. authorities' still-clear tendency to bring enforcement actions when part of the conduct relates to the United States, even when other jurisdictions with a history of prosecuting corruption have more significant interest.

- *Continuing Examples of Risks Associated with Sovereign Wealth Funds.* Many of the largest settlements in recent years have involved dealings with sovereign wealth funds (e.g., Société Générale, Legg Mason, and Och-Ziff). While the amounts involved in this year's Goldman enforcement action eclipsed those (already significant) settlements, the lessons remain the same. Interactions with sovereign wealth funds, public pension funds, and other state-owned and controlled entities may pose significant corruption risk, particularly when well-connected intermediaries are involved.

Other key corporate enforcement developments in 2020 include:

- *Sustained Focus on the Life Sciences and Pharmaceutical Industries.* Life sciences companies continue to make FCPA headlines.<sup>18</sup> In February, Ohio-based **Cardinal Health** became the first pharma company to settle an FCPA action in 2020. It agreed to pay approximately \$8.8 million to resolve SEC charges alleging that it violated the FCPA's accounting provisions by, *inter alia*, failing to identify improper payments made by employees of a former Chinese subsidiary, Cardinal China. The SEC Order alleged that Cardinal China maintained financial accounts on its own books for certain third-party business partners that were used to fund these business partners' operations and marketing endeavors in China (the reverse of the usual fact pattern of hiding items on third-party books). The SEC Order also alleged that the Chinese subsidiary maintained and operated an account used to make improper payments in the form of cash, luxury goods, travel expenses, and gift cards to Chinese government healthcare personnel and others on behalf of business partners.

Four years after having resolved an FCPA matter with the SEC for \$16 million, Switzerland-based **Novartis AG** and its former subsidiary, multinational eye care company **Alcon Pte Ltd**, agreed to pay more than \$233 million in combined criminal penalties. This resolution involved charges regarding improper payments to representatives in public and private healthcare positions in South Korea, Vietnam, and Greece, by current Novartis AG subsidiary Novartis Greece, and its

Continued on page 9

18. Kara Brockmeyer, Bruce E. Yannett, Andreas A. Glimenakis, & Stephanie D. Thomas, "Recent FCPA Settlements Signal Ongoing Risks in the Life Sciences Industry," FCPA Update, Vol. 12, No. 1 (Aug. 2020), <https://www.debevoise.com/insights/publications/2020/08/fcpa-update-august-2020>.



## United States

Continued from page 8

former subsidiary (and current Alcon Inc. subsidiary) in Singapore. Novartis also agreed to pay over \$112 million to settle similar charges brought by the SEC. The allegations involved a “pay-to-prescribe” scheme by Novartis Greece to bribe health officials working for state-owned and state-controlled hospitals and clinics in Greece. The company was charged with violating both the FCPA’s anti-bribery and accounting provisions. Alcon Singapore was charged with violating the accounting provisions of the FCPA in a scheme to facilitate and falsely record improper payments to Vietnamese state hospitals and clinics by Alcon Singapore. As a recidivist, Novartis paid a criminal penalty that was based on a discount of 25% from above the midpoint of the relevant fine range, not the bottom of the range, as is common with non-recidivists.<sup>19</sup>

Lastly, Boston-based **Alexion Pharmaceuticals, Inc.** agreed to pay over \$21 million to settle the SEC’s charges that the company violated the FCPA’s accounting provisions. This matter involved subsidiaries’ payments to government officials in Turkey and Russia in exchange for favorable regulatory and consumer-facing treatment of Alexion’s drug Soliris. DOJ also investigated the company, but declined to take any enforcement action.

- *Failure to Satisfy Good Faith Obligations Regarding Minority-Owned Subsidiaries.* In April 2020, Italian multinational oil and gas company **Eni S.p.A.** agreed to pay \$24.5 million to settle SEC cease-and-desist proceedings charging violations of the FCPA’s books and records and internal accounting controls provisions in connection with an improper payment scheme in Algeria.<sup>20</sup> This is a very rare example of an SEC order specifically referencing Section 13(b)(6) of the Exchange Act in an FCPA action, which requires issuers to proceed in good faith to use their influence over minority-owned subsidiaries to assure appropriate internal controls. The SEC alleged that, between 2007 and 2010, Eni’s minority-owned and controlled subsidiary, Saipem S.p.A, entered into four sham contracts with an intermediary to assist in obtaining contracts awarded by Algeria’s state-owned oil company. With approval from Saipem’s CFO – who later became Eni’s CFO in August 2008 – Saipem paid approximately €198 million to the intermediary, who directed a portion of that money to government officials. The SEC alleged that Eni failed to record accurately the true nature of Saipem’s intermediary payments in its books and records and failed to satisfy its good faith obligations to use its influence over Saipem to devise and maintain proper

Continued on page 10

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19. See, e.g., Bruce E. Yannett, Andrew M. Levine, Philip Rohlik, & Andrew K. Weiss, Corporate Recidivism in the FCPA Context, NYU Law Program on Corporate Compliance and Enforcement (July 2017), [https://wp.nyu.edu/compliance\\_enforcement/2017/07/07/corporate-recidivism-in-the-fcpa-context/](https://wp.nyu.edu/compliance_enforcement/2017/07/07/corporate-recidivism-in-the-fcpa-context/).

20. Order, *In re Eni S.p.A.*, Securities Exchange Act Release No. 88679 (Apr. 2020), <https://www.sec.gov/litigation/admin/2020/34-88679.pdf>.

## United States

Continued from page 9

internal accounting controls. The SEC's order focused on the fact that Saipem conducted no substantive review of the intermediary contracts; that audits were inadequate (e.g., simply matching invoices to payment amounts); and that Saipem's CFO bypassed contracting and procurement controls to enter into contracts with the intermediary, including falsifying and backdating documents concerning the intermediary. The hook to Eni's failure to meet its good faith obligations likely is tied to Saipem's CFO later becoming Eni's CFO and continuing to conceal and facilitate the payments on sham contracts.<sup>21</sup> Like Novartis, Eni was a recidivist. This may also explain the SEC's aggressive posture in charging Eni's internal controls violations on grounds that Eni did not proceed in good faith to use its influence to cause its subsidiary to devise and maintain sufficient internal controls. The SEC's press release explicitly noted that this was Eni's second FCPA resolution and that the first, stemming from a 2010 bribery scheme in Nigeria, involved charges for violating the same accounting provisions.<sup>22</sup>

“[The Eni case] is a very rare example of an SEC order specifically referencing [the good faith obligations regarding minority-owned subsidiaries set out in] Section 13(b)(6) of the Exchange Act in an FCPA action.”

- *Inability-to-Pay*. In September 2020, U.S.-based **Sargeant Marine** pleaded guilty to DOJ charges that it conspired to violate the FCPA's anti-bribery provisions by participating in a scheme to bribe government officials in Brazil, Ecuador, and Venezuela.<sup>23</sup> According to DOJ, the company paid bribes through intermediaries to secure contracts to purchase or sell asphalt to state-owned and controlled oil companies, netting over \$38 million. The criminal fine should have been \$90 million after Sargeant Marine received a 25% discount off the bottom of the applicable fine range due to its cooperation and remediation. Based on the company's inability to pay a larger sum without threatening its solvency,

Continued on page 11

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21. *Id.* ¶¶ 19–21. This saga has run parallel to ongoing litigation in Italy, where in December 2020, Italy's highest court of appeal upheld an acquittal of Saipem and its CFO, reversing the trial court's order that Saipem pay approximately €598 million in fines and forfeiture and the CFO's prison sentence. See “Italy Top Court Throws Out Prosecutor Appeal Against Saipem in Algeria Graft Case,” Reuters (Dec. 14, 2020), <https://www.reuters.com/article/saipem-algeria-corruption/italy-top-court-throws-out-prosecutor-appeal-against-saipem-in-algeria-graft-case-idUSL8N2IU51N>.
  22. Paul R. Berger & Aaron Tidman, “Technip S.A. and Snamprogetti Settlements Highlight the Importance of Due Diligence When Selecting Joint Venture Partners,” FCPA Update, Vol. 1, No. 12 (July 2010), <https://www.debevoise.com/insights/publications/2010/07/fcpa-update>.
  23. Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363 (E.D.N.Y. Sept. 21, 2020), <https://www.justice.gov/criminal-fraud/file/1320011/download>.

## United States

Continued from page 10

DOJ reduced the penalty to \$16.6 million (an 80% discount). This was the first time prosecutors have applied DOJ's October 2019 guidance on inability-to-pay claims to an FCPA matter,<sup>24</sup> though we have seen DOJ consider and acknowledge inability-to-pay arguments in other cases (e.g., Vantage Drilling, Transport Logistics, SBM Offshore, and Odebrecht). In addition to this corporate settlement, DOJ charged seven individuals in connection with the schemes, including company executives, intermediaries, and government officials, and six already have pleaded guilty.

- *Significant Fines Without Anti-Bribery Charges.* In August 2020, U.S.-based global nutrition company **Herbalife Nutrition Ltd.** joined another direct selling company (Avon) in having paid over \$100 million to settle accounting provisions violations related to its business in China.<sup>25</sup> Herbalife agreed to pay approximately \$123 million to settle SEC cease-and-desist proceedings charging books and records and internal controls violations. It also entered into a three-year DPA with DOJ to resolve DOJ's charges that the company conspired to violate the books and records provisions.

Although technically not in 2020, in January 2021, **Deutsche Bank A.G.** settled its second FCPA case in less than 1.5 years. The bank agreed to pay more than \$122 million to settle SEC charges that it violated the books and records and internal controls provisions and DOJ's charges that it conspired to violate those same provisions.<sup>26</sup> These \$100+ million accounting-only settlements join Walmart (2019) and Avon (2014) as the only settlements of that size to feature only accounting charges brought by both the SEC and DOJ in an FCPA case.

- *Only One Declination Under DOJ's Corporate Enforcement Policy.* In August 2020, U.S.-based consumer finance company **World Acceptance Corp.** agreed to pay \$21.7 million to settle SEC anti-bribery, books and records, and internal controls charges related to a bribery scheme at a former wholly-owned subsidiary in Mexico. In its only declination brought under the CEP in 2020, DOJ declined to prosecute the company, citing the company's prompt, voluntary self-disclosure, full cooperation and remediation, and disgorgement paid to the SEC.<sup>27</sup>

Continued on page 12

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24. Dylan Tokar, "Asphalt Company Got \$70 Million Break on Penalty," Wall St. J. (Oct. 1, 2020), <https://www.wsj.com/articles/asphalt-company-got-70-million-break-on-penalty-11601544601>.

25. Kara Brockmeyer, Andrew M. Levine, & Philip Rohlik, "Herbalife Settlement Highlights Risks in China and Provides Insight Regarding DOJ's Compliance Program Expectations," FCPA Update, Vol. 12 No. 2 (Sept. 2020), <https://www.debevoise.com/insights/publications/2020/09/fcpa-update-september-2020>;

26. United States Dep't. of Justice, Press Release No. 21-23, "Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case" (Jan. 8, 2021), <https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud>. The bank paid over \$130 million when adding amounts paid to settle the commodities fraud portion of the case.

27. Declination Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Mark E. Schamel et al., Re: *World Acceptance Corp.*, Declination (Aug. 5, 2020), <https://www.justice.gov/criminal-fraud/file/1301826/download>.

## United States

Continued from page 11

- *Risks of Settling with One Enforcement Agency Without the Other(s)*  
Generally speaking, the SEC and DOJ coordinate their FCPA resolutions. However, we have seen a few instances in which DOJ's case followed years after the SEC's. In October 2020, U.S.-based producer and seller of alcoholic beverages **Beam Suntory Inc.** entered into a three-year DPA with DOJ and agreed to pay \$19.6 million to settle FCPA charges stemming from conduct involving improper payments by an Indian subsidiary.<sup>28</sup> DOJ's resolution lagged more than two years behind Beam's settlement with the SEC and comes more than six years after the company's 2012 disclosure to both the SEC and DOJ.<sup>29</sup> DOJ and the SEC seemingly reached opposite conclusions as to the amount of credit Beam deserved for its cooperation, highlighting that cooperating with one government agency is not the same as cooperating with every government agency. This appears to be the first time since the adoption of the Anti-Piling On Policy that DOJ explicitly has refused to credit the related civil penalty that a company previously agreed to pay the SEC. DOJ attributed its decision, at least partly, to Beam's failure to "seek to coordinate a parallel resolution with [DOJ]." Beam Suntory is the third global alcoholic beverage company in nine years (after Diageo in 2011 and Anheuser-Busch InBev in 2016) to resolve an action at least in part based on conduct in India.

**B. Heat Map by Geography**

As in 2019, cases involving China (4) and Brazil (4) again figured most prominently in 2020, though the rest of the world also was well-represented. U.S. authorities brought corporate enforcement actions based on conduct that occurred in Africa (Algeria), Asia (China, India, Malaysia, South Korea, and Vietnam), Europe (Greece, Russia, and Turkey), North America (Mexico), and South America (Brazil, Colombia, Ecuador, and Venezuela). And this does not include many of the 20 countries referenced in the sprawling Airbus bribery scheme prosecuted by French and U.K. authorities, given that DOJ's FCPA settlement focused only on China-based conduct.

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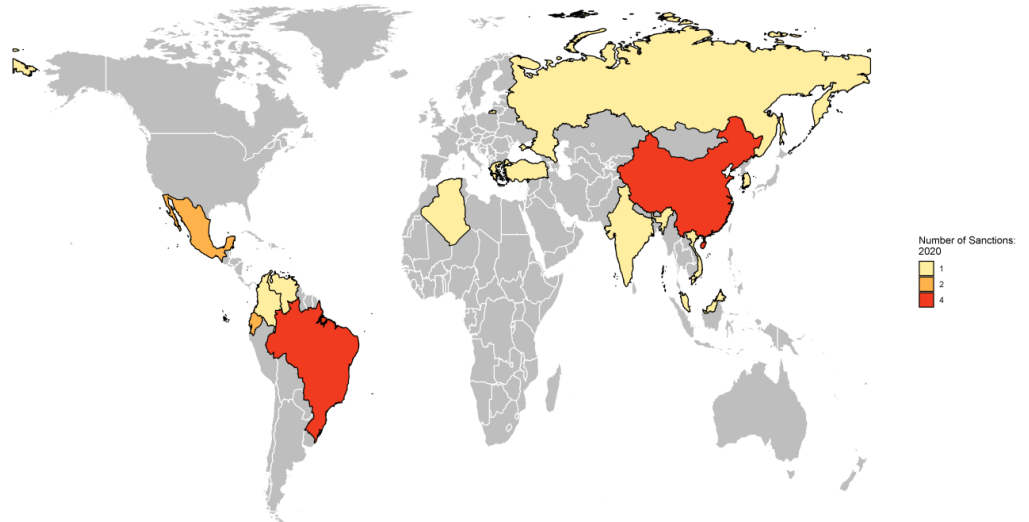
28. Andrew M. Levine, Jane Shvets, Andreas A. Glimenakis, & Liliana Ramirez, "Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC," FCPA Update, Vol. 12, No. 4 (Nov. 2020), <https://www.debevoise.com/insights/publications/2020/11/fcpa-update-november-2020>.

29. In 2018, Beam Suntory agreed to pay \$6.1 million in disgorgement and pre-judgment interest and a \$2 million civil penalty to the SEC.

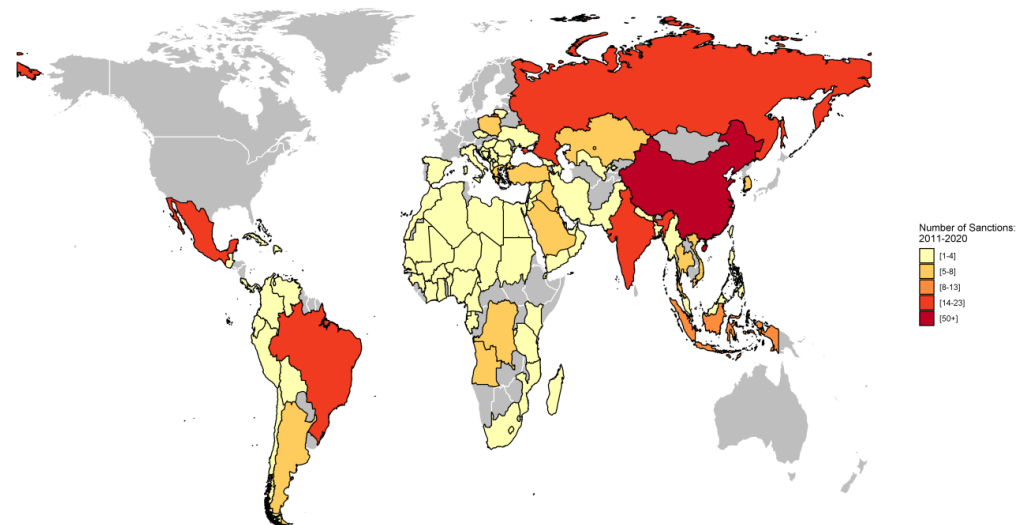
United States

Continued from page 12

Corporate Resolutions: 2020 Heat Map



Corporate Resolutions: 2011-2020 Heat Map



C. Follow-on Litigation Related to FCPA Issues

*Och-Ziff and the Mandatory Victims Restitution Act*

After the resolution of FCPA enforcement actions with U.S. agencies or non-U.S. counterparts, companies may face related follow-on litigation. These lawsuits typically take the form of securities fraud class actions and shareholder

Continued on page 14

## United States

Continued from page 13

derivative suits. (See discussion below of SQM, Raytheon and Airbus.) Other claims, such as third parties seeking restitution, are unusual after FCPA settlements and generally have not succeeded.

However, a recent case involving hedge fund **Sculptor Capital Management, Inc. (formerly Och-Ziff Capital Management Group LLC)** illustrates that some “victims” of FCPA-related actions may find success. In 2016, Och-Ziff paid \$412 million to settle enforcement actions with DOJ and the SEC based on bribes paid by its subsidiary, OZ Africa Management GP, LLC (“OZ Africa”), to Congolese officials in order to secure control of a Congolese mine.<sup>30</sup> Following this action, a group of former investors in the Canada-incorporated mining company Africo Resources Ltd. (“Africo”) filed a lawsuit contending that they qualified as victims under the Mandatory Victims Restitution Act (the “MVRA”), because they had incurred losses as a result of bribes paid by OZ Africa.

“Although not every party has succeeded in utilizing the MVRA for restitution claims, the Och-Ziff case illustrates the potential pitfalls for FCPA violators with cases involving third-party claimants deemed ‘victims’”

In an August 2019 order, Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York agreed with Africo’s interpretation of the MVRA in the FCPA context. This holding permitted Africo’s restitution claim to proceed. In November 2020, Sculptor Capital (f/k/a Och-Ziff) settled the case for more than \$135 million.<sup>31</sup> Although not every party has succeeded in utilizing the MVRA for restitution claims,<sup>32</sup> the Och-Ziff case illustrates the potential pitfalls for FCPA violators with cases involving third-party claimants deemed “victims.”

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30. David A. O’Neil, Philip Rohlik & Jil Simon, “Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risk for Companies Settling FCPA Actions,” FCPA Update, Vol. 11, No. 2 (Sept. 2019), <https://www.debevoise.com/insights/publications/2019/09/fcpa-update-september-2019>.
31. Order of Restitution, *United States v. OZ Africa Management GP, LLC*, No. 16-CR-515 (E.D.N.Y. Nov. 12, 2020), ECF. No. 110.
32. See, e.g., Order, *In re Empresa Publica de Hidrocarburos del Ecuador*, No. 20-11430 (11th Cir. May 26, 2020) (denying Ecuadorian state-owned oil company’s petition for writ of mandamus pursuant to the Crime Victims’ Rights Act (“CVRA”) and agreeing with district court’s determination that company could not be considered a victim under the CVRA and MVRA).

## United States

Continued from page 14

*Follow-On Securities Class Action Lawsuits*

In 2020, Chilean company **Sociedad Química y Minera de Chile S.A. (“SQM”)** agreed to settle a long-running securities class action alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5.<sup>33</sup> The shareholder suit alleged that the price of SQM ADSs significantly declined following disclosures that Chilean authorities were investigating SQM.

In January 2017, SQM paid over \$30.4 million to settle with DOJ and the SEC regarding alleged violations of the FCPA’s accounting provisions.<sup>34</sup> (DOJ’s DPA recognized but did not formally credit \$9 million in penalties, taxes, and interest SQM paid to Chilean authorities in connection with the conduct outlined in the DPA.) On December 11, 2020, SQM agreed to pay \$62.5 million to settle the class action lawsuit.<sup>35</sup> In total, therefore, SQM paid more than \$100 million to resolve claims related to the bribe scheme.

In October 2020, after disclosing an SEC and DOJ investigation into alleged improper payments in the Middle East, **Raytheon Technologies Corporation** and certain officers and directors were sued by shareholders both derivatively and in class action lawsuits over the same conduct.<sup>36</sup> Although the derivative action has been stayed pending the securities class actions, Raytheon remains embroiled in both the government investigations and pending civil litigation.

**Airbus** faces a shareholder securities class action lawsuit filed in New Jersey in August 2020. This case references the various announcements of European and U.S. anti-corruption investigations and alleges that the company made false and misleading statements by, *inter alia*, failing to disclose the scope of the misconduct and that the resolution would foreseeably cost billions.<sup>37</sup>

And in an example of a case that was unsuccessful, a federal judge in New Jersey dismissed a putative securities class action lawsuit against Anglo-Swiss multinational company **Glencore PLC** that alleged that Glencore concealed its engagement in a bribery scheme in the Democratic Republic of the Congo, Venezuela, and Nigeria.<sup>38</sup>

Continued on page 16

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33. Complaint, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 15-cv-02106-ER (S.D.N.Y. Mar. 19, 2015), ECF No. 1 [hereinafter “SQM Lawsuit”]; Complaint, *Molinero v. Chemical and Mining Company of Chile Inc.*, No. 15-cv-02884-ER (S.D.N.Y. Apr. 14, 2015), ECF No. 1.
34. Kara Brockmeyer et al., “Anti-Corruption Enforcement in 2017: A Return to Normalcy,” FCPA Update, Vol. 9, No. 6 (Jan. 2018), <https://www.debevoise.com/insights/publications/2018/01/fcpa-update-jan-2018-vol-9-no-6>.
35. SQM Lawsuit, ECF No. 234.
36. See, e.g., Complaint, *Bajjuri v. Raytheon Technologies Corporation*, No. 4:20-cv-00468-JCH (D. Ariz. Oct. 30, 2020), ECF No. 1; Complaint, *Norris v. Raytheon Technologies Corporation*, No. 4:20-cv-00543-RM (D. Ariz. Dec. 11, 2020), ECF No. 1; Complaint, *Mo v. Kennedy*, No. 20-cv-01614-MN (D. Del. Nov. 25, 2020), ECF No. 1.
37. Complaint, *Kornecki v. Airbus SE*, No. 20-cv-10084-KM-JBC (D.N.J. Aug. 6, 2020), ECF No. 1.
38. *Church v. Glencore PLC*, No. CV1811477SDWCLW, 2020 WL 4382280, at \*1 (D.N.J. July 31, 2020).

**United States**

Continued from page 15

The case was dismissed on forum non conveniens grounds because there was no indication that the plaintiffs were connected to New Jersey or that Glencore had any office or subsidiaries in the state. Additionally, the alleged conduct giving rise to the plaintiffs’ claims occurred abroad, with Glencore’s purported misstatements/ omissions crafted and approved from Switzerland.

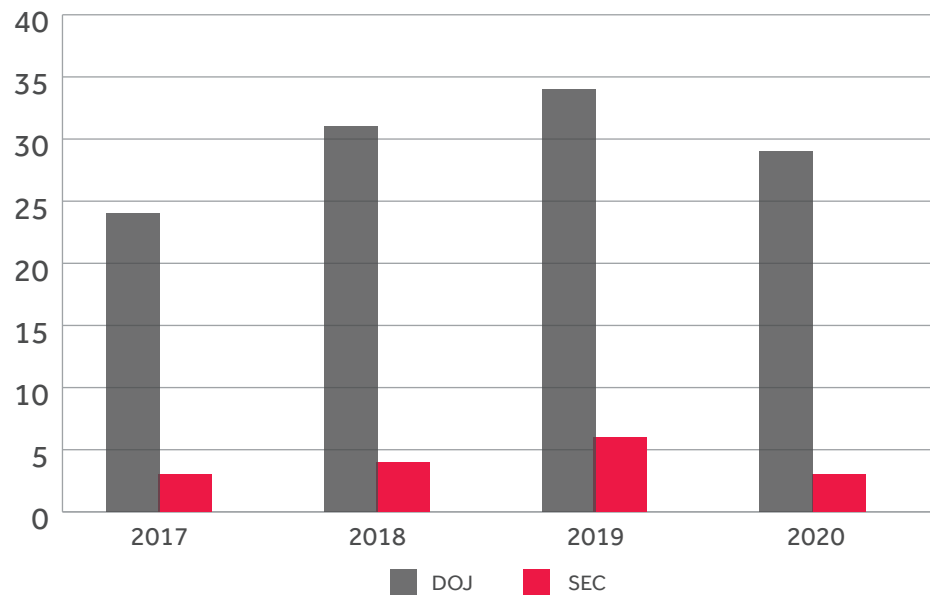
**II. FCPA Enforcement Against Individuals**

DOJ and the SEC filed more than 30 actions against individuals in 2020. Continuing a trend from the past several years, the majority of these cases were clustered around a small number of matters and continued to demonstrate DOJ’s willingness to prosecute foreign citizens and press the FCPA’s extraterritorial jurisdictional reach.

**A. SEC and DOJ Individual Actions with Related Corporate Resolutions**

This year, nearly half of the corporate actions had associated individual actions. The Goldman, Herbalife, J&F Investimentos, Sargeant Marine, and Vitol corporate resolutions also involved charges against company executives, intermediaries, and government officials (*i.e.*, the supply side, middlemen, and demand side of the alleged bribes), though some of these cases predated the associated corporate resolution.

**Charges Announced Against Individuals in FCPA-related Actions**



Continued on page 17



## United States

Continued from page 16

Below are a few highlights:

- *Sargeant Marine*. Five individuals who played a major role in an eight-year scheme to pay bribes to foreign officials in Brazil, Venezuela, and Ecuador pleaded guilty in 2020, including Daniel Sargeant, the company's namesake and senior executive; a Sargeant Marine trader; consultants who acted as bribe intermediaries in Brazil and Venezuela; and a former PDVSA official who received bribes in connection with the Venezuela contracts.<sup>39</sup> A sixth individual, another trader at Sargeant Marine, pleaded guilty in November 2017 for his role in the Brazil scheme. DOJ also unsealed a criminal complaint against another former PDVSA official, charging him with conspiracy to commit money laundering, in part, for his alleged role in the Venezuela scheme.

“Continuing a trend from the past several years, the majority of these cases [against individuals] were clustered around a small number of matters and continued to demonstrate DOJ’s willingness to prosecute foreign citizens and press the FCPA’s extraterritorial jurisdictional reach.”

- *J&F/Pilgrim’s Pride*. The SEC settled charges against two Pilgrim’s Pride board members, Joesley and Wesley Batista, finding that they caused Pilgrim’s Pride’s violations of the FCPA’s books and records and internal controls provisions in connection with a bribery scheme to facilitate JBS’s acquisition of U.S. issuer Pilgrim’s Pride.<sup>40</sup> According to the SEC’s Order, the Batistas paid approximately \$150 million in bribes at the direction of a Brazilian Finance Minister using funds obtained from JBS operating accounts containing funds from Pilgrim’s Pride including through intercompany transfers and dividend payments. The Batistas agreed to pay civil penalties of \$550,000 each.
- *Vitol*. Joining others previously charged, in September 2020, DOJ indicted a former manager at Vitol on charges of conspiracy to violate the FCPA and conspiracy to commit money laundering. DOJ alleged that the manager participated in a five-year bribery scheme involving over \$870,000 in payments to Ecuadorian officials to secure a \$300 million contract with Petroecuador, Ecuador’s state-owned oil company.<sup>41</sup>

Continued on page 18

39. U.S. Dep’t of Justice Press Release No. 30-983, “Sargeant Marine Inc. Pleads Guilty and Agrees to Pay \$16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador” (Sept. 22, 2020), <https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign>.

40. See J&F Investimentos SEC Order.

41. U.S. Dep’t of Justice, “Former Manager of Oil Trading Firm Charged in Money Laundering and Bribery Scheme” (Sept. 22, 2020), <https://www.justice.gov/usao-edny/pr/former-manager-oil-trading-firm-charged-money-laundering-and-bribery-scheme>.

## United States

Continued from page 17

- *Alstom/Marubeni*. Continuing a trend of announcing a handful of actions against individuals tied to previous corporate resolutions, in February 2020, DOJ charged two former executives of the Indonesian subsidiary of French power and transportation company Alstom S.A. and a former executive of Japanese trading company Marubeni Corporation.<sup>42</sup> The defendants allegedly paid bribes to officials, including a high-ranking member of the Indonesian Parliament and the president of Indonesia's state-owned electricity company, in exchange for assistance in securing a contract for Alstom's subsidiaries in Connecticut and Indonesia and for Marubeni to provide power-related services. In addition to the corporate resolutions, five individuals have pleaded guilty in the case so far. Due in part to his extensive cooperation, former Indonesia Country President for Alstom S.A. Edward Thiessen was sentenced on July 20, 2020 to time served and ordered to pay \$15,000 for his role in the scheme.<sup>43</sup>
- *PDVSA*. DOJ announced charges against five more individuals (including several Venezuelan citizens) and guilty pleas entered by four more in connection with the sprawling public procurement corruption scheme in Venezuela.<sup>44</sup> These individuals included the procurement head of a PDVSA majority-owned joint venture, the former general counsel of PDVSA, and Venezuelan businessmen. Since 2015, DOJ has publicly announced charges against some 25 individuals and obtained 19 guilty pleas in connection with this scheme, in which U.S.-based PDVSA vendors bribed foreign officials to obtain PDVSA contracts and to secure payment on overdue invoices.
- *Seguros Sucre*. In February 2020, DOJ charged three individuals for their alleged roles in a money laundering conspiracy to secure contracts with Ecuador's state-owned insurance company, Seguros Sucre.<sup>45</sup> Those individuals included Juan Ribas Domenech, a former Seguros Sucre chairman and Ecuadorian citizen; Jose Vicente Gomez Aviles, an Ecuadorian businessperson who helped companies secure contracts with Seguros Sucre; and Felipe Moncaleano Botero, a Colombian citizen and former executive of an unnamed UK reinsurance broker's Colombian subsidiary that worked with Seguros Sucre. Separately, in March, DOJ filed an additional criminal complaint charging Roberto Heinert,

Continued on page 19

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42. U.S. Dep't of Justice Press Release No. 20-196, "Former Alstom Executives and Marubeni Executive Charged with Bribing Indonesian Officials" (Feb. 18, 2020), <https://www.justice.gov/opa/pr/former-alstom-executives-and-marubeni-executive-charged-bribing-indonesian-officials>.

43. Judgment, *United States v. Thiessen*, No. 3:19-cr-00181-JBA (D. Conn. July 20, 2020).

44. See, e.g., *United States v. Tulio Anibal Farias-Perez*, No. 20-cr-00089 (S.D. Tex. Feb. 7, 2020); *United States v. Lennys Rangel*, No. 19-cr-20726-JEM (S.D. Fla. Nov. 4, 2019); *United States v. Edoardo Orsoni*, No. 19-cr-20725-MGC (S.D. Fla. Nov. 4, 2019); *United States v. Carlos Enrique Urbano Fermin*, No. 20-cr-20163-RNS (S.D. Fla. Mar. 20, 2020); *United States v. Leonardo Santilli*, No. 20-MJ-02459-LFL (S.D. Fla. Mar. 20, 2020).

45. *United States v. Ribas Domenech, et al.*, No. 20-2228JJO (S.D. Fla. Feb. 12, 2020).

## United States

Continued from page 18

a dual U.S. and Ecuadorian citizen who worked with Gomez, with a related money laundering offense. According to the criminal complaints, Ribas allegedly received bribes from Gomez, Heinert, and Botero, laundered through U.S. bank accounts, in exchange for awarding a reinsurance contract for Ecuador's Ministry of Defense provided by Seguros Sucre. Gomez pleaded guilty on June 11, 2020 and Ribas, Heinert, and Botero await trial dates.

- *Adoption Cases.* On August 13, 2020, DOJ charged three individuals for their alleged roles in an international criminal adoption scheme involving bribe payments to Ugandan government officials, including judges, in exchange for permitting adoptions of Ugandan and Polish children, including some not properly deemed to be orphans.<sup>46</sup>

**B. SEC and DOJ Individual Stand-Alone Actions**

In addition to the charges relating to these larger schemes and those associated with corporate resolutions, 2020 saw a handful of stand-alone actions against individuals, including:

- *Kang.* On December 17, 2020, Deck Wong Kang of New Jersey pleaded guilty to one count of violating the anti-bribery provision of the FCPA. Kang admitted to paying a total of \$100,000 in promised bribes to a Korean government official in order to obtain and retain contracts with the Defense Acquisition Program Administration, a state-owned and state-controlled agency within the Republic of Korea's Ministry of National Defense.<sup>47</sup>
- *Berko.* In one of the SEC's three publicly-announced charges against individuals in 2020, the Commission charged Asante Berko, a former executive of a Goldman foreign-based subsidiary with violating and aiding and abetting violations of the FCPA's anti-bribery provisions. The civil complaint alleges that Berko arranged for his firm's client, a Turkish energy company, to funnel at least \$2.5 million to a Ghana-based intermediary to pay bribes to Ghanaian government officials in order to gain their approval of an electrical power plant project. According to the complaint, Berko took deliberate measures to prevent his employer from detecting his bribery scheme, including misleading his employer's compliance personnel about the true role and purpose of the intermediary company.

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46. U.S. Dep't of Justice Press Release No. 20-784, "Three Individuals Charged with Arranging Adoptions from Uganda and Poland Through Bribery and Fraud" (Aug. 17, 2020), <https://www.justice.gov/opa/pr/three-individuals-charged-arranging-adoptions-uganda-and-poland-through-bribery-and-fraud>.

47. U.S. Dep't of Justice Press Release No. 20-1370, "New Jersey Man Pleads Guilty to Violating the Foreign Corrupt Practices Act" (Dec. 17, 2020), <https://www.justice.gov/opa/pr/new-jersey-man-pleads-guilty-violating-foreign-corrupt-practices-act>.

## United States

Continued from page 19

**C. DOJ Trial Convictions and Updates**

Beyond the announced arrests, indictments, and guilty pleas, DOJ secured one trial conviction in 2020 and litigated appeals of three of the four convictions secured in 2019:

- *Government Official Convicted in FCPA-related trial.* DOJ tried and convicted a former member of the Barbados Parliament and Minister of Industry, Donville Inniss, for his role in a bribery scheme in which Insurance Corporation of Barbados Limited (“ICBL”) executives paid him bribes.<sup>48</sup> According to evidence presented at the one-week trial, Inniss used his position to help ICBL secure two insurance contracts from the Barbados government. He then took part in a scheme to launder the \$36,000 he received in bribes into the United States.
- *Lawrence Hoskins.* Following a November 2019 jury conviction for 11 FCPA- and money laundering-related charges, Lawrence Hoskins, the former senior vice president for the Asia Region of Alstom Holdings S.A., moved for an acquittal based on insufficient evidence. In February 2020, the court overturned the seven FCPA convictions finding that the government failed to present sufficient evidence that Hoskins acted as an agent of Alstom Power (a U.S. subsidiary). In March 2020, Hoskins was sentenced to 15 months in prison based on the money laundering convictions. DOJ has appealed the acquittal of the seven FCPA convictions, as well as the judgment imposed for the money-laundering convictions. Hoskins filed an opposition brief and is cross-appealing, raising Sixth Amendment, jury instruction, and venue arguments.
- *Roger Boncy and Joseph Baptiste.* In June 2019, Roger Boncy, the chairman and chief executive officer of an investment firm, and Joseph Baptiste, the firm’s president and a board member, were found guilty of conspiracy to violate the FCPA and Travel Act.<sup>49</sup> In March 2020, the court granted Boncy and Baptiste a new trial based on ineffective assistance of counsel.<sup>50</sup> DOJ has appealed to the First Circuit, arguing that the district court erred as a matter of law.<sup>51</sup>

Continued on page 21

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48. U.S. Dep’t of Justice Press Release No. 20-52, “Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company” (Jan. 16, 2020), <https://www.justice.gov/opa/pr/former-member-barbados-parliament-and-minister-industry-found-guilty-receiving-and-laundering>.

49. U.S. Dep’t of Justice Press Release No. 19-697, “Two Businessmen Convicted of International Bribery Offenses” (June 20, 2019), <https://www.justice.gov/opa/pr/two-businessmen-convicted-international-bribery-offenses-0>.

50. Mem. & Order on Defs.’ Mots. for J. of Acquittal & New Trial, *United States v. Baptiste*, No. 17-cr-10305-ADB (D. Mass. Mar. 10, 2020), ECF No. 286.

51. Appellant Brief, *United States v. Baptiste*, No. 17-cr-10305-ADB (D. Mass. Mar. 10, 2020).

## United States

Continued from page 20

- *Looking Ahead to 2021.* There are at least six FCPA trials scheduled for 2021, including those of former Goldman Sachs executive Ng Chong Hwa (Roger Ng); former Cognizant president Gordon J. Coburn and chief legal officer Steven Schwartz; former Braskem CEO Jose Carlos Grubisich; a former procurement officer and manager of a Houston-based subsidiary of PDVSA, Jose Luis de Jongh-Atensio; and an employee of an intercountry adoption agency, Debra Parris.

“Beyond the announced arrests, indictments, and guilty pleas, DOJ secured one trial conviction in 2020 and litigated appeals of three of the four convictions secured in 2019.”

### III. FCPA-Related Legal, Policy, and Enforcement Updates

#### **A. Congress Expands the SEC’s Disgorgement Authority**

On January 1, 2021, Congress overrode the President’s veto to pass the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”). Among the many provisions of the bill, the NDAA amended Section 21(d) of the Exchange Act to allow the SEC to seek disgorgement in federal court actions brought by the SEC where “any person received unjust enrichment as a result of the violation.”<sup>52</sup> The NDAA set a 10-year limitations period for the SEC to seek disgorgement for scienter-based violations of the federal securities laws and a five-year limitations period for non-scienter based violations.

We expect the SEC will move swiftly to take advantage of this new authority under the NDAA. This authority applies on its face to any actions pending when the bill became law. It also frees the SEC from at least some of the restrictions on disgorgement imposed by the Supreme Court’s decision in *Liu v. SEC*,<sup>53</sup> which questioned the SEC’s disgorgement authority where: (1) disgorgement was not returned to victims; (2) joint-and-several liability was imposed; or (3) disgorgement exceeded the defendant’s net profits after deducting legitimate business expenses. The amendments may obviate any requirement that disgorgement be awarded to victims and provide room to advocate that legitimate business expenses are deductible from disgorgement.

Continued on page 22

52. Kara Brockmeyer, Andrew J. Ceresney, et al., “The SEC’s Expanded Disgorgement Authority Complicates Investigations and Settlements,” Debevoise Update (Jan. 2021), <https://www.debevoise.com/insights/publications/2021/01/the-secs-expanded-disgorgement-authority>.

53. 140 S. Ct. 1936 (2020).

## United States

Continued from page 21

**B. Policy Developments**

With many working from home, the summer of 2020 provided an opportunity for DOJ and the SEC to update their FCPA Resource Guide alongside noteworthy changes to DOJ's compliance guidance. These pronouncements contain the most complete discussions to date of the U.S. agencies' interpretation of relevant law and expectations for compliance programs, providing a useful guide for companies and compliance officers seeking to evaluate and update their programs.

**1. Evaluation of Corporate Compliance Programs**

In June, DOJ released an updated version of its *Evaluation of Corporate Compliance Programs* (the "2020 Guidance").<sup>54</sup> As we addressed more fully earlier this year,<sup>55</sup> although the updates did not change radically the existing guidelines, the following points stand out:

- *One Size Does Not Fit All.* The 2020 Guidance highlighted the importance of risk assessments and made clear that each company must tailor its compliance program to fit its own business. An "off-the-shelf" program is not adequate.
- *Sufficiency of Compliance Resources.* The 2020 Guidance doubles down on the importance of compliance resources, asking whether the program is "adequately resourced and empowered to function effectively" – the key question behind effective implementation. Even the most thoughtfully designed compliance program will fail without the necessary funding, staffing, and support from personnel at all levels of the company.
- *Critical Importance of Data.* Acknowledging a trend towards leveraging data to better design, implement, and operationalize compliance programs, DOJ now instructs prosecutors to evaluate whether compliance staff have "sufficient direct or indirect access to relevant sources of data" to do their jobs effectively.<sup>56</sup> That access to operational data should be cross-functional and continuous such as to enable timely monitoring, not just a series of snapshots.
- *Ongoing Monitoring of Third-Party Agents.* DOJ highlighted the need for a company's ongoing management, oversight, and evaluation of third-party partners, including through due diligence and audits and beyond the moment of initial onboarding.

Continued on page 23

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54. U.S. Dep't of Justice, Criminal Div., "Evaluation of Corporate Compliance Programs" (Updated June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [hereinafter "2020 Guidance"].

55. Kara Brockmeyer, Andrew J. Ceresney, et al., "DOJ Updates Guidance on Corporate Compliance Programs," Debevoise Update (June 2020), <https://www.debevoise.com/insights/publications/2020/06/doj-updates-guidance-on-corporate-compliance>.

56. *Id.* at 12.

## United States

Continued from page 22

- *Integration of Acquisitions.* The 2020 Guidance asks prosecutors to evaluate whether an acquiring company was able to complete its pre-acquisition due diligence (and, if not, why) and instructs prosecutors to determine whether the company has a process for timely and orderly integration of the acquired entity into the acquirer's existing compliance program.

## 2. Updated FCPA Resource Guide

In July, DOJ and the SEC released the long-awaited new edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Second Edition").<sup>57</sup> This publication provides an update to the original resource guide, which was released in 2012 (the "First Edition"). Although much of the Guide remained the same, the Second Edition addresses interpretations of the FCPA that have developed in the past eight years, including in case law, enforcement actions, and the policies and guidance of both DOJ and the SEC.<sup>58</sup> The following are several notable highlights from the Second Edition:

- *Conspiracy and Aiding-and-Abetting Theories After Hoskins.* Perhaps most significantly, the Second Edition recognizes the impact of the Second Circuit's decision in *United States v. Hoskins* on FCPA enforcement. Before *Hoskins*, there had been a general understanding that foreign non-issuers and individuals were subject to the FCPA through the conspiracy and aiding-and-abetting statutes, even when entities had not taken any relevant action in the United States.<sup>59</sup> In *Hoskins*, the Second Circuit held that, because the FCPA specifically identifies those subject to the statute's anti-bribery jurisdiction, the government cannot use the conspiracy or aiding-and-abetting statutes to expand the extraterritorial reach of the anti-bribery provisions over foreign nationals.<sup>60</sup> Therefore, "at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA anti-bribery provisions or aiding and abetting an anti-bribery violation only if that individual's conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA's anti-bribery provisions."<sup>61</sup> The Second Edition notes that *Hoskins* is not settled law and mentions that one district court – the Northern District of Illinois – has rejected the decision. It also maintains that the conspiracy and aiding-and-abetting

Continued on page 24

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57. U.S. Dep't of Justice, Criminal Div. & U.S. Sec. & Exch. Comm'n, Enf't Div., *A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition* (July 2020), at 36, <https://www.justice.gov/criminal-fraud/file/1292051/download> [hereinafter "Second Edition"].

58. Kara Brockmeyer, Andrew M. Levine, Jane Shvets, Bruce E. Yannett & Philip Rohlik, "New Edition of FCPA Resource Guide Offers Guidance and Raises Questions," *FCPA Update*, Vol. 11, No. 12 (July 2020), <https://www.debevoise.com/insights/publications/2020/07/fcpa-update-july-2020> [hereinafter "July 2020 FCPA Update"].

59. U.S. Dep't of Justice, Criminal Div. and U.S. Sec. and Exch. Comm'n, Enf't Div., "A Resource Guide to the U.S. Foreign Corrupt Practices Act" at 12, 34 (Nov. 2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

60. *United States v. Hoskins*, 902 F. 3d 69, 71–72 (2d Cir. 2018).

61. Second Edition, *supra* note 57, at 36.

## United States

Continued from page 23

theories are available for the accounting provisions of the FCPA because those terms apply to “any person.”<sup>62</sup>

- *Additional Commentary Regarding Successor Liability.* The Second Edition goes a bit further than the prior version in providing comfort in the transactional context, incorporating by reference the CEP’s statement that an acquiring company may be eligible for a declination when voluntarily disclosing a target’s prior misconduct.<sup>63</sup> DOJ continues to tout the importance of pre- and post-acquisition anti-corruption due diligence and compliance integration, though there is no guaranteed transactional free pass, and a declination under the CEP remains less attractive than a traditional declination.

“[T]he Second Edition recognizes the impact of the Second Circuit’s decision in *United States v. Hoskins* on FCPA enforcement [, but] notes that *Hoskins* is not settled law [and] . . . that the conspiracy and aiding-and abetting theories are available for the accounting provisions of the FCPA because those terms apply to ‘any person.’”

- *Other Updates on Case Law, Case Examples, and DOJ Policies.* The Second Edition provides updates on relevant case law and DOJ policies decided or adopted since 2012, including updated discussions of what constitutes an “instrumentality” under the FCPA to incorporate the multifactor test in *Esquenazi* and to compile in one place the CEP and various guidance memos regarding the imposition of corporate monitors, coordination and anti-piling on, and the evaluation of corporate compliance programs.

### 3. Changes to DOJ’s “Attachment C” Involving Minimum Requirements for Compliance Programs

In August, DOJ made a little-noticed update to “Attachment C,” the list of minimum requirements for a compliance program that has been included in DPAs entered into by DOJ in FCPA actions for at least a decade, when it announced the *Herbalife* settlement.<sup>64</sup> This update incorporated new requirements from DOJ’s June 2020 Guidance.

Continued on page 25

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62. *Id.* at 46 (emphasis added).

63. Second Edition, *supra* note 57, at 31–32.

64. Kara Brockmeyer, Andrew M. Levine, & Philip Rohlik, “Herbalife Settlement Highlights Risks in China and Provides Insight Regarding DOJ’s Compliance Program Expectations,” FCPA Update, Vol. 12 No. 2 (Sept. 2020), [https://www.debevoise.com/insights/publications/2020/09/fcpa-update-september-2020;DeferredProsecutionAgreement,UnitedStatesv.HerbalifeNutritionLtd.,CaseNo.1:20-cr-00443-GHW\(Sept.1,2020\),atC-1–C-2,https://www.justice.gov/criminal-fraud/file/1312361/download](https://www.debevoise.com/insights/publications/2020/09/fcpa-update-september-2020;DeferredProsecutionAgreement,UnitedStatesv.HerbalifeNutritionLtd.,CaseNo.1:20-cr-00443-GHW(Sept.1,2020),atC-1–C-2,https://www.justice.gov/criminal-fraud/file/1312361/download).



## United States

Continued from page 24

The Herbalife DPA included four major additions to Attachment C:

- *Commitment to Compliance.* While previous versions of Attachment C stated that directors and senior management needed to demonstrate support and commitment to the company's compliance policy, the Herbalife DPA amplified this requirement to reference middle management and encompass all levels of an organization.
- *Internal Reporting and Investigation.* The Herbalife DPA included supplemental language requiring the effective and timely investigation of complaints and "following up with appropriate discipline where necessary."<sup>65</sup>
- *Third-Party Relationships.* The Herbalife DPA added language about conducting adequate due diligence, securing anti-corruption commitments, and conducting ongoing monitoring. It also addressed ensuring the company understands and records the business rationale for using a third party, the contract specifically describes the services to be performed, the contracted services actually are provided, and compensation is in line with the industry and geography.
- *Monitoring, Testing, and Remediation.* Again echoing the June 2020 updates, the DPA's Attachment C added commitments to ensure that compliance personnel have sufficient access to relevant sources of data to enable timely and effective monitoring and testing of transactions.

## C. Other Updates

### 1. Challenges to the Internal Controls Provision

As we've discussed previously,<sup>66</sup> the SEC and DOJ have broadly interpreted the FCPA's internal controls provision to encompass compliance controls. This interpretation has received some pushback, including from two SEC commissioners.

In November, Commissioners Hester Peirce and Elad Roisman questioned whether the SEC's interpretation of "internal accounting controls" is unduly broad. In explaining their dissenting votes against a proposed securities fraud case,<sup>67</sup> the Commissioners warned against overlooking "accounting" as intentionally included limiting language.<sup>68</sup> They argued that the full text of Section 13(b)(2)(B) makes clear that the focus is "internal **accounting** controls" and not generic "internal controls."

Continued on page 26

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65. *Id.* at C-5.

66. July 2020 FCPA Update, *supra* note 58, at 8.

67. Order, *In re Andeavor LLC*, Securities Exchange Act Release No. 90208 (Oct. 15, 2020), <https://www.sec.gov/litigation/admin/2020/34-90208.pdf>.

68. U.S. Securities & Exchange Commission, "Statement of Commissioners Hester M. Peirce and Elad L. Roisman – Andeavor LLC" (Nov. 13, 2020), <https://www.sec.gov/news/public-statement/peirce-roisman-andeavor-2020-11-13>.

## United States

Continued from page 25

We may soon get some guidance from at least one court. In 2018, DOJ charged former Goldman executive Roger Ng with conspiracy to violate the FCPA, including to circumvent Goldman's internal controls. In November 2020, Ng moved to dismiss the charges, arguing that DOJ's interpretation of the internal controls provision was unduly broad because, among other things, the alleged bribes were misappropriated from non-issuer 1MDB (not Goldman) and because DOJ focused on the concealing of middleman Jho Low's role in the 1MDB transactions from Goldman's compliance and legal group.<sup>69</sup> According to Ng, the compliance function is not an internal "accounting" control, which he argues is limited to "a protocol concerning the identification, management and disposition of the issuer's assets."<sup>70</sup>

Debate as to the breadth of the FCPA's internal controls provision likely will continue into 2021, particularly as the Second Edition of the FCPA Resource Guide, released in 2020, clarified that the FCPA's statutory language referring to internal accounting controls is not synonymous with a company's compliance program.<sup>71</sup>

## 2. Coburn: How Many Counts Is Too Many?

In *United States v. Coburn*, the government charged two former executives of Cognizant for their alleged roles in a scheme to pay approximately \$2 million in bribes to government officials in India.<sup>72</sup> Each defendant was charged with multiple counts for the same overall scheme, on the theory that the "unit of prosecution" under the FCPA is each use of the means or instrumentalities of interstate commerce – in this case, emails – rather than each offer, promise, or authorization to give anything of value.<sup>73</sup>

A judge in the District of New Jersey issued an order expansively interpreting the FCPA by concluding that each use of interstate commerce could constitute a separate charge under the anti-bribery provisions. The court also held that a defendant charged with participating in a bribery scheme need not personally "use" interstate commerce, so long as such use by another was a foreseeable part of the scheme.

Continued on page 27

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69. Def.'s Mot. Dismiss, *United States v. Ng Chong Hwa a.k.a. Roger Ng*, No. 18-cr-538 (MKB) (E.D.N.Y. Nov. 20, 2020).

70. *Id.* at 49.

71. Second Edition, *supra* note 57, at 40–41.

72. Kara Brockmeyer, Andrew M. Levine, Andreas A. Glimenakis, & Katherine R. Seifert, "District Courts Address Significant Aspects of Individual Criminal Liability under the FCPA" FCPA Update, Vol. 11, No. 8 (Mar. 2020), <https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020>.

73. See *United States v. Coburn*, 439 F. Supp. 3d 361, 372–80 (D.N.J. 2020).

## United States

Continued from page 26

**3. OECD Phase 4 Report Commends United States for “Prominent Role” in Anti-Corruption Enforcement**

In November 2020, the OECD Working Group on Bribery issued its Phase 4 Report on U.S. implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments.<sup>74</sup> The Report commends U.S. anti-corruption enforcement efforts and attributes robust enforcement to enhanced investigatory and prosecutorial expertise and resources; enforcement of a broad range of offences in foreign bribery cases; effective use of non-trial resolutions (e.g., DPAs, NPAs); and the development of published policies incentivizing cooperation with enforcement agencies (e.g., CEP’s presumption of a declination).

Among the Report’s recommendations are that the United States extend anti-retaliation protection to more whistleblowers (i.e., to all private sector whistleblowers, not just those reporting about issuers); address recidivism through appropriate sanctions; and that enforcement agencies publicly announce whether an NPA or DPA has been extended or completed and the ground for any extension.

**4. Uptick in Whistleblower Reports and Awards**

Fiscal year 2020 marked a record-setting year for the SEC’s Whistleblower program, including the number of tips received (6,900 tips), number of individuals granted awards (39 individuals) and the total dollar value of awards issued (\$175 million).<sup>75</sup> 2020 also saw the two largest awards in the program’s history: \$50 million in June and \$114 million in October. Approximately 208 (3%) of the year’s tips alleged FCPA violations, which is on par (despite a slight proportional decrease) with the number of FCPA tips received in prior years. For example, there were 200 FCPA tips in 2019 (3.8% of the 5,212 tips received) and 202 FCPA tips in 2018 (3.8% of the 5,282 tips received).<sup>76</sup> Notably, attorneys for a whistleblower referenced in a September SEC press release<sup>77</sup> confirmed that their client, a Brazilian doctor, received a \$1.8 million award for a 2014 tip that led to a January 2017 SEC enforcement action against Orthofix International for FCPA violations in Brazil.<sup>78</sup>

Continued on page 28

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74. Andrew M. Levine, Jane Shvets, Scott M. Caravello, & Andreas Constantine Pavlou, “OECD Working Group Issues Report on U.S. Anti-Corruption Enforcement,” FCPA Update, Vol. 12 No. 5 (Dec. 2020), <https://www.debevoise.com/insights/publications/2020/12/fcpa-update-december-2020>.
  75. Debevoise Debrief, “SEC Annual Report on Whistleblower Program Highlights Record-Setting 10-Year Anniversary” (Nov. 19, 2020), <https://www.debevoise.com/insights/publications/2020/11/sec-annual-report-on-whistleblower>.
  76. U.S. Securities & Exchange Commission, “2020 Annual Report to Congress Whistleblower Program” (Nov. 2, 2020), [https://www.sec.gov/files/2020%20Annual%20Report\\_0.pdf](https://www.sec.gov/files/2020%20Annual%20Report_0.pdf).
  77. U.S. Securities & Exchange Commission, “SEC Awards Over \$2.5 Million to Joint Whistleblowers for Detailed Analysis That Led to Multiple Successful Actions” (Sept. 1, 2020), <https://www.sec.gov/news/press-release/2020-201>.
  78. Mengqi Sun, “Whistleblower in Orthofix Bribery Case Awarded \$1.8 Million,” Wall Street Journal (Sept. 25, 2020), [https://www.wsj.com/articles/whistleblower-in-orthofix-bribery-case-awarded-1-8-million-11601064562?mod=mw\\_quote\\_news](https://www.wsj.com/articles/whistleblower-in-orthofix-bribery-case-awarded-1-8-million-11601064562?mod=mw_quote_news).

## United States

Continued from page 27

The Office of the Whistleblower Chief stated that the SEC hopes “the awards made in FY 2020 continue to incentivize whistleblowers to come forward and report specific, timely, and credible information to the Commission, which in turn enhances the agency’s ability to detect wrongdoing and protect investors and the marketplace.”

Also, in September, the SEC adopted amendments to the rules governing whistleblower awards under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act to provide greater clarity to whistleblowers and increase the program’s efficiency and transparency. This includes by: (1) creating a presumption in favor of the statutory maximum amount for awards under \$5 million; (2) permitting awards based on DOJ non-prosecution agreements and deferred prosecution agreements; (3) expediting resolution of plainly non-meritorious whistleblower claims; and (4) adopting a uniform definition of “whistleblower” for purposes of the award program and the anti-retaliation protections.<sup>79</sup>

“Fiscal year 2020 marked a record-setting year for the SEC’s Whistleblower program, including the number of tips received (6,900 tips), number of individuals granted awards (39 individuals) and the total dollar value of awards issued (\$175 million).”

### 5. Congress Approves Kleptocracy Asset Recovery Rewards Act

The NDAA, enacted on January 1, 2021, includes the Kleptocracy Asset Recovery Rewards Act (“KARRA”), establishing a rewards program for whistleblowers who assist U.S. authorities in recovering certain proceeds of corruption.<sup>80</sup> There are several notable parameters to KARRA’s three-year pilot program, which the Department of Treasury will administer. These details include limiting rewards payments to \$5 million, reducing or denying payments to individuals who participated in the corruption, and excluding officers and employees of federal, state, or foreign governments from eligibility.<sup>81</sup>

Continued on page 29

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79. U.S. Securities & Exchange Commission, “SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program” (Sept. 23, 2020), <https://www.sec.gov/news/press-release/2020-219>.

80. Kara Brockmeyer, Andrew M. Levine, Philip Rohlik, & Valerie A. Zuckerman “Pending U.S. Legislation Will Expand Anti-Kleptocracy Initiative,” FCPA Update, Vol. 12, No. 5 (Dec. 2020), <https://www.debevoise.com/insights/publications/2020/12/fcpa-update-december-2020>.

81. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 9703(e)-(f).

**United States**

Continued from page 28

The KARRA program appears to supplement the SEC's current whistleblower program (the "SEC Program"). Although whistleblowers might submit information through both programs, they seemingly cannot seek a reward from both. Additionally, any award under KARRA likely will be significantly lower than under the SEC Program. Also, the type of qualifying information furnished by a whistleblower differs between the two programs. The SEC Program rewards individuals who provide "original information" about a violation of securities laws (including the FCPA), leading to a successful enforcement action.<sup>82</sup> In contrast, KARRA's bar rewards individuals who report information leading to the restraint, seizure, forfeiture, or repatriation of assets held at a U.S. financial institution.

Continued on page 30

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82. See, e.g., U.S. Securities & Exchange Commission, Office of the Whistleblower Guidance for Whistleblower Award Determinations (Sept. 23, 2020), [https://www.sec.gov/files/OWB%20Guidance%20for%20OWB%20Award%20Determinations\\_0.pdf](https://www.sec.gov/files/OWB%20Guidance%20for%20OWB%20Award%20Determinations_0.pdf).

## United Kingdom

With hindsight, 2020 was never going to be a big year for UK white collar enforcement. Difficulties caused by the global pandemic added to pre-existing concerns over the slow progress, and often disappointing results, of major white collar investigations.

As we look forward to the start of the progressive lifting of measures adopted to fight COVID-19 during 2021, and the hoped-for recovery of economies and the wider society, the question is the extent to which UK white collar enforcement will bounce back. With that in mind, we focus this section on the biggest structural change to the UK enforcement landscape in a generation: the UK's final severing of ties with the institutional framework built up by the European Union in the broad field of criminal justice cooperation.

From 23:00 GMT on December 31, 2020, UK cross-border enforcement activities in cases involving the jurisdiction of a member state of the EU will be governed by Part III of the Trade and Co-operation Agreement provisionally agreed between the EU and UK on Christmas Eve 2020 ("TCA").<sup>1</sup> On any view, these new arrangements will create novel sources of friction and delay, bucking the trend particularly in the area of cross-border, multi-agency investigations where international cooperation was becoming increasingly seamless. Nevertheless, as we shall see, there is hope that the UK on the one hand, and the EU collectively and/or individual Member States on the other, can build on the provisions of the TCA to recreate working arrangements to mitigate the delays and inefficiencies resulting from the UK's departure from the EU criminal justice framework.

### I. Enforcement Activity

Any analysis of white collar enforcement activity in 2020 needs to be set against a background of operational difficulties caused by the fight against COVID-19. Remote working, difficulties accessing documents, and the logistics of conducting interviews are all examples of issues causing delays in progressing investigations. Additionally, temporary closures and an ongoing need to provide for social distancing also caused a massive reduction in court capacity which has meant that many white collar trials have been postponed as courts prioritize cases with defendants in custody.

Continued on page 31

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1. The TCA is provisionally operational pending final approval by the European Parliament, expected towards the end of Q1 2021.

## United Kingdom

Continued from page 30

## A. SFO

Following the difficulties of the previous year,<sup>2</sup> the Serious Fraud Office saw its activity slow somewhat in 2020 as the impact of COVID-19 was felt and the agency sought to operate predominantly remotely. Despite these challenges, 2020 brought some successes for the SFO in securing three Deferred Prosecution Agreements (“DPAs”) and convictions of executives in connection to the long-running Unaoil matter. However, there were also announcements that ongoing investigations had been dropped, and the SFO’s Director faced judicial criticism for her interactions with a private investigator while prosecuting one case.

*Three New DPAs*

The SFO secured three DPAs in 2020, concluding years-long investigations. Most significantly, in January, following a four-year investigation, the SFO was party to the largest ever global bribery-related settlement. Airbus SE entered into a DPA and agreed to pay €991 million in fines and costs in the UK; a significant share of the total €3.6 billion settlement which also involved a U.S. DPA and a French CJIP (addressed elsewhere in this issue).<sup>3</sup>

Two further DPAs followed in the second half of the year, once the pandemic had hit. In July, G4S Care and Justice Services (UK) Ltd entered into a DPA relating to fraud offenses against the UK’s Ministry of Justice under which it agreed to pay a fine of £38.5 million and the SFO’s costs. In October, the SFO entered a DPA with the defunct aviation company Airline Services Limited (“ASL”) relating to three counts of failing to prevent bribery under s.7 of the Bribery Act. The offenses concerned the sale of commercial aircraft refitting services to Lufthansa through an agent. Under the DPA, ASL agreed to pay £2,979,685 consisting of a fine, disgorgement of profits and an amount to contribute to the SFO’s investigation costs. This DPA with ASL is the SFO’s third following investigations in the aviation industry, following the high-profile Airbus and Rolls-Royce cases.<sup>4</sup> The news in November that the SFO officially launched an investigation into Bombardier Inc. relating to sales to the Indonesian airline Garuda suggests a continued SFO focus on this industry.

Continued on page 32

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2. “The Year 2019 in Review: 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>.
  3. See Antoine F. Kirry et al., “Airbus Reaches Record-Breaking Global Settlement,” FCPA Update, Vol. 11, No. 7 (Feb. 2020), <https://www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020>.
  4. Debevoise & Plimpton LLP, “Debevoise Advises Rolls-Royce in Coordinated Resolutions with UK, U.S., and Brazil Investigating Authorities” (Jan. 17, 2017), [https://www.debevoise.com/news/2017/01/rolls\\_royce\\_coordinated-resolutions\\_uk-us](https://www.debevoise.com/news/2017/01/rolls_royce_coordinated-resolutions_uk-us).

## United Kingdom

Continued from page 31

*Pursuing Individuals*

The SFO received some criticism in previous years for failing to secure convictions against individuals connected with corporate investigations and settlements. In this regard, the SFO faced a challenging start to the year with the February acquittal of three former senior Barclays executives on fraud charges.<sup>5</sup> These acquittals followed the dismissal of related charges against Barclays corporate entities in 2018 and the same individuals and one other executive in 2019. The Barclays case has intensified the debate regarding the UK's corporate liability regime, as discussed below.

**“[Brexit] will create novel sources of friction and delay, bucking the trend particularly in the area of cross-border, multi-agency investigations where international cooperation was becoming increasingly seamless.”**

However, the SFO achieved some successes later in the year. In July, the agency secured £5.45 million combined confiscation orders against the CEO and COO of the former oil and gas services company Afren plc, both of whom had been convicted and sentenced for fraud and money laundering offenses in October 2018.

The SFO also secured some convictions for foreign bribery offenses. Very recently, in January 2021, a conviction was secured against the former Global Head of Sales at Petrofac, the oilfield services company into which a long-running investigation is continuing. Most significantly, however, following a trial which was kept running through the initial phase of the pandemic, between July and October, the SFO secured the convictions of three individuals connected with the long running Unaoil investigation. Basil al-Jarah, Unaoil's former partner in Iraq, and Ziad Akle and Stephen Whiteley, both former Unaoil territory managers in Iraq, were sentenced to between three and five years' imprisonment for their roles in a conspiracy to pay in excess of \$17 million of bribes to secure contracts in Iraq worth approximately \$1.7 billion. The success in the Unaoil trial was somewhat marred by judicial criticism levelled at Lisa Osofsky, the Director of the SFO. Judge Martin Beddoe criticised Osofsky's interaction with a Florida based private investigator who was acting for individuals implicated in the Unaoil investigation. The SFO has

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5. Bruce E. Yannett, Karolos Seeger, Robin Lööf, & Aisling Cowell, "The SFO's Failed *Barclays* Prosecutions: The Limitations of English Corporate Liability Exposed?" FCPA Update, Vol. 11, No. 8 (Mar. 2020), <https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020>.



United Kingdom  
Continued from page 32

announced the launch of an inquiry into the criticism and the handling of the case, but no results have yet been published.

2020 also saw the SFO bring high-profile charges against individuals in cases to watch going forwards. In September and October, fraud charges were brought against five executives of Balli Group plc and Balli Steel plc. The SFO also charged individuals in connection with the investigation into GPT Special Project Management Ltd.

The speed with which individual prosecutions will reach their conclusions will increasingly be subject to how court capacity is managed. The pandemic exacerbated a pre-existing problem with deficiencies in material and human resources and, as this goes to print, the backlog of cases waiting to be tried before juries in the Crown Courts stands at around 54,000. Cases are now being routinely listed for trial well into 2022, and anecdotally even into 2023. How the UK government decides to deal with this large and growing problem for the criminal justice system as a whole will have an impact also on the small subset of cases involving allegations of serious white collar offending.

#### *Dropping Investigations*

The SFO dropped two of its ongoing investigations for evidential insufficiency. In May, the investigation opened in 2017 into Swiss engineering company ABB Ltd (linked to the Unaoil investigation was terminated). In June, the SFO also halted its investigation into the bank note printing company De La Rue plc. This investigation had only been launched in 2019.

#### *DPA Guidance*

In October, the SFO published the chapter on DPAs from its Operational Handbook.<sup>6</sup> This publication contains guidance on various aspects of securing and negotiating DPAs, including the SFO's expectations in terms of self-reporting and cooperation and managing multi-jurisdictional investigations.

#### **B. FCA**

In 2020, the Financial Conduct Authority ("FCA") imposed financial penalties on 11 firms and individuals, totalling £224 million. This is in line with the average over the last few years. The number of open enforcement investigations stabilized in 2020 after several years of significant increases, with 646 open investigations as of March 31, 2020.

Continued on page 34

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6. Karolos Seeger, Robin Lööf, & Aisling Cowell, "The SFO Publishes Its Internal Guidance on Deferred Prosecution Agreements," Compliance & Enforcement (Oct. 30, 2020), [https://wp.nyu.edu/compliance\\_enforcement/2020/10/30/the-sfo-publishes-its-internal-guidance-on-deferred-prosecution-agreements](https://wp.nyu.edu/compliance_enforcement/2020/10/30/the-sfo-publishes-its-internal-guidance-on-deferred-prosecution-agreements).

United Kingdom  
Continued from page 33

Notably, in December, the FCA issued its first market manipulation penalty under the Market Abuse Regulation, against Corrado Abbattista. Combating market abuse has been a priority for the FCA for some time now and it has invested heavily in market surveillance tools. Also notable is the June fine of almost £38 million imposed on Commerzbank AG for failings in its oversight of anti-money laundering (“AML”) issues, including customer due diligence processes and transaction monitoring. This was the latest in a series of cases demonstrating that AML controls remain at the top of the FCA’s agenda.

## II. Legislative Developments

With lawmakers preoccupied with managing the fallout from the pandemic and the final severing of ties with the EU, not much attention was given to reforming law and procedure affecting white collar enforcement activity. Even so, it is worth noting changes in relation to the cross-border obtaining of electronic evidence, as well as further developments in the long-running saga of the possible reform of corporate criminal liability.

### **A. Overseas Production Orders**

On July 8, 2020, the U.K.-U.S. Bilateral Data Access Agreement (the “Agreement”)<sup>7</sup> became the first, and so far only, “designated international cooperation arrangement” for the purposes of the Crime (Overseas Production Orders) Act 2019 (“COPOA”), which aims to facilitate and accelerate international cooperation in the collection of electronic data located overseas.<sup>8</sup> The Agreement grants reciprocal rights to law enforcement agencies in the UK and US to access data from Communication Service Providers without review by local authorities. The Agreement targets serious crimes, punishable under domestic law by a maximum custodial sentence of at least three years.

Whereas electronic data may take months or even years to be produced under traditional Mutual Legal Assistance treaties, data custodians served with Overseas Production Orders pursuant to the Agreement will generally need to comply within seven days.

Continued on page 35

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7. The text of the Agreement is available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/836969/CS\\_USA\\_6.2019\\_Agreement\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_USA\\_on\\_Access\\_to\\_Electronic\\_Data\\_for\\_the\\_Purpose\\_of\\_Counteracting\\_Serious\\_Crime.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Counteracting_Serious_Crime.pdf) (PDF: 268 KB). For relevant press releases, see <https://www.gov.uk/government/news/uk-and-us-sign-landmark-data-access-agreement> (U.K.) and <https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists> (U.S.).
8. The Act entered into force in England, Scotland, and Wales on October 9, 2019. It received Royal Assent on February 12, 2019.

United Kingdom  
Continued from page 34

The UK appears to hope that the Agreement will serve as a successful template for future bilateral agreements to speed up the cross-border obtaining of data relevant to the investigation of serious crime. Even so, the regime has limitations: respect for traditional international comity means that non-compliance with an OPO is not criminally sanctionable, and OPOs cannot require electronic data to be decrypted.

## B. Corporate Criminal Responsibility

Over recent years, there has been growing momentum in favor of reforming the UK's corporate criminal responsibility framework. SFO Director Lisa Osofsky has taken up the call of her predecessor David Green QC for an expansion of the existing "failure to prevent" offense under the UK Bribery Act 2010 into a general offense of failing to prevent economic crime.<sup>9</sup> There is also concern that the identification principle – which governs the attribution of corporate criminal liability under UK law – does not allow for misconduct carried out by or on behalf of companies to be successfully prosecuted, often as a result of the diffusion of decision-making within a large corporation. This concern is to a certain extent fuelled by the SFO's poor record of convictions against corporations in relation to, in particular, fraud and money laundering. As noted above, in early 2020, the case against the Barclays corporate entities, which turned on whether the bank itself could be attributed liability for the alleged criminal dishonesty of the bank's senior officers, were dismissed<sup>10</sup> with the courts adopting a very strict interpretation of the identification principle.<sup>11</sup>

In November 2020, the Law Commission began its review of the UK's corporate criminal liability legislation, after the government asked it to examine potential avenues for improvement.<sup>12</sup> The review will cover the law "relating to the criminal liability of non-natural persons, including companies, and providing options for reform." Referring the matter to the Law Commission was the government's much-delayed response to a consultation launched by a previous government in 2017, and was justified with reference to a lack of consensus among the respondents to the consultation. It appears that those awaiting an overhaul of the UK's corporate liability regime will have to wait for a while longer. For now, the restrictive approach to the identification principle remains.

Continued on page 36

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9. Max Walters, "Parliament urged to create all encompassing 'failure to prevent' law," *The Law Society Gazette* (Nov. 19, 2018), <https://www.lawgazette.co.uk/law/parliament-urged-to-create-all-encompassing-failure-to-prevent-law/5068369.article>.

10. *SFO v Barclays PLC* [2018] EWHC 3055 (QB).

11. See *supra* note 5.

12. For more information, refer to the Law Commission site at <https://www.lawcom.gov.uk/project/corporate-criminal-liability>.

United Kingdom

Continued from page 35

### III. The New UK / EU Cooperation Regime

Tortuously but relatively hastily negotiated, the mammoth Trade and Co-operation Agreement between the UK and EU was approved in principle on Christmas Eve. Provisionally in force as of 23:00 GMT on December 31, 2020, it is set to provide the framework for relations between the UK and the EU and its Member States for years to come in a whole host of areas, including criminal justice cooperation. How the new framework is implemented and, in due course, improved will be a significant factor in how effective UK white collar enforcement bodies will be at tackling serious, cross-border offending.

“How the new framework is implemented ... will be a significant factor in how effective UK white collar enforcement bodies will be at tackling serious, cross-border offending.”

#### **A. Institutional Cooperation**

##### *EU Law Enforcement and Judicial Agencies*

Once the UK ceased to be a Member State, it forfeited its automatic inclusion within the EU's law enforcement and judicial networks. While this change will affect the UK's relationship with a number of EU entities, we consider below the impact on the UK's participation in three elements of the EU's law enforcement framework that are likely to be particularly affected, namely Europol and Eurojust (together, the “EU Agencies”) and Joint Investigation Teams (“JITs”).

- Europol is the EU's law enforcement body, which supports over 40,000 investigations annually. The agency assists national crime agencies by gathering, analysing, and sharing information, and coordinating cross-border operations.
- Eurojust assists national judicial authorities in investigating and prosecuting multi-jurisdictional criminal offenses by providing a range of operational support, including facilitating requests for mutual legal assistance and European Arrest Warrants. Eurojust also provides a facility for EU member states to resolve conflicting jurisdictional claims.

Continued on page 37

## United Kingdom

Continued from page 36

- JITs are teams consisting of legal professionals from several member states, established for a fixed period, to carry out specific cross-border criminal investigations. They enable states to exchange information and directly participate in investigative measures carried out on each others' territories. In 2019, Eurojust supported 270 JITs, including the UK/French JIT that investigated corruption allegations against Airbus SE.

*UK Relationship with EU Agencies*

Following Brexit, the UK's relationship with the EU Agencies will undoubtedly change. The UK will no longer be part of the Europol or Eurojust management boards, and, therefore, cannot influence the agencies' strategies. Additionally, as a third country, the UK will not automatically have direct access to the EU Agencies' information systems. Having said that, the TCA includes provisions that seek to ensure that the UK will retain a close relationship with the EU Agencies, and the EU and UK will continue to cooperate on judicial and enforcement matters (a level of cooperation that may not have been achievable in the absence of a deal between the UK and EU).<sup>13</sup>

The UK also will continue to work with the EU Agencies to combat serious cross-border crime. The TCA provides some insight into these future arrangements, but many more specific details, including negotiation of access to the EU Agencies' information systems, will be established through future working agreements. The UK and the EU Agencies will:

- Second officers to one another's organizations. In particular, the UK will second a team of up to six liaison prosecutors to Eurojust, who will in turn second a representative to the UK. The UK's secondment team is significantly larger than those permitted under the Swiss, Norwegian, and U.S. Working Agreements, which allow for only two secondees. Liaison prosecutors are "able to engage in many instances in much the same way"<sup>14</sup> as Member State representatives.
- Establish contact points to facilitate communication between the UK and the EU Agencies.
- Mutually exchange information to facilitate investigations and prosecutions. The information exchanged with Europol may include specialist knowledge, strategic analysis results, and information on criminal investigation procedures and crime prevention methods. Information exchanged with Eurojust may include personal, classified, and sensitive information.

Continued on page 38

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13. See Part Three, Titles V & VI, TCA.

14. House of Lords European Union Committee, "Brexit: future UK-EU security and police cooperation" (Dec. 16, 2016) (at chapter 2, paragraph 76).

United Kingdom  
Continued from page 37

In addition to Member States, the EU Agencies work closely with a number of third countries and international agencies. For example, Eurojust has executed working agreements with Switzerland, Norway and the United States. Though these could give some indications as to the content of the UK's agreement, it remains to be seen what the UK's relationship with the EU Agencies will look like.

#### *UK Participation in JITs*

The UK's withdrawal from the EU will likely have a minimal impact on its participation in JITs. It will continue to be able to join JITs, albeit as a third country rather than a Member State, and has already enacted the necessary underlying legislation to provide a legal basis for its continued participation. The UK will continue to cooperate with Member States and third countries as before, and will still be able to receive support and funding from Eurojust for any JITs (albeit funding applications will have to be submitted on the UK's behalf by a Member State). Further, as we discuss below, there is a good track record of third countries participating actively in the JIT regime.

#### *Practical Consequences for Corporate Criminal Investigations*

The impact of Brexit on the UK's relationship with the EU Agencies and JITs is currently unclear as (i) the change is unprecedented, (ii) the UK's relationships with these entities will be defined by further working agreements that are yet to be concluded, and (iii) sufficient time has not elapsed for the full impact of the change to become apparent. Nonetheless, it appears that there is significant political willpower on both sides to facilitate full and effective police and judicial co-operation to avoid a "security downgrade."<sup>15</sup> The UK has previously recognized the detrimental impact that leaving these organizations would have on UK policing and criminal justice when it elected to continue as a member of the EU Agencies in December 2014, in the immediate aftermath of the Lisbon Treaty.

The effectiveness of UK corporate crime investigations is most likely to be impacted by the UK's future participation in JITs. Third countries are increasingly participating in JITs. In 2018 and 2019, approximately 20% of JITs included third countries, with Norway and Switzerland being the most heavily involved. The EU's experience of working with third countries should enable the UK to participate with ease. Furthermore, the UK should be able to avoid many of the pitfalls faced by third countries when attempting to join a team, given that it participated in JITs in its capacity as a Member State.<sup>16</sup>

Continued on page 39

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15. Home Affairs Committee, "Home Office preparations for the UK exiting the EU" (Dec. 7, 2018) (at chapter 1, paragraph 26).

16. See Eurojust, "Third JIT Evaluation Report" (Mar. 2020), [www.eurojust.europa.eu/third-jit-evaluation-report](http://www.eurojust.europa.eu/third-jit-evaluation-report).

## United Kingdom

Continued from page 38

The UK's relationship with the EU Agencies is less likely to impact corporate crime investigations, as they are more commonly used for offenses such as terrorism and drugs trafficking. Nonetheless, Brexit is likely to have an acute short-term impact on these relationships. The UK's co-operation with the EU Agencies is conditional upon other agreements coming into effect, which often take several years of negotiation. Although the UK's status as a former Member State and the aforementioned political willpower may expedite the process, realizing the full potential of cooperation provided for by the TCA cannot be achieved until then.

**B. Evidence Gathering**

The process by which the UK may gather evidence from the EU in cross-border criminal matters changed significantly with the end of the transition period.

The UK is no longer able to use European Investigation Orders ("EIOs"), which enable an authority in one EU Member State directly to request that an authority in another Member State either provide it with evidence already in its possession or exercise a wide range of investigative measures. Member States must recognise an EIO within 30 days and execute it within 90 days of recognition. UK authorities have sent and received hundreds of EIOs each year since they were introduced in July 2017.

**“Once the UK ceased to be a Member State, it forfeited its automatic inclusion within the EU’s law enforcement and judicial networks.”**

Because the TCA provides no direct replacement for EIOs, the UK will fall back on individual mutual legal assistance ("MLA") agreements with Member States or the 1959 European Convention on Mutual Legal Assistance in Criminal Matters. Both of these procedures allow discretion in complying with a request and are likely to be considerably slower than the EIO process. The TCA does include mechanisms aimed at simplifying and expediting MLA requests such as time limits, additional channels of communication between relevant authorities, and the use of joint investigation teams; it remains to be seen how effective these will be in practice.

Continued on page 40

United Kingdom  
Continued from page 39

At the same time, the deepening of the EU co-operation framework continues without the UK. The EU's proposed European Production Order ("EPO") mechanism will enable an authority to seek a court order requiring a service provider in another Member State to produce electronically stored data, for use as evidence in criminal investigations or proceedings. The TCA is silent on EPOs, and it is unlikely that the UK will be able to participate in the scheme when it comes into effect. However, as we explain below, this is an area which has seen UK legislative developments providing for bilateral solutions, and so it is not impossible that the UK will be able to facilitate exchange of electronic data through bilateral arrangements.

### C. Extradition and Surrender

Title VII of Part 3 of the TCA addresses 'Surrender' and EU-UK extradition arrangements, replacing the European Arrest Warrant (the "EAW"). The new arrangements will be overseen by the Specialised Committee on Law Enforcement and Judicial Cooperation (the "Committee"), rather than the Court of Justice of the European Union.

The new arrangements broadly resemble those the EU has with Norway and Iceland, and still reflect many of the core provisions of the EAW scheme. For example, surrender under the TCA allows for direct transmission between judicial authorities, sets out limited grounds for refusal to execute an arrest warrant, and follows the same tight timescales as under the EAW. Moreover, the EAW's removal of the dual criminality requirement for a list of 32 categories, i.e., doing away with the need for an act falling within those categories to be an offense in both the requesting and requested jurisdiction, has been retained.

While the level of cooperation in terms of extradition / surrender remains close under the TCA, the new arrangement departs from both the EAW and the EU's arrangements with Norway and Iceland in three key ways.

First, the TCA introduces a new concept of proportionality, requiring that "cooperation through the arrest warrant shall be necessary and proportionate." When making this assessment, the judicial authorities should consider the rights of the requested person, the victim's interests, the seriousness of the act, the potential penalty, and the possibility of taking less coercive measures (e.g., to avoid unnecessarily long pre-trial detention). This does not necessarily imply an objective worsening of the legal framework, as the introduction of a similar provision in the EAW scheme has been under discussion for some time to deter or prevent the use of heavy-handed procedures in respect of allegations of relatively minor offending.

Continued on page 41



## United Kingdom

Continued from page 40

Second, there are new grounds for refusing to execute an arrest warrant. Most notably, the UK and EU Member States have the option to refuse to surrender their own nationals. Member States, such as Germany, with constitutional prohibitions on the extradition of their own nationals outside the EU will almost certainly adopt this position. That said, if a state exercises the exception, it must still consider taking action “commensurate with the subject matter of the arrest warrant, having taken into account the views of the issuing State” against the requested individual.

Third, the Agreement allows the UK or an EU Member State to request additional safeguards in specific circumstances. For example, if there are substantial grounds for believing that there is a real risk to the fundamental rights of the requested person, the executing judicial authority may seek further guarantees about the treatment of the person after surrender. Similarly, if the offense is punishable by a custodial life sentence, the surrender may be made subject to the issuing State reviewing the penalty imposed, either on request or within 20 years after conviction. More generally, a requested person must be informed of their right to appoint a lawyer in the issuing State for the purpose of assisting the lawyer in the executing State. Under the Agreement, they also have the right to have the consular authority of their country notified of their arrest.

Overall, the new arrangements share the EAW’s fundamental objective to avoid lengthy extradition procedures. Nevertheless, the proportionality principle and additional exceptions, coupled with greater individual protections, may lead to States refusing surrender, or at least, delaying the execution of the arrest warrant more frequently than in the past.

**D. Database Access**

Due to its operational importance, a key area of focus of the Brexit negotiations relating to the future security arrangements was the UK’s continued access to and use of the EU’s criminal databases. Such access has facilitated countless law enforcement interventions, with UK law enforcement authorities reportedly running hundreds of millions of searches annually.

*Schengen Information System (“SIS II”)*

SIS II is the largest information-sharing system for security and border management in Europe, and is used across EU-member states. It contains a wide number of data types, including data on missing persons, stolen property and suspected criminals across the member states. SIS II also issues real time alerts for European Arrest Warrants, informing member states when they are issued and allowing for the police and border control to respond accordingly.

Continued on page 42

## United Kingdom

Continued from page 41

Historically, SIS II has been extensively used in the UK, with officials said to have used the database over 600 million times a year. While the TCA provides broadly for “cooperation on operational information” it does not provide for direct access to SIS II by the UK. The UK will therefore no longer receive real time alerts for EAWs and will now have to rely solely on Interpol’s I-24/7 database. Importantly, I-24/7 is not linked to national systems and is generally regarded as slower than the SIS II. On 11 November 2020, Martin Hewitt QPM, the Chair of the National Police Chiefs’ Council, sent a letter to the Home Affairs Committee detailing the extent of loss of access to EU law enforcement cooperation tools, and the major operational impact this will have. He described the loss of access to SIS II as a change which “will have a major operational impact.” The UK will now have to rely on EU member states circulating notices through Interpol as well as through SIS II.

*The Prüm DNA Exchange Programme (“Prüm”)*

Prüm allows member states to immediately share DNA, fingerprint, and vehicle registration data, and to search EU partner databases for such information. The UK has used Prüm since July 2019, and the fingerprint connections since October 2020. Under the TCA, the UK will retain access to Prüm. The sharing of DNA, fingerprint, and vehicle registration data between the UK and member states will therefore be maintained, allowing the UK’s enforcement authorities to benefit from instant cross-border information gathering for these types of data.

*European Criminal Records Information System (“ECRIS”)*

ECRIS provides for the exchange of information on criminal records throughout the EU, aiming to do so quickly and in a compatible way. ECRIS requires data to be provided within 10 days of a request. Under the TCA, the UK will lose access to ECRIS. In relation to this sort of data, the UK will need to fall back on the 1959 European Convention on Mutual Assistance in Criminal Matters 1959. Concerns have been raised that this may result in a delay to the UK receiving information about overseas convictions by up to 60 days. The 1959 Convention does provide for the electronic exchange of records within 20 working days of a request, but delays in practice are often longer, so time will tell what impact this will have.

Continued on page 43

**United Kingdom**

Continued from page 42

*EU Passenger Name Record (“PNR”) Data*

PNR data broadly covers personal information about passengers that is collected and held by airlines, including passenger’s names, itineraries, baggage information, contact details, and payment details. The TCA provides for the continued transfer of PNR data from the EU to the UK to be used to protect the public from terrorism and serious crime. The transfer of such data is subject to data protection safeguards on the use and storage of the information. The agreement to share PNR data is not unprecedented, with the UK’s agreement based on previous EU precedents with third countries such as the United States.

In summary, although the Brexit agreement contains some provisions to maintain the UK’s access to some criminal databases, it fails to ensure that the UK can access SIS II, which is arguably the most important database for operational law enforcement. As much of this cooperation is covered in pre-existing multilateral arrangements, the extent to which UK law enforcement will suffer delays is likely to depend on whether UK MLA requests will be a lower priority for its EU counterparts. It remains open to the UK to seek future bilateral agreements with individual countries, including EU member states, to try to enhance cooperation.

Continued on page 44

## France

In 2020, France sharpened its anti-corruption enforcement policy. A new law extended the scope of the French-style DPA and defined the status and powers of the France-based European delegated prosecutors. The French Ministry of Justice issued recommendations on enforcement of international corruption cases. Additionally, corruption cases led to record-breaking settlements and significant court rulings.

### I. Legislative Developments

#### **A. New Law on the EPPO and CJIPs**

On December 24, 2020, France passed a new law addressing various criminal law issues,<sup>1</sup> including the European Public Prosecutor's Office (the "EPPO") and the French-style deferred prosecution agreement (known as the "CJIP").

*Functioning of the EPPO in France.* The law includes provisions permitting the functioning of the EPPO in France.<sup>2</sup> In particular, the law addresses the status and powers of the five French "European delegated prosecutors" who will investigate and prosecute offenses to the EU's financial interests, including corruption and influence peddling. The law also grants exclusive jurisdiction to the Paris courts over these cases. The EPPO is expected to start its investigations in France during the first semester of 2021.

*Extension of the scope of the CJIP.* The CJIP was created by the Sapin II Law of December 9, 2016. This mechanism offers corporate entities the possibility to negotiate an outcome without an admission of guilt or a criminal conviction. The defendant corporation, however, must agree to pay a fine proportionate to the benefit secured through 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 after approval by a judge following a public hearing. Until now, the CJIP was only available in cases relating to corruption, influence peddling, tax fraud, and the laundering of the proceeds of tax fraud. The new law now extends the mechanism to the laundering of the proceeds of corruption and influence peddling, as well as to some criminal environmental offenses. The law now also provides for reimbursement of court costs by the company signing a CJIP.

Continued on page 45

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1. Law No. 2020-1672 (Dec. 24, 2020) on the European Public Prosecutor's Office, Environmental and Specialized Justice, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042737977>.
  2. See Debevoise & Plimpton LLP, "European Public Prosecutor's Office – EPPO", <https://www.debevoise.com/topics/eppo>.

## France

Continued from page 44

*Extraterritorial reach of French criminal law.* French courts generally may exercise extraterritorial jurisdiction over criminal offenses committed outside French territory by or against French nationals. That extraterritorial reach is conditional upon a complaint by the victim or an official denunciation by the foreign authorities. The new law now provides that such a prior complaint or denunciation is no longer necessary where the case is prosecuted by specialized prosecutor's offices, including the French National Financial Prosecutor ("PNF"). This provision will facilitate prosecution of white collar crimes committed outside French territory by or against French nationals, including corporations.

**B. A Circular on Corruption Enforcement**

On June 2, 2020, the French Ministry of Justice sent to French public prosecutors a ministerial circular on enforcement of international corruption cases (the "Circular").<sup>3</sup> Though non-binding, circulars carry considerable weight. The Circular reiterates the central role of the PNF and makes recommendations on detection of misconduct, investigation strategy, and prosecution methods.

*PNF's role and powers.* The Circular states that the PNF is now a key player in the corruption enforcement landscape, is "recognised and respected by international authorities because of its technical and legal expertise", has developed a specific expertise in complex financial investigations, and has proved to be a pioneer in criminal settlements through its use of the CJIP. For these reasons, the Ministry recommends that other prosecutors' offices should refer international corruption cases to the PNF.

*Information collection and reporting.* The Circular reiterates that French administrative bodies and agents are required to report crimes, such as international corruption, to public prosecutors. The Circular points to the French Anticorruption Agency (the "AFA"), the tax administration, the diplomatic and consular services, the competition authority, and the Financial Markets Authority in particular.

Under French law, the PNF and other prosecutors offices have discretion to propose resolution of a case through a CJIP. The Circular states that self-reporting should be in the company's best interest as it may help to have the corruption cases resolved through a CJIP rather than at trial. This is in line with the guidelines published by the PNF in June 2019.<sup>4</sup> Interestingly, the Circular now recommends that the PNF adopt a practical approach to encourage companies to actually self-report.

Continued on page 46

3. Circular No. JUSD2007407 on criminal justice policy in the fight against international corruption (June 2, 2020), <https://www.legifrance.gouv.fr/download/pdf/circ?id=44989>.

4. "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/EN\\_Lignes\\_directrices\\_CJIP\\_revAFA%20Final%20\(002\).pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf). See Debevoise & Plimpton LLP, "French DPAs—First CJIP Guidelines Published" (July 9, 2019), <https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines>.

## France

Continued from page 45

*“Mirror” investigations.* The Circular encourages the PNF to investigate facts that are already the subject of foreign investigations (so-called “mirror” investigations). Information about foreign investigations usually comes through incoming mutual assistance requests targeting French companies or companies conducting business in France.

*Extraterritorial jurisdiction in corruption cases.* The Sapin II Law extended extraterritorial jurisdiction in the context of acts of corruption: French law now applies to acts committed abroad so long as the perpetrator is a French national, a French resident, “or someone conducting, in whole or in part, business in France.” The Circular takes the view that “someone conducting, in whole or in part, business in France” should be read as covering at least foreign companies having a subsidiary, branches, commercial offices, or other establishments in France, even if those entities in France have no distinct legal personhood.

**“A new law extended the scope of the French-style DPA and defined the status and powers of the France-based European delegated prosecutors.”**

## II. Enforcement Activity

### A. CJIPs

Since the creation of the French-style DPA, 11 cases have been concluded through CJIPs, of which three were approved in 2020.<sup>5</sup>

- *Bank of China.* On January 10, 2020, Bank of China agreed to pay a €3 million fine to settle alleged charges of money laundering of the proceeds of tax fraud. In addition to the amount of profits derived from the offense (€1.6 million), the Paris prosecutor’s office took into account the “increasing attention” to money laundering in the fight against organized crime and the central role that banks play in the management of international finance flows. Given these circumstances, the Paris prosecutor’s office imposed an additional €1.4 million fine. Prosecution authorities noted that the bank’s cooperation efforts were undermined by Chinese law prohibiting the transmission of requested information. The CJIP does not specify to what extent the bank’s efforts to

Continued on page 47

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5. The CJIPs and their approval orders are available in French at <https://www.economie.gouv.fr/afa/publications-legales>.

## France

Continued from page 46

develop an anti-money laundering program were taken into account. The bank also paid €900,000 in compensation to the French state.

- *Airbus SE*. 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. As part of this global settlement, Airbus entered into a CJIP with the PNF and agreed to pay a €2.1 billion fine. In addition to the estimated improper benefit amount (€1.053 billion), the PNF took into account the following aggravating factors: the alleged corrupt practice was repeated over a long period of time and involved different contracts; the facts involved the corruption of public officials; and the company used corporate resources to conceal the alleged corruption. Based on these aggravating factors, the PNF applied a 275% multiplier to the improper benefit (*i.e.*, an increase of €2.9 billion). The PNF then applied a 50% discount based on the following mitigating factors: the exemplary level of cooperation provided by the company; its thorough internal investigation in coordination with the judicial investigation; and the early implementation of corrective compliance measures. The CJIP specifies that Airbus’s deployment of its anticorruption program will be monitored by the AFA for the next three years.
- *Swiru Holding AG*. On May 4, 2020, the Swiss-based entity Swiru Holding AG agreed to pay a €1.4 million fine to settle charges of conspiracy to evade tax. In addition to the estimated amount of the improper benefit (€1.3 million), the prosecution authorities took into account the “complexity of the tax scheme ... designed to avoid tax” in connection with their decision to add a €100,000 complementary fine.

**B. Criminal Trials**

This year, the French Court of Cassation rendered two important decisions.

- *Tesler*. On April 1, 2020, the French Court of Cassation once again denied the applicability of the *non bis in idem* principle in a criminal case that had already resulted in a non-trial resolution in the United States.<sup>6</sup> Jeffrey Tesler was prosecuted in France on charges of bribery of Nigerian public officials. The defendant based his defense on the fact that he had already concluded a plea agreement with U.S. authorities pursuant to which he had waived both his right to contest his guilt and his right against self-incrimination. After almost

Continued on page 48

6. Cass. Crim., case No. 19-83.969 (Apr. 1, 2020), [https://www.legifrance.gouv.fr/juri/id/JURITEXT000041810479?tab\\_selection=juri&query=%7B\(%40ALL%5Bt%22\\*%22%5D\)%7D&jurisdictionJudiciaire=Cour+de+cassation&numAffaire=19-83.969&isAdvancedResult=true&sortValue=DATE\\_DESC&pageSize=10&typeRecherche=date&init=true&page=1](https://www.legifrance.gouv.fr/juri/id/JURITEXT000041810479?tab_selection=juri&query=%7B(%40ALL%5Bt%22*%22%5D)%7D&jurisdictionJudiciaire=Cour+de+cassation&numAffaire=19-83.969&isAdvancedResult=true&sortValue=DATE_DESC&pageSize=10&typeRecherche=date&init=true&page=1).

## France

Continued from page 47

ten years of criminal proceedings<sup>7</sup> resulting in five court decisions,<sup>8</sup> the Court of Cassation rejected the argument. According to the Court, plea bargaining does not effectively mean that the defendant waived his right to contest his guilt before a foreign court, but is part of a more global defense strategy aiming to avoid criminal trial in the United States. The Court further noted that the U.S. plea agreement did not read as imposing obligations applying before French courts: “these obligations take on their meaning only in the context of U.S. judicial proceedings and cannot prevent a defendant from defending himself before foreign courts.” Accordingly, the defendant remained free to exercise his rights, including his right against self-incrimination, before the French courts. The Court added that prosecution authorities had gathered extensive evidence against the defendant, irrespective of his confessions in the plea agreement. Drawing on this, the Court upheld Mr. Tesler’s conviction.

- *Iron Mountain France*. On November 25, 2020, the Court of Cassation issued a landmark decision whereby public limited liability companies may now be held criminally liable for the prior criminal conduct of the companies they acquire through so-called “mergers by acquisition.”<sup>9</sup> The Court based its ruling on recent ECHR and CJEU cases, and acknowledged the existence of an “economic and operational continuity” between merged companies. The ruling covers mergers by acquisitions closed after November 25, 2020 of public limited liability companies falling within the scope of Directive (EU) 2017/1132.<sup>10</sup> In France, the very commonly used *sociétés anonymes par actions simplifiées* are covered. The Court detailed the consequences of its ruling, including by noting that the acquiring company may raise any defense that would have been available to the acquired company. Also, the only criminal sanctions that may be imposed on the acquiring company are fines and forfeiture, to the exclusion of the various other criminal sanctions. The Court also reiterated that when the purpose of a merger is to escape criminal liability, courts may always impose fines on the acquiring company, regardless of the date of the merger or the corporate form.

Continued on page 49

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7. See Debevoise & Plimpton LLP, “Anti-Corruption Enforcement in 2017: A Return to Normalcy,” FCPA Update, Vol. 9, No. 6 (Jan. 2018), at 48 et seq., [www.debevoise.com/insights/publications/2018/01/fcpa-update-jan-2018-vol-9-no-6](http://www.debevoise.com/insights/publications/2018/01/fcpa-update-jan-2018-vol-9-no-6).

8. T. Corr Paris, Case No. P02291092509 (June 24, 2014), Paris Court of Appeal, Case No.14/06273 (Sept. 21, 2016), Cass. Crim., January 17, 2018, No. 16-86.491, Versailles Court of Appeal, case No 18/01410 (May 9, 2019) and Cass. Crim., case No. 19-83.969 (Apr. 1, 2020).

9. Cass. Crim., case No. 18-86.955 (Nov. 25, 2020), [https://www.courdecassation.fr/jurisprudence\\_2/chambre\\_criminelle\\_578/2333\\_25\\_45981.html](https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/2333_25_45981.html).

10. Directive (EU) 2017/1132 of the European Parliament and the Council of 14 June 2017.



## France

Continued from page 48

**C. Second Decision of the AFA's Enforcement Committee**

The AFA's role is not to prosecute corruption or influence peddling, but rather to ensure that entities implemented anticorruption compliance programs, as required by the Sapin II Law. The AFA also supervises the implementation of anti-corruption compliance programs imposed by a CJIP. In case of a breach, the AFA's director may refer the case to the AFA's Enforcement Committee, which may impose administrative fines. On January 22, 2020, the AFA's Enforcement Committee held its second hearing in a case involving the French company Imerys, a world leader in mineral-based specialties.<sup>11</sup> The company allegedly had failed to implement: (1) a risk mapping addressing the company's risks associated with its activity and geographical locations; (2) an updated code of conduct; and (3) accounting control processes specifically addressing corruption risks.

The Enforcement Committee dismissed charges relating to the risk mapping, but found that Imerys had failed to implement an updated code of conduct and accounting processes. Although no pecuniary sanction was imposed, the Committee ordered Imerys to implement a code of conduct with a specific chapter on corruption and influence peddling (cross-referencing the company's internal anti-corruption program), and annexed to the internal ethics rules of the French entities. Imerys was also ordered to implement accounting controls targeting corruption risks. The Committee granted time to resolve those issues by September 1, 2020 and March 31, 2021, respectively.

Continued on page 50

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11. AFA, Enforcement Committee, sanction No. 19-02 (Feb. 7, 2020), <https://www.agence-francaise-anticorruption.gouv.fr/files/files/DECISION%2019-02%20COMMISSION%20DES%20SANCTIONS%20%20ANONYME.PDF>.

## Germany

### I. Legislative Developments Regarding Corporate Criminal Liability

In 2020, the German Federal Government continued pursuing the 2018 Coalition Treaty commitment to reform corporate criminal liability in a separate law, the Corporate Sanctions Act: following the August 2019 leak of an unofficial draft,<sup>1</sup> the Government sought in April consultations with business institutions and German states regarding an official draft of the law. In June, despite strong concerns expressed by stakeholders, the Government introduced an only slightly revised draft in the German Parliament.<sup>2</sup> After further revisions triggered by the Parliament's Federal Council, the Act now awaits the legislators' discussion and resolution.

The revisions did not change the substance of the initial draft, which still consists of the following elements:

The Act replaces administrative liability for corporate misconduct with corporate criminal liability that attaches if top management commits a corporate crime or fails to prevent criminal conduct by lower ranking employees. It extends the liability for corporations domiciled in Germany to crimes committed abroad if the crime is punishable both in Germany and the foreign jurisdiction. The Act also provides for mandatory prosecution of corporate crimes, instead of the current regime that allows prosecutors to exercise their discretion. The resulting additional workload for already overburdened prosecutors' offices is meant to be addressed by further specified grounds to close investigations.

While the draft Act still includes severe sanctions, including up to 10% of annual worldwide and group-wide revenues and disgorgement of profits, it no longer provides for the dissolution of the company. An internal investigation has a mitigating effect on potential penalties if it materially contributes to the discovery of the crime, involves full and continuous cooperation with the prosecution, and observes fair trial standards such as informing the interviewee of his/her right to representation by counsel or the Works Council, or the right to remain silent. But the draft still denies a mitigating effect if the investigation is conducted by outside defense counsel protected by professional secrecy. The final call on whether the Act should enter into force two or three years after promulgation now rests with the lawmakers.

Continued on page 51

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1. Thomas Schürle and Friedrich Popp, "Germany Begins Reform of Corporate Criminal Liability," FCPA Update, Vol. 11, No. 5 (Dec. 2019), <https://www.debevoise.com/insights/publications/2019/12/fcpa-update-december-2019>.
  2. Thomas Schürle, Karolos Seeger, Friedrich Popp, & Jennifer Deschins, "German Corporate Criminal Liability Act Heads to Parliament," FCPA Update, Vol. 11, No. 11 (June 2020), <https://www.debevoise.com/insights/publications/2020/06/fcpa-update-june-2020>.

**Germany**

Continued from page 50

In light of the friendly reception of the draft Act in the Parliament and the nearing end of the Coalition in fall 2018, it is fair to assume that the legislature will approve the Act before summer 2021.

## **II. Judicial Decision Regarding Employee Data Protection and Works Council Co-Determination Rights**

The processing of employee personal data in internal investigations triggers not only the EU GDPR but also German employee data protection laws. A decision of the Higher Labor Court of Cologne (1 Ca 538/19), published in 2020, highlights an additional layer of law, the Works Council co-determination rights in employee data processing. A German Works Council is the labor law body representing the interests of non-leading employees vis-a-vis the employer, including with respect to data protection.

In this case, a Works Council learned from the company data protection officer that the company had collected and shared employee emails with an external auditor and a law firm as part of an internal investigation. The Works Council, on the ground that it was not asked for approval of the processing of the employee emails, successfully argued to be informed of the names of the concerned employees and the reasons for their involvement, and that further processing be stopped. The court further required the employer to arrange for destruction of the electronic and physical documents in the possession of the auditor and the law firm. The only caveat by the court is that the Works Council cannot require the erasure of personal data to the extent the employer has a sufficient interest in using the data in legal proceedings.

Accordingly, when conducting an internal investigation in Germany, it remains important to respect the co-determination rights of any relevant Works Council and to seek their early involvement.

Continued on page 52

## Russia

Russia, like the rest of the world, spent 2020 focused on its management of the COVID-19 pandemic. At the same time, 2020 was a relatively active year for anti-corruption enforcement and regulation in Russia.

There was an increase in both the number of corruption-related criminal cases<sup>1</sup> and in the amount of civil and administrative penalties collected for breaches of anti-corruption laws. In the first nine months of 2020, Russian prosecutors filed corruption-related administrative and civil lawsuits that exceeded RUB 6.6 billion (approximately USD 88 million) in aggregate, in comparison to RUB 2.8 billion (approximately USD 37 million) over the same period in 2019.<sup>2</sup>

According to the Council of Europe's Group of States Against Corruption ("GRECO") Compliance Report,<sup>3</sup> Russia satisfactorily implemented nine of GRECO's twenty-two anti-corruption compliance recommendations.<sup>4</sup> Those nine recommendations relate to the reporting of gifts received by members of parliament; sanctions for breaches of revenue and other disclosure requirements; the appointment of judges and prosecutors; anti-corruption training of members of parliament; and security of tenure for the justices of the peace. GRECO's recommendations that remain subject to further improvement or implementation include increasing the transparency of legislative processes, the implementation and development of conflict of interest provisions, limitations on judges' immunity, and prosecutorial independence.

Legislative and regulatory activities related to anti-corruption were focused on increasing control over the liability of companies and their managing bodies for administrative corruption violations, the flow of money and digital currencies, and public procurement compliance.

- (i) *Company Liability for Administrative Corruption Violations*: On July 8, 2020, the Presidium of the Russian Supreme Court adopted the Overview of the Court Practice on The Imposition of Administrative Liability under Article 19.28 of the Russian Administrative Offences Code (the "Overview").<sup>5</sup> As part of the Overview, which serves as guidance for courts

Continued on page 53

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1. The interview of the Chairman of the Russian Investigative Committee is available at <https://ria.ru/20201209/korruptsiya-1588207057.html>.
2. The interview of the Prosecutor General of Russia is available at <https://rg.ru/2020/12/08/generalnyj-prokuror-igor-krasnov-o-novyh-sposobah-borby-s-korruptsiej.html>.
3. Council of Europe, Group of States against Corruption ("GRECO"), "Russian Federation – Publication of 4th Round Compliance Report" (Aug. 18, 2020), <https://www.coe.int/en/web/greco/-/russian-federation-publication-of-4th-round-compliance-report>.
4. *Id.*
5. According to Article 14 of the Anticorruption Law, a legal entity is subject to administrative liability for offering illegal remuneration on its behalf.

## Russia

Continued from page 52

but is not mandatory, the Supreme Court clarified the grounds for corporate administrative liability for illicit remuneration on behalf of a company. According to the Overview, an administrative offense is committed when an individual pays illicit remuneration while having the authority to act on the company's behalf. Individuals who are not formally authorized to act on a company's behalf can still be considered as doing so if they act on the instructions of, or with the consent or approval of, those who are so authorized. For corporate liability to attach, the company's economic or other interest in the actions for which illicit remuneration was offered, promised, or provided must be proved. Administrative offense proceedings against a company and criminal proceedings against an individual are independent of each other, and the absence of a conviction of the individual does not preclude a case against the company.

- (ii) *Increased Control over Money Flows:* On July 13, 2020, amendments to the AML Law<sup>6</sup> were adopted to increase the monitoring of cash.<sup>7</sup> Beginning on January 10, 2021, certain cash transactions over RUB 600,000 (approximately USD 8,000) and transactions relating to real estate over RUB 3 million (approximately USD 40,000) must be reported to the Federal Financial Monitoring Service.
- (iii) *Increased Control over Operations with Digital Currency:* The Law on Digital Financial Assets ("DFA"),<sup>8</sup> which came into force on January 1, 2021, regulates the circulation of digital currency. The Law on DFA provides that, for the purposes of the Anticorruption Law,<sup>9</sup> digital currency constitutes property, and must be duly reported as such by state and municipal officials. This should prevent the accumulation of illegally obtained funds in the form of digital currencies.
- (iv) *Public Procurement Compliance:* In April, Russia adopted Law No. 124,<sup>10</sup> a wide-ranging set of legislative amendments designed to aid the country in combatting the COVID-19 pandemic and associated economic difficulties.

Continued on page 54

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6. Federal Law No. 208-FZ on Amendments to the Federal Law on Counteracting Legalization of Illicit Earnings and Financing of Terrorism (July 13, 2020) ("Amendments to the AML Law").
  7. The opinion of the head of State Duma's Financial Market Committee is available at <https://www.kommersant.ru/doc/4616974>.
  8. Federal Law No. 259-FZ on Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation dated July 31, 2020 (the "Law on DFA").
  9. Federal Law No. 273-FZ on Counteraction Corruption dated December 25, 2008 (the "Anticorruption Law").
  10. Federal Law No. 124-FZ on Introduction of Amendments to Certain Legislative Acts of the Russian Federation in Respect of Provision of Sustainable Growth of the Economy in Response to Deterioration of Conditions Due to the Novel Coronavirus Infection (Apr. 24, 2020) ("Law No. 124").

**Russia**

Continued from page 53

In May, the Ministry of Labor and Social Security issued a set of recommendations (the “Recommendations”).<sup>11</sup> Law No. 124 and the Recommendations contain provisions and measures aimed at counteracting corruption in public procurement. Specifically:

- a. Law No. 124 provides that the procurement commission must check whether companies participating in a tender have been found liable for corruption-related administrative offenses in the past two years. Previously, such checks were discretionary.
- b. The Recommendations advise state authorities and organizations to implement general and specific anti-corruption measures to prevent corruption in public procurement.

In 2020, the Russian Government proposed limiting the liability of governmental officials, including judges and prosecutors, for anti-corruption compliance violations, such as violations of conflict of interest regulations, if the failure to comply was caused by a force majeure event.<sup>12</sup> A government official may be exempted from liability only if the special commission establishes a causal link between the force majeure event and the failure to comply with the relevant anti-corruption regulations. This proposal remains under consideration.

Continued on page 55

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11. Letter of the Ministry of Labour and Social Security of Russia No. 18-2/10/П-4671 (May 21, 2020) (the “Recommendations”).

12. Bill No. 1078992-7 on Amendments to Certain Legal Acts to Improve Measures of Liability for Corruption Offences.

## Asia

Despite the COVID-19 pandemic, 2020 was a reasonably active year for anti-corruption legislation and enforcement in the Asia Pacific region. While some countries in the region focused on combatting the pandemic and were less active than in prior years, anti-corruption campaigns in China and Vietnam continued to be aggressively pursued, Malaysia convicted its former Prime Minister and saw the coming into effect of one of the world's most stringent anti-bribery statutes, and South Korea created a new anti-corruption agency while its courts affirmed the corruption-related sentences of two former presidents.

### I. People's Republic of China (Mainland)

#### **A. Anti-Corruption Campaign Enforcement**

Aggressive domestic enforcement against public and private bribery continues in China. Having declared a “sweeping victory” in its anti-corruption campaign at the end of 2018,<sup>1</sup> the Chinese government has announced that it is now in a “consolidation” phase of the campaign, establishing regimes to help prevent corruption, while continuing to “hunt” both high-level official “tigers” and low-level “flies.”

China reported that a total of 152,850 officials were held accountable in 2020 for violating the “eight point regulation”, which aims at prohibiting “hedonism, extravagance, bureaucracy, and abuse of power.”<sup>2</sup> Moreover, in the first three quarters of 2020, the disciplinary inspection and supervisory organs of the Party and public administration had disciplined over 390,000 officials, including 18 senior provincial officials.

As in the past, China's anti-corruption campaign in 2020 focused on the financial sector. At least 83 officials from banks, asset management companies, trust companies, and regulatory bodies were investigated, disciplined, or prosecuted. Most notable was Lai Xiao Min, the former director of the China Banking Regulatory Commission and the chief of Huarong Asset Management Co., a company controlled by the Ministry of Finance of China. Lai was convicted of taking bribes over RMB 1.7 billion (around US\$270 million) and of bigamy. He was sentenced to death.<sup>3</sup>

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1. “反腐败斗争取得压倒性胜利,” Xinhua Daily Telegraph (Dec. 14, 2018), [http://www.xinhuanet.com//mrdx/2018-12/14/c\\_137674713.htm](http://www.xinhuanet.com//mrdx/2018-12/14/c_137674713.htm).
  2. See “Over 152,000 Chinese officials held accountable in China's anti-corruption campaign this year,” Global Times (Dec. 4, 2020), <https://www.globaltimes.cn/content/1209010.shtml>.
  3. See “China Sentences Ex-Finance Chief to Death on Corruption,” Bloomberg (Jan. 6, 2021), <https://www.bloomberg.com/news/articles/2021-01-05/china-sentences-former-huarong-chairman-to-death-over-bribery>.

## Asia

Continued from page 55

In August 2020, it was also announced that the judiciary, police, and prisons would also be subject to increased anti-corruption scrutiny. At least 78 senior officials already have been investigated and punished, including provincial and municipal chief judges, prosecutors, and heads of police departments. This campaign is expected to continue through the first quarter of 2022.<sup>4</sup>

**B. Criminal Law Amendment Addressing Commercial Bribery**

On December 26, 2020, China passed the 11th Amendment (“Amendment”) to its Criminal Law.<sup>5</sup> While there have been a number of corruption-related amendments to the Criminal Law in the past five years, the Amendment is the first recent one to target commercial bribery. This may represent China’s attempt to expand the anti-corruption campaign, which to date has focused on state functionaries who accept bribes, into the private sector.

The Amendment increases the maximum penalty for non-state functionaries<sup>6</sup> who accept bribes to life imprisonment, and makes criminal fines in such cases mandatory rather than discretionary.<sup>7</sup> Now, a non-state functionary who accepts a bribe may be subject to three-level sentencing. When the amount of the bribe is “relatively large,” the penalty will be imprisonment or penal servitude of up to three years, plus a fine. When the amount of the bribe is “large,” the penalty will be imprisonment between three and ten years, plus a fine. When the amount of the bribe is “especially large,” the penalty will be fixed-term imprisonment over ten years or life imprisonment,<sup>8</sup> plus a fine (this third level is newly added). The thresholds for “relatively large,” “large,” and “especially large” are unspecified under the Amendment. According to the Supreme People’s Court’s judicial interpretation regarding corruption cases issued in 2016, for the crime of accepting bribes by non-state functionaries, the range of “relatively large” is between RMB 60,000 to RMB 400,000 (approximately US\$9200-US\$61,500), and the range of “large” is between RMB 400,000 to RMB 6,000,000 (approximately US\$61,500 – US\$925,000).<sup>9</sup> It is unclear whether these ranges will still apply after the enactment of the Amendment, but the Supreme People’s Court is planning to issue another interpretation (expected in 2021) regarding corruption cases.

Continued on page 57

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4. See “Anti-corruption campaign in political and legal systems, heavier blows on way: experts,” Global Times (Aug. 23, 2020), <https://www.globaltimes.cn/content/1198602.shtml>.
  5. See Sean Hecker, Bruce E. Yannett, & Philip Rohlik, “China Amends its Bribery Laws,” FCPA Update, Vol. 7, No. 2 (Sept. 2015), <https://www.debevoise.com/insights/publications/2015/09/fcpa-update-september-2015>.
  6. “State functionaries” include civil servants as well as employees of state-owned enterprises who perform public duties and persons assigned to private enterprises to perform public duties. This definition is not as broad as the interpretation given to “foreign official” under the FCPA. Thus, many employees of state-owned enterprises are considered “non-state functionaries.”
  7. Article. 10 of the Amendment, unofficial translation available at <http://en.pkulaw.cn/display.aspx?cgid=1c36a17d9fa0d40cbdfb&lib=law>.
  8. The death penalty is the maximum penalty for a state functionary who accepts especially large bribes.
  9. See Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, & Christina Jie Wang, “China Releases New Criminal Judicial Interpretation on Bribery,” FCPA Update, Vol. 7, No. 10 (May 2016), <https://www.debevoise.com/insights/publications/2016/05/fcpa-update-may-2016>.



## Asia

Continued from page 56

**C. Healthcare Regulations**

The National Healthcare Security Administration of China published an opinion on August 28, 2020, urging the establishment of a credit evaluation system by group purchasing organizations before the end of 2020. To date, there has been no public announcement that the evaluation system has begun functioning. The system will be designed to record misconduct by companies in the healthcare sector, including commercial bribery, monopolistic behavior, bid-rigging, and willful breach of contract. In the meantime, healthcare companies participating in group purchasing are required to make written representations relating to their compliance programs and other steps taken to prevent corruption.

“2020 was a reasonably active year for anti-corruption legislation and enforcement in the Asia Pacific region. While some countries in the region focused on combatting the pandemic and were less active than in prior years, anti-corruption campaigns in China and Vietnam continue to be aggressively pursued....”

**II. Hong Kong Special Administrative Region**

In the first ten months of 2020, the Hong Kong Independent Commission Against Corruption (“ICAC”) handled over 1,600 corruption complaints (excluding election-related complaints), representing a decrease of 18% when compared with the same period in 2019.<sup>10</sup> In addition to the ICAC, the Hong Kong Police, Hong Kong Customs & Excise Department, and the Securities and Futures Commission (the “SFC”) play important roles in supporting Hong Kong’s robust efforts to fight financial crime.

In October 2020, in parallel with actions in the United States and elsewhere, the SFC reprimanded and fined Goldman Sachs (Asia) LLC (“Goldman Asia”) US\$350 million. The reprimand related to the SFC’s finding that Goldman Asia had failed to detect and prevent the misconduct by its responsible officer, Timothy Leissner, and his co-conspirators despite numerous red flags raised in connection with potentially serious money laundering and/or bribery risks in the three bond offerings by 1Malaysia Development Berhad (1MDB).<sup>11</sup>

Continued on page 58

10. Briefing by Commissioner of the Independent Commission Against Corruption to Legislative Council Panel on Security (Nov. 2020), <https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20201201cb2-397-1-e.pdf>.

11. Press release by the Securities and Futures Commission (Oct. 22, 2020), <https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=20PR103>.

## Asia

Continued from page 57

In 2020, a judicial clarification of Hong Kong's anti-money laundering ordinance introduced an objective test for intent. In December 2019, the Hong Kong Court of Final Appeal<sup>12</sup> reformulated the test for determining whether a defendant charged with dealing with proceeds of crime had "reasonable grounds to believe" that the relevant property represented proceeds of an indictable offence. The new test introduces an objective element to what was originally a subjective test. A court must now assess whether (i) the defendant is telling the truth when he says that he did not believe that the property was tainted; and (ii) a reasonable person in the position of the defendant could have failed to believe that the property was tainted. Accordingly, a person may now be held liable despite a genuinely held belief that the relevant funds were legitimate if the Court considers such belief to be unreasonable.

### III. South Korea

In July 2020, South Korea passed the Act Establishing the Corruption Investigation Office for High Ranking Officials, almost 25 years after the office was first proposed. The Corruption Investigation Office will be charged with policing corruption among almost 6,500 top officials and their close family members.<sup>13</sup> In late December, President Moon Jae-in nominated a former judge and researcher at South Korea's constitutional court to head the office.<sup>14</sup> The law was passed against the backdrop of a year of in-fighting between the Minister of Justice and the Supreme Prosecutor, following the latter's investigation of individuals close to the ruling party, including the wife of the Minister of Justice's immediate predecessor.<sup>15</sup> Depending on one's political point of view, this dispute (ending with the Supreme Prosecutor's suspension from office for two months) involved either an overly aggressive prosecutor with unchecked powers or an attempt to curtail prosecutorial independence.<sup>16</sup> In either case, South Korea has been aggressive in policing bribery in recent years, a trend that is expected to continue.

Continued on page 59

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12. *HKSAR v Harjani Haresh Murlidhar* [2019] HKCFA 47.

13. Kim Se-jeong, "Corruption investigation agency now official but not ready," *The Korea Times* (July 15, 2020), [https://www.koreatimes.co.kr/www/nation/2020/09/356\\_292861.html](https://www.koreatimes.co.kr/www/nation/2020/09/356_292861.html).

14. Ser Myo-ja, "Moon nominates form Judge Kim Jin-wook to lead CIO," *Korea Joong Ang Daily* (Dec. 30, 2020), <https://koreajoongangdaily.joins.com/2020/12/30/national/socialAffairs/Kim-Jinwook-CIO-Corruption-Investigation-Office/20201230161300629.html>.

15. "Breaking News Analysis: Ministry of Justice Suspends the Supreme Prosecutor," *Blue Roof* (Nov. 24, 2020), <https://www.bluroofpolitics.com/p/breaking-news-alert/>.

16. See, e.g., "South Korean government tainted with corruption allegations," *DW.com* (Dec. 12, 2020), <https://www.dw.com/en/south-korean-government-tainted-with-corruption-allegations/a-55896840>.

## Asia

Continued from page 58

Also in 2020, the South Korean Supreme Court upheld the corruption-related 17-year prison term of former President Lee-Myung-bak, ordering his return to prison.<sup>17</sup> At the very beginning of 2021, the Supreme Court upheld the corruption conviction of Lee's successor, former President Park Geun-hye.<sup>18</sup>

#### IV. Malaysia

Few countries have been in the anti-corruption spotlight as much as Malaysia in recent years. In 2020, Malaysia's former prime minister was convicted, and the corporate liability provisions of its anti-corruption law entered into force.

In July 2020, former Prime Minister Datuk Seri Najib Razak was sentenced to 12 years in prison and fined 210 million Malaysian Ringgit (approximately US\$52 million) for violating the abuse of power provisions of Malaysia's anti-corruption law as well as money laundering offenses. The conviction, in what was the first of possibly many 1MDB-related trials for the former Prime Minister, related to the misappropriation of approximately US\$10 million from one of many companies linked to the 1MDB scandal.<sup>19</sup> Both former Prime Minister Najib and the prosecution are appealing, and the appeal will be heard starting in February 2021.<sup>20</sup>

Also in July, Section 17A of the MACC Amendment Act of 2018 became effective. Section 17A was passed just before the end of former Prime Minister Najib's term in 2018 and, as we noted at the time, is perhaps the world's most aggressive anti-corruption corporate liability provision. The provision creates both a corporate offense for failure to prevent bribery for entities that carry "a business or part of a business in Malaysia" and a criminal offense for managers of a convicted company. Under Section 17A(3), a "person concerned with the management of [an entity's] affairs" is presumed to be guilty of an offense if the relevant entity is convicted of the corporate offense. The control person carries the burden of proving that he or she exercised due diligence to prevent the commission of the corporate offense.<sup>21</sup>

Continued on page 60

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17. Choe Sang-hun, "Former South Korean President Ordered Back to Prison for Bribery," *New York Times* (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/world/asia/south-korea-president-bribery.html>.
  18. Jake Kwan and Julia Hollingsworth, "South Korea's top court upholds former leader Park Geun-hye's 20-year prison sentence," *CNN.com* (Jan. 14, 2021), <https://edition.cnn.com/2021/01/14/asia/south-korea-president-park-sentence-intl-hnk/index.html>.
  19. Sharanjit Singh, Khairah N Karim, Rahmat Khairulrijal, "Najib sentenced to 12 years' jail, RM 210 million fine," *New Straits Times* (July 28, 2020), <https://www.nst.com.my/news/crime-courts/2020/07/612343/najib-sentenced-12-years-jail-rm210-million-fine>.
  20. See Hafiz Tatim, "Prosecution appealing against Najib's sentences in SRC conviction," *The Edge Markets* (Aug. 11, 2020), <https://www.theedgemarkets.com/article/prosecution-appealing-against-najibs-sentences-src-conviction>; "Malaysian court to hear ex-PM Najib's 1MDB appeal from February 15," *Reuters* (Oct. 1, 2020), <https://www.reuters.com/article/us-malaysia-politics-najib/malaysian-court-to-hear-ex-pm-najibs-1mdb-appeal-from-february-15-idUSKBN26M53V>.
  21. See Kara Brockmeyer, Karolos Seeger, Philip Rohlik, & Saqib Alam, "Malaysia Strengthens its Anti-Corruption Law," *FCPA Update*, Vol. 9, No. 10 (May 2018), <https://www.debevoise.com/insights/publications/2018/05/fcpa-may-2018>.

## Asia

Continued from page 59

Thus, the lack of adequate procedures means not only that an entity cannot avail itself of an affirmative defense, but also that its officers, directors, and other control persons are presumed to be criminally liable for the lack of those procedures. The implementation of Section 17A was delayed to give companies an opportunity to adopt compliance programs in alignment with Guidelines on adequate procedures.<sup>22</sup> The Guidelines, issued by the Prime Minister's Department in late 2018, essentially follow the guidance issued by the U.K. Ministry of Justice, condensed into five criteria: top level commitment; risk assessment; undertaking of control measures; systematic review, monitoring, and enforcement; and training (or T.R.U.S.T).<sup>23</sup>

**V. Vietnam**

While not as well publicized as Xi Jinping's anti-corruption campaign in China, President and Party Secretary Nguyen Phu Trong of Vietnam has also spent the past several years engaging in a crackdown on corruption. The "Blazing Furnace" campaign has seen over 50,000 Communist Party of Vietnam members (including generals and senior officers) disciplined since 2016.<sup>24</sup> In 2020, Nguyen Duc Chung, the former Communist Party Chief of Hanoi, was added to that list after he was sentenced to five years' imprisonment for appropriating state secrets, causing the loss of over \$40 million from the state budget.<sup>25</sup>

Continued on page 61

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22. Esther Landau, "More expected to be charged under Section 17A," New Straits Times (July 22, 2020), <https://www.nst.com.my/news/nation/2020/07/610600/more-expected-be-charged-under-section-17a>
  23. Prime Minister's Department, "Guidelines on Adequate Procedures pursuant to subsection (5) of Section 17A under the Malaysian Anti-Corruption Commission Act of 2009" (Dec. 4, 2018), <http://giacc.jpm.gov.my/garis-panduan-tatacara/>.
  24. Hai Hong Nguyen, "Will Vietnam's anti-corruption 'blazing furnace' heat up in 2020," East Asia Forum (Feb. 6, 2020), <https://www.eastasiaforum.org/2020/02/06/will-vietnams-anti-corruption-blazing-furnace-heat-up-in-2020/>.
  25. "Vietnam courts sentences ex-Hanoi chairman to jail amid crackdown on graft," Reuters (Dec. 11, 2020), <https://www.reuters.com/article/vietnam-security-trial/vietnam-courts-sentences-ex-hanoi-chairman-to-jail-amid-crackdown-on-graft-idUSKBN28L0UE>.

## Latin America

The past year witnessed significant anti-corruption developments in Latin America, including successes and setbacks, particularly in Brazil, Mexico, Argentina, and Peru. In some countries, political interference has impacted and even derailed certain anti-corruption initiatives. Meanwhile, the COVID-19 pandemic has posed anti-corruption challenges across the region, both as a source of corruption risk and an obstacle to combatting it.

To date, at least nine Latin American countries have been criminally investigating senior government officials for allegedly participating in schemes to misappropriate emergency COVID-19 funds or for engaging in fraudulent purchases of personal protective equipment. Notable pandemic-related corruption matters include:

- Argentine prosecutors are investigating a politically connected man for purchasing thousands of expired N95 masks, costing Buenos Aires ten times their listed price.<sup>1</sup>
- Bolivian authorities arrested Health Minister Marcelo Navajas following allegations that he purchased 170 ventilators unsuitable for longer-term care at prices over four times the price at which the manufacturer sold the ventilators to distributors.<sup>2</sup>
- In Colombia, 14 of 32 governors are being investigated for pandemic-related crimes, including embezzlement and awarding no-bid contracts.<sup>3</sup>
- Ecuadorian prosecutors claim that a criminal ring colluded with Health Ministry officials to sell body bags to hospitals at 13 times their market price.<sup>4</sup>
- The Mexican federal hospital system returned flawed ventilators purchased from the son of the head of the federal electricity commission (a key ally of President Andrés Manuel López Obrador) at prices 85% higher than other available options.<sup>5</sup>

Continued on page 62

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1. Joshua Goodman, "Spread of coronavirus fuels corruption in Latin America," AP News (May 27, 2020), <https://apnews.com/article/a240ff413fb23220aff30c6d6e6aba4c>.
  2. *Id.*
  3. *Id.*
  4. Natalie Kitroeff and Mitra Taj, "Latin America's Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks," New York Times (June 6, 2020), <https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html>.
  5. *Id.*

**Latin America**

Continued from page 61

- Panamanian prosecutors are investigating the Vice Minister of the Presidency Juan Carlos Muñoz after he issued letters of commitment to purchase 100 ventilators at nearly \$49,000 a piece, significantly above the \$5,000 market price.<sup>6</sup>
- Peru's police chief and interior minister resigned after news broke that their subordinates had purchased diluted hand sanitizer and flimsy face masks for police officers.<sup>7</sup>

It remains to be seen how these investigations will play out and, more broadly, to what extent the pandemic will undermine anti-corruption initiatives that have been gaining momentum in Latin America over the past several years.

**I. Brazil**

In 2020, Brazil entered a new enforcement phase as political tensions impacted the country's anti-corruption landscape. The Office of the Prosecutor General of the Republic ("PGR"), Brazil's top prosecutor, extended some of the *Lava Jato* task forces, and the federal government introduced a five-year anti-corruption plan. Nevertheless, important questions persist regarding the future of white collar enforcement in Brazil and whether recent difficulties represent short-term obstacles or new long-term realities.

*A New Chapter for Brazilian Anti-Corruption Enforcement*

After running a largely anti-establishment, anti-corruption campaign, President Jair Bolsonaro initiated his tenure in 2019 by appointing former judge Sergio Moro as Minister of Justice. In a dramatic turn of events, Moro left his position in 2020 and has spoken publicly about resistance to reforms within the government as well as accused the President of interfering in investigations.<sup>8</sup>

In parallel, Operation *Lava Jato* – which in many ways accomplished what previously seemed impossible – has faced some backlash.<sup>9</sup> Further, the tensions

Continued on page 63

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6. Cristina Guevara, "Basta Ya! How pandemic-related corruption calls for new social contract in Panama," The Atlantic Council (Nov. 10, 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/basta-ya-how-pandemic-related-corruption-calls-for-a-new-social-contract-in-panama>.

7. Marcos Aquino, "Peru's Vizcarra Denies New Corruption Allegations, Prosecutors To Investigate," Reuters (Oct. 19, 2020), <https://www.reuters.com/article/us-peru-politics/perus-vizcarra-denies-new-corruption-allegations-prosecutors-to-investigateidUSKBN2742JG?il=0>.

8. Luciana Magalhães and Jeffrey T. Lewis, "Brazil's Former Justice Minister Accuses President of Abandoning Anticorruption Fight," Wall Street Journal (June 2, 2020), <https://www.wsj.com/articles/brazils-former-justice-minister-accuses-president-of-abandoning-anticorruption-fight-11591138621>; Bryan Harris, "Anti-Corruption Drive Floundering Under Bolsonaro, Says Ex-Minister," Financial Times (July 26, 2020), <https://www.ft.com/content/710f9fe2-9f06-411b-a5e6-ec3b5b23cbb6>.

9. See, e.g., Kelli Kadanus, "Crítico da Lava Jato, Aras Deve Ver Forças-Tarefas Regulamentadas Neste Ano" [Lava Jato Critic, Aras Should See Task Forces Regulated This Year], UOL (Jan. 11, 2021), <https://noticias.uol.com.br/politica/ultimas-noticias/2021/01/11/critico-das-forcas-tarefas-aras-deve-ver-o-modelo-regulamentado-neste-ano.htm>; Andres Schipani, Michael Stott, and Jude Webber, "Latin America: Brazil's Anti-Corruption Drive Faces a Backlash," Financial Times (Aug. 11, 2019), <https://www.ft.com/content/0f31cdb4-b1e1-11e9-bec9-fdcab53d6959>.

## Latin America

Continued from page 62

between certain task forces and the PGR seemingly contributed to certain prosecutors in Brasília and São Paulo resigning and the effective end of the latter's task force.<sup>10</sup> Deltan Dallagnol reportedly came close to being disciplined by Brazil's prosecutorial oversight body and ultimately resigned from his longstanding position as head of the task force in Curitiba, citing family issues.<sup>11</sup>

**“In some countries, political interference has impacted and even derailed certain anti-corruption initiatives. Meanwhile, the COVID-19 pandemic has posed anti-corruption challenges across the region....”**

In October, Bolsonaro surprisingly announced that he was ending *Lava Jato* because “there no longer is corruption in government,”<sup>12</sup> stirring criticism.<sup>13</sup> Some important task forces remain in place, though, at least for now. Throughout 2020, the PGR extended their mandates incrementally, most recently for the Rio de Janeiro and Curitiba task forces until January and October 2021, respectively.<sup>14</sup> But that could change, as the Superior Council (“CSMPF”) of the Public Prosecutors’ Office (“MPF”) is considering internal rules that could keep the task forces operational in some way for another two years, subject to a two-year extension.<sup>15</sup>

Continued on page 64

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10. Aguirre Talento, “Grupo da Lava-Jato na PGR Pedem Demissão Coletiva por Discordância com Gestão Aras” [Lava Jato Group at PGR’s Office Collectively Resigns for Disagreement with Aras’s Administration], *O Globo* (June 26, 2020), <https://oglobo.globo.com/brasil/grupo-da-lava-jato-na-pgr-pede-demissao-coletiva-por-discordancia-com-gestao-aras-1-24502348>; Julia Affonso, “Lava Jato em SP Completa Um Mês sem Força-Tarefa e com 190 Investigações Ainda em Curso” [Lava Jato in SP Completes One Month Without Task Force and with 190 Ongoing Investigations], *G1* (Oct. 28, 2020), <https://g1.globo.com/sp/sao-paulo/noticia/2020/10/28/lava-jato-em-sp-completa-um-mes-sem-forca-tarefa-e-com-190-investigacoes-ainda-em-curso.ghtml>.
  11. “Deltan Dallagnol, Coordenador da Lava Jato em Curitiba, Deixa a Força-Tarefa” [Deltan Dallagnol, *Lava Jato* Coordinator in Curitiba, Leaves the Task Force], *G1* (Sep. 1, 2020), <https://g1.globo.com/jornal-nacional/noticia/2020/09/01/deltan-dallagnol-coordenador-da-lava-jato-em-curitiba-deixa-a-forca-tarefa.ghtml>.
  12. Jussara Soares and Emily Behnke, “Bolsonaro: ‘Acabei com a Lava Jato Porque Não Tem Mais Corrupção no Governo’” [Bolsonaro: ‘I ended Lava Jato Because There No Longer Is Corruption in Government’], *O Estado de S. Paulo* (Oct. 7, 2020), <https://politica.estadao.com.br/noticias/geral,bolsonaro-acabei-com-a-lava-jato-porque-nao-tem-mais-corrupcao-no-governo,70003467453>.
  13. See, e.g., Celso Rocha de Barros, “How Lava Jato Died – And What Comes Next,” *Americas Quarterly* (Oct. 15, 2020), <https://www.americasquarterly.org/article/how-lava-jato-died-and-what-comes-next>.
  14. Katna Baran, “Aras Prorroga Força-Tarefa da Lava Jato em Curitiba e no Rio” [Aras Extends Lava Jato Task Force in Curitiba and Rio], *Folha de S. Paulo* (Dec. 7, 2020), <https://www1.folha.uol.com.br/poder/2020/12/aras-prorroga-forca-tarefa-da-lava-jato-em-curitiba-e-no-rio.shtml>.
  15. See Kadanus, *supra* note 9.

## Latin America

Continued from page 63

The impact of these developments on Brazil's long-term efforts to tackle corruption remains unclear. However, even after the *Lava Jato* task forces conclude, their influence will persist. This includes the task forces' various investigative techniques and their openness to negotiated resolutions, which individual prosecutors throughout the country (many of whom worked on the task forces) likely will continue.<sup>16</sup>

In 2020, the number of major leniency agreements executed by the MPF decreased, with one notable exception being the Vitol resolutions in coordination with DOJ and the CFTC to resolve bribery charges related to conduct in Brazil, Ecuador, and Mexico.<sup>17</sup> But in recent years, the Comptroller-General's Office ("CGU") and Attorney-General's Office ("AGU") have become increasingly active anti-corruption enforcement authorities.<sup>18</sup> For example, the CGU and AGU have executed various high-profile leniency agreements, including with Odebrecht, Andrade Gutierrez, OAS, and Engevix Group, and similarly developed a relationship with U.S. authorities, as evidenced by the coordinated resolutions with Technip.<sup>19</sup> In addition, the CGU recently fined the restaurant chain Madero and telecommunications company Vivo for breaches of the Brazilian Anti-Corruption Law involving allegations that the former gave cash and food to government inspectors and that the latter improperly distributed World Cup tickets to government officials.<sup>20</sup>

*Changes to Brazil's Anti-Corruption Enforcement Landscape*

Over time, the multiplicity of agencies involved in tackling corruption and related matters in Brazil has led to serious questions and concerns about their coordination and the potential lack of finality when resolving matters with some – but not all – of them.

Partly in response to this, in August 2020, the AGU, CGU, and Federal Court of Accounts executed a Technical Cooperation Agreement ("TCA") that potentially could alter the way corruption-related matters are investigated and

Continued on page 65

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16. See Andrew M. Levine, Daniel Aun, Fabricio M. Archanjo, et al., "Latin American Anti-Corruption Enforcement: Walking a Tightrope of Challenges and Opportunities," FCPA Update, Vol. 12, No. 3 (Oct. 2020), <https://www.debevoise.com/insights/publications/2020/10/fcpa-update-october-2020>.
  17. U.S. Department of Justice, "Vitol Inc. Agrees to Pay Over \$135 Million to Resolve Charges for Bribery Schemes in Latin America" (Dec. 3, 2020), <https://www.justice.gov/usao-edny/pr/vitol-inc-agrees-pay-over-135-million-resolve-charges-bribery-schemes-latin-america>.
  18. See Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2019 in Review: 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>.
  19. "Acordo de Leniência" [Leniency Agreement], Federative Republic of Brazil (Aug. 2020), <https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorruptcao/acordo-leniencia>.
  20. Decisions of September 15, 2020, Case Nos. 00190.105384/2018-01 and 00190.106166/2019-67, Official Gazette, Ed. 199 § 1 at 92 (Oct. 10, 2020), <https://www.in.gov.br/web/dou/-/decisao-de-15-de-setembro-de-2020-283217967>; <https://www.in.gov.br/web/dou/-/decisaode-15-de-setembro-de-2020-283218062>.



## Latin America

Continued from page 64

resolved in Brazil.<sup>21</sup> Among other things, the TCA provides that the CGU and AGU will be responsible for negotiating and executing leniency agreements under the Anti-Corruption Law, and that the CGU, AGU, MPF, and Federal Police shall seek to coordinate their efforts in negotiating corporate leniency agreements and potentially parallel individual collaboration agreements.

Shortly after the TCA's announcement, the MPF's Fifth Chamber issued a technical note opposed to the MPF joining the TCA, reasoning that the agreement fails to reflect the MPF's authority to negotiate and execute leniency agreements.<sup>22</sup> To date, the MPF has not joined the TCA, and some changes introduced by the TCA are yet to be implemented. But some Brazilian officials have stated that the MPF's absence is not presently a major concern and that inter-agency cooperation continues as usual.<sup>23</sup> Defense counsel in Brazil similarly have reported that companies seeking to resolve their issues in Brazil continue approaching all agencies, just as they did before the TCA.

2021 may bring about the narrowing of an important non-penal avenue for anti-corruption enforcement: the Administrative Improbability Law. A legislative proposal before the Brazilian Congress since 2018 would revise this law, including by limiting violations to intentional conduct. Discussions regarding the latest proposed changes to the text have been on hold since October 2020.<sup>24</sup>

On the judicial front, higher courts reversed sentences that former Judge Moro previously imposed. The Supreme Court's Second Panel voided one of Moro's sentences in a pre-*Lava Jato* financial scheme, with two justices finding that he was partial. And the Federal Appellate Court for the Fourth Region voided Moro's sentences of PT's former treasurer and a businessman in connection with *Lava Jato*.<sup>25</sup>

Finally, just before the year ended, the federal government unveiled a comprehensive five-year anti-corruption plan, suggesting that it remains committed to strengthening Brazil's ability to fight corruption, notwithstanding Bolsonaro's recent comments.<sup>26</sup> The plan addresses activities to be undertaken by the CGU,

Continued on page 66

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21. See Kara Brockmeyer, Andrew M. Levine, Daniel Aun, et al., "Brazilian Authorities Announce Anti-Corruption Cooperation and Leniency Framework; MPF's 5th Chamber Opposes It," FCPA Update, Vol. 12, No. 2 (Sep. 2020), <https://www.debevoise.com/insights/publications/2020/09/fcpa-update-september-2020>.
  22. See *id.*
  23. See Levine, et al., Oct. 2020 FCPA Update, *supra* note 16.
  24. Proposed Legislation No. 10887/2018, House of Representatives, <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2184458>.
  25. Fausto Macedo and Rayssa Motta, "Tribunal da Lava Jato Anula Sentença de Moro e Absolve Ex-Tesoureiro do PT" [Lava Jato Tribunal Annuls Sentence by Moro and Acquits PT's Former Treasurer], UOL (Aug. 27, 2020), <https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2020/08/27/tribunal-da-lava-jato-anula-sentenca-de-moro-e-absolve-ex-tesoureiro-do-pt.htm>.
  26. "Governo Lança Plano Anticorrupção" [Government Releases Anticorruption Plan], Federative Republic of Brazil (Dec. 9, 2020), <https://www.gov.br/pt-br/noticias/justica-e-seguranca/2020/12/governo-lanca-plano-anticorruptcao>.

## Latin America

Continued from page 65

AGU, Ministry of Justice, Ministry of Economy, and Internal Revenue Service. In particular, the plan raises the prospect of further guidance on important aspects of anti-corruption resolutions, such as self-reporting benefits and the criteria for fine reductions. The plan also pushes for greater cooperation and exchange of information among all agencies; more training within the government; greater transparency regarding enforcement activities; increased involvement by the federal tax authority in anti-corruption and money laundering investigations; and additional focus on financial intelligence more broadly.<sup>27</sup>

## II. Mexico

In Mexico, anti-corruption enforcement in 2020 likewise included both advances and difficulties. Since campaigning vigorously on an anti-corruption platform, President Andrés Manuel López Obrador has implemented several measures to fight corruption, though remains subject to criticism for not making more headway.

Last year, Mexico's Financial Intelligence Unit (Unidad de Inteligencia Financiera, "UIF") pursued investigations of several high-profile targets, including Supreme Court Justice Eduardo Medina Mora, former Treasury Secretary Luis Videgaray Caso, and former Pemex president Emilio Lozoya.<sup>28</sup> Mexico's now-autonomous Attorney General's Office (Fiscalía General de la República, "FGR") – which was created in 2019 and operates independently of the executive branch<sup>29</sup> – reportedly has initiated several investigations into alleged public corruption by some former Mexican presidents, including Enrique Peña Nieto. Although the Attorney General's Office has not confirmed it is formally investigating Peña Nieto, Attorney General Gertz Manero stated publicly last summer that all individuals accused by Lozoya would be investigated.<sup>30</sup> Previously, Lozoya had claimed that Peña Nieto "created a scheme of corruption in the federal government" during his time in office between 2012 and 2018.<sup>31</sup>

Continued on page 67

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27. "Plano Anticorrupção: Diagnóstico e Ações do Governo Federal" [Anticorruption Plan: Diagnosis and Federal Government Actions], Federative Republic of Brazil (Dec. 2020), <https://www.gov.br/cgu/pt-br/anticorruptcao/plano-anticorruptcao.pdf>.
  28. Robert Simon and Emilie Sweigart, "The Risky Politics of Anti-Money Laundering," *Americas Quarterly* (Apr. 27, 2020), <https://www.americasquarterly.org/article/the-risky-politics-of-anti-money-laundering>; see also Juan Arvizu and Teresa Moreno, "Confirma la UIF investigación contra Videgaray," *El Universal* (Nov. 26, 2020), <https://www.eluniversal.com.mx/nacion/politica/confirma-la-uif-investigacion-contra-videgaray>.
  29. Carlos G. Guerrero, "El futuro del fiscal general de México," *CNN Mexico* (Jan. 13, 2020), <https://cnnespanol.cnn.com/2020/01/13/el-futuro-del-fiscal-general-de-mexico>.
  30. Versión Estenográfica de la sesión digital del Seminario sobre Violencia y Paz de EL Colegio de México "El caso Lozoya. Un dialogo con Alejandro Gertz Manero," (Aug. 12, 2020), [https://violenciaypaz.colmex.mx/assets/docs\\_pubs/original/40/Transcripcion\\_Dialogo\\_con\\_Gertz\\_Manero.pdf?1597932088](https://violenciaypaz.colmex.mx/assets/docs_pubs/original/40/Transcripcion_Dialogo_con_Gertz_Manero.pdf?1597932088).
  31. Ioan Grillo, "Mexico and the Gods of Corruption," *New York Times* (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/opinion/international-world/mexico-corruption-lopez-obrador.html>.

## Latin America

Continued from page 66

Lozoya also lodged corruption allegations against 69 other individuals, including former President Felipe Calderón, against whom UIF director Santiago Nieto announced in September 2020 an investigation.<sup>32</sup> A couple of months later, in November 2020, the FGR also launched an investigation into Felipe Calderón and six of his former cabinet members for abuse of power and purported “damage to the nation.”<sup>33</sup>

“In October, [Brazilian President] Bolsonaro surprisingly announced that he was ending Lava Jato because ‘there no longer is corruption in government,’ stirring criticism.”

In March 2020, the Prosecution Bureau Specialized in the Combat of Corruption (La Fiscalía Especializada en Combate a la Corrupción) – the part of the FGR charged with enforcing Mexico’s anti-corruption laws, led by Special Anti-Corruption Prosecutor Luz Maria Mijangos Borja – submitted its first annual report to the Mexican Senate.<sup>34</sup> This report included a vow to redouble efforts to combat corruption and outlined three specific goals, namely to: (i) increase the focus on prosecuting corruption-related crimes by companies, ending their impunity and creating a specialized area to fight corporate corruption; (ii) develop guidelines for evaluating compliance programs of companies under criminal investigation; and (iii) strengthen prosecutorial effectiveness by advocating for changes to certain anti-corruption laws.<sup>35</sup>

The office of the Special Anti-Corruption Prosecutor reportedly now has a caseload of more than 950 cases<sup>36</sup> and has handled 1,700 complaints by individuals and government bodies.<sup>37</sup> Notably, in December 2020, Special Anti-Corruption

Continued on page 68

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32. Adrián Espallargas, “México investiga a los expresidentes Felipe Calderón y Peña Nieto por el caso Odebrecht,” ABC Internacional (Sept. 29, 2020), [https://www.abc.es/internacional/abci-mexico-investiga-expresidentes-felipe-calderon-y-pena-nieto-caso-odebrecht-202009290133\\_noticia.html?ref=https:%2F%2Fwww.google.com%2F](https://www.abc.es/internacional/abci-mexico-investiga-expresidentes-felipe-calderon-y-pena-nieto-caso-odebrecht-202009290133_noticia.html?ref=https:%2F%2Fwww.google.com%2F).
  33. “Fiscalía General de la República investiga a Felipe Calderón por ‘Abuso de poder,’” Región Sur (Nov. 14, 2020), <https://www.regionsurto.com/fiscalia-de-la-republica-investiga-a-felipe-calderon-por-abuso-de-poder>.
  34. See Informe Annual de Actividades y Resultados, Gaceta del Senado 11-03-2020 (Mex.), FECC/OF/277/2020, formato PDF, [https://infosen.senado.gob.mx/sgsp/gaceta/64/2/2020-03-12-1/assets/documentos/Oficio\\_FECC.pdf](https://infosen.senado.gob.mx/sgsp/gaceta/64/2/2020-03-12-1/assets/documentos/Oficio_FECC.pdf).
  35. See *id.*
  36. Maureen Meyer and Moses Ngong, “Mexico Faces a Test for its Anti-Corruption and Justice Reform Efforts,” WOLA (Nov. 25, 2020), <https://www.wola.org/analysis/mexico-faces-test-anti-corruption-justice-reform-efforts>.
  37. GIR Interactive Regional Spotlight: Latin America Conference, *Keynote Address: Maria de la Luz Mijangos Borja*, GIR (Dec. 10, 2020), <https://globalinvestigationsreview.com/look-back-girs-interactive-regional-spotlight-latin-america-conference>.

## Latin America

Continued from page 67

Prosecutor María de la Luz Mijangos Borja indicated that her office is keeping a “close eye on the resolutions and agreements related to the FCPA,” noting the significance of these matters to her office and the important role that cooperation with other agencies and governments plays in those investigations.<sup>38</sup> Nevertheless, what ultimately will come from these investigations and whether the FGR more broadly will achieve the ambitious goals articulated in the annual report remain to be seen, especially given political and economic headwinds.

The Mexican government also worked last year to deploy as an anti-corruption tool the National Asset Forfeiture Law (Ley Nacional de Extinción de Dominio), which it adopted in August 2019.<sup>39</sup> An amendment to the law in January 2020 established the Institute for Returning to the People what was Stolen (Instituto para Devolver al Pueblo lo Robado), which is charged with managing seized assets.<sup>40</sup> Given the law’s extensive reach, the National Human Rights Commission and several private citizens have filed suits challenging its constitutionality.<sup>41</sup> According to UIF director Santiago Nieto, in its first year, forty-five charges have been filed using the law, though none has yet yielded a conviction.<sup>42</sup> Nieto has advocated for increased enforcement of the law to net stronger anti-corruption results.<sup>43</sup>

Finally, 2020 saw the final ratification of the United States-Mexico-Canada Agreement (“USMCA”).<sup>44</sup> The USMCA imposes an affirmative duty on the signatories to enforce or enact legislation supporting anti-corruption measures and adds another incentive for Mexico to continue in its efforts to fight public corruption.<sup>45</sup>

Mexico also faced in 2020 a number of challenges in combating corruption. For example, President López Obrador and the Mexican Congress failed to implement and fund important provisions of the country’s National Anti-Corruption System (Sistema Nacional Anticorrupción or “SNA”). In particular, 18 judicial seats remained open for an extended period of time, and several agencies

Continued on page 69

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38. *Id.*

39. See Andrew Levine and Jonathan Florez, “Mexico Adds a New Tool to its Anti-Corruption Enforcement Arsenal,” FCPA Update, Vol. 11, No. 7 (Feb. 2020), <https://www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020>.

40. *Id.* at 12.

41. See *id.*

42. Fernando Gutiérrez, “Hay que fortalecer extinción de dominio, insiste UIF,” *El Economista* (Nov. 17, 2020), <https://www.eleconomista.com.mx/politica/Hay-que-fortalecer-extincion-de-dominio-insiste-UIF-20201117-0138.html>.

43. *Id.*

44. “TIMELINE-The long bumpy road from NAFTA to USMCA,” Reuters (July 1, 2020), <https://www.reuters.com/article/usa-trade-usmca-timeline/timeline-the-long-bumpy-road-from-nafta-to-usmca-idUSL1N2E803Q>.

45. See Kara Brockmeyer, Andrew J. Ceresney, et al., “The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement,” FCPA Update, Vol. 11, No. 6, p. 76 (Jan. 2020), <https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020>.

## Latin America

Continued from page 68

within the SNA experienced significant budget cuts.<sup>46</sup> This occurred just as the government began ramping up discretionary spending for public contracts,<sup>47</sup> without additional oversight and governance tools.<sup>48</sup>

In addition, President López Obrador has faced heightened scrutiny following negative media coverage surrounding his family and administration. In September 2020, videos surfaced from August 2015 apparently showing the president's brother receiving 1.4 million Mexican pesos from the one-time head of Mexico's disaster prevention agency who subsequently oversees the government's purchase of medicines for public hospitals during the pandemic.<sup>49</sup> While initially defending his brother, President López Obrador later stated that he supported the FGR's efforts to investigate the incident, suggesting that the FGR should seek the testimony of former presidents Carlos Salinas de Gortari, Calderón, and Peña Nieto relating to allegations in the Lozoya and García Luna cases.<sup>50</sup> Questions also persist regarding the president's control of the UIF, exacerbated by his own comments in January 2020 that "Nieto [the UIF director] doesn't do anything without first consulting with the president."<sup>51</sup>

More recently, controversy surrounding drug trafficking allegations against former Mexican Secretary of Defense General, Salvador Cienfuegos, has drawn negative attention and presumably strained U.S.-Mexican relations. On October 15, U.S. authorities arrested on drug trafficking charges General Cienfuegos, while he was visiting the United States. The United States subsequently dropped these charges and released General Cienfuegos to Mexican authorities, reportedly with the understanding that Mexico – with intelligence gathered by U.S. authorities –

Continued on page 70

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46. Juan Montes, "Mexican Leader Vowed to End Corruption, but Some Ask: 'What Is Different Now?'" Wall Street Journal (Sept. 15, 2020), <https://www.wsj.com/articles/mexican-leader-vowed-to-end-corruption-but-some-ask-what-is-different-now-11600174811>.
  47. In 2019, 78 percent of government contracts did not undergo a public bidding process. Juan Montes, "Mexican Leader Vowed to End Corruption, but Some Ask: 'What Is Different Now?'" Wall Street Journal (Sept. 15, 2020), <https://www.wsj.com/articles/mexican-leader-vowed-to-end-corruption-but-some-ask-what-is-different-now-11600174811>.
  48. "The Capacity to Combat Corruption (CCC) Index," AS/COA Anti-Corruption Working Group (June 8, 2020), [https://www.as-coa.org/sites/default/files/archive/CCC\\_Report\\_2020\\_Updated.pdf](https://www.as-coa.org/sites/default/files/archive/CCC_Report_2020_Updated.pdf). For example, *El Universal* reported that the federal government's Sowing Life (Sembrando Vida) – a tree-planting employment program with more than 230,000 enrolled farmers – is riddled with operational flaws and corruption, including that the program is largely being managed through improvised decisions rather than a legitimate plan. "Farmers reveal faults, corruption in government's tree-planting program," Mexico Daily News (June 2, 2020), <https://mexiconewsdaily.com/news/farmers-reveal-faults-corruption-i-tree-planting-program>. Notably, farmers have stated that they have been forced to pay kickbacks to local officials in charge of the program. See *id.*
  49. See *supra* note 39.
  50. Animal Político, "Dinero que recibió mi hermano eran aportaciones de la gente: AMLO" (Aug. 25, 2020), [animalpolitico.com/2020/08/amlo-respuesta-video-pio-lopez-obrador-david-leon-dinero/](http://animalpolitico.com/2020/08/amlo-respuesta-video-pio-lopez-obrador-david-leon-dinero/), and La Jornada, "Pide AMLO ir a fondo en caso de video de David León y su hermano Pío", <https://videos.jornada.com.mx/video/41014080/pide-amlo-ir-a-fondo-en-caso-de-video-de-david-leo/>.
  51. Alberto Morales y Alexis Ortiz, "Santiago Nieto no hace nada sin consultar con el Presidente: AMLO," *El Universal* (Jan. 9, 2020), <https://www.eluniversal.com.mx/nacion/la-mananera-santiago-nieto-no-hace-nada-sin-consultar-con-el-presidente-amlo>.

## Latin America

Continued from page 69

intended to continue the investigation and take appropriate action.<sup>52</sup> Just a few weeks later, the office of Mexico's attorney general announced it would not charge General Cienfuegos, stating there was "no evidence that he had used electronic equipment or means, or that he had issued any order to favor the criminal groups mentioned in this case."<sup>53</sup> In response, a DOJ spokesperson stated that the United States "reserves the right to recommence its prosecution of Cienfuegos if the Government of Mexico fails to do so."<sup>54</sup>

### III. Argentina

Argentina likewise continued in 2020 its efforts to combat corruption amidst various challenges. In particular, the country grappled with fallout from *Caso Cuadernos* (the ongoing Notebooks scandal), while an Argentine court upheld important aspects of the country's anti-corruption law.

**“Since campaigning vigorously on an anti-corruption platform, [Mexican President] Obrador has implemented several measures to fight corruption, though remains subject to criticism for not making more headway.”**

*Caso Cuadernos* once again dominated Argentina's anti-corruption landscape. Former Argentine President and current Vice President Cristina Fernández de Kirchner remain among those implicated.<sup>55</sup> Vice President Kirchner allegedly diverted \$1.2 billion in public funds by accepting bribes and favoring certain executives in exchange for highly lucrative public works contracts.<sup>56</sup> At her trial in December 2019, Vice President Kirchner testified denying all allegations of wrongdoing.

Since then, prosecutors have faced various setbacks including the release from custody in March 2020 of Julio De Vido, former Argentine Minister of Public Works and veteran Kirchnerite official. De Vido had faced charges associated with the

Continued on page 71

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52. Taylor Barnes, Natalie Gallon and Florencia Trucco, "Mexican president defends decision not to press charges against ex-minister who was arrested on drug charges in US," CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/15/americas/mexican-president-defends-dismissal-of-probe/index.html>.

53. *Id.*

54. *Id.*

55. Scott Squires, "Former Argentina President Indicted on Corruption Charges" Reuters, (Sept. 17, 2018), <https://www.reuters.com/article/us-argentina-corruption/former-argentina-president-indicted-on-corruption-charges-idUSKCN1LX2I6>.

56. See *supra* note 1.

## Latin America

Continued from page 70

Kirchner corruption scandal, but the court held that he was detained for longer than the legal maximum of two years.<sup>57</sup> A month later, Argentina's Anti-Corruption Office ("OA") withdrew as plaintiff in the money laundering cases against Kirchner and her siblings. Some including opposition lawmakers and former officials viewed this as politically motivated and a blow to Argentine anti-corruption efforts.<sup>58</sup> Current OA Chief Félix Crous defended this decision as necessary to focus the agency's limited resources on other initiatives to fight corruption and promote integrity and transparency.<sup>59</sup> Meanwhile, on November 28, 2020, a federal judge acquitted Kirchner in one of the eleven corruption trials after determining that the notebooks were inadmissible, though appeals are ongoing.<sup>60</sup>

Of particular significance, on November 30, 2020, the Argentina Federal Court of Cassation declared valid by a two-to-one majority the 2016 law known locally as the repentance law.<sup>61</sup> Under this law, individuals and companies can enter plea deals with prosecutors to receive lesser penalties when they plead guilty, affirm the facts, and assist authorities in ongoing investigations.<sup>62</sup> The court rejected arguments made by various Argentine officials implicated in the *Cuadernos* scandal that the law violated their constitutional rights.<sup>63</sup> Argentine lawyers have heralded the court's decision noting the law's importance in providing Argentine prosecutors with the necessary tools to prosecute complex bribery and corruption cases such as *Cuadernos*.<sup>64</sup>

Last, on December 14, 2020, the World Bank Group's Integrity Vice Presidency and Argentina's National Administrative Investigations' Prosecutor ("PIA") announced a Memorandum of Understanding ("MOU"). This agreement strengthens their cooperation in preventing and investigating fraud and corruption that violate national legislation or World Bank Group rules and policies.<sup>65</sup> More broadly, the

Continued on page 72

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57. "Court Orders Ex-planning Minister Julio de Vido's Release," Buenos Aires Times (Mar. 5, 2020), <https://www.batimes.com.ar/news/argentina/court-orders-ex-planning-minister-julio-de-vidos-release.phtml>.
  58. Felix Crous and Laura Alonso, "Anti-Corruption Office withdraws as plaintiff in cases involving former officials," Buenos Aires Times (Apr. 24, 2020), <https://www.batimes.com.ar/news/argentina/anti-corruption-office-withdraws-as-plaintiff-in-cases-involving-former-officials.phtml>.
  59. *Id.*
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  65. World Bank Group Press Rel. No. 2021/079/INT, "The World Bank Group and the Argentine National Administrative Investigations' Prosecutor Advance Anticorruption Cooperation" (Dec. 14, 2020), <https://www.worldbank.org/en/news/press-release/2020/12/14/the-world-bank-group-and-the-argentine-national-administrative-investigations-prosecutor-advance-anticorruption-cooperation>.

## Latin America

Continued from page 71

MOU signals the intention of the Integrity Vice Presidency and PIA to work jointly through an exchange of information and resources. Mouhamadou Diagne, World Bank Group Integrity Vice President, described the collaboration as “vital to [the Bank’s] anticorruption mission.”<sup>66</sup>

#### IV. Peru

Despite Peru’s significant strides to combat corruption in recent years, 2020 ended on a note of uncertainty. In November 2020, the Peruvian Parliament removed then-President Martín Vizcarra – in what some have deemed “a legislative coup”<sup>67</sup> – by using a law that allows the president’s removal for “permanent moral incapacity.”<sup>68</sup> Peruvian parliamentarians had accused Vizcarra of taking over \$630,000 in bribes in exchange for two construction contracts when he was a regional governor.<sup>69</sup> He denied this accusation, which some suggest may relate to Vizcarra’s dissolution of Parliament in 2019 to further anti-corruption reform.<sup>70</sup>

In a country where every former living president is being investigated or has been charged with corruption (all but one tied to Brazil’s Odebrecht scandal), and where 68 of 130 parliamentarians are currently under investigation,<sup>71</sup> Vizcarra’s removal may seriously challenge the future of Peru’s anti-corruption regime. This recent development is particularly notable considering Peru’s Parliament had approved Vizcarra’s anti-corruption reforms with a vote of confidence on June 5, 2019, roughly a year before his removal.<sup>72</sup> For many, Vizcarra had represented renewed vigor in Peru’s anti-corruption regime, as he attempted to enact anti-corruption reforms including granting the judiciary greater authority to curtail immunity for politicians suspected of corruption.

Continued on page 73

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72. Samuel Trilling, “Peru’s President Wins Vote for Corruption Reforms,” *Organized Crime and Corruption Reporting Project* (June 6, 2019), <https://www.occrp.org/en/daily/9886-peru-s-president-wins-vote-for-corruption-reforms-2>.



## Latin America

Continued from page 72

Before Vizcarra's removal, Peru's position in the 2020 Capacity to Combat Corruption Index ("CCC Index") had improved considerably, with an almost 6% increase in its overall score since 2019 and, in particular, an 11% increase in legal capacity.<sup>73</sup> Launched in 2019, the CCC Index assesses Latin American countries' ability to uncover, punish, and prevent corruption by reviewing key variables, including the independence of judicial institutions, strength of investigative journalism, and level of resources available for combating white-collar crime.<sup>74</sup> Of the eight Latin American countries included in the CCC Index in both 2019 and 2020, only Peru's score improved. According to the CCC Index, the change in Peru's score reflected gains in law enforcement capacity, the court system, and civil society, as well as the importance of anti-corruption in the agenda of now-former President Vizcarra. In addition, Peru is currently undergoing phase 2 review of its implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, having successfully completed in 2019 the phase 1 review.<sup>75</sup> Notwithstanding these positive developments, it remains unclear how Vizcarra's removal and the associated political turmoil will impact Peru's future anti-corruption efforts.

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